**ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016**

No. 15-1363 (and consolidated cases)

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

STATE OF WEST VIRGINIA, *et al.*,
*Petitioners*,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
*Respondents*.

**On Petitions for Review of Final Agency Action of the**
**United States Environmental Protection Agency**
**80 Fed. Reg. 64,662 (Oct. 23, 2015)**

# REPLY BRIEF OF PETITIONERS ON CORE LEGAL ISSUES

Ken Paxton
ATTORNEY GENERAL OF TEXAS
Jeffrey C. Mateer
First Assistant Attorney General
Scott A. Keller
Solicitor General
*Counsel of Record*
P.O. Box 12548
Austin, TX 78711-2548
Tel: (512) 936-1700
scott.keller@texasattorneygeneral.gov

*Counsel for Petitioner State of Texas*

Patrick Morrisey
ATTORNEY GENERAL OF WEST VIRGINIA
Elbert Lin
Solicitor General
*Counsel of Record*
J. Zak Ritchie
Assistant Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel: (304) 558-2021
Fax: (304) 558-0140
elbert.lin@wvago.gov

*Counsel for Petitioner State of West Virginia*

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*Additional counsel listed on following pages*

F. William Brownell
Allison D. Wood
Henry V. Nickel
Tauna M. Szymanski
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
bbrownell@hunton.com

*Counsel for Petitioners Utility Air Regulatory Group and American Public Power Association*

Peter S. Glaser
Carroll W. McGuffey III
Justin T. Wong
TROUTMAN SANDERS LLP
401 Ninth Street N.W., Suite 1000
Washington, D.C. 20004
Tel: (202) 274-2998
peter.glaser@troutmansanders.com

*Counsel for Petitioner National Mining Association*

Peter D. Keisler
Roger R. Martella, Jr.
C. Frederick Beckner III
Ryan C. Morris
Paul J. Ray
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8027
pkeisler@sidley.com

*Counsel for Petitioners Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; and National Federation of Independent Business*

Luther Strange
ATTORNEY GENERAL OF ALABAMA
Andrew Brasher
Solicitor General
*Counsel of Record*
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 353-2609
abrasher@ago.state.al.us

*Counsel for Petitioner State of Alabama*

Mark Brnovich
ATTORNEY GENERAL OF ARIZONA
John R. Lopez IV
*Counsel of Record*
Dominic E. Draye
Keith J. Miller
Assistant Attorneys General
Maureen Scott
Janet Wagner
Janice Alward
Arizona Corp. Commission,
Staff Attorneys
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-5025
john.lopez@azag.gov
dominic.draye@azag.gov
keith.miller@azag.gov

*Counsel for Petitioner Arizona Corporation Commission*

Thomas A. Lorenzen
Sherrie A. Armstrong
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Tel: (202) 624-2500
tlorenzen@crowell.com
sarmstrong@crowell.com

*Counsel for Petitioners National Rural Electric Cooperative Association; Big Rivers Electric Corporation; Brazos Electric Power Cooperative, Inc.; Buckeye Power, Inc.; Central Montana Electric Power Cooperative; Central Power Electric Cooperative, Inc., Corn Belt Power Cooperative; Dairyland Power Cooperative; East River Electric Power Cooperative, Inc.; Georgia Transmission Corporation; Kansas Electric Power Cooperative, Inc.; North Carolina Electric Membership Corporation; Northwest Iowa Power Cooperative; Oglethorpe Power Corporation; PowerSouth Energy Cooperative; Prairie Power, Inc.; Rushmore Electric Power Cooperative, Inc.; Seminole Electric Cooperative, Inc.; Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; and Upper Missouri G. & T. Electric Cooperative, Inc.*

Leslie Rutledge
ATTORNEY GENERAL OF ARKANSAS
Lee Rudofsky
Solicitor General
*Counsel of Record*
Jamie L. Ewing
Assistant Attorney General
323 Center Street, Suite 400
Little Rock, AR 72201
Tel: (501) 682-5310
lee.rudofsky@arkansasag.gov

*Counsel for Petitioner State of Arkansas*

Cynthia H. Coffman
ATTORNEY GENERAL OF COLORADO
Frederick Yarger
Solicitor General
*Counsel of Record*
1300 Broadway, 10th Floor
Denver, CO 80203
Tel: (720) 508-6168
fred.yarger@state.co.us

*Counsel for Petitioner State of Colorado*

*Of Counsel*

Rae Cronmiller
Environmental Counsel
NATIONAL ASSOCIATION OF RURAL ELECTRIC COOPERATIVES
4301 Wilson Blvd.
Arlington, VA 22203
Tel: (703) 907-5500
rae.cronmiller@nreca.coop

*Counsel for Petitioner National Rural Electric Cooperative Association*

Eric L. Hiser
JORDEN BISCHOFF & HISER, PLC
7272 E. Indian School Road, Suite 360
Scottsdale, AZ 85251
Tel: (480) 505-3927
ehiser@jordenbischoff.com

*Counsel for Petitioner Arizona Electric Power Cooperative, Inc.*

Brian A. Prestwood
Senior Corporate and Compliance Counsel
ASSOCIATED ELECTRIC COOPERATIVE, INC.
2814 S. Golden, P.O. Box 754
Springfield, MO 65801
Tel: (417) 885-9273
bprestwood@aeci.org

*Counsel for Petitioner Associated Electric Cooperative, Inc.*

Pamela Jo Bondi
ATTORNEY GENERAL OF FLORIDA
Jonathan L. Williams
Deputy Solicitor General
*Counsel of Record*
Jonathan A. Glogau
Special Counsel
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Tel: (850) 414-3818
Fax: (850) 410-2672
jonathan.williams@myfloridalegal.com
jonathan.glogau@myfloridalegal.com

*Counsel for Petitioner State of Florida*

Samuel S. Olens
ATTORNEY GENERAL OF GEORGIA
Britt C. Grant
Solicitor General
*Counsel of Record*
40 Capitol Square S.W.
Atlanta, GA 30334
Tel: (404) 656-3300
Fax: (404) 463-9453
bgrant@law.ga.gov

*Counsel for Petitioner State of Georgia*

David Crabtree
Vice President, General Counsel
DESERET GENERATION & TRANSMISSION CO-OPERATIVE
10714 South Jordan Gateway
South Jordan, UT 84095
Tel: (801) 619-9500
Crabtree@deseretpower.com

*Counsel for Petitioner Deseret Generation & Transmission Co-operative*

John M. Holloway III
SUTHERLAND ASBILL & BRENNAN LLP
700 Sixth Street, N.W., Suite 700
Washington, D.C. 20001
Tel: (202) 383-0100
Fax: (202) 383-3593
jay.holloway@sutherland.com

*Counsel for Petitioners East Kentucky Power Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Minnkota Power Cooperative, Inc.; and South Mississippi Electric Power Association*

Gregory F. Zoeller
ATTORNEY GENERAL OF INDIANA
Timothy Junk
Deputy Attorney General
*Counsel of Record*
Indiana Government Ctr. South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46205
Tel: (317) 232-6247
tim.junk@atg.in.gov

*Counsel for Petitioner State of Indiana*

Derek Schmidt
ATTORNEY GENERAL OF KANSAS
Jeffrey A. Chanay
Chief Deputy Attorney General
*Counsel of Record*
Bryan C. Clark
Assistant Solicitor General
120 S.W. 10th Avenue, 3rd Floor
Topeka, KS 66612
Tel: (785) 368-8435
Fax: (785) 291-3767
jeff.chanay@ag.ks.gov

*Counsel for Petitioner State of Kansas*

Patrick Burchette
HOLLAND & KNIGHT LLP
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
Tel: (202) 469-5102
Patrick.Burchette@hklaw.com

*Counsel for Petitioners East Texas Electric Cooperative, Inc.; Northeast Texas Electric Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; and Tex-La Electric Cooperative of Texas, Inc.*

Christopher L. Bell
GREENBERG TRAURIG LLP
1000 Louisiana Street, Suite 1700
Houston, TX 77002
Tel: (713) 374-3556
bellc@gtlaw.com

*Counsel for Petitioner Golden Spread Electrical Cooperative, Inc.*

Andy Beshear
ATTORNEY GENERAL OF KENTUCKY
Mitchel T. Denham
Assistant Deputy Attorney General
Joseph A. Newberg, II
Assistant Attorney General
*Counsel of Record*
700 Capitol Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5611
joe.newberg@ky.gov

*Counsel for Petitioner Commonwealth of Kentucky*

Jeff Landry
ATTORNEY GENERAL OF LOUISIANA
Steven B. "Beaux" Jones
*Counsel of Record*
Duncan S. Kemp, IV
Assistant Attorneys General
Environmental Section – Civil Division
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6085
Fax: (225) 326-6099
jonesst@ag.state.la.us

*Counsel for Petitioner State of Louisiana*

Mark Walters
Michael J. Nasi
JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, TX 78701
Tel: (512) 236-2000
Fax: (512) 236-2002
mwalters@jw.com
mnasi@jw.com

*Counsel for Petitioners San Miguel Electric Cooperative, Inc. and South Texas Electric Cooperative, Inc.*

Randolph G. Holt
Jeremy L. Fetty
PARR RICHEY OBREMSKEY FRANDSEN & PATTERSON LLP
Wabash Valley Power Association, Inc.
722 N. High School Road
P.O. Box 24700
Indianapolis, IN 46224
Tel: (317) 481-2815
R_holt@wvpa.com
jfetty@parrlaw.com

*Counsel for Petitioner Wabash Valley Power Association, Inc.*

Herman Robinson
Executive Counsel
Donald Trahan
*Counsel of Record*
Elliott Vega
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Legal Division
P.O. Box 4302
Baton Rouge, LA 70821-4302
Tel: (225) 219-3985
Fax: (225) 219-4068
donald.trahan@la.gov

*Counsel for Petitioner State of Louisiana Department of Environmental Quality*

Monica Derbes Gibson
Lesley Foxhall Pietras
LISKOW & LEWIS, P.L.C.
701 Poydras Street, Suite 5000
New Orleans, LA 70139
Tel: (504) 556-4010
Fax: (504) 556-4108
mdgibson@liskow.com
lfpietras@liskow.com

*Counsel for Petitioner Louisiana Public Service Commission*

Megan H. Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
megan.berge@bakerbotts.com

*Counsel for Petitioner Western Farmers Electric Cooperative*

Steven C. Kohl
Gaetan Gerville-Reache
WARNER NORCROSS & JUDD LLP
2000 Town Center, Suite 2700
Southfield, MI 48075-1318
Tel: (248) 784-5000
skohl@wnj.com

*Counsel for Petitioner Wolverine Power Supply Cooperative, Inc.*

Bill Schuette
ATTORNEY GENERAL FOR THE PEOPLE OF MICHIGAN
Aaron D. Lindstrom
Michigan Solicitor General
*Counsel of Record*
P.O. Box 30212
Lansing, MI 48909
Tel: (515) 373-1124
Fax: (517) 373-3042
lindstroma@michigan.gov

*Counsel for Petitioner People of the State of Michigan*

Jim Hood
ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI
Harold E. Pizzetta
Assistant Attorney General
Civil Litigation Division
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
Tel: (601) 359-3816
Fax: (601) 359-2003
hpizz@ago.state.ms.us

*Counsel for Petitioner State of Mississippi*

Christina F. Gomez
Lawrence E. Volmert
Garrison W. Kaufman
Jill H. Van Noord
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202
Tel: (303) 295-8000
Fax: (303) 295-8261
cgomez@hollandhart.com
lvolmert@hollandhart.com
gwkaufman@hollandhart.com
jhvannoord@hollandhart.com

Patrick R. Day
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
Cheyenne, WY 82001
Tel: (307) 778-4200
Fax: (307) 778-8175
pday@hollandhart.com

Emily C. Schilling
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Tel: (801) 799-5800
Fax: (801) 799-5700
ecschilling@hollandhart.com

*Counsel for Petitioner Basin Electric Power Cooperative*

Donna J. Hodges
Senior Counsel
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
P.O. Box 2261
Jackson, MS 39225-2261
Tel: (601) 961-5369
Fax: (601) 961-5349
donna_hodges@deq.state.ms.us

*Counsel for Petitioner Mississippi Department of Environmental Quality*

Todd E. Palmer
Valerie L. Green
MICHAEL, BEST & FRIEDRICH LLP
601 Pennsylvania Ave., N.W., Suite 700
Washington, D.C. 20004-2601
Tel: (202) 747-9560
Fax: (202) 347-1819
tepalmer@michaelbest.com
vlgreen@michaelbest.com

*Counsel for Petitioner Mississippi Public Service Commission*

Stacey Turner
SOUTHERN COMPANY SERVICES, INC.
600 18th Street North
BIN 14N-8195
Birmingham, AL 35203
Tel: (205) 257-2823
staturne@southernco.com

*Counsel for Petitioners Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company*

C. Grady Moore, III
Steven G. McKinney
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35303-4642
Tel: (205) 251-8100
Fax: (205) 488-5704
gmoore@balch.com
smckinney@balch.com

*Counsel for Petitioner Alabama Power Company*

Margaret Claiborne Campbell
Angela J. Levin
TROUTMAN SANDERS LLP
600 Peachtree Street, NE, Suite 5200
Atlanta, GA 30308-2216
Tel: (404) 885-3000
margaret.campbell@troutmansanders.com
angela.levin@troutmansanders.com

*Counsel for Petitioner Georgia Power Company*

Chris Koster
ATTORNEY GENERAL OF MISSOURI
James R. Layton
Solicitor General
*Counsel of Record*
P.O. Box 899
207 W. High Street
Jefferson City, MO 65102
Tel: (573) 751-1800
Fax: (573) 751-0774
james.layton@ago.mo.gov

*Counsel for Petitioner State of Missouri*

Timothy C. Fox
ATTORNEY GENERAL OF MONTANA
Alan Joscelyn
Chief Deputy Attorney General
Dale Schowengerdt
Solicitor General
*Counsel of Record*
215 North Sanders
Helena, MT 59620-1401
Tel: (406) 444-7008
dales@mt.gov

*Counsel for Petitioner State of Montana*

Terese T. Wyly
Ben H. Stone
BALCH & BINGHAM LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Tel: (228) 214-0413
twyly@balch.com
bstone@balch.com

*Counsel for Petitioner Mississippi Power Company*

Jeffrey A. Stone
BEGGS & LANE, RLLP
501 Commendencia Street
Pensacola, FL 32502
Tel: (850) 432-2451
JAS@beggslane.com

James S. Alves
2110 Trescott Drive
Tallahassee, FL 32308
Tel: (850) 566-7607
jim.s.alves@outlook.com

*Counsel for Petitioner Gulf Power Company*

Douglas J. Peterson
ATTORNEY GENERAL OF NEBRASKA
Dave Bydlaek
Chief Deputy Attorney General
Justin D. Lavene
Assistant Attorney General
*Counsel of Record*
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2834
justin.lavene@nebraska.gov

*Counsel for Petitioner State of Nebraska*

Robert Lougy
ACTING ATTORNEY GENERAL OF NEW JERSEY
David C. Apy
Assistant Attorney General
John R. Renella
Deputy Attorney General
*Counsel of Record*
Division of Law
R.J. Hughes Justice Complex
P.O. Box 093
25 Market Street
Trenton, NJ 08625-0093
Tel: (609) 292-6945
Fax: (609)341-5030
john.renella@dol.lps.state.nj.us

*Counsel for Petitioner State of New Jersey*

James S. Alves
2110 Trescott Drive
Tallahassee, FL 32308
Tel: (850) 566-7607
jim.s.alves@outlook.com

*Counsel for Petitioner $CO_2$ Task Force of the Florida Electric Power Coordinating Group, Inc.*

John J. McMackin
WILLIAMS & JENSEN
701 8th Street, N.W., Suite 500
Washington, D.C. 20001
Tel: (202) 659-8201
jjmcmackin@wms-jen.com

*Counsel for Petitioner Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation*

William M. Bumpers
Megan H. Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
william.bumpers@bakerbotts.com
megan.berge@bakerbotts.com

Kelly McQueen
ENTERGY SERVICES, INC.
425 W. Capitol Avenue, 27th Floor
Little Rock, AR 72201
Tel: (501) 377-5760
kmcque1@entergy.com

*Counsel for Petitioner Entergy Corporation*

Wayne Stenehjem
ATTORNEY GENERAL OF NORTH DAKOTA
Margaret Olson
Assistant Attorney General
North Dakota Attorney General's Office
600 E. Boulevard Avenue #125
Bismarck, ND 58505
Tel: (701) 328-3640
maiolson@nd.gov

Paul M. Seby
Special Assistant Attorney General
State of North Dakota
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Tel: (303) 572-6500
Fax: (303) 572-6540
sebyp@gtlaw.com

*Counsel for Petitioner State of North Dakota*

Michael DeWine
ATTORNEY GENERAL OF OHIO
Eric E. Murphy
State Solicitor
*Counsel of Record*
30 E. Broad Street, 17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
eric.murphy@ohioattorneygeneral.gov

*Counsel for Petitioner State of Ohio*

Paul J. Zidlicky
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8000
pzidlicky@sidley.com

*Counsel for Petitioners GenOn Mid-Atlantic, LLC; Indian River Power LLC; Louisiana Generating LLC; Midwest Generation, LLC; NRG Chalk Point LLC; NRG Power Midwest LP; NRG Rema LLC; NRG Texas Power LLC; NRG Wholesale Generation LP; and Vienna Power LLC*

David M. Flannery
Kathy G. Beckett
Edward L. Kropp
STEPTOE & JOHNSON, PLLC
707 Virginia Street East
Charleston, WV 25326
Tel: (304) 353-8000
dave.flannery@steptoe-johnson.com
kathy.beckett@steptoe-johnson.com
skipp.kropp@steptoe-johnson.com

Stephen L. Miller
STEPTOE & JOHNSON, PLLC
700 N. Hurstbourne Parkway, Suite 115
Louisville, KY 40222
Tel: (502) 423-2000
steve.miller@steptoe-johnson.com

*Counsel for Petitioner Indiana Utility Group*

E. Scott Pruitt
ATTORNEY GENERAL OF OKLAHOMA
Patrick R. Wyrick
Solicitor General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 521-4396
Fax: (405) 522-0669
fc.docket@oag.state.ok.us
scott.pruitt@oag.ok.gov

David B. Rivkin, Jr.
*Counsel of Record*
Mark W. DeLaquil
Andrew M. Grossman
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Tel: (202) 861-1731
Fax: (202) 861-1783
drivkin@bakerlaw.com

*Counsel for Petitioners State of Oklahoma and Oklahoma Department of Environmental Quality*

F. William Brownell
Eric J. Murdock
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
bbrownell@hunton.com
emurdock@hunton.com

Nash E. Long III
HUNTON & WILLIAMS LLP
Bank of America Plaza, Suite 3500
101 South Tryon Street
Charlotte, NC 28280
Tel: (704) 378-4700
nlong@hunton.com

*Counsel for Petitioner LG&E and KU Energy LLC*

Alan Wilson
ATTORNEY GENERAL OF SOUTH CAROLINA
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
*Counsel of Record*
P.O. Box 11549
Columbia, SC 29211
Tel: (803) 734-3680
Fax: (803) 734-3677
esmith@scag.gov

*Counsel for Petitioner State of South Carolina*

Marty J. Jackley
ATTORNEY GENERAL OF SOUTH DAKOTA
Steven R. Blair
Assistant Attorney General
*Counsel of Record*
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Tel: (605) 773-3215
steven.blair@state.sd.us

*Counsel for Petitioner State of South Dakota*

P. Stephen Gidiere III
Thomas L. Casey III
Julia B. Barber
BALCH & BINGHAM LLP
1901 6th Ave. N., Suite 1500
Birmingham, AL 35203
Tel: (205) 251-8100
sgidiere@balch.com

Stephanie Z. Moore
Vice President and General Counsel
LUMINANT GENERATION COMPANY LLC
1601 Bryan Street, 22nd Floor
Dallas, TX 75201

Daniel J. Kelly
Vice President and Associate General Counsel
ENERGY FUTURE HOLDINGS CORP.
1601 Bryan Street, 43rd Floor
Dallas, TX 75201

*Counsel for Petitioners Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC*

Sean Reyes
ATTORNEY GENERAL OF UTAH
Tyler R. Green
Solicitor General
*Counsel of Record*
Parker Douglas
Federal Solicitor
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320
pdouglas@utah.gov

*Counsel for Petitioner State of Utah*

Brad D. Schimel
ATTORNEY GENERAL OF WISCONSIN
Misha Tseytlin
Solicitor General
*Counsel of Record*
Andrew Cook
Deputy Attorney General
Delanie M. Breuer
Assistant Deputy Attorney General
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
Tel: (608) 267-9323
tseytlinm@doj.state.wi.us

*Counsel for Petitioner State of Wisconsin*

Ronald J. Tenpas
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 739-3000
rtenpas@morganlewis.com

*Counsel for Petitioner Minnesota Power (an operating division of ALLETE, Inc.)*

Allison D. Wood
Tauna M. Szymanski
Andrew D. Knudsen
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
awood@hunton.com
tszymanski@hunton.com
aknudsen@hunton.com

*Counsel for Petitioner Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.*

Peter K. Michael
ATTORNEY GENERAL OF WYOMING
James Kaste
Deputy Attorney General
*Counsel of Record*
Michael J. McGrady
Erik Petersen
Senior Assistant Attorneys General
Elizabeth Morrisseau
Assistant Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002
Tel: (307) 777-6946
Fax: (307) 777-3542
james.kaste@wyo.gov

*Counsel for Petitioner State of Wyoming*

Sam M. Hayes
General Counsel
*Counsel of Record*
Craig Bromby
Deputy General Counsel
Andrew Norton
Deputy General Counsel
NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY
1601 Mail Service Center
Raleigh, NC 27699-1601
Tel: (919) 707-8616
sam.hayes@ncdenr.gov

*Counsel for Petitioner North Carolina Department of Environmental Quality*

William M. Bumpers
Megan H. Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
william.bumpers@bakerbotts.com
megan.berge@bakerbotts.com

*Counsel for Petitioner NorthWestern Corporation d/b/a NorthWestern Energy*

Joshua R. More
Jane E. Montgomery
Amy Antoniolli
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 6600
Chicago, IL 60606
Tel: (312) 258-5500
jmore@schiffhardin.com
jmontgomery@schiffhardin.com
aantoniolli@schiffhardin.com

*Counsel for Petitioner Prairie State Generating Company, LLC*

Dennis Lane
STINSON LEONARD STREET LLP
1775 Pennsylvania Ave., N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 785-9100
Fax: (202) 785-9163
dennis.lane@stinson.com

Parthenia B. Evans
STINSON LEONARD STREET LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
Tel: (816) 842-8600
Fax: (816) 691-3495
parthy.evans@stinson.com

*Counsel for Petitioner Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas*

Allison D. Wood
Tauna M. Szymanski
Andrew D. Knudsen
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
awood@hunton.com
tszymanski@hunton.com
aknudsen@hunton.com

*Counsel for Petitioner Tri-State Generation and Transmission Association, Inc.*

William M. Bumpers
Megan H. Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
william.bumpers@bakerbotts.com
megan.berge@bakerbotts.com

*Counsel for Petitioner Westar Energy, Inc.*

Peter D. Keisler
Roger R. Martella, Jr.
C. Frederick Beckner III
Ryan C. Morris
Paul J. Ray
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8027
pkeisler@sidley.com

*Counsel for Petitioners 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*

Jeffrey R. Holmstead
Sandra Y. Snyder
BRACEWELL LLP
2001 M Street, N.W., Suite 900
Washington, D.C. 20036
Tel: (202) 828-5852
Fax: (202) 857-4812
jeff.holmstead@bracewelllaw.com

*Counsel for Petitioner American Coalition for Clean Coal Electricity*

Geoffrey K. Barnes
J. Van Carson
Wendlene M. Lavey
John D. Lazzaretti
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
Tel: (216) 479-8646
geoffrey.barnes@squirepb.com

*Counsel for Petitioner Murray Energy Corporation*

Andrew C. Emrich
HOLLAND & HART LLP
6380 South Fiddlers Green Circle
Suite 500
Greenwood Village, CO 80111
Tel: (303) 290-1621
Fax: (866) 711-8046
acemrich@hollandhart.com

Emily C. Schilling
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Tel: (801) 799-5753
Fax: (202) 747-6574
ecschilling@hollandhart.com

*Counsel for Petitioners Newmont Nevada Energy Investment, LLC and Newmont USA Limited*

Charles T. Wehland
*Counsel of Record*
Brian J. Murray
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, IL 60601-1692
Tel: (312) 782-3939
Fax: (312) 782-8585
ctwehland@jonesday.com
bjmurray@jonesday.com

*Counsel for Petitioners The North American Coal Corporation; The Coteau Properties Company; Coyote Creek Mining Company, LLC; The Falkirk Mining Company; Mississippi Lignite Mining Company; North American Coal Royalty Company; NODAK Energy Services, LLC; Otter Creek Mining Company, LLC; and The Sabine Mining Company*

Robert G. McLusky
JACKSON KELLY, PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322
Tel: (304) 340-1000
rmclusky@jacksonkelly.com

*Counsel for Petitioner West Virginia Coal Association*

Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
Tel: (301) 639-5238 (cell)
emtrisko7@gmail.com

*Counsel for Petitioner International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers*

Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
Tel: (301) 639-5238 (cell)
emtrisko7@gmail.com

*Counsel for Petitioner International Brotherhood of Electrical Workers, AFL-CIO*

Grant F. Crandall
General Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (703) 291-2429
gcrandall@umwa.org

Arthur Traynor, III
Staff Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (703) 291-2457
atraynor@umwa.org

Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
emtrisko7@gmail.com

*Counsel for Petitioner United Mine Workers of America*

Steven P. Lehotsky
Sheldon B. Gilbert
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
slehotsky@uschamber.com

*Counsel for Petitioner Chamber of Commerce of the United States of America*

Linda E. Kelly
Quentin Riegel
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
Tel: (202) 637-3000
qriegel@nam.org

*Counsel for Petitioner National Association of Manufacturers*

Richard S. Moskowitz
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1667 K Street, N.W., Suite 700
Washington, D.C. 20006
Tel: (202) 457-0480
rmoskowitz@afpm.org

*Counsel for Petitioner American Fuel & Petrochemical Manufacturers*

Karen R. Harned
Executive Director
Elizabeth A. Gaudio
Senior Executive Counsel
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
Tel: (202) 314-2061
karen.harned@nfib.org
elizabeth.milito@nfib.org

*Counsel for Petitioner National Federation of Independent Business*

Megan H. Berge
William M. Bumpers
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
megan.berge@bakerbotts.com
william.bumpers@bakerbotts.com

*Counsel for Petitioner National Association of Home Builders*

Kathryn D. Kirmayer
General Counsel
Evelyn R. Nackman
Associate General Counsel
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
Tel: (202) 639-2100
kkirmayer@aar.org

*Counsel for Petitioner Association of American Railroads*

Chaim Mandelbaum
Litigation Manager
FREE MARKET ENVIRONMENTAL LAW CLINIC
726 N. Nelson Street, Suite 9
Arlington, VA 22203
Tel: (703) 577-9973
chaim12@gmail.com

*Counsel for Petitioner Energy and Environment Legal Institute*

Catherine E. Stetson
Eugene A. Sokoloff
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Tel: (202) 637-5600
Fax: (202) 637-5910
cate.stetson@hoganlovells.com
eugene.sokoloff@hoganlovells.com

*Counsel for Petitioner Denbury Onshore, LLC*

C. Boyden Gray
Adam R.F. Gustafson
*Counsel of Record*
Derek S. Lyons
James R. Conde
BOYDEN GRAY & ASSOCIATES, PLLC
1627 I Street, N.W., Suite 950
Washington, D.C. 20006
Tel: (202) 955-0620
gustafson@boydengrayassociates.com

*Counsel for Petitioners Competitive Enterprise Institute; Buckeye Institute for Public Policy Solutions; Independence Institute; Rio Grande Foundation; Sutherland Institute; Klaus J. Christoph; Samuel R. Damewood; Catherine C. Dellin; Joseph W. Luquire; Lisa R. Markham; Patrick T. Peterson; and Kristi Rosenquist*

Sam Kazman
Hans Bader
COMPETITIVE ENTERPRISE INSTITUTE
1899 L Street, N.W., 12th Floor
Washington, D.C. 20036
Tel: (202) 331-1010

*Counsel for Petitioner Competitive Enterprise Institute*

Robert Alt
BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS
88 E. Broad Street, Suite 1120
Columbus, OH 43215
Tel: (614) 224-4422
robert@buckeyeinstitute.org

*Counsel for Petitioner Buckeye Institute for Public Policy Solutions*

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## GLOSSARY OF TERMS

| | |
|---|---|
| Act (or CAA) | Clean Air Act |
| Core Br. | Opening Brief of Petitioners on Core Legal Issues, *West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir. filed Feb. 19, 2016, final form filed Apr. 22, 2016) |
| EPA | United States Environmental Protection Agency |
| EPA Br. | Respondent EPA's Initial Brief, *West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir. filed Mar. 28, 2016, final form filed Apr. 22, 2016) |
| FERC | Federal Energy Regulatory Commission |
| JA | Joint Appendix |
| Record Br. | Opening Brief of Petitioners on Procedural and Record-Based Issues, *West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir. filed Feb. 19, 2016, final form filed Apr. 22, 2016) |
| Rule | U.S. Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) |

## INTRODUCTION AND SUMMARY OF ARGUMENT

In its response brief, EPA ties itself in knots, torn between touting the Rule's significance and downplaying the extraordinary nature of what it seeks to do. On one hand, EPA describes the Rule as "a significant step forward in addressing the Nation's most urgent environmental threat," necessary for "critically important reductions in carbon dioxide emissions" from fossil fuel-fired power plants. EPA Br. 1, 25. On the other hand, EPA claims the Rule is not "transform[ative]," because "industry trends" will result in "significant reductions in coal-fired generation … even in the Rule's absence." *Id.* at 26, 39-40.

The fact is that, through the Rule, EPA *does* seek fundamentally to "'transform[] … the domestic energy industry.'" Core Br. 23 (quoting White House Fact Sheet, JA5711). The Rule is premised on the unprecedented assertion that EPA has the legal authority under section 111(d) to require emission reductions based on shutting down existing fossil fuel-fired power plants and building new, EPA-favored plants to replace them. Moreover, the Rule's "emission performance rates" cannot be met even if every existing regulated source installs what EPA has found to be the "best" state-of-the-art controls for new sources. Rather, a State can comply only by adopting a plan based on building new renewable facilities and shuttering existing fossil-fueled sources.

EPA's novel contention that it may require emission reductions premised on altering the nation's mix of electric generation—resulting in a Rule with sweeping

implications—cannot stand because EPA has not shown clear congressional authorization. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"); *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005) ("*ABA*"). In its 174-page brief, EPA does not even cite *ABA*, and devotes just two pages to *UARG*, failing to acknowledge the Supreme Court's unequivocal statement that the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Yet EPA cannot deny that altering how electricity is produced in this country is a decision of vast economic and political significance, and the notion that section 111 "clearly" confers that monumental power on EPA strains credulity.

In fact, section 111 plainly forecloses EPA's unprecedented assertion of authority over the electric grid. EPA seeks to deflect attention from the critical statutory provisions, dismissing them as "textual snippets." EPA Br. 60. Rather than confront the controlling statutory language, EPA instead attempts to justify its approach by claiming what it calls "generation-shifting" is a practice some utilities have engaged in, citing a smattering of State and corporate initiatives and other Clean Air Act ("Act" or "CAA") programs. But "EPA is a federal agency—a creature of statute. It has … only those authorities conferred upon it by Congress," *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001), and what some States and companies have chosen to do voluntarily has no bearing on what Congress authorized EPA to

require under section 111. Similarly, EPA blithely ignores the key statutory differences in other CAA programs that allow trading and that evidence Congress's intent to set them apart.

EPA's principal textual response is that alleged "ambiguity" in the phrase "best system of emission reduction" gives it authority to treat the entire electric grid as a "'complex machine'" to which it can apply a single grid-wide "system" to reduce overall emissions. EPA Br. 29 (quoting 80 Fed. Reg. 64,662, 64,725 (Oct. 23, 2015), JA206), 60-61. EPA's assertion bears no relationship to the statute. The statute requires that any emission limitation be "achievable" by an individual regulated source "through the application of" a best system of emission reduction. CAA § 111(a)(1). But *no* individual regulated source can achieve the Rule's emission performance rates, and EPA's grid-wide system of emission reduction is not a control system that *any* individual source can use to reduce emissions. EPA's justification that sources' "owners and operators" can meet the standard, even though "sources" cannot themselves do so, improperly conflates distinct statutory terms, resulting in a vast expansion of regulatory authority that Congress never authorized.

The Rule also regulates emissions from sources already regulated under section 112, even though the Section 112 Exclusion flatly forbids such double-regulation. EPA again tries to manufacture ambiguity, but as its previous admissions regarding the Exclusion's literal meaning demonstrate, section 111's text is entirely clear.

Contrary to EPA's claims, the Rule also usurps State authority under section 111(d) by mandating a specific level of emission reductions. Both section 111 and EPA's own implementing regulations confer on States the authority to establish performance standards for existing sources and allow States to adopt standards less stringent than EPA's guidelines. Furthermore, EPA's Rule denies to States their statutory right to set less stringent performance standards based on individual sources' "remaining useful lives" and other factors, and neither trading nor programs relaxing some sources' rates at the expense of others solves that problem.

Finally, the Rule violates the Tenth Amendment by commandeering and coercing state officials. EPA claims the Rule is simply an instance of "cooperative federalism," Br. 98-101, but the Rule forces States to carry out federal policy whether under a state or federal plan. The "choice" EPA purports to give the States between exercising authority to reconstitute their generation mix or facing blackouts is no choice at all.

At the end of the day, EPA urges this Court to uphold the Rule because it addresses what EPA views as "the Nation's most important and urgent environmental challenge." EPA Br. 1. But this case is not about the wisdom of any particular policy; it is about whether EPA acted within its delegated authority, as all federal agencies must do. Because it has not, the Rule must be vacated.

# ARGUMENT

## I. EPA's Assertion of Authority Is Unlawful Because It Lacks Clear Congressional Authorization.

### A. EPA Cannot Identify Clear Congressional Authorization for the Novel and Vast Authority Claimed in the Rule.

The Rule is foreclosed not only by the plain language of section 111(d), *see* Core Br. 29-31, 41-48, but also by the lack of the clear statement from Congress required under *UARG*, *Brown & Williamson*, and *King v. Burwell*, 135 S. Ct. 2480 (2015), for transformative rules, *see* Core Br. 32-36.

EPA's primary response (Br. 41-42) is to dismiss those cases as limited to their facts, to deny the existence of a clear-statement rule for expansive assertions of agency authority "to regulate 'a significant portion of the American economy,'" *UARG*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159), and to claim deference under *Chevron*. But those arguments are precluded by binding precedent, which establishes that, in extraordinary cases like this one, agencies must point to clear statutory authorization, not merely allege vague text. The Supreme Court has instructed that it "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

EPA tries to distinguish *UARG*, *King*, and *Brown & Williamson* by downplaying the Rule's practical significance, claiming it merely builds on existing industry trends. EPA Br. 18-19, 38-40, 42-43. But rules that "follow[] existing industry trends," *id.* at

18, are not usually announced by the President in an East Room ceremony. EPA's claim is belied by the many statements from senior EPA and Administration officials that the Rule will "'aggressive[ly] transform[]'" the power sector, bringing about a "'decarboniz[ation]'" of electric generation in favor of a new "'clean energy'" economy. Core Br. 2-3; *see also* EPA Br. 1. EPA cannot now claim the Rule is of little moment.

In truth, the Rule will have sweeping practical significance, far beyond anything the agency has ever sought to achieve under the narrow and rarely used section 111(d). *See infra* Section II.A.3. The Rule is based on "generation-shifting"—the agency's euphemism for permanently "replac[ing] … higher emitting generation with lower- or zero-emitting generation"—from fossil-fueled generation to generation from other types of facilities, many of which (like renewables) are not even regulated sources. 80 Fed. Reg. at 64,728, JA209. In EPA's own words, the Rule's "emission performance rates" for sources are "*effective* emission rates"—that is, mere "regulatory constructs" intended to be attainable only with "generation-shifting pollution-reduction measures," rather than measures at an actual plant. EPA Br. 38. The Rule is thus specifically designed to force significant reductions in coal-fired generating capacity. And, by EPA's own admission, the Rule will succeed in doing so. *Id.* at 39; 80 Fed. Reg. at 64,728, JA209 ("[M]ost of the $CO_2$ controls need to come in the form

of those other measures … that involve, in one form or another, replacement of higher emitting generation with lower- or zero-emitting generation.”).[1]

The Rule also works an “enormous and transformative expansion” of EPA’s legal authority. *UARG*, 134 S. Ct. at 2444. EPA claims the power to require States to enforce emission reductions that are premised on changing the nation’s mix of electricity generation—a power that would permit EPA to effectively ban the sources of generation it disfavors. *See, e.g.*, 80 Fed. Reg. at 64,709 (claiming authority to “substitute” one type of generation for another), JA190. That is precisely the sort of “unheralded power to regulate ‘a significant portion of the American economy’” that requires clear congressional authorization. *UARG*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159). And it is what distinguishes this Rule from the other environmental rules to which EPA refers. *Compare* EPA Br. 42-44, *with* Section II.A.3 *infra*.

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[1] Unlike EPA (Br. 38-40), the U.S. Energy Information Administration (“EIA”), which was created by Congress to monitor the energy industry, does not see a significant “trend” in coal unit retirements and associated carbon dioxide emission reductions without the Rule. *See* EIA, Annual Energy Outlook 2015, Data Table: Electricity Generating Capacity: Electric Power Sector: Power Only: Total (Apr. 2015), http://www.eia.gov/forecasts/aeo (showing small reductions of coal capacity from 2016 forward), JA5341. EPA tries to manufacture such a trend by manipulating its “base case,” assuming, *contra* to EIA, nearly 20 percent of coal capacity will disappear this year even without the Rule. *Compare* EPA Regulatory Impact Analysis Base Case for the final Clean Power Plan (without the Rule), https://www.epa.gov/airmarkets/power-sector-modeling, spreadsheet estimate of 2016 coal capacity of 214 gigawatts, JA6280, *with* EIA’s estimate of 261 gigawatts, JA5341. EPA did not support its forecast with evidence of announced retirements. Without these phantom retirements, EPA’s “trends” evaporate. Core Br. 22.

While EPA labels this concern "hyperbolic," Br. 38, the agency can point to nothing in its textual analysis that would prohibit it from banning disfavored types of generation. If EPA were to maintain that a complete shift to renewable generation were "achievable," its asserted authority would enable it to completely "decarboniz[e]" the power sector by setting performance rates of zero. Nor has EPA shown that its rationale for an expansive interpretation of section 111(d) for electric generators would not apply to other industries. *See* Core Br. 33-34.

Finally, EPA turns to *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), claiming that the case "confirms" Congress clearly authorized "generation-shifting measures" and that EPA has expertise in energy matters. EPA Br. 44, 52-53.[2] *AEP* does not bear the weight EPA places on it. While *AEP* referred to EPA's authority to regulate carbon dioxide under section 111(d)—assuming EPA did not trigger one of that section's exclusions, *see* 564 U.S. at 424 n.7—the Court did not determine *how* EPA may regulate. In fact, the Court warned that EPA did not have "'a roving license to ignore the statutory text'" and must "'exercise discretion within defined statutory limits.'" *Id.* at 427 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)). Furthermore, the Supreme Court nowhere suggested that EPA had expertise beyond its past focus on source-specific emission controls or could make

[2] To the extent EPA is asserting (Br. 44) that the statute itself "clear[ly]" authorizes generation-shifting, that assertion is refuted not only by the plain text but by the agency's consistent practice over 40 years. *See infra* Section II.A.3.

judgments on numerous aspects of the American power system. Indeed, EPA has conceded elsewhere that it is not expert in those matters. *See* Core Br. 35-36.

### B. EPA Seeks To Invade a Traditional State Regulatory Domain Without a Clear Statement from Congress.

EPA must also point to a clear statement because the Rule regulates intrastate generation—"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); Core Br. 36-41. In response, EPA fails to cite, let alone distinguish, *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014), *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 544 (2002), *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), or *ABA*, 430 F.3d at 471-72. These precedents require a clear statement of authority where an agency seeks to regulate a matter "traditionally [within] the province of the states," regardless of whether the agency is directly regulating States and their officials. *ABA*, 430 F.3d at 471.

EPA claims (Br. 55-59) that this principle does not apply because it has not engaged in "direct regulation of energy markets." According to EPA, the Rule is a garden-variety exercise of Clean Air Act authority, no more intrusive as to state authority than any other EPA regulation in the power sector. EPA's claim is unconvincing.

*First*, while any air quality regulation might raise a particular unit's costs and therefore "indirectly" affect how it is dispatched into the grid, *id.* at 55-56, the Rule

goes much further and aims directly at the mix of generation in each State, Core Br. 14, 20, 22. EPA's "emission performance rates" are *premised* on "generation-shifting" and *intended* to shift generation. And they are set at a level where the only way to meet them is for plant owners and operators actually to move generation from existing fossil fuel-fired plants to new renewable plants, producing exactly what EPA's own modeling predicts. *See* Core Br. 22. But the Supreme Court has long recognized (in another case not cited by EPA) that determining the mix of electric generation in a State is within the State's traditional authority. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (The "[n]eed for new power facilities … ha[s] been characteristically governed by the States.").[3]

*Second*, the Rule "reach[es] into" the States' traditional sphere of regulating utility resource planning by necessitating legislative or regulatory activity that States would not otherwise undertake. *ABA*, 430 F.3d at 471. The new renewable generation the Rule demands will not simply appear; States must adopt programs and accelerate the planning, siting, permitting, and constructing of new plants and associated transmission infrastructure to ensure this happens. *See* Core Br. 78-83. State utility commissions must also address stranded investments in prematurely retired coal

[3] Because forcing States to reorder their resource portfolios is the direct and intended consequence of the Rule, cases like *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016), and *Connecticut Department of Public Utility Control v. FERC*, 569 F.3d 477, 479-83 (D.C. Cir. 2009), provide no support for EPA's position. *See* EPA Br. 56.

plants. *See* Former State Pub. Util. Comm'rs Amici Br. in Supp. of Pet'rs (Feb. 23, 2016), ECF 1600328 (explaining Rule's impact on state electricity regulation). And, as EPA itself recognizes, the Rule depends on States exercising their "responsibility to maintain a reliable electric system" in the face of the widespread retirements the Rule will cause. 80 Fed. Reg. at 64,678, JA159.

EPA asserts that the Rule provides "flexibility" and that States need not "engage in any particular legislative or regulatory activities to implement the Rule." EPA Br. 17, 58. But while States may have some choices at the margin, most of the Rule's required emission reductions are based on "generation-shifting," *see* 80 Fed. Reg. at 64,728, JA209, and EPA never claims that States could feasibly account for all or even most of these reductions by any other means. To the contrary, EPA acknowledges "the Best System … includes … strategies to increase utilization of cleaner forms of power generation." EPA Br. 4. Further, much of the Rule's claimed "flexibility" consists of the States' authority to implement programs that reduce demand for electricity or increase demand for renewable generation. *See* 80 Fed. Reg. at 64,835-36, JA316-17. EPA cannot justify the Rule's interference with state regulation of energy production on the grounds that States may choose to alter their energy production in *other* ways to meet EPA's demands.[4]

[4] EPA's assertion that the "logical extension" of Petitioners' argument will "preclude EPA from implementing *any* Section 111(d) guidelines," Br. 56, is wrong. The clear-statement rule will prohibit only those EPA regulations that are

## II. Section 111 Unambiguously Forecloses EPA's "Generation-Shifting" Best System of Emission Reduction.

EPA's Rule adopts a best system of emission reduction that cannot be implemented by any individual "stationary source" but instead requires sources to "shift generation" to other facilities, including many that are not regulated under section 111. Petitioners showed (Core Br. 43-48) that the language, history, and structure of section 111—including the statutory terms that authorize regulation, which EPA dismisses as "textual snippets," EPA Br. 60—foreclose EPA's assertion of the previously unheralded authority at the heart of the Rule.

### A. Section 111 Does Not Authorize EPA To Base Emission Reductions on Measures that Cannot Be "Appl[ied] … to" Individual Regulated "Stationary Sources."

EPA's reliance on "generation-shifting" is unambiguously precluded by the statutory mandate that any section 111(d) standard—and therefore any "system" EPA designates—must be "appl[icable] … to" individual sources within the source category and must yield emission limitations that are "achievable" by those sources individually. CAA § 111(a)(1), (2), (d)(1); Core Br. 41-42. "Generation-shifting" does not apply "to" any individual source or produce emission limitations that a source can "achiev[e]." Instead, it requires some plant owners and operators to close their units, and others, as a condition of continued operation, to purchase credits or directly invest in new renewable generation. Indeed, the "system" EPA adopted is specifically

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transformative in nature or effect, or that invade a traditional state domain, such as intrastate energy generation, without clear congressional authorization.

designed *not* to "appl[y] … to" individual sources, but rather "'the source category as a whole,'" Core Br. 43, 47 (quoting 80 Fed. Reg. at 64,727, JA208), and indeed to the entire grid. EPA's attempts to evade these textual limitations are unavailing.

### 1. EPA cannot dissociate its best system of emission reduction from the standards of performance that will be based on that system.

EPA's central textual response attempts to separate the best-system-of-emission-reduction determination from the performance standards that must be set for, and be applicable to, stationary sources. EPA contends that "the fact that states set standards 'for' or 'applicable to' any existing source does not itself place any limits on the scope of measures that can be considered as part of the Best System" of emission reduction. EPA Br. 61.

The plain language of section 111 and the Rule's own findings refute this contention. Foremost, EPA's reading ignores that the term "best system of emission reduction" is part of the definition of "standard of performance." CAA § 111(a)(1). A "standard of performance" is an "emission limitation" "for" and "appli[cable] … to a[] particular source," *id.* § 111(a)(1), (d)(1), that must be "achievable *through the application of* the best system of emission reduction," *id.* § 111(a)(1) (emphasis added). In other words, a particular source must be able to achieve the emission limitation through application of EPA's best system of emission reduction. *See* Record Br. 18, 50.

That limitation is critical: without it, EPA's authority would be virtually unbounded. Under EPA's reading, nearly *anything* could qualify as part of the best system of emission reduction. *See* 80 Fed. Reg. at 64,720 (defining "system of emission reduction" as "a set of measures that work together to reduce emissions"), JA201. For instance, EPA could decide the "system" includes using only fossil fuels transported on low-emitting trains or ships.[5]

The Rule itself recognized this "important limitation," conceding that the best system of emission reduction may include only "measures that can be implemented—'appl[ied]'—by the sources themselves." *Id.* EPA's new justification thus is foreclosed under *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Indeed, EPA even recognizes elsewhere in its brief that the Rule rejected the rationale EPA now advances. Br. 28 (acknowledging the Rule found that "the 'system' must encompass actions the sources themselves can implement").

EPA understandably seeks to avoid this limitation, and the concession in the Rule, because it dooms the Rule. No individual source can achieve the Rule's

[5] EPA claims elsewhere in the brief (Br. 28) that there are "significant constraints" to its best system of emission reduction, citing 80 Fed. Reg. at 64,776, JA257, because the system "must assure emission reductions from the affected sources." EPA's reading of this requirement renders it entirely ineffectual. EPA views the requirement as satisfied if a regulated source's owners or operators can contract with a non-source to "lower [its] effective emission rate," even if no actual emission reduction occurs at the regulated plant. EPA Br. 16-17, 161. That is legally incorrect, *see infra* pp. 15-19, 23-26, and really no constraint at all, as the enterprises with which a source could contract are essentially boundless.

performance rates through application of the agency's grid-wide best system of emission reduction. That is why EPA's brief argues that the Rule's emission performance rates need only be achievable based on applying a system of emission reduction to the entire electric grid, including new renewable facilities that are outside the scope of section 111 (and do not yet exist). *Id.* at 29-30, 36-37, 122-40. Those performance rates are a mere accounting construct that no existing facility can actually "achieve." *Id.* at 15. They can be met only virtually—by acquiring "credits" from lower- or zero-emitting plants to offset the affected unit's actual emissions. 40 C.F.R. § 60.5790(c)(1); Core Br. 46; EPA Br. 38 ("The guidelines are purposefully set in the form of *effective* emission rates," which are "regulatory constructs intended to reflect adjustments to actual emission rates."). The Rule thus demands that two or more facilities *together* achieve the required rate, in effect treating distant and unrelated facilities as a single "stationary source." Core Br. 46.

**2. EPA improperly redefines the statutory term "source."**

Having found in the Rule that a best system of emission reduction must be "implementable" by individual sources, 80 Fed. Reg. at 64,735, 64,762, JA216, JA243, EPA nevertheless now maintains that the Rule can be reconciled with the statute. EPA's reconciliation, however, impermissibly contorts the term "source" in two different ways.

a. At page 61 of its brief, EPA finally turns to the principal legal rationale it presented in the Rule—that its authority concerning "standards of performance" for

"existing source[s]" empowers it to force a source's *owner or operator* to build or subsidize new "low-emission" facilities. As EPA argues, "the guidelines are achievable by sources through generation-shifting" because "the owner or operator of a source … will implement generation-shifting measures." EPA Br. 62; *see also* 80 Fed. Reg. at 64,766 ("[best system of emission reduction] must consist of measures that can be undertaken by an affected source—that is, its owner or operator"), JA247.

This argument improperly conflates the term "source" with the term "owner or operator." Core Br. 43-45. EPA asserts (Br. 28) that "power plants reduce emissions by replacing higher-emitting generation with lower-emitting generation." But "power plants" cannot engage in "generation-shifting." Core Br. 45. Any "generation-shifting" that may occur on the grid is accomplished by utility owners and operators, not by changes to the plants and their operations.

This conflation of the term "source" and the term "owner or operator" is neither "unremarkable," *id.* at 62, nor semantic. It is the conceptual linchpin of the Rule, 80 Fed. Reg. at 64,762, JA243; *see also, e.g.*, *id.* at 64,766-67, 64,772, JA247-48, JA253, and an unprecedented reimagining of section 111 that transforms a program that for nearly a half-century has been limited to setting emission limitations "for" and "achievable" by "sources" into a program that now sets emission limitations based on systems "for" plants' owners and operators, that are unachievable by individual "sources," and that demand a reordering of the national electric utility system, Core Br. 45. As this Court held just weeks ago, "[t]o suddenly extend" a statute well beyond

its previous limits "would end-run the statute's careful line-drawing and thwart the structure and targeted purpose of the statute." *Dist. of Columbia v. Dep't of Labor*, No. 14-5132, 2016 WL 1319453, at *6 (D.C. Cir. Apr. 5, 2016) ("*District of Columbia*").

EPA has no textual response to Petitioners' demonstration that conflating "sources" with the "owners or operators" of sources violates the plain statutory text and congressional intent. Core Br. 43-45. EPA nods (Br. 61-62) to section 111(e), but that subsection supports Petitioners' point that if Congress had intended to include a source's owner or operator within the term "source," it would not have separately specified the obligations of the "owner or operator," nor separately defined those terms. Core Br. 44.

Bereft of textual support, EPA offers a handful of unconvincing arguments. *First*, it asserts (Br. 62) that the Rule does not actually conflate sources with owners or operators because it does not "direct states to set a single standard for the $CO_2$ emissions from all of a particular *company's* power operations." EPA's assertion supports Petitioners' argument: while EPA agrees that the Rule would be unlawful if a single standard were applied to all of a particular company's power operations, the Rule does something even worse by basing the limitation on a system of cumulative reductions for the entire *grid* and making the limitation itself one that is "achievable" only *collectively* by multiple sources and other facilities on the grid. *Compare* Core Br. 15, 18-19, 47, *with* EPA Br. 15-16.

*Second*, EPA claims (Br. 45) that "generation-shifting … incorporate[s] changes in 'production processes' or 'operations' of an individual plant," but the agency's own explanation undermines this. EPA contends that the owner or operator of an individual regulated source can undertake "generation-shifting" precisely because, if the source alters its production to comply with the Rule, "other sources must decrease or increase commensurately … to balance supply with demand." *Id.* at 45-46. Thus, it is undisputed that a source must have the aid of "other sources" (including many not subject to EPA regulation) to accomplish the "generation-shifting" the Rule requires.

*Third*, EPA claims (Br. 62) that the Rule makes the individual source "the entity subject to the emission limit," but that is just semantics. The emission limit is a mathematical "construct[]," EPA Br. 38, derived from actions that an owner or operator must undertake to subsidize generation at other locations.

*Fourth*, EPA contends (Br. 63) that the Rule's requirements for source owners and operators are similar to those required under other CAA programs, asserting that "sources routinely rely on emissions-trading programs to meet a range of CAA requirements." But neither voluntary choices by source owners or operators nor Congress's decision to deploy trading regimes expressly in other CAA programs says anything about whether EPA may make such regimes an "integral part," 80 Fed. Reg. at 64,734, JA215, of a section 111 "best system of emission reduction." As explained above, that term necessarily includes only measures that can be implemented at an individual source. *See Transbrasil S.A. Linhas Aereas v. Dep't of Transp.*, 791 F.2d 202,

205 (D.C. Cir. 1986) (When Congress uses different terms in a statute, "the court must presume that Congress intended the terms to have different meanings.") (internal quotation marks omitted).

Furthermore, EPA ignores the difference between programs like section 111(d) that establish standards based on at-the-source control systems, and options, like trading regimes, to *comply* with those standards. Under section 111(d), as EPA itself recognized, sources may comply with an emission limitation using measures that differ from the controls upon which the standard is based. *See* CAA § 111(a)(1), (b)(5). Thus, for example, although EPA excluded programs to reduce electricity demand from the final Rule's best system of emission reduction as inconsistent with EPA precedent, demand reduction programs are still allowed as a compliance option. *See* 80 Fed. Reg. at 64,673, JA154. This distinction is important. Permitting EPA to base performance rates only on controls that can be implemented at the source limits EPA to its expertise: identifying technological and operational improvements that can reduce emissions. On the other hand, allowing sources broader discretion in selecting control measures to comply with the rates encourages industry innovation and efficiency. Thus, Petitioners do not "seek to have it both ways." EPA Br. 48. Instead, it is EPA that conflates two distinct issues.

b. EPA also contorts the term "source" in a different way, arguing that, while performance standards must be set for "particular sources," the best system of emission reduction may be applied to "a particular *source category*," *id.* at 7 (emphasis

added), in order to "establish the degree of emission limitation those standards must *collectively* achieve," *id.* at 60 (emphasis added); *see also id.* at 15-16 ("EPA applied the Best System … and quantified … the reductions achievable for each subcategory"); Core Br. 47.

But the statute does not give EPA authority to require aggregate reductions from the source category. *Supra* pp. 12-15. As Petitioners demonstrated, Core Br. 47, when Congress wishes to refer to a source *category*, rather than individual sources, it knows how to do so, *see, e.g.*, CAA § 111(b)(1)(A) (requiring EPA to list "categor[ies] of sources"). Indeed, a Rule premised on "generation-shifting" across the electric grid strays even further from the statute, as it affects facilities both within the regulated source category and outside it (like renewables).

EPA argues that it was appropriate to consider total emission reductions across the source category in selecting a best system of emission reduction because it was appropriate to estimate the total air quality benefits of regulation. EPA Br. 64. This is a straw man. Regardless of whether EPA *may consider* the sum of each source's reductions when selecting a best system, the text forbids EPA to select a system that *can be implemented* only by multiple sources and non-sources collaboratively—here, by the entire source category together with facilities outside the source category across the entire grid. *See supra* pp. 12-15.

For this reason, EPA's argument that the best system of emission reduction can be determined without reference to individual sources is foreclosed by *ASARCO*

*Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), which rejected EPA's ability to redefine the term "source" and limited the term to "a single building, structure, facility, or installation" and not "a combination of such units," *id.* at 327. EPA argues (Br. 63) that *ASARCO* did not define the terms at issue here, but the question this Court answered in *ASARCO* was whether the standard of performance obligation can be extended beyond "the units to which" it applies to a combination of facilities. 578 F.2d at 322, 326-27. Because the standard of performance here is defined by a "system" that applies collectively to generating facilities across the electric grid, this Court's ban on aggregating sources is dispositive. And, as in *ASARCO*, allowing EPA to aggregate sources would defeat Congress's intent to regulate emissions at the level of individual sources. *See id.* at 327-28.[6]

**3. The Rule is unprecedented.**

The Rule also departs from EPA's prior practice by setting rates that can be met only by shutting down certain sources and constructing new, unregulated facilities—a fact strongly suggesting the Rule exceeds the statute's bounds. Core Br.

[6] EPA questions whether *ASARCO* was undermined by *Chevron*. EPA Br. 63-64. It was not. *Chevron* concerned whether, under a different statutory program, a source may be defined as all emitting buildings within a single plant or whether each individual building must be a separate source. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 840, 860-61 (1984). The Supreme Court agreed that EPA may define a source under that different program as all the emitting buildings within a plant's boundaries, *id.* at 865—a definition with which Petitioners take no issue. *Chevron* never suggested that section 111's definition of "stationary source" as a "building, structure, facility, or installation" may include all existing generating facilities connected to the grid, as under the Rule. Indeed, the Court acknowledged that section 111 was "not literally applicable to the permit program" at issue there. *Id.* at 860-61.

48-49. In response, EPA does not cite a single instance, from over one hundred new source performance standards and five existing source guidelines, in which it set rates that regulated sources were themselves categorically unable to meet and that required source owners to invest in other facilities. Nor does it point to any existing-source rule that has demanded building *new* facilities. And EPA cites no rule that identifies the best system of emission reduction for the entire source category in the aggregate. *See District of Columbia*, 2016 WL 1319453, at *1 (The "novelty of [an agency's] interpretation" and the fact that a statute "has *never* been applied" in this way "buttresses [a] conclusion" that the agency lacks the expanded authority it claims.).[7]

The only section 111 precedent EPA cites in support of its argument is the Clean Air Mercury Rule ("Mercury Rule") and the phrase "allowance system," which EPA added to its section 111(d) implementing regulations, 40 C.F.R. § 60.21(f), in the Mercury Rule. 70 Fed. Reg. 28,606, 28,649 (May 18, 2005), JA4556; EPA Br. 33-34, 58-69. That rule, along with the change to section 60.21(f), was vacated by *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).[8] Its vacatur aside, the Mercury Rule does not help EPA because unlike the Rule, the Mercury Rule cap-and-trade program was

[7] Amicus, but not EPA, refers to a 1971 performance standard that "assumed" the best system of emission reduction involved "precombustion cleaning of coal." Br. of the Inst. for Policy Integrity as Amicus Curiae in Supp. of Resp'ts 16-17 (Apr. 1, 2016), ECF 1606724. But on-site use of coal that was cleaned off-site is no different than on-site use of control systems, like scrubbers, constructed off-site.

[8] Because 40 C.F.R. § 60.21(f) and the phrase "establishing an allowance system" are a legal nullity after *New Jersey*, EPA errs in asserting (Br. 68) that its section 111(d) regulations independently "authorize[] trading programs."

"based on control technology available in the relevant timeframe" that could be installed at each regulated source. 70 Fed. Reg. at 28,617, 28,620, JA4551, JA4554. These "technologies" were sufficient to support the Mercury Rule's performance standards "[e]ven assuming, arguendo, that the term 'standard of performance' prohibited an emissions cap and allowance trading program." *Id.* at 28,620 n.5, JA4554.[9] The Mercury Rule did *not* set rates that *no* source could meet, nor was it designed to force "generation-shifting." The Mercury Rule certainly did not purport to "aggressive[ly] transform[]" the industry by "shifting" generation outside the regulated source category.

### B. The Rule Does Not Provide for "Standards of Performance."

#### 1. Under the statute, a standard of performance cannot involve "generation-shifting."

a. As Petitioners showed, Core Br. 24-25, EPA's adoption of a section 111 rule premised on the "non-performance" of certain sources cannot be squared with Supreme Court case law. EPA's assertion (Br. 65) that it can ignore the plain meaning of the word "performance" because it is part of "a statutorily defined term" is foreclosed by *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*"), which similarly involved an agency failing to give meaning to one word ("navigable") in a defined term ("navigable waters"). EPA's

[9] EPA points (Br. 34) to an isolated reference in the Mercury Rule to "dispatch changes," but that merely referred to an alternative compliance option for the standard based on "control technology" and was in no way used to set the standard. 70 Fed. Reg. at 28,619, JA4553.

citation (Br. 65) of *Stenberg v. Carhart*, 530 U.S. 914 (2000), is unavailing because the dispute there was whether the colloquial understanding of a term trumped the statutory definition, not whether an agency's interpretation failed to give one of the words in the term any meaning at all. 530 U.S. at 942.

In the alternative, EPA asserts that the word "performance" refers to a source's "emissions performance" rather than its "production performance." EPA Br. 65 (emphases omitted). But this argument is merely a repackaging of the argument foreclosed by *SWANCC*. In any event, "generation-shifting" has no more to do with an individual plant's emissions performance than its production performance. While "generation-shifting" seeks to reduce emissions, it does so not by improving a plant's emissions rate but by assuming the plant simply will work *less*—or not at all.

b. As Petitioners further explained, a "standard of performance" must reflect an "emission limitation" that requires "continuous" emission reductions during operation. Core Br. 7-8, 52; CAA § 302(k); *see also id.* § 302(*l*). A standard that does not require better emission performance when a source is producing emissions is not a "continuous" limitation.

EPA asserts (Br. 66) that its Rule only identifies the "system" on which performance standards are based and that, unlike the standards, the system EPA selects "need not itself entail 'continuous' [emission] reduction" during source operations. But as discussed *supra*, pp. 13-15, and as EPA's brief admits (Br. 28), in determining the "system" under section 111(d), the agency is subject to the statutory

"constraints" applicable to the emission standards precisely "because sources must be able to attain their emission standards." Because the emission standards must limit emissions on a "continuous basis," and because those standards must be "achievable through the application of the best system of emission reduction," CAA §§ 111(a)(1), 302(k), the "system" EPA adopts must itself be premised upon measures to "continuously" limit emissions at the source.

EPA's fallback response (Br. 66-67) is that the Rule does satisfy the "continuous basis" requirement because the numerical standard set for each unit imposes an "uninterrupted obligation" on the unit to comply. But continuous legal obligations to hold allowances simply do not "limit[] the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." CAA § 302(k). Nor does EPA have a good response to the legislative history that confirms the statute's plain language. As EPA recognizes (Br. 67), Congress added the term "continuous" to the definitions of "emission limitation," "emission standard," and "standard of performance" in 1977 to prohibit "intermittent controls" and other "measures that simply disperse pollutants away from higher concentration areas," which while continuously *in effect* do not continuously *reduce emissions*, H.R. Rep. No. 95-294, at 81 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1159, JA4102. But if section 302(k)'s continuous-limitation requirement means what EPA now says, it would have been ineffective at achieving Congress's goal: EPA's uninterrupted-obligation standard would authorize intermittent controls and other dispersion

measures that only periodically reduce emissions. Such measures are prohibited only if the word "continuous" requires consistently better emission performance. *See* Core Br. 52.

Finally, contrary to EPA's assertions, Petitioners have not argued that section 111(d) mandates only "technological" controls, but simply that EPA may not adopt a control "system" that cannot be "appli[ed]" to an individual "source" to "achiev[e]" an "emission limitation." EPA Br. 40-50 (citing CAA § 111(a)(7)). Control technologies (e.g., scrubbers), process design (e.g., low NOx burners), or operational processes (e.g., low-sulfur coal) all achieve such reductions. Congress inserted the word "technological" in 1977 to encourage new sources to install scrubbers instead of relying solely on low-sulfur coal to meet sulfur dioxide performance standards. This was done in part to make low-sulfur coal more affordable for existing sources. H.R. Rep. No. 95-294, at 166 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1245, JA4112-13. With the adoption of the more comprehensive sulfur dioxide-focused Acid Rain Program in 1990, Congress removed "technological" from the section 111 definition to return to the range of systems and operational processes originally contemplated under section 111. 136 CONG. REC. H12923 (daily ed. Oct. 26, 1990), JA4178; *see also ASARCO*, 578 F.2d at 327 n.26 (Section 111 in 1970 was "designed to insure that new stationary sources are designed, built, equipped, operated, and maintained so as to reduce emissions.").

### 2. The Rule is at odds with the Clean Air Act's structure.

As Petitioners explained (Core Br. 54-56), the distinction between "performance-based" and "air quality-based" programs that appears throughout the Act supports the plain-language reading of "standard of performance." EPA argues, however, that this distinction does not "speak to whether the 'best system of emission reduction' *for interconnected power plants* can include … generation-shifting." Br. 68 (emphasis added). But on the face of the statute, performance-based programs like section 111 cannot apply to "interconnected power plants"—they can apply only to individual "sources." *See supra* pp. 12-21.

EPA offers no persuasive response to the critical differences between those other CAA programs and section 111. *See* Core Br. 54-56. The suggestion that its section 111 authority is the same as the authority Congress provided in any other program, *see, e.g.*, EPA Br. 63, impermissibly overlooks differences in language, structure, and purpose that demonstrate differences of congressional intent, Core Br. 44. Thus, for example, EPA's reliance on the section 110 trading-based Cross-State Air Pollution Rule ignores the critical fact that Congress *expressly* authorized a trading-based approach under section 110. CAA § 110(a)(2)(A) (authorizing not just "emission limitations" but "other control measures," including "marketable permits[] and auctions of emissions rights"); *see also* Core Br. 55.

EPA also argues (Br. 67) that generation-shifting can satisfy the "continuous" requirement based on Congress's use of the term "emission limitation" in Title IV's

cap-and-trade program. In fact, in Title IV, Congress distinguished between "emission limitations" and "allowance trading," providing "emission limitations" for identified generating units, *in addition to* a trading-based option for complying with the source-specific emission limitations. CAA § 404(a)(1) ("unlawful … to emit sulfur dioxide in excess of the tonnage limitation … unless … owner or operator of such unit holds allowances"); *id.* § 405(b)(1) ("unlawful … to exceed an annual sulfur dioxide tonnage emission limitation equal to … 1.20 lbs/mmBtu, divided by 2,000, unless the owner or operator of such unit holds allowances"); *see also* Core Br. 56. The absence of such a trading program in section 111 confirms the more limited focus of that provision.[10] Br. for Members of Cong. as Amici Curiae in Supp. of Pet'rs 20-22 (Feb. 23, 2016), ECF 1600258.

The attempts by EPA and its supporters, *see* EPA Br. 33; Envtl. Intervenors' Br. 17 (Mar. 29, 2016), ECF 1606130, to analogize the Rule to other "performance-based" programs fall short because "generation-shifting" played no role in setting the standard under these programs. In its rule regulating hazardous power plant emissions, for example, EPA based the standards on the "maximum achievable control technology" for the regulated facilities. 77 Fed. Reg. 9304, 9394 (Feb. 16,

[10] *Van Hollen v. FEC*, 811 F.3d 486, 493 (D.C. Cir. 2016), undermines rather than supports EPA. EPA Br. 33. In *Van Hollen*, this Court, under *Chevron* step two, accepted the agency's decision to limit its authority under one statutory provision in line with limitations in another parallel provision because the two were similar in intent. The opposite holds true here: the language of section 111(d) is clear, and other trading programs differ substantially in structure and purpose. *See, e.g.*, Core Br. 54-56.

2012). The provision EPA cites (Br. 33) merely allowed plants additional time to comply by building replacement resources if needed to avoid a power shortfall. Similarly, in the regional haze program, EPA based the standards on the emission performance of operational processes and control technology that can be implemented at the regulated source. CAA § 169A(b)(2)(A) & (g)(2); 40 C.F.R. § 51.308(e)(1). EPA provided flexibility to use a cap-and-trade program as a compliance option—not, as here, as a basis for the standard.[11]

### C. The Rule Is Inconsistent with Section 111 as a Whole.

Petitioners demonstrated EPA's critical interpretive error in giving a fundamentally different reading to "best system of emission reduction" for purposes of the Rule than it gave in the parallel rulemaking for new units under section 111(b). Core Br. 57. By adopting a system based on "generation-shifting" under section 111(d)—but *not* section 111(b)—the Rule inverted the structure of section 111 and produced a bizarre outcome. *Id.* at 57-58. The Rule sets performance rates for *existing* sources that are significantly more stringent than for *new* sources, *id.* at 11-12, 15-16, in contrast with EPA's prior consistent practice, *id.* at 59.

In response, EPA suggests the performance rates it set for new and existing sources cannot be compared. EPA Br. 71-72. But comparing these rates is perfectly

[11] Similarly, Environmental Intervenors (Br. 18) refer to a waste combustor regulation, 60 Fed. Reg. 65,387, 65,402 (Dec. 19, 1995), but that rule supports Petitioners because it offered averaging and trading merely as compliance mechanisms for plant-specific standards properly based on the use of controls or measures at the source, *id.*

appropriate: both the new-source and existing-source rules purport to limit the rate at which fossil fuel-fired units may emit carbon dioxide. *See* 80 Fed. Reg. at 64,667, JA148; 80 Fed. Reg. 64,510, 64,513 (Oct. 23, 2015). EPA does not dispute that the actual, numerical performance rates for existing sources are *lower* than those for new sources. Core Br. 11-12, 15-16. And EPA does not dispute that even if existing sources were to adopt what EPA determined to be the "best system of emission reduction" for new sources, those existing sources still could not achieve the Rule's performance rates. *Id.* at 16, 58-59.

EPA provides no credible explanation why the "phase-in" of the existing-source performance rates means they cannot be compared to the new-source performance rates. EPA Br. 71. Existing-source rates based on retrofitting require lead-in time for sources to comply; that fact has never before led EPA to make them more stringent than immediately-applicable new source rates. *See* CAA § 111(a)(2), (b)(1)(B) (new-source standards effective retroactively to date of proposal). EPA suggests that the new-source standards may be tightened in the future to align them more closely with the existing-source rates in the Rule, but the agency never found that technological developments would eventually justify making new-source standards as stringent as the existing-source rates. In any event, such prognostication would be simply the "'crystal ball' inquiry" this Court has forbidden as a basis for setting section 111 standards. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973).

EPA also offers "[s]everal considerations" why it declined to adopt performance rates for new sources based on "generation-shifting." Br. 70-71. For instance, EPA opines that, for new sources, the cost of "generation-shifting" combined with on-site improvements would be excessive. But because EPA found that "generation-shifting" brings about *more* reductions than the carbon capture technology contemplated for new coal units, the agency could, under its view of its own authority, simply have set the new-source standard based on "generation-shifting" alone. And EPA uses circular reasoning when it asserts (Br. 72) that it could adopt conflicting definitions of "system" because it allowed existing sources, but not new sources, to engage in trading. If EPA believes existing sources can comply by trading, then under its view new sources can too—indeed, the Rule even contemplates that States may allow new sources to trade with existing sources. 80 Fed. Reg. at 64,887-88, JA368-69.

Finally, EPA points (Br. 72-73) to a single previous section 111(d) guideline under which "an occasional old plant may have a lower guideline fluoride emission rate than a new plant." 45 Fed. Reg. 26,294, 26,295 (Apr. 17, 1980). But EPA explained there that emerging designs for new aluminum plants caused those plants to have "much greater uncontrolled emission rates" than some old plants. *Id.* Accordingly, emissions from a few aluminum plants were actually *more difficult* to control than emissions from some existing plants. EPA does not claim that such circumstances are present here.

## III. The Section 112 Exclusion Unambiguously Prohibits the Rule.

Separately, EPA's Rule is unlawful because the Act prohibits EPA from invoking section 111(d) to require States to regulate an existing "source category which is regulated under section [1]12." CAA § 111(d)(1)(A)(i); *see AEP*, 564 U.S. at 424 n.7 ("EPA may not employ § [1]11(d) if existing stationary sources of the pollutant in question are regulated under … § [1]12.").[12] The agency itself in 1995, 2004, 2005, 2007, and 2014 acknowledged this "literal" reading of the Exclusion as it appears in the U.S. Code. Core Br. 62-63. And EPA has uniformly acted consistently with that understanding until this Rule, never once seeking to regulate under section 111(d) an existing source category already regulated under section 112. *Id.* at 67.

### A. EPA Fails To Defend the Interpretation of the Exclusion It Adopted in the Rule.

In the Rule, EPA interpreted the Exclusion as it appears in the U.S. Code to be different in scope than the Exclusion as it existed before 1990. As originally enacted in 1970, section 111(d) prohibited EPA from regulating "any air pollutant" "included on a list published under … [108](a) … or [112](b)(1)(A)"—that is, any criteria air pollutant or hazardous air pollutant. 42 U.S.C. § 1857c-6(d) (1970). In 1990, Congress significantly revised the Exclusion by deleting the phrase "or 112(b)(1)(A)" and inserting the phrase "or emitted from a source category which is regulated under

[12] EPA's claim (Br. 94) that the Court's use of the phrase "of the pollutant in question" suggested a different understanding is grammatically wrong. The subject of the Supreme Court's verb phrase "are regulated under … Section [1]12" is the noun phrase "existing stationary sources," not "the pollutant in question."

Section 112." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990), JA4188. EPA concluded in the Rule that this change prohibits "the regulation of [hazardous air pollutant] emissions under CAA section 111(d) and only when that source category is regulated under CAA section 112." 80 Fed. Reg. at 64,714, JA195. In other words, EPA interpreted the change to narrow the Exclusion from prohibiting regulation under section 111(d) of any hazardous air pollutants to only those hazardous air pollutants emitted from a source category actually regulated under section 112.

In its brief, EPA abandons this interpretation, urging instead that the Exclusion still prohibits the regulation of *any* hazardous air pollutants, just as it did before 1990. The Exclusion, EPA now says, "is most reasonably interpreted to mean *hazardous* pollutants." EPA Br. 82; *id.* at 81 ("[T]he phrase … exclud[es] … only a source category's emissions of *hazardous pollutants regulated under Section 112*."). The post-1990 language in the U.S. Code, EPA asserts, did "not dramatically change [the Exclusion's] scope." *Id.* at 86.

This approach to the Exclusion is fatal to EPA's position. To begin with, *Chenery* bars an agency from changing for litigation purposes the interpretation it adopted in rulemaking. *See, e.g.*, *Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 835 (D.C. Cir. 2000). Moreover, by changing its interpretation, EPA offers no reasoned defense of its transformation of the Exclusion from a prohibition against regulating "any air pollutant … emitted from a source category which is regulated under section [1]12" into a prohibition against "the regulation of [hazardous air pollutant] emissions under

CAA section 111(d) and only when that source category is regulated under CAA section 112." 80 Fed. Reg. at 64,714, JA195. EPA leaves entirely unrebutted Petitioners' argument (Core Br. 64-68) that this is merely an impermissible effort to "rewrite clear statutory terms to suit [the agency's] own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446.

### B. EPA's Arguments Against the Unambiguous Meaning of the Exclusion Lack Merit.

Instead of defending its own reading of the statute, EPA focuses on attacking Petitioners' interpretation. But these arguments do not withstand scrutiny.

#### 1. The statutory text, as it appears in the U.S. Code, is not ambiguous.

There is no merit to EPA's attempt, for the first time in 25 years, to manufacture ambiguity in the statutory text.

*First*, EPA argues (Br. 79-80) that Congress's use of the word "or" to separate the three exclusions in section 111(d) could be read to treat the three exclusions as not operating independently. But "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994); statutory text is ambiguous only where it "is reasonably susceptible to more than one meaning," *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 724 F.3d 230, 235-36 (D.C. Cir. 2013) (internal quotation marks omitted). That is not true here as EPA itself rejected this alternative reading of "or" as "not a reasonable reading." 80 Fed. Reg. at 64,713, JA194. Moreover, *Chevron* deference applies only where the alleged ambiguity

is "such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." *ABA*, 430 F.3d at 469. The ambiguity EPA purports to identify in the "or" language is the relationship among three different exclusions. But there is no dispute here as to that question. *See* 80 Fed. Reg. at 64,713, JA194. The only relevant dispute is the meaning of the Exclusion itself, on which the "or" language has no bearing.

*Second*, EPA incorrectly argues that the phrase "regulated under section [1]12" is ambiguous. EPA's assertion that "one must … ask not only 'who' is regulated under Section 112 …, but also 'what,'" EPA Br. 81, cannot be squared with *Western Minnesota Municipal Power Agency v. FERC*, 806 F.3d 588 (D.C. Cir. 2015). That case, which EPA does not address, involved a statute that gave preference to applications "by States and municipalities" for certain water permits. Noting that "[n]othing in th[e] [statutory] language qualifies or restricts which 'states' or which 'municipalities' are to be favored," this Court rejected as "manufactured ambiguity" FERC's claim that it had to read into the statute a limitation to municipalities "in the vicinity" of the water in question. *Id.* at 592, 594 (internal quotation marks omitted). EPA's claimed ambiguity regarding the phrase "source category which is regulated under section [1]12" here is similarly manufactured, where Congress likewise chose not to put any

further qualifications on the phrase "source category which is regulated under section [1]12."[13]

*Third*, EPA's attempt to find ambiguity in the statutory term "any air pollutant" is similarly contrived. EPA appears to be asserting that this term, which appears only once in section 111(d), has two contradictory meanings. The phrase means "any" pollutant when considering which pollutants section 111(d) applies to, but this same phrase means "hazardous air pollutant" when looking at the Exclusion. EPA cites no case to support the novel proposition that one instance of three words can fundamentally change its nature when observed in different ways. *Clark v. Martinez*, 543 U.S. 371, 378 (2005).

**2. EPA's non-textual arguments fail.**

EPA next raises several non-textual arguments, urging first that Petitioners' reading would "practically nullify the Section 111(d) program." EPA Br. 83-84. The agency ignores the fact that since the 1990 Amendments, EPA has never once sought to regulate under section 111(d) a source category that was already regulated under section 112. Core Br. 62, 67. It is EPA's interpretation that would revolutionize this rarely used program, potentially subjecting many existing source categories already

[13] The cases on which EPA relies—*Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366 (2002), and *UNUM Life Insurance Company of America v. Ward*, 526 U.S. 358, 363 (1999)—concerned the very different phrase "regulates insurance," which the Supreme Court has found ambiguous due in part to the unique challenges in discerning what constitutes the "business of insurance," *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 743 (1985).

regulated under section 112's stringent standards to double-regulation under section 111(d).

EPA's charge (Br. 84) that Petitioners' reading would create "a gaping hole in the Act's coverage" is baseless. EPA fails to acknowledge that the 1990 Amendments "expanded section 112 from a program that covered only a small universe of extremely dangerous pollutants into an expansive program," and does not dispute that it has not "identified a single pollutant that the agency believes would meet the definition of pollutant under section 111 but not section 112." Core Br. 67. In any event, the Supreme Court has made clear that the CAA does not authorize EPA to regulate every pollutant, from every source, under every program, no matter what. *See UARG*, 134 S. Ct. at 2444.

EPA's "context[ual]" argument based upon section 112(d)(7) (Br. 84) is similarly meritless. As a threshold matter, section 112(d)(7) deals with the situation in which the section 111 rule predates a section 112 rule, whereas the Exclusion deals with the opposite sequence. There is no conflict between the two provisions.

EPA contends that it does not make sense that "EPA could regulate a source category under both Section 111(d) and 112 *so long as it regulated under Section 111(d) first*." EPA Br. 87. But EPA ignores that the focus of section 111 is the regulation of *new* sources under section 111(b), to which the Exclusion does not apply. Core Br. 5, 8. It is perfectly reasonable to believe that Congress had that primary purpose in mind when referring to section 111 in section 112(d)(7).

Moreover, EPA's own interpretation of the Exclusion is susceptible to the same criticism, undermining EPA's claims of "absurdity." EPA Br. 87. In the Rule, EPA claimed that the Exclusion prohibits the regulation under section 111(d) of a source category's hazardous air pollutants "only when that source category is regulated under CAA section 112." 80 Fed. Reg. at 64,714, JA195. So it would also be true under EPA's (flawed) interpretation that "EPA could regulate a source category [for hazardous air pollutants] under both Section 111(d) and 112 so long as it regulated under Section 111(d) first." EPA Br. 87 (emphasis omitted).

Finally, EPA's assertion (Br. 85) that Petitioners have not identified any "statement[s]" in the 1990 legislative history to explain the change in the Exclusion does not help its cause. "[T]he theory of the dog that did not bark" in the legislative history is not a permissible interpretive doctrine. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980). This is particularly true here, given that EPA also has not identified any "statement" supporting the interpretation the agency adopted in the Rule, which would involve a significant change to the Exclusion's meaning.

In any event, the legislative history supports Petitioners' interpretation. EPA does not dispute that it previously explained that the historical record supports the conclusion that the House of Representatives intended to adopt precisely the meaning Petitioners urge here, in order to eliminate the problem of "duplicative or overlapping regulation." 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005), JA4545. While an agency

may be "free to change its interpretation of a statute" in certain circumstances, EPA Br. 90, it cannot ignore historical facts it previously acknowledged.

### C. EPA's Defense of the Erroneous Conforming Amendment Is Unpersuasive.

EPA closes its argument by discussing the conforming amendment that was excluded from the U.S. Code by the non-partisan Office of the Law Revision Counsel. *Id.* at 77-78. Notably, this "Senate amendment" theory previously was EPA's sole basis for avoiding the Exclusion's "literal" terms, but is now essentially an afterthought. Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units at 26 (undated), EPA-HQ-OAR-2013-0602-0419, JA2765; *see also* 70 Fed. Reg. at 16,029-32, JA4543-46.

*First*, EPA does not dispute that the Law Revision Counsel routinely and properly excludes from the U.S. Code "trivial or duplicative" amendments that cannot be executed. EPA Br. 89 n.70. And wisely so. "[A] failure to delete an inappropriate cross-reference in the bill that Congress later enacted into law" creates no ambiguity. *Chickasaw Nation v. United States*, 534 U.S. 84, 91 (2001).

EPA suggests that this is "the rare instance[]" where the "unexecuted text has substantive import" and "must be considered." EPA Br. 89 n.70. But the agency offers no indication that the Senate amendment had "substantive import." To the contrary, it is a trivial "drafting error," 70 Fed. Reg. at 16,031, JA4545, as the agency acknowledged a mere five years after the 1990 Amendments, Core Br. 72.

*Second*, EPA offers no reasoning to support its *ipse dixit* assertion (Br. 91) that its interpretation "gave meaning to both" amendments. In fact, the Rule gives no effect whatsoever to the Senate amendment. In the Rule, EPA claims the Senate amendment would have "maintained the pre-1990 meaning" of the Exclusion. 80 Fed. Reg. at 64,712, JA193. In contrast, EPA interprets the House amendment to prohibit something different: "the regulation of [hazardous air pollutant] emissions under CAA section 111(d) and only when that source category is regulated under CAA section 112." *Id.* at 64,714, JA195. EPA's position in the Rule is that the House amendment is the Exclusion's complete meaning, *id.*, which fails to give any effect—let alone "full effect"—to the Senate amendment.

*Finally*, EPA's response (Br. 91-92) to Petitioners' explanation that the Rule must still fall if both amendments are given full effect is wrong. EPA points out that section 111(d) is an "affirmative mandate," *id.* at 92, but that misses the point. The only issue is the meaning of the amendments, which clearly concern *limitations* on section 111(d)'s affirmative mandate. Thus, both amendments may be given full effect only by imposing *both* limitations on EPA's authority. *AEP*, 564 U.S. at 424 n.7.[14]

[14] EPA suggests this Court could strike both amendments, or just the House amendment, putting the Exclusion back to its pre-1990 meaning. EPA Br. 92, 93 n.73. These arguments are foreclosed by the *Chenery* doctrine, since EPA did not base the Rule upon its pre-1990 understanding of the Exclusion. *See supra* p. 33. They also would require invalidating many statutes based upon what EPA admits are "trivial" drafting mistakes. EPA Br. 89 n.70.

## IV. The Rule Unlawfully Abrogates Authority Granted to the States by the Clean Air Act.

### A. EPA Has Improperly Intruded on State Authority To "Establish[]" Performance Standards Under Section 111(d).

EPA offers no persuasive response to Petitioners' argument that EPA improperly claims power to establish "a minimum stringency for emission standards," Core Br. 76—a power entrusted to the States by section 111 and explicitly recognized in EPA's own regulations. Unlike section 111(b), which authorizes EPA to "establish[] Federal standards of performance for new sources," section 111(d) provides that *States* "establish[] standards of performance for any existing source" pursuant to EPA "procedure[s]." Thus, EPA's regulations provide that EPA will issue only an "emission guideline" based on the "application of the best system of emission reduction," and that the States will establish the standards of performance, which may differ from and even be less stringent than EPA's emissions guidelines. 40 C.F.R. § 60.24(f) (authorizing "less stringent emissions standards" for specific facilities or classes of facilities due to unreasonable cost, physical impossibility, and other factors); Core Br. 75.

EPA now claims (Br. 74) that its regulations have "stated since 1975" that it is actually "*EPA's* job" to "establish a minimum level of stringency." In support, EPA alleges that 40 C.F.R. § 60.24(c) requires that standards for pollutants the Administrator determines threaten public health "'shall be no less stringent than the [EPA] guidelines.'" *Id.* at 74 n.50 (quoting 40 C.F.R. § 60.24(c)).

But EPA's regulations do not make such a sweeping statement. In quoting 40 C.F.R. § 60.24(c), EPA omits the crucial introductory clause "[*e*]*xcept as provided in paragraph (f) of this section*." (Emphasis added.) That subsection expressly provides that States may apply "less stringent emissions standards … than those otherwise required by paragraph (c) of this section," based on a State's demonstration of "[u]nreasonable cost" or "[p]hysical impossibility" or "[o]ther factors specific to the facility (or class of facilities)." 40 C.F.R. § 60.24(f). Similarly, contrary to EPA's suggestion, the 1975 preamble unambiguously explained that States shall be "free to vary from the levels of control represented by the emission guidelines." 40 Fed. Reg. 53,340, 53,343 (Nov. 17, 1975), JA4089. Congress twice made major amendments to section 111 while these regulations have been in place and expressed no disagreement with EPA's longstanding statutory interpretation. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

### B. EPA Improperly Intrudes on State Authority To Consider a Source's Remaining Useful Life and Other Factors.

EPA also disputes that it has failed to comply with the statutory obligation to "permit the State[s] in applying a standard of performance to any particular source … to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." CAA § 111(d)(1). Though it concedes (Br. 75) that the Rule forbids States from "mak[ing] additional goal adjustments based on remaining useful life and other facility-specific factors," 80 Fed. Reg. at 64,870,

JA351, EPA argues that the word "permit" is "commonly understood as granting authority that may be subject to conditions," EPA Br. 75 n.53.

But it cannot be that the agency's power to "establish a procedure" for States includes the power to set conditions that entirely deprive States of their statutory discretion, as EPA has done here.

*First*, the ability to adopt a trading regime (Br. 75) does not permit States to take remaining useful life into account. Trading is a general program that applies uniformly to *all* of a State's regulated sources, including those with dramatically different remaining useful lives. Trading is thus clearly not the "appl[ication of] a standard of performance to *a particular source*," because it does not permit States to adjust the performance rates for "any *particular* source" to reflect that source's remaining useful life. CAA § 111(d)(1) (emphases added). Trading's purported "flexibility" cannot replace source-by-source consideration of remaining useful life. *Cf.* 40 Fed. Reg. at 53,344 ("variances are also permissible" under 40 C.F.R. § 60.24(d) on top of regulation's inherent "flexibility"), JA4090.

Furthermore, even with trading, EPA projects a substantial number of coal plants will be forced to close under the Rule—indeed, the only way the rates can be met is if coal-based generation is reduced dramatically. *See* Core Br. 14-22, 42. That is because trading allows sources to continue operating only by paying for emission credits—even when such payments would impair a source's viability. And trading does not alter the Rule's fundamental dynamic: forced replacement of existing sources

with new renewable generation. *See supra* p. 11. A Rule that will close plants early over a State's objections is hardly one that allows States—such as Kansas, which recently spent $3 billion to upgrade coal-fired power plants at EPA's behest—to account for remaining useful life when applying standards of performance. Core Br. 77 n.40.

*Second*, EPA claims (Br. 75) that a State may relax an individual source's emission rate if the State imposes on other sources rates that are *more* stringent than what EPA has determined is the "emission limitation achievable through the application of the best system of emission reduction." CAA § 111(a)(1). But under any reading of the statute, EPA lacks authority to require better reductions than could be achieved by the "best system of emission reduction." EPA cannot force States either to forego considering remaining useful life or to submit to the unlawful condition of imposing requirements more stringent than authorized in section 111. Indeed, sources by definition cannot reasonably achieve emission reductions more stringent than can be attained by the "*best* system of emission reduction"; requiring them to do so is arbitrary and capricious.

EPA argues the statute is "silent" on whether States may "relax the overall degree of emission limitation." EPA Br. 75 (emphasis and internal quotation marks omitted). But the statute *does* address that question. By allowing EPA to demand from any source, at most, only the reductions that can be attained by the best system of emission reduction, and by permitting States to deviate from a performance standard for a particular source in light of its remaining useful life or other facility-specific

factors, CAA § 111(d)(1), Congress necessarily allowed States to depart from "the overall degree of emission limitation," which is the sum of sources' reductions.

## V. The Rule Violates the Tenth Amendment.

EPA cites no authority, and there is none, upholding as constitutional a "cooperative" federalism program that the federal government cannot hope to administer without requiring States to adopt and administer federal policy choices in core areas of state responsibility.

The Rule is predicated on EPA's determination that, rather than risk severe disruptions to their electric systems, States will exercise their "responsibility to maintain a reliable electric system" by following the Rule's chosen federal electric generation policy. 80 Fed. Reg. at 64,678, 64,694 (noting the "numerous remedies" that state public utility commissions can use to address reliability), JA159, JA175; *see also* 40 C.F.R. §§ 60.5745(a)(7), 60.5780(a)(5)(iii). In so doing, the Rule places substantial duties on even those States that formally "decline[]" to administer it, thereby commandeering and coercing States and their officials. Core Br. 78.

The "textbook example[s] of cooperative federalism" EPA cites in response (Br. 98-101)—*Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *New York v. United States*, 505 U.S. 144 (1992)—are inapposite because neither concerned actions where the federal government conceded that direct federal administration would be insufficient. EPA admits that in *Hodel*, "the Court found no Tenth Amendment issue because 'the States are not compelled to enforce the []

standards, to expend any state funds, or to participate in the federal regulatory program.'" EPA Br. 99 (quoting *Hodel*, 452 U.S. at 288-89). Here, in contrast, the Rule acknowledges that States must participate in the federal regulatory program by exercising their "responsibility to maintain a reliable electric system," 80 Fed. Reg. at 64,678, JA159, and EPA's brief (Br. 104) tacitly acknowledges that States must expend funds on other regulatory programs to facilitate the Rule.[15] Likewise, EPA acknowledges (Br. 99) that in *New York*, 505 U.S. at 174, the Court "found no Tenth Amendment issue where 'any burden caused by a State's refusal to regulate will fall on those who generate waste … rather than on the State as a sovereign.'"

EPA's argument (Br. 102-05) that the Rule passes constitutional muster because any federal plan would regulate individual sources (and not States) ignores reality. Even if a federal plan would be aimed nominally at individual sources, state officials nevertheless would have to exercise their "responsibility to maintain a reliable electric system." 80 Fed. Reg. at 64,678, JA159. States have no meaningful choice

[15] State and Municipal Respondent-Intervenors incorrectly suggest that *Hodel* requires this Court to disregard the ways in which the Rule requires States' action outside any directly preempted activity. Br. for State & Municipal Intervenors in Supp. of Resp'ts 19-20 (Mar. 29, 2016), ECF 1606037. *Hodel* concerned a claim that a cooperative federalism scheme could have "conceivable effects" on state police powers. 452 U.S. at 289. *Hodel* did not consider a federal scheme that fundamentally relied on state administration to operate, as does this one.

whether to regulate because the federal government has no authority to carry out the regulatory actions needed to keep the lights on.[16]

That is why *FERC v. Mississippi*, 456 U.S. 742 (1982), does not support EPA's position. *Mississippi* "upheld the statute at issue because it did not view the statute as such a command" to regulate. *New York*, 505 U.S. at 161. Instead, all the statute did was require that States "'consider' federal standards … as a precondition to continued state regulation of an otherwise pre-empted field." *Printz v. United States*, 521 U.S. 898, 926 (1997). The Rule, by contrast, requires States to carry out federal policy and does not offer to relieve States from doing so through federal preemption.

EPA's "parade of horribles"—that everything from the Act's Acid Rain Trading Program to an increase in the federal minimum wage would be unconstitutional if Petitioners prevail—is fanciful. EPA Br. 104-05 & n.88. A ruling in Petitioners' favor on this ground would not bring about the results EPA fears. Rather, the Rule uniquely forces States to administer federal policy, even if they opt not to submit a state plan. The Rule is different in kind because "utilities provide an essential public service and are regulated and managed in ways unlike any other industrial activity." 80 Fed. Reg. at 64,664, JA145. EPA's decision to regulate them in a manner

[16] EPA's ability to address energy reliability issues in a federal plan is further constrained by the fact that FERC, not EPA, is the federal agency with jurisdiction over interstate electricity transmission and practices affecting wholesale rates. Core Br. 38-39.

that poses dire consequences for States that do not change their energy policies to facilitate EPA's decarbonization mandate is unprecedented.

Finally, EPA errs by suggesting (Br. 102) that the record does not support Petitioners' claims that the Rule commandeers and coerces them into changing energy regulation in order to avoid severe disruption. The administrative record is replete with comments from States and others explaining how EPA's Rule would require extensive State action to avoid disruptions. *See* Core Br. 22. So is the successful Supreme Court stay briefing. *See, e.g.*, Appl. by 29 States & State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773). And EPA itself recognized this problem in its proposed federal plan for this Rule. *See* 80 Fed. Reg. 64,966, 64,981 (Oct. 23, 2015). EPA trumpets the Rule's supposed "flexibility" (Br. 100), but that is a façade: the Rule forces States and electric utilities to shift the national energy mix away from fossil fuels to renewables. *See supra* p. 11.

At a minimum, statutes "must be construed, if fairly possible, so as to avoid not only the conclusion that [they are] unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). EPA's reliance on *Rust v. Sullivan*, 500 U.S. 173 (1991), is misplaced. Unlike this case, no alternative construction was readily available because the *Rust* petitioners' statutory construction arguments were weak (being based on "highly generalized" statements that "do not directly address the scope of" the challenged statutory provision) and their

constitutional arguments had only "some force." *Id.* at 189, 191. This Court should thus adopt the compelling constructions of the CAA that avoid these constitutional concerns and limit EPA to its traditional role in regulating sources.

## CONCLUSION

For the foregoing reasons, the petitions should be granted and the Rule vacated.

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Respectfully submitted,

/s/ F. William Brownell
F. William Brownell
Allison D. Wood
Henry V. Nickel
Tauna M. Szymanski
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
bbrownell@hunton.com
awood@hunton.com
hnickel@hunton.com
tszymanski@hunton.com

*Counsel for Petitioners Utility Air Regulatory Group and American Public Power Association*

/s/ Peter S. Glaser
Peter S. Glaser
TROUTMAN SANDERS LLP
401 Ninth Street N.W., Suite 1000
Washington, D.C. 20004
Tel: (202) 274-2998
peter.glaser@troutmansanders.com

Carroll W. McGuffey III
Justin T. Wong
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E., Suite 5200
Atlanta, GA 30308
Tel: (404) 885-3000
mack.mcguffey@troutmansanders.com
justin.wong@troutmansanders.com

*Counsel for Petitioner National Mining Association*

/s/ Elbert Lin
Patrick Morrisey
ATTORNEY GENERAL OF WEST VIRGINIA
Elbert Lin
Solicitor General
*Counsel of Record*
J. Zak Ritchie
Assistant Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel: (304) 558-2021
Fax: (304) 558-0140
elbert.lin@wvago.gov

*Counsel for Petitioner State of West Virginia*

/s/ Scott A. Keller
Ken Paxton
ATTORNEY GENERAL OF TEXAS
Jeffrey C. Mateer
First Assistant Attorney General
Scott A. Keller
Solicitor General
*Counsel of Record*
P.O. Box 12548
Austin, TX 78711-2548
Tel: (512) 936-1700
scott.keller@texasattorneygeneral.gov

*Counsel for Petitioner State of Texas*

/s/ Peter D. Keisler
Peter D. Keisler
Roger R. Martella, Jr.
C. Frederick Beckner III
Ryan C. Morris
Paul J. Ray
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8027
pkeisler@sidley.com
rmartella@sidley.com
rbeckner@sidley.com

*Counsel for Petitioners 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*

/s/ Andrew Brasher
Luther Strange
ATTORNEY GENERAL OF ALABAMA
Andrew Brasher
Solicitor General
*Counsel of Record*
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 353-2609
abrasher@ago.state.al.us

*Counsel for Petitioner State of Alabama*

/s/ John R. Lopez IV
Mark Brnovich
ATTORNEY GENERAL OF ARIZONA
John R. Lopez IV
*Counsel of Record*
Dominic E. Draye
Keith J. Miller
Assistant Attorneys General
Maureen Scott
Janet Wagner
Janice Alward
Arizona Corp. Commission,
Staff Attorneys
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-5025
john.lopez@azag.gov
dominic.draye@azag.gov
keith.miller@azag.gov

*Counsel for Petitioner Arizona Corporation Commission*

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen
Sherrie A. Armstrong
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Tel: (202) 624-2500
tlorenzen@crowell.com
sarmstrong@crowell.com

*Counsel for Petitioners National Rural Electric Cooperative Association; Big Rivers Electric Corporation; Brazos Electric Power Cooperative, Inc.; Buckeye Power, Inc.; Central Montana Electric Power Cooperative; Central Power Electric Cooperative, Inc., Corn Belt Power Cooperative; Dairyland Power Cooperative; East River Electric Power Cooperative, Inc.; Georgia Transmission Corporation; Kansas Electric Power Cooperative, Inc.; North Carolina Electric Membership Corporation; Northwest Iowa Power Cooperative; Oglethorpe Power Corporation; PowerSouth Energy Cooperative; Prairie Power, Inc.; Rushmore Electric Power Cooperative, Inc.; Seminole Electric Cooperative, Inc.; Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; and Upper Missouri G. & T. Electric Cooperative, Inc.*

/s/ Lee Rudofsky
Leslie Rutledge
ATTORNEY GENERAL OF ARKANSAS
Lee Rudofsky
Solicitor General
*Counsel of Record*
Jamie L. Ewing
Assistant Attorney General
323 Center Street, Suite 400
Little Rock, AR 72201
Tel: (501) 682-5310
lee.rudofsky@arkansasag.gov

*Counsel for Petitioner State of Arkansas*

/s/ Frederick Yarger
Cynthia H. Coffman
ATTORNEY GENERAL OF COLORADO
Frederick Yarger
Solicitor General
*Counsel of Record*
1300 Broadway, 10th Floor
Denver, CO 80203
Tel: (720) 508-6168
fred.yarger@state.co.us

*Counsel for Petitioner State of Colorado*

*Of Counsel*

Rae Cronmiller
Environmental Counsel
NATIONAL ASSOCIATION OF RURAL ELECTRIC COOPERATIVES
4301 Wilson Blvd.
Arlington, VA 22203
Tel: (703) 907-5500
rae.cronmiller@nreca.coop

*Counsel for Petitioner National Rural Electric Cooperative Association*

/s/ Eric L. Hiser
Eric L. Hiser
JORDEN BISCHOFF & HISER, PLC
7272 E. Indian School Road, Suite 360
Scottsdale, AZ 85251
Tel: (480) 505-3927
ehiser@jordenbischoff.com

*Counsel for Petitioner Arizona Electric Power Cooperative, Inc.*

/s/ Brian A. Prestwood
Brian A. Prestwood
Senior Corporate and Compliance Counsel
ASSOCIATED ELECTRIC COOPERATIVE, INC.
2814 S. Golden, P.O. Box 754
Springfield, MO 65801
Tel: (417) 885-9273
bprestwood@aeci.org

*Counsel for Petitioner Associated Electric Cooperative, Inc.*

/s/ Jonathan L. Williams
Pamela Jo Bondi
ATTORNEY GENERAL OF FLORIDA
Jonathan L. Williams
Deputy Solicitor General
*Counsel of Record*
Jonathan A. Glogau
Special Counsel
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Tel: (850) 414-3818
Fax: (850) 410-2672
jonathan.williams@myfloridalegal.com
jonathan.glogau@myfloridalegal.com

*Counsel for Petitioner State of Florida*

/s/ Britt C. Grant
Samuel S. Olens
ATTORNEY GENERAL OF GEORGIA
Britt C. Grant
Solicitor General
*Counsel of Record*
40 Capitol Square S.W.
Atlanta, GA 30334
Tel: (404) 656-3300
Fax: (404) 463-9453
bgrant@law.ga.gov

*Counsel for Petitioner State of Georgia*

/s/ David Crabtree
David Crabtree
Vice President, General Counsel
DESERET GENERATION & TRANSMISSION CO-OPERATIVE
10714 South Jordan Gateway
South Jordan, UT 84095
Tel: (801) 619-9500
Crabtree@deseretpower.com

*Counsel for Petitioner Deseret Generation & Transmission Co-operative*

/s/ John M. Holloway III
John M. Holloway III
SUTHERLAND ASBILL & BRENNAN LLP
700 Sixth Street, N.W., Suite 700
Washington, D.C. 20001
Tel: (202) 383-0100
Fax: (202) 383-3593
jay.holloway@sutherland.com

*Counsel for Petitioners East Kentucky Power Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Minnkota Power Cooperative, Inc.; and South Mississippi Electric Power Association*

/s/ Timothy Junk
Gregory F. Zoeller
ATTORNEY GENERAL OF INDIANA
Timothy Junk
Deputy Attorney General
*Counsel of Record*
Indiana Government Ctr. South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46205
Tel: (317) 232-6247
tim.junk@atg.in.gov

*Counsel for Petitioner State of Indiana*

/s/ Jeffrey A. Chanay
Derek Schmidt
ATTORNEY GENERAL OF KANSAS
Jeffrey A. Chanay
Chief Deputy Attorney General
*Counsel of Record*
Bryan C. Clark
Assistant Solicitor General
120 S.W. 10th Avenue, 3rd Floor
Topeka, KS 66612
Tel: (785) 368-8435
Fax: (785) 291-3767
jeff.chanay@ag.ks.gov

*Counsel for Petitioner State of Kansas*

/s/ Patrick Burchette
Patrick Burchette
HOLLAND & KNIGHT LLP
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
Tel: (202) 469-5102
Patrick.Burchette@hklaw.com

*Counsel for Petitioners East Texas Electric Cooperative, Inc.; Northeast Texas Electric Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; and Tex-La Electric Cooperative of Texas, Inc.*

/s/ Christopher L. Bell
Christopher L. Bell
GREENBERG TRAURIG LLP
1000 Louisiana Street, Suite 1700
Houston, TX 77002
Tel: (713) 374-3556
bellc@gtlaw.com

*Counsel for Petitioner Golden Spread Electrical Cooperative, Inc.*

/s/ Mark Walters
Mark Walters
Michael J. Nasi
JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, TX 78701
Tel: (512) 236-2000
Fax: (512) 236-2002
mwalters@jw.com
mnasi@jw.com

*Counsel for Petitioners San Miguel Electric Cooperative, Inc. and South Texas Electric Cooperative, Inc.*

/s/ Joe Newberg
Andy Beshear
ATTORNEY GENERAL OF KENTUCKY
Mitchel T. Denham
Assistant Deputy Attorney General
Joseph A. Newberg, II
Assistant Attorney General
*Counsel of Record*
700 Capitol Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5611
joe.newberg@ky.gov

*Counsel for Petitioner Commonwealth of Kentucky*

/s/ Steven B. "Beaux" Jones
Jeff Landry
ATTORNEY GENERAL OF LOUISIANA
Steven B. "Beaux" Jones
*Counsel of Record*
Duncan S. Kemp, IV
Assistant Attorneys General
Environmental Section – Civil Division
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6085
Fax: (225) 326-6099
jonesst@ag.state.la.us

*Counsel for Petitioner State of Louisiana*

/s/ Randolph G. Holt
Randolph G. Holt
Jeremy L. Fetty
PARR RICHEY OBREMSKEY FRANDSEN & PATTERSON LLP
Wabash Valley Power Association, Inc.
722 N. High School Road
P.O. Box 24700
Indianapolis, IN 46224
Tel: (317) 481-2815
R_holt@wvpa.com
jfetty@parrlaw.com

*Counsel for Petitioner Wabash Valley Power Association, Inc.*

/s/ Megan H. Berge
Megan H. Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
megan.berge@bakerbotts.com

*Counsel for Petitioner Western Farmers Electric Cooperative*

/s/ Steven C. Kohl
Steven C. Kohl
Gaetan Gerville-Reache
WARNER NORCROSS & JUDD LLP
2000 Town Center, Suite 2700
Southfield, MI 48075-1318
Tel: (248) 784-5000
skohl@wnj.com

*Counsel for Petitioner Wolverine Power Supply Cooperative, Inc.*

/s/ Donald Trahan
Herman Robinson
Executive Counsel
Donald Trahan
*Counsel of Record*
Elliott Vega
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Legal Division
P.O. Box 4302
Baton Rouge, LA 70821-4302
Tel: (225) 219-3985
Fax: (225) 219-4068
donald.trahan@la.gov

*Counsel for Petitioner State of Louisiana Department of Environmental Quality*

/s/ Monica Derbes Gibson
Monica Derbes Gibson
Lesley Foxhall Pietras
LISKOW & LEWIS, P.L.C.
701 Poydras Street, Suite 5000
New Orleans, LA 70139
Tel: (504) 556-4010
Fax: (504) 556-4108
mdgibson@liskow.com
lfpietras@liskow.com

*Counsel for Petitioner Louisiana Public Service Commission*

/s/ Christina F. Gomez
Christina F. Gomez
Lawrence E. Volmert
Garrison W. Kaufman
Jill H. Van Noord
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202
Tel: (303) 295-8000
Fax: (303) 295-8261
cgomez@hollandhart.com
lvolmert@hollandhart.com
gwkaufman@hollandhart.com
jhvannoord@hollandhart.com

Patrick R. Day
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
Cheyenne, WY 82001
Tel: (307) 778-4200
Fax: (307) 778-8175
pday@hollandhart.com

Emily C. Schilling
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Tel: (801) 799-5800
Fax: (801) 799-5700
ecschilling@hollandhart.com

*Counsel for Petitioner Basin Electric Power Cooperative*

/s/ Aaron D. Lindstrom
Bill Schuette
ATTORNEY GENERAL FOR THE PEOPLE OF MICHIGAN
Aaron D. Lindstrom
Michigan Solicitor General
*Counsel of Record*
P.O. Box 30212
Lansing, MI 48909
Tel: (515) 373-1124
Fax: (517) 373-3042
lindstroma@michigan.gov

*Counsel for Petitioner People of the State of Michigan*

/s/ Harold E. Pizzetta, III
Jim Hood
ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI
Harold E. Pizzetta
Assistant Attorney General
Civil Litigation Division
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
Tel: (601) 359-3816
Fax: (601) 359-2003
hpizz@ago.state.ms.us

*Counsel for Petitioner State of Mississippi*

/s/ Stacey Turner
Stacey Turner
SOUTHERN COMPANY SERVICES, INC.
600 18th Street North
BIN 14N-8195
Birmingham, AL 35203
Tel: (205) 257-2823
staturne@southernco.com

*Counsel for Petitioners Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company*

/s/ C. Grady Moore, III
C. Grady Moore, III
Steven G. McKinney
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35303-4642
Tel: (205) 251-8100
Fax: (205) 488-5704
gmoore@balch.com
smckinney@balch.com

*Counsel for Petitioner Alabama Power Company*

/s/ Margaret Claiborne Campbell
Margaret Claiborne Campbell
Angela J. Levin
TROUTMAN SANDERS LLP
600 Peachtree Street, NE, Suite 5200
Atlanta, GA 30308-2216
Tel: (404) 885-3000
margaret.campbell@troutmansanders.com
angela.levin@troutmansanders.com

*Counsel for Petitioner Georgia Power Company*

/s/ Donna J. Hodges
Donna J. Hodges
Senior Counsel
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
P.O. Box 2261
Jackson, MS 39225-2261
Tel: (601) 961-5369
Fax: (601) 961-5349
donna_hodges@deq.state.ms.us

*Counsel for Petitioner Mississippi Department of Environmental Quality*

/s/ Todd E. Palmer
Todd E. Palmer
Valerie L. Green
MICHAEL, BEST & FRIEDRICH LLP
601 Pennsylvania Ave., N.W., Suite 700
Washington, D.C. 20004-2601
Tel: (202) 747-9560
Fax: (202) 347-1819
tepalmer@michaelbest.com
vlgreen@michaelbest.com

*Counsel for Petitioner Mississippi Public Service Commission*

/s/ Terese T. Wyly
Terese T. Wyly
Ben H. Stone
BALCH & BINGHAM LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Tel: (228) 214-0413
twyly@balch.com
bstone@balch.com

*Counsel for Petitioner Mississippi Power Company*

/s/ Jeffrey A. Stone
Jeffrey A. Stone
BEGGS & LANE, RLLP
501 Commendencia Street
Pensacola, FL 32502
Tel: (850) 432-2451
JAS@beggslane.com

James S. Alves
2110 Trescott Drive
Tallahassee, FL 32308
Tel: (850) 566-7607
jim.s.alves@outlook.com

*Counsel for Petitioner Gulf Power Company*

/s/ James R. Layton
Chris Koster
ATTORNEY GENERAL OF MISSOURI
James R. Layton
Solicitor General
*Counsel of Record*
P.O. Box 899
207 W. High Street
Jefferson City, MO 65102
Tel: (573) 751-1800
Fax: (573) 751-0774
james.layton@ago.mo.gov

*Counsel for Petitioner State of Missouri*

/s/ Dale Schowengerdt
Timothy C. Fox
ATTORNEY GENERAL OF MONTANA
Alan Joscelyn
Chief Deputy Attorney General
Dale Schowengerdt
Solicitor General
*Counsel of Record*
215 North Sanders
Helena, MT 59620-1401
Tel: (406) 444-7008
dales@mt.gov

*Counsel for Petitioner State of Montana*

/s/ James S. Alves
James S. Alves
2110 Trescott Drive
Tallahassee, FL 32308
Tel: (850) 566-7607
jim.s.alves@outlook.com

*Counsel for Petitioner $CO_2$ Task Force of the Florida Electric Power Coordinating Group, Inc.*

/s/ John J. McMackin
John J. McMackin
WILLIAMS & JENSEN
701 8th Street, N.W., Suite 500
Washington, D.C. 20001
Tel: (202) 659-8201
jjmcmackin@wms-jen.com

*Counsel for Petitioner Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation*

/s/ William M. Bumpers
William M. Bumpers
Megan H. Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
william.bumpers@bakerbotts.com
megan.berge@bakerbotts.com

Kelly McQueen
ENTERGY SERVICES, INC.
425 W. Capitol Avenue, 27th Floor
Little Rock, AR 72201
Tel: (501) 377-5760
kmcque1@entergy.com

*Counsel for Petitioner Entergy Corporation*

/s/ Justin D. Lavene
Douglas J. Peterson
ATTORNEY GENERAL OF NEBRASKA
Dave Bydlaek
Chief Deputy Attorney General
Justin D. Lavene
Assistant Attorney General
*Counsel of Record*
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2834
justin.lavene@nebraska.gov

*Counsel for Petitioner State of Nebraska*

/s/ John R. Renella
Robert Lougy
ACTING ATTORNEY GENERAL OF NEW JERSEY
David C. Apy
Assistant Attorney General
John R. Renella
Deputy Attorney General
*Counsel of Record*
Division of Law
R.J. Hughes Justice Complex
P.O. Box 093
25 Market Street
Trenton, NJ 08625-0093
Tel. (609) 292-6945
Fax (609)341-5030
john.renella@dol.lps.state.nj.us

*Counsel for Petitioner State of New Jersey*

/s/ Paul J. Zidlicky
Paul J. Zidlicky
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8000
pzidlicky@sidley.com

*Counsel for Petitioners GenOn Mid-Atlantic, LLC; Indian River Power LLC; Louisiana Generating LLC; Midwest Generation, LLC; NRG Chalk Point LLC; NRG Power Midwest LP; NRG Rema LLC; NRG Texas Power LLC; NRG Wholesale Generation LP; and Vienna Power LLC*

/s/ David M. Flannery
David M. Flannery
Kathy G. Beckett
Edward L. Kropp
STEPTOE & JOHNSON, PLLC
707 Virginia Street East
Charleston, WV 25326
Tel: (304) 353-8000
dave.flannery@steptoe-johnson.com
kathy.beckett@steptoe-johnson.com
skipp.kropp@steptoe-johnson.com

Stephen L. Miller
STEPTOE & JOHNSON, PLLC
700 N. Hurstbourne Parkway, Suite 115
Louisville, KY 40222
Tel: (502) 423-2000
steve.miller@steptoe-johnson.com

*Counsel for Petitioner Indiana Utility Group*

/s/ Paul M. Seby
Wayne Stenehjem
ATTORNEY GENERAL OF NORTH DAKOTA
Margaret Olson
Assistant Attorney General
North Dakota Attorney General's Office
600 E. Boulevard Avenue #125
Bismarck, ND 58505
Tel: (701) 328-3640
maiolson@nd.gov

Paul M. Seby
Special Assistant Attorney General
State of North Dakota
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Tel: (303) 572-6500
Fax: (303) 572-6540
sebyp@gtlaw.com

*Counsel for Petitioner State of North Dakota*

/s/ Eric E. Murphy
Michael DeWine
ATTORNEY GENERAL OF OHIO
Eric E. Murphy
State Solicitor
*Counsel of Record*
30 E. Broad Street, 17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
eric.murphy@ohioattorneygeneral.gov

*Counsel for Petitioner State of Ohio*

/s/ F. William Brownell
F. William Brownell
Eric J. Murdock
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
bbrownell@hunton.com
emurdock@hunton.com

Nash E. Long III
HUNTON & WILLIAMS LLP
Bank of America Plaza, Suite 3500
101 South Tryon Street
Charlotte, NC 28280
Tel: (704) 378-4700
nlong@hunton.com

*Counsel for Petitioner LG&E and KU Energy LLC*

/s/ David B. Rivkin, Jr.
E. Scott Pruitt
ATTORNEY GENERAL OF OKLAHOMA
Patrick R. Wyrick
Solicitor General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 521-4396
Fax: (405) 522-0669
fc.docket@oag.state.ok.us
scott.pruitt@oag.ok.gov

David B. Rivkin, Jr.
*Counsel of Record*
Mark W. DeLaquil
Andrew M. Grossman
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Tel: (202) 861-1731
Fax: (202) 861-1783
drivkin@bakerlaw.com

*Counsel for Petitioners State of Oklahoma and Oklahoma Department of Environmental Quality*

/s/ P. Stephen Gidiere III
P. Stephen Gidiere III
Thomas L. Casey III
Julia B. Barber
BALCH & BINGHAM LLP
1901 6th Ave. N., Suite 1500
Birmingham, AL 35203
Tel: (205) 251-8100
sgidiere@balch.com

Stephanie Z. Moore
Vice President and General Counsel
LUMINANT GENERATION COMPANY LLC
1601 Bryan Street, 22nd Floor
Dallas, TX 75201

Daniel J. Kelly
Vice President and Associate General Counsel
ENERGY FUTURE HOLDINGS CORP.
1601 Bryan Street, 43rd Floor
Dallas, TX 75201

*Counsel for Petitioners Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC*

/s/ James Emory Smith, Jr.
Alan Wilson
ATTORNEY GENERAL OF SOUTH CAROLINA
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
*Counsel of Record*
P.O. Box 11549
Columbia, SC 29211
Tel: (803) 734-3680
Fax: (803) 734-3677
esmith@scag.gov

*Counsel for Petitioner State of South Carolina*

/s/ Steven R. Blair
Marty J. Jackley
ATTORNEY GENERAL OF SOUTH DAKOTA
Steven R. Blair
Assistant Attorney General
*Counsel of Record*
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Tel: (605) 773-3215
steven.blair@state.sd.us

*Counsel for Petitioner State of South Dakota*

/s/ Ronald J. Tenpas
Ronald J. Tenpas
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 739-3000
rtenpas@morganlewis.com

*Counsel for Petitioner Minnesota Power (an operating division of ALLETE, Inc.)*

/s/ Allison D. Wood
Allison D. Wood
Tauna M. Szymanski
Andrew D. Knudsen
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
awood@hunton.com
tszymanski@hunton.com
aknudsen@hunton.com

*Counsel for Petitioner Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.*

/s/ Tyler R. Green
Sean Reyes
ATTORNEY GENERAL OF UTAH
Tyler R. Green
Solicitor General
*Counsel of Record*
Parker Douglas
Federal Solicitor
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320
pdouglas@utah.gov

*Counsel for Petitioner State of Utah*

/s/ Misha Tseytlin
Brad D. Schimel
ATTORNEY GENERAL OF WISCONSIN
Misha Tseytlin
Solicitor General
*Counsel of Record*
Andrew Cook
Deputy Attorney General
Delanie M. Breuer
Assistant Deputy Attorney General
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
Tel: (608) 267-9323
tseytlinm@doj.state.wi.us

*Counsel for Petitioner State of Wisconsin*

/s/ William M. Bumpers
William M. Bumpers
Megan H. Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
william.bumpers@bakerbotts.com
megan.berge@bakerbotts.com

*Counsel for Petitioner NorthWestern Corporation d/b/a NorthWestern Energy*

/s/ Joshua R. More
Joshua R. More
Jane E. Montgomery
Amy Antoniolli
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 6600
Chicago, IL 60606
Tel: (312) 258-5500
jmore@schiffhardin.com
jmontgomery@schiffhardin.com
aantoniolli@schiffhardin.com

*Counsel for Petitioner Prairie State Generating Company, LLC*

/s/ James Kaste
Peter K. Michael
ATTORNEY GENERAL OF WYOMING
James Kaste
Deputy Attorney General
*Counsel of Record*
Michael J. McGrady
Erik Petersen
Senior Assistant Attorneys General
Elizabeth Morrisseau
Assistant Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002
Tel: (307) 777-6946
Fax: (307) 777-3542
james.kaste@wyo.gov

*Counsel for Petitioner State of Wyoming*

/s/ Sam M. Hayes
Sam M. Hayes
General Counsel
*Counsel of Record*
Craig Bromby
Deputy General Counsel
Andrew Norton
Deputy General Counsel
NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY
1601 Mail Service Center
Raleigh, NC 27699-1601
Tel: (919) 707-8616
sam.hayes@ncdenr.gov

*Counsel for Petitioner North Carolina Department of Environmental Quality*

/s/ Allison D. Wood
Allison D. Wood
Tauna M. Szymanski
Andrew D. Knudsen
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
awood@hunton.com
tszymanski@hunton.com
aknudsen@hunton.com

*Counsel for Petitioner Tri-State Generation and Transmission Association, Inc.*

/s/ William M. Bumpers
William M. Bumpers
Megan H. Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
william.bumpers@bakerbotts.com
megan.berge@bakerbotts.com

*Counsel for Petitioner Westar Energy, Inc.*

/s/ Jeffrey R. Holmstead
Jeffrey R. Holmstead
Sandra Y. Snyder
BRACEWELL LLP
2001 M Street, N.W., Suite 900
Washington, D.C. 20036
Tel: (202) 828-5852
Fax: (202) 857-4812
jeff.holmstead@bracewelllaw.com

*Counsel for Petitioner American Coalition for Clean Coal Electricity*

/s/ Dennis Lane
Dennis Lane
STINSON LEONARD STREET LLP
1775 Pennsylvania Ave., N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 785-9100
Fax: (202) 785-9163
dennis.lane@stinson.com

Parthenia B. Evans
STINSON LEONARD STREET LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
Tel: (816) 842-8600
Fax: (816) 691-3495
parthy.evans@stinson.com

*Counsel for Petitioner Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas*

/s/ Geoffrey K. Barnes
Geoffrey K. Barnes
J. Van Carson
Wendlene M. Lavey
John D. Lazzaretti
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
Tel: (216) 479-8646
geoffrey.barnes@squirepb.com

*Counsel for Petitioner Murray Energy Corporation*

/s/ Andrew C. Emrich
Andrew C. Emrich
HOLLAND & HART LLP
6380 South Fiddlers Green Circle
Suite 500
Greenwood Village, CO 80111
Tel: (303) 290-1621
Fax: (866) 711-8046
acemrich@hollandhart.com

Emily C. Schilling
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Tel: (801) 799-5753
Fax: (202) 747-6574
ecschilling@hollandhart.com

*Counsel for Petitioners Newmont Nevada Energy Investment, LLC and Newmont USA Limited*

/s/ Charles T. Wehland
Charles T. Wehland
*Counsel of Record*
Brian J. Murray
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, IL 60601-1692
Tel: (312) 782-3939
Fax: (312) 782-8585
ctwehland@jonesday.com
bjmurray@jonesday.com

*Counsel for Petitioners The North American Coal Corporation; The Coteau Properties Company; Coyote Creek Mining Company, LLC; The Falkirk Mining Company; Mississippi Lignite Mining Company; North American Coal Royalty Company; NODAK Energy Services, LLC; Otter Creek Mining Company, LLC; and The Sabine Mining Company*

/s/ Robert G. McLusky
Robert G. McLusky
JACKSON KELLY, PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322
Tel: (304) 340-1000
rmclusky@jacksonkelly.com

*Counsel for Petitioner West Virginia Coal Association*

/s/ Eugene M. Trisko
Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
Tel: (301) 639-5238 (cell)
emtrisko7@gmail.com

*Counsel for Petitioner International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers*

/s/ Eugene M. Trisko
Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
Tel: (301) 639-5238 (cell)
emtrisko7@gmail.com

*Counsel for Petitioner International Brotherhood of Electrical Workers, AFL-CIO*

/s/ Grant F. Crandall
Grant F. Crandall
General Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (703) 291-2429
gcrandall@umwa.org

Arthur Traynor, III
Staff Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (703) 291-2457
atraynor@umwa.org

Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
emtrisko7@gmail.com

*Counsel for Petitioner United Mine Workers of America*

/s/ Steven P. Lehotsky
Steven P. Lehotsky
Sheldon B. Gilbert
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
slehotsky@uschamber.com

*Counsel for Petitioner Chamber of Commerce of the United States of America*

/s/ Quentin Riegel
Linda E. Kelly
Quentin Riegel
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
Tel: (202) 637-3000
qriegel@nam.org

*Counsel for Petitioner National Association of Manufacturers*

/s/ Richard S. Moskowitz
Richard S. Moskowitz
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1667 K Street, N.W., Suite 700
Washington, D.C. 20006
Tel: (202) 457-0480
rmoskowitz@afpm.org

*Counsel for Petitioner American Fuel & Petrochemical Manufacturers*

/s/ Karen R. Harned
Karen R. Harned
Executive Director
Elizabeth A. Gaudio
Senior Executive Counsel
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
Tel: (202) 314-2061
karen.harned@nfib.org
elizabeth.milito@nfib.org

*Counsel for Petitioner National Federation of Independent Business*

/s/ Megan H. Berge
Megan H. Berge
William M. Bumpers
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
megan.berge@bakerbotts.com
william.bumpers@bakerbotts.com

*Counsel for Petitioner National Association of Home Builders*

/s/ Kathryn D. Kirmayer
Kathryn D. Kirmayer
General Counsel
Evelyn R. Nackman
Associate General Counsel
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
Tel: (202) 639-2100
kkirmayer@aar.org

*Counsel for Petitioner Association of American Railroads*

/s/ Chaim Mandelbaum
Chaim Mandelbaum
Litigation Manager
FREE MARKET ENVIRONMENTAL LAW CLINIC
726 N. Nelson Street, Suite 9
Arlington, VA 22203
Tel: (703) 577-9973
chaim12@gmail.com

*Counsel for Petitioner Energy and Environment Legal Institute*

/s/ Catherine E. Stetson
Catherine E. Stetson
Eugene A. Sokoloff
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Tel: (202) 637-5600
Fax: (202) 637-5910
cate.stetson@hoganlovells.com
eugene.sokoloff@hoganlovells.com

*Counsel for Petitioner Denbury Onshore, LLC*

/s/ Adam R.F. Gustafson
C. Boyden Gray
Adam R.F. Gustafson
*Counsel of Record*
Derek S. Lyons
James R. Conde
BOYDEN GRAY & ASSOCIATES, PLLC
1627 I Street, N.W., Suite 950
Washington, D.C. 20006
Tel: (202) 955-0620
gustafson@boydengrayassociates.com

*Counsel for Petitioners Competitive Enterprise Institute; Buckeye Institute for Public Policy Solutions; Independence Institute; Rio Grande Foundation; Sutherland Institute; Klaus J. Christoph; Samuel R. Damewood; Catherine C. Dellin; Joseph W. Luquire; Lisa R. Markham; Patrick T. Peterson; and Kristi Rosenquist*

Sam Kazman
Hans Bader
COMPETITIVE ENTERPRISE INSTITUTE
1899 L Street, N.W., 12th Floor
Washington, D.C. 20036
Tel: (202) 331-1010

*Counsel for Petitioner Competitive Enterprise Institute*

Robert Alt
BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS
88 E. Broad Street, Suite 1120
Columbus, OH 43215
Tel: (614) 224-4422
robert@buckeyeinstitute.org

*Counsel for Petitioner Buckeye Institute for Public Policy Solutions*

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(e)(1) and 32(e)(2)(C), I hereby certify that the foregoing final form Reply Brief of Petitioners on Core Legal Issues contains 12,449 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: April 22, 2016

/s/ Elbert Lin
Elbert Lin

## CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of April 2016, a copy of the foregoing final form Reply Brief of Petitioners on Core Legal Issues was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Elbert Lin
Elbert Lin

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Air Act [this chapter] (as amended by this Act) and will not provide for the attainment of national primary ambient air quality standards in the time required by such Act. If the Administrator so determines, he shall, within 90 days after promulgation of any national ambient air quality standards pursuant to section 109(a) of the Clean Air Act [section 1857c-4(a) of this title], notify the State and specify in what respects changes are needed to meet the additional requirements of such Act, including requirements to implement national secondary ambient air quality standards. If such changes are not adopted by the State after public hearings and within six months after such notification, the Administrator shall promulgate such changes pursuant to section I10(c) of such Act [section 1857c-5(c) of this title].

"(2) The amendments made by section 4(b) [amending sections 1857b and 1857d of this title] shall not be construed as repealing or modifying the powers of the Administrator with respect to any conference convened under section 108(d) of the Clean Air Act [section 1857d of this title] before the date of enactment of this Act [Dec. 31, 1970].

"(b) Regulations or standards issued under this title II of the Clean Air Act [subchapter II of this chapter] prior to the enactment of this Act [Dec 31, 1970] shall continue in effect until revised by the Administrator consistent with the purposes of such Act."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1857c, 1857c-2, 1857c-6, 1857c-9, 1857c-10, 1857f-6c, 1857h-5, 6211 of this title.

**§ 1857c-6. Standards of performance for new stationary sources**

**(a) Definitions**

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

**(b) Publication and revision by Administrator of list of categories of stationary sources; inclusion of category in list; proposal of regulations by Administrator establishing standards for new sources within category; promulgation and revision of standards; differentiation within categories of new sources; issuance of information on pollution control techniques; applicability to new sources owned or operated by United States**

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publications, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

**(c) Implementation and enforcement by State; procedure; delegation of authority of Administrator to State; enforcement power of Administrator unaffected**

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

**(d) Emission standards for any existing source for any air pollutant; submission of State plan to Administrator establishing, implementing and enforcing standards; authority of Administrator to prescribe State plan; authority of Administrator to enforce State plan; procedure**

(1) The Administrator shall prescribe regulations which shall establish a procedure similar

to that provided by section 1857c-5 of this title under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 1857c-3(a) or 1857c-7(b)(1)(A) of this title but (ii) to which a standard of performance under subsection (b) of this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 1857c-5(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 1857c-8 and 1857c-9 of this title with respect to an implementation plan.

**(e) Prohibited acts**

After the effective date of standards of performance promulgated under this section, it shall be 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.

(July 14, 1955, ch. 360, title I, § 111, as added Dec. 31, 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1683, and amended Nov. 18, 1971, Pub. L. 92-157, title III, § 302(f), 85 Stat. 464.)

PRIOR PROVISIONS

A prior section 111 of Act July 14, 1955, was renumbered section 118 by Pub. L. 91-604, and is set out as section 1857f of this title.

AMENDMENTS

1971—Subsec. (b)(1)(B). Pub. L. 92-157 substituted in first sentence "publish proposed" for "propose".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1857c-5, 1857c-7 to 1857c-10, 1857d, 1857d-1, 1857e, 1857f, 1857h-5, 1857h-6 of this title.

**§ 1857c-7. National emission standards for hazardous air pollutants**

**(a) Definitions**

For purposes of this section—

(1) The term "hazardous air pollutant" means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) The term "new source" means a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source.

(3) The terms "stationary source", "modification", "owner or operator" and "existing source" shall have the same meaning as such terms have under section 1857c-6(a) of this title.

**(b) Publication and revision by Administrator of list of hazardous air pollutants; inclusion of air pollutant in list; proposal of regulations by Administrator establishing standards for pollutant; establishment of standards; standards effective upon promulgation; issuance of information on pollution control techniques**

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within thirty days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutant subject to the provisions of this section.

**(c) Prohibited acts; exemption by President for any stationary source; duration and extension of exemption; report to Congress**

(1) After the effective date of any emission standard under this section—

(A) no person may construct any new source or modify any existing source which in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may

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Par. (3). Pub. L. 101–549, § 403(d), directed the insertion of ‘‘, clean fuels,’’ after ‘‘including fuel cleaning,’’, which was executed by making the insertion after ‘‘including fuel cleaning’’ to reflect the probable intent of Congress, and inserted at end ‘‘Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.’’

1977—Par. (2)(C). Pub. L. 95–190 added subpar. (C).

STUDY OF MAJOR EMITTING FACILITIES WITH POTENTIAL OF EMITTING 250 TONS PER YEAR

Pub. L. 95–95, title I, § 127(b), Aug. 7, 1977, 91 Stat. 741, directed Administrator, within 1 year after Aug. 7, 1977, to report to Congress on consequences of that portion of definition of ‘‘major emitting facility’’ under this subpart which applies to facilities with potential to emit 250 tons per year or more.

SUBPART II—VISIBILITY PROTECTION

CODIFICATION

As originally enacted, subpart II of part C of subchapter I of this chapter was added following section 7478 of this title. Pub. L. 95–190, § 14(a)(53), Nov. 16, 1977, 91 Stat. 1402, struck out subpart II and inserted such subpart following section 7479 of this title.

## § 7491. Visibility protection for Federal class I areas

### (a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for—

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

### (b) Regulations

Regulations under subsection (a)(4) of this section shall—

(1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including—

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

### (c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may rea-

sonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

**(d) Consultations with appropriate Federal land managers**

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

**(e) Buffer zones**

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

**(f) Nondiscretionary duty**

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a ''nondiscretionary duty'' of the Administrator.

**(g) Definitions**

For the purpose of this section—

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

(2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;

(3) the term ''manmade air pollution'' means air pollution which results directly or indirectly from human activities;

(4) the term ''as expeditiously as practicable'' means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410(c) of this title for purposes of this section);

(5) the term ''mandatory class I Federal areas'' means Federal areas which may not be designated as other than class I under this part;

(6) the terms ''visibility impairment'' and ''impairment of visibility'' shall include reduction in visual range and atmospheric discoloration; and

(7) the term ''major stationary source'' means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

(July 14, 1955, ch. 360, title I, § 169A, as added Pub. L. 95–95, title I, § 128, Aug. 7, 1977, 91 Stat. 742.)

EFFECTIVE DATE

Subpart effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

**§ 7492. Visibility**

**(a) Studies**

(1) The Administrator, in conjunction with the National Park Service and other appropriate Federal agencies, shall conduct research to identify and evaluate sources and source regions of both visibility impairment and regions that provide predominantly clean air in class I areas. A total of $8,000,000 per year for 5 years is authorized to be appropriated for the Environmental Protection Agency and the other Federal agencies to conduct this research. The research shall include—

(A) expansion of current visibility related monitoring in class I areas;

(B) assessment of current sources of visibility impairing pollution and clean air corridors;

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in the case of a concern which is a publicly traded company at least 51 percent of the stock of the company is owned by, one or more individuals who are members of the following groups:

''(I) Black Americans.

''(II) Hispanic Americans.

''(III) Native Americans.

''(IV) Asian Americans.

''(V) Women.

''(VI) Disabled Americans.

''(ii) The presumption established by clause (i) may be rebutted with respect to a particular business concern if it is reasonably established that the individual or individuals referred to in that clause with respect to that business concern are not experiencing impediments to establishing or developing such concern as a result of the individual's identification as a member of a group specified in that clause.

''(C) The following institutions are presumed to be disadvantaged business concerns for purposes of subsection (a):

''(i) Historically black colleges and universities, and colleges and universities having a student body in which 40 percent of the students are Hispanic.

''(ii) Minority institutions (as that term is defined by the Secretary of Education pursuant to the General Education Provision Act (20 U.S.C. 1221 et seq.)).

''(iii) Private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

''(D) A joint venture may be considered to be a disadvantaged business concern under subsection (a), notwithstanding the size of such joint venture, if—

''(i) a party to the joint venture is a disadvantaged business concern; and

''(ii) that party owns at least 51 percent of the joint venture.

A person who is not an economically disadvantaged individual or a disadvantaged business concern, as a party to a joint venture, may not be a party to more than 2 awarded contracts in a fiscal year solely by reason of this subparagraph.

''(E) Nothing in this paragraph shall prohibit any member of a racial or ethnic group that is not listed in subparagraph (B)(i) from establishing that they have been impeded in establishing or developing a business concern as a result of racial or ethnic discrimination.

''SEC. 1002. USE OF QUOTAS PROHIBITED.—Nothing in this title shall permit or require the use of quotas or a requirement that has the effect of a quota in determining eligibility under section 1001.''

### § 7602. Definitions

When used in this chapter—

(a) The term ''Administrator'' means the Administrator of the Environmental Protection Agency.

(b) The term ''air pollution control agency'' means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term ''interstate air pollution control agency'' means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term ''State'' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term ''person'' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term ''municipality'' means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term ''air pollutant'' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term ''air pollutant'' is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term ''Federal land manager'' means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms ''major stationary source'' and ''major emitting facility'' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms ''emission limitation'' and ''emission standard'' mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design,

equipment, work practice or operational standard promulgated under this chapter..[1]

(*l*) The term ''standard of performance'' means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term ''means of emission limitation'' means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term ''primary standard attainment date'' means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(*o*) The term ''delayed compliance order'' means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term ''schedule and timetable of compliance'' means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this chapter, the term ''applicable implementation plan'' means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) INDIAN TRIBE.—The term ''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(s) VOC.—The term ''VOC'' means volatile organic compound, as defined by the Administrator.

(t) PM–10.—The term ''PM–10'' means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

(u) NAAQS AND CTG.—The term ''NAAQS'' means national ambient air quality standard. The term ''CTG'' means a Control Technique Guideline published by the Administrator under section 7408 of this title.

(v) $NO_x$.—The term ''$NO_x$'' means oxides of nitrogen.

(w) CO.—The term ''CO'' means carbon monoxide.

(x) SMALL SOURCE.—The term ''small source'' means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

(y) FEDERAL IMPLEMENTATION PLAN.—The term ''Federal implementation plan'' means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

(z) STATIONARY SOURCE.—The term ''stationary source'' means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title.

(July 14, 1955, ch. 360, title III, § 302, formerly § 9, as added Pub. L. 88–206, § 1, Dec. 17, 1963, 77 Stat. 400, renumbered Pub. L. 89–272, title I, § 101(4), Oct. 20, 1965, 79 Stat. 992; amended Pub. L. 90–148, § 2, Nov. 21, 1967, 81 Stat. 504; Pub. L. 91–604, § 15(a)(1), (c)(1), Dec. 31, 1970, 84 Stat. 1710, 1713; Pub. L. 95–95, title II, § 218(c), title III, § 301, Aug. 7, 1977, 91 Stat. 761, 769; Pub. L. 95–190, § 14(a)(76), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101–549, title I, §§ 101(d)(4), 107(a), (b), 108(j), 109(b), title III, § 302(e), title VII, § 709, Nov. 15, 1990, 104 Stat. 2409, 2464, 2468, 2470, 2574, 2684.)

CODIFICATION

Section was formerly classified to section 1857h of this title.

PRIOR PROVISIONS

Provisions similar to those in subsecs. (b) and (d) of this section were contained in a section 1857e of this title, act July 14, 1955, ch. 360, § 6, 69 Stat. 323, prior to the general amendment of this chapter by Pub. L. 88–206.

AMENDMENTS

1990—Subsec. (b)(1) to (3). Pub. L. 101–549, § 107(a)(1), (2), struck out ''or'' at end of par. (3) and substituted periods for semicolons at end of pars. (1) to (3).

Subsec. (b)(5). Pub. L. 101–549, § 107(a)(3), added par. (5).

Subsec. (g). Pub. L. 101–549, § 108(j)(2), inserted at end ''Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used.''

Subsec. (h). Pub. L. 101–549, § 109(b), inserted before period at end '', whether caused by transformation, conversion, or combination with other air pollutants''.

Subsec. (k). Pub. L. 101–549, § 303(e), inserted before period at end '', and any design, equipment, work practice or operational standard promulgated under this chapter.''

Subsec. (q). Pub. L. 101–549, § 101(d)(4), added subsec. (q).

Subsec. (r). Pub. L. 101–549, § 107(b), added subsec. (r).

Subsecs. (s) to (y). Pub. L. 101–549, § 108(j)(1), added subsecs. (s) to (y).

Subsec. (z). Pub. L. 101–549, § 709, added subsec. (z).

1977—Subsec. (d). Pub. L. 95–95, § 218(c), inserted ''and includes the Commonwealth of the Northern Mariana Islands'' after ''American Samoa''.

Subsec. (e). Pub. L. 95–190 substituted ''individual, corporation'' for ''individual corporation''.

Pub. L. 95–95, § 301(b), expanded definition of ''person'' to include agencies, departments, and instrumentalities of the United States and officers, agents, and employees thereof.

[1] So in original.

Subsec. (g). Pub. L. 95–95, § 301(c), expanded definition of ''air pollutant'' so as, expressly, to include physical, chemical, biological, and radioactive substances or matter emitted into or otherwise entering the ambient air.

Subsecs. (i) to (p). Pub. L. 95–95, § 301(a), added subsecs. (i) to (p).

1970—Subsec. (a). Pub. L. 91–604, § 15(c)(1), substituted definition of ''Administrator'' as meaning Administrator of the Environmental Protection Agency for definition of ''Secretary'' as meaning Secretary of Health, Education, and Welfare.

Subsecs. (g), (h). Pub. L. 91–604, § 15(a)(1), added subsec. (g) defining ''air pollutant'', redesignated former subsec. (g) as (h) and substituted references to effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate for references to injury to agricultural crops and livestock, and inserted references to effects on economic values and on personal comfort and well being.

1967—Pub. L. 90–148 reenacted section without change.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

## § 7603. Emergency powers

Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings such an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

(July 14, 1955, ch. 360, title III, § 303, as added Pub. L. 91–604, § 12(a), Dec. 31, 1970, 84 Stat. 1705; amended Pub. L. 95–95, title III, § 302(a), Aug. 7, 1977, 91 Stat. 770; Pub. L. 101–549, title VII, § 704, Nov. 15, 1990, 104 Stat. 2681.)

CODIFICATION

Section was formerly classified to section 1857h–1 of this title.

PRIOR PROVISIONS

A prior section 303 of act July 14, 1955, was renumbered section 310 by Pub. L. 91–604 and is classified to section 7610 of this title.

AMENDMENTS

1990—Pub. L. 101–549, § 704(2)–(5), struck out subsec. (a) designation before ''Notwithstanding any other'', struck out subsec. (b) which related to violation of or failure or refusal to comply with subsec. (a) orders, and substituted new provisions for provisions following first sentence which read as follows: ''If it is not practicable to assure prompt protection of the health of persons solely by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources). Prior to taking any action under this section, the Administrator shall consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking. Such order shall be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period. Whenever the Administrator brings such an action within such period, such order shall be effective for a period of forty-eight hours or such longer period as may be authorized by the court pending litigation or thereafter.''

Pub. L. 101–549, § 704(1), which directed that ''public health or welfare, or the environment'' be substituted for ''the health of persons and that appropriate State or local authorities have not acted to abate such sources'', was executed by making the substitution for ''the health of persons, and that appropriate State or local authorities have not acted to abate such sources'' to reflect the probable intent of Congress.

1977—Pub. L. 95–95 designated existing provisions as subsec. (a), inserted provisions that, if it is not practicable to assure prompt protection of the health of persons solely by commencement of a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources), that, prior to taking any action under this section, the Administrator consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking, that the order be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period, and that, whenever the Administrator brings such an action within such period, such order be effective for a period of forty-eight hours or such longer period as may be authorized by the court pending litigation or thereafter, and added subsec. (b).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L.

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Land Manager has provided notice and opportunity for public comment on the integral vista in which case the review must include impacts on any integral vista identified at least 6 months prior to submission of a complete permit application, unless the State determines under §51.304(d) that the identification was not in accordance with the identification criteria, or

(2) That proposes to locate in an area classified as nonattainment under section 107(d)(1)(A), (B), or (C) of the Clean Air Act that may have an impact on visibility in any mandatory Class I Federal area.

(c) Review of any major stationary source or major modification under paragraph (b) of this section, shall be conducted in accordance with paragraph (a) of this section, and §51.166(o), (p)(1) through (2), and (q). In conducting such reviews the State must ensure that the source's emissions will be consistent with making reasonable progress toward the national visibility goal referred to in §51.300(a). The State may take into account the costs of compliance, the time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the useful life of the source.

(d) The State may require monitoring of visibility in any Federal Class I area near the proposed new stationary source or major modification for such purposes and by such means as the State deems necessary and appropriate.

[45 FR 80089, Dec. 2, 1980, as amended at 64 FR 35765, 35774, July 1, 1999]

### §51.308 Regional haze program requirements.

(a) *What is the purpose of this section?* This section establishes requirements for implementation plans, plan revisions, and periodic progress reviews to address regional haze.

(b) *When are the first implementation plans due under the regional haze program?* Except as provided in §51.309(c), each State identified in §51.300(b)(3) must submit, for the entire State, an implementation plan for regional haze meeting the requirements of paragraphs (d) and (e) of this section no later than December 17, 2007.

(c) [Reserved]

(d) *What are the core requirements for the implementation plan for regional haze?* The State must address regional haze in each mandatory Class I Federal area located within the State and in each mandatory Class I Federal area located outside the State which may be affected by emissions from within the State. To meet the core requirements for regional haze for these areas, the State must submit an implementation plan containing the following plan elements and supporting documentation for all required analyses:

(1) *Reasonable progress goals.* For each mandatory Class I Federal area located within the State, the State must establish goals (expressed in deciviews) that provide for reasonable progress towards achieving natural visibility conditions. The reasonable progress goals must provide for an improvement in visibility for the most impaired days over the period of the implementation plan and ensure no degradation in visibility for the least impaired days over the same period.

(i) In establishing a reasonable progress goal for any mandatory Class I Federal area within the State, the State must:

(A) Consider the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources, and include a demonstration showing how these factors were taken into consideration in selecting the goal.

(B) Analyze and determine the rate of progress needed to attain natural visibility conditions by the year 2064. To calculate this rate of progress, the State must compare baseline visibility conditions to natural visibility conditions in the mandatory Federal Class I area and determine the uniform rate of visibility improvement (measured in deciviews) that would need to be maintained during each implementation period in order to attain natural visibility conditions by 2064. In establishing the reasonable progress goal, the State must consider the uniform rate of improvement in visibility and

This monitoring strategy must be coordinated with the monitoring strategy required in § 51.305 for reasonably attributable visibility impairment. Compliance with this requirement may be met through participation in the Interagency Monitoring of Protected Visual Environments network. The implementation plan must also provide for the following:

(i) The establishment of any additional monitoring sites or equipment needed to assess whether reasonable progress goals to address regional haze for all mandatory Class I Federal areas within the State are being achieved.

(ii) Procedures by which monitoring data and other information are used in determining the contribution of emissions from within the State to regional haze visibility impairment at mandatory Class I Federal areas both within and outside the State.

(iii) For a State with no mandatory Class I Federal areas, procedures by which monitoring data and other information are used in determining the contribution of emissions from within the State to regional haze visibility impairment at mandatory Class I Federal areas in other States.

(iv) The implementation plan must provide for the reporting of all visibility monitoring data to the Administrator at least annually for each mandatory Class I Federal area in the State. To the extent possible, the State should report visibility monitoring data electronically.

(v) A statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any mandatory Class I Federal area. The inventory must include emissions for a baseline year, emissions for the most recent year for which data are available, and estimates of future projected emissions. The State must also include a commitment to update the inventory periodically.

(vi) Other elements, including reporting, recordkeeping, and other measures, necessary to assess and report on visibility.

(e) *Best Available Retrofit Technology (BART) requirements for regional haze visibility impairment.* The State must submit an implementation plan containing emission limitations representing BART and schedules for compliance with BART for each BART-eligible source that may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area, unless the State demonstrates that an emissions trading program or other alternative will achieve greater reasonable progress toward natural visibility conditions.

(1) To address the requirements for BART, the State must submit an implementation plan containing the following plan elements and include documentation for all required analyses:

(i) A list of all BART-eligible sources within the State.

(ii) A determination of BART for each BART-eligible source in the State that emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area. All such sources are subject to BART.

(A) The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART within the State. In this analysis, the State must take into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

(B) The determination of BART for fossil-fuel fired power plants having a total generating capacity greater than 750 megawatts must be made pursuant to the guidelines in appendix Y of this part (Guidelines for BART Determinations Under the Regional Haze Rule).

(C) *Exception.* A State is not required to make a determination of BART for $SO_2$ or for $NO_X$ if a BART-eligible source has the potential to emit less than 40 tons per year of such pollutant(s), or for $PM_{10}$ if a BART-eligible

source has the potential to emit less than 15 tons per year of such pollutant.

(iii) If the State determines in establishing BART that technological or economic limitations on the applicability of measurement methodology to a particular source would make the imposition of an emission standard infeasible, it may instead prescribe a design, equipment, work practice, or other operational standard, or combination thereof, to require the application of BART. Such standard, to the degree possible, is to set forth the emission reduction to be achieved by implementation of such design, equipment, work practice or operation, and must provide for compliance by means which achieve equivalent results.

(iv) A requirement that each source subject to BART be required to install and operate BART as expeditiously as practicable, but in no event later than 5 years after approval of the implementation plan revision.

(v) A requirement that each source subject to BART maintain the control equipment required by this subpart and establish procedures to ensure such equipment is properly operated and maintained.

(2) A State may opt to implement or require participation in an emissions trading program or other alternative measure rather than to require sources subject to BART to install, operate, and maintain BART. Such an emissions trading program or other alternative measure must achieve greater reasonable progress than would be achieved through the installation and operation of BART. For all such emission trading programs or other alternative measures, the State must submit an implementation plan containing the following plan elements and include documentation for all required analyses:

(i) A demonstration that the emissions trading program or other alternative measure will achieve greater reasonable progress than would have resulted from the installation and operation of BART at all sources subject to BART in the State and covered by the alternative program. This demonstration must be based on the following:

(A) A list of all BART-eligible sources within the State.

(B) A list of all BART-eligible sources and all BART source categories covered by the alternative program. The State is not required to include every BART source category or every BART-eligible source within a BART source category in an alternative program, but each BART-eligible source in the State must be subject to the requirements of the alternative program, have a federally enforceable emission limitation determined by the State and approved by EPA as meeting BART in accordance with section 302(c) or paragraph (e)(1) of this section, or otherwise addressed under paragraphs (e)(1) or (e)(4)of this section.

(C) An analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each source within the State subject to BART and covered by the alternative program. This analysis must be conducted by making a determination of BART for each source subject to BART and covered by the alternative program as provided for in paragraph (e)(1) of this section, unless the emissions trading program or other alternative measure has been designed to meet a requirement other than BART (such as the core requirement to have a long-term strategy to achieve the reasonable progress goals established by States). In this case, the State may determine the best system of continuous emission control technology and associated emission reductions for similar types of sources within a source category based on both source-specific and category-wide information, as appropriate.

(D) An analysis of the projected emissions reductions achievable through the trading program or other alternative measure.

(E) A determination under paragraph (e)(3) of this section or otherwise based on the clear weight of evidence that the trading program or other alternative measure achieves greater reasonable progress than would be achieved through the installation and operation of BART at the covered sources.

(ii) [Reserved]