ORAL ARGUMENT NOT YET SCHEDULED
No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF MANUFACTURERS; AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; AMERICAN CHEMISTRY COUNCIL; AMERICAN COKE AND COAL CHEMICALS INSTITUTE; AMERICAN FOUNDRY SOCIETY; AMERICAN FOREST & PAPER ASSOCIATION; AMERICAN IRON & STEEL INSTITUTE; AMERICAN WOOD COUNCIL; BRICK INDUSTRY ASSOCIATION; ELECTRICITY CONSUMERS RESOURCE COUNCIL; LIGNITE ENERGY COUNCIL; NATIONAL LIME ASSOCIATION; NATIONAL OILSEED PROCESSORS ASSOCIATION; and PORTLAND CEMENT ASSOCIATION,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY; and GINA MCCARTHY, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for Review of a Final Rule of the United States Environmental Protection Agency

MOTION FOR STAY OF EPA'S FINAL RULE

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Exhibit 8 Additional Materials

A) EPA, *Clean Energy Now and in the Future*, *available at* http://www.epa.gov/airquality/cpp/fs-cpp-clean-energy.pdf ("EPA Factsheet")

B) U.S. Energy Information Administration, *Most States Have Renewable Portfolio Standards*, *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=4850 ("EIA Renewable Statistics")

C) Press Release, H.R. Energy & Commerce Comm. (July 23, 2014), *available* at http://energycommerce.house.gov/press-release/pollution-vs-energy-lacking-proper-authority-epa-can%E2%80%99t-get-carbon-message-straight ("House Press Release")

D) Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, N.Y. Times (Dec. 11, 2014), *available at* http://www.nytimes.com/2014/12/12/world/strange-climate-event-warmth-toward-the-us.html?_r=4 ("Kerry Statement")

E) Joby Warrick, *White House set to adopt sweeping curbs on carbon pollution*, Wash. Post (Aug. 1, 2015), *available at* https://www.washingtonpost.com/national/health-science/white-house-set-to-adopt-sweeping-curbs-on-carbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html ("White House Factsheet")

F) Remarks of Gina McCarthy, Administrator, EPA, at RFF Leadership Forum (Sept. 25, 2014), *available at* http://www.rff.org/files/sharepoint/Documents/Events/RFF-Sept25-GinaMcCarthyPLF.pdf ("McCarthy Remarks")

G) Brian Deese, *President Obama's Clean Power Plan Is a Strong Signal of International Leadership* (Aug. 5, 2015), *available at* https://climate.america.gov/clean-power-plan-strong-signal-international-leadership/ ("Deese Article")

H) Interagency Working Group on Social Cost of

Carbon, *Technical Support Document: - Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis* (Revised July 2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-tsd-final-july-2015.pdf ("Interagency TSD")

I) Remarks by President Obama (Aug. 3, 2015), *available at* https://www.whitehouse.gov/the-press-office/2015/08/03/remarks-president-announcing-clean-power-plan ("President's Remarks")

J) U.S. Energy Information Administration, *Monthly power sector carbon dioxide emissions reach 27-year low in April* (Aug. 5, 2015), *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=22372 ("EIA Chart")

K) Settlement Agreement between EPA and New York *et al.*, attached to *West Virginia v. EPA*, No. 14-1146, Dkt. No. 1510473 (Sept. 3, 2014) ("Settlement Agreement")

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[*] *Authorities upon which we chiefly rely are marked with asterisks.*

STATUTES AND REGULATIONS

LEGISLATIVE HISTORY

OTHER AUTHORITY

GLOSSARY

Act (or CAA)	Clean Air Act, 42 U.S.C. § 7401, *et seq.*
BACT	Best Available Control Technology
EPA	United States Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
New Source Rule	EPA, *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*, 80 FR 64510 (Oct. 23, 2015)
Movants	Chamber of Commerce of the United States of America National Association of Manufacturers National Federation of Independent Business American Chemistry Council American Coke and Coal Chemicals Institute American Foundry Society American Forest & Paper Association American Fuel & Petrochemical Manufacturers American Iron & Steel Institute American Wood Council Brick Industry Association Electricity Consumers Resource Council Lignite Energy Council National Lime Association National Oilseed Processors Association Portland Cement Association
MW	Megawatt
NPRM Legal Mem.	EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units*
NPRM	EPA, Proposed Rule, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 FR 34830 (2014)
Rule	EPA, Final Rule, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Rule*, 80 FR 64662 (Oct. 23, 2015)

The Court should stay EPA's attempt to "'aggressive[ly] transform[] … the domestic energy industry.'" White House Factsheet, Ex. 8-E. The Rule exceeds the established bounds of EPA's authority under the CAA, sweeping virtually all aspects of electricity production within EPA's control. States and industry must begin now to overhaul the power sector, including passing new laws to ensure the permitting, construction, and funding of EPA's preferred power sources, as well as shutting down existing disfavored plants that would otherwise be dispatched to meet demand.

EPA's Rule rests entirely on a single phrase plucked from a rarely used provision authorizing EPA to establish "a procedure" for States to issue "standards of performance" for existing "sources." CAA §111(d)(1). EPA may not invoke this provision to bootstrap from a "long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"). That is particularly true where, as here, Congress has repeatedly considered and rejected giving EPA the new authority it now claims, and where EPA is attempting to assert primacy over a sector traditionally regulated by the States. *ABA v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005). Certainly, a provision that exclusively addresses *existing* sources cannot supply a statutory basis for EPA to mandate the construction of EPA's new preferred sources.

The Rule seeks to create a new "clean energy economy," EPA Factsheet 2, Ex. 8-A, by, in the words of a senior administration official, "decarboniz[ing]" the electricity sector, Deese Article, Ex. 8-G. This mandate will impose enormous,

immediate, and unrecoverable costs not only on States, who never have been asked to make such extensive changes in so little time, but also on Movants' member companies. A stay is warranted so this Court may assess whether EPA has the unprecedented legal authority the Rule purports to exercise.[1]

BACKGROUND

CAA §111(d)(1) authorizes EPA to require States to establish "standards of performance for any existing source ... to which a standard of performance under this section would apply if such existing source were a new source" regulated under §111(b) (emphasis added). To regulate a "new source" under §111(b), EPA must first find that the source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA §111(b)(1)(A).

In a separate rulemaking under §111(b), EPA imposed performance standards on carbon emissions from new fossil fuel-fired generating units. 80 FR 64510 (Oct. 23, 2015). Section 111(d)(1) therefore confines the Rule at issue here to mandating emission reductions for existing fossil fuel-fired generating units, which would be regulated "under [§111(b)] if such existing source[s] were ... new source[s]." CAA §111(d)(1). This statutory limitation posed a difficulty for EPA, because— as EPA acknowledges — technological and economic factors constrain reductions that can be

[1] Movants notified EPA's counsel before filing this motion. Several movants asked EPA to stay the Rule on October 2, 2015, but EPA has not acted on that request.

achieved at existing fossil fuel-fired power plants. *See* 80 FR 64662, 64751, 64787-89 (Oct. 23, 2015).

In the NPRM, EPA nonetheless proposed to reduce carbon emissions from existing power plants by 30% as of 2030. EPA could achieve such reductions only by regulating entities and activities in addition to existing fossil fuel-fired generating units. 79 FR 34830, 34832, 34835 (2014). The NPRM claimed such regulation would be lawful. It asserted that because a "standard of performance" means the emissions limits "'achievable through the application of the best system of emission reduction,'" and because the word "system" means "'[a] set of things working together as parts of a mechanism or interconnecting network,'" *id.* at 34885, EPA "may include [within its authority] anything that reduces emissions," including obligations imposed on entities beyond the regulated sources themselves. NPRM Legal Mem. 51-52, Ex. 6-C.

In the final Rule—in response to many comments demonstrating that its proposed approach would violate the CAA—EPA purported to switch course. EPA now claims to regulate only actions "implementable by the sources themselves." 80 FR at 64762. Yet the same beyond-the-source obligations remain. The Rule requires States to make even deeper emission reductions than the proposed rule. *Compare* 80 FR at 64665 (reducing emissions by 32%) *with* 79 FR at 34832 (reducing emissions by 30%). And the Rule acknowledges that only a small fraction of those reductions can be accomplished on-site at existing plants. *See* 80 FR at 64727.

Specifically, the final Rule imposes nationwide ceilings on the "rate" of carbon

emissions from coal- and natural gas-fired plants: 1,305 lb. CO_2/MW-hours for coal and 771 lb. CO_2/MW-hours for gas. *Id.* at 64667. These ceilings are the "chief regulatory requirement of th[e] rulemaking" and constitute EPA's "application of the [best system of emission reduction] to the affected" plants. *Id.* at 64823.[2] The ceilings are more stringent than the emission ceilings for *new* plants, which are 1,400 lb. CO_2/MW-hours for coal-fired plants and 1,000 lb. CO_2/MW-hours for gas-fired plants, 80 FR at 64512-13, even though the new source ceilings are based on "state-of-the-art means of control," *id.* at 64540. This disparity makes clear that the "existing source" ceilings cannot be achieved by existing sources themselves.

Emissions Ceilings for New and Existing Sources		
	Newly-constructed	**Existing**
Coal	1,400 lb. CO2/MW-hours	1,305 lb. CO2/MW-hours
Natural Gas	1,000 lb. CO2/MW-hours	771 lb. CO2/MW-hours

EPA calculated these rates based on three "building blocks": 1) on-site efficiency improvements by fossil fuel-fired generating units, 2) shifting electricity generation from coal-fired units to lower-emitting gas-fired units; and 3) shifting generation from both coal- and gas-fired units to new renewable energy sources. 80 FR at 64667. EPA based the national emission ceilings on the reductions it believes States could achieve by implementing these "building blocks." *Id.* at 64719-20, 64752.

The Rule finds that block 1 on-site efficiency improvements are capable of

[2] EPA also issued rate- and mass-based goals for each State; they consist simply of mathematical application of these national emission rate ceilings to each State's existing power plants. 80 FR at 64821-23.

improving efficiency at coal generating units by at most 4.3%. *Id.* at 64727. While block 2 assumes that coal-fired generation can be displaced by increased gas-fired generation, *id.* at 64724, EPA projects that ultimately gas-fired generation will be *reduced* by 1-4% under the Rule by 2030, *id.* at 64927, tbl.17.

Thus, the bulk of the emission reductions the Rule mandates are based on block 3, which assumes States will require the construction and dispatch of a vast amount of new, renewable generation to displace coal-fired generation. EPA forecasts that the Rule will result in about 540,000,000 MW-hours of new renewable energy generation by 2030. Goal Computation TSD 23, Ex. 6-A. This increase would nearly double the share of generation by renewable energy plants. EPA Factsheet 3, Ex. 8-A. Correlatively, EPA projects that coal-fired generating capacity will be cut nearly in half, from roughly 336,000 MW in 2012 to 183,000 MW in 2030. Regulatory Impact Analysis 2-3, 3-24, Ex. 6-B; *see also* EPA Factsheet 3, Ex. 8-A (showing loss of share of coal-based generation).

In the Rule, EPA does not dispute that existing plants will be unable to achieve the strict national emission ceilings for coal- and gas-fired plants by making changes at the sources themselves. Instead, EPA explains that existing sources will be able to comply because their *owners* can make arrangements with *other* independent sources that can produce electricity with lower emissions. For example, EPA says a coal-fired plant can "average [the plant's] emission rate with [credits] issued on the basis of incremental generation from an existing [gas-fired] unit" or a new renewable power

unit that the coal-fired plant's owners also own. 80 FR at 64753. The coal-fired unit's owners could also enter into "a bilateral transaction with the owner/operator of the [gas-fired or renewable] unit" to obtain credits, or enter into "a transaction for [credits] through an intermediary," such as in an emissions trading market, *id.*—an approach EPA singled out as "integral" to the Rule, *id.* at 64734.

States must submit complex compliance plans for EPA approval by September 2016 (or by September 2018, if EPA grants an extension). *Id.* at 64669. If a State fails to submit an approvable plan, EPA will take control of the State's electricity sector by imposing a federal plan, *id.* at 64664, 64840, presumably comprised of an emissions trading program, *see* 80 FR 64966, 64966 (Oct. 23, 2015).

ARGUMENT

In reviewing a motion for stay, this Court considers: (1) the likelihood that the movant will prevail on the merits; (2) the prospect of irreparable injury if relief is withheld; (3) the possibility of substantial harm to others if relief is granted; and (4) the public interest. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). All four factors weigh strongly in favor of a stay here.

I. MOVANTS ARE LIKELY TO PREVAIL ON THE MERITS

In developing the Rule, EPA faced a "dilemma." 80 FR at 64769. It sought massive reductions in the carbon emitted by fossil fuel-generated electricity. But EPA knew that carbon emissions are inherent in how those facilities generate power, that retrofitting "carbon capture" technology industry-wide on existing facilities is not

technologically or financially feasible, and that upgrades that could practicably be undertaken by existing facilities could at best achieve only a small fraction of the emission reductions EPA desired. *See supra* pp. 2-4; 80 FR at 64751, 64787-89. Thus, the reductions sought by EPA could not be achieved under its established CAA powers through "standards of performance" for "existing sources." Instead, such reductions would require a fundamental shift in energy policy—one requiring States to enact a host of new laws to ensure construction of costly new energy sources and infrastructure and the shuttering of plants that would otherwise provide efficient, reliable, and cost-effective electricity for businesses and consumers. *See supra* p. 5.

Section 111(d) provides no authority for EPA to "aggressive[ly] transform[]" the domestic electricity sector to achieve EPA's vision of how that sector should be constituted. The Executive Branch may be frustrated that Congress rebuffed attempts to enact laws authorizing the "cap-and-trade" regime that the Rule now seeks to replicate, *e.g.* H.R. 2454, 111th Cong. (2009); S.2191, 110th Cong. (2007), but EPA cannot circumvent the political process by legislating through regulation. Movants' challenge has a strong probability of success.

1. The Act, at most, permits EPA to impose emission reduction obligations based only on the reductions that can be achieved by the actual fossil fuel-fired generating unit subject to regulation under §111(d). Section 111(d)(1)(A) addresses "standards of performance *for any existing source*" (emphasis added). The CAA defines "source," in turn, as "any building, structure, facility, or installation which emits or

may emit any air pollutant." CAA §111(a)(3). Thus, §111(d) permits EPA to require States to establish performance standards only for the building, structure, facility, or installation whose "emi[ssions]" are being controlled.

In the few instances in which EPA has applied §111(d), it has read the statute consistently with the plain text and established emission guidelines based on reductions achievable by implementing emission-reducing technology or practices only at the regulated source. *See* 61 FR 9905, 9907 (Mar. 12, 1996); 45 FR 26294, 26294 (Apr. 17, 1980); 44 FR 29828, 29829 (May 22, 1979); 42 FR 55796, 55797 (Oct. 18, 1977); 42 FR 12022, 12022 (Mar. 1, 1977). Indeed, just last year EPA acknowledged that standards of performance are "based on the BSER *achievable at [the regulated] source*." 79 FR 36880, 36885 (June 30, 2014) (emphasis added).

2. As noted, EPA now concedes it lacks the authority it claimed in the NPRM to regulate "*anything* that reduces emissions" by fossil fuel-fired generating units. NPRM Legal Mem. 51, Ex. 6-C (emphasis added); 80 FR at 64761-62. EPA agrees that §111(d) permits it to require only actions "that are implementable by the sources themselves." 80 FR at 64762; *id.* at 64720. Despite this purported change, the Rule seeks to impose emission reduction obligations *deeper* than those proposed in the NPRM and that indisputably cannot be met by installation of control technologies or practices at fossil fuel-fired generating facilities. *Supra* pp. 2-4.

EPA's own analysis conclusively demonstrates that the Rule regulates far more than "the sources themselves." 80 FR at 64762. EPA's block 1 analysis found that

"control measures" that could be implemented at individual fossil fuel-fired generating units "yield only a small amount of emission reductions." *Id.* at 64769. Similarly, as noted *supra* p. 4, even a *new* coal or gas plant with state-of-the-art controls could not achieve the emission rate the Rule demands.

Thus, EPA ultimately concedes that it is, in fact, regulating beyond the regulated source. 80 FR at 64761 (acknowledging the Rule regulates "actions that may occur off-site and actions that a third party takes"). EPA tries to justify its approach by claiming it may regulate any "action[] taken by the *owners or operators* of the sources" that can reduce emissions. *Id.* at 64720 (emphasis added); *see also id.* at 64762 ("As a practical matter, the 'source' includes the 'owner or operator' of any building, structure, facility, or installation for which a standard of performance is applicable."). And it is only by regulating the source's "owner"—rather than the actual source—that EPA tries to justify imposing building blocks 2 and 3. *Id.* (EPA may require building blocks 2 and 3 "because they consist of measures that the owners/operators of the affected [sources] can implement to achieve their emission limits"); *see also id.* at 64761-62. For example, EPA says that a coal-fired source can satisfy its emission limit because the owner theoretically can build new renewable plants and get credit for generation shifted to those plants; the owner can buy credits from another renewable energy generator in a trading market; or the owner can shift generation to a gas plant it already owns. *See, e.g.*, *id.* at 64753-54.

But EPA has no authority to require an *owner* of a source to take specific action

beyond the regulated source merely because that action might impact overall emissions. Section 111(d)(1)(A) permits EPA only to require States to establish "standards of performance *for any existing source,*" and an existing source is specifically defined in §111(a) as "any building, structure, facility, or installation which emits or may emit any air pollutant." Section 111(a)(5) separately defines "owner or operator," but §111(d) does not authorize "standards of performance" for "owners or operators," only for an "existing source."

Indeed, §111(e) confirms EPA's error in claiming that "the 'source' includes the 'owner or operator.'" *Id.* at 64762. That provision declares it unlawful "for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." CAA §111(e). Thus, Congress specifically *distinguished* the "sources" subject to performance standards from the "owners or operators" of those "sources." "'[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings.'" *Transbrasil S.A. Linhas Aereas v. Dep't of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986). Congress needed to adopt a specific provision to hold an "owner or operator" of a new source liable precisely because, contrary to the Rule's central assumption, the owner *is* legally distinct from the "source"—and §111(d) gives EPA no authority to impose the Rule's obligations on existing sources' "owners."

In addition to improperly conflating "sources" with their "owners," EPA's interpretation of §111(d) is independently unlawful because it regulates sources

collectively rather than on an individual basis. EPA asserts that it may require reductions at a coal plant because the owner of the plant can, for example, construct a renewable plant elsewhere or agree to shift demand to a different gas plant—even a plant located thousands of miles away. 80 FR at 64753-54. In effect, EPA treats these distant and unrelated facilities as the same "stationary source." But *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), forecloses this interpretation, squarely holding that the "basic unit" regulated under §111 is the individual source and not "a combination of such units." *Id.* at 327 (emphasis omitted). In all, EPA's limitless interpretation is not only without precedent for the electricity sector, but, if affirmed, could enable the agency to fundamentally restructure any industry as long as EPA can allege that shifting production among market participants may reduce emissions.

3. The Rule's approach to defining a regulated source's obligations—based on anything its owner theoretically might do elsewhere to reduce emissions—also conflicts with the structure of the CAA, particularly §111(b). In its parallel rulemaking to establish standards of performance for new units, EPA expressly *rejected* the Rule's beyond-the-source approach—even though §111(b) and §111(d) apply precisely the same "standard of performance" definition set forth in §111(a). 80 FR at 64627. To the contrary, EPA stated that it would not set new source performance standards for coal plants based on the ability to shift generation from the new coal plant to other sources with lower emissions. *Id.*

But §111(a)'s term "system" cannot be given one meaning when applied in

§111(b) and another when applied in §111(d). *See Brown v. Gardner*, 513 U.S. 115, 116 (1994). Indeed, in its implementing regulations, EPA asserted the authority to adopt "substantive" obligations under §111(d) in large part precisely *because of* the strong parallels between §111(b) and (d). 40 FR 53340, 53342-43 (Nov. 17, 1975). EPA emphasized that both provisions require a "technology-based approach" and that EPA would be able to take advantage of its analysis of the "availability and costs of control technology" for new sources in determining the best "control technology" for existing sources. *Id.* By instead imposing an entirely different and more stringent performance standard on *existing* units than on *new* units, EPA's approach in the Rule is the exact opposite of what was intended by Congress in §111.[3]

Other statutory CAA provisions fortify the conclusion that "system of emission reduction" must refer to a system applied to individual sources themselves, not to anything beyond those sources that might reduce emissions overall. For instance, in CAA §407, Congress referred to the "retrofit application" of a "system of continuous emission reduction." The term "retrofit" refers to "modification or addition of equipment (as on an aircraft or automobile) to include changes made for later production models." *Webster's Third New Int'l Dictionary* 1940 (1993). A "system of continuous emission reduction" that can be required in "retrofitting" must necessarily be a system capable of installation at a particular facility; it makes no sense to speak of

[3] Imposing more stringent standards under §111(d) than under §111(b) is especially perverse given that the range of control technologies that can be cost-effectively retrofitted to existing units is necessarily more restricted.

"retrofitting" an owner, let alone "retrofitting" the power sector. The same is true for the substantively identical phrase used in §111. *See, e.g.*, *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998) ("similar language contained within the same section of a statute must be accorded a consistent meaning").

Similarly, standards of performance under §111(d) set a regulatory floor in the Act's pre-construction permitting program for stationary sources, known as "PSD." *See* CAA §169(3). This is because the "best available control technology" (or "BACT") standard used in the PSD program must be at least as stringent as the "best system of emission reductions" of §111. *Id.* The PSD program results in permit conditions that are imposed directly on the specific new or modified facility and, therefore, are necessarily source-based. *See id.* §165(a)(1). That Congress elected to make standards of performance under §111 the floor for BACT determinations confirms that §111(d) performance standards must also be source-based.[4]

4. The CAA's text and structure is more than sufficient to foreclose EPA's "capacious" reading of §111(d). 80 FR at 64761. But even if there were some ambiguity on this score, controlling canons of construction preclude EPA's assertion of authority to fundamentally restructure the power sector.

[4] Applying EPA's beyond-the-source analysis as the BACT floor would also produce absurd results. EPA acknowledges that existing coal-fired power plants cannot achieve the proposed emission reduction targets on their own. Yet, because standards of performance under §111(d) could be applied as a BACT floor if an existing source triggers PSD permitting obligations, permitting authorities could apply as a "best available control technology" limitation an emissions limit that *cannot be achieved* by control technology available to even a *new* facility. *Supra* p. 4.

First, when Congress wishes to assign a "question of deep economic and political significance ... to an agency," Congress speaks "expressly." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Such a clear statement is doubly necessary in this case, where EPA claims to discover for the first time vast powers "in a long-extant statute"—a claim courts greet with well-deserved skepticism. *UARG*, 134 S. Ct. at 2444.

Certainly, §111(d) contains no clear mandate. Until now, EPA viewed §111(d) as an unimportant provision: "Over the last forty years, under CAA section 111(d), the agency has regulated four pollutants from five source categories," 80 FR at 64703, with only one of these rulemakings in the last three decades, *see* 61 FR 9905 (Mar. 12, 1996). EPA now contends that Congress intended in this obscure provision to confer authority on it to govern electricity production, distribution, and reliability—a field which has long been subject to extensive regulation by the States and, to a lesser extent, FERC, but not EPA. Under EPA's reading, §111(d)'s importance would dwarf the remainder of §111—and indeed, the remainder of the CAA. But "Congress ... does not alter the fundamental details of a regulatory scheme in ... ancillary provisions" like §111(d). *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In any event, even if Congress had intended to assert federal power *sub silentio* over the mix of generation facilities that must exist in each State, it is inconceivable that Congress would have selected *EPA* (rather than FERC) to exercise such authority. As the Supreme Court recently restated, Congress is "especially unlikely" to make an implicit delegation of regulatory power to an agency with "no expertise" in

the statute's subject matter. *King*, 135 S. Ct. at 2489; *see also Delaware Dep't of Natural Res. v. EPA*, 785 F.3d 1, 18 (D.C Cir. 2015) ("[G]rid reliability is not a subject of the Clean Air Act and is not the province of EPA.").

EPA cannot dispute that this Rule is of "deep economic and political significance." As the Administration emphasized, the Rule is intended to "transform[]" and "decarboniz[e]" the energy industry. White House Factsheet, Ex. 8-E; Deese Article, Ex. 8-G. The Rule imposes a broad new "cap-and-trade" regime comparable to failed legislative efforts. *E.g.* H.R. 2454, 111th Cong. (2009); S. 2191, 110th Cong. (2007). EPA's analysis shows the Rule requires nationwide decommissioning of coal plants and constructing a vast fleet of new renewable power plants. *Supra* p. 5. And EPA recognized the Rule can undermine the reliability of the nation's grid, and required States to try to mitigate those impacts. *Id.* at 64668.

Second, "[f]ederal law 'may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion.'" *ABA*, 430 at 471. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States," *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983), and the States retain "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns," *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) ("*PG&E*"). Particularly relevant here, the "[n]eed for new power facilities [and] their economic

feasibility … are areas that have been characteristically governed by the States"—indeed, the "'franchise to operate a public utility … is a special privilege which … may be granted or withheld at the pleasure of the State.'" *Id.* Congress has guaranteed, time and again, that federal regulation of the power sector may not deprive the States of this traditional role. *See, e.g.*, 16 U.S.C. §§824(a), 824(b)(1), 824o(i)(2). Indeed, the United States recently acknowledged to the Supreme Court that "promot[ion of] new generation facilities" is "an area expressly reserved to state authority." Pet. for Cert. at 26, *FERC v. Elec. Power Supply Ass'n*, No. 14-840 (S. Ct. Jan. 15, 2015).

Under the Rule, however, EPA, not the States, would exercise these important "police powers" and determine the "need for new power facilities." Until now, the States have determined for themselves the extent to which they should (or should not) mandate particular levels of renewable generation, balancing such generation's benefits against the risks that energy dependent on weather events (such as wind speeds and hours of cloud cover) often pose to the grid's reliability.[5] Indeed, the very reason EPA seeks to adopt the Rule is because to date States have not sought to "decarboniz[e]" their economies to the extent favored by EPA. Correlatively, the Rule requires decommissioning of coal-fired generation throughout the country, *see supra* p. 5, even in States that have decided, as a policy matter, to encourage diversified

[5] EIA Renewable Statistics, Ex. 8-B (while Congress has rejected federal renewable portfolio standards, "30 States and the District of Columbia had enforceable RPS or other mandated renewable capacity policies," and seven had adopted voluntary renewable energy goals).

generation within their borders. Whatever level of ambiguity exists in 111(d), it does not provide a "clear and manifest" intent to legislate "in a field the States have traditionally occupied." *PGE*, 461 U.S. at 206.[6]

II. MOVANTS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

The seismic change to the power industry—and the national economy—required by the Rule presents the type of extraordinary circumstances that warrant a stay. The Rule requires a fundamental restructuring of the power sector, compelling States, utilities, and suppliers to adopt EPA's preferred sources of power and fuel and to redesign their electricity infrastructure in the process. Never before in the CAA's history have the States and industry been ordered to do so much in so little time. Such an extraordinary alteration of the national economy warrants the exercise of this Court's extraordinary authority so it can review the petitions before these fundamental changes to the economy occur and cannot be undone. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (the fundamental purpose of a stay is to preserve the *status quo*).

A stay is also warranted because these fundamental changes will cause Movants' members immediate, irreparable harm. According to Secretary Kerry, the Rule's purpose is to "'take a bunch of [coal-fired power plants] out of commission,'" Kerry Statement, Ex. 8-D, and the Rule's own modeling confirms that will start

[6] Movants understand that other challengers will argue the Rule is unlawful because EPA already regulates emissions from existing fossil fuel-fired generating units under §112, and §111(d) prohibits regulating air pollutants "emitted from a source category which is regulated under" §112. Movants agree this argument also presents a strong likelihood of success.

happening soon. Under the modeling, the Rule would cause scores of generating units representing at least 10,793-11,430 MW of coal-fired generation (and almost certainly more) to retire in 2016. *See* Harbert Decl. ¶17, Ex. 7-A.[7] The loss of these primary assets would irreparably harm their owners, businesses, and workforces. *See id.* ¶¶17, 21. Consumers will see their electricity rates rise as affordable power sources close and utilities are forced to build expensive new plants. *See id.* ¶18-19. The closures will also cause immediate, collateral harms. Coal mines associated with the shuttered plants will have to reduce operations or close entirely, laying off numerous employees in the process. *See id.* ¶¶20, 22. Thousands of businesses providing support services to coal-fired plants and coal mines will see their customer base shrivel; many will have to lay off workers and face the prospect of closing their doors. *See, e.g.*, Howard Decl. ¶¶4-8, Ex. 7-D; Thompson Decl. ¶¶5-6, Ex. 7-G; Young Decl. ¶7, Ex. 7-E; Voigt Decl. ¶¶7-12, Ex. 7-C; Hammes Decl. ¶¶9-10, Ex. 7-K.

These losses will cause immediate, irreparable harm to the surrounding areas. In many areas, power generation and mining jobs are the principal drivers for the local economy. Harbert Decl. ¶26, Ex. 7-A; Blanton Decl. ¶¶7-8, Ex. 7-J; Witherspoon Decl. ¶¶4-6, Ex. 7-N. Taxes from utilities and mines are crucial for many counties and

[7] The reason why EPA's modeling shows immediate plant closures is that maintaining coal-fired plants is very expensive; if the Rule will render the plants inoperable when it comes fully into effect, many plant owners will choose to shut down their plants during the period of judicial review rather than make pointless investments in units that will ultimately have to be closed. Harbert Decl. ¶¶14, 19, Ex. 7-A. Administrator McCarthy herself has emphasized that the Rule is already causing significant shifts in investments. McCarthy Remarks, Ex. 8-F.

towns, *see, e.g.*, Taylor Decl. ¶5, Ex. 7-F, and the loss of that revenue would dramatically affect those communities, potentially causing counties to reduce civil services and schools to reduce staff and make cuts to educational programs. *See* Rinas Decl. ¶¶10-11, Ex. 7-B; Pierce Decl. ¶10, Ex. 7-H; Smith Decl. ¶13, Ex. 7-L. These harms will be exacerbated as towns and counties located near power plants and mines see their populations dwindle when laid-off employees are forced to relocate in search of new employment. *See, e.g.*, Rinas Decl. ¶¶6-7, Ex. 7-B; Dick Decl. ¶¶5-10, Ex. 7-I; Kennedy Decl. ¶¶8-11, Ex. 7-M.

III. THE BALANCE OF EQUITIES FAVORS A STAY

Although the Rule will immediately harm States and industry, *supra* §II, its immediate implementation will not protect the environment. The balance of harms and public interest favor a stay.

President Obama has stated that "[n]o single action[] [and] no single country will change the warming of the planet on its own." President's Remarks, Ex. 8-I. Indeed, the government acknowledges that "[e]ven if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from enough to avoid substantial climate change," Interagency TSD 14, Ex. 8-H, and that the Rule is merely a "step" in a "series of long-term actions" to combat climate change, 80 FR at 64677. Furthermore, EPA admits the purported benefits the Rule, along with other measures, is intended to achieve will not be realized in the near term. EPA's "Endangerment Finding"—the basis of EPA's finding of the harm to be addressed by the Rule—

explains that the relevant timeframe for considering climate effects is "the next several decades, and in some cases to the end of this century," 74 FR 66496, 66524 (Dec. 15, 2009)—not the limited time implementation would be delayed by a stay. After all, emission reductions are intended to bring about benefits over "centuries and millennia." 80 FR at 64682. EPA's own three-year delay in issuing the Rule demonstrates that it is not designed to alleviate immediate harm. *See* Settlement Agreement, Ex. 8-K (committing to release Rule by May 2012). In light of EPA's delay, the timeframe at issue in the Rule, and the many additional measures, domestic and foreign, the Administration admits are needed to address climate change, a short stay of the Rule will not impair the public interest.

Finally, EPA cannot contend that, without the Rule, no progress towards its goals will be made. EPA acknowledges the electricity market "is already changing," as "advancements in innovative power sector technologies and ... low-carbon fuel," renewable energy, and efficiency technologies are implemented. 80 FR at 64678. In fact, in the last decade, America reduced "total carbon pollution more than any other nation on Earth," President's Remarks, Ex. 8-I, and monthly CO_2 emissions from coal-fired plants reached a 27-year low this year, *see* EIA Chart, Ex. 8-J.

The public interest is best served by allowing the Court to address petitions for review before the Rule's sweeping changes begin to occur. *See Nken*, 556 U.S. at 429.

CONCLUSION

The Court should grant the requested stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October 2015, I will cause to be served electronically one copy of the foregoing Motion for Stay of EPA's Final Rule, along with associated exhibits, upon each of the following:

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