To: Administrator McCarthy, Gina[Administrator@epa.gov]; Ali, Mustafa[Ali.Mustafa@epa.gov]; Beauvais, Joel[Beauvais.Joel@epa.gov]; Benenati, Frank[benenati.frank@epa.gov]; briefings[briefings@epa.gov]; Distefano, Nichole[DiStefano.Nichole@epa.gov]; Emerson, Michael[Emerson.Michael@epa.gov]; Wachter, Eric[Wachter.Eric@epa.gov]; Flynn, Mike[Flynn.Mike@epa.gov]; Fritz, Matthew[Fritz.Matthew@epa.gov]; Harrison, Melissa[Harrison.Melissa@epa.gov]; Hautamaki, Jared[Hautamaki.Jared@epa.gov]; Kim, Hyon[Kim.Hyon@epa.gov]; Knapp, Kristien[Knapp.Kristien@epa.gov]; Vaught, Laura[Vaught.Laura@epa.gov]; Meiburg, Stan[Meiburg.Stan@epa.gov]; Michaels, Andrew[Michaels.Andrew@epa.gov]; Naples, Eileen[Naples.Eileen@epa.gov]; Pieh, Luseni[Pieh.Luseni@epa.gov]; Ragland, Micah[Ragland.Micah@epa.gov]; Rupp, Mark[Rupp.Mark@epa.gov]; Threet, Derek[Threet.Derek@epa.gov]
From: Gaines, Cynthia
Sent: Tue 8/23/2016 8:23:07 PM
Subject: Daily Reading File: August 23, 2016
Daily Reading File.8.23.16.pdf

To: Garbow, Avi[Garbow.Avi@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Administrator; McCarthy, Gina; Administrator
From: Purchia, Liz
Sent: Fri 4/1/2016 6:54:23 PM
Subject: Clips on CPP filings

A number of stories out today on the folks supporting CPP that

Tech giants back U.S. EPA in climate rule legal challenge

WASHINGTON | BY VALERIE VOLCOVICI
http://www.reuters.com/article/us-climatechange-usa-tech-idUSKCN0WY58C

Technology companies Google, Apple, Microsoft and Amazon on Friday declared support for the Obama administration in a lawsuit facing its central plan to combat climate change, saying the rule is needed to drive a transition to cleaner energy.

As large energy users, the companies filed a joint amicus brief to the federal Court of Appeals for the District of Columbia Circuit to support the Environmental Protection Agency as it defends its signature Clean Power Plan against a challenge by industry groups and more than half of U.S. states.

"The Clean Power Plan reflects reasonable and attainable assumptions about the increasing availability of renewable generation in the nation's power sector," the companies wrote in the filing they submitted to the federal court.

The regulation is designed to lower carbon emissions from the U.S. power sector by 2030 to 32 percent below 2005 levels, encouraging each state to replace dirtier fossil fuels with cleaner energy sources.

The rule is the United States' main tool to meet the emissions reduction target pledge it made at December's U.N. climate talks in Paris, but it was challenged by 27 states, along with business and industry groups in the D.C. Circuit court.

In February, the rule faced a major blow when the Supreme Court put it on hold pending the outcome of the litigation in the lower court. But the death of Justice Antonin Scalia a few days later renewed hopes for its survival.

A three-judge panel of D.C. Circuit court had unanimously rejected the same request for a stay that the Supreme Court accepted. The panel is viewed by lawyers on both sides as relatively favorable for the administration.

The technology companies, which all rely largely on renewable energy through power-purchase deals or their own facilities to power their energy-intensive data centers, said the EPA rule would

help all businesses "invest and benefit from clean energy."

Earlier this week, the EPA filed a 200-page brief defending its rule, which said carbon emissions pose a "monumental threat" to the health and welfare of Americans.

On Friday, 44 current and former senators, as well as 164 current and former House members from 38 states also filed supportive briefs.

The D.C. Circuit panel will hear oral arguments on the merits of the case on June 2.

Over 200 current, former lawmakers back Obama in climate case

http://thehill.com/policy/energy-environment/274893-over-200-current-former-lawmakers-back-obama-in-climate-case

By Timothy Cama - 04/01/16 10:10 AM EDT

Over 200 current and former members of Congress are supporting the Obama administration in the legal challenge to its landmark climate rule for power plants.

The lawmakers, almost all Democrats, argued in a brief filed late Thursday that the Environmental Protection Agency's (EPA) regulation follows exactly what Congress intended to do when it wrote the Clean Air Act (CAA) and amended it in 1990.

"The rule at issue effectuates the policy Congress established in the CAA because it is consistent with the text, structure, and legislative history of the act," the lawmakers wrote to the D.C. Circuit U.S. Court of Appeals.

"Most significantly, it reflects Congress's considered decision to establish a comprehensive regulatory regime that could address all pollutants, both known and unknown," they said.

The members said that Congress wrote a section into the law meant as a "gap-filling" provision so that the EPA could, in the future, regulation pollutants that Congress did not identify in 1990.

That is the provision that the EPA used to justify its Clean Power Plan, which seeks a 32 percent cut in the power sector's carbon dioxide emissions by 2030.

The section "continues to authorize EPA to regulate those air pollutants that pose a substantial threat to the public health and welfare, and the rule is an exercise of that authority. To hold otherwise would critically undermine the statutory structure that Congress put in place in the CAA."

The filing serves in part as an answer to a group of Republican lawmakers who filed a brief in February with the court, arguing that the EPA does not have the power to enforce the regulation it wrote.

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Thursday was the deadline for most briefs in support of the EPA's position in the case. The court also received briefs from two former Republican EPA heads, former state energy and environment officials.

Early Friday morning, technology companies Apple, Google, Microsoft and Amazon asked the court for permission to file their own brief supporting the EPA.

The Supreme Court ordered a temporary delay on the rule in February while the legal challenge proceeds.

Hundreds Of Current And Former Lawmakers File Brief Defending Clean Power Plan

A federal appeals court will hear a challenge to Obama's signature climate rule in June.

04/01/2016 02:04 pm ET

http://www.huffingtonpost.com/entry/congress-clean-power-plan_us_56fe98c8e4b0daf53aef7b9c

Laura Barron-Lopez Reporter, The Huffington Post

WASHINGTON — More than 208 current and former members of Congress filed an amicus brief to the U.S. Court of Appeals for the District of Columbia Friday in defense of the Obama administration's signature climate change regulation.

In June, the federal appeals court plans to hear an appeal filed by 29 states and a slew of industry groups against the Clean Power Plan, which seeks to reduce 32 percent of carbon dioxide emissions from power plants from 2005 levels by 2030.

The brief filed on Friday includes 44 current and former senators and 164 current and former House members. All current lawmakers who signed on to the brief are Democrats. Two former Republican lawmakers, Sen. David Durenberger (Minn.) and Rep. Sherwood Boehlert (N.Y.), joined them.

The brief from Democrats comes after Republican lawmakers filed a brief in February in which

they argued the Environmental Protection Agency does not have the authority to enforce the regulation it crafted.

Democrats, including Senate and House Minority Leaders Harry Reid (Nev.) and Nancy Pelosi (Calif.), wrote in their brief that opponents' reading of the Clean Air Act, "fundamentally misunderstands" the law and the "authority it confers on EPA."

"When Congress amended the CAA in 1970, it was acutely aware of the serious and evolving problem posed by air pollution," the lawmakers wrote, adding that the law passed in response to that threat was meant to "effect a major change" in how the U.S. solved it.

The brief goes on to explain that in certain provisions of the CAA, Congress was intentionally vague to give EPA a "key role" in shaping and developing standards for sources and pollutants.

"The rule that petitioners challenge is entirely consistent with the text, structure, and history of the CAA and ... advances the objectives Congress set out to accomplish in the CAA," the lawmakers wrote.

In February, the Supreme Court granted a stay to those opposing the landmark regulation, allowing the lower court's proceedings to play out. While the stay in practice puts a hold on implementation, it does not mean the high court will ultimately strike it down.

The EPA and administration remain confident that the rule will survive all legal challenges, and dismissed concerns that the stay could push back goalposts set under the plan. States don't have to submit plans until 2018.

Liz Purchia

Acting Associate Administrator, Public Affairs

U.S. Environmental Protection Agency

Office: 202-564-6691

Cell: Personal Cell/email

To: Administrator McCarthy, Gina Administrator
From: Emerson, Michael
Sent: Wed 3/30/2016 2:36:07 PM
Subject: FW: FOR BOOK - Methane Forum remarks
03 30 16 GM TPs Global Methane Forum - FOR BOOK_V3.docx

Michael S. Emerson

Executive Assistant to the Administrator

U.S. Environmental Protection Agency
Office of the Administrator
Office: (202) 564-2704; Personal Cell/email

www.epa.gov

From: Azoolin, Liel
Sent: Wednesday, March 30, 2016 10:36 AM
To: Emerson, Michael <Emerson.Michael@epa.gov>
Subject: FW: FOR BOOK - Methane Forum remarks

From: Fried, Becky
Sent: Tuesday, March 29, 2016 1:56 PM
To: briefings <briefings@epa.gov>; Bluhm, Kate <Bluhm.Kate@epa.gov>; Michaels, Andrew <Michaels.Andrew@epa.gov>; Azoolin, Liel <Azoolin.Liel@epa.gov>
Cc: DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Hunter-Pirtle, Ann <Hunter-Pirtle.Ann@epa.gov>; Harrison, Melissa <Harrison.Melissa@epa.gov>; Purchia, Liz <Purchia.Liz@epa.gov>; Allen, Laura <Allen.Laura@epa.gov>; Lee, Monica <Lee.Monica@epa.gov>; Abrams, Dan <Abrams.Dan@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: RE: FOR BOOK - Methane Forum remarks

All – Please use the attached version for tomorrow's methane remarks (V3). This is an updated version including some late comments from Janet.

Thanks for your patience!

Becky Fried

Director of Speechwriting

U.S. Environmental Protection Agency

O: 202.564.0960

M: 202.308.7673

Personal Cell/email

From: Fried, Becky
Sent: Tuesday, March 29, 2016 11:45 AM
To: briefings <briefings@epa.gov>; Bluhm, Kate <Bluhm.Kate@epa.gov>; Michaels, Andrew <michaels.andrew@epa.gov>; Azoolin, Liel <Azoolin.Liel@epa.gov>
Cc: DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Hunter-Pirtle, Ann <Hunter-Pirtle.Ann@epa.gov>; Harrison, Melissa <Harrison.Melissa@epa.gov>; Purchia, Liz <Purchia.Liz@epa.gov>; Allen, Laura <Allen.Laura@epa.gov>; Lee, Monica <Lee.Monica@epa.gov>; Abrams, Dan <Abrams.Dan@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>
Subject: FOR BOOK - Methane Forum remarks

All,

Attached are remarks for tomorrow's Global Methane Forum. OAR has reviewed these remarks.

Thanks!

Becky Fried

Director of Speechwriting

U.S. Environmental Protection Agency

O: 202.564.0960

Personal Cell/email

fried.becky@epa.gov

April 28, 2016

Janet McCabe
Acting Assistant Administrator for the Office of Air and Radiation
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Request for Additional Information and Technical Assistance Related to the Clean Power Plan

Dear Acting Assistant Administrator McCabe:

We are a group of state environmental agency officials writing to request additional information and technical assistance related to the final Clean Power Plan in a manner that is respectful of the Supreme Court's stay of the regulations until the conclusion of pending litigation. This additional information and assistance will be important to our state efforts to prudently plan for and implement a variety of state and federal obligations.

As you know, state environmental agencies have important obligations to protect public health and the environment. We strive to prudently conduct our public engagement, planning, and regulatory activities in a way that comprehensively integrates our own state statutory obligations and policy goals as well as existing and future federal regulations. Among the states signing onto this letter, individual states are currently planning for federal ozone standards that will affect the power sector, engaging with energy agencies on integrated resource plans for electric utility companies, developing state climate and energy plans, reviewing and revising state greenhouse gas regulations

for the power sector, working with other agencies to set renewable energy targets, and planning for compliance with the Clean Power Plan, depending on the eventual outcome of pending litigation.

We understand that the Supreme Court has stayed the Clean Power Plan until litigation is resolved and that neither the D.C. Circuit Court of Appeals nor the Supreme Court has ruled on the merits of the case. The final resolution of this litigation is uncertain; however, having more information about how states might comply with the Clean Power Plan should it be upheld will better inform state engagement and agency decision-making in the different contexts identified above.

We are pleased that EPA has already committed to provide technical assistance related to state plan development when such requests are made by states. In addition to providing such assistance, we request that EPA provide a final model rule or rules. Of course, the relevance of such a rule will depend on the outcome of litigation, however our states would find the information helpful in the near term for the planning purposes described above. We also ask that EPA provide additional information on the Clean Energy Incentive Program; tracking systems for allowances or credits; and energy efficiency evaluation, measurement, and verification, along with appropriate technical assistance related to this additional information.

We recognize that the EPA must respect the stay of the Clean Power Plan regulations in providing additional information and that this information would be subject to the outcome of the federal Clean Power Plan litigation. We believe EPA can provide information helpful to states consistent with the stay, as EPA has done previously when litigation is pending and a stay is in effect.[1]

---

[1] *See, e.g.,* EPA's February 21, 2012, final revision rule making changes to the Cross State Air Pollution rule and federal plan while the rule was stayed by order of the D.C. Circuit Court of Appeals. In that action, EPA revised budgets for specific states based on updated modelling assumptions and made other changes. EPA noted that the action was "consistent with" and "unaffected by" the stay order and that it did not impose any requirements in and of itself on regulated units or states. Cross State Air Pollution Rule Final Revisions Rule, 77 Fed. Reg. 10,324, 10,326 (Feb. 21, 2012). EPA also proposed and finalized other changes to the rule during the stay, *see* Cross State Air Pollution Rule June Revisions Rule, 77 Fed. Reg. 34,830 (June 12, 2012).

Providing such information and technical assistance could help our states make informed decisions that take into account potential Clean Power Plan obligations along with other factors as we fulfill diverse state and federal commitments.

Sincerely,

Edie Chang
Deputy Executive Officer
California Air Resources Board

Martha E. Rudolph
Director of Environmental Programs
Colorado Department of Public Health and Environment

Robert Klee
Commissioner
Connecticut Department of Energy and Environmental Protection

David S. Small
Secretary
Delaware Department of Natural Resources and Environmental Control

Ben Grumbles
Secretary
Maryland Department of the Environment

Martin Suuberg
Commissioner
Massachusetts Department of Environmental Protection

John Linc Stine
Commissioner
Minnesota Pollution Control Agency

Thomas S. Burack
Commissioner
New Hampshire Department of Environmental Services

Basil Seggos
Acting Commissioner
New York State Department of Environmental Conservation

Joni Hammond
Deputy Director
Oregon Department of Environmental Quality

Janet Coit
Director
Rhode Island Department of Environmental Management

Deborah L. Markowitz
Secretary
Vermont Agency of Natural Resources

Michael G. Dowd
Director, Air Division
Virginia Department of Environmental Quality

Maia D. Bellon
Director
Washington Department of Ecology

REMARKS FOR ADMINISTRATOR GINA MCCARTHY // GLOBAL METHANE FORUM
MARCH 30, 2016 // WASHINGTON, DC // 15 MINS

(INTRO / ACKS)

- THANK YOU TO THE **G.M.I.** AND THE **CLIMATE AND CLEAN AIR COALITION** FOR HOSTING THIS EVENT.

- THE SUPPORT OF OUR INTERNATIONAL COLLEAGUES IS ABSOLUTELY ESSENTIAL TO ADDRESSING CLIMATE CHANGE. YOUR HARD WORK, AND YOUR PRESENCE HERE IS VALUED AND APPRECIATED.

(IMPORTANCE OF INTERNATIONAL COLLABORATION / G.M.I.)

- I WANT TO START BY STATING THE OBVIOUS: THAT WHERE WE ARE TODAY ON CLIMATE IS LEAPS AND BOUNDS AHEAD OF WHERE WE WERE JUST A DECADE AGO.

- LAST DECEMBER'S **PARIS** AGREEMENT WAS A HISTORIC MOMENT. IT WAS AN UNPRECENDENTED SHOWING OF GLOBAL COOPERATION – THE LIKES OF WHICH WE'VE NEVER SEEN. AND IT GIVES US A FRAMEWORK TO CONTINUE MAKING THE PROGRESS WE NEED TO MAKE TOGETHER.

- SO MUCH OF OUR SUCCESS TO DATE HAS BEEN POSSIBLE BECAUSE OF THE LEADERSHIP AND COOPERATION OF THE INTERNATIONAL COMMUNITY.

- WHEN IT COMES TO GLOBAL CHALLENGES LIKE CLIMATE CHANGE, PARTNERSHIPS AND COLLABORATIONS THAT BRIDGE NATIONAL INTERESTS, AND BRING US TOGETHER ARE INVALUABLE.

- WE SAW IT EARLIER THIS MONTH, WHEN **CANADA** AND THE **U.S.** JOINTLY COMMITTED TO TAKE ACTION ON METHANE, AND REAFFIRMED OUR COUNTRIES' LEADERSHIP ON CLIMATE.

- IT WAS YET ANOTHER EXAMPLE OF JUST WHAT'S POSSIBLE WHEN COUNTRIES COME TOGETHER AROUND A COMMON GOAL.

- AND THAT'S PRECISELY THE KIND OF COLLABORATION THAT THE **GLOBAL METHANE INITIATIVE** HAS BEEN SUCCESSFULLY PROMOTING FOR YEARS.

- PROGRAMS UNDER THE **G.M.I** ARE LIFTING UP COMMUNITIES AROUND THE WORLD IN SO MANY WAYS—NOT JUST BY REDUCING POLLUTION, BUT BY BUILDING CAPCITY IN PARTNER COUNTRIES, AND BY GENERATING ENTHUSIASM AND COMMITMENTS FROM BUSINESSES AND INDUSTRIES ACROSS THE GLOBE.

- FOR OVER A DECADE, THE **G.M.I.** HAS WORKED TO HELP IMPLEMENT METHANE MITIGATION PROJECTS THAT REDUCE METHANE FROM ANIMAL WASTE, COAL MINES, LANDFILLS, WASTEWATER TREATMENT PLANTS, AND OIL & GAS OPERATIONS.

- AND THROUGH GOVERNMENT AND PRIVATE-SECTOR PARTNERS, THE **G.M.I.** HAS DEVELOPED WORLD-CLASS EXPERTISE ON BEST PRACTICES, AND SHARED TOOLS AND RESOURCES TO HELP PARTNERS TAKE ADVANTAGE OF OPPORTUNITIES FOR COST-EFFECTIVE METHANE-REDUCTION.

- BUT WE KNOW THERE ARE STILL MANY MORE OPPORTUNITIES FOR METHANE REDUCTIONS… AND THEY'RE OUT THERE, WAITING TO BE TAPPED.

- SO, I'M THRILLED THAT THE **G.M.I.** HAS BEEN RE-CHARTED FOR ANOTHER **5 YEARS**. I KNOW THAT TOGETHER WE CAN DO SO MUCH MORE.

(U.S. LEADERSHIP ON CLIMATE)

- IN THE **U.S.,** WE ARE COMMITED TO CONTINUING TO DO OUR PART.

- THANKS TO **PRESIDENT OBAMA'S** LEADERSHIP, WE'VE SET SOME VERY AMBITIOUS, BUT VERY ACHIEVABLE GOALS FOR OURSELVES**,** AND WE ARE ON-TRACK TO MEET THEM.

- WE'RE SEEING INCREDIBLE MOMENTUM IN THE **U.S.** MARKETPLACE TOWARD A LOW CARBON FUTURE.

- AND **E.P.A** HAS BEEN WORKING TO UNDERPIN THAT MOMENTUM WITH ACTION.

    - WE'VE ALREADY MOVED FORWARD ON **CARS AND TRUCKS**. AND NOW WE'RE DOING EVEN MORE WITH TRUCKS THAN BEFORE.

    - WE'RE TAKING ACTION ON HYDROFLUOROCARBONS – OR **H.F.C.'S**.

    - WE LAUNCHED OUR **CLEAN POWER PLAN** LAST SUMMER TO CUT CARBON POLLUTION FROM OUR POWER SECTOR. AND WHILE THAT RULE IS TEMPORARILY STAYED BY THE **SUPREME COURT**, MANY **U.S.** STATES ARE CHOOSING TO MOVE FORWARD WITH PLANNING FOR IMPLEMENTATION. AND WE ARE GOING TO KEEP SUPPORTING THEM.

(U.S. ACTIONS ON METHANE)

- SO WE HAVEN'T SLOWED DOWN. NOT BY A LONG SHOT. AND NOWHERE IS THAT MORE EVIDENT THAN IN OUR WORK TO CURB METHANE EMISSIONS.

- THE **U.S.** HAS BEEN LOOKING AT METHANE VERY CLOSELY. BECAUSE WE KNOW THAT BY TACKLING METHANE, WE CAN UNLOCK AN AMAZING OPPORTUNITY TO BETTER PROTECT OUR ENVIRONMENT FOR THE FUTURE.

(PROPOSED METHANE STANDARDS)

- THAT'S WHY THIS PAST SUMMER, WE PROPOSED STANDARDS TO DIRECTLY REDUCE METHANE EMISSIONS FROM THE OIL AND GAS SECTOR.

- THIS WILL HELP MOVE THE **U.S.** TOWARD OUR GOAL OF CUTTING METHANE EMISSIONS FROM THE OIL AND GAS SECTOR BY **40 TO 45 PERCENT** BELOW **2012** LEVELS BY **2025**.

- RIGHT NOW, WE'RE COMPLETING REVIEW OF THE MORE THAN **900,000** COMMENTS RECEIVED ON OUR PROPOSAL, AND WE'RE WORKING TOWARD ISSUING FINAL RULES THIS SPRING.

(METHANE CHALLENGE)

- AND AS YOU HEARD FROM **JANET** ALREADY WE'VE ALSO BEEN WORKING TO EXPAND VOLUNTARY PARTNERSHIPS TO REDUCE METHANE EMISSIONS FROM THE OIL AND GAS SECTOR, THROUGH OUR NEW **METHANE CHALLENGE PROGRAM**.

- THE PROGRAM, WHICH JUST LAUNCHED, IS A PLATFORM FOR COMPANIES TO REPORT SYSTEMATIC AND COMPREHENSIVE ACTIONS TO REDUCE METHANE EMISSIONS. AND IT'S A MECHANISM FOR THOSE COMPANIES TO BE PUBLICLY RECOGNIZED AS LEADERS IN CLIMATE ACTION.

- MANY COMPANIES ARE CHOOSING TO MAKE AMBITIOUS COMMITMENTS AS PART OF THIS PROGRAM. THEY'RE MAKING THE CHOICE TO LEAD, AND IT'S REALLY ENCOURAGING.

(EXISTING SOURCES / I.C.R.)

- AT THE SAME TIME, WE'RE STAYING VIGILANT, AND CONTINUING TO FOLLOW WHERE THE SCIENCE AND THE DATA LEAD US.

- LAST MONTH, **E.P.A.** RELEASED A DRAFT OF OUR 21ST ANNUAL **GREENHOUSE GAS INVENTORY** FOR PUBLIC COMMENT.

- THE DRAFT PRESENTS DATA ON TOTAL REPORTED **U.S.** GREENHOUSE GAS EMISSIONS ACROSS MANY SECTORS OF OUR ECONOMY – INCLUDING OIL AND GAS.

- WITH THIS CURRENT DRAFT INVENTORY, WE WERE ABLE TO INCLUDE A SIGNIFICANT AMOUNT OF NEW INFORMATION – INCLUDING FROM OUR FELLOW GOVERNMENT AGENCIES, INDUSTRY ORGANIZATIONS, AND ACADEMIC AND INDUSTRY RESEARCHERS.

- THE NEW INFORMATION SHOWS THAT METHANE EMISSIONS FROM EXISTING SOURCES IN THE OIL AND GAS SECTOR ARE SUBSTANTIALLY HIGHER THAN WE PREVIOUSLY UNDERSTOOD.

- SO, A FEW WEEKS AGO, AT THE **PRESIDENT'S** DIRECTION, WE ANNOUNCED THAT **E.P.A.** IS GOING TO TAKE A CLOSER LOOK AT REGULATING EXISTING SOURCES IN THE OIL AND GAS SECTOR.

- OUR FIRST STEP WILL BE TO ISSUE AN **INFORMATION COLLECTION REQUEST** TO HELP US LEARN MORE ABOUT EXISTING SOURCES OF METHANE EMISSIONS, THE TECHNOLOGIES THAT ARE AVAILABLE TO CUT THOSE EMISSIONS, AND THE COSTS OF THOSE TECHNOLOGIES.

- THIS IS A KEY STEP IN OUR NORMAL PROCESS FOR DEVELOPING REGULATIONS TO REDUCE AIR POLLUTION.

(CONCLUSION / THANKS)

- SO – WE'RE MOVING FORWARD.

- THERE'S NO QUESTION THAT WE'VE COME A LONG WAY ON CLIMATE ACTION – INCLUDING ON METHANE. BUT WE'VE GOT A LOT MORE TO DO.

- I CAN'T EMPHASIZE ENOUGH HOW IMPORTANT YOUR COLLABORATION AND PARTNERSHIP HAS BEEN IN THIS EFFORT, AND WE WILL CONTINUE TO DEPEND ON IT AS WE MOVE AHEAD.

- I THANK YOU FOR BEING HERE, FOR YOUR HARD WORK, AND I LOOK FORWARD TO OUR NEXT STEPS TOGETHER.

- THANK YOU.

###

To: Administrator McCarthy, Gina **Administrator**
From: McCabe, Janet
Sent: Fri 2/5/2016 1:26:08 AM
Subject: FW: Final Supplemental Declaration
Harvey_SuppDecl_SupCt_2.3.16_final_signed.pdf
ATT00001.htm

This is a pretty quick read.

From: Drinkard, Andrea
Sent: Thursday, February 04, 2016 12:51 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: Fwd: Final Supplemental Declaration

Andrea Drinkard

(o) 202.564.1601

Personal Cell/email

Begin forwarded message:

From: "Zenick, Elliott" <Zenick.Elliott@epa.gov>
Date: February 4, 2016 at 12:10:02 PM EST
To: "Schmidt, Lorie" <Schmidt.Lorie@epa.gov>, "Millett, John" <Millett.John@epa.gov>, "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>
Subject: FW: Final Supplemental Declaration

From: Schramm, Daniel
Sent: Thursday, February 04, 2016 9:59 AM
To: Shenkman, Ethan <Shenkman.Ethan@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: Final Supplemental Declaration

Ethan,

This is the final, signed version of the declaration. Enjoy!

Daniel Schramm

U.S. EPA Office of General Counsel

(202) 564-3377

schramm.daniel@epa.gov

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

To: Administrator McCarthy, Gina Administrator
Cc: Emerson, Michael[Emerson.Michael@epa.gov]
From: Goffman, Joseph
Sent: Thur 1/7/2016 6:38:47 PM
Subject: Fwd: DOI PEIS TPs 1 7 16 v2
DOI PEIS TPs 1 7 16 v2 (LEV).docx
ATT00001.htm

UPDATED version. Michael - please print a copy to replace the one Gina liberated from Janet this AM. Thanks.

- Joseph Goffman
Sent from my iPhone

Begin forwarded message:

From: "Vaught, Laura" <Vaught.Laura@epa.gov>
Date: January 7, 2016 at 1:34:41 PM EST
To: "Goffman, Joseph" <Goffman.Joseph@epa.gov>, "McCabe, Janet" <McCabe.Janet@epa.gov>, "Giles-AA, Cynthia" <Giles-AA.Cynthia@epa.gov>, "Rennert, Kevin" <Rennert.Kevin@epa.gov>, "Garbow, Avi" <Garbow.Avi@epa.gov>
Subject: RE: DOI PEIS TPs 1 7 16 v2

With one bullet added under the section on Ex. 5 - Deliberative

From: Goffman, Joseph
Sent: Thursday, January 07, 2016 10:50 AM
To: McCabe, Janet <McCabe.Janet@epa.gov>; Giles-AA, Cynthia <Giles-AA.Cynthia@epa.gov>; Vaught, Laura <Vaught.Laura@epa.gov>; Rennert, Kevin <Rennert.Kevin@epa.gov>; Garbow, Avi <Garbow.Avi@epa.gov>
Subject: DOI PEIS TPs 1 7 16 v2

With Cynthia's point added as bullet under Ex. 5 - Deliberative

To: Administrator McCarthy, Gina Administrator
Cc: Emerson, Michael[Emerson.Michael@epa.gov]
From: Goffman, Joseph
Sent: Thur 12/17/2015 8:07:33 PM
Subject: Fwd: meeting w/ AEE this afternoon -- CPP stay litigation

Please see suggestion below. Thanks

- Joseph Goffman
Sent from my iPhone

Begin forwarded message:

From: "Hoffman, Howard" <hoffman.howard@epa.gov>
Date: December 17, 2015 at 2:58:18 PM EST
To: "Goffman, Joseph" <Goffman.Joseph@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>, "Harvey, Reid" <Harvey.Reid@epa.gov>, "Culligan, Kevin" <Culligan.Kevin@epa.gov>
Subject: meeting w/ AEE this afternoon -- CPP stay litigation

Atty Work Product

Atty Work Product

Atty Work Product

Atty Work Product

To: Administrator McCarthy, Gina **Administrator**
From: McCabe, Janet
Sent: Thur 12/17/2015 3:41:47 AM
Subject: FW: Afternoon Energy, presented by Nuclear Matters: Reid warns GOP on green incentives for oil exports — Mercury rule survives but co-benefits fight looms — Stern says he doesn't know source of one-word blunder in Paris

This statement from NERC is kind of amazing.

From: Niebling, William
Sent: Wednesday, December 16, 2015 3:43 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Harvey, Reid <Harvey.Reid@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Kurlansky, Ellen <Kurlansky.Ellen@epa.gov>
Subject: FW: Afternoon Energy, presented by Nuclear Matters: Reid warns GOP on green incentives for oil exports — Mercury rule survives but co-benefits fight looms — Stern says he doesn't know source of one-word blunder in Paris

Fyi, the blurb pasted here from the email below:

NERC FRETS GAS GROWTH, LESS FREAKED BY CPP: The growing U.S. reliance on natural gas is still a cause for reliability concern, the North American Electric Reliability Corp. said in its latest long-term assessment. NERC acknowledged that "substantial progress" had been made on addressing the interdependencies between the electric and natural gas industries but nevertheless said it was worried about maintaining bulk power system reliability as competition between heating and electricity demands rise. The group also noted that its two central concerns, noted in a report this spring , about the EPA's Clean Power Plan seem to have been addressed. "NERC recommended further consideration for the timing needed to implement the infrastructure changes requisite for compliance with the draft rule. Additionally, NERC recommended the inclusion of a Reliability Assurance Mechanism to ensure the maintenance of system reliability was prioritized. The final rule addressed both of these concerns," NERC's new report says. NERC intends to release a guidance and recommendation document for states in January 2016 as well as a "scenario-based analysis" of the Clean Power Plan near the end of the first quarter of 2016.

From: POLITICO Pro Energy [mailto:politicoemail@politicopro.com]
Sent: Tuesday, December 15, 2015 2:59 PM

To: Niebling, William <Niebling.William@epa.gov>
Subject: Afternoon Energy, presented by Nuclear Matters: Reid warns GOP on green incentives for oil exports — Mercury rule survives but co-benefits fight looms — Stern says he doesn't know source of one-word blunder in Paris

By Jennifer Shutt | 12/15/2015 02:57 PM EDT

With help from Alex Guillén, Elana Schor, Darren Goode and Darius Dixon

REID WARNS GOP THAT GREEN INCENTIVES MUST BE PART OF OIL EXPORT DEAL: Senate Minority Leader Harry Reid this morning pleaded with Republicans to "take yes for an answer" and accept Democrats offer to extend wind and solar tax credits as part of a deal on ending the oil export ban. "Republicans must decide which they prefer," Reid said in a floor speech. "If Republicans think reducing our carbon emissions and encouraging the use of renewable energy is an unacceptable price to pay, we can move the rest of the [budget] package without the oil export ban. ... It's decision time." Reid's remarks amount to a warning amid GOP confidence that victory on oil exports already has been secured in a combined spending and tax deal that isn't expected to see formal release until later today.

- **Cramer: Oil export deal not locked down:** One of the strongest House GOP backers of oil exports told POLITICO this morning that the terms of a deal to end the decades-old ban on crude exports are "not locked down" and that Speaker Paul Ryan made no promises on exports during a call with his conference late Monday. Rep. Kevin Cramer, a close ally of the oil industry in his home state of North Dakota, pointed to the delicate vote-counting math ahead for Republicans by warning that reliance on Democratic votes to pass an oil export deal means "the price will be such that victory will be rather hollow."

- **Mikulski: Seven 'Super Bowl' riders remain:** Negotiators are wrangling over seven "mega-riders" related to environmental and healthcare disputes, Sen. Barbara Mikulski, the top Democrat on the Senate appropriations committee told reporters this afternoon. She did not divulge specifics but described them as "like Super Bowl riders."

"They're big," she told reporters before heading into caucus lunches this afternoon. "They're like Super Bowl riders."

Welcome to Afternoon Energy. I'm your host Jennifer Shutt, and here is great roundup of Secretary of State John Kerry's Dunkin' Donuts adventures. Send your energy news and tips to jshutt@politico.com, mdaily@politico.com and njuliano@politico.com, and keep up with us on Twitter at @JenniferShutt, @dailym1, @nickjuliano, @Morning_Energy and @POLITICOPro.

MERCURY RULE SURVIVES, BUT CO-BENEFITS FIGHT LOOMS: EPA's mercury rule survived a key legal test today, but agency critics are preparing a new line of attack that could undermine the foundation of that rule along with other key elements of the Obama administration's regulatory agenda. EPA can keep regulating mercury emissions from power

plants while it fixes a rule setting those limits, a three-judge panel of the D.C. Circuit Court of Appeals ruled Tuesday. The agency failed to consider the rule's costs early enough in the process, but the panel said that mistake passed a judicial test for whether a rule should be kept in place even as it is sent back to an agency for fixing.

- **While the decision is a major win for the Obama administration** , EPA may not have much time to rest on its laurels. Opponents of the rule are expected eventually to begin a new lawsuit challenging EPA's use of co-benefits.

- **In welcoming the D.C. Circuit's ruling Tuesday, EPA** pointed highlighted the other pollutant reductions. "These practical and achievable standards are already cutting pollution from power plants that will save thousands of lives each year and prevent heart and asthma attacks," EPA spokeswoman Melissa Harrison said in a statement. "The standards also slash emissions of the neurotoxin mercury, which can impair children's ability to learn. All told, for every dollar spent to make these cuts in emissions, the public is receiving up to $9 in health benefits."

- **Critics aren't buying any part of EPA's analysis** , and plan to go after EPA's use of co-benefits. "The fact of the matter is that the Obama EPA is unable to justify this illegal rule through any cost-benefit analysis, which is why they never did any such analysis in the first place," said Gary Broadbent, assistant general counsel for Murray Energy. "Their use of co-benefits is a farce." Murray will sue again over the new "appropriate and necessary" finding, he added.

** **A Message from Nuclear Matters:** Providing more than 62% of America's carbon-free electricity, existing, state-of-the-art nuclear energy plants play a vital role in achieving our clean-energy and carbon-reduction goals. The industry also supports more than 475,000 jobs nationally and provides critical tax revenue locally for roads, schools and other public priorities. Learn more at NuclearMatters.com. **

STERN: SOURCE OF PARIS CLIMATE TALKS' ONE-WORD BLUNDER A MYSTERY: Todd Stern said he doesn't know who swapped out "should" for "shall" in a late version of the Paris climate text, inserting a one-word edit into the proposal that would have rendered the deal dead in the U.S. "Somehow or another a gremlin got into the French typewriters and computers and the word popped out," Stern, the State Department's special envoy for climate change, said at a Center for American Progress event. The edit was in a crucial line declaring that wealthier countries "shall" set economy-wide targets for cutting their greenhouse gas pollution, rather than saying "should," a change that would have made the provision legally binding and required the two-thirds approval of the U.S. Senate.

NERC FRETS GAS GROWTH, LESS FREAKED BY CPP: The growing U.S. reliance on natural gas is still a cause for reliability concern, the North American Electric Reliability Corp. said in its latest long-term assessment. NERC acknowledged that "substantial progress" had been made on addressing the interdependencies between the electric and natural gas industries but nevertheless said it was worried about maintaining bulk power system reliability as competition between heating and electricity demands rise. The group also noted that its two central concerns, noted in a report this spring , about the EPA's Clean Power Plan seem to have been addressed.

"NERC recommended further consideration for the timing needed to implement the infrastructure changes requisite for compliance with the draft rule. Additionally, NERC recommended the inclusion of a Reliability Assurance Mechanism to ensure the maintenance of system reliability was prioritized. The final rule addressed both of these concerns," NERC's new report says. NERC intends to release a guidance and recommendation document for states in January 2016 as well as a "scenario-based analysis" of the Clean Power Plan near the end of the first quarter of 2016.

NYC COMPTROLLER TO ANNOUNCE HE'LL VOTE FOR COAL DIVESTMENT: POLITICO New York's Laura Nahmias and David Giambusso report : City Comptroller Scott Stringer, who oversees the city's nearly $160 billion pension funds, will announce today that he intends to vote in favor of divesting the city's pension funds from coal. "A pending resolution to divest from coal is now before us. And I can tell you that my vote will be to divest. It's not just the smart thing to do from a fiduciary point of view, it's the right thing - for our planet, for our children, and yes for our retirees," Stringer will say during a speech to the Citizen's Budget Commission, according to a copy of his prepared remarks provided to POLITICO New York. Stringer's support for coal divestment follows mounting pressure from environmental groups like 350.org as well as recent announcements by Mayor Bill de Blasio and several council members urging the city's five pension boards to drop the carbon-intensive fuel source. Until now, Stringer has opted for a greater voice on the boards of companies - so-called proxy access - in which city pensions are invested, arguing it would give the city a greater voice in the direction of those companies.

U.S. ANTITRUST OFFICIALS UNHAPPY WITH HALLIBURTON-BAKER HUGHES MERGER PLANS: Government approval of the merger between Halliburton Co. and Baker Hughes Inc. will continue through, at least, next year after antitrust officials said Tuesday they are not satisfied with the $26 billion deal. Bloomberg reports that "The combination has been fraught from the beginning. The companies faced early resistance from U.S. officials, who were concerned the tie-up could hurt competition because it would reduce the top three players to two, a person familiar with the matter told Bloomberg News in July. The officials were concerned even then that the oilfield services industry would become too concentrated and that proposed asset sales didn't go far enough, the person said." The merger is also being reviewed by Australia, Brazil and Europe.

MOVER, SHAKER: Emily Beyer, the Interior Department's deputy press secretary, is now a senior associate at Precision Strategies, the firm started by former Obama campaign alumni Stephanie Cutter, Teddy Goff and Jen O'Malley Dillon. (h/t POLITICO Influence)

QUICK HITS:

- "The proportion of infants and children with above-average levels of lead in their blood has nearly doubled since the city switched from the Detroit water system to using the Flint River as its water source, in 2014." The Washington Post.

- Shell bid aims to preserve U.S. drilling rights in Arctic Ocean. Bloomberg.

- Yes, Mr. President, we remade our atlas to reflect shrinking ice. National Geographic.

- Mexico launches bidding for onshore fields. Fuel Fix.

- Axiall plant accident sends 11 to hospital in Wetzel County, W.Va. State Journal.

WIDE WORLD OF POLITICS:

- 5 things to watch in tonight's debate

- Carson, Huckabee, Fiorina earned speaking fees during campaign

- Gun control becomes a litmus test in Democratic primaries

- Bonus! NASA's Charles Bolden talks Star Wars, aliens and traveling to Mars

** **A Message from Nuclear Matters:** Some of America's existing nuclear energy plants face early closure due to current economic and policy conditions. Providing more than 62% of America's carbon-free electricity, existing, state-of-the-art nuclear energy plants play a vital role in achieving our clean-energy and carbon-reduction goals. The industry also supports more than 475,000 jobs nationally and provides critical tax revenue locally for roads, schools and other public priorities.

If we want to keep America working, we need policymakers to support policies that will keep safe and reliable nuclear energy plants working for all of us. Voice your support for sensible policies that drive our national economy and join us at NuclearMatters.com. **

To view online:
https://www.politicopro.com/tipsheets/afternoon-energy/2015/12/reid-warns-gop-on-green-incentives-for-oil-exports-015062

Stories from POLITICO Pro

Reid warns GOP that green incentives must be part of oil export deal Back

By Elana Schor and Darren Goode | 12/15/2015 02:57 PM EDT

Senate Minority Leader Harry Reid this morning pleaded with Republicans to "take yes for an answer" and accept Democrats offer to extend wind and solar tax credits as part of a deal on ending the oil export ban.

"Republicans must decide which they prefer," Reid said in a floor speech. "If Republicans think reducing our carbon emissions and encouraging the use of renewable energy is an unacceptable price to pay, we can move the rest of the [budget] package without the oil export ban. ... It's decision time."

Reid's remarks amount to a warning amid GOP confidence that victory on oil exports already has been secured in a combined spending and tax deal that isn't expected to see formal release until later today. House Republicans are set to meet at 5 p.m. today to discuss the deal, while senators are poised to discuss the parameters during party lunches.

Sources have described the latest Democratic terms as including a five-year extension of wind and solar tax credits, language sought by the solar industry making the solar credit available to projects based on when construction has commenced. A shorter-term Land and Water Conservation Fund reauthorization and the removal of most other environmental policy riders also are expected to be part of a final deal.

Democrats are also reportedly pressing for the bill to let the Obama administration reprogram existing spending to make good on its $3 billion pledge for international climate change aid.

Back

Rep. Cramer: Oil export deal not locked down Back

By Elana Schor | 12/15/2015 02:57 PM EDT

One of the strongest House GOP backers of oil exports told POLITICO this morning that the terms of a deal to end the decades-old ban on crude exports are "not locked down" and that Speaker Paul Ryan made no promises on exports during a call with his conference late Monday.

Rep. Kevin Cramer, a close ally of the oil industry in his home state of North Dakota, pointed to the delicate vote-counting math ahead for Republicans by warning that reliance on Democratic votes to pass an oil export deal means "the price will be such that victory will be rather hollow."

Given the current global glut of oil supply, Cramer noted, "the real impact [of exports] in the short run, at least, and maybe the middle run, isn't going to be that great. Who's going to buy our oil and pay the extra freight cost ... when Saudi Arabia is practically giving oil away? It becomes problematic."

Senate Minority Leader Harry Reid urged Republicans to accept Democrats' latest offer of a five-year extension for wind and solar tax breaks as part of an oil-exports deal, saying that government funding would not be put at risk if an agreement on ending the ban proves elusive.

Back

Dem appropriator: Omnibus talks down to 7 'Super Bowl riders' Back

By Annie Snider | 12/15/2015 02:57 PM EDT

Negotiations over an end-of-year spending deal are down to seven riders related to environmental and healthcare disputes, the top Democrat on the Senate appropriations committee told reporters this afternoon.

But those are "mega-riders" encompassing unresolved issues in two previously proposed bills to fund the Interior Department and EPA as well as the departments of Labor and Health and Human Services, Sen. Barbara Mikulski said. The Maryland Democrat did not provide specifics, but Republicans have previously proposed riders to those two appropriations bills blocking EPA climate change and water rules, and changing how certain insurers are paid under Obamacare, although other issues also could be at play.

"They're big," she told reporters before heading into caucus lunches this afternoon. "They're like Super Bowl riders."

She said decisions about how the deal comes together are in the hands of leadership, including whether a major effort to lift the oil export ban gets wrapped into the omnibus or a parallel tax package.

Mikulski said she thought the final issues could still be resolved in time to unveil a deal today.

"We could go tonight," she said. "If they blow the whistle and resolve those things, we can resolve some other things."

Back

Mercury rule survives, but co-benefits fight looms Back

By Alex Guillén | 12/15/2015 02:57 PM EDT

EPA's mercury rule survived a key legal test Tuesday, but agency critics are preparing a new line of attack that could undermine the foundation of that rule along with other key elements of the Obama administration's regulatory agenda.

EPA can keep regulating mercury emissions from power plants while it fixes a rule setting those limits, a three-judge panel of the D.C. Circuit Court of Appeals ruled Tuesday. The agency failed to consider the rule's costs early enough in the process, but the panel said that mistake passed a judicial test for whether a rule should be kept in place even as it is sent back to an agency for fixing.

While the decision is a major win for the Obama administration, EPA may not have much time to rest on its laurels. Opponents of the rule are expected eventually to begin a new lawsuit challenging EPA's use of co-benefits.

The Supreme Court in June ordered EPA to reanalyze whether it was "appropriate and necessary" to write the mercury rule, and to consider costs and benefits from the start. The agency is planning a new finding by April, and the circuit's ruling means the Supreme Court's ruling was more of a speed bump than a roadblock for the mercury rule.

While the justices acknowledged EPA has discretion over exactly how to weigh costs and

benefits, Chief Justice John Roberts singled out its reliance in this case on ancillary benefits, and Justice Antonin Scalia's majority opinion cited the direct benefits of the rule - fueling speculation that they are eager to take on the issue.

EPA has considered co-benefits as far back as 1978, according to a brief in the mercury case from New York University's Institute for Policy Integrity. "EPA simply followed longstanding professional practices for assessing indirect regulatory effects," the institute wrote.

It is also only sensible to include co-benefits in a calculation because EPA would have to include the ancillary costs of any of its rules, IPI's Michael Livermore said in an interview.

"Why would it be that if the Clean Power Plan reduces particulate matter pollution, it doesn't take that into account? It just doesn't make any sense," he said. Once a court fully weighs the co-benefits issue, Livermore added, "they'll realize that it would be very inefficient for the agency to ignore these benefits."

The issue has flared to new levels over the mercury rule because EPA could only quantify $6 million in direct benefits, though there were a number of benefits it did not or could not assign a dollar figure. However, installing the mercury controls also significantly reduces power plants' emissions of particulate matter, a co-benefit worth tens of billions of dollars that helped EPA justify the costs rule.

In welcoming the D.C. Circuit's ruling Tuesday, EPA pointed highlighted the other pollutant reductions.

"These practical and achievable standards are already cutting pollution from power plants that will save thousands of lives each year and prevent heart and asthma attacks," EPA spokeswoman Melissa Harrison said in a statement. "The standards also slash emissions of the neurotoxin mercury, which can impair children's ability to learn. All told, for every dollar spent to make these cuts in emissions, the public is receiving up to $9 in health benefits."

The rule was estimated to cost utilities nearly $10 billion to install mercury controls, vastly more than the $6 million in quantifiable benefits directly tied to mercury reductions. EPA argued that while the ancillary benefits helped tip the balance in a formal cost-benefit analysis, it also believes the rule is justified because the costs represent a small fraction - about 2.7 percent - of the electricity industry's annual revenues.

Even the direct benefits calculation is vulnerable to rejection in court, said William Yeatman of the Competitive Enterprise Institute, a free-market group. Yeatman rejected EPA's analysis, in which the agency assumed damages related to pregnant women catching and eating mercury-contaminated fish from polluted waterways.

"EPA's has produced no evidence these voracious pregnant anglers actually exist; rather, they are modeled to exist," Yeatman said in a statement. "I suggest these 'victims' don't exist, and that the putative mercury benefits are much closer to zero."

Critics aren't buying any part of EPA's analysis, and plan to go after EPA's use of co-benefits.

"The fact of the matter is that the Obama EPA is unable to justify this illegal rule through any cost-benefit analysis, which is why they never did any such analysis in the first place," said Gary Broadbent, assistant general counsel for Murray Energy. "Their use of co-benefits is a farce."

Murray will sue again over the new "appropriate and necessary" finding, he added.

EPA's foes are also eyeing co-benefits as another avenue to attack the agency's power plant carbon rules, which rely in part on health benefits as high as $34 billion that come from incidental reductions in nitrogen oxides and sulfur dioxides.

The Clean Power Plan "has the same inherent flaws" as the mercury rule when it comes to co-benefits, Broadbent said.

C. Boyden Gray, a former ambassador and energy diplomat in the Bush administrations, wrote in July that EPA should not be able to count ancillary benefits of the Clean Power Plan because that part of the Clean Air Act "expressly prohibits" EPA from regulating certain pollutants, including particulate matter. Gray represented the National Federation of Independent Business in the failed lawsuit challenging EPA's proposed carbon rule.

The co-benefits controversy has gained traction in part because key members of the judiciary have openly signaled their interest in reviewing the practice. Roberts questioned whether EPA was making an "end-run" around the law when it "bootstrapped" the ancillary benefits into its analysis.

"It's a good thing if your regulation also benefits in other ways," Roberts said at oral arguments over the mercury rule in March. "But when it's such a disproportion, you begin to wonder whether it's an illegitimate way of avoiding the quite different limitations on EPA that apply in the criteria program."

The Obama administration disputed Roberts' argument, with Solicitor General Don Verrilli saying that counting co-benefits "is a well-recognized methodology that goes back decades."

D.C. Circuit Judge Brett M. Kavanaugh earlier this month pointed to Roberts' concern and predicted courts would be asked to weigh in on the question soon.

The Supreme Court's ultimate ruling in the MATS case sidestepped the co-benefits issue, and it's not clear whether the justices simply didn't have enough information to make up their minds at the time or if Roberts was unable to round up a majority on the matter.

Regardless, the chief justice clearly telegraphed skepticism about the longstanding policy, and EPA's foes have taken note.

Andrea Bitely, a spokeswoman for Michigan Attorney General Bill Schuette, said he is "aware" of Roberts' comments and will "continue to evaluate all arguments in our challenge to the rule."

Back

Stern: Source of Paris climate talks' one-word blunder a mystery Back

By Alex Guillén | 12/15/2015 02:57 PM EDT

Todd Stern said he doesn't know who swapped out "should" for "shall" in a late version of the Paris climate text, inserting a one-word edit into the proposal that would have rendered the deal dead in the U.S.

"Somehow or another a gremlin got into the French typewriters and computers and the word popped out," Stern, the State Department's special envoy for climate change, said at a Center for American Progress event.

The edit was in a crucial line declaring that wealthier countries "shall" set economy-wide targets for cutting their greenhouse gas pollution, rather than saying "should," a change that would have made the provision legally binding and required the two-thirds approval of the U.S. Senate.

"It is a very interesting mystery as to what happened, because somebody somewhere in the French or secretariat system decided to do that, because you don't autocorrect from 'should' to 'shall,'" he added.

The international community had long known that the bulk of the climate agreement could not be legally binding if it was going to get support from the U.S., where Congressional Republicans have vowed to block any pact that required ratification.

Stern noted that the U.S. has pushed for years to adopt a new agreement that did away with the parts of Kyoto Protocol that was first adopted in 1997, particularly the divide between developed and developing nations. Stern had also pushed for most of the deal to avoid any legally binding language, both because it would have been impossible to clear through the Senate and because those types of provisions didn't work under Kyoto.

After noticing the erroneous word, Stern immediately contacted the French and United Nations officials in charge of the text, but they said they knew nothing about the matter.

There was a 90-minute period when Stern feared that the Paris climate talks could fall apart just before the historic signing, all because of one little word change. Getting it fixed would essentially require approval from all the other nations.

"I couldn't imagine it would all fall apart over this," he said. "But still, there's a tremendous amount of history of distrust and skepticism in these negotiations."

So Stern and Secretary of State John Kerry furiously worked the room for an hour and a half in what Stern called "hustling-around diplomacy," convincing foreign negotiators that the U.S. was not getting an improper concession.

They feared that other nations may demand additional concessions of their own in return, which "would have unraveled the whole thing," according to Stern.

The change ultimately was approved with little fanfare and the deal was struck.

Still, Stern cautioned that the agreement is not the end of the battle over climate change.

"The name of the game now is that countries have to take next steps, which are almost always at the national level, to meet the targets that they put forward," he said.

Back

One stray word rattled climate talks' 11th hour Back

By Andrew Restuccia | 12/15/2015 02:57 PM EDT

LE BOURGET, France - After years of preparation and two weeks of tireless negotiations, after all the speeches and backroom compromising, one misplaced word brought the momentum toward a historic global deal on climate change to a halt Saturday - for at least a few hours.

Obama administration lawyers discovered early in the day that the latest draft text had a potentially deal-killing tweak: Deep into the document, in Article 4, was a line declaring that wealthier countries "shall" set economy-wide targets for cutting their greenhouse gas pollution.

That may not sound like such a headache-inducing roadblock, but in the world of international climate negotiations, every word counts. In previous drafts, the word "shall" had been "should" - and in the lingo of U.N. climate agreements, "shall" implies legal obligation and "should" does not. That means the word change could have obliged the Obama administration to submit the final deal to the Senate for its approval. And inevitably, the GOP-led chamber would kill it on sight.

"When I looked at that, I said, 'We cannot do this and we will not do this,'" Secretary of State John Kerry told reporters afterward. "'And either it changes or President Obama and the United States will not be able to support this agreement.'"

And so the scrambling began. With the clock ticking and the start of the talks' final meeting already delayed by several hours, top U.S. negotiators huddled in a cavernous plenary hall in this suburb of Paris trying to get the language changed. At the same time, supporters of the deal feared that re-opening the text would lead to a flood of revisions from other countries, possibly swamping the entire effort.

In the end, the U.S. persuaded the summit's French hosts to change the wording, and the tweak was read aloud by a delegate in the plenary hall, lost in a package of other technical revisions. Minutes later, French Foreign Minister Laurent Fabius banged his gavel and the most significant international climate change deal in history won the resounding approval of 196 governments,

representing nearly every country on the planet.

The 11th-hour kerfuffle capped an often-torturous 13 days of negotiations that stretched through the night and into the early morning almost every day this week. This year's talks weren't marked by the sharp-toothed bickering that has defined two decades of climate negotiations, including the 2009 failure in Copenhagen that has shadowed Obama's climate efforts for the past six years. But they weren't smooth sailing either.

One U.S. official told POLITICO that even as late as Friday night, the talks were "dicey" - and not just because of the wording error, which a different senior administration official called "understandable in an environment when the French presidency's staff have been working non-stop through the two weeks."

Another speed bump was defusing objections from China.

Even though the U.S. had dramatically improved its relationship with China in the last 18 months through a series of one-on-one huddles that produced a joint climate pledge last year by President Barack Obama and Chinese leader Xi Jinping, administration negotiators were haggling with Beijing - and India - into the morning on Saturday, sources familiar with the issue said. The topic was two of the most thorny issues in the negotiations: how to verify that all countries would meet their promises and how to pay for the hundreds of billions of dollars that poorer nations will need to address the threat of climate change.

China is the world's top producer of carbon pollution and India is No. 3, with the U.S. in the middle, but the two Asian powerhouses are also developing nations that have relied heavily on fossil fuels like coal to try to lift their populations out of poverty.

Todd Stern, Obama's lead climate negotiator, Obama senior climate adviser Brian Deese and fellow senior White House climate official Paul Bodnar were all spotted on Saturday morning meeting again with Chinese delegates.

China and India frustrated many richer countries when they objected to key provisions in an earlier draft text during closed-door meetings this week. That tense set of meetings set off a new round of diplomacy among the United States, India and China. The final compromise relied in part on assuaging China and India's worries that they would be held to the same standards as developed countries like the United States.

Several factors helped bring China and India on board with the final deal: frustration over the air pollution in both countries and a sense among senior officials there that they didn't want to be painted as the villains thwarting a deal aimed at saving the world.

But another factor played perhaps a more decisive short-term effect on the dynamics of the negotiations: the European Union and United States' strategy of building such a huge coalition of supporters that China, India and its other allies had little choice but to follow suit. The bloc, led by the European Union and the Marshall Islands, wanted a commitment to a stringent temperature goal and strong transparency provisions, among other things.

Obama made an early push to win over island nations - and by extension the other countries that are most vulnerable to the effects of climate change - with a personal meeting with the leaders of five countries, including the Marshall Islands and Saint Lucia. Kerry also had frequent meetings with officials from the island nations, including Tony de Brum, the Marshall Islands' minister of foreign affairs, and Tuvalu Prime Minister Enele Sopoaga. Kerry and Sopoaga worked together to come up with compromise language on the contentious issue of how to compensate more vulnerable countries for the losses and damage they face from climate change, according to sources.

The United States began talking with an informal coalition of countries fighting for a strong climate deal several months ago, and the discussions progressed during an hours-long dinner in Paris late last week with Stern, EU climate commissioner Miguel Arias Cañete and others. By the end of this week, the coalition's membership had swelled to well over 100 governments, including the EU, Africa, Caribbean and Pacific island nations, Canada and Brazil, diminishing the collective bargaining power of other negotiating blocs and influential countries like India, China and South Africa. Representatives of those latter countries even griped to reporters that they weren't formally invited to join the so-called "high ambition coalition."

And by Saturday, the fierce disagreements that marred behind-the-scenes negotiations had dissipated - at least publicly.

While the French kept their draft deal under lock and key for much of Saturday, the mood in the hallways of the conference center was downright giddy, and the "high ambition coalition" had become the stars of the show.

The United Kingdom's offices became the makeshift headquarters for the "high ambition" countries, firming up their position before the final gathering of all 176 governments. Stern was met with applause when he entered a meeting there Saturday afternoon.

As the clock nearexxd 11.30 a.m. Paris time, the "high ambition" ministers filed out through the chipboard doors of the office and posed for a group photo. They proceeded to make the slow walk down the winding conference halls, surrounded by a ballooning throng of reporters, negotiators and observers and growing cheers and whistles, and finally filed into a key gathering of negotiators.

"It's a massive, massive thing. One year of work," one EU source whispered on the sidelines, punching the air with excitement.

The gentle optimism remained in the hours after Fabius presented his draft text, while negotiators pored over each page to decide whether they would vote it through or not.

India's environment minister, Prakash Javadekar, strolled by the U.K. office, where a number of coalition members were still meeting, and gave Brazil's chief negotiator a hug and then shook Stern's hand. Days of animosity had turned into excitement. The climate agreement was in the bag.

"This is a good agreement," Javadekar told reporters. Three hours later, the deal was done.

Sara Stefanini contributed to this story.

Back

NERC presses EPA to address power reliability in carbon rule: Back

By Alex Guillén | 12/15/2015 02:57 PM EDT

The transition from coal toward natural gas and renewables that is prescribed under EPA's carbon rules for power plants will present "reliability challenges" for the nation's electric grid, according to a report issued today by the North American Electric Reliability Corp.

NERC, the industry group charged with monitoring the grid, says companies will need more time than is currently allotted to understand the changes to generation and transmission required under EPA's Clean Power Plan. And NERC says that many coal-fired plants will move from baseload power to seasonal peaking, which will lift electricity costs, and that the increased use of gas will require more pipeline capacity, particularly in winter.

"Together, industry stakeholders and regulators will need to develop an approach that accommodates the time required for infrastructure deployments, market enhancements, and reliability needs if the environmental objectives of the proposed rule are to be achieved," NERC concludes.

The report makes several recommendations, including that EPA add a "reliability assurance mechanism" in its final rule in order to avoid outages during implementation, which many utilities have asked for. NERC also recommends policymakers get more time to write implementation plans to address reliability risks.

The report is the first in a three-part series of NERC analyses of the Clean Power Plan. The next installment, in 2016, will review the final rule before state implementation deadlines.

Back

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To: Administrator McCarthy, Gina Administrator ; McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Garbow, Avi[Garbow.Avi@epa.gov]
From: Purchia, Liz
Sent: Fri 10/30/2015 11:07:18 AM
Subject: Fwd: WSJ Editorial: The EPA Deserves a Stay

Not surprisingly the WSJ wrote an editorial based on the news of the AGs suing, saying that there is so much scrutiny around the CPP that it should be stayed.

We will work with OAR on an LTE about Ex. 5 - Deliberative Ex. 5 - Deliberative

The EPA Deserves a Stay

The agency tries to run out the clock on its 'Clean Power' diktat.

http://www.wsj.com/articles/the-epa-deserves-a-stay-1446160482?alg=y

President Obama's palace revolution on climate won't come off peaceably after all, as 26 states and dozens of business groups this week filed suits against his takeover of the carbon economy. For all Mr. Obama's eco-abuses, the legal reckoning now at hand is the most important.

On Aug. 3 the Environmental Protection Agency finalized the so-called Clean Power Plan, or CPP, which orders states to reorganize their energy systems from power plants to electric outlets. But the EPA waited no fewer than 81 days until Oct. 23 to publish the rule in the Federal Register, a delay that matters in administrative law because publication formally opens the plan to judicial review. The average lag for the EPA this year on all other major rules is 27 days.

The EPA is stalling for time because the Obama crowd knows that states must rush to start the slow, capital-intensive and irrevocable transition away from fossil fuels over the next year or so to meet their 2020 "interim" targets. Even if the CPP is repealed by the next Administration, or junked by the courts, they're hoping to intimidate the states and dictate the U.S. energy mix for a generation.

So the 26 Attorneys General and business lobbies are asking the D.C. Circuit Court of Appeals for a stay that would enjoin the CPP while the judiciary considers the legal merits. This would be unusual. Conventional regulatory litigation spools out over the years, with judges tending to defer to rule-makers.

But the EPA has invited more scrutiny by deliberately exploiting this deference. Its thinking is that if the energy reality on the ground shifts while the courts move at the

snail's pace, then losses are irrelevant. For instance, the Supreme Court overturned a mercury-emissions regulation earlier this year, albeit when it was too late. When the EPA published the rule in 2011, the low-ball prediction was that coal use would fall by less than 1%. Instead it plunged by 12% in 2012 alone and continued to drop.

Thus EPA Administrator Gina McCarthy could brag on Bill Maher's show that however the Court ruled, "Most of [the utilities] are already in compliance, investments have been made, and we'll catch up. We're still going to get at the toxic pollution from these facilities." So much for the rule of law.

The Clean Power plaintiffs can demonstrate immediate and permanent injury. The EPA's own models show utilities will shed 233 coal-fired power plants in 2016 alone, or 20% of the grid's remaining coal generation. Some marginal generators like rural electric nonprofit cooperatives may go under.

The plaintiffs are also likely to prevail on the legal merits, both statutory and constitutional. The 2,000-page CPP is conjured from a couple hundred words in a subsection of a 38-year-old statute about "best systems of emissions reduction." Traditionally this has meant technology that can be installed on a given site, like scrubbers.

Now the EPA is rewriting the definition to direct states to regulate "outside the fence line" of power plants well beyond the best tech. They must not only decommission sources of carbon energy, but they must also run the green gamut from mandating a new fleet of wind and solar, building new transmission lines, creating more efficiency subsidy programs for consumers and much else. On a rewrite so grandiose, the EPA has earned a stay and deserves no administrative deference.

Such a claim of authority with no limiting principle will naturally expand over time. Under the pretext of regulating power plants, can the EPA instruct states to adopt green-city building codes that curtail the use of CO2-heavy cement? How about an organic fertilizer mandate for agriculture, or controls on "enteric fermentation"—er, flatulence—in cattle and other livestock? The EPA has entertained all of these possibilities in draft documents, and no sphere of public or private life will be spared.

Oklahoma Attorney General Scott Pruitt best limns the larger constitutional stakes. He grounds his argument in the Supreme Court's anti-coercion doctrine, which teaches that the feds cannot commandeer sovereign state resources. The EPA says state agencies must rewrite their laws and programs to carry out orders from Washington headquarters, or else it will impose a more draconian federal plan. The Supreme Court reversed ObamaCare's Medicaid expansion mandate because it denied states "a legitimate choice whether to accept the federal conditions." One irony is that even if EPA weren't rewriting black-letter law to bullrush the CPP, the rewrite itself would be unconstitutional.

The CPP will undermine growth, consumer incomes and U.S. competitiveness in ways that will be difficult for the next President to reverse, if he or she is so inclined. Perhaps

this time the courts will give the EPA's willfulness more than the customary wink and nod.

To: Administrator McCarthy, Gina Administrator
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]
From: Janet McCabe
Sent: Fri 10/30/2015 2:15:24 AM
Subject: cpp 2 WH Check In 10 29 15 jm
cpp 2 WH Check In 10 29 15 jm.docx

Gina—I apologize for sending this from my gmail account, but remote email is doing me wrong tonight.

Attached is a short handout we can use tomorrow to walk through the CPP update with Brian et al.

Shortly, I will send you a powerpoint for the second meeting on methane.

To: Garbow, Avi[Garbow.Avi@epa.gov]
Cc: Administrator McCarthy, Gina Administrator ; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: McCabe, Janet
Sent: Thur 10/29/2015 7:52:06 PM
Subject: Re: October 29 -- Greenwire is ready

You go Avi! I love your quotes at the end.

Sent from my iPhone

On Oct 29, 2015, at 1:50 PM, Garbow, Avi <Garbow.Avi@epa.gov> wrote:

Thought you would be interested in this article from my participation with Cruden today at ABA meeting in Chicago.

Avi S. Garbow
General Counsel
U.S. Environmental Protection Agency

Sent from my iPhone

Begin forwarded message:

From: "Purchia, Liz" <Purchia.Liz@epa.gov>
Date: October 29, 2015 at 12:24:50 PM CDT
To: "Garbow, Avi" <Garbow.Avi@epa.gov>, "Harrison, Melissa" <Harrison.Melissa@epa.gov>
Subject: RE: October 29 -- Greenwire is ready

Obama attorneys confident as legal 'Super Bowl' kicks off

Robin Bravender, E&E reporter

Published: Thursday, October 29, 2015

CHICAGO -- President Obama's top environmental attorneys today said they're ready for what one dubbed the "Super Bowl" of climate litigation.

The legal battle over the administration's Clean Power Plan -- a rule to slash power plants' greenhouse gas emissions -- formally kicked off last week. It pits U.S. EPA and its allies against 26 states and numerous industry challengers.

"This is the Super Bowl of climate change litigation right now," Assistant Attorney General John Cruden said today at an environmental law conference here. Cruden, who heads the Justice Department's environmental branch, will be defending the EPA rules against the challenges lodged in the U.S. Court

of Appeals for the District of Columbia Circuit.

Administration attorneys say some of their top talent has been preparing for the court fights and are confident they'll prevail in the legal skirmish that's expected to drag on for years and may ultimately be decided by the Supreme Court.

"I fully feel that once we get to the merits of this case, the agency is going to be in good shape," EPA General Counsel Avi Garbow said today at the conference hosted by the American Bar Association. "We are quite proud of what we've done with the Clean Power Plan, and now the eyes are on the lawyers in many respects to ensure that we can defend it."

Agency lawyers have long been preparing behind the scenes for the inevitable court battle, Cruden added. "We have now a team of lawyers that were designated from early on, were watching all of this," Cruden said. "We were prepared to go right away."

And, Cruden added, this won't be the administration's first time defending its climate policies in court. "We've gone to the Supreme Court multiple times on greenhouse gas issues. This is the latest in that area," he said.

Several of EPA's challengers have asked federal judges to immediately freeze the rule as the court considers the broader legal arguments. Allowing the rule to go forward, EPA's foes say, would cause them irreparable harm.

In a **request** sent to the court yesterday, Cruden laid out EPA's proposed schedule for judges to assess the requests to halt the rule. EPA's schedule envisions that the court will still be weighing petitions and responses through the end of December, meaning a stay wouldn't be issued before U.N. climate talks start in Paris late next month.

Sen. James Inhofe (R-Okla.) yesterday accused the administration of delaying a court decision on staying the rule with Paris in mind.

"The Clean Power Plan is on legally vulnerable ground, and the agency knows it," Inhofe said. He added EPA has "been slow-walking" the existing power plant rule's publication and "now is asking the federal court to delay next steps on the rule's legal challenges until after the international climate talks in Paris" (*E&ENews PM*, Oct. 28).

But Garbow rejected that claim.

"Keep in mind, we didn't move for a stay; others did," he said. "When we talk about timing and litigation, one of the key questions that everybody asks is, 'What's a reasonable amount of time for the government to intelligently respond to the motion at issue?'"

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Given the flurry of lawsuits surrounding the Clean Power Plan and the controversial Waters of the U.S. regulation, Cruden joked today that the Obama administration has provided an "economic stimulus package" for environmental and natural resources lawyers.

'Cut the rhetoric'

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"Oftentimes, it is clients that feel in some way at greater liberty to throw around harmful rhetoric that does nothing to promote in my judgment a solution," Garbow said in response to a question about how lawyers should engage with agency attorneys.

"Please assume that we have acted reasonably," Garbow added. "There is a temptation to think -- and whether it's grandstanding or what -- to think that there are some ill motivations behind public servants in the government or in the rank and file here and that you're coming in to kind of correct a horrendous error in the law. That's really not the case."

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From: Garbow, Avi
Sent: Thursday, October 29, 2015 1:22 PM
To: Purchia, Liz <Purchia.Liz@epa.gov>; Harrison, Melissa <Harrison.Melissa@epa.gov>
Subject: Fwd: October 29 -- Greenwire is ready

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U.S. Environmental Protection Agency

Sent from my iPhone

Begin forwarded message:

From: E&E Publishing <ealerts@eenews.net>
Date: October 29, 2015 at 12:19:34 PM CDT
To: <garbow.avi@epa.gov>
Subject: October 29 -- Greenwire is ready

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GREENWIRE — Thu., October 29, 2015

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Enviros attack road emissions testing proposal

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26.UKRAINE:
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To: Administrator McCarthy, Gina Administrator McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Garbow, Avi
Sent: Thur 10/29/2015 5:50:30 PM
Subject: Fwd: October 29 -- Greenwire is ready

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To: Administrator McCarthy, Gina Administrator
From: Emerson, Michael
Sent: Fri 10/23/2015 6:40:54 PM
Subject: Re: Clean Power Plan Clips

Yes

Sent from my iPhone

On Oct 23, 2015, at 2:37 PM, Administrator McCarthy, Gina Administrator wrote:

Thanks Liz.

Michael can you please print for me? Thanks

Sent from my iPhone

On Oct 23, 2015, at 2:26 PM, Purchia, Liz <Purchia.Liz@epa.gov> wrote:

Talked to Mark and he is going to follow up and provide you with more specifics, but here are a couple stories so far that continue to be updated.

The states joining West Virginia are Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, Arizona and North Carolina.

The WV AG held a press call today. We are making sure all reporters have our statement, blog from you and that they understand that an AG does not speak for the entire state. There was a press call with on the legal standing by Tom Miller, Iowa AG, Michael J. Myers, New York Assistant AG and Ricky Revez.

This AP story is the most widely distributed story and I think captures what all sides are saying today.

The Associated Press

States reliant on fossil fuels sue over new clean air rules

Originally published October 23, 2015 at 8:40 am Updated October 23, 2015 at 11:20 am

WASHINGTON (AP) — States and industry groups dependent on fossil fuels began filing court challenges Friday to President Barack Obama's Clean Power Plan, which aims to reduce greenhouse gas emissions.

A flurry of lawsuits was expected at the U.S. Court of Appeals as the Environmental Protection Agency published its final version of the new regulations. All but two of the 24 states filing challenges are led by Republicans. They deride the plan as an "unlawful power grab by Washington bureaucrats" that will kill coal mining jobs and drive up electricity costs.

"The Clean Power Plan is one of the most far-reaching energy regulations in this nation's history," said West Virginia Attorney General Patrick Morrisey, among those leading the challenges. "I have a responsibility to protect the lives of millions of working families, the elderly and the poor, from such illegal and unconscionable federal government actions."

The Obama administration and environmental groups counter that the rules are needed to cut carbon emissions while curbing the worst impacts of climate change and sea-level rise. They also say the plan will spur new clean-energy jobs.

The new rules would require states to cut carbon emissions by 30 percent by 2030. Each state has a customized target and is responsible for drawing up an effective plan to meet its goal.

"We expect polluters and their allies to throw everything they've got at the Clean

Power Plan, and we expect them to fail," said Sierra Club Executive Director Michael Brune, among those defending the law. "The Clean Power Plan is based on a law passed by Congress, upheld by the Supreme Court, and demanded by the American people."

The EPA says it has authority to enact the plan under the Clean Air Act. At issue are dueling provisions added to the law by the House and Senate in 1990. The EPA's interpretation relies on the Senate language, but opponents argue that the House version should win out.

"We are confident we will again prevail against these challenges and will be able to work with states to successfully implement these first-ever national standards to limit carbon pollution, the largest source of carbon emissions in the United States," said EPA Administrator Gina McCarthy.

EPA already regulates other power-plant pollutants under a different section of the Clean Air Act, and the opponents claim the law prohibits "double regulation."

Morrisey said he will seek a stay barring the plan from taking effect while the court challenges proceed, a question that will likely be up to the Supreme Court.

The states challenging the plan in court are Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas, Utah, West Virginia, Wyoming and Wisconsin.

There is some political variation within the list. Governors in Colorado, Michigan and New Mexico will comply with the new EPA rules even as attorneys general from their states joined the lawsuit. In North Carolina, the state environmental agency controlled by the Republican governor joined the opposition after the Democratic attorney general declined.

Members of Congress from coal-mining states also said Friday they will introduce new legislation aimed at blocking the EPA from enforcing the plan.

On the other side, 15 states and the District of Columbia say they are backing the Obama administration and will begin working to comply with the new rules.

Under the Clean Air Act, certain challenges to agency rules skip the federal district court and go directly to the appeals court in Washington, D.C.

The Hill:

http://thehill.com/policy/energy-environment/257856-24-states-coal-company-sue-obama-over-climate-rule

Two dozen states sue Obama over coal plant emissions rule

Timothy Cama

A coalition of 24 states and a coal mining company filed lawsuits Friday to challenge the most significant piece of President Obama's environmental agenda, his signature climate change rule for power plants.

The litigants accuse the Environmental Protection Agency (EPA) of going far beyond the authority Congress granted to it by ordering a significant transformation of states' electricity generation, moving away from fossil fuels like coal and toward lower-carbon sources like wind and solar power.

They are asking the Court of Appeals for the District of Columbia Circuit to overturn the rule. They also want the court to immediately stop its implementation while it works its way through the courts.

West Virginia Attorney General Patrick Morrisey (R), who is leading the legal fight against the plan, called it "the single most onerous and illegal regulations that we've seen coming out of D.C. in a long time."

On a call with reporters, Morrisey repeated many of the long-held arguments against the rule: that it will hurt his state's coal mining industry, raise power rates for consumers and risk electricity reliability.

"EPA's rule is flatly illegal and one of the most aggressive executive branch power grabs we've seen in a long time," he said. "The EPA cannot do what it intends to do legally."

Morrissey said he wants the court to rule on a stay "as soon as possible." He noted it took a federal judge about a month to delay an EPA water regulation earlier this month, and said that could be a "guidepost" for how long litigation might take.

The climate rule, dubbed the Clean Power Plan, seeks a 32 percent cut in the power sector's carbon emissions by 2030, compared with 2005 levels. Each state has been assigned a specific emissions goal based on its unique circumstances, with flexibility in how the goals are met.

West Virginia and Murray led a similar coalition in two lawsuits earlier this year against the regulation that were deemed premature by the D.C. court. The first was before the final rule had been announced, and the second was in August, before it was published in the Federal Register.

The Obama administration has been steadfast in its defense of the legal backing of the rule.

The EPA said its rule is legal and will pass all court challenges.

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In the House, Rep. Ed Whitfield (R-Ky.) will introduce the resolutions.

Devin Henry contributed.

This story was last updated at 12:24 a.m.

Washington Times:

http://www.washingtontimes.com/news/2015/oct/23/two-dozen-states-file-lawsuit-against-clean-power-/?utm_source=RSS_Feed&utm_medium=RSS

Two dozen states file lawsuit against Clean Power Plan

Valerie Richardson

DENVER — A coalition of 24 states and a power company filed a lawsuit Friday challenging the Obama administration's Clean Power Plan, calling it an unlawful federal bid to control state power grids.

The lawsuit was filed in the U.S. Court of Appeals for the District of Columbia on the same day that the Environmental Protection Agency published the plan, also known as the 111(d) rule, in the Federal Register.

"The EPA's latest power grab — disguised as a 'Clean Power Plan' — takes already burdensome federal regulations a step further by driving up energy costs, stagnating job growth, threatening the reliability of our electric grid and treading all over the State of Texas' sovereignty," Texas Gov. Greg Abbott said in a statement.

"With seemingly no concept of what it costs to support a family, start a business or save for retirement, the federal government has yet again proven its readiness to sacrifice American jobs in the name of expanding bureaucratic authority and pushing its liberal agenda," Mr. Abbott said.

As part of the lawsuit, the states seek to place a hold on the Clean Power Plan's deadlines for meeting its carbon emissions goals, which supporters have described as necessary to improve air quality but foes have criticized as arbitrary and unrealistically strict.

Meanwhile, Senate Majority Leader Mitch McConnell announced Friday that he and Sen. Joe Manchin, West Virginia Democrat, will file a resolution of disapproval under the Congressional Review Act in an effort to stop the agency's rule against new coal-fired plants from taking effect.

"Here's what is lost in this Administration's crusade for ideological purity: the

livelihoods of our coal miners and their families," Mr. McConnell said in a statement. "Folks who haven't done anything to deserve a 'war' being declared upon them."

He said he plans to join another CRA effort spearheaded by Sens. Shelley Capito, West Virginia Republican, and Heidi Heitkamp, North Dakota Democrat, against the plan's limits on existing coal-fired plants.

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Environmental groups rushed Friday to defend the Clean Power Plan, a key piece of the Obama administration's climate-change agenda, saying the clampdown on coal emissions are needed to combat global warming.

"Global warming is here and it's affecting us now," said Anna Aurilio, director of Environment America's office in Washington, D.C. "2015 is almost certain to be the hottest year on record. Extreme storms have caused unusually large floods from South Carolina to Texas. California is still in the middle of a drought that is causing huge losses to agriculture and to the states' forests. Today North America braces for the landfall of Hurricane Patricia, called the strongest hurricane ever recorded."

Colorado Attorney General Cynthia H. Coffman argued that the plan fails to take into account her state's aggressive moves to improve air quality, saying Colorado "continues to be a national leader in establishing clean energy standards."

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The Guardian:

http://www.theguardian.com/us-news/2015/oct/23/obama-carbon-coal-power-plant-epa-lawsuit-republicans

Obama's carbon reduction plan under attack from 24 states and Republicans

Coal groups and almost half of US states sued EPA for rules on cutting power plant pollution, as congressmen prepare to overturn crux of climate change plan

Suzanne Goldenberg, US environment correspondent

Friday 23 October 2015 13.22 EDT Last modified on Friday 23 October 2015 13.29 EDT

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The challenge filed on Friday asked a federal court in Washington DC, to strike down the power plant rules, thus gutting the heart of Obama's climate plan.

Republicans in Congress are planning to introduce measures next week seeking to overturn the rules.

Administration officials have said repeatedly they believe they are in a strong position to beat back both sets of challenges.

But the lawsuits and the initiatives in Congress send a powerful message to the international community ahead of the Paris climate conference next month that Obama faces significant opposition to his efforts to cut America's carbon pollution and sign on to a global deal to fight climate change.

Obama is leaning heavily on the power plant rules as evidence of his efforts to fight climate change in the US – and so help lead other countries to an international agreement. In addition to their efforts against the EPA rules, Republicans in Congress are trying to block Obama from joining an international climate agreement without first securing Senate approval.

The EPA rules under attack on Friday would reduce greenhouse gas emissions from power plants by 32% by 2030 on 2005 levels, delivering the biggest single cut in America's carbon pollution.

In the first wave of lawsuits, filed in the US court of appeals for the DC circuit, the states and Murray Energy Corp, a coalmining company, accuse the Environmental Protection Agency of exceeding its authority by requiring states to lower their carbon pollution, a standard which will compel power companies to shutter coal-fired power plants and source more of their electricity from cleaner forms of energy.

"The Clean Power Plan is one of the most far-reaching energy regulations in this nation's history," Patrick Morrisey, West Virginia's attorney general, said in a statement.

He called the rules a "blatant and unprecedented attack on coal".

Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, the Arizona corporations commission, and the North Carolina department of environmental quality have also joined the lawsuit.

The National Mining Association, a leading coal lobbying group, also sued the EPA on Friday.

Gina McCarthy, the EPA administrator, said the agency was on solid legal ground.

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Obama launched his climate change plan in mid-2013, and the EPA rules were issued in early August. But the lawsuits could not go ahead until Friday, when the rules were finally published.

In addition to the legal challenges, Mitch McConnell, the Senate majority leader, has said he will invoke a little-used piece of legislation that enables members of Congress to vote down new rules by a simple majority.

The White House has said it would veto any effort in Congress to overturn the EPA

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Republicans are also trying to block the US from signing on to a climate deal in Paris by requiring Obama to submit any agreement to approval by the Senate.

"I believe we, as the Senate, should support basic oversight responsibilities," Jim Inhofe, an Oklahoma Republican, said this week. "President Obama and his administrative officials are going out of their way to circumvent the role of the US Senate in this negotiating process."

To: Administrator McCarthy, Gina **Administrator**
From: Purchia, Liz
Sent: Fri 10/23/2015 6:26:51 PM
Subject: Clean Power Plan Clips

Talked to Mark and he is going to follow up and provide you with more specifics, but here are a couple stories so far that continue to be updated.

The states joining West Virginia are Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, Arizona and North Carolina.

The WV AG held a press call today. We are making sure all reporters have our statement, blog from you and that they understand that an AG does not speak for the entire state. There was a press call with on the legal standing by Tom Miller, Iowa AG, Michael J. Myers, New York Assistant AG and Ricky Revez.

This AP story is the most widely distributed story and I think captures what all sides are saying today.

The Associated Press

States reliant on fossil fuels sue over new clean air rules

Originally published October 23, 2015 at 8:40 am Updated October 23, 2015 at 11:20 am

WASHINGTON (AP) — States and industry groups dependent on fossil fuels began filing court challenges Friday to President Barack Obama's Clean Power Plan, which aims to reduce greenhouse gas emissions.

A flurry of lawsuits was expected at the U.S. Court of Appeals as the Environmental Protection Agency published its final version of the new regulations. All but two of the 24 states filing

challenges are led by Republicans. They deride the plan as an "unlawful power grab by Washington bureaucrats" that will kill coal mining jobs and drive up electricity costs.

"The Clean Power Plan is one of the most far-reaching energy regulations in this nation's history," said West Virginia Attorney General Patrick Morrisey, among those leading the challenges. "I have a responsibility to protect the lives of millions of working families, the elderly and the poor, from such illegal and unconscionable federal government actions."

The Obama administration and environmental groups counter that the rules are needed to cut carbon emissions while curbing the worst impacts of climate change and sea-level rise. They also say the plan will spur new clean-energy jobs.

The new rules would require states to cut carbon emissions by 30 percent by 2030. Each state has a customized target and is responsible for drawing up an effective plan to meet its goal.

"We expect polluters and their allies to throw everything they've got at the Clean Power Plan, and we expect them to fail," said Sierra Club Executive Director Michael Brune, among those defending the law. "The Clean Power Plan is based on a law passed by Congress, upheld by the Supreme Court, and demanded by the American people."

The EPA says it has authority to enact the plan under the Clean Air Act. At issue are dueling provisions added to the law by the House and Senate in 1990. The EPA's interpretation relies on the Senate language, but opponents argue that the House version should win out.

"We are confident we will again prevail against these challenges and will be able to work with states to successfully implement these first-ever national standards to limit carbon pollution, the largest source of carbon emissions in the United States," said EPA Administrator Gina McCarthy.

EPA already regulates other power-plant pollutants under a different section of the Clean Air Act, and the opponents claim the law prohibits "double regulation."

Morrisey said he will seek a stay barring the plan from taking effect while the court challenges proceed, a question that will likely be up to the Supreme Court.

The states challenging the plan in court are Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas, Utah, West Virginia, Wyoming and Wisconsin.

There is some political variation within the list. Governors in Colorado, Michigan and New Mexico will comply with the new EPA rules even as attorneys general from their states joined the lawsuit. In North Carolina, the state environmental agency controlled by the Republican governor joined the opposition after the Democratic attorney general declined.

Members of Congress from coal-mining states also said Friday they will introduce new legislation aimed at blocking the EPA from enforcing the plan.

On the other side, 15 states and the District of Columbia say they are backing the Obama administration and will begin working to comply with the new rules.

Under the Clean Air Act, certain challenges to agency rules skip the federal district court and go directly to the appeals court in Washington, D.C.

The Hill:

http://thehill.com/policy/energy-environment/257856-24-states-coal-company-sue-obama-over-climate-rule

Two dozen states sue Obama over coal plant emissions rule

Timothy Cama

A coalition of 24 states and a coal mining company filed lawsuits Friday to challenge the most significant piece of President Obama's environmental agenda, his signature climate change rule for power plants.

The litigants accuse the Environmental Protection Agency (EPA) of going far beyond the authority Congress granted to it by ordering a significant transformation of states' electricity generation, moving away from fossil fuels like coal and toward lower-carbon sources like wind and solar power.

They are asking the Court of Appeals for the District of Columbia Circuit to overturn the rule. They also want the court to immediately stop its implementation while it works its way through the courts.

West Virginia Attorney General Patrick Morrisey (R), who is leading the legal fight against the plan, called it "the single most onerous and illegal regulations that we've seen coming out of D.C. in a long time."

On a call with reporters, Morrisey repeated many of the long-held arguments against the rule: that it will hurt his state's coal mining industry, raise power rates for consumers and risk electricity reliability.

"EPA's rule is flatly illegal and one of the most aggressive executive branch power grabs we've seen in a long time," he said. "The EPA cannot do what it intends to do legally."

Morrissey said he wants the court to rule on a stay "as soon as possible." He noted it took a federal judge about a month to delay an EPA water regulation earlier this month, and said that could be a "guidepost" for how long litigation might take.

The climate rule, dubbed the Clean Power Plan, seeks a 32 percent cut in the power sector's

carbon emissions by 2030, compared with 2005 levels. Each state has been assigned a specific emissions goal based on its unique circumstances, with flexibility in how the goals are met.

West Virginia and Murray led a similar coalition in two lawsuits earlier this year against the regulation that were deemed premature by the D.C. court. The first was before the final rule had been announced, and the second was in August, before it was published in the Federal Register.

The Obama administration has been steadfast in its defense of the legal backing of the rule.

The EPA said its rule is legal and will pass all court challenges.

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Valerie Richardson

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Suzanne Goldenberg, US environment correspondent

Friday 23 October 2015 13.22 EDT Last modified on Friday 23 October 2015 13.29 EDT

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To: Administrator McCarthy, Gina[Administrator] McCabe, Janet[McCabe.Janet@epa.gov]; Rupp, Mark[Rupp.Mark@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Hedman, Susan
Sent: Tue 9/1/2015 7:39:47 PM
Subject: RE: Michigan - Clean Power Plan

Here's an article on the announcement from Michigan -- and another piece of encouraging news: I spoke with the IEPA Director at an event this morning -

Ex. 5 - Deliberative

Ex. 5 - Deliberative

Gov. Rick Snyder administration will comply with EPA carbon rule while AG Bill Schuette sues to stop it

LANSING, MI -- Michigan will comply with the federal Environmental Protection Agency's Clean Power Plan by creating its own state-based carbon implementation plan, the Gov. Rick Snyder administration announced Tuesday.

The EPA in August announced the final rule, which requires power plants nationally to slash 32 percent in carbon emissions from 2005 levels by 2030. Under the rule states can choose to create their own mix of solutions toward meeting individual goals or follow a set of rules from the federal government.

Michigan plans to carve its own path.

"The best way to protect Michigan is to develop a state plan that reflects Michigan's priorities of adaptability, affordability, reliability and protection of the environment," Snyder said. "We need to seize the opportunity to make Michigan's energy decisions in Lansing, not leave them in the hands of bureaucrats in Washington, D.C."

Today's announcement represents yet another divide between Snyder's administration and Attorney General Bill Schuette, who is suing to stop the plan with the administration moves to comply.

"I am deeply concerned by yet another executive action taken by President Obama and the EPA that violates the Clean Air Act and causes the price of electricity to increase, placing jobs at risk and costing Michigan families more," Schuette said in a statement when the plan was released.

Valerie Brader, director of the Michigan Agency for Energy, said that consultation between state departments the administration determined a state-based plan with robust input from stakeholders would best fit Michigan's needs.

"We believe that a state plan will be far more beneficial to Michigan than any federal plan," Brader said.

Department of Environmental Quality Director Dan Wyant said that this approach "keeps decision making in Michigan's hands."

The EPA between its proposed and final rules did not take into account all the feedback that Michigan provided. For instance, more than half of the state's progress on renewable energy will not count because it was built too early, something Brader said was "absolutely the EPA rewarding delay over early action."

But some good news for Michigan is that it can continue to count on waste reduction as a compliance alternative. Brader pointed out that Snyder had focused on efficiency and waste reduction in his March energy plan. At the time of course he didn't know what the EPA final rule would be, but "nothing in this plan makes that look like a bad idea now," Brader said.

Schuette, for his part, is one of more than a dozen Attorneys General who seek a stay of the rule's deadlines.

Rodger Kershner is an attorney with expertise in energy who practices at Howard & Howard in Royal Oak. He said that procedurally it's very early to be filing for a stay of the rule, which does not take effect until 60 days after being printed in the federal register.

"You have to wonder what exactly is the rush? It seems to have a significant political component to it," Kershner said.

For Schuette and the other Attorneys General to get the stay, Kershner said, they would have to prove that implementing the rule would cause irreparable harm and that they have a chance of ultimately prevailing legally.

Back in Michigan, the Snyder administration is staying far away from that lawsuit.

"The Attorney General is pursuing that case in his independent capacity... there are no plans for the state to join the current challenges," Brader said.

Schuette spokesperson Andrea Bitely said "The Attorney General remains hopeful about the plan the Governor's office is developing. The Attorney General remains committed to stopping overregulation and excessive mandates from the EPA."

Groups including MI Air MI Health, the Natural Resources Defense Council, Christian Coalition, the Michigan Agri-Business Association, some businesses and the Michigan Conservative Energy Forum applauded the state's plan to move forward with compliance.

"As Governor Rick Snyder has now shown, conservatives can lead on Clean Energy and provide meaningfully to the discussion," said MCEF Leadership Council member Ed Rivet. "Conservatives have ideas and solutions to the energy challenges of today and tomorrow – I'm very happy that Governor Snyder is showing the leadership we need to transition the state towards a clean and renewable energy model which will build our future."

The state will have to work diligently to meet the EPA's Sept. 2016 deadline for plan submission, Brader said. She expects the state's proposal to go through the administrative rule-making process and not the legislature.

-----Original Message-----
From: Hedman, Susan
Sent: Tuesday, September 01, 2015 7:44 AM
To: Administrator McCarthy, Gina; McCabe, Janet; Rupp, Mark; Goffman, Joseph
Subject: Michigan - Clean Power Plan

This morning, during the ECOS regional breakfast for R5 Commissioners, Dan Wyant mentioned that the Michigan Governor will be holding a press conference at 9 am to announce that MDEQ is preparing a Clean Power Plan submittal that will be filed by EPA's September 2016 deadline (barring any unforeseen issues that would require a request for an extension.)

Sent from my iPhone

FOIA EPA-HQ-2016-009655

ORAL ARGUMENT NOT YETSCHEDULED

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.

Response of Advanced Energy Associations In Opposition to Motion for Stay

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Lawrence S. Robbins
Jennifer S. Windom
Daniel N. Lerman
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
lrobbins@robbinsrussell.com
Counsel for Advanced Energy Economy

Gene Grace
AMERICAN WIND ENERGY ASSOCIATION
1501 M St., N.W., Ste. 1000
Washington, D.C. 20005
Telephone: (202) 383-2500
Facsimile: (202) 290-9404
ggrace@awea.org
Counsel for American Wind Energy Association

Richard Ayres
Jessica Olson
John Bernetich
AYRES LAW GROUP LLP
1707 L Street, N.W., Suite 850
Washington, D.C. 20036
Telephone: (202) 452-9200
ayresr@ayreslawgroup.com
Counsel for Solar Energy Industries Association

December 8, 2015

FOIA EPA-HQ-2016-009655

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FOIA EPA-HQ-2016-009655

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772 F.2d 972 (D.C. Cir. 1985) 1

Wis. Gas Co. v. FERC,
758 F.2d 669 (D.C. Cir. 1985) 3

Regulations

* 80 Fed. Reg. 64,662 (Oct. 23, 2015) 4

* Authorities chiefly relied upon are marked with an asterisk.

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GLOSSARY

CO_2:	Carbon Dioxide
EPA:	Environmental Protection Agency

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Proposed respondent-intervenors Advanced Energy Economy, American Wind Energy Association, and Solar Energy Industries Association (collectively, "Advanced Energy Associations") represent more than 3,000 companies and organizations in the advanced energy industry that, in 2014, constituted a $200 billion industry in the U.S. alone. Advanced Energy Associations' member companies manufacture, fund, develop, purchase, and operate advanced energy solutions that will reduce CO_2 emissions from existing fossil-fuel-fired power plants to meet the requirements of the Clean Power Plan ("the Rule"). Members range from companies that produce and supply electricity from natural gas, solar, and wind projects, to companies that improve the performance of the electricity distribution grid and increase the efficiency of energy use, to large electricity consumers with an interest in a robust and reliable electricity system.

Movants allege harms that are wholly speculative and not causally related to the Rule, and fail to demonstrate irreparable harm during the short period of judicial review. Industry Movants, in particular, contend that they must make imminent business and investment decisions in reliance on the hypothetical requirements of state plans. But, with a readily available extension, those final plans are not due to EPA until September 2018 (EPA Br. at 10), and compliance obligations will not be triggered until at least 2022. By contrast, as explained below, a stay would inflict real and substantial harm on the advanced energy industry. Movants have utterly failed to establish grounds for this Court to exercise its "extraordinary injunctive powers" to stay the Rule. *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985).

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ARGUMENT[1]

A. Movants have not established that the Rule will cause them irreparable harm during the pendency of this litigation.

1. *Movants' alleged harms are too speculative to warrant a stay.* Industry Movants speculate that the Rule will cause coal plants to close imminently. But the Rule does not mandate that plant owners and operators take *any* particular compliance measures—much less that they shutter coal plants, develop infrastructure, or take other specific actions. And Movants have no obligations to phase in moderate emission reductions until at least 2022, with full compliance deferred until 2030. Indeed, given that final state plans need not be submitted until September 2018, any near-term plant retirement would be a voluntary, forward-looking business decision, based on factors other than the Rule, and a stay would not prevent it.[2] Movants' alleged harms—which do not result from the Rule in any event—would not be prevented by a stay of this litigation.

Movants' claims about coal plant retirements and other changes in the power sector allegedly resulting from the Rule ignore the myriad factors that have contributed to these changes, including increasing cost-competitiveness of electricity from renewable sources (Goggin Decl. ¶ 49 (D110-111); Baca Decl. ¶¶ 4-5 (D11); Woolf Decl. ¶¶ 38-46 (D279-2867); historically low natural gas prices (Woolf ¶ 39

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[1] The Advanced Energy Associations join EPA's arguments regarding the likelihood of success on the merits and public interest factors. EPA Br. at 11-49, 67-70.

[2] Movants concede that affected companies cannot now predict what specific actions will be required to comply with state plans. *See, e.g.,* Harbert Decl. ¶ 16, Ex. 7-A to Cham. of Comm. Mtn. ("Businesses are simply unable to predict with any degree of certainty which of the many compliance pathways . . . will be chosen by their States.").

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(D280-281); Tierney Decl. ¶ 57); other, independent regulations (Tierney ¶ 60); rising deployment of low-cost energy efficiency (Woolf ¶¶ 47-54 (D286-292)); and increasing demand for advanced energy from consumers (Demasi Decl. ¶¶ 4, 7 (D48-49)). To demonstrate irreparable harm, however, claimed injury "must be both certain and great." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Movants have not shown, and cannot show, that any plant retirements during this litigation will be the *certain* and *direct* result of the Rule, as opposed to these other factors.

This Court rejected similar claims of irreparable harm in *Wisconsin Gas*, observing that, to justify a stay, irreparable harm must "directly result from the action which the movant seeks to enjoin," and that movants' alleged injury was conjecture dependent on "innumerable variables including . . . overall demand and the price of alternative fuels." 758 F.2d at 674, 676. "Bare allegations of what is likely to occur," however, "are of no value since the court must decide whether the harm will *in fact* occur." *Id.* at 674. "The movant must provide proof that . . . the harm is certain to occur in the near future." *Id.* Here, it is sheer speculation that Movants' claimed harms will occur in the near future and, to the extent they do, they have no causal relationship whatsoever to the Rule they seek to enjoin.

2. *Movants have sufficient time to comply with the Rule without a stay.* Movants contend that a stay is necessary because they must take compliance steps immediately, given the lead times for new generation projects. That premise is flawed. Renewable energy projects can be developed quickly from initial assessment to completion—often in less than two years, even for utility-scale plants. Goggin ¶¶ 21-22 (D97-98); Gallagher Decl. ¶ 21 (D60-61); Condo Decl. ¶ 6 (D33); Alonso Decl. ¶ 11 (D3-4). New gas-fired

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plants, too, can be developed much quicker than the decades-long time scale posited by Movants. Condo ¶ 7 (D33-34). And for both gas and renewables, infrastructure changes already in development can accommodate any generation changes associated with the Rule, further undermining Movants' exaggerated lead-time arguments. Goggin ¶¶ 24-35, 57-63 (D98-104, D115-120); Woolf ¶ 78 (D304-305).

Movants entirely ignore other compliance options that can be deployed almost immediately. For example, the Rule contemplates increased use of *existing* natural-gas-fired plants, which can happen now. The Rule also recognizes that utilities can comply through energy efficiency and other demand-side measures (80 Fed. Reg. at 64,901), many of which can be deployed rapidly and achieve significant emission reductions. Woolf ¶¶ 57-67 (D293-298); Whitman Decl. ¶ 10 (D249-250); Caperton Decl. ¶ 8 (D21-22); Simon Decl. ¶ 10 (D233). Because Movants can wait until completion of litigation to take compliance actions, they have failed to show that a stay is required.[3]

3. *Movants mischaracterize the availability and economic impacts of renewable energy, energy efficiency, and natural gas deployment.* Even if solar, wind, and natural gas resources did need to be developed during this litigation to achieve compliance (and they do not), such circumstances would not harm either utilities or consumers. Renewable energy

[3] Movants also can achieve rapid compliance with the Rule through emissions-trading programs. *See* 80 Fed. Reg. at 64,733-35. Although Movants contend that such trading is not feasible, that claim is belied by analogous Clean Air Act programs in which regulated entities met or exceeded emission targets by trading with other sources. In such cases, trading systems arose rapidly in the market and were extremely successful in reducing regulated emissions of sulfur dioxide, nitrogen oxide, and other pollutants. Movants offer no reason to assume that, contrary to this experience, the trading of carbon emissions will not serve as an equally successful, rapidly deployable, and cost-effective method for complying with the Rule. *See* Woolf ¶¶ 83-101 (D308-319).

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made up 50% of all capacity added to the grid from 2012-2014, and 55% of all capacity added in 2014. Gallagher ¶ 9 (D54-55). Wind, solar, and gas already dominate the market for new generation—as a result of market forces unrelated to the Rule—and can be deployed rapidly and cost-effectively to achieve compliance. Woolf ¶ 45.

Contrary to Movants' claims, advanced energy and energy efficiency measures are cost-competitive—indeed, they are often the *lowest-cost* generation methods. Gallagher ¶ 6 (D53-54); Baca ¶¶ 6-7 (D12); Goggin ¶ 50 (D111). From 2009 to 2014, the cost of utility-scale wind and solar power declined by 58% and 82%, respectively. Goggin ¶ 49 (D110-111); Meehan Decl. ¶ 16 (D205-206); Woolf ¶¶ 38-42 (D279-283). Renewable energy is generally subject to less price volatility than fossil-fuel generation (Baca ¶ 8 (D12-13); Gallagher ¶ 19 (D59-60); Goggin ¶ 51 (D112)), providing a significant benefit to large energy consumers seeking to reduce exposure to price volatility. Demasi ¶ 10 (D50-51). Natural gas prices also have come down significantly. Woolf ¶ 39 (D280-281). And, once again, Movants ignore entirely energy efficiency measures, which can achieve significant reductions—all while *reducing* electricity bills. Woolf ¶¶ 47-54 (D286-292); Caperton ¶ 5 (D20-21); Chapin Decl. ¶ 5 (D26-27); Counihan Decl. ¶ 12 (D42).

Movants are therefore wrong to assert—particularly prior to knowing what will be required in final state plans—that compliance will be costly. But they are doubly wrong to assert that *states and utilities* will incur any immediate costs of compliance. To the extent that solar, wind, and natural gas resources are developed in the near future, development costs will not be borne by utilities or states. Nearly all associated project costs are incurred by private developers, with no cost or risk incurred by utilities until

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they purchase the output of a renewable project or sign a contract to purchase the output. Goggin ¶¶ 7-12 (D90-93); Condo ¶¶ 7-10 (D33-35); Alonso ¶ 12 (D4-5).

4. *Reliance on advanced energy solutions does not create reliability problems.* Movants also contend that the Rule will impair energy reliability. Again, Movants are not obligated to take *any* immediate action under the Rule, much less actions that will affect reliability. Roth Decl. ¶¶ 8-11 (D217-219); Gaw Decl. ¶ 10 (D67).

Regardless, Movants' concerns are contradicted by utilities' real-world experience with reliably integrating large amounts of renewable energy into the grid. Goggin ¶¶ 90-91 (D134-135); Woolf ¶¶ 68-82 (D299-307); Horsman Decl. ¶¶ 12-15 (D177-179). Numerous analyses have shown that increased integration of renewable energy does *not* impair reliability and that the U.S. can obtain a much higher share of its electricity from wind and solar energy. Simon ¶ 8 (D232); Meehan ¶¶ 11-14 (D202-205); Baca ¶¶ 10-13 (D13-16); Goggin ¶ 99-100 (D139-141); Alonso ¶ 22 (D7-9). In fact, the experience of states that receive the highest percentage of electricity generation from renewable energy demonstrates that integration of renewable energy can *improve* reliability. Gallagher ¶¶ 15-18 (D57-59); Goggin ¶ 96 (D137-138). Electricity consumers that depend on an extremely reliable electricity supply, including Google, have located facilities in regions with high renewable penetration without experiencing problems with the stability of that supply. Demasi ¶¶ 3, 9 (D47-48, D50).

Technological advances and economies of scale have driven innovation—including controls in renewable generators, demand-response technology, flexible gas generation, storage, and energy efficiency—that pair with renewable energy to further

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bolster reliability. Woolf ¶ 53 (D291); Meehan ¶ 15 (D205); Chapin ¶ 4 (D25-26); Horsman ¶ 12 (D177); Goggin ¶ 102 (D141-145). A well-balanced portfolio of low and zero-emitting sources, coupled with energy efficiency and other demand-side measures, also increases reliability. Woolf ¶ 73 (D301-302); Whitman ¶¶ 6-7 (D247-248); Geller Decl. ¶¶ 4-5 (D79-80). And, contrary to Movants' assertions, existing and planned infrastructure *can* accommodate temporary increases in natural gas demand. Woolf ¶ 78-79 (D304-305). Movants' reliability arguments do not withstand scrutiny.

B. A stay would harm the advanced energy industry.

The Court must consider the harms that a stay would impose on the Advanced Energy Associations' members and similarly-situated parties. *See, e.g., Ambach v. Bell*, 686 F.2d 974, 988 (D.C. Cir. 1982) (denying stay where there was "close balance of equities" between the harm to petitioners and the harm to respondents).

A stay of the Rule would chill the continued growth of the $200 billion advanced energy market—including the businesses of the Advanced Energy Associations' members—below what would otherwise occur by introducing uncertainty among investors.[4] Investors rely on policy certainty in deciding whether to finance advanced energy projects. A stay could shake that reliance, making it more difficult to secure affordable project-level debt and equity, which are essential to developing, constructing, and operating solar, wind, and energy efficiency projects.[5]

[4] As one example, such uncertainty could delay projects until past the phasedown of the Federal Investment Tax Credit. Mendelsohn Decl. ¶¶ 20-21 (D213-214).

[5] By contrast, electricity generator Movants would not be similarly harmed if a stay were not issued, because they typically do not finance new construction through the private capital markets. Nor would the coal industry be affected, because its members are already largely unable to raise capital, owing to factors unrelated to the Rule.

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Storch Decl. ¶ 18 (D241-242); Mendelsohn ¶ 9 (D209-210); Woolf ¶ 104 (D320-321). Uncertainty or slowing growth in the renewable energy market also could harm consumers planning to make long-term purchases of additional renewable energy. Demasi ¶ 11 (D51).

A stay would also likely diminish the benefit to investors of the Rule's Clean Energy Incentive Program ("CEIP"), a voluntary early action program. To be eligible for marketable CEIP emission credits, a facility must be constructed after the relevant state submits its final plan. The facility can then earn salable credits for clean power generated or saved in 2020 and 2021. A stay that delayed the submission of state plans would delay construction of wind and solar facilities, or development of energy efficiency projects, which could in turn constrict or even eliminate the opportunity to earn such credits. Mendelsohn ¶ 19 (D212-213); Storch ¶ 17 (D241); Woolf ¶ 105 (D321); Lehr Decl. ¶ 32 (D193).

These harms will be felt beyond the Advanced Energy Associations and their members. A stay would, for example, delay the CEIP's double-crediting for energy efficiency projects in low-income communities and diminish the incentive to work in these disadvantaged areas. Woolf ¶ 105 (D321); Hladik Decl. ¶¶ 11, 18 (D167, D170-171). A stay would also slow job growth in the solar and wind industries (Luecke Decl. ¶ 11 (D198); Mendelsohn ¶¶ 10-12; Goggin ¶ 137 (D161)), which collectively employ more than twice as many workers as the coal industry. Luecke ¶¶ 6-7; Mendelsohn ¶ 10 (D210).

CONCLUSION

For the foregoing reasons, the Court should deny the motions to stay the Rule.

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Dated: December 8, 2015

/s/ Lawrence S. Robbins
Lawrence S. Robbins
Jennifer S. Windom
Daniel N. Lerman
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
lrobbins@robbinsrussell.com
Counsel for Advanced Energy Economy

/s/ Gene Grace
Gene Grace
AMERICAN WIND ENERGY ASSOCIATION
1501 M St., N.W., Ste. 1000
Washington, D.C. 20005
Telephone: (202) 383-2500
Facsimile: (202) 290-9404
ggrace@awea.org
Counsel for American Wind Energy Association

/s/ Richard Ayres
Richard Ayres
Jessica Olson
John Bernetich
AYRES LAW GROUP LLP
1707 L Street, N.W., Suite 850
Washington, D.C. 20036
Telephone: (202) 452-9200
ayresr@ayreslawgroup.com
Counsel for Solar Energy Industries Association

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CERTIFICATE OF COMPLIANCE

The foregoing Response of Advanced Energy Associations in Opposition to Motions for Stay complies with the type-volume and type-space requirements of Fed. R. App. P. 32(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Point font. The combined pages of this brief and those filed by the State Intervenors, NGO Intervenors, and Power Company Intervenors does not exceed the 50-page limit set by the Court in its November 17, 2015, Order (Doc. # 1583948).

Dated: December 8, 2015

/s/ Lawrence S. Robbins
Lawrence S. Robbins

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 28(a)(1) and 28(a)(1)(A), Intervenor Power Companies state as follows:

Parties:

Petitioners:

15-1363 – States of West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming, the State of Arizona Corporation Commission, the Commonwealth of Kentucky, the State of Louisiana Department of Environmental Quality, Attorney General Bill Schuette on behalf of the People of Michigan, and the State of North Carolina Department of Environmental Quality

15-1364 – State of Oklahoma and the Oklahoma Department of Environmental Quality

15-1365 – International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO **15-1366** – Murray Energy Corporation

15-1367 – National Mining Association

15-1368 – American Coalition for Clean Coal Electricity

15-1370 – Utility Air Regulatory Group and American Public Power Association

15-1371 – Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company Inc.

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15-1372 – CO_2 Task Force of the Florida Electric Power Coordinating Group,

15-1373 – Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

15-1374 – Tri-State Generation and Transmission Association, Inc.

15-1375 – United Mine Workers of America

15-1376 – National Rural Electric Cooperative Association, Arizona Electric Power Cooperative, Inc., Associated Electric Cooperative, Inc., 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, Deseret Generation & Transmission Co-operative, Inc., East Kentucky Power Cooperative, Inc., East River Electric Cooperative, Inc., East Texas Electric Cooperative, Inc., Georgia Transmission Corporation, Golden Spread Electric Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Kansas Electric Power Cooperative, Inc., Minnkota Power Cooperative, Inc., North Carolina Electric Membership Corporation, Northeast Texas Electric Cooperative, Inc., Northwest Iowa Power Cooperative, Oglethorpe Power Corporation, Powersouth Energy Cooperative, Prairie Power, Inc., Rushmore Electric Power Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., San Miguel Electric Cooperative, Inc., Seminole Electric Cooperative, Inc., South Mississippi Electric Power Association, South Texas Electric Cooperative, Inc., Southern Illinois Power Cooperative, Sunflower Electric Power Corporation, Tex-La Electric Cooperative of Texas, Inc., Upper Missouri G. & T. Electric Cooperative, Inc., Wabash Valley Power Association, Inc., Western Farmers Electric Cooperative,

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and Wolverine Power Supply Cooperative, Inc.

15-1377 – Westar Energy, Inc.

15-1378 – NorthWestern Corporation

15-1379 – National Association of Home Builders

15-1380 – State of North Dakota

15-1382 – 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

15-1383 – Association of American Railroads

15-1386 – Luminant Generation Company, 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

15-1393 – Basin Electric Power Cooperative

15-1398 – Energy & Environment Legal Institute

15-1409 – Mississippi Department of Environmental Quality

15-1410 – International Brotherhood of Electrical Workers, AFL-CIO

15-1413 – Entergy Corporation

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15-1418 – LG&E and KU Energy LLC

15-1422 – West Virginia Coal Association

15-1432 – Newmont Nevada Energy Investment, LLC and Newmont USA Limited

Respondents

Respondents are Regina A. McCarthy, Administrator, United States Environmental Protection Agency and the United States Environmental Protection Agency.

Intervenors and *Amici Curiae*

Movant-intervenors are American Wind Energy Association, Advanced Energy Economy, American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, Sierra Club, Peabody Energy Corporation, Solar Energy Industries Association, the States of New York, California (by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Kamala D. Harris), Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota (by and through the Minnesota Pollution Control Agency), New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, Broward County, Florida, NextEra Energy, Inc., Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, and Pacific Gas and Electric

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Company, Dixon Bros., Inc., Nelson Brothers, Inc., Western Explosive Systems Company, Norfolk Southern Corp., Joy Global Inc., Gulf Coast Lignite Coalition, West Virginia Highlands Conservancy, the Ohio Valley Environmental Coalition, Coal River Mountain Watch, the Kanawha Forest Coalition, Mon Valley Clean Air Coalition, Keepers of the Mountains Foundation, New York Power Authority, Sacramento Municipal Utility District and Southern California Edison Company.

Amicus Curiae are William D. Ruckelshaus and William K. Reilly.

Movant-*Amicus Curiae* is Philip Zoebisch.

Rulings under Review:

The final agency action under review is "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units", 80 Fed. Reg. 64,662 (October 23, 2015).

Related Cases:

The following consolidated cases pending before this Court challenge a related agency action: *State of North Dakota v. EPA*, No. 15-1381; *Murray Energy Corporation v. EPA, et al.*, No. 15-1396; *Energy & Environment Legal Institute v. EPA*, No. 15-1397; *State of West Virginia, et al. v. EPA, et al.*, No. 15-1399; and *Peabody Energy Corporation v. EPA, et al.*, 15-1438.

/s/ Lawrence S. Robbins
Lawrence S. Robbins

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2015, I electronically filed the foregoing Advanced Energy Associations in Opposition to Motions for Stay by using the appellate CM/ECF system, which will send notice of such filing to all registered counsel. I also caused the foregoing to be served via U.S. Mail on counsel for the following parties at the following addresses:

Ms. Janice M. Alward
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Kelvin Allen Brooks
Office of the Attorney General, State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397
Counsel for Movant-Intervenor State of New Hampshire

Patrick Burchette
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006-6801
Counsel for Petitioners East Texas Electric Cooperative, Inc.; Northeast Texas Electric Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; Tex-La Electric Cooperative of Texas, Inc.

William F. Cooper
State of Hawaii Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
Counsel for Movant-Intervenor State of Hawaii

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David Finley Crabtree
Vice President, General Counsel
10714 South Jordan Gateway
South Jordan, UT 84092
Counsel for Petitioner Deseret Generation & Transmission Co-operative

Tannis Fox
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Counsel for Movant-Intervenor State of New Mexico

Ms. Karen R. Harned
National Federation of Independent Business
1201 F Street, NW
Suite 200
Washington, DC 20004
Counsel for Petitioner National Federation of Independent Business

Jacob Larson
Environmental Law Division
321 E. 13th Street, Room 18
Des Moines, IA 50319
Counsel for Movant-Intervenor State of Iowa

Mr. Karl Roy Moor
Southern Company Services, Inc.
600 18th Street, North 15N
Birmingham, AL 35203
Counsel for Petitioner Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company

Carrie Noteboom
New York City Law Department
100 Church Street
New York, NY 10007
Counsel for Movant-Intervenor City of New York

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Steven J. Oberg
Lynn, Jackson, Shultz & Lebrun, P.C.
PO Box 8250
Rapid City, SD 57709
Counsel for Petitioner Rushmore Electric Power Cooperative, Inc.

Mr. Gary Vergil Perko
Hopping Green & Sams
119 South Monroe Street
Suite 300
Tallahassee, FL 32301
Counsel for Petitioner Gulf Power Company

Mr. Lee Philip Rudofsky
Office of the Attorney General, State of Arkansas
323 Center Street
Suite 200
Little Rock, AR 72201
Counsel for Petitioner State of Arkansas

Bill Spears
Segrest & Segrest, P.C.
18015 West Highway 84
McGregor, TX 76657
Counsel for Petitioner Brazos Electric Power Cooperative, Inc.

Mr. Ben H. Stone
Balch & Bingham LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Counsel for Petitioner Mississippi Power Company

Luther J. Strange, III
Office of the Attorney General, State of Alabama
501 Washington Avenue
Montgomery, AL 36130
Counsel for Petitioner State of Alabama

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Laurence H. Tribe
Harvard Law School
Griswold 307
1563 Massachusetts Avenue
Cambridge, MA 02138
Counsel for Movant-Intervenors Peabody Energy Corporation, Dixon Bros., Inc., Nelson Brothers, Inc., Western Explosive Systems Company, Norfolk Southern Corporation, Joy Global Inc., and Gulf Coast Lignite Coalition

Thiruvendran Vignarajah
Office of the Attorney General, State of Maryland
200 St. Paul Place
20th Floor
Baltimore, MD 21202-2021
Counsel for Movant-Intervenor State of Maryland

Ms. Janet F. Wagner
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Philip Zoebisch
28 W Madison Avenue
Collingswood, NJ 08108
Movant-Amicus Curiae

/s/ Lawrence S. Robbins

Lawrence S. Robbins

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ORAL ARGUMENT NOT YET SCHEDULED

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

Case No. 15-1363 and Consolidated Cases

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

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

Respondents.

On Petitions for Review of Final Action of the
United States Environmental Protection Agency

ENVIRONMENTAL AND PUBLIC HEALTH RESPONDENT-INTERVENORS' OPPOSITION TO MOTIONS FOR STAY

Sean H. Donahue
Donahue & Goldberg, LLP
1130 Connecticut Avenue NW, Suite 950
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

David Doniger
Benjamin Longstreth
Melissa J. Lynch
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005
(202) 513-6256
ddoniger@nrdc.org
blongstreth@nrdc.org
Counsel for Natural Resources Defense Council

December 8, 2015

Additional Counsel Listed on Next Page

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Tomás Carbonell
Vickie Patton
Martha Roberts
Peter Zalzal
Environmental Defense Fund
1875 Connecticut Avenue NW
Suite 600
Washington, D.C. 20009
(202) 572-3610
tcarbonell@edf.org
vpatton@edf.org
mroberts@edf.org
pzalzal@edf.org
Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5725
joanne.spalding@sierraclub.org
andres.restrepo@sierraclub.org
alejandra.nunez@sierraclub.org
Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
aweeks@catf.us
jduffy@catf.us
Counsel for American Lung Association, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, and Ohio Environmental Council

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Mass. Ave., NW, Suite 702
Washington, DC 20036
(202) 667-4500
hfox@earthjustice.org
dbaron@earthjustice.org
tballo@earthjustice.org
Counsel for Sierra Club

Vera P. Pardee
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org
Counsel for Center for Biological Diversity

William V. DePaulo
122 N Court Street, Suite 300
Lewisburg, WV 24901
Tel: 304-342-5588
william.depaulo@gmail.com
Counsel for West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition, Coal River Mountain Watch, Kanawha Forest Coalition, Mon Valley Clean Air Coalition and Keepers of the Mountains Foundation

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Susan F. Tierney	Analysis Group – *Energy Policy, Energy Markets, and Regulatory Expert*	B1
Dallas Burtraw & Joshua Linn	Resources for the Future – *Economic Analysis of Near-Term Action*	B69
Madeleine K. Albright	Former Secretary of State – *Foreign Affairs*	B103
Jon Wellinghoff	Former Chair, Federal Energy Regulatory Commission – *Electricity System and Reliability*	B108
Eric Svenson	Consultant & Former Public Service Enterprise Group – *Electricity Infrastructure and Reliability*	B131
Tom Sanzillo	Institute for Energy Economics and Financial Analysis – *Coal Industry Financial Analysis*	B157
David Schlissel	Institute for Energy Economics and Financial Analysis – *Energy Sector Financial Analysis*	B178

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Larry Soward	Former Texas Commission on Environmental Quality & Former Public Utility Commission of Texas – *Texas Planning and Compliance*	B233
John Hall	Environmental Defense Fund & Former Texas Natural Resource Conservation Commission – *Texas Planning and Compliance*	B253
Karl Rábago	Pace Energy and Climate Center & Former Public Utility Commission of Texas – *Texas Planning and Compliance*	B278
Kathryn Watson	Former Indiana Department of Environmental Management – *Indiana Planning and Compliance*	B290
George Meyer	Former Wisconsin Department of Natural Resources – *Wisconsin Planning and Compliance*	B297
Barbara Roberts	Former Colorado Air Quality Control Commission – *Colorado Planning and Compliance*	B303
Jeanne M. Fox	Former New Jersey Board of Public Utilities and Department of Environmental Protection – *New Jersey Planning and Compliance*	B318
Diane Munns	Environmental Defense Fund, Former National Association of Regulatory Utility Commissioners, Former Iowa Utilities Board – *State Compliance Scenarios Analysis*	B337
Paul J. Hibbard & Andrea M. Okie	Analysis Group – *Historic Carbon Emissions Analysis and Context*	B404
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GLOSSARY OF ABBREVIATIONS

CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
IPM	Integrated Planning Model
RIA	Regulatory Impact Analysis
UARG	Utility Air Regulatory Group

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Power plants are the country's largest sources of the carbon dioxide pollution that is destabilizing the Earth's climate and imperiling human health and welfare, exceeding even the "enormous quantity" emitted by the transportation sector, *see Massachusetts v. EPA*, 549 U.S. 497, 524-25 (2007). To reduce this harmful pollution, EPA has adopted the Clean Power Plan ("Rule") under Section 111(d) of the Clean Air Act, which "'speaks directly'" to carbon dioxide emissions from existing power plants. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (*AEP*).

This Court should reject Movants' attempt to delay the Rule's vital climate and public health protections. All four factors, *see Nken v. Holder*, 556 U.S. 418, 433-34 (2009), strongly disfavor a stay.

I. MOVANTS ARE UNLIKELY TO SUCCEED ON THE MERITS

The caricatures in the stay motions bear no similarity to the actual Rule. In fact, the Rule builds on well-established measures that have already resulted in substantial carbon emission reductions from fossil-fueled power plants. It establishes readily achievable targets to realize further reductions that – consistent with industry comments – are phased in gradually between 2022 and 2030. It allows states that choose to develop plans up to three years to do so, affording broad discretion as to plan design and the timing of emission reductions. Accommodating industry's preference – expressed in this and other Clean Air Act rulemakings – for flexible, cost-effective means of reducing emissions, the Rule enables emissions averaging and trading. The Rule is projected to lower consumer electric bills by 2025, and it provides robust safeguards to guarantee electric system reliability.

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Contrary to Movants' contentions, ample Clean Air Act precedent supports EPA's common-sense approach. Many air pollution control programs under section 111 and other provisions of the Act, particularly programs addressing the power sector, have relied upon shifts in generation and have employed techniques such as emissions averaging and trading to reduce emissions efficiently.[1] Shifting generation among facilities is a routine part of the power industry's daily operations, and a familiar component of companies' longer-term emission reduction strategies. 80 Fed. Reg. at 64,795, 64,782 n.604; Tierney ¶ 28. Many industry commenters urged EPA to allow them to *comply* with the standards by these means, reflecting recognition that such measures are a well-demonstrated "system of emission reduction." *See, e.g.*, Legal Memo 14-18.[2]

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[1] *See* R. Revesz et al., Inst. for Policy Integrity, *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan* 1, 3 (Dec. 4, 2015), *available at* http://policyintegrity.org/files/publications/FamiliarTerritory.pdf (summarizing "a wide variety of regulations from the Clean Air Act's forty-five-year history that provide substantial precedent for the flexible design of the Clean Power Plan" and noting that EPA "has previously promulgated several rules—under both Section 111 and other provisions of the Clean Air Act—that incorporate beyond-the-fenceline strategies for reducing emissions."); *see also, e.g.*, 80 Fed. Reg. at 64,678; Legal Memorandum Accompanying Clean Power Plan for Certain Issues (Legal Memo), Docket No. EPA-HQ-OAR-2013-0602-36872 at 7-8, 104-17; *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534-36 (D.C. Cir. 1983) (upholding gasoline lead standards that aimed for aggregate, category-wide pollution reductions and were premised on the projection that refineries would engage in emission credit trading).

[2] Likewise, industry (including several Movants) urged EPA to interpret the term "installation of controls" under section 112 to encompass construction of new generation and transmission – an interpretation EPA adopted in the Mercury and Air Toxics Standards. Legal Memo at 115-16.

Movants identify no credible statutory basis for restricting EPA, when identifying the "best system of emission reduction," to measures that every source can implement on its premises alone. Indeed, the rigid strictures Movants advocate for would force reliance on *more* expensive measures (such as conversion to natural gas or retrofitting carbon capture technology) or achieve *less* emissions reductions. *See EPA v. EME Homer City Generation,* 134 S. Ct. 1584, 1606-07 (2014) (affirming the Agency's "sensibl[e]" choice to adopt the "easier, *i.e.*, less costly," means of achieving the necessary pollution reduction as "nothing in the text of the [statute] precludes that choice.").[3] Movants can point to no statutory terms that require EPA to limit the "best" system of emission reduction to "heat rate" improvements that EPA found would achieve only minimal reductions – or perversely even increase pollution, *see* 80 Fed. Reg. at 64,745. Congress plainly intended more – that the "best" system would accomplish as many emissions reductions as are achievable at reasonable cost. *See Sierra Club v. EPA*, 657 F.2d 298, 326 (D.C. Cir. 1981) ("no sensible interpretation" of provision would ignore quantity of emission reductions).

Movants' favored "on-site" restriction also conflicts with the reality that sources would seek to use off-site generation-shifting and related measures for compliance even if the stringency of the standards were constrained as they now insist. *See* 80 Fed. Reg. 64,761 (noting that sources would use the generation-shifting

[3] In *EME Homer City*, the Court upheld EPA's Cross-State Air Pollution Rule – a power sector-specific rule that relies upon "increased dispatch of lower-emitting generation and fuel-switching," 76 Fed. Reg. 48,208, 48,252, 48,279-80 (Aug. 8, 2011) – as "permissible, workable, and equitable," 134 S. Ct. at 1610. *See also NRDC v. Thomas*, 805 F.2d 410, 425 (D.C. Cir. 1986) (upholding emissions averaging for vehicle fleet owners as sensible and not prohibited by statute).

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measures of building blocks 2 and 3 (as well as energy efficiency) to "comply with *whatever emission standards* are set as a result of this rule") (emphasis added). *See also id.* at 64,769 (industry comments favoring off-site measures for compliance); Legal Memo at 14-18 (same). Like other Clean Air Act provisions built on federal targets and state implementation,[4] section 111(d) comfortably accommodates the types of flexible implementation mechanisms EPA has adopted here. EPA found the characteristics of both carbon pollution and the electric industry (including the "unique interconnectedness" of the grid, 80 Fed. Reg. at 64,734) favor regulatory approaches that reduce emissions at lower cost through flexibility and emissions averaging and trading. *E.g., id.* at 64,703, 64,717, 64,725.[5]

Movants' repeated allegations that the Rule impermissibly intrudes upon the jurisdiction of federal or state energy regulatory agencies are misguided. The Rule does not disturb the existing roles of energy regulators, system operators, or generators, all of whom have extensive experience incorporating federal air pollution requirements into the power system's planning and daily operations. *See, e.g.*, Legal Memo at 26; Wellinghoff ¶¶ 35-36 (former FERC chair's refutation of these claims);

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[4] *See* 42 U.S.C. § 7410(a)(2) (listing "marketable permits" among measures that may be included in state plans); *id.* § 7602(y) (same for federal plans). Congress linked section 111(d) to the flexible section 110 regime, directing that EPA's regulations "establish a procedure similar to that provided by" section 110. *Id.* § 7411(d)(1).

[5] Such determinations merit "special deference." *Nat'l Ass'n for Surface Finishing v. EPA*, 795 F.3d 1, 7 (D.C. Cir. 2015) (scientific determinations); *Earthlink v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006) (applications of technical expertise); *id.* at 11-12 (predictive judgments); *see also NRDC*, 805 F.2d at 425 (decision whether emissions averaging best served statutory objectives was "peculiarly within the expertise of the agency").

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Kelliher ¶ 6-12 (same); Tierney ¶¶ 28-29; Roberts ¶ 19; Fox ¶¶ 27-30. The Rule gives states the option to regulate power plant emissions or leave it to EPA. And if EPA issues a federal plan, a state can still opt to promulgate a state plan later. McCabe ¶ 34; Soward ¶ 12; Tierney ¶ 24.

The Rule implements a provision that "'speaks directly'" to carbon pollution from existing power plants.[6] *AEP*, 131 S. Ct. at 2537. Regulating *any* form of power plant air pollution necessarily has economic consequences for electricity generators, but those consequences do not immunize power plants from Clean Air Act regulation. Rather, as the Court noted in *AEP*, section 111(d) requires balancing the "environmental benefit" with "our Nation's energy needs and the possibility of economic disruption,"and the Act "entrusts such complex balancing to EPA in the first instance." *Id.* at 2539; *see also Sierra Club*, 657 F.2d at 406 (section 111(b) standards for new coal-burning power plants "demand a careful weighing of cost, environmental, and energy considerations"). EPA carefully weighed these considerations here and explained why its interpretation fits within statutory bounds. Movants cannot succeed on the merits.

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[6] As EPA shows, Opp. 37-42, there is no merit to contentions (W. Va. Mot. 11-15) that the Rule is precluded by EPA's regulation of mercury and other air toxics from power plants under the section 112 "hazardous air pollutant" program. EPA reasonably reads section 111(d) to preclude coverage only of pollutants actually regulated under section 112. Movants' theory would open a gap contrary to the Clean Air Act's explicit design and to Congress' explicit intent, in strengthening the hazardous air pollutant program in the 1990 Amendments, not to weaken any section 111 requirements. *See* 42 U.S.C. § 7412(d)(7) ("No emission standard or other requirement promulgated under this section [112] shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section [111].").

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II. MOVANTS CANNOT SHOW IRREPARABLE HARM

Movants have the burden to show that irreparable harm is "certain" to befall them "in the near future" as a "direct[] result" of the Rule. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). They have failed to meet that burden. First, in response to comments raising the same issues that Movants raise here, EPA made substantial changes in the final rule (*e.g.*, deferring the first compliance obligation to 2022 and softening the subsequent emission reduction "glide path") and explained in detail why those changes met commenters' concerns about implementation time, reliability, and other issues. 80 Fed. Reg. at 64,855-59, 64,826-29, 64,874-81. These factual findings, which rest on judgments squarely within the agency's statutorily delegated domain, are entitled to deference. *EarthLink*, 462 F.3d at 9.

Second, the expert declarations of EPA and Respondent-Intervenors refute each of Movants' main factual claims. These submissions include, among many others, declarations from energy policy expert Susan Tierney on many of the central claims; former Secretary of State Madeleine Albright on foreign policy implications; former FERC Chairs Jon Wellinghoff and Joseph Kelliher on electric system reliability and energy regulation; economists Dallas Burtraw and Joshua Linn on modeling; and many current and former state energy and environmental officials (including former commissioner of the Texas Commission on Environmental Quality Larry R. Soward, and former head of the National Association of Regulatory Utility Commissioners Diane Munns) on state planning. These rebuttals show that Movants' contentions are unfounded. Given Movants' burden to show that harm "is certain to occur in the near future," *Wis. Gas*, 758 F.2d at 674, their motions cannot succeed.

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Movants can cite no case in which this Court (or any other) has stayed agency action when the required compliance was so remote in time,[7] or when sources' actual obligations remained to be determined. The Rule does not require *any* emission limitations until 2022. Once in effect, emission reductions will phase in gradually through 2030, allowing each state to determine an optimal "glide path" for compliance. McCabe ¶¶ 6-9 (EPA). For states that choose to submit plans, the Rule allows three years to develop them – longer than provided under numerous past Clean Air Act programs for the power sector. McCabe ¶¶ 10-31; Fox ¶¶ 14-15; Soward ¶¶ 18-19; Tierney ¶ 19. Individual sources' obligations will depend upon the design of state plans to be adopted years from now, and the Rule enables states to provide for flexible compliance options when emission limits begin to phase in. Granting a stay here would, in short, require discarding the traditional, demanding standard for finding irreparable harm. *Wis. Gas*, 758 F.2d at 674.

Movants' declarations allege harms that are speculative, would occur (if at all) long past the litigation period, and rest on rank mischaracterizations of the Rule's structure and modeling analysis. They ignore the ongoing impacts of dramatic, long-term economic trends that have steadily shifted generation away from aging, high-cost, high-emitting coal plants, unpersuasively assigning blame to CO_2 emissions

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[7] Stays of two prior Clean Air Act rules (both of which were later dissolved) provide no support for a stay here (*cf.* Peabody Mot. 5). This Court stayed the NO_x SIP Call four months, and the Cross-State Air Pollution Rule two days, before the relevant compliance deadlines. *See Michigan v. EPA*, No. 98-1497 (D.C. Cir. May 25, 1999) (order granting in part motion for partial stay); *EME Homer City*, No. 11–1302 (D.C. Cir. Dec. 30, 2011) (order granting motion to stay case).

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limitations not yet even established in state (or federal) plans, and that will not go into effect for years. Past and recently announced coal plant retirement decisions are in fact primarily due to a host of market forces – including low natural gas prices, falling costs of renewable energy, rising costs of coal production, the high costs of maintaining very old coal-fired plants – that have driven a dramatic shift away from coal-fired power generation, and show no sign of abating irrespective of the Rule. Sanzillo ¶¶ 7-31; Tierney ¶¶ 67-73; Burtraw ¶¶ 8-15; Schlissel ¶¶ 10-63; Rábago ¶¶ 10-12, 15; Culligan ¶¶ 6-24.

A. The Rule Does Not Require Immediate Coal-Plant Retirements or Other Substantial Action by Industry Movants

Contrary to Movants' claims, nothing in the Rule, EPA's modeling, or the state planning process compels power generators to make expensive retirement or investment decisions during this litigation. The Rule's first emission limits take effect in 2022, and power plant owners are not required to demonstrate compliance until the end of the first interim period in 2025 – almost a decade from now. This lead time far exceeds the time allowed in prior power-sector regulations – rules that required substantial capital investments and operational changes and were implemented successfully. Wellinghoff ¶¶ 26-29; Meyer ¶¶ 6-10; Watson ¶¶ 6-7. Even after emissions limits take effect, the Rule's flexible compliance framework enables individual plants to operate above applicable emissions limits by averaging with other plants or by acquiring emissions credits. Tierney ¶¶ 25-27; 80 Fed. Reg. at 64,709-10. For all these reasons, any decision to retire an existing plant *now* because of the

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possible impact of the Rule seven or more years from now would be a voluntary choice – not one flowing from regulatory mandates.

Contrary to the claims of National Mining Association's declarant Seth Schwartz, EPA's modeling results do not compel plant owners to make immediate retirement and investment decisions. The Integrated Planning Model (IPM) is a powerful tool for illustrating potential responses across the power system to emission constraints and other factors, but modeling results create no obligations. *See* Burtraw ¶¶ 17-18. Further, as declarants Burtraw and Linn explain, the IPM model cannot credibly be employed to predict near-term, plant-specific behavior as Movants try to do. Burtraw ¶¶ 16-24; *see also* Harvey ¶¶ 33-40. Until a state or federal plan is finalized, no individual plant's obligations for 2022 and beyond are known. Burtraw ¶ 20; Tierney ¶ 41. Absent any requirement to act immediately, a plant owner can readily defer major retirement or investment decisions until state plans are completed or other uncertainties reduced. Burtraw ¶ 25; Tierney ¶ 43.

Movants imply that new generating capacity might have to be built before 2022 to assure compliance, and claim that lead-time requirements for building such capacity mandate immediate decisions. McLennan ¶¶ 19-25; Greene ¶ 6; K. Johnson ¶ 13. Neither is correct. Declarant Munns shows that as many as 21 of the Movant States can meet the Rule's emissions targets through 2024 – and as many as 18 can meet the targets through 2030 – with generation projects already proposed, permitted, or under construction, coupled with existing state requirements for renewables and energy

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efficiency. Munns ¶ 9.[8] Should it be needed, a large amount of new cleaner generating capacity is already in advanced stages of planning or under construction. Tierney ¶¶ 48-54.

Some Movants also claim that they are forced to act now because costs otherwise will rise prohibitively. Ledger ¶ 29 (UARG). Analysis of a delayed compliance scenario using the IPM model squarely contradicts this claim, finding that the Rule's compliance costs would be nearly the same even if firms defer their investment decisions until 2018 – after state plans are completed and specific compliance obligations are defined. Burtraw ¶¶ 36-40. Thus, claims that major investment or retirement decisions must be made immediately are unfounded.

Movants offer no substantial analytical support for other claims that the Rule will cause near-term harm. Their declarations cite highly flawed studies that exaggerate compliance costs, all but one of which analyze the *proposed* rather than *final* Rule. Burtraw ¶¶ 43-46; Tierney ¶ 46. Because there is no basis for Movants' primary claims that the Rule compels plant owners to make immediate compliance decisions, there is also no basis for their derivative claims of immediate jobs, mining, or business or tax revenue losses. Burtraw ¶ 46; Price ¶ 2.

Some companies claim they are harmed because they must decide whether to make near-term investments *for other reasons* such as upgrading an old facility to remain

[8] The same analysis shows that the remaining Movant States can comply through modest incremental measures. Munns finds that North Dakota, for example, a coal-intensive state that has alleged economic harms, N.D. Mot. at 14, could fully comply with the Rule merely by maintaining recent modest rates of wind power development. Munns ¶ 12. *See also* Hall ¶¶ 44-45 (showing that Texas will come close to full compliance with the Rule under "business as usual" conditions).

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competitive.[9] But a stay would not, as Movants imply, allow them to ignore carbon risk considerations when making such near-term decisions. Tierney ¶ 58; Burtraw ¶ 25; Sanzillo ¶¶ 42-44. Thus, a stay would not be a reliable basis for a company to alter its near-term investment decisions. Indeed, a stay could *increase* regulatory uncertainty for the power sector and related industries. Sanzillo ¶ 45.

B. State Planning Under the Rule Does Not Work Irreparable Harm

EPA and State Respondent-Intervenors have fully refuted claims that state planning efforts impose substantial, let alone irreparable harms. *See also* Meyer ¶¶ 8-10; Watson ¶¶ 8-14. For states that choose to develop their own plans, their near-term obligations are very modest. McCabe ¶¶ 11-17; Tierney ¶¶ 19-22; Hall ¶¶ 52, 56. The Rule allows two more years to any state that undertakes a few undemanding tasks by September 2016, McCabe ¶¶ 11-17, although states may choose to submit a full plan by that date, *see* Tierney ¶ 19 (discussing Pennsylvania official's intent to submit final plan in September 2016). The three-year period for submitting a full state plan compares favorably with other programs under the Act and does not impose unusual burdens over the litigation period. Tierney ¶¶ 19-22; McCabe ¶ 11; Soward ¶¶ 9-26; Fox ¶¶ 14-15. Contrary to claims that states will need to adopt sweeping new legislation, virtually every state already has existing state law authority to limit air pollutants regulated under the Act, including CO_2. Tierney ¶ 30; *see also* Fox ¶¶ 9-11. The Rule allows states to adopt emission standards for CO_2-emitting power plants patterned on traditional, cost-effective programs that states already employ. *See*

[9] *See, e.g.*, Jura ¶ 30 (UARG); McInnes ¶ 21 (UARG); Johnson ¶ 28 (UARG).

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McCabe ¶¶ 18-21; Tierney ¶ 37 n.40 (citing Revesz, *Familiar Territory*); Wellinghoff ¶ 38; *see also* Roberts ¶¶ 6-7, 9-10. For example, Movant States have successfully demonstrated emission trading programs in both vertically-integrated and restructured electricity markets.[10]

C. Movants' Other Claims of Post-2022 Harm Are Unfounded

Charges that the Rule will increase electric bills disregard EPA's analysis and judgment – entitled to deference – that the Rule will *lower* electric bills by 2025, Regulatory Impact Analysis for the Clean Power Plan Final Rule, Docket No. EPA-HQ-OAR-2013-0602-36791 ("RIA") 3-40, and ignore (1) cost-saving compliance strategies such as energy efficiency, which *reduce* electric bills, and (2) flexible tools like emissions trading that minimize costs. *See* Kolata ¶¶ 8, 15; Bingham ¶¶ 5-6; Busby ¶ 6; Tierney ¶¶ 75-80.

Movants' allegations regarding reliability are similarly mistaken. Power plants have complied for decades with Clean Air Act regulations often more prescriptive and with shorter compliance timelines – without jeopardizing reliability. Wellinghoff ¶ 29; Tierney ¶¶ 60-65; Fox ¶ 28. Similarly, many states with diverse characteristics – including some Movants – have already reduced emissions in recent years at rates that exceed what is required under the Rule. Hibbard ¶ 21; *see also* Worley ¶ 4. The Rule includes multiple reliability safeguards, *see* 80 Fed. Reg. at 64,876–79; Svenson ¶¶ 23-29, and does not disturb any reliability policies or mechanisms implemented by

[10] Of Movant States, 22 have adopted emissions trading programs in state plans under the Good Neighbor or Regional Haze programs. Tierney ¶ 32.

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FERC, regional grid operators, state regulators, and other entities. Wellinghoff ¶ 6; Kelliher ¶¶ 6-9; Fox ¶¶ 31-32.

III. A STAY WOULD BE CONTRARY TO THE PUBLIC INTEREST

Movants have made clear that their objective is to delay the Rule's deadlines both for state planning and for power plant compliance. *See, e.g.*, Basin Mot. 19. Any such delays would be decidedly contrary to the public interest. First, postponing deadlines for industry compliance would further delay vital reductions in the largest source of the carbon pollution driving current and future climate change impacts that gravely endanger public health and welfare. *See* MacCracken ¶¶ 30, 56; Field ¶¶ 9-16. Because CO_2 is long-lived in the atmosphere, the increase in pollution allowed by any such delay would damage our climate far beyond the period of the stay. Contrary to Movants' attempts to belittle the Rule's benefits, EPA's record and leading climate scientists' declarations show that the Rule's CO_2 emission reductions will help mitigate highly dangerous future climate impacts, ranging from extreme weather events to rapid sea level rise. MacCracken ¶¶ 20, 25-28; Field ¶ 21. These reductions will provide quantifiable climate protection benefits to society worth tens of billions of dollars over the lifetime of the Rule. *See* RIA 4-9. Even delaying the Rule's CO_2 reductions by one year would sacrifice climate protection benefits worth $11 billion. MacCracken ¶¶ 43-44. Staying compliance deadlines would also further delay reductions in dangerous pollutants emitted together with CO_2 that cause serious illness and hundreds of premature deaths each year. *See* 80 Fed. Reg. at 64,914; Levy ¶¶ 20-28; Losada ¶¶ 3-8. These impacts fall hardest on vulnerable communities. Henry ¶¶ 5-7; Bingham ¶ 3; Busby ¶¶ 7-10.

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Second, a stay would muddle a carefully crafted policy-making framework. EPA structured the interim and final planning schedule to allow states adequate time for technical work and regulatory procedures and to enable the robust participation of all interests and communities with a stake in state plan design. Truncating state planning would harm many stakeholders, including those most vulnerable to power plant pollution. Magaña ¶ 28; Bullard ¶ 18; Ray ¶ 13. A stay would also delay implementation of the Clean Energy Incentive Program, which is intended, among other things, to encourage early investment in energy efficiency projects in low income communities. Magaña ¶ 29.

Third, staying the Rule would undermine the critical U.S. foreign policy objective of galvanizing global efforts to curb climate-changing carbon pollution. As former Secretary of State Madeleine Albright explains, the Rule is the central element of U.S. domestic action, and was critical to achieving serious action commitments from China a year ago and from more than 170 other nations since then, leading into the Paris Climate Conference. Albright ¶¶ 2, 4-5. Albright states that "[t]he leadership role of the United States will remain critical" going forward, and "if our country were to falter or renege on its commitments, we will undermine others' performance," setting back global cooperation on curbing climate pollution for years. *Id.* ¶ 8; *see also* MacCracken ¶¶ 50-51. For these reasons, Albright concludes that a stay would have "serious adverse foreign policy consequences" and be "sharply contrary to the public interest." Albright ¶ 12.

CONCLUSION

The motions to stay the Rule should be denied.

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Respectfully submitted,

/s/ Benjamin Longstreth

David Doniger
Benjamin Longstreth
Melissa J. Lynch
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005
(202) 513-6256
ddoniger@nrdc.org
blongstreth@nrdc.org
llynch@nrdc.org
Counsel for Natural Resources Defense Council

Sean H. Donahue
Donahue & Goldberg, LLP
1130 Connecticut Avenue NW, Suite 950
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

Tomás Carbonell
Vickie Patton
Martha Roberts
Peter Zalzal
Environmental Defense Fund
1875 Connecticut Avenue NW
Suite 600
Washington, D.C. 20009
(202) 572-3610
tcarbonell@edf.org
vpatton@edf.org
mroberts@edf.org
pzalzal@edf.org
Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5725
joanne.spalding@sierraclub.org
andres.restrepo@sierraclub.org
alejandra.nunez@sierraclub.org
Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
aweeks@catf.us

Vera P. Pardee
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org
Counsel for Center for Biological Diversity

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jduffy@catf.us
Counsel for American Lung Association, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, and Ohio Environmental Council

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Mass. Ave., NW, Suite 702
Washington, DC 20036
(202) 667-4500
hfox@earthjustice.org
dbaron@earthjustice.org
tballo@earthjustice.org
Counsel for Sierra Club

William V. DePaulo
122 N Court Street, Suite 300
Lewisburg, WV 24901
Tel: 304-342-5588
william.depaulo@gmail.com
Counsel for West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition, Coal River Mountain Watch, Kanawha Forest Coalition, Mon Valley Clean Air Coalition and Keepers of the Mountains Foundation

Dated: December 8, 2015

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is printed in 14-point, proportionally spaced typeface.

I hereby certify that the foregoing Response in Opposition of Environmental and Public Health Respondent-Intervenors to Motions to Stay complies with the type-volume limitations of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the Rules of this Court. I further certify that this brief is 14 pages long and that it, combined with those separately filed by the other respondent-intervenors, does not exceed the 50-page combined limit set in this Court's order of November 17, 2015 (Doc.1583948).

/s/ Benjamin Longstreth

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the Environmental and Public Health Intervenors state as follows:

All parties, rulings and related cases are correctly set forth in the Certificate appended to the Response of Power Companies in Opposition to Motions for Stay filed on December 8, 2015 (Doc. #1587423).

/s/ Benjamin Longstreth

CERTIFICATE OF SERVICE

I certify that on December 8, 2015, the foregoing Environmental and Public Health Movant-Intervenors' Opposition to Motions for a Stay, was served upon all registered counsel via the Court's ECF system.

/s/ Benjamin Longstreth

Dated: December 8, 2015

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ORAL ARGUMENT NOT YET SCHEDULED

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.

ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINISTRATOR,

Respondents.

RESPONSE OF POWER COMPANIES IN OPPOSITION TO MOTIONS FOR STAY

Richard Ayres
Jessica Olson
John Bernetich
AYRES LAW GROUP LLP
1707 L Street, N.W., Suite 850
Washington, D.C. 20036
(202) 452-9200
ayresr@ayreslawgroup.com
olsonj@ayreslawgroup.com
bernetichj@ayreslawgroup.com

Counsel for NextEra Energy, Inc.

Kevin Poloncarz
Donald L. Ristow
Paul Hastings LLP
55 2nd Street #2400
San Francisco, CA 94105
(415) 856-7000
kevinpoloncarz@paulhastings.com

Counsel for Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas And Electric Company, Sacramento Municipal Utility District, and Southern California Edison Company

December 8, 2015

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* 80 Fed. Reg. 64,662 (Oct. 23, 2015) 7

*Authorities chiefly relied upon are marked with an asterisk.

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GLOSSARY

CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission

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I. INTRODUCTION

The Power Companies are among the nation's largest and most forward-thinking electric utilities and owners of generating units subject to the Clean Power Plan.[1] Together, they own and operate nearly 100,000 megawatts of generating capacity and serve millions of customers in 19 states across the country. The Power Companies support the Clean Power Plan because it will harness market forces to hasten trends that are already occurring in the electricity sector and thereby achieve significant reductions in carbon dioxide ("CO_2") emissions. Through their investment in low- and zero-emissions generation capacity and their procurement of electricity generated by such sources, the Power Companies have reduced CO_2 emissions within their respective generation fleets and portfolios, while continuing to provide reliable and affordable power to their customers.[2] Their collective experience doing so demonstrates the achievability and reasonableness of the Clean Power Plan.

II. ARGUMENT

Movants are incorrect when they describe the alleged harms they say will immediately befall electric generators and utilities because the Rule requires nothing of affected sources until 2022 (at the earliest). Furstenwerth Decl. ¶ 19 (C16). They claim that, in the absence of a stay, they will be forced to make decisions *now* about

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[1] The Power Companies include Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, NextEra Energy, Inc., Pacific Gas and Electric Company, Sacramento Municipal Utility District and Southern California Edison Company.

[2] Gianunzio Decl. ¶ 3 (C25); LaBauve Decl. ¶ 22 (C43); Mele Decl. ¶ 4 (C51); Nichols Decl. ¶ 4 (C54-55).

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retirements of existing coal-fired power plants and investments in new natural gas-fired combined cycle and renewable generation capacity and related infrastructure. These charges are unfounded.

First, Movants wrongly attribute the many ills affecting domestic coal mining and coal-fired power generation to the Rule. In fact, reductions in coal-fired generation are being driven by independent changes in the electricity sector that predate the Rule, which are causing shifts towards increased generation from gas-fired and renewable power plants. Furstenwerth ¶¶ 16-17 (C14-15). These changes include the abundant supply of relatively inexpensive natural gas and the increasing competitiveness of electricity from renewable generation sources. *Id.*; Kelliher Decl. ¶ 13 (C33-34). Movants cannot conflate these secular changes with alleged impacts of the Rule. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (stating that, "the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin").

Second, Movants have failed to point to any specific coal plants that would not otherwise retire that will do so during the litigation period because of the Rule. Furstenwerth ¶ 23 (C18). No one would retire a financially viable source in the near term merely because its retirement was predicted by an EPA model designed to illustrate the long-term impacts of regulation on the power sector as a whole, assuming perfect foresight. *Id.* ¶ 22 (C17-18). Any near-term decisions to retire particular coal-fired power plants would be purely economic decisions and not due to any regulatory mandate imposed by the Rule. *Id.* ¶ 20 (C16). These economic decisions, made years in advance of any regulatory obligation applicable to the

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affected EGUs, constitute self-imposed actions and do not fulfill the requirements for granting a stay. *See Cuomo v. NRC*, 772 F.2d 972, 977 (D.C. Cir. 1985) (stating "self-imposed costs are not properly the subject of inquiry on a motion for stay."). Further, in light of the tremendous flexibility afforded by the Rule, it is still too early to determine what will ultimately be required in 2022 for any individual unit by the relevant state plan. Furstenwerth ¶ 19 (C16); Kelliher ¶ 13 (C33-34). Accordingly, it is inaccurate and conjectural to allege that the Rule *requires* coal-fired power plants to retire now. Such speculative harm cannot provide the basis for a stay. *See Wisconsin Gas Co.*, 758 F.2d at 674 (stating, "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.").

Third, because there are still more than six years before the Rule actually requires any reductions from the affected units, Movants can wait until the Court decides this case on the merits, if they choose, before seeking the necessary permits and financing to build any new capacity that may be needed to achieve the Rule's goals. Furstenwerth ¶ 27 (C20-22). The lead time for new solar and wind generating capacity can be significantly shorter than five years absent the need for new transmission to deliver power from these resources to the load. *Id.* Likewise, although the construction of new natural gas-fired combined cycle capacity is not a component of the Rule's "best system of emission reduction", if such capacity should ultimately be needed, it can be built in as little as four years, often without requiring new transmission infrastructure. *Id.* Additionally, existing gas-fired combined cycle plants can be operated at substantially greater utilization rates, avoiding the need for

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the number of new gas-fired units Movants suggest that they must construct to meet load in 2022. *Id.* ¶ 26 (C20).

Further, the substantial costs that Movants assert would be incurred in the next two years would either be voluntary—such as costs associated with achieving early reductions pursuant to the Clean Energy Incentive Program—or inconsistent with the Power Companies' extensive experience developing new generation capacity. Furstenwerth ¶ 28 (C22) (significant costs not incurred and financing not obtained until after permits issued). Such voluntarily incurred costs cannot provide the basis for a stay. *See Cuomo*, 977 F.2d at 977.

Movants claim they must start incurring costs now because there is no guarantee emissions trading will be available as a compliance pathway or the price of allowances or emission rate credits will be exorbitantly expensive. These highly speculative assertions are unsupported by the Power Companies' collective experience. Functioning emissions markets have consistently developed under other emissions standards affecting the power sector and provided a pathway for compliance, without impairing the functioning of the underlying electricity markets or the supply of reliable and affordable power. Furstenwerth ¶¶ 9-14 (C11-14); Kelliher ¶¶ 7-8 (C30-31). The Power Companies anticipate that, in addition to state and regional carbon markets that already exist and will likely be relied upon by several states to achieve the Rule's goals, emissions markets will develop throughout the rest of the country and provide a pathway to compliance for their affected units. Baggs Decl. ¶ 7 (C3-4); Furstenwerth ¶ 14 (C13-14); Gianunzio ¶ 8 (C26-27); Lavinson Decl. ¶ 7 (C48-49); Welz Decl. ¶ 7 (C58). Thus, Movants' speculation that emissions

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trading will not be available and that they must therefore take immediate action to shut down plants and build new ones provides no basis for staying the Rule. *See Cuomo*, 772 F.2d at 976-77 (movant's costs must be both "certain to occur in the near future" and not "self-imposed" to justify stay); *Small Refiner Lead Phase-down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983) (upholding standard for lead in gasoline where record demonstrated trading program would develop so all refiners could comply).

Finally, granting a stay would not remove the uncertainty surrounding the future regulation of CO_2 emissions or the Rule, which Movants claim is preventing them from moving forward with major investments at this time or causing them to factor the risks associated with the Rule's implementation into their decisions and contracts. Irrespective of the Rule's implementation, it would be unreasonable and imprudent *not* to address the Rule's implementation and the possibility of future carbon regulations in major investment decisions and contracts. The Power Companies regularly manage uncertainty—and, in particular, uncertainty surrounding future regulation of CO_2 emissions—through negotiation of specific commercial terms. Furstenwerth ¶¶ 10, 24 (C11, 18-19); *see also* Baggs ¶ 3 (C2). That is the ordinary means of addressing regulatory risk within the power sector; it is unrealistic for Petitioners to suggest they should be forever insulated from the risk of future CO_2 regulation. Furstenwerth ¶ 24 (C18-19). That risk will remain regardless of the Rule's implementation or the Court's grant of a stay. Thus, a stay cannot provide the relief Movants seek, but would only deepen uncertainty about when and how power-sector CO_2 emissions will ultimately be regulated. As a consequence, granting a stay could itself cause harm to the Power Companies and others who are investing in clean

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generation technology today in anticipation of future CO_2 regulation. *See* Kelliher ¶ 18 (C35-36); LaBauve ¶ 23 (C43-44).

Contrary to Movants' assertions that the Rule would reconfigure the entire national electric grid, the Rule applies to affected units no differently than other regulations implemented under the Clean Air Act to reduce power sector emissions, which operate by limiting emissions from affected units and thereby creating incentives to shift dispatch from higher- to lower-emitting units. Furstenwerth ¶ 10 (C11); *see also* Kelliher ¶ 16 (C34-35). The Power Companies are accustomed to coordinating with the nation's independent system operators and regional transmission organizations to meet new Clean Air Act requirements without impairing the reliability of the electricity grid. Furstenwerth ¶ 11 (C12). They also regularly incorporate costs for compliance with emissions standards into wholesale power prices and commercial terms (*id.* ¶ 10); this has not interfered with the operation of the power markets (*id.*); nor has it been found to usurp a state's authority over its intrastate generation or FERC's jurisdiction under the Federal Power Act. In fact, the Rule does not subject the electricity sector, renewable power generation, or wholesale markets to the EPA's jurisdiction any more than the Cross-State Air Pollution Rule or other emissions standards. Kelliher ¶¶ 7-11 (C30-32).

The Power Companies' experience confirms that the Rule's required reductions could, in fact, be achieved by individual sources, but at significantly greater cost than if sources rely upon the flexible generation-shifting and trading mechanisms afforded by the Rule instead. *See* Furstenwerth ¶ 18 (C15); LaBauve ¶¶ 9-10 (C40-41). For the same reason, Movants are wrong to contend that the Rule is unlawful because it

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allows the flexibility of trading to meet its goals. Emissions trading is a demonstrated means of achieving cost-effective reductions from the power sector (*see* 80 Fed. Reg. 64662, 64709); this fact is confirmed by the Power Companies' experience complying with other Clean Air Act emission reduction programs and state and regional programs to reduce CO_2 emissions. *See* Gianunzio ¶ 8 (C26-27); Lavinson ¶ 6 (C48); Nichols ¶ 7 (C55); Welz ¶ 7 (C58). The Power Companies and the power sector therefore advocated in their comments on the proposed rule for the EPA to incorporate the flexibility of emissions trading into the Rule. *See* 80 Fed. Reg. at 64733, note 380 (summarizing industry comments supportive of trading). While Movants now portray the Rule's flexibility in this regard as a straightjacket, their portrayal contradicts the Power Companies' experience and the express preferences of the electricity sector.[3]

III. CONCLUSION

Faced with a Rule that requires *nothing* of affected sources until 2022 at the earliest, Movants seek to blame the Rule, not only for the many ills facing the coal industry, but for a series of speculative harms as well. They incorrectly suggest that many coal-fired power plants will retire as soon as next year, but make no claim that any particular plant will retire because of the Rule. They contend they must begin

[3] The Power Companies also agree that staying the Rule would not be in the public interest. *See, e.g.*, Resp. of Env. & Pub. Health Intervenors at 13-14. In particular, "a stay of the [Rule] would likely cast doubt on the ability of the United States to achieve domestic emission reductions and lead other nations to delay implementing emission reductions." *Id.*, Albright Decl. ¶ 9 (B106). Stalling the momentum and opportunity that the Rule represents to address CO_2 emissions would therefore result in irreparable harm. *See* Albright ¶ 10 (B106).

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incurring significant costs now, years in advance of the date when the first emissions reduction obligations under the Rule will go into effect. These claims of immediate harm are without merit.

Any near-term retirements or costs would be due to Movants' own economic decisions and not to any imminent regulatory mandate imposed by the Rule. The regulatory uncertainty Movants contend is created by the Rule's obligation to reduce CO_2 emissions is already a fact of life for the electricity sector, one that the Power Companies regularly manage in the ordinary course of business and that would not be alleviated by the grant of a stay in any event. Finally, assertions that the Rule is unlawful because it allows the flexibility of trading contradict, not only the Power Companies' and the electricity sector's express preference, but the long history of relying upon emissions trading to create incentives to shift dispatch from higher- to lower-emitting units and thereby reduce power sector emissions under the Clean Air Act.

The Power Companies' experience reducing CO_2 emissions demonstrates that the Rule's flexible goals can be met by the nation's utilities, even if they should wait until the Court decides this case on the merits to make decisions on retirements and begin building out new generation capacity. For these reasons, the Court should deny Movants' motions for stay of the Rule.

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Dated: December 8, 2015

Respectfully submitted,

/s/ Richard Ayres
Richard Ayres
Jessica Olson
John Bernetich
AYRES LAW GROUP LLP
1707 L Street, N.W., Suite 850
Washington, D.C. 20036
(202) 452-9200
ayresr@ayreslawgroup.com
olsonj@ayreslawgroup.com
bernetichj@ayreslawgroup.com

Counsel for NextEra Energy, Inc.

/s/ Kevin Poloncarz
Kevin Poloncarz
Counsel of Record
Donald L. Ristow
Paul Hastings LLP
55 2nd Street #2400
San Francisco, CA 94105
(415) 856-7000
kevinpoloncarz@paulhastings.com

Counsel for Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas And Electric Company, Sacramento Municipal Utility District, and Southern California Edison Company

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response of Power Companies in Opposition to Motions for Stay complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure and the Circuit Rules of this Court. I further certify that the combined pages of this brief and those filed by State Intervenors, NGO Intervenors, and Trade Association Intervenors does not exceed the 50 page limit set by the Court in its November 17, 2015 Order (Document #1583948).

/s/ Kevin Poloncarz
Kevin Poloncarz

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 28(a)(1) and 28(a)(1)(A), Intervenor Power Companies state as follows:

Parties:

Petitioners:

15-1363 – States of West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming, the State of Arizona Corporation Commission, the Commonwealth of Kentucky, the State of Louisiana Department of Environmental Quality, Attorney General Bill Schuette on behalf of the People of Michigan, and the State of North Carolina Department of Environmental Quality

15-1364 – State of Oklahoma and the Oklahoma Department of Environmental Quality

15-1365 – International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

15-1366 – Murray Energy Corporation

15-1367 – National Mining Association

15-1368 – American Coalition for Clean Coal Electricity

15-1370 – Utility Air Regulatory Group and American Public Power Association

15-1371 – Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company

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15-1372 – CO_2 Task Force of the Florida Electric Power Coordinating Group, Inc.

15-1373 – Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

15-1374 – Tri-State Generation and Transmission Association, Inc.

15-1375 – United Mine Workers of America

15-1376 – National Rural Electric Cooperative Association, Arizona Electric Power Cooperative, Inc., Associated Electric Cooperative, Inc., 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, Deseret Generation & Transmission Co-operative, Inc., East Kentucky Power Cooperative, Inc., East River Electric Cooperative, Inc., East Texas Electric Cooperative, Inc., Georgia Transmission Corporation, Golden Spread Electric Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Kansas Electric Power Cooperative, Inc., Minnkota Power Cooperative, Inc., North Carolina Electric Membership Corporation, Northeast Texas Electric Cooperative, Inc., Northwest Iowa Power Cooperative, Oglethorpe Power Corporation, Powersouth Energy Cooperative, Prairie Power, Inc., Rushmore Electric Power Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., San Miguel Electric Cooperative, Inc., Seminole Electric Cooperative, Inc., South Mississippi Electric Power Association, South Texas Electric Cooperative, Inc., Southern Illinois Power Cooperative, Sunflower Electric Power Corporation, Tex-La Electric Cooperative of Texas, Inc., Upper Missouri G. & T. Electric Cooperative,

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Inc., Wabash Valley Power Association, Inc., Western Farmers Electric Cooperative, and Wolverine Power Supply Cooperative, Inc.

15-1377 – Westar Energy, Inc.

15-1378 – NorthWestern Corporation

15-1379 – National Association of Home Builders

15-1380 – State of North Dakota

15-1382 – 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

15-1383 – Association of American Railroads

15-1386 – Luminant Generation Company, 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

15-1393 – Basin Electric Power Cooperative

15-1398 – Energy & Environment Legal Institute

15-1409 – Mississippi Department of Environmental Quality

15-1410 – International Brotherhood of Electrical Workers, AFL-CIO

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15-1413 – Entergy Corporation

15-1418 – LG&E and KU Energy LLC

15-1422 – West Virginia Coal Association

15-1432 – Newmont Nevada Energy Investment, LLC and Newmont USA Limited

Respondents

Respondents are Regina A. McCarthy, Administrator, United States Environmental Protection Agency and the United States Environmental Protection Agency.

Intervenors and *Amici Curiae*

Movant-intervenors are American Wind Energy Association, Advanced Energy Economy, American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, Sierra Club, Peabody Energy Corporation, Solar Energy Industries Association, the States of New York, California (by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Kamala D. Harris), Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota (by and through the Minnesota Pollution Control Agency), New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, Broward County, Florida, NextEra Energy, Inc., Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City

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Light Department, National Grid Generation, LLC, and Pacific Gas and Electric Company, Dixon Bros., Inc., Nelson Brothers, Inc., Western Explosive Systems Company, Norfolk Southern Corp., Joy Global Inc., Gulf Coast Lignite Coalition, West Virginia Highlands Conservancy, the Ohio Valley Environmental Coalition, Coal River Mountain Watch, the Kanawha Forest Coalition, Mon Valley Clean Air Coalition, Keepers of the Mountains Foundation, New York Power Authority, Sacramento Municipal Utility District and Southern California Edison Company.

Amicus Curiae are William D. Ruckelshaus and William K. Reilly.

Movant-*Amicus Curiae* is Philip Zoebisch.

Rulings under Review:

The final agency action under review is "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units", 80 Fed. Reg. 64,662 (October 23, 2015).

Related Cases:

The following consolidated cases pending before this Court challenge a related agency action: *State of North Dakota v. EPA*, No. 15-1381; *Murray Energy Corporation v. EPA, et al.*, No. 15-1396; *Energy & Environment Legal Institute v. EPA*, No. 15-1397; *State of West Virginia, et al. v. EPA, et al.*, No. 15-1399; and *Peabody Energy Corporation v. EPA, et al.*, 15-1438.

/s/ Kevin Poloncarz
Kevin Poloncarz

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. I also caused the foregoing to be served via overnight delivery on counsel for the following parties at the following addresses:

Ms. Janice M. Alward
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Kelvin Allen Brooks
Office of the Attorney General, State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397
Counsel for Movant-Intervenor State of New Hampshire

Patrick Burchette
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006-6801
Counsel for Petitioners East Texas Electric Cooperative, Inc.; Northeast Texas Electric Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; Tex-La Electric Cooperative of Texas, Inc.

William F. Cooper
State of Hawaii Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
Counsel for Movant-Intervenor State of Hawaii

FOIA EPA-HQ-2016-009655

David Finley Crabtree
Vice President, General Counsel
10714 South Jordan Gateway
South Jordan, UT 84092
Counsel for Petitioner Deseret Generation & Transmission Co-operative

Tannis Fox
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Counsel for Movant-Intervenor State of New Mexico

Ms. Karen R. Harned
National Federation of Independent Business
1201 F Street, NW
Suite 200
Washington, DC 20004
Counsel for Petitioner National Federation of Independent Business

Jacob Larson
Environmental Law Division
321 E. 13th Street, Room 18
Des Moines, IA 50319
Counsel for Movant-Intervenor State of Iowa

Mr. Karl Roy Moor
Southern Company Services, Inc.
600 18th Street, North 15N
Birmingham, AL 35203
Counsel for Petitioner Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company

Carrie Noteboom
New York City Law Department
100 Church Street
New York, NY 10007
Counsel for Movant-Intervenor City of New York

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Steven J. Oberg
Lynn, Jackson, Shultz & Lebrun, P.C.
PO Box 8250
Rapid City, SD 57709
Counsel for Petitioner Rushmore Electric Power Cooperative, Inc.

Mr. Gary Vergil Perko
Hopping Green & Sams
119 South Monroe Street
Suite 300
Tallahassee, FL 32301
Counsel for Petitioner Gulf Power Company

Mr. Lee Philip Rudofsky
Office of the Attorney General, State of Arkansas
323 Center Street
Suite 200
Little Rock, AR 72201
Counsel for Petitioner State of Arkansas

Bill Spears
Segrest & Segrest, P.C.
18015 West Highway 84
McGregor, TX 76657
Counsel for Petitioner Brazos Electric Power Cooperative, Inc.

Mr. Ben H. Stone
Balch & Bingham LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Counsel for Petitioner Mississippi Power Company

Luther J. Strange, III
Office of the Attorney General, State of Alabama
501 Washington Avenue
Montgomery, AL 36130
Counsel for Petitioner State of Alabama

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Laurence H. Tribe
Harvard Law School
Griswold 307
1563 Massachusetts Avenue
Cambridge, MA 02138
Counsel for Movant-Intervenors Peabody Energy Corporation, Dixon Bros., Inc., Nelson Brothers, Inc., Western Explosive Systems Company, Norfolk Southern Corporation, Joy Global Inc., and Gulf Coast Lignite Coalition

Thiruvendran Vignarajah
Office of the Attorney General, State of Maryland
200 St. Paul Place
20th Floor
Baltimore, MD 21202-2021
Counsel for Movant-Intervenor State of Maryland

Ms. Janet F. Wagner
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Philip Zoebisch
28 W Madison Avenue
Collingswood, NJ 08108
Movant-Amicus Curiae

/s/ Kevin Poloncarz
Kevin Poloncarz

FOIA EPA-HQ-2016-009655

ORAL ARGUMENT NOT SCHEDULED

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, *Respondent*,	No. 15-1363 (and consolidated cases)

Opposition to Petitioners' Motions for a Stay
On Behalf of States of New York, California (by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Kamala D. Harris), Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland (by and through Attorney General Brian E. Frosh), Minnesota (by and through the Minnesota Pollution Control Agency), New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, and Broward County, Florida

KAMALA D. HARRIS
Attorney General of California
M. ELAINE MECKENSTOCK
JONATHAN WIENER
Deputy Attorneys General
California Department of Justice
1515 Clay Street, 20th Floor
Oakland, CA 94612

MAURA HEALEY
Attorney General of Massachusetts
MELISSA A. HOFFER
CHRISTOPHE COURCHESNE
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place
Boston, MA 02108

ERIC T. SCHNEIDERMAN
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
BETHANY A. DAVIS NOLL
KAREN LIN
Assistant Solicitors General
MICHAEL J. MYERS
MORGAN A. COSTELLO
BRIAN LUSIGNAN
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2400

December 8, 2015

Additional Counsel on Signature Pages

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(N.D. Pub. Serv. Comm'n, May 9, 2012) 10fn6

In re Application of Ok. Gas & Elec. Co.,
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GLOSSARY

Act	Clean Air Act
Albright Decl.	Declaration of Madeleine Albright, Albright Stonebridge Group (submitted with Non-Governmental Intervenors' Stay Opposition)
Chang Decl.	Declaration of Edith Chang, California Air Resources Board
Clark Decl.	Declaration of Stuart Clark, Washington Department of Ecology
Dykes Decl.	Declaration of Katherine Dykes, Connecticut Department of Energy and Environmental Protection
Glatt Decl.	Declaration of L. David Glatt, North Dakota Department of Health (submitted as part of Attachment A to North Dakota's Stay Motion)
Gore Decl.	Declaration of Ronald Gore, Alabama Department of Environmental Management (submitted as part of Exhibit C to State Petitioners' Stay Motion)
Eisdorfer Decl.	Declaration of Jason Eisdorfer, Oregon Public Utilities Commission
Easterly Decl.	Declaration of Thomas Easterly, Indiana Department of Environmental Management (submitted as part of Exhibit C to State Petitioners' Stay Motion)
EPA	United States Environmental Protection Agency
Field Decl.	Declaration of Christopher Field, United States Environmental Protection Agency (submitted as Exhibit 5 to EPA's Opposition to Stay Motions)
Hodanbosi Decl.	Declaration of Robert Hodanbosi, Ohio Environmental Protection Agency (submitted as part of Exhibit C to State Petitioners' Stay Motion)

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Hyde Decl.	Declaration of Richard Hyde, Texas Commission on Environmental Quality (submitted as part of Exhibit C to State Petitioners' Stay Motion)
Jones Decl.	Declaration of Suzanne Jones, City of Boulder, Colorado
Klee Decl.	Declaration of Robert Klee, Connecticut Department of Energy and Environmental Protection
KS Comments	Comments Submitted to EPA on Clean Power Plan by John Mitchell, Director, Kansas Department of Health and Environment (Nov. 17, 2014), EPA-HQ-OAR-2013-23255
KY Comments	Comments Submitted to EPA on Clean Power Plan by Leonard Peters, Secretary, Kentucky Energy and Environment Cabinet (Nov. 26, 2014), EPA-HQ-OAR-2013-22574
McCabe Decl.	Declaration of Janet G. McCabe, United States Environmental Protection Agency (submitted as Exhibit 1 to EPA's Opposition to Stay Motions)
McVay Decl.	Declaration of Douglas McVay, Rhode Island Department of Environmental Management
Millar Decl.	Declaration of Neil Millar, California Independent System Operator
MT Comments	Comments Submitted to EPA by Steve Bullock, Governor, State of Montana (Dec. 1, 2014), EPA-HQ-OAR-2013-22969
Nowak Decl.	Declaration of Ellen Nowak, Public Service Commission of Wisconsin (submitted as part of Exhibit C to State Petitioners' Stay Motion)
Pedersen Decl.	Declaration of Dick Pedersen, Oregon Department of Environmental Quality

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Randolph Decl.	Declaration of Edward Randolph, California Public Utilities Commission
Rikard Decl.	Declaration of Gary Rikard, Mississippi Department of Environmental Quality (submitted with Mississippi Department of Environmental Quality's Stay Motion)
RGGI	Regional Greenhouse Gas Initiative
Snyder Decl.	Declaration of Jared Snyder, New York State Department of Environmental Conservation
Stern Decl.	Declaration of Todd Stern, United States Department of State (submitted as Exhibit 6 to EPA's Opposition to Stay Motions)
Stoddard Decl.	Declaration of Philip Stoddard, City of South Miami, Florida
Suuberg Decl.	Declaration of Martin Suuberg, Massachusetts Department of Environmental Protection
Thornton Decl.	Declaration of David Thornton, Minnesota Pollution Control Agency
Tierney Decl.	Declaration of Susan F. Tierney, Analysis Group, Inc. (submitted with Non-Governmental Intervenors' Stay Opposition)
Winslow Decl.	Declaration of Dallas Winslow, Delaware Public Utilities Commission
Wright Decl.	Declaration of Craig Wright, New Hampshire Department of Environmental Services
Zibelman Decl.	Declaration of Audrey Zibelman, New York State Public Service Commission

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PRELIMINARY STATEMENT

To protect their residents' health and welfare from the dangers of climate change, the undersigned proposed Intervenor States and Municipalities ("State Intervenors") have sought for years to mitigate climate change harms and reduce carbon-dioxide emissions. The Clean Power Plan is an essential part of these efforts because it will impose pollution limits on the country's largest source of those emissions: fossil-fuel power plants. 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"). The Rule appropriately utilizes the cooperative-federalism framework of section 111(d) of the Clean Air Act, which directs EPA to prescribe regulations for emissions of carbon dioxide from power plants. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011).

Petitioners have moved to stay the Rule, asserting that it unconstitutionally commandeers States to implement a federal policy and improperly forces them to transform their energy sectors.[1] These arguments fundamentally mischaracterize the Rule. Far from intruding on state sovereignty or coercing state governments, the Rule sets reasonable limits on carbon-dioxide pollution from fossil-fuel power plants—just as previous EPA rules have limited other forms of pollution from these same power

[1] This Opposition focuses on arguments concerning state sovereignty and State Petitioners' alleged harms, which State Intervenors are uniquely situated to answer. State Intervenors agree with EPA and the other Intervenors-Respondents that Petitioners' other arguments lack merit.

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plants. The Rule allows States the option of implementing the emission limits themselves—through a broad range of possible approaches—or opting out of regulation completely, in which case EPA will directly regulate the power plants. Under either approach, States will continue, as before, to exercise any traditional regulatory oversight they have to review and approve power plant decisions to comply with the Rule. Contrary to Petitioners' arguments, the Rule respects rather than interferes with state regulation of energy, and follows a long tradition of successful regulation of power plant pollution. For these reasons, Petitioners are unlikely to succeed on the merits, and a stay should be denied.

The equities also weigh heavily against a stay. State Intervenors are experiencing climate change harms firsthand and urgently seek the reductions provided for in the Rule. Any delay in emission reductions from a stay would compound these harms. Denial of a stay, on the other hand, would not cause irreparable harm. State Petitioners have sufficient time and flexibility to plan compliance strategies that will best enable power plants to meet emission obligations.

ARGUMENT

I. THE CLEAN POWER PLAN IS A LAWFUL EXERCISE OF EPA'S AUTHORITY UNDER SECTION 111(d)'S COOPERATIVE FEDERALISM STRUCTURE.

A. The Clean Power Plan Gives States Substantial Leeway to Decide Whether and How to Participate in Reducing Emissions.

Petitioners complain that the Rule forces States to "undertake a long series of

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regulatory actions" in violation of their constitutional rights, Ok. Br. 11. *See also* W.Va. Br. 6, 10-11; Chamber Br. 6, 14-15; UARG Br. 2, 6, 13; NMA Br. 11. To the contrary, the Rule follows Congress's well-established framework of cooperative federalism—one that is embodied in the Clean Air Act and other statutes, and that has consistently been upheld as constitutional. *See Texas v. EPA*, 726 F.3d 180, 196 (D.C. Cir. 2013).

Similar to other Clean Air Act regulations, the Rule sets emission limits for power plants. In accord with the Act's cooperative federalism framework, the Rule gives each State the option of designing and implementing a state-specific plan to ensure that power plants in the State achieve these federally-enforceable emission limits. *See* 42 U.S.C. § 7411(d)(1); 80 Fed. Reg 64,827; EPA Br. 5-6. But no State is required to exercise this option. If a State opts out of submitting a plan, EPA will issue and enforce its own federal plan to implement the Rule's carbon-dioxide emission limits. 80 Fed. Reg. at 64,881-82; 42 U.S.C. § 7411(d)(2) (authorizing federal plan). Under a federal plan, EPA will enforce emission limits directly against power plants, which will have the choice to make technological changes that reduce emissions, purchase credits or allowances, shift to lower-emitting generation, or implement other measures to reduce emissions. *See* 80 Fed. Reg. 64,966, 64,970 (Oct. 23, 2015).

The "constitutionality of federal statutes that allow States to administer federal programs but provide for direct federal administration if a State chooses not to administer it" has been "repeatedly affirm[ed]." *Texas*, 726 F.3d at 196. The option of

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direct federal regulation thus removes any "suggestion that the [Rule] commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-90 (1980).

The cooperative-federalism framework endorsed in *Texas* and *Hodel* exists throughout federal law. *See New York v. United States*, 505 U.S. 144, 167-68 (1992) (listing examples). And the Rule straightforwardly applies this framework. The Rule thus bears no similarity to the federal statutes that were found to impermissibly commandeer States in *Printz v. United States* and *New York v. United States*, contrary to Petitioners' claims (*see* Ok. Br. 10-11). In those cases, the States had no choice but to comply with federal mandates. *Printz*, 521 U.S. 898, 904, 932-33 (1997) (no choice to opt out of duty to perform background checks on gun purchasers); *New York*, 505 U.S. at 175 (no choice but to regulate as instructed or take title to low-level radioactive waste, both of which were commandeering). Here, the Rule, by contrast, allows States to decline to regulate at all and thus does not commandeer or coerce any State. *Cf. Hodel*, 452 U.S. at 288-89; *see also Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 175 (D.C. Cir. 2015) ("the Clean Air Act does not" compel States to implement federal regulatory programs).

The backstop of direct federal regulation by itself defeats Petitioners' claims of unconstitutional commandeering or coercion. But the availability of a federal option is not the only way in which the Rule respects state choices. States that decide to

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participate in the regulation of carbon-dioxide emissions are afforded the "maximum possible degree of flexibility" in meeting emission goals. 80 Fed. Reg. at 64,820. The broad range of options available to States underscores the extraordinary degree to which the Rule respects, rather than interferes with, state sovereignty.

To provide States with a full range of options, EPA began by establishing guidelines for States to follow in limiting carbon-dioxide pollution for coal- and gas-fired power plants. To calculate these limits, EPA considered the degree of emission reductions that these power plants could achieve by adopting the "best system of emission reduction . . . adequately demonstrated," 42 U.S.C. § 7411(a)(1); *see also* 40 C.F.R § 60.22(b)(5). In EPA's determination, the "best system of emission reduction" includes the "building blocks" of improving heating efficiency at the power plants and shifting generation from fossil-fuel fired power plants to lower- or zero-emitting units, all of which are proven strategies to reduce carbon-dioxide pollution.[2] To maximize flexibility for States opting to submit state plans, EPA then translated these plant-specific emission limits into statewide goals. 80 Fed. Reg. at 64,667.

The Rule gives States broad discretion to decide how to achieve these statewide goals. States need not require power plants to use the particular measures EPA selected as the "building blocks" of the "best system of emission reduction" for

[2] EPA's consideration of these measures to set the emission limits—and power plants' use of them to meet the limits—is not unique in Clean Air Act regulation. *See* 80 Fed. Reg. at 64,724-25, 64,770-73 (listing examples); EPA Br. 28-30 (same).

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purposes of their calculations of emission limits. *See* 80 Fed. Reg. at 64,710. Nor must States (or power plants) employ these "building blocks" at the levels EPA used in its limit-setting calculations, as some Petitioners concede. *See* NMA Br. 13 ("sources are not required to use the EPA-established [best system of emission reduction]"). As the Rule makes clear, States (and power plants) may achieve the emission goals by using any combination of measures. 80 Fed. Reg. at 64,755. *See* EPA Br. 9.

States that choose to submit a state plan may select a plan that places most of the burden on the power plants themselves, rather than the State. *See* EPA Br. 17, 46, 57.[3] Under such a plan, power-plant owners would be left to decide how to comply and the measures available to power-plant owners are familiar ones for that industry. The options include purchasing emission credits or allowances, making heat rate improvements, co-firing natural gas with coal, converting coal plants to natural gas, shifting generation to lower emitting units, or some combination of these and other options. *See* 80 Fed. Reg. at 64,709, 64,833-35; *see also* EPA Br. 9, 34-35.

This approach conforms with previous Clean Air Act regulations involving power plants (see *infra,* 9-10), and, contrary to Petitioners' claims, does not "dictate the market share of each generation fuel-type." *See* UARG Br. 6, 13. States that

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[3] The Rule recognizes States may adopt a "trading ready" plan, *see* McCabe Decl. ¶¶ 19-21, or work with other States to achieve cost-effective emission reductions through market-based trading, such as the successful Regional Greenhouse Gas Initiative. *See, e.g.*, Dykes Decl., ¶¶ 8-9, 26-30 (A47, A55-57).

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choose to implement the Rule's emission limits (and power plants on which limits are ultimately imposed) have freedom to choose from a broad range of familiar compliance options, underscoring the absence of any infringement on state sovereignty.

B. The Clean Power Plan Respects, Rather than Undermines, State Authority Over Energy.

Petitioners further argue that the Rule encroaches on States' authority to regulate their intrastate electrical grids. Ok. Br. 6, 11-12; *see also* Chamber Br. 14. Some Petitioners claim EPA is "bypassing all federal and state energy laws and the regulators that have overseen the industry for over seventy years." UARG Br. 2. Others assert that EPA is infringing on state sovereignty because, even if States opt out and EPA imposes the Rule's emissions limits directly on the power plants, States' utility regulators will have to oversee compliance responses such as generation shifting or plant closures. *See* Ok. Br. 6, 11-12. None of these claims has merit.

Far from intruding on the States' authority to regulate energy, the Rule preserves that authority, as previous Clean Air Act rules have, because any measures taken by power plants to comply with the Rule—whether under a state plan or a federal plan—will remain subject to the States' regulatory oversight of the energy sector. Whatever changes power plants implement to reduce carbon-dioxide emissions must still comply with the States' traditional regulation of "the economic aspects of electrical generation," including the setting of retail electricity rates and the

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licensing of generating facilities, *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). *See* EPA Br. 33 ("[S]tates retain the same authorities they always have."). For example, as one State Petitioner's declarant notes, state energy regulators will continue, as before, to exercise their existing authority to review proposed power-plant retirements in response to the Rule to ensure continued reliability. Nowak Decl. ¶ 12.

Petitioner Oklahoma derides the Rule's preservation of state oversight authority as requiring States to "accommodate" the Rule or "facilitate the changes to electricity generation and transmission that the Rule requires." Ok. Br. 2. But the Rule merely anticipates that state regulators will continue exercising their ordinary oversight of compliance measures that would affect the energy sector—just as state regulators would review any changes caused by other regulations, economic forces, industry practice, or power-plant owners' business decisions.[4] Rather than "run[ning] roughshod over States' sovereign rights," W.Va. Br. 10; *see also* Chamber Br. 6, 14-16, the Rule assumes States will continue to exercise their sovereign rights to oversee their energy sectors and provides ample space for States to do so, whether a State submits a plan or EPA imposes a federal plan. This continued oversight is presumed in all

[4] Just last week, Oklahoma's public utility regulator exercised its regulatory authority to deny a power plant owners' plan for complying with federal environmental regulations, which had included converting two coal plants to natural gas. *In re Application of Ok. Gas & Elec. Co.*, No. PUD 201400229 (Ok. Corp. Comm'n, Dec. 2, 2015), *available at* http://imaging.occeweb.com/AP/Orders/occ5245126.pdf.

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federal emission limits on power plants and cannot render the Rule unconstitutional.

States have extensive experience with providing regulatory oversight of power plants' compliance decisions. Many of the measures used by power plants to reduce emissions under prior EPA rules—such as plant retirements, conversions from coal to natural gas, and construction of new lower or zero-emitting generation—have required state regulatory approvals. State regulators have routinely reviewed and approved those measures as well as rate increases necessary to recover the costs of those measures.[5] For example, Virginia granted an application to convert a coal-fired power plant to natural gas after the Clean Air Act's regulatory requirements made the continued use of coal uneconomical. *In re Va. Elec. & Power Co.*, No. PUE-2012-00101, 2013 Va. PUC LEXIS 633 (Va. Corp. Comm'n, Sept. 10, 2013). Similarly, in coordination with state environmental regulators, Oregon's energy regulator approved the permanent retirement of a coal-fired power plant by 2020 to meet the State's regional haze obligations under the Clean Air Act while maintaining reliability. Eisdorfer Decl. ¶ 18 (A180-81); *see also* Thornton Decl. ¶ 10 (A146-47) (repowering project in Minnesota). State Petitioners also have overseen and approved similar

[5] *See, e.g.*, Zibelman Decl. ¶ 12 (A232) (discussing process in New York for Public Service Commission to ensure plant retirements in response to air regulations do not undermine reliability); Randolph Decl. ¶¶ 38-39 (A213-14) & Millar Decl. ¶ 6 (A185-86) (discussing work of California Public Utilities Commission and Independent System Operator to ensure power plants' decisions to comply with federal standards for particulate matter and restrictions on use of cooling water is consistent with long-term electric reliability planning for the Los Angeles Basin area).

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power-plant compliance responses to previous EPA regulations. For example, state regulators routinely oversee the selection of appropriate compliance strategies from among a range of options (including generation shifting), the shutdown of power plants, the conversion of plants from coal to natural gas, and the recovery of the costs of compliance with federal emission limits, all while ensuring reliability and managing rate impacts.[6] States oversee these compliance measures even when the emission limits that power plants must comply with resulted from direct federal regulation under a federal plan.[7] Comparing this history with States' oversight under the Rule

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[6] *See, e.g.*, *In re Application of Tucson Elec. Power Co.*, No. E-01933A-12-0291, 2013 WL 3296522, at *6, 32, 59 (Ariz. Corp. Comm'n, June 27, 2013) (allowing power company to recover power plants' costs of complying with EPA regional haze and mercury air toxics rules); *In re Montana-Dakota Utilities Co.*, No. PU-11-163, 2012 WL 2849479 (N.D. Pub. Serv. Comm'n, May 9, 2012) (granting application for a proposed project at coal-fired power plant to comply with EPA-approved regional haze state implementation plan and mercury rule after considering other options, including conversion to natural gas, construction of a new natural gas plant and purchase of wind energy); *In re Appalachian Power Co. DBA, Am. Elec. Power*, No. 13-0764-E-CN, 2014 WL 5212906, at *1 (W. Va. Pub. Serv. Comm'n, Feb. 12, 2014) (approving conversion of several coal-fired units to natural gas to "retain needed generation capacity while complying with the recent tightening of federal environmental regulations"); *see also* M.J. Bradley & Associates, *Public Utility Comm'n Study*, EPA Contract No. EP-W-07-064 (Mar. 31, 2011) (describing responses by utility regulators, including in Indiana, Georgia, and West Virginia, to power plant efforts to comply with federal pollution regulations), *available at* http://www3.epa.gov/airtoxics/utility/puc_study_march2011.pdf; Matthew Bandyk, *We Energies coal-to-gas conversion gets approval from Wis. Regulators*, SNL (Feb. 3, 2014) (describing Wisconsin's utility regulator's approval of a coal plant's conversion to natural gas to comply with federal rule); Matthew Bandyk, *Kentucky Power gets approval to convert coal unit at Big Sandy to gas*, SNL (Aug. 1, 2014) (same for Kentucky).

[7] *See, e.g.*, *In re Tucson Elec. Power Co.*, No. U-1933-96-086, 1996 WL 551857

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underscores the degree to which the Rule respects, rather than interferes with, state sovereignty.[8]

II. STATE PETITIONERS HAVE NOT DEMONSTRATED IRREPARABLE HARM.

A. The Clean Power Plan Does Not Impose Any Burdens that Justify a Stay.

State Petitioners assert that they face irreparable harm because they will have to spend "unrefundable dollars" to write their plans and decide what regulatory changes to make "governing their electricity markets" in order to ensure compliance with the Rule's deadlines. W. Va. Br. 17; *see also* Miss. Br. 10-11; Ok. Br. 17-18; N.D. Br. 14. But the Rule does not mandate States incur such costs because they have the option not to submit a plan and instead accept direct federal regulation of sources. Moreover,

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(Ariz. Corp. Comm'n, Apr. 24, 1996) (approving application for authorization to issue new pollution control bonds and refinance other pollution control revenue bonds for costs of compliance with federal plan regulating regional haze).

[8] For the same reasons, Petitioners' argument that the Clean Air Act does not contain a sufficiently "clear statement" authorizing EPA's consideration of energy in its regulation of pollution from power plants fails. *See, e.g.*, Ok. Br. 7-8; W. Va. Br. 10-11. By authorizing EPA to regulate power plants, the Act by necessity authorizes EPA to consider broader energy impacts of such regulation, and EPA routinely has done so. The Act also authorizes EPA to use a cooperative-federalism approach when it regulates under section 111(d), and instructs it to "tak[e] into account" "energy requirements," 42 U.S.C. § 7411(a)(1); *see also Am. Elec. Power v. Conn.*, 131 S. Ct. at 2539. Thus, EPA had sufficient statutory authority over interstitial details, such as consideration of the ability of power plants to shift generation to comply with pollution controls, and no further clear statement was required. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 302 (3d Cir. 2015). And to the extent there is ambiguity in the statute, EPA's interpretation is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

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even if a State submits a plan, it may choose a regulatory framework that imposes little burden on the State itself. A State can, for example, set up a trading system based on EPA's model rule and leave it to power-plant owners to decide how to comply.[9] *See* Point I.A, *supra*. *Cf. Ill. League of Advocates for the Developmentally Disabled v. Ill. Dep't of Human Servs.*, 803 F.3d 872, 875-76 (7th Cir. 2015) (denying stay where rule did not require alleged injury).[10] To the extent a State choosing to implement the Rule's emission limits goes beyond these options and makes regulatory decisions "governing their electricity markets," those "self-imposed costs" cannot establish irreparable harm. *Cuomo v. NRC*, 772 F.2d 972, 977 (D.C. Cir. 1985).

In addition, any voluntary choices States make to begin complying with the Rule during the pendency of this litigation cannot justify a stay. If developing a state plan or considering other compliance options could constitute irreparable harm, any cooperative federalism rule under the Clean Air Act or other similar statutes could be stayed. This would improperly transform a stay from an "extraordinary remedy" that is not a "matter of right" into a commonplace event. *Cf. Nken v. Holder*, 129 S. Ct. 1749, 1757, 1760 (2009) (quotation marks omitted); *see also Freedom Holdings, Inc. v.*

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[9] Further, States that initially decline to submit a state plan—perhaps waiting to see how this litigation unfolds—can change their mind and submit a state plan later. 40 CFR § 60.5720(b). Thus, even a State's decision to accept direct federal regulation of the State's power plants is not an irreversible one.

[10] State Petitioners argue the model rule here is only a proposal, but EPA has stated it would "likely approve" a state plan based on it. *See* McCabe Decl. ¶ 21 & n.6.

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Spitzer, 408 F.3d 112 (2d Cir. 2005) ("ordinary compliance costs are typically insufficient to constitute irreparable harm"); Order, *Miss. Comm'n on Envtl. Quality* (D.C. Cir. No. 12-1309) (Nov. 5, 2012) (Doc. No. 1403139) (denying stay in challenge to EPA's nonattainment designations); EPA Br. 58.

State Petitioners' further contention that they will be harmed even if they accept a federal plan because their utility regulators will have to review certain compliance measures by power plants, W. Va. Br. 16, Ok. Br. 18-19, relies on costs that are not a "direct[] result" mandated by the Rule. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Any potential decisions by state utility regulators on how to structure and regulate electricity generation in response to power plants' decisions—including whether to approve plant retirements, permits for new natural gas or renewable facilities, or rate change petitions—simply reflect their continued traditional role as an electricity regulator, not a burden caused by the Rule. See *supra* Part I.B.[11]

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[11] State Petitioners' assertions of constitutional injury (Miss. Br. 10-11; Ok. Br. 17-18) also do not, by themselves, justify a stay. *See Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997) ("traditional prerequisites for injunctive relief" are still required when constitutional violation is asserted). Order, *Miss. Comm'n on Envtl. Quality*, *supra* (denying motion for a stay where Indiana had alleged constitutional violations). In addition, *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), relied upon by State Petitioners (*e.g.*, Ok. Br. 17), is inapposite because it involved Kansas's claim to ownership of land within state borders, not regulation under a cooperative federalism structure. *See* EPA Br. 54; *see also generally* Point I, *supra*.

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B. State Petitioners' Asserted Burdens Are Neither "Certain and Great" Nor Imminent Enough to Warrant a Stay.

Moreover, State Petitioners have fallen far short of showing harm that is "both certain and great" or "imminen[t]." *Wisconsin Gas Co.*, 758 F.2d at 674. The Rule gives States flexibility to meet its deadlines without incurring overly burdensome costs or making irreversible decisions.

The September 2016 deadline for plan submissions or extension requests (until September 2018) does not, as State Petitioners assert,[12] require States to make final decisions now on what will be in their plans. *See* 80 Fed. Reg. at 64,669. States can submit an extension request by providing basic information to EPA about: (i) the plan options under consideration, (ii) why more time is needed to prepare the plan, and (iii) a description of the State's public participation process. 40 C.F.R. § 60.5765(a). Providing this information does not constitute a great burden and States are well-positioned to prepare timely extension requests. *See* McCabe Decl. ¶¶ 12-17. All State Intervenors are prepared to take this straightforward and simple step where necessary. *See, e.g.*, Clark Decl. ¶ 16 (A35-36); Klee Decl. ¶ 32 (A72); McVay Decl. ¶ 19 (A92); Pedersen Decl. ¶ 14 (A106).

The deadline for plan submittals in September 2018 is also readily achievable. It

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[12] *See* Hodanbosi Decl. ¶ 4 (required to design an "interim State Plan" by September 2016); Gore Decl. ¶ 2; Rikard Decl. ¶ 2 (must submit final plan "absent special circumstances"); Easterly Decl. ¶¶ 5, 6; Glatt Decl. ¶ 11; Hyde Decl. ¶¶ 9, 11.

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is consistent with the typical time period for preparing plans under the Clean Air Act. *See e.g.*, Clark Decl. ¶¶ 27-28 (A40-41); McCabe Decl. ¶¶ 25-30. And State Intervenors have finalized plans in shorter time.[13] In public comments, several State Petitioners took the position that three years would be sufficient to develop their plans implementing the Rule. *See, e.g.*, KS Comments at 15; KY Comments at 18; MT Comments at 15.

The Rule's next set of deadlines, governing compliance with the emission limits, also do not cause irreparable harm. Compliance with the Rule's final limits need not be achieved until 2030, with gradual interim deadlines beginning in 2022. 80 Fed. Reg. at 64,828, 64,785-86. Despite these generous deadlines, State Petitioners assert they will be forced to take steps now to "enable compliance" and avert "reliability impacts," W.Va. Br. 16, because of decisions that power plants will supposedly make now to comply with the Rule, Ok. Br. 19. But the generous compliance deadlines are far beyond the duration of litigation over the Rule[14] and assertions about decisions power plants will make now are speculative and based on unrealistic scenarios. *See*

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[13] Thornton Decl. ¶ 34 (A156) (section 111(d) plan for large municipal waste combustors developed in twenty-eight months); Chang Decl. ¶ 21 (A14-15) (State developed plan to achieve particulate matter standard in Los Angeles area within two years, including extensive air quality modeling and stakeholder input); Klee Decl. ¶ 41 (A76) (state plan to implement nitrogen oxides trading program for power plants developed in twelve months).

[14] State Intervenors understand that Petitioners intend to seek expedited briefing in this case.

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EPA Br. 57, 60-62; Tierney Decl. ¶¶ 28-29 (B15-18).[15] In addition, to enable power plants to meet the deadlines, States can design plans that allow the power plants to meet the interim emission limits through easily and quickly deployable strategies. *See* Advanced Energy Ass'ns Opp. 3-4; Power Companies Opp. 3-4. Moreover, many States are well on their way to meeting their statewide emission goals due to trends in the electricity generation sector toward less carbon-intensive fuels, Dykes Decl. ¶¶ 9-10 (A47-48), and widespread state regulations that require a certain percentage of power to be generated by renewable sources of energy such as wind and solar, *see* Clark Decl. ¶ 26 (A40); Klee Decl. ¶ 23 (A69); Thornton Decl., ¶ 8 (A145-46).

State Intervenors' experience implementing Clean Air Act rules also demonstrates that power plants have sufficient time and flexibility to comply with the Rule without jeopardizing reliability or causing significant increases in electricity prices. For example, more than two dozen States implemented the Clean Air Interstate Rule (CAIR), 70 Fed. Reg. 25,162 (May 12, 2005), a cap-and-trade program requiring power plants to reduce their emissions of nitrogen oxides and/or sulfur dioxide pursuant to interim and final deadlines. States had four and a half years for the first deadline and nine and a half years for the second (compared to seven years and fourteen years under the Rule). And although the compliance deadlines under CAIR

[15] Nor are State Petitioners correct that power plant owners or utility regulators will soon have to make "irreversible" decisions to retire coal-fired generation. *See* EPA Br. 60-61, 65-66; Zibelman Decl. ¶ 13 (A233).

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were much more expedited, there were no significant reliability problems associated with CAIR's implementation. *See also* McCabe Decl. ¶¶ 47-51 (discussing similar case with respect to Cross-State Air Pollution Rule).

Similarly, certain State Intervenors have implemented rules limiting carbon-dioxide emissions expeditiously without harming reliability or increasing electricity prices. To implement the Regional Greenhouse Gas Initiative (RGGI), all ten participating States enacted the necessary regulations to cap and reduce carbon emissions from their power plants in less than two and a half years following issuance of a model rule.[16] RGGI's compliance period began only a few months after States had established their programs. Snyder Decl. ¶ 27 (A123). And the RGGI States have already reduced regional carbon-dioxide emissions from power plants by forty percent from 2005 levels without compromising grid reliability or increasing consumer electricity bills. Dykes Decl. ¶¶ 8-9, 13-14 (A47, A50-51) (RGGI States on track for fifty percent reduction from 2005 levels by 2020; the program created $1.3 billion net economic benefits for region and reduced consumer energy bills by $460 million). Winslow Decl. ¶ 20 (A225) ("Implementing RGGI has not adversely affected electric reliability in Delaware in any way."). Similarly, California and Oregon timely

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[16] *See, e.g.*, Snyder Decl. ¶¶ 19, 26 (A120-22); Wright Decl. ¶¶ 14, 19-20 (A165-68) (New Hampshire able to enact necessary legislation despite fact that legislature meets only periodically); Suuberg Decl. ¶ 7 (A140) (Massachusetts joined RGGI in 2007 and adopted final regulations implementing program the following year).

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implemented programs to successfully reduce greenhouse gas emissions while preserving reliability and keeping rates stable. Chang Decl. ¶ 21 (A14-15); Randolph Decl. ¶¶ 7-8 (A194-95); Eisdorfer Decl. ¶ 7 (A176). *See also* Thornton Decl. ¶¶ 9, 11-16 (A146-49) (discussing Minnesota's experience promoting efficiency and reducing emissions while growing clean energy jobs).

III. A STAY IS NOT IN THE PUBLIC INTEREST.

Even where a stay is necessary to prevent irreparable harm, it may not be granted if it would "visit similar harm on other interested parties." *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982). The Court must consider "the interests of . . . stakeholders who supported the rule and who . . . stand to suffer harm if the rule is enjoined." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015).

A. A Stay that Results in Delays to the Clean Power Plan's Deadlines Will Harm State Intervenors.

State Intervenors have faced significant harms and costs from climate change for many years. To spur federal action, several State Intervenors pursued litigation against EPA more than ten years ago, successfully forcing the agency to consider whether carbon dioxide and other greenhouse gases may reasonably be anticipated to endanger public health and welfare. *Massachusetts v. EPA*, 549 U.S. 497 (2007). Certain State Intervenors also sued EPA to promptly establish carbon-dioxide emissions limits under section 111 of the Clean Air Act because of the contribution of power plants' emissions to climate change. *New York v. EPA* (D.C. Cir. No. 06-1322).

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EPA subsequently found that greenhouse gases pose a serious danger to public health and welfare. 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). Subsequent research has only strengthened that finding, concluding that climate change poses increased risk of mortality, especially in children and the elderly, during extreme heat events and from infectious and waterborne diseases, as well as threats to coastal communities and infrastructure from storms and rising sea levels. 80 Fed. Reg. at 64,683.

That conclusion is borne out by the experiences of State Intervenors. For example, in South Florida, flooding exacerbated by rising seas is now commonplace, adversely impacting homes, roads, bridges, drinking water, and sewage systems.[17] Many other cities and States face more severe storms, wildfires and droughts.[18] In addition, the increased heat waves, droughts, fires, storms, and freezes resulting from climate change all threaten reliability of the electric grid. Randolph Decl. ¶¶ 20-22 (A202-04) & Dykes Decl. ¶ 21 (A53-54). A stay that results in postponed emission reductions would be prejudicial because more emissions would continue to intensify the climate change that has been harming State Intervenors. Field Decl. ¶¶ 7, 29; *see also* McVay Decl. ¶ 35 (citing recent experience of three-year delay in emission

[17] Stoddard Decl. ¶¶ 7-13 (South Miami) (A250-51) & Ex. C (A266-70) (multi-city letter discussing similar hardships faced by other South Florida municipalities).

[18] *See* Jones Decl. ¶ 39 (A243) (Boulder); *see* Chang Decl. ¶ 2 (A2-6) (California); Clark Decl. ¶¶ 4-5 (A28-29) (Washington); Klee Decl. ¶ 6 (A60-61) (Connecticut); Pedersen Decl. ¶ 5 (A101-02) (Oregon); Snyder Decl. ¶ 4 (A112-13) (New York); Thornton Decl., ¶¶ 36-37 (A156-57) (Minnesota); Wright Decl., ¶ 6 (A161) (New Hampshire).

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reductions from Cross-State Air Pollution Rule from stay granted at litigation's outset). A stay would also disrupt state programs set to coordinate with compliance planning for the Rule.[19]

B. A Stay Could Endanger United States' Ability to Secure International Reductions in Greenhouse Gas Emissions.

A stay of the Rule—a fundamental plank of our country's pledge to cut carbon pollution—could prejudice the United States' ability to convince other countries to implement an international agreement to reduce carbon emissions.[20] The potential for a stay to endanger the United States' interests internationally weighs heavily against granting it. *See Adams v. Vance*, 570 F.2d 950, 957 (D.C. Cir. 1978) (preliminary relief particularly disfavored where it will cause "symbolic impacts" to international relations and "substantially endanger the interests of the United States").

CONCLUSION

For the above reasons, Petitioners' motion for a stay should be denied.

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[19] For example, a stay would hamper California's efforts to integrate the Rule's emission reduction requirements with the State's existing cap-and-trade program for carbon-dioxide emissions. Chang Decl. ¶¶ 28-37 (A18-23); *see also* Winslow Decl. ¶ 22 (A226) (stay would complicate Delaware Public Utility Commission's integrated energy planning efforts); McVay Decl. ¶ 36 (A98-99) (same for RI and pending RGGI program review by all RGGI states).

[20] Jones Decl. ¶¶ 38-39 (A243) & Ex. A (A245-47) (letter from ten cities, including four in petitioning States, opposing a stay). *See* Stern Decl. ¶¶ 11, 18, 20, 31; Albright Decl. ¶¶ 7-12 (B105-07).

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Dated: December 8, 2015

Respectfully submitted,

FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

By: /s/ Michael J. Myers[21]
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
BETHANY A. DAVIS NOLL
Karen W. Lin
Assistant Solicitor General
MICHAEL J. MYERS
MORGAN A. COSTELLO
BRIAN LUSIGNAN
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2392

[21] Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this brief.

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FOR THE STATE OF CALIFORNIA

KAMALA D. HARRIS
ATTORNEY GENERAL
Robert W. Byrne
Sally Magnani
Senior Assistant Attorneys General
Gavin G. McCabe
David A. Zonana
Supervising Deputy Attorneys General
Jonathan Wiener
M. Elaine Meckenstock
Raissa Lerner
Deputy Attorneys General
1515 Clay Street
Oakland, CA 94612
(510) 622-2100

Attorneys for the State of California, by and through Governor Edmund G. Brown, Jr., the California Air Resources Board, and Attorney General Kamala D. Harris

FOR THE STATE OF CONNECTICUT

GEORGE JEPSEN
ATTORNEY GENERAL
Matthew I. Levine
Kirsten S. P. Rigney
Scott N. Koschwitz
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

FOR THE STATE OF DELAWARE

MATTHEW P. DENN
ATTORNEY GENERAL
Valerie S. Edge
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3d Floor
Dover, DE 19904
(302) 739-4636

FOR THE STATE OF HAWAI'I

DOUGLAS S. CHIN
ATTORNEY GENERAL
William F. Cooper
Deputy Attorney General
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

FOR THE STATE OF ILLINOIS

LISA MADIGAN
ATTORNEY GENERAL
Matthew J. Dunn
Gerald T. Karr
James P. Gignac
Assistant Attorneys General
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660

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FOR THE STATE OF IOWA

TOM MILLER
ATTORNEY GENERAL
Jacob Larson
Assistant Attorney General
Environmental Law Division
Lucas State Office Building
321 E. 12th St., Room 18
Des Moines, Iowa 50319
(515) 281-5351

FOR THE STATE OF MAINE

JANET T. MILLS
ATTORNEY GENERAL
Gerald D. Reid
Natural Resources Division Chief
6 State House Station
Augusta, ME 04333
(207) 626-8800

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
ATTORNEY GENERAL
Thiruvendran Vignarajah
Deputy Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6328

Attorneys for State of Maryland,
By and through Attorney General
Brian E. Frosh

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL
Melissa A. Hoffer
Christophe Courchesne
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2423

FOR THE STATE OF MINNESOTA

LORI SWANSON
ATTORNEY GENERAL
Karen D. Olson
Deputy Attorney General
Max Kieley
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1244

Attorneys for State of Minnesota,
by and through the Minnesota Pollution
Control Agency

FOR THE STATE OF NEW HAMPSHIRE

JOSEPH A. FOSTER
ATTORNEY GENERAL
K. Allen Brooks
Senior Assistant Attorney General
Chief, Environmental Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-3679

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FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
ATTORNEY GENERAL
Tannis Fox
Assistant Attorney General
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 827-6000

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
ATTORNEY GENERAL
Paul Garrahan
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE STATE OF RHODE ISLAND

PETER F. KILMARTIN
ATTORNEY GENERAL
Gregory S. Schultz
Special Assistant Attorney General
Rhode Island Department of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

FOR THE STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL
Thea Schwartz
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-2359

FOR THE COMMONWEALTH OF VIRGINIA

MARK HERRING
ATTORNEY GENERAL
John W. Daniel, II
Deputy Attorney General
Lynne Rhode
Senior Assistant Attorney General and Chief
Matthew L. Gooch
Assistant Attorney General
Environmental Section
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 225-3193

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
ATTORNEY GENERAL
Leslie R. Seffern
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-4613

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FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
ATTORNEY GENERAL
James C. McKay, Jr.
Senior Assistant Attorney General
Office of the Attorney General
441 Fourth Street, NW
Suite 630 South
Washington, DC 20001
(202) 724-5690

FOR THE CITY OF BOULDER

TOM CARR
CITY ATTORNEY
Debra S. Kalish
Senior Assistant City Attorney
City Attorney's Office
1777 Broadway, Second Floor
Boulder, CO 80302
(303) 441-3020

FOR THE CITY OF CHICAGO

BENNA RUTH SOLOMON
Deputy Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, IL 60602
(312) 744-7764

FOR THE CITY OF NEW YORK

ZACHARY W. CARTER
CORPORATION COUNSEL
Carrie Noteboom
Senior Counsel
New York City Law Department

FOR THE CITY OF PHILADELPHIA

SHELLEY R. SMITH
CITY SOLICITOR
Scott J. Schwarz
Patrick K. O'Neill
Divisional Deputy City Solicitors
The City of Philadelphia
Law Department
One Parkway Building
1515 Arch Street, 16th Floor
Philadelphia, PA 19102-1595
(215) 685-6135

FOR THE CITY OF SOUTH MIAMI

THOMAS F. PEPE
CITY ATTORNEY
City of South Miami
1450 Madruga Avenue, Ste 202
Coral Gables, Florida 33146
(305) 667-2564

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FOR BROWARD COUNTY,
FLORIDA

JONI ARMSTRONG COFFEY
COUNTY ATTORNEY
Andrew J. Meyers
Chief Deputy County Attorney
Mark A. Journey
Assistant County Attorney
Broward County Attorney's Office
155 S. Andrews Avenue, Room 423
Fort Lauderdale, FL 33301
(954) 357-7600
100 Church Street
New York, NY 10007
(212) 356-2319

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Opposition to Petitioners' Motions for a Stay on Behalf of State, District, City and County Intervenors-Respondents, dated December 8, 2015, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's briefing order issued on November 17, 2015, which limited the briefs for Intervenors in Support of Respondent to a total of 50 pages. I certify that this brief contains 20 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), and that when combined with the word count of the other Intervenors-Respondents, the total does not exceed 50 pages.

/s/ Michael J. Myers
MICHAEL J. MYERS

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Petitioners' Motions for a Stay on Behalf of State, District, City and County Intervenors-Respondents was filed on December 8, 2015 using the Court's CM/ECF system, and that, therefore, service was accomplished upon all registered counsel of record by the Court's system.

I further certify that a copy of the foregoing document was served by U.S. Mail on the following non-CM/ECF counsel:

Janice M. Alward
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Patrick Burchette
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006-6801
Counsel for Petitioners East Texas Electric Cooperative, Inc.; Northeast Texas Electric Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; Tex-La Electric Cooperative of Texas, Inc.

David Finley Crabtree
Vice President, General Counsel
10714 South Jordan Gateway
South Jordan, UT 84092
Counsel for Petitioner Deseret Generation & Transmission Co-operative

Karen R. Harned
National Federation of Independent Business
1201 F Street, NW
Suite 200
Washington, DC 20004
Counsel for Petitioner National Federation of Independent Business

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FOIA EPA-HQ-2016-009655

Karl Roy Moor
Southern Company Services, Inc.
600 18th Street, North 15N
Birmingham, AL 35203
Counsel for Petitioner Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company

Steven J. Oberg
Lynn, Jackson, Shultz & Lebrun, P.C.
PO Box 8250
Rapid City, SD 57709
Counsel for Petitioner Rushmore Electric Power Cooperative, Inc.

Gary Vergil Perko
Hopping Green & Sams
119 South Monroe Street
Suite 300
Tallahassee, FL 32301
Counsel for Petitioner Gulf Power Company

Lee Philip Rudofsky
Office of the Attorney General, State of Arkansas
323 Center Street
Suite 200
Little Rock, AR 72201
Counsel for Petitioner State of Arkansas

Bill Spears
Segrest & Segrest, P.C.
18015 West Highway 84
McGregor, TX 76657
Counsel for Petitioner Brazos Electric Power Cooperative, Inc.

Ben H. Stone
Balch & Bingham LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Counsel for Petitioner Mississippi Power Company

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Luther J. Strange, III
Office of the Attorney General, State of Alabama
501 Washington Avenue
Montgomery, AL 36130
Counsel for Petitioner State of Alabama

Laurence H. Tribe
Harvard Law School
Griswold 307
1563 Massachusetts Avenue
Cambridge, MA 02138
Counsel for Movant-Intervenors Peabody Energy Corporation, Dixon Bros., Inc., Nelson Brothers, Inc., Western Explosive Systems Company, Norfolk Southern Corporation, Joy Global Inc., and Gulf Coast Lignite Coalition

Janet F. Wagner
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Philip Zoebisch
28 W Madison Avenue
Collingswood, NJ 08108
Movant-Amicus Curiae

/s/ Michael J. Myers
MICHAEL J. MYERS

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Appendix B – EPA: 2016 Milestones and Big Moments

Not Responsive

Not Responsive

DEFEND KEY EPA ACTIONS

- Defend the substance of the Clean Power Plan in court. We expect the D.C. Circuit to decide in early 2016 whether to stay the Clean Power Plan during litigation and to set a schedule for briefing and arguing the case – *Ongoing*

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Not Responsive

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ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 14-1151

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

IN RE: MURRAY ENERGY CORPORATION,

Petitioner.

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

On Petition for Writ of Prohibition & Petition for Review

FINAL BRIEF FOR RESPONDENTS

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
Email: amanda.berman@usdoj.gov

Of Counsel:

Elliott Zenick
Scott Jordan
United States Environmental
Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

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Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rules 28(a)(1)(A) and 21(d), Respondents the United States Environmental Protection Agency et al. states as follows:

Parties and Amici:

The parties in these consolidated cases are:

Petitioner: Murray Energy Corporation;

Intervenors for Petitioner: National Federation of Independent Business, Utility Air Regulatory Group, Peabody Energy Corporation, State of Alabama, State of Alaska, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Dakota, State of West Virginia, State of Wyoming;

Amici Curiae for Petitioner: American Coalition for Clean Coal Electricity, National Mining Association, American Chemistry Council, American Coatings Association, Inc., American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, State of South Carolina, United States Chamber of Commerce, Council for Industrial Boiler Owners, Independent Petroleum Association of America, Metals Service Center Institute, National Association of Manufacturers;

Respondents: The United States Environmental Protection Agency, and Regina A. McCarthy, Administrator;

Intervenors for Respondent: Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Commonwealth of Massachusetts, District of

Colombia, State of California, State of Connecticut, State of Delaware, State of Maine, State of Maryland, State of New Mexico, State of New York, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, City of New York; and

Amici Curiae for Respondent: State of New Hampshire, Clean Wisconsin, Michigan Environmental Council, Ohio Environmental Council, Calpine Corporation, Jody Freeman, and Richard J. Lazarus.

Rulings under Review:

Petitioner challenges, and alternatively asks this Court to issue a writ prohibiting, this proposed rule: *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,380 (June 18, 2014).

Related Cases:

These consolidated cases are related to, and have been designated by the Court for argument on the same day as, State of West Virginia, et al., v. EPA, No. 14-1146, which purportedly challenges a 2010 settlement agreement between EPA, certain states, and non-governmental organizations, but asks the Court to stop the same ongoing rulemaking that Petitioner Murray Energy Corp. challenges in this case.

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MISCELLANEOUS

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GLOSSARY

Act	The Clean Air Act
CO_2	Carbon dioxide
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
MATS	Mercury and Air Toxics Standards
OLRC	Office of the Law Revision Counsel of the United States House of Representatives

Jurisdiction and Standing

As explained in Argument sections I through III, Petitioner lacks standing and the Court lacks jurisdiction over this challenge to an ongoing EPA rulemaking.

Issues Presented

1. Whether Petitioner has standing to seek relief from a proposed rule that – if finalized – would not regulate Petitioner;

2. Whether Petitioner can challenge a *proposed* rule despite the requirement that agency action be final prior to judicial review;

3. Whether this Court has jurisdiction to issue a writ of prohibition to stop an ongoing rulemaking; and

4. Whether, even if it has jurisdiction, the Court should take the truly extraordinary step of prohibiting an ongoing rulemaking based on Petitioner's interpretation of an ambiguous statutory provision.

Statutes and Regulations

All relevant statutes and regulations are set forth in Respondents' Addendum.

Statement of the Case

Greenhouse gas emissions continue to pose a real threat to Americans by causing "damaging and long-lasting changes in our climate that can have a range of severe negative effects on human health and the environment." 79 Fed. Reg. 34,830, 34,833 (June 18, 2014) ("Proposed Rule"). Fossil-fuel fired power plants are, "by far, the largest emitters" of greenhouse gases in the United States. Id.

At the President's direction, EPA has proposed regulatory measures to address U.S. greenhouse gas emissions. One key measure is its proposal that states submit plans for reducing existing power plants' carbon dioxide ("CO_2") emissions under 42 U.S.C. § 7411(d). 79 Fed. Reg. at 34,830-33. Murray Energy Corp. ("Murray"), a coal producer, objects to this proposal, and petitions the Court to "halt" the ongoing rulemaking, either by issuing a writ of prohibition or "set[ting] aside EPA's legal conclusion." Pet.Br. 1. It so requests even though Murray is not an entity that would be regulated under the Proposed Rule; the rule is not final; and the issue Murray raises concerns the interpretation of a patently-ambiguous statutory provision.

Murray argues that this is an "extraordinary case." Pet.Br. 1. Murray is right, but not for the reasons it believes. Rather, it is what Murray asks this Court to do – halt an ongoing rulemaking before EPA takes final action – that is extraordinary. There is no legal basis for such relief, and EPA should not be prevented from completing a rulemaking intended to address the serious threat of climate change.

Background

I. THE CLEAN AIR ACT

The Clean Air Act ("Act") was enacted in 1970 to "[r]espond[] to the growing perception of air pollution as a serious national problem." Ala. Power Co. v. Costle, 636 F.2d 323, 346 (D.C. Cir. 1979). It set out a comprehensive scheme for air pollution control, "address[ing] three general categories of pollutants emitted from stationary sources": (1) criteria pollutants; (2) hazardous pollutants; and (3) "pollutants that are (or may be) harmful to public health or welfare but are not" hazardous or criteria pollutants "or cannot be controlled under" those programs. 40 Fed. Reg. 53,340 (Nov. 17, 1975).

Six relatively ubiquitous "criteria" pollutants are regulated under 42 U.S.C. §§ 7408-7410. These are pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare"; "the presence of which in the ambient air results from numerous and diverse mobile or stationary sources"; and for which the Administrator has issued, or plans to issue, "air quality criteria." 42 U.S.C. § 7408(a)(1). Once EPA issues air quality criteria for such pollutants, the Administrator must propose primary National Ambient Air Quality Standards (NAAQS) for them at levels "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(a)-(b).

"Hazardous air pollutants" are regulated under 42 U.S.C. § 7412, and include pollutants so designated by Congress in 1990 and other pollutants that EPA finds:

> may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise . . . .

42 U.S.C. § 7412(b)(2). Hazardous air pollutants tend to be less widespread than criteria pollutants but are considered more potent and are associated with more serious health impacts, such as cancer, neurological disorders, reproductive dysfunctions, and death, even in small quantities. H.R. Rep. 101-490, 315 (1990), reprinted in 2 Legislative History of the Clean Air Act Amendments of 1998, at 3339 (Comm. Print 1998). EPA must publish and revise a list of "major" and "area" source categories of hazardous pollutants, and then has a nondiscretionary obligation to establish achievable emission standards for all listed hazardous air pollutants emitted by sources within a listed category. 42 U.S.C. § 7412(c)(1) & (2).

Congress prescribed a unique listing requirement for power plants. EPA must first study the hazards posed by power plant emissions after imposition of the other requirements of the Act, and then determine if regulation is "appropriate and necessary" after considering the results of the study. See 42 U.S.C. § 7412(n)(1)(A). If EPA so determines, regulation of hazardous emissions from power plants proceeds under section 7412(d) just as with any other type of listed source category. See White Stallion Energy Ctr. LLC v. EPA, 748 F.3d 1222, 1243-44 (D.C. Cir. 2014), cert. granted, 135 S. Ct. 702 (Nov. 25, 2014).

The final major category of pollutants covered by the Act – harmful pollutants not regulated under the NAAQS or hazardous pollutant programs – are subject to regulation under 42 U.S.C. § 7411. Section 7411 has two main components. First, section 7411(b) requires EPA to promulgate federal "standards of performance" addressing *new* stationary sources that cause or contribute significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Once EPA has set *new* source standards addressing emissions of a particular pollutant, section 7411(d) authorizes EPA to promulgate regulations requiring states to establish standards of performance for *existing* stationary sources of the same pollutant. 42 U.S.C. § 7411(d)(1). If a state fails to submit a satisfactory plan, EPA is authorized to prescribe a plan for the state, and also to enforce plans where states fail to do so. Id. § 7411(d)(2).

Together, the NAAQS, hazardous pollutant, and performance standard programs constitute a comprehensive scheme designed to achieve Congress' goal of "protect[ing] and enhance[ing] the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b).

II. THE 1990 AMENDMENTS

The Act was amended extensively in 1990. Among other things, Congress sought to accelerate EPA's regulation of hazardous pollutants. White Stallion, 748 F.3d at 1230. To that end, Congress established a lengthy list of hazardous air pollutants; set criteria for listing "source categories" of such pollutants; and required

EPA to establish standards for each source category hazardous pollutant emissions. 42 U.S.C. § 7412(a), (b)(1) & (2), & (d)(1).

In the course of overhauling the regulation of hazardous pollutants under section 7412, Congress also edited section 7411(d), which cross-referenced a provision of old section 7412 that was to be eliminated. Specifically, the pre-1990 version of section 7411(d) obligated EPA to require standards of performance:

> 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 [7408(a)] or [7412(b)(1)(A)] . . . .

42 U.S.C. § 7411(d)(1)(A) (1988). To address the obsolete cross-reference to section 7412(b)(1)(A), Congress passed two amendments – one from the House and one from the Senate – that were never reconciled. The House amendment replaced the cross-reference with the phrase "emitted from a source category which is regulated under section [7412]." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). The Senate amendment replaced the same text with a cross-reference to section 7412. Pub. L. No. 101-549, § 302(a), 104 Stat. at 2574. Both amendments were enacted into law in the Statutes at Large, which supersedes the U.S. Code if there is a conflict.[1]

[1] See 1 U.S.C. §§ 112 & 204(a).

III. THE MATS RULE

In 2000, EPA determined under 42 U.S.C. § 7412(n)(1)(A) "that regulation of [hazardous pollutant] emissions from coal- and oil-fired [power plants] under section 112 of the [Act] is appropriate and necessary," and added those power plants to the section 7412(c) list of source categories to be regulated. 65 Fed. Reg. 79,825, 79,826-30 (Dec. 20, 2000). EPA determined that it was not "appropriate and necessary" to regulate natural-gas fired power plants. Id. at 79,831. In 2012, EPA promulgated a final rule establishing hazardous pollutant emission standards for coal- and oil-fired plants. 77 Fed. Reg. 9304 (Feb. 16, 2012) (the "MATS Rule"). The MATS Rule does not regulate CO_2, which is not a listed hazardous air pollutant, and does not regulate natural gas-fired plants, which are not a listed source category. Unlike the MATS Rule, the Proposed Rule addresses CO_2, and covers natural gas-fired plants as well as coal- and oil-fired plants. Compare 77 Fed. Reg. 9304 with 79 Fed. Reg. at 34,855.

This Court upheld the MATS Rule. White Stallion, 748 F.3d at 1222. The Supreme Court granted certiorari. Michigan v. EPA, 135 S. Ct. 702 (Nov. 25, 2014). Murray has filed an amicus brief urging the Court to vacate the MATS Rule, arguing that hazardous pollution from power plants instead should be regulated under section 7411 because: "Section [74]11 offers the flexibility necessary for regulating a widely diverse source category like power plants without imposing unjustified costs" and "the ability to address all of the same public health and environmental concerns." Am. Curiae Br. of Murray Energy Corp. (No. 14-46) at 22, 27.

IV. THE PROPOSED RULE

In 2013, the President announced his "Climate Action Plan," and directed EPA to work expeditiously to promulgate CO_2 emission standards for fossil fuel-fired power plants. EPA has since proposed (1) performance standards for new power plants under section 7411(b), 79 Fed. Reg. 1430 (Jan. 8, 2014); (2) standards for modified and reconstructed power plants under section 7411(b), 79 Fed. Reg. 34,960, (June 18, 2014); and (3) and regulations under which states would submit plans to address CO_2 emissions from existing power plants under section 7411(d), 79 Fed. Reg. at 34,830-34 ("Proposed Rule"). Petitioner challenges the last of these proposals.

The Proposed Rule has two main elements: (1) state-specific emission rate-based CO_2 goals, to be achieved collectively by all of a state's regulated coal- and natural gas-fired sources; and (2) guidelines for the development, submission, and implementation of state plans. 79 Fed. Reg. at 34,833. While the proposal lays out individualized CO_2 goals for each state, it does not prescribe how a state should meet its goal. Id. Rather, each state would have the flexibility to design a program that reflects its circumstances and energy and environmental policy objectives. Id.

EPA solicited comments on all aspects of the Proposed Rule. 79 Fed. Reg. at 34,830. Over two million comments were submitted before the comment period closed on December 1, 2014. EPA is reviewing those comments, and plans to take final action this summer.

Summary of Argument

Neither Murray nor Intervenors in support of Petitioner can establish that they have Article III standing to seek review of the Proposed Rule. Speculation regarding the consequences of one *possible* future outcome of an ongoing notice-and-comment rulemaking proceeding is not enough to demonstrate the concrete, particularized, and actual or imminent injury required for Article III standing. The Court has dismissed such challenges on standing grounds in previous cases and should do likewise here.

The Court also lacks jurisdiction because the Proposed Rule is obviously not a "final" action. The Act prescribes the process by which EPA may establish standards or requirements under section 7411(d), and EPA indisputably has not completed that process. EPA has only published a proposal for notice and comment; it has not yet considered and responded to those comments as the Act requires, nor "promulgated" a regulation. Thus, it has taken no action that has binding legal effect or determines any entity's rights or obligations. Moreover, because EPA is in the midst of a notice-and-comment rulemaking process in which it will evaluate and respond to comments on the very legal question Murray would have this Court prematurely decide, this petition is not "fit" for a judicial decision and must be dismissed as unripe.

If this Court were to reach the merits despite the non-final nature of the challenged rulemaking, it should decline to issue a writ of prohibition or otherwise "halt" the rulemaking as Murray asks. Murray argues that section 7411(d) of the Act bars EPA from addressing power plants' emissions of carbon dioxide – or any other

pollutant – under that provision because power plants' emissions of certain *hazardous* pollutants, like mercury, have been regulated under section 7412. But section 7411(d) is far from unambiguous on this point. Given the convoluted, ungrammatical and ambiguous nature of the text as set forth in the U.S. Code, it could reasonably be interpreted as authorizing EPA to address *non-hazardous* emissions from power plants. Moreover, in interpreting section 7411(d), EPA could also appropriately consider the existence of two separate amendments to the relevant portion of that text in the Statutes at Large, one of which would plainly authorize the regulation of non-hazardous pollutants under that provision. Thus, there are a number of reasons why EPA might reasonably conclude it may address power plants' carbon dioxide emissions under section 7411(d), and the Court should not intervene in the rulemaking before EPA has the opportunity to reach a final conclusion and articulate its reasoning, based on its own ongoing analysis as well as the comments received.

Argument

I. MURRAY LACKS ARTICLE III STANDING.

A. Murray cannot show "actual or imminent" injury from a proposal.

"To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (internal quotation and citations omitted). A petitioner that asserts standing based on the expectation of future injury "confronts a significantly more rigorous burden to

establish standing." Chamber of Commerce of U.S. v. EPA, 642 F.3d 192, 200 (D.C. Cir. 2011) (internal quotation omitted); accord Clapper, 133 S. Ct. at 1147 ("allegations of *possible* future injury are not sufficient") (internal quotation omitted).

Additionally, "when the [petitioner] is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (internal quotation omitted). In such a case, standing "depends on the unfettered choices [of] independent actors . . . whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it thus becomes the petitioner's burden "to adduce facts showing that those choices have been or will be made in such manner as to produce causation and redressability of injury." Id. (internal quotations omitted); Chamber of Commerce, 642 F.3d at 201.

Murray cannot possibly meet this burden here, because the action it challenges is only a "proposed" rule. This Court long has held that an administrative agency's "*initiation* of a rulemaking" through a notice and comment process does not impair the rights of interested parties so as to give rise to Article III standing, even if such parties would be directly regulated by a final rule. Alternative Research & Dev. Found. v. Veneman, 262 F.3d. 406, 411 (D.C. Cir. 2001) (emphasis added). In Alternative Research, the Court held that an association of biomedical researchers lacked standing to challenge a settlement establishing a schedule for rulemaking to consider whether to regulate the treatment of birds, mice and rats used in such research. Id. As the

Court observed, parties potentially affected by such a rulemaking have the opportunity, first, to *participate* in the rulemaking – by making known any objections they may have and, if desired, attempting to persuade the agency not to finalize the proposal – and then to seek judicial review if the proposed rule is finalized in a manner that genuinely harms their interests. See id.

The Court recently reaffirmed this conclusion in Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013), where it held that an association of energy companies lacked standing to intervene for the purpose of challenging a consent decree that set a rulemaking schedule to revise regulations governing wastewater discharges from power plants. See id. at 1323-26. There, as in Alternative Research, the claimants faced the potential of direct regulation by the rulemaking at issue, unlike Murray; yet the Court again made clear that merely commencing a notice-and-comment rulemaking that *may* result in a "new, stricter rule" does not create standing, because Article III "requires more than the *possibility* of potentially adverse regulation." Perciasepe, 714 F.3d at 1325 (emphasis added); see also Nat'l Ass'n of Home Builders v. EPA, 667 F.3d 6, 13 (D.C. Cir. 2011) (no standing to challenge Clean Water Act jurisdictional determination).

Because Murray's claim is based on predicting the substantive content of one possible final outcome of the rulemaking, it is too speculative to support standing. Murray relies on the predictive modeling EPA developed in connection with the Proposed Rule, which projects that if the proposal is promulgated as a final rule,

domestic power plants will use 25 to 27 percent less coal to generate electricity by 2020 (as compared with a hypothetical base case in which no final rule is ever promulgated), and 30 to 32 percent less coal by 2030. 79 Fed. Reg. at 34,934; Pet.Br. 13-14; Declaration of Robert E. Murray ("Murray Decl.") ¶¶ 15-16 (attached to Pet.Br.). This model necessarily assumes, however, not only that EPA will promulgate a final rule, but that the content of that final rule will not significantly change from the proposal. At this stage, when EPA is still evaluating and has not yet responded to the millions of comments it received, any predictions about what state-specific guidelines EPA might adopt in a final rule – let alone what requirements each state, in turn, independently may impose on power plants pursuant to such guidelines – are pure conjecture. See La. Envtl. Action Network v. Browner, 87 F.3d 1379, 1383 (D.C. Cir. 1996) (no standing based on "multi-tiered speculation" that states with delegated authority would adopt certain programs and that EPA would approve).

The Article III standing cases Murray relies on (Pet.Br. 12-14) involved challenges to final rules promulgated *after* notice and comment – not proposed rules published for the purpose of *soliciting* public comments[2] – or to agency directives that were not subject to notice-and-comment, e.g., National Envt'l Dev. Ass'n's Clean Air Project ("NEDA-CAP") v. EPA, 752 F.3d 999, 1005-06 (D.C. Cir. 2014) (EPA

[2] See, e.g., Ethyl Corp. v. EPA, 306 F.3d 1144, 1147-48 (D.C. Cir. 2002); Monroe Energy, LLC v. EPA, 750 F.3d 909, 914-15 (D.C. Cir. 2014).

directive established an immediately-effective new policy for permitting decisions).[3] Murray cites *no* authority holding that speculation about one possible outcome of an ongoing notice-and-comment rulemaking process can give rise to Article III standing.

B. Murray cannot show that the impacts it cites are traceable to the Proposed Rule and would be averted if the Court grants relief.

Even if EPA had promulgated a *final* section 7411(d) rule for power plants in January 2014, Murray's affidavit would still fail to establish Article III standing. As a coal producer, Murray would not be subject to any requirements if such a rule were promulgated. It therefore bears a heightened burden to establish that the downstream economic effects it complains of are genuinely traceable to EPA's action rather than to third parties' independent choices, and are redressable here. Lujan, 504 U.S. at 562. Specifically, Murray must demonstrate a "substantial probability" that these economic effects would not have occurred but for EPA's January 2014 publication, and that, "if the court affords the relief requested, the [alleged] injury will be removed." Ass'n of Battery Recyclers, Inc. v. EPA, 716 F.3d 667, 671 (D.C. Cir. 2013) (internal quotation omitted).[4] This Murray has not done.

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[3] Other cases are inapposite because they address "prudential standing" or the "zone of interests" test, not Article III standing. E.g., Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014); Pet.Br. 14 n.3.

[4] The claimants in most of the Article III cases Murray cites either were directly regulated by the rules in question or asserted injuries that Murray does not. See, e.g., Monroe, 750 F.3d at 915; Ethyl Corp., 306 F.3d at 1147-48 (asserting "informational" injuries). And in Motor & Equip Mfrs. Ass'n v. Nichols, 142 F.3d 449, 457 (D.C. Cir. 1998), EPA did not contest that the rule caused the third-party conduct at issue.

For example, Murray's standing affidavit states that several of its power plant customers anticipate converting coal-fired units to other fuel sources in the foreseeable future. These plans often are *not* characterized as a response specifically to the Proposed Rule, however, but rather to the cumulative regulatory burden under other, *final* regulations that EPA previously promulgated, such as the MATS Rule. See Murray Decl. ¶¶ 20, 25. Elsewhere, Murray simply states in conclusory fashion that certain customers' power plants have shut down or are slated for closure, without providing any reasons for these customers' decisions. Id. ¶ 24. Another power plant reportedly faces "uncertainty" about whether it will continue operating beyond 2020, but Murray does not identify that plant as a customer. Id. ¶ 22.

Murray also relies on reports identifying regional and national trends towards reduced coal production, and the industry-wide conversion of many coal-fired power plants to natural gas or other fuel sources. But these patterns of industry behavior emerged years before EPA published the Proposed Rule. See Murray Decl. ¶¶ 17-19[5]; see also 77 Fed. Reg. 22,392, 22,399 (April 13, 2012) (preamble to April 2012 proposal under section 7411(b)); 79 Fed. Reg. at 34,863. As discussed in EPA's preamble statements, there are numerous economic factors independent of EPA's air regulations that may explain these long-term trends towards increased use of natural

[5] Murray also cites one report predicting that the Proposed Rule will result in reduced coal generation capacity in Texas. Id. ¶ 21. Murray has no coal production operations in Texas, nor supplies any power plant customers there. Id. ¶¶ 9, 13.

gas and decreased use of coal in power generation, and Murray's standing affidavit makes no attempt to address such factors. Nor has Murray shown a "substantial likelihood" that power plants will reverse these trends if the Court sets aside the Proposed Rule. See Crete Carrier Corp. v. EPA, 363 F.3d 490, 494 (D.C. Cir. 2004) (trucking companies lacked standing to challenge rule regulating engine manufacturers because "'it is entirely conjectural whether the nonagency activity' (that is, the engine manufacturers' production decisions) affecting the prices of tractors . . . 'will be altered or affected' should the EPA rescind [it]") (quoting Lujan, 504 U.S. at 571). In short, Murray's affidavit would fail even if EPA had *completed* its rulemaking process.

C. The Intervenors also lack Article III standing.

If the Court finds that Murray lacks standing, then the Intervenors in support of Murray also are subject to Article III standing requirements. See Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997). None of the Intervenors can stand in Murray's shoes, however, because they did not file within sixty days after Federal Register publication of the Proposed Rule. 42 U.S.C. § 7607(b)(1); Okla. Dep't of Envtl. Quality ("ODEQ") v. EPA, 740 F.3d 185, 191 (D.C. Cir. 2014) (time limit is jurisdictional); see Doc Nos. 1520421 & 1523376 (motions to intervene in Case No. 14-1112 filed by National Federation of Independent Businesses and Utility Air Regulatory Group, respectively, on Nov. 3 & Nov. 19, 2014); 1523876 (joint notice of intention to intervene filed by State Intervenors on Nov. 21, 2014); 1529468

(motion to intervene filed by Peabody Energy Corp. on Dec. 29, 2014).[6] Even if not untimely, the Intervenors' standing assertions would fail for the reasons discussed above or in EPA's brief in the related petition brought by states. See Brief for EPA in Case No. 14-1146 at 11-22 (Doc No. 1533964).

II. THE COURT LACKS JURISDICTION OVER MURRAY'S DIRECT CHALLENGE TO THE PROPOSAL FOR ADDITIONAL REASONS.

Murray bears the burden of demonstrating that the Court has subject-matter jurisdiction. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Its invocation of the All Writs Act does not change that requirement. See In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998)); infra Argument III. Murray cannot meet that burden here, because a "proposed" rule is neither "final action" nor ripe for judicial review.

A. Under the plain text of the Act, neither the Proposed Rule nor the supporting legal memorandum is a "final action."

Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), governs judicial review of EPA's nationally applicable air regulations and is an exclusive remedy. Id. § 7607(e); ODEQ, 740 F.3d at 191. It lists specific, nationally applicable actions that are subject to judicial review – including action "*promulgating* . . . any standard of

[6] Moreover, "investor perceptions of the short-term impacts of the Proposed Rule on Peabody's business" are not a cognizable injury under Article III. Peabody Br. at 8 (Doc. No. 1529726); see Perciasepe, 714 F.3d at 1323 (consent agreement did not cause injury despite claimant's belief that EPA "likely" would "promulgate a rule economically harmful to" energy companies); cf. Gen. Elec. Co. v. Jackson, 610 F.3d 110, 121-22 (D.C. Cir. 2010).

performance or requirement under [42 U.S.C. § 7411]" – along with "any other nationally applicable regulations *promulgated*, or *final action* taken, by the Administrator under this chapter." 42 U.S.C. § 7607(b)(1) (emphasis added).

Murray relies on a truncated reading of this last phrase to suggest that although Congress expressly made only "promulgated" standards or requirements under section 7411 reviewable, it also intended to make *proposed* requirements under this section subject to judicial review when it referred to review of "any other . . . final action." Pet.Br. 38. Murray further contends that because the Proposed Rule was signed by the Administrator, both the proposal and its supporting legal memorandum are "presumptively final." Pet.Br. 48. Murray errs on both counts.

With respect to Murray's first argument, the plain text of the Act's general rulemaking provision, 42 U.S.C. § 7607(d), unambiguously mandates the procedures by which EPA first "proposes" and then "promulgates" all notice-and-comment rules subject to that provision, which include all such rules under section 7411. See id. § 7607(d)(1)(C). Section 7607(d) makes clear that only a *promulgated* rule consummates the rulemaking process. Specifically, the Act states that "proposed rules" are to be made available for public comment in the Federal Register and must include a notice specifying the period available for public comment. Id. § 7607(d)(3). "Promulgated rules," in contrast, are only issued *after* the public comment period and must be accompanied, inter alia, by "an explanation of the reasons for any major changes in the promulgated rule from the proposed rule," and "a response to each of the

significant comments, criticisms, and new data submitted in written or oral presentations during the comment period." Id. § 7607(d)(6)(A)(ii), (B).

Because the Act is so precise in referring to "proposed" and to "promulgated" rules, giving each term a distinct meaning, the fact that the judicial review provision in 42 U.S.C. § 7607(b)(1) *only* refers to "promulgated," not proposed, rules when describing actions that are subject to this Court's review is dispositive. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." So. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 894 (D.C. Cir. 2006) (internal quotation omitted); see, e.g., City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 337-38 (1994). Had Congress intended that proposed rules be subject to immediate judicial review, it could readily have made that clear by including "action *proposing or* promulgating [requirements under section 7411 and other listed items]" on the list of specific actions subject to review. Congress chose, instead, specifically to authorize review only of final action "promulgating" such requirements.

The fact that 42 U.S.C. § 7607(d)(7)(B) limits judicial review to "[o]nly" those objections "raised with reasonable specificity during the period for public comment (including any public hearing)" further supports the conclusion that only "promulgated," not "proposed" rules governed by section 7607(d)'s procedures are subject to judicial review. If a claimant could petition for review of a proposed rule

without first submitting comments and awaiting EPA's final action in response to those comments, this limitation would make no sense.

Moreover, when the phrase "other . . . final action taken" is read in conjunction with the earlier list of *specific* "promulgated" actions – rather than reading the latter phrase in isolation as Murray does – it becomes clear that "other . . . final action" logically refers not to any of the specific "promulgated" regulations already listed as reviewable (such as requirements under section 7411), but to *other* types of final actions EPA may take that do not involve notice and comment.[7] Reading this phrase to *also* encompass judicial review of "proposed requirements under section 7411" would effectively nullify the Act's provisions mandating the procedures by which such requirements may be made final through "promulgation." See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 485 (2001) (Act may not be construed in a manner that "nullifies textually applicable provisions"). Congress' choice not to subject proposed rules to judicial review until they are "promulgated" must be given effect.

That the Act provides for judicial review of promulgated regulations even if they are the subject of administrative petitions for reconsideration (Pet.Br. 50) does not contradict this plain reading of the statutory text. Whether or not a petition for

[7] One example of a non-notice-and-comment "final" action of which this phrase authorizes judicial review is an action under 42 U.S.C. § 7410(c)(1)(A) ("find[ing] that a State has failed to make a [state implementation plan] submission . . .").

reconsideration has been filed, the relevant question for purposes of the judicial review provision is whether the regulation has been "promulgated" in the manner the Act requires. The Proposed Rule here has not.

Murray's second contention – that EPA's Proposed Rule and supporting legal memorandum may be "presumed" final because of the Administrator's signature on the preamble, Pet.Br. 48-49 – is not supported by the case Murray cites. In National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971), the Court reviewed a Department of Labor advisory letter issued pursuant to the Fair Labor Standards Act. Id. at 689. Thus, not only was Schultz decided under a different statute than the CAA and prior to the Supreme Court's clarification of the test for determining "finality" in Bennett v. Spear, 520 U.S. 154 (1997), but the Court there did *not* suggest that a "presumption of finality" could apply to a "proposed rule" published as part of a notice-and-comment process, as no such proposal was at issue. Instead, the Court specifically limited the scope of its holding to "interpretative rulings." Shultz, 443 F.2d at 702.

However valid a presumption of finality may have been in the narrow set of circumstances addressed by Shultz, it makes *no* sense in the context of the CAA's notice-and-comment rulemaking process. The CAA mandates that *every* "proposed rule" subject to the rulemaking procedures in section 7607(d) be accompanied by a "statement of basis and purpose" that includes, inter alia, "the major legal interpretations . . . underlying the proposed rule." 42 U.S.C. § 7607(d)(3)(C). Thus,

by setting forth relevant legal interpretations in the preamble to the Proposed Rule and supporting legal memorandum (see Pet.Br. 45-47), EPA was merely taking a step that the Act requires for *any* proposed rule governed by section 7607(d).

Moreover, the Administrator routinely signs proposed rules that are nationwide in scope, such as this one, because the Administrator is the only agency official authorized to take such administrative action. Thus, were the Court to adopt Murray's "presumption," *every* proposed nationwide air rule could potentially be considered "final" and immediately reviewable in this Court without waiting for the conclusion of the rulemaking process. Were such a precedent established, claimants that disagree with EPA's legal interpretations in any future proposed rule under the CAA likely would be *forced* to sue within sixty days of publication of the proposal in order to avoid the risk that their challenge might otherwise be deemed untimely.[8]

In short, Murray's suggested approach for determining "finality" is wholly at odds with the text of the Act's rulemaking and judicial review provisions and would destroy the orderly scheme that Congress established. Dismissing Murray's petition, in contrast, would uphold the "prescribed order of decisionmaking" in which "the first decider under the Act is the expert administrative agency, the second, federal judges." Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2539 (2011).

[8] See 42 U.S.C. § 7607(b)(1).

B. Murray cannot satisfy either prong of the Bennett finality test.

1. The Proposed Rule did not consummate the rulemaking process.

Although it is clear that the Proposed Rule and supporting legal memorandum are not final actions for the reasons explained above, the familiar finality test articulated in Bennett reinforces this conclusion, as this Court held when dismissing premature challenges to EPA's 2012 proposed rule under section 7411(b). Las Brisas Energy Ctr., LLC v. EPA, No. 12-1248 & consolidated cases (Order dated Dec. 13, 2012) (Attach. A).

To be final, an action (1) "must mark the consummation of the agency's decisionmaking process" and "must not be [] merely tentative or interlocutory"; and (2) it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett, 520 U.S. at 177-78. Murray cannot demonstrate that the first criterion is met here, because the Proposed Rule clearly does not represent "the consummation of [EPA's] decision-making process." The process by which the Administrator promulgates "standards of performance" and other "requirements" under section 7411 is prescribed by 42 U.S.C. § 7607(d) as shown above, and EPA indisputably has not completed that process. Therefore, the Proposed Rule is an "interlocutory" action. Bennett, 520 U.S. at 178.

The Proposed Rule is also "tentative," id., in that EPA has sought comments on all aspects of the proposal – including on the legal questions at the heart of Murray's challenge – and EPA may modify its final action in any number of ways in

response to those comments. See 79 Fed. Reg. at 34,853/2 (EPA "solicits comment on all aspects of its legal interpretations, *including the discussion in the Legal Memorandum*") (emphasis added); id. at 34,835/2 (EPA seeks "public comment on all aspects of this proposal"). Hypothetically, it would be well within EPA's administrative discretion to issue a supplemental proposal, issue a modification to the Proposed Rule, or even withdraw it entirely if the Administrator determined, after consideration of the comments, that such action was appropriate. See 79 Fed. Reg. 1352 and 79 Fed. Reg. 1430 (Jan. 8, 2014) (notices withdrawing April 2012 proposal and substituting a new, substantially different proposal under section 7411(b)).

Murray insists that the legal interpretations in the preamble and supporting legal memorandum are phrased in an "unequivocal" or conclusive manner, and argues that because EPA employed such phrasing, the Court may review the Proposed Rule despite the acknowledged possibility that EPA may not promulgate a rule or may modify the proposal. See generally Pet.Br. 45-55. But the absence of hedge-words does not render a "proposed" notice-and-comment rule definitive. While courts sometimes ascertain finality based on the agency's choice of language or other contextual clues in cases involving agency letters,[9] guidance statements,[10] or other

[9] E.g,. Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980).

[10] E.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (D.C. Cir. 2000). Murray's reliance on Appalachian Power is especially ironic, since the Court held that it was error to adopt a guidance statement without going through notice and comment. 208 F.3d at 1028. Here, Murray seeks to *thwart* the notice-and-comment

actions *not* subject to statutory notice-and-comment rulemaking requirements,[11] here the decision-making process EPA must follow is spelled out in the Act itself.

Murray's reliance on Whitman v. American Trucking Associations, 531 U.S. 457 (2001), is also misplaced (Pet.Br. 49, 51, 57). There, the Supreme Court held that an interim policy for implementing NAAQS was reviewable, in part, because EPA had published the policy in conjunction with the proposed rule and *then* adopted the policy in the preamble to the *final* rule "in light of" the comments it received. Id. at 477-79. Here, in contrast, EPA's challenged preamble and supporting legal memorandum have only been published with the Proposed Rule for the purpose of *seeking* comments on EPA's legal interpretations, and EPA has not yet considered and responded to those comments as the Act requires.

2. Proposing a rule creates no binding legal consequence.

Murray asserts that the second prong of Bennett's test is satisfied (Pet.Br. 55-57), but never explains how EPA's mere publication of a rulemaking proposal could impose legal consequences or determine rights or obligations. Bennett, 520 U.S. at 177-78. No state or potentially regulated entity – let alone Murray – is "required" to

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process by asking the Court to review the merits before EPA has the opportunity to consider and respond to the comments it received.

[11] E.g., Sackett v. EPA, 132 S. Ct. 1367, 1369 (2012) (administrative compliance order). Other cases are irrelevant because they did not address finality. E.g., Athlone Indus. v. Consumer Prod. Safety Comm'n, 707 F.2d 1485 (D.C. Cir. 1983).

do *anything* based on the Proposed Rule. Only a final regulation promulgated in conjunction with EPA's responses to comments would have such effect.

C. Murray's challenges are unripe.

In assessing ripeness, this Court "focus[es] on . . . the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" Am. Petroleum Inst. ("API") v. EPA, 683 F.3d 382, 387 (D.C. Cir. 2012) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). "[A] dispute is not ripe if it is not fit . . . and . . . it is not fit if it does not involve final agency action." Holistic Candlers & Consumers Ass'n v. Food & Drug Admin., 664 F.3d 940, 943 n.4 (D.C. Cir. 2012) (internal citations omitted).

Because fitness is so plainly lacking when a claimant seeks judicial review of a legal dispute that may be mooted by the outcome of a pending notice and comment rulemaking process, this Court historically has dismissed such claims as unripe. See, e.g., API, 683 F.3d at 386; Atlantic States Legal Found. v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003); Utility Air Regulatory Group v. EPA, 320 F.3d 272, 278-79 (D.C. Cir. 2003); Action on Smoking & Health v. Dep't of Labor, 28 F.3d 162, 165 (D.C. Cir. 1994); accord Las Brisas (Order dated Dec. 13, 2012) (Attach. A); see also Brief for EPA in Case No. 14-1146 at 28-31. This Court should likewise dismiss Murray's premature petition.

III. THE COURT LACKS JURISDICTION TO ISSUE A WRIT OF PROHIBITION TO STOP THE ONGOING RULEMAKING.

Murray cannot overcome the non-final nature of the action it challenges by invoking the All Writs Act. Murray attempts to convince the Court otherwise by mixing together disparate bits of All Writs Acts jurisprudence, with a dash of the collateral order doctrine and other inapposite case law thrown in for good measure. See Pet.Br. at 39-41. But Murray's writ request remains half-baked. The All Writs Act does not confer jurisdiction where it is otherwise lacking; a writ is unavailable where there is another legal remedy; and writ issuance is a rare occurrence that has been confined to limited categories of circumstances, none of which apply here.

A. A writ may issue to aid, but not enlarge, jurisdiction.

Murray ignores key constraints on the Court's authority under the All Writs Act. That act "is not itself a grant of jurisdiction." In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004). Rather, it "confines the [court's] authority to the issuance of process 'in aid of' the issuing court's jurisdiction" and "does not enlarge that jurisdiction." Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999). It "can never provide jurisdiction to a court that does not and would not otherwise have jurisdiction." Ayuda, Inc. v. Thornburgh, 948 F.2d 742, 755 (D.C. Cir. 1991) (vacated on other grounds).

Here, entertaining a challenge to the ongoing section 7411(d) rulemaking would impermissibly enlarge the Court's jurisdiction. As discussed above, it is well-established that courts only have jurisdiction to review final agency action. Allowing

Murray to challenge the Proposed Rule would allow parties to bypass the limitations imposed by Congress in 42 U.S.C. § 7607(b)(1), thus enlarging the Court's jurisdiction. Ayuda, 948 F.2d at 755 ("Surely" a "court may not use the All Writs Act to exercise jurisdiction over an agency . . . *before* a case is ripe or the agency's action is final. Otherwise . . . courts could easily circumvent those jurisdictional bars.").

Moreover, premature review of the rulemaking would impede, not aid, the Court's exercise of its jurisdiction, as it places the Court in the position of having to review an agency position that is not fully developed. As this Court explained in Telecomms. Research & Action Ctr. v. FCC ("TRAC"), 750 F.2d 70, 79 (D.C. Cir. 1984) (quotation omitted), "[p]ostponing review until relevant agency proceedings have been concluded permits an administrative agency to develop a factual record, [and] to apply its expertise to that record." Murray suggests that those steps are unnecessary here because its challenge "focuses exclusively on the legal basis" for the rulemaking and "will never be clearer." Pet.Br. 43. But that ignores the value of comments received from Murray and others on the issue raised. Such comments – of which EPA has received many – may alter EPA's or the Court's analysis. Indeed, if an issue is *not* raised in comment with reasonable specificity, it cannot be raised on judicial review. See 42 U.S.C. § 7607(d). This further underscores that Murray's challenge is inconsistent with the review process Congress prescribed in the Act.

B. A writ is only available where there is no other legal remedy.

A writ is "an extraordinary remedy that is not available when review by other means is possible." TRAC, 750 F.2d at 78. Here, the Clean Air Act already provides a specific remedy for an allegedly "ultra vires" rule: review under its judicial review provision, 42 U.S.C. § 7607(b)(1), once the rule is final. Thus, "review by other means" is not only possible, but certain here.

Murray suggests, with much hyperbole, that review of the final rule is not an *adequate* remedy because states and industry will have to expend resources before the rule is finalized. Pet.Br. 42-43 (complaining that the "specter of the mandate" may force coal plants to shut down, and "States must immediately devote tremendous time and resources"). As discussed in Section I, that claim is factually unsubstantiated. But in any event, such concerns do not justify issuing a writ where the challenged action will be reviewable in the normal course. See Public Util. Comm'r of Or. v. Bonneville Power Admin., 767 F.2d 622, 630 (9th Cir. 1985) (rejecting argument that writ should issue because delay would cause irreparable harm).

C. An extraordinary writ may issue only in certain circumstances.

Because an extraordinary writ may only issue "in aid of" a court's jurisdiction, courts have entertained petitions for a writ only in certain narrow categories of circumstances, otherwise concluding that jurisdiction is lacking.

First, "[t]he traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or

to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); see also I.C.C. v. U.S. ex rel. Campbell, 289 U.S. 385, 394 (1933) ("Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal . . . ").

Second, appellate courts have issued writs to address non-jurisdictional lower court action where "resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524 (D.C. Cir. 1975). Such cases have generally addressed discovery orders, see, e.g., Schlagenhauf v. Holder, 379 U.S. 104 (1964), which "are often collateral to the litigation and thus lost to appellate review . . . ." Gasch, 509 F.2d at 526.

Third, courts "have the authority, under the All Writs Act, 28 U.S.C. § 1651, to issue a writ of mandamus" in regard to agency action where an agency has "unreasonably delayed" taking action required of it by law. Sierra Club v. Thomas, 828 F.2d 783, 795-96 (D.C. Cir. 1987); TRAC, 750 F.2d at 76 (court had jurisdiction over petition for a writ of mandamus alleging unduly lengthy delay by the FCC in responding to complaint).[12] The delayed action must lie within the Court's future jurisdiction, see Tennant, 359 F.3d at 529, and issuance of the writ must be necessary

[12] After Thomas and TRAC, Congress amended the Clean Air Act so that unreasonable delay claims are now heard in district court. See 42 U.S.C. § 7604(a).

"to protect [that] future jurisdiction." TRAC, 750 F.2d at 76. In other words, the court may only assume jurisdiction if "the agency might forever evade our review and thus escape its duties [while] we awaited final action." Thomas, 828 F.2d at 793.

Murray's petition fits into none of these three categories. It does not address a lower court's exercise of jurisdiction it lacks or refusal to exercise jurisdiction, but rather the substance of administrative action. It also does not fit into the Gasch/Schlagenhauf category, not only because it does not address lower court action, but also because the goals of preventing similar errors and furthering the "efficient administration of justice" by addressing an issue that might otherwise evade review are not in play here. To the contrary, "[r]efusing intervention in current agency proceedings ensures against premature, possibly unnecessary, and piecemeal judicial review." Bonneville Power, 767 F.2d at 629. The issue Murray raises can be addressed when a final rule is before this Court. While that issue may be important and undecided, "[n]ot every issue of first impression or every 'basic, undecided' problem should be the basis for mandamus relief." Gasch, 509 F.2d at 525.

The third category – the only one addressing *agency* action as opposed to lower court action – is also inapposite because, unlike in TRAC and the other cases in this vein, Murray does not challenge agency *delay* that might frustrate the Court's review of final action. Rather, it is Murray that would deprive the Court of the opportunity to review a final rule by demanding that the agency take no action.

Murray attempts to overcome the traditional limitations on the availability of an extraordinary writ by cobbling together isolated aspects of some of the above cases, while ignoring the corresponding limitations. Murray relies heavily on Gasch and Schlagenhauf as authorizing review of "new and important problems" (Pet.Br. 39) – a label that could apply to any number of cases – but conveniently ignores that those cases were limited to addressing district court discovery orders that might have otherwise been "lost to appellate review." Gasch, 509 F.2d at 526. Petitioner points to Thomas and TRAC as holding that the Court can review non-final agency action (Pet. at 24), but glosses over the limitation of those holdings to undue delay claims where the court's opportunity to review the agency's action might be frustrated by a failure to take action. Thomas, 828 F.2d at 793; TRAC, 750 F.2d at 76. Petitioner also fails to mention that the Court declined to issue the writ in both cases. Id.

D. No authority supports the issuance of a writ here.

Apparently recognizing that the All Writs Act is insufficient to achieve its ends, Murray turns to several other inapposite doctrines and cases. Pet.Br. 40-41. Not one of them supports its arguments.

Murray cites McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963), as holding that a court can enjoin non-final action that involves "public questions particularly high in the scale of our national interest." Pet.Br. at 40. But no party challenged jurisdiction in that case, regarding whether the NLRB could hold an election on a Honduran ship. Addressing jurisdiction on its own initiative, the Court noted that the

NLRB's action "aroused vigorous protests from foreign governments," creating "a uniquely compelling justification for prompt judicial resolution of the controversy." 372 U.S. at 16-17. While the Proposed Rule has certainly drawn "vigorous protests" from Murray and others, such protests – which occur often in agency rulemakings – do not present the same type of "compelling justification" for bypassing normal jurisdictional rules as the international incident at issue in McCulloch.

Murray also relies on Leedom v. Kyne, 358 U.S. 184, 187-91 (1958). But there, the National Labor Relations Board conceded that the district court had jurisdiction under a general review provision, *unless* the National Labor Relations Act specifically deprived it of such jurisdiction. Id. Here, there is no such general grant of jurisdiction that allows review of non-final EPA action, and the All Writs Act cannot fill that void. As discussed above, it does not "enlarge" the Court's jurisdiction.

Finally, Murray relies on Meredith v. Federal Mine Safety and Health Review Commission, 177 F.3d 1042 (D.C. Cir. 1999), for the proposition that the Court may review non-final action under the collateral-order doctrine. Pet.Br. at 41. But Murray offers no support for its bare assertion that the prerequisites for application of that doctrine – conclusiveness and unreviewability – have been met, even though the challenged rulemaking has not concluded and the Court will have the opportunity to review the resulting final rule under 42 U.S.C. § 7607(b)(1) once it does.

Murray's argument for issuance of an extraordinary writ is, in essence, that the challenged rulemaking is really important. But even if true, that is not enough. There

is simply no authority for the remarkable proposition Murray advances: that the Court can halt an ongoing rulemaking under the auspices of the All Writs Act. As in other cases where a party has attempted to use that limited tool to achieve a novel end, the Court should reject this argument. See In re Bluewater Network, 234 F.3d 1305, 1312 (D.C. Cir. 2000) ("petitioners cannot use the present mandamus action to challenge the substance of" temporary regulations).

IV. THE COURT SHOULD NOT STOP THE RULEMAKING BASED ON ONE INTERPRETATION OF AN AMBIGUOUS PROVISION.

If it reaches the merits, the Court should decline to take the extreme step of ordering EPA to stop an ongoing rulemaking based on Murray's preferred interpretation of a patently ambiguous provision.

To prevail on the merits at this preliminary stage, Murray must show that its interpretation of section 7411(d) of the Act – under which EPA is barred from addressing *non-hazardous* pollutants emitted by a source category because it has regulated *hazardous* pollutants from that source category – is clearly and indisputably the only possible way to interpret that provision. See Chevron, U.S.A., Inc. v. Natural Resources Def. Council, 467 U.S. 837 (1984) (a court must accept an agency's reasonable construction of an ambiguous provision); In re United States, 925 F.2d 490, 1991 WL 17225, at *2 (D.C. Cir. Feb. 11, 1991) (a writ may issue only where the "right to issuance . . . is 'clear and indisputable'") (quoting Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 403 (1976)).

Murray cannot make that showing. The text of section 7411(d), even as amended by the House alone, does not require Murray's interpretation; the legislative history and statutory context do not favor it; and Murray improperly discounts the Senate's amendment to section 7411(d), which would plainly allow EPA to regulate power plants' emissions of carbon dioxide. Moreover, even under Murray's interpretation of section 7411(d), EPA would still have the authority to regulate *natural gas plants*; thus, in seeking to halt the rulemaking (which addresses both coal- and natural gas-fired plants) in its entirety, Murray is seeking relief that would preclude EPA from exercising authority that even Murray does not dispute EPA has.

EPA must have the opportunity to proffer its own interpretation of section 7411(d), addressing all of the above, after completing its analysis and considering the comments it has received from Murray, Intervenors, and thousands of others. Then, this Court can properly consider whether that interpretation is reasonable in light of the statute's text, context, and legislative history, as well as common sense.

A. Section 7411(d) need not be read as Murray insists.

Murray contends that there is only one way to read section 7411(d): as barring regulation thereunder of *all* emissions from a source category once that source category's *hazardous* emissions have been regulated under section 7412. Not so. As EPA has previously explained,[13] that provision – even as amended by the House only

[13] Because EPA discussed these alternative interpretations at length in both its Response to [Writ] Petition in this case (p.28-30) and in its brief in the companion

– is rife with ambiguity and subject to several other possible interpretations. All except Murray's proposed reading would authorize regulation of *non-hazardous pollutants*, such as carbon dioxide, emitted by power plants.

First, the literal text of the House-amended version of section 7411(d) (set forth in the U.S. Code) can be read as authorizing EPA to address power plant emissions under that provision so long as the pollutant in question (here, carbon dioxide) is not a criteria pollutant. This interpretation is apparent once one focuses on the way the three qualifying clauses in the text are joined:

> **The Administrator shall prescribe regulations** . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source **for any air pollutant** [1] for which air quality criteria have not been issued **or** [2] which is not included on a list published under section 7408(a) of this title **or** [3] emitted from a source category which is regulated under section 7412 of this title . . . .

42 U.S.C. § 7411(d)(1) (emphasis and internal numbering added). Because Congress used the conjunction "or" rather than "and" between the three clauses, they would be more naturally read as alternatives, rather than requirements to be imposed simultaneously.[14] In other words, the literal language of section 7411(d) provides that the Administrator may require states to establish standards for an air pollutant so long

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case West Virginia v. EPA, No. 14-146 (Brief for Respondent pp.35-40), it will provide a more condensed treatment here.

[14] Merriam Webster defines "or" as "a function word [used] to indicate an alternative <coffee *or* tea> <sink *or* swim>." At http://www.merriam-webster.com/dictionary/or.

as *either* air quality criteria have not been established for that pollutant, *or* one of the remaining criteria is met. Air quality criteria have not been issued for CO_2; thus, whether power plants have been regulated under section 7412 is arguably irrelevant.

Section 7411(d) could also be literally read as requiring regulation of power plant carbon dioxide emissions because of the lack of a negative before the third clause. Petitioner presumes that the negative from the second clause was intended to carry over, implicitly inserting another "which is not" before "emitted from a source category." But the text (as amended by the House) says that EPA "shall" require standards for "any air pollutant . . . emitted from a source category which is regulated under section 7412." 42 U.S.C. § 7411(d)(1). Thus, section 7411(d) can also be literally read as requiring EPA to regulate emissions of a pollutant from a source category if that category *is* regulated under section 7412.

Next, the House chose to use the term "regulated," which is inherently ambiguous. As the Supreme Court has explained, when interpreting that term, an agency must consider *what* is being regulated. See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 366 (2002) (It is necessary to "pars[e] . . . the 'what'" of the term "regulates."); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 363 (1999) (the term "'regulates insurance' . . . require[s] interpretation, for [its] meaning is not 'plain.'") Here, the "what" being "regulated under section 7412" is a source category's emission of specific hazardous pollutants. Thus, EPA could reasonably conclude that it is only precluded from regulating sources in regard to a particular pollutant under

section 7411(d) if those sources are already "regulated under section 7412" *with respect to that same pollutant.* This is precisely the sort of "reasonable, context-appropriate meaning" that the Supreme Court has directed EPA to give such ambiguous terms. Utility Air Regulatory Group v. EPA (UARG), 134 S. Ct. 2427, 2440 (2014).

Moreover, the phrase "which is regulated under section 7412" is ambiguous in regard to the object(s) it modifies. Petitioner assumes it modifies "source category," but it may also or instead modify "air pollutant." "As enemies of the dangling participle well know, the English language does not always force a writer to specify [to what] . . . a modifying phrase relates." Young v. Cmty. Nutrition Inst., 476 U.S. 974, 980-81 (1986) (FDA's interpretation therefore gets Chevron deference). If Congress intended the phrase "which is regulated . . ." to modify "air pollutant," then regulation would be barred only if a source category was already regulated under section 7412 *for the same pollutant EPA sought to regulate under section 7411(d)*.

Finally, the clause "emitted from a source category which is regulated under section 7412" is ambiguous as a whole because it modifies the ambiguous phrase "any air pollutant." 42 U.S.C. § 7411(d). As the Supreme Court recently noted, "any air pollutant" is routinely given a "context-appropriate meaning." UARG, 134 S. Ct. at 2439. Here, context suggests that "any air pollutant" "emitted from a source category which is regulated under section 7412" should be understood as referring only to any *hazardous* air pollutants, since hazardous pollutants are what section 7412 addresses.

Murray addresses none of these textual ambiguities. Rather, it blithely asserts that "[t]he Supreme Court has . . . already confirmed . . . that the text of Section [74]11(d) as reflected in the United States Code prohibits EPA from mandating state-by-state standards . . . ." Pet.Br. 17.[15] The Supreme Court has done no such thing. In a footnote in American Electric Power v. Connecticut, the Court said:

> "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program §§ 7408-7410, or the 'hazardous air pollutants' program, § 7412."

131 S. Ct. 2527, 2537 n.7 (2011) ("AEP"). First, the issue presented here – whether section 7411(d) bars regulation of *all* emissions from a source category once *hazardous* emissions from that category have been regulated under section 7412 – was not raised or addressed in AEP. To the contrary, industry petitioners asserted in briefing that "EPA may . . . require States to submit plans to control" power plants' greenhouse

[15] Murray also claims that EPA has "acknowledged that the text of Section [74]11(d) . . . unambiguously prohibits doubly regulating existing source categories." Not true. As discussed in EPA's brief in West Virginia (pp.51-53), while, in the preamble to a 2005 rule that was overturned, EPA stated that the interpretation of 42 U.S.C. § 7411(d) advanced by Murray here was "*a* literal reading" of that text (emphasis added), it nevertheless concluded that the text was ambiguous, not only because of the Senate amendment, but also because of context and legislative history. See 70 Fed. Reg. 15,994, 16,031-32 (Mar. 29, 2005) ("Such a reading would be inconsistent with the general thrust of the 1990 amendments . . . . We do not believe that Congress sought to eliminate regulation for a large category of sources . . ."). No party disagreed. Rather, the question raised then was whether section 7411(d) authorized regulation thereunder of a *hazardous pollutant* where that pollutant was listed, but not actually regulated, under section 7412. In any event, EPA is not tied to statements in the preamble of a vacated rule, and it should not be criticized for failing to explore all possible meanings of the House amendment in that context, particularly given that the argument Murray now asserts was not raised in that rulemaking.

gas emissions under 42 U.S.C. § 7411(d),[16] and reiterated at argument – which took place *after* EPA proposed the MATS Rule – that EPA has "the authority to consider [greenhouse gas] standards under section [74]11."[17]

Furthermore, the phrase "of the pollutant in question" arguably indicates that the Supreme Court understood the prohibition to be pollutant-specific. The structure of the Court's statement also so suggests, as the Court's references to the NAAQS program and hazardous pollutant program are parallel, and it is indisputable that the NAAQS exclusion is criteria-pollutant specific.[18] Thus, if the Supreme Court's dicta in AEP means what Murray believes, then it is at least half wrong.

Finally, the holding of AEP – that section 7411 "speaks directly to emissions of [CO_2] from the defendants' [power] plants," 131 S. Ct. at 2537 – undercuts Murray's position, particularly since it post-dates the issuance of the final MATS Rule.

The Supreme Court has not yet grappled with the myriad ambiguities of section 7411(d), and its passing reference to the language of that provision in AEP does not inform the analysis here. What is evident, at this point, is that this is no "case of 'clear right'" concerning a "clear statutory provision," TRAC, 750 F.2d at 79, and so the Court should neither issue a writ of prohibition nor set aside the Proposed Rule.

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[16] Brief for Pet's, No. 10-174, 2011 WL 334707, at *6-7.

[17] Transcript, 2011 WL 1480855, at *16-17.

[18] See 42 U.S.C. § 7411(d)("The Administrator shall prescribe regulations . . . [requiring states to] establish[] standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued . . .).

B. The Act's structure, purpose, context, and legislative history do not favor Murray's authority-nullifying interpretation of § 7411(d).

Statutory interpretation begins with the text, but does not end there. As this Court has explained, "[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent." Bell Atlantic Telephone Cos. v. F.C.C., 131 F.3d 1044, 1047 (D.C. Cir. 1997). Rather, the Court "must employ all the tools of statutory interpretation, including . . . structure, purpose, and legislative history." Loving v. I.R.S., 742 F.3d 1013, 1016 (D.C. Cir. 2014) (internal quotation omitted). Fully employed here, those tools favor a reading of section 7411(d) that does not bar regulation thereunder of *all* emissions from a source simply because its *hazardous* emissions are already regulated under section 7412.

1. The Act's structure and purpose conflict with Murray's interpretation.

In assessing any interpretation of section 7411(d), the Court should consider how the three main programs set forth in the Act work together. See UARG, 134 S. Ct. at 2442 (a "reasonable statutory interpretation must account for . . . the broader context of the statute as a whole") (quotation omitted).

Congress designed section 7411(d) to work in tandem with the NAAQS and section 7412 programs such that, together, the three programs cover the full range of dangerous emissions from stationary sources. See supra pp. 3-5. Under Murray's reading, there would be a gaping hole in that coverage, leaving sources' emissions of

certain pollutants outside the Act's scope. Such a result is starkly at odds with the Act's purpose of protecting "public health and welfare." 42 U.S.C. § 7401(b)(1).

This Court should not rush to adopt an interpretation of section 7411 that is at odds with the Act's purpose and creates gaps in the otherwise-comprehensive scheme designed by Congress in 1970. Rather, it should give EPA an opportunity to interpret that provision so as to "make sense of the whole." Bell Atl., 131 F.3d at 1047.

2. The legislative history conflicts with Murray's interpretation.

The legislative history of the 1990 Amendments also "makes it plain" that Murray's theory of section 7411(d) "is not a reasonable statutory interpretation." United States v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982). That history is replete with language indicating that Congress sought to expand EPA's regulatory authority across the board, compelling the Agency to regulate more pollutants, under more programs, more quickly.[19] Conversely, no party has identified a single statement in the legislative history indicating that Congress simultaneously sought to restrict EPA's

[19] See S. Rep. No. 101-228 at 133 ("the program to regulate hazardous air pollutants . . . should be restructured to provide EPA with authority to regulate industrial and area source categories of air pollution . . . in the near term"), reprinted in 5 Legis. Hist. at 8473; S. Rep. No. 101-228 at 14 ("The bill gives significant authority to the Administrator in order to overcome the deficiencies in [the NAAQS program]"), reprinted in 5 Legis. Hist. at 8354; H.R. Rep. No. 101-952 at 336, 340, 345 & 347 (discussing enhancements to Act's motor vehicle provisions, EPA's new authority to promulgate chemical accident prevention regulations, the enactment of the Title V permit program, and enhancements to EPA's enforcement authority), reprinted in 1 Legis. Hist. at 1786, 1790, 1795, & 1797.

authority under the existing source performance standards program or to create gaps in the comprehensive structure of the statute. This strongly suggests that both houses simply intended to edit section 7411(d) to reflect the structural changes made to section 7412; i.e., EPA's new mandate to regulate the nearly 200 hazardous pollutants Congress identified on a source category-by source category basis, rather than regulating hazardous pollutants *one-by-one*. Indeed, that was the conclusion drawn by the Congressional Research Service shortly after enactment of the 1990 Amendments. 1 Legis. Hist. at 46 n.1 (characterizing House and Senate amendments as "duplicative" edits that "change the reference to section 112" using "different language").

Lacking any contemporaneous historical evidence supporting its interpretation of section 7411(d), Murray presents a theory as to why Congress might have wanted to exempt all source categories regulated under section 7412 from any regulation under section 7411(d): a supposed desire to prohibit "double regulation." Pet.Br. 20. Murray posits that "ban[ning] EPA from doubly regulating source categories under both Sections [74]11(d) and [74]12" was "sensibl[e]" because those provisions might impose "conflicting or unaffordable requirements." Pet.Br. 19-20. Beyond the lack of historical evidence supporting it, there are several things wrong with this theory.

First, sections 7412 and 7411 regulate different types of air pollutants – hazardous and non-hazardous respectively – although a lay reader of Murray's brief would have no idea this was the case. If the section 7411 and section 7412 programs addressed the same sets of pollutants, then Murray's theory might make some sense,

but there is obviously no "double regulation" when the two programs at issue address different pollutants. Moreover, Murray provides no factual support for its suggestion that the controls required under section 7412 to address hazardous emissions might "conflict," technologically, with the controls required under section 7411(d) to address the emissions of other pollutants.

Second, instead of legislating to avoid any regulatory overlap between state and federal programs as Murray theorizes (Pet.Br. 19), Congress in fact made it clear that sources may be simultaneously subject to multiple regulatory programs. See 42 U.S.C. § 7416 (authorizing states to require sources already regulated under section 7412 or other national standards to impose additional, *more stringent* state controls). Indeed, the Title V program, enacted in 1990 and providing for the collection of all regulatory requirements applicable to a source into one permit, would be largely unnecessary if a source can only be subject to one program at a time.

Finally, Murray's suggestion that Congress sought to bar all regulation under section 7411(d) once a source category has been regulated under section 7412 in order to avoid imposing "unaffordable requirements" is undercut by something Murray itself points out: the fact that the standards set under those programs both incorporate cost considerations. Pet.Br. 19; 42 U.S.C. §§ 7411(a)(1), 7412(d). Thus, Congress addressed the issue of affordability by incorporating cost considerations into the standard-setting process under both the section 7411(d) and 7412 programs, not by exempting a source category from one of those programs.

3. The statutory context is also at odds with Murray's interpretation.

"Context serves an especially important role in textual analysis of a statute when Congress has not expressed itself as unequivocally as might be wished." Bell, 131 F.3d at 1047. Where the Court is "charged with understanding the relationship between two different provisions within the same statute" – e.g., §§ 7411(d) and 7412 – it "must analyze the language of each to make sense of the whole." Id.

Here, the text of section 7412 states that regulation of hazardous pollutants under that section is not to "diminish or replace the requirements of" EPA's regulation of non-hazardous pollutants under section 7411. 42 U.S.C. § 7412(d)(7). Under Murray's reading, section 7412 standards for hazardous pollutants would entirely *eliminate* regulation of non-hazardous emissions from a source category. Given that current sections 7412(d)(7) and 7411(d) were both the result of the 1990 Amendments, one would have to ascribe contradictory intentions to the same Congress to interpret the latter as Murray suggests.

Ultimately, EPA may or may not conclude that section 7411(d) should be interpreted as Murray argues, and the reasoning supporting its conclusion may or may not be along the lines of the arguments addressed above. But EPA must be afforded the opportunity to complete the rulemaking process, and reach its own final conclusion regarding the issues raised here, before the arguments for and against any particular interpretation of the statute can properly be considered by this Court.

C. The Senate Amendment also conflicts with Murray's interpretation of section 7411(d), and cannot be ignored.

Murray's preferred interpretation of section 7411(d) is also at odds with Congress' enactment of a second amendment to that provision, drawn from the Senate's bill, which plainly authorizes EPA to regulate unless *the same pollutant* is already regulated under section 7412. This clear preservation of EPA's regulatory authority over the full range of dangerous pollutants emitted by a source, hazardous and non-hazardous, is properly considered when interpreting section 7411(d).

1. The Senate Amendment should not be ignored.

Unlike the ambiguous amendment to section 7411(d) drawn from the House bill, the amendment drawn from the Senate bill is straightforward. It simply substitutes "section 112(b)" for the prior cross-reference to "section 112(b)(1)(A)." Pub. L. No. 101-549, § 302(a), 104 Stat. at 2574. So amended, section 7411(d) would mandate that EPA require states to submit plans establishing standards "for any existing source for any air pollutant . . . which is not included on a list published under section 7408(a) or section 7412(b)."

Murray and Intervenors offer various arguments as to why this clear mandate, which all concede is at odds with the interpretation of section 7411(d) advanced by Murray (see Pet.Br. n8), should be ignored. All are unavailing. First, Murray asserts that the Court should "defer" to the Office of Law Revision Counsel's ("OLRC's") "decision" regarding "what the text of the Clean Air Act" is; i.e., that OLRC's non-

execution of the Senate Amendment in the U.S. Code is the authoritative word on the interpretation of section 7411(d). Pet.Br. 34. Murray goes so far as to claim that, because OLRC did not execute the Senate Amendment, "there is no ambiguity." Id.

But Murray misunderstands the role of OLRC. OLRC is not a "legislative agency" as Murray asserts (id.); it does not make law. Rather, its job is simply to "prepare[] and publish[] the United States Code."[20] OLRC may also *recommend* "such amendments and corrections as will remove ambiguities, contradictions, and other imperfections" in a law and submit a revised version of that title to the Committee of the Judiciary of the House of Representatives,[21] but until Congress enacts that version of the title into positive law, the text in the Statutes at Large controls. See Stephan v. United States, 319 U.S. 423, 426 (1943) ("the Code cannot prevail over the Statutes at Large when the two are inconsistent"); Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988) ("[W]here the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statutes at Large controls."). This Court accordingly concluded in Five Flags that it had to give effect to the version of a provision set forth in the Statutes at Large, as opposed to the version in the U.S. Code, where there was a substantive difference between the two. Id. In contrast, OLRC's mechanical

[20] At http://uscode.house.gov/about/info.shtml.

[21] Id.

non-execution of an amendment (for whatever reason[22]) is entitled to "no weight." United States v. Welden, 377 U.S. 95, 98 n.4 (1964).[23]

None of the cases cited by Murray (Pet.Br. 35-36) remotely support its argument to the contrary. NLRB v. Noel Canning, 134 S. Ct. 2550, 2577 (2014), concerned the President's authority under the Recess Appointment Clause of the Constitution. While the Court found "some linguistic ambiguity" in that Clause, which it interpreted in light of "the basic purpose of the Clause, and the historical practice," id. at 2573, there were obviously no issues of conflicting *statutory* language, or deference to the OLRC. The "undue judicial interference" language repeatedly quoted by Murray relates to the question of whether the Court should take the Senate's representations of its own actions at face value or instead inquire into the facts behind them. Thus, Noel Canning is irrelevant to the issues presented here. Ex parte Wren, 63 Miss. 512 (Miss. 1886), is also off point. That case addressed whether

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[22] Murray states that the House Amendment had "execution priority" because it appears before the Senate Amendment in the bill. But "if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control." Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb, 580 F.2d 496, 510 (D.C. Cir. 1978).

[23] EPA does not dispute that there are other instances in which statutory amendments have not been executed. See Pet.Br. n.9. Murray misses the point: in the rare instances where unexecuted text is found to matter, it must be considered and given effect, just as this Court did in Five Flags. This will not "embroil" courts in "the intricacies of the legislative process" as Murray hyperbolically suggests. Indeed, most of the unexecuted amendments cited by Murray are trivial and/or duplicative (e.g., 1990 Amendments to 42 U.S.C. § 1395l(a)(1)(K) (both amendments struck same word, "and"), or obviously in error (e.g., 2008 Amendments to 15 U.S.C. § 2081(b)(1) (section amended had been repealed)).

an amendment that did *not* make its way into the final bill signed by the governor, despite the legislature's intent to include it, has effect. If anything, the Mississippi Supreme Court's conclusion – that the text of the bill *as signed into law* governs – supports EPA's position here, not Murray's.

Murray also suggests that the Senate amendment should be discounted because it is "not substantive," but only "conforming." Pet.Br. 33. Murray is again wrong. First, the "conforming" label is irrelevant. A "conforming" amendment may be substantive or non-substantive. Burgess v. United States, 553 U.S. 124, 135 (2008). And while the House Amendment contains more words, it also qualifies as "conforming" under the definition in the Senate Legislative Drafting Manual, Section 126(b)(2) ("necessitated by the substantive amendments of provisions of the bill"). Here, both the House and Senate amendments were "necessitated by" Congress' revisions to section 7412, which included the deletion of old section 7412(b)(1)(A). Thus, the House's amendment is no less "conforming" than the Senate's, and the heading under which it was enacted – "Miscellaneous Guidance" – no more indicates substantive import. In any event, this Court gives full effect to conforming amendments, see Washington Hospital Center v. Bowen, 795 F.2d 139, 149 (D.C. Cir. 1986), and so the Senate amendment cannot be ignored.[24]

[24] Murray cites Am. Petroleum Inst. v. SEC as suggesting otherwise. Pet.Br. 33. It does not. There, the Court did not ignore a conforming amendment; rather, it

Intervenors NFIB and UARG seize on a line from the legislative history stating that the Senate "recedes to the House," arguing that this language indicates the Senate "defer[red] . . . to the . . . House amendment" and thereby "reconcile[ed] the alternate versions of the 1990 amendments." NFIB/UARG Br. 17 (citing S. 1631, 101st Cong., § 108 (Oct. 27, 1990), reprinted in 1 Leg. Hist. at 885) (JA 418)). Intervenors misuse this rather mundane legislative history snippet.

To begin with, the language quoted is not from the conference report as Intervenors state, but from a "Statement of Senate Managers" read into the record on the floor. See 1 Leg. Hist., at 880 (JA 413). As the reader noted, it was "not reviewed or approved by all of the conferees," id., and thus has limited value. Furthermore, "recedes" is a boilerplate term that signals that one chamber is withdrawing its prior objection to a provision of a bill, either because it has been amended, replaced, or otherwise. See Riddick's Senate Procedure S. Doc. 101-28 at pp. 1481-82 (JA 426-27). It does not mean one house is deferring to another. Moreover, the statement at issue here is specific to section 108 of the bill, and thus says nothing about the Senate's intentions regarding section 302, containing the Senate amendment. Indeed, the Senate Managers expressly stated that they were not addressing Title III of the bill, which contained that amendment. 1 Leg. Hist., at 880 (JA 413). In any event, the key

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refused to act based on a non-existent conforming amendment that a party theorized Congress might have forgotten to enact. 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

point remains that both amendments to section 7411(d) were enacted into law, and must therefore be given effect. See Envtl. Def. Fund v. EPA, 82 F.3d 451, 460 n.10 (D.C. Cir. 1996) (Statement of Senate Managers "cannot undermine the statute's language"). Thus, both Murray and Intervenors fail to show that the Senate Amendment must be disregarded.

2. The Senate Amendment poses no non-delegation issue.

In a last-ditch attempt to excise the Senate Amendment from the Act, Intervenors point to the non-delegation doctrine. They argue that agencies may not "pick and choose between . . . conflicting legislative enactments" (NFIB Br. 22), and that EPA is unlawfully "attempt[ing] to exercise lawmaking power" (Peabody Br. 11). Intervenors' attempt to scare up a constitutional bogeyman fails.

First, it is not apparent that there is a "conflict" between the two amendments to section 7411(d), given that the House-amended text can be interpreted as not barring regulation of a source category under section 7411(d) unless that source category's emissions of *the pollutant in question* are already regulated under section 7412. Supra pp. 35-40. EPA should be permitted to at least consider that possibility.[25]

Second, if there is tension between the two amendments, EPA should have the opportunity to try to harmonize them, in light its expertise on this statutory scheme.

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[25] See Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2228 (2014) (Sotomayor, J., dissenting) ("before concluding that Congress has legislated in conflicting and unintelligible terms," "traditional tools of statutory construction" should be used to "allow [the statute] to function as a coherent whole.").

Where "internal tension" in a statute "makes possible alternative reasonable constructions," "Chevron dictates that a court defer to the agency's . . . expert judgment about which interpretation fits best with, and makes the most sense of, the statutory scheme." Scialabba, 134 S. Ct. at 2203 (Kagan, J., plurality op.). This Court has similarly opined that where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course." Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 872 (D.C. Cir. 1979). Thus, if there is a conflict between the House and Senate amendments, EPA should be given the chance to find a reasonable "middle course." Id.[26]

Intervenors cite to Chief Justice Roberts' statement that "Chevron is not a license for an agency to repair a statute that doesn't make sense." NFIB Br. 25 (citing Scialabba, 134 S. Ct. at 2214 (concurring opinion)). But (in addition to being at odds with the plurality opinion), that statement doesn't apply here. The Act makes sense;

[26] Intervenors cite Whitman, 531 U.S. at 457, as suggesting that EPA may not choose "between competing versions of a statute." NFIB/UARG Br. 22. But that case concerned whether Congress' command that EPA set air quality standards "requisite to protect public health" and "allowing an adequate margin of safety" was too broad. It was in that different context that the Court suggested that, if a grant of authority was too broadly drawn, EPA could not cure it by declining to exercise some of that authority. Id. at 472. And the Court noted that "[i]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes," whereas it has routinely upheld agencies' authority to execute vaguely-drafted Congressional commands. 531 U.S. at 474.

Congress' intent in 1970 to establish a comprehensive regulatory scheme, covering the full range of dangerous pollutants, was clear and sensible, and its intent to strengthen that scheme in 1990 was equally clear and sensible. If EPA determines that there is a discrepancy between the two amendments at issue here, those "intelligible principles" can guide its application of the traditional tools of statutory interpretation to harmonize the two amendments. Indeed, the Chief Justice made clear that he favored reading a statute "as a symmetrical and coherent regulatory scheme," and "fit[ing], if possible, all parts into a harmonious whole." Id. at 2214.

Finally, even if the Court concluded that there was a "direct conflict" between the House and Senate amendments, which it did not think the agency could properly address through interpretation, 134 S. Ct. at 2203, the result would not be what Murray or Intervenors wish. Rather, the amended portion of section 7411(d) would revert to its pre-1990 text – which would either render it entirely null (because it cross-references section 4712(b)(1)(A), which no longer exists), or instead might be found to preserve the pre-1990 scope of the exclusion (if only the now-inapplicable subsection references ("(b)(1)(A)") are considered null).[27]

[27] See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 189 (2012) ("[I]f a text contains truly irreconcilable provisions . . . and they have been simultaneously adopted, neither provision should be given effect.").

EPA has not yet determined what weight to give the Senate amendment; whether or how to reconcile it with the House amendment; or if reconciliation is even necessary. Intervenors suggest that, instead of having the opportunity to proffer its conclusions on these issues, EPA must throw its hands in the air and look to either Congress to clarify its intentions or the Court to divine them. But separation of powers principles instead require that the agency to which Congress has delegated the implementation of a statute, and which has extensive expertise in interpreting and applying that statute, gets the first crack at answering such questions.

Conclusion

The Court should dismiss or deny Murray's Petition for Review and its Petition for an Extraordinary Writ.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

March 9, 2015

Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, as counted by the word count feature of Microsoft Office Word, it contains 13,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1); and

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) because it was prepared using Microsoft Office Word 2013 in a proportionally spaced typeface, Garamond, in 14 pt. font.

/s/ Amanda Shafer Berman
Amanda Shafer Berman
Counsel for Respondent EPA

Dated: March 9, 2015

Certificate of Service

I certify that the Brief of Respondent EPA was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, and that, pursuant to Circuit Rule 31(b), eight paper copies of the brief were delivered to the Court by hand.

I further certify that a copy of the foregoing Brief of Respondent EPA was today served electronically through the court's CM/ECF system on all registered counsel for Petitioners, Intervenors and Amici.

/s/ Amanda Shafer Berman
Counsel for Respondent

Dated: March 9, 2015

Attachment A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 **September Term, 2012**

EPA-77FR22392

Filed On: December 13, 2012

Las Brisas Energy Center, LLC,

Petitioner

v.

Environmental Protection Agency and Lisa Perez Jackson,

Respondents

Conservation Law Foundation, et al.,
Intervenors

Consolidated with 12-1251, 12-1252, 12-1253, 12-1254, 12-1257

BEFORE: Rogers, Garland, and Brown, Circuit Judges

ORDER

Upon consideration of the motions to dismiss, the oppositions thereto, and the replies; and the motion for declaratory relief, the oppositions thereto, and the replies, it is

ORDERED that the motions to dismiss be granted. The challenged proposed rule is not final agency action subject to judicial review. See 42 U.S.C. § 7607(b)(1); Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (holding that final agency action "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow") (internal quotations omitted). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 **September Term, 2012**

FURTHER ORDERED that the motion for declaratory relief be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOIA EPA-HQ-2016-009655

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 14-1151

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

IN RE: MURRAY ENERGY CORPORATION,

Petitioner.

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

On Petition for Writ of Prohibition & Petition for Review

RESPONDENTS' FINAL STATUTORY ADDENDUM

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

Of Counsel:

Elliott Zenick
Scott Jordan
United States Environmental
Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

March 9, 2015

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Public Law 101-549
101st Congress

An Act

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

Nov. 15, 1990
[S. 1630]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Air pollution control.

TITLE I—PROVISIONS FOR ATTAINMENT AND MAINTENANCE OF NATIONAL AMBIENT AIR QUALITY STANDARDS

Sec. 101. General planning requirements.
Sec. 102. General provisions for nonattainment areas.
Sec. 103. Additional provisions for ozone nonattainment areas.
Sec. 104. Additional provisions for carbon monoxide nonattainment areas.
Sec. 105. Additional provisions for particulate matter (PM-10) nonattainment areas.
Sec. 106. Additional provisions for areas designated nonattainment for sulfur oxides, nitrogen dioxide, and lead.
Sec. 107. Provisions related to Indian tribes.
Sec. 108. Miscellaneous provisions.
Sec. 109. Interstate pollution.
Sec. 110. Conforming amendments.
Sec. 111. Transportation system impacts on clean air.

SEC. 101. GENERAL PLANNING REQUIREMENTS.

Inter-governmental relations.

(a) AREA DESIGNATIONS.—Section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)) is amended to read as follows:

"(d) DESIGNATIONS.—

"(1) DESIGNATIONS GENERALLY.—

"(A) SUBMISSION BY GOVERNORS OF INITIAL DESIGNATIONS FOLLOWING PROMULGATION OF NEW OR REVISED STANDARDS.—By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 109, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

"(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

"(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

"(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not

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exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

"(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and all applicable regulations.

"(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

"(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

"(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 105.".

SEC. 108. MISCELLANEOUS GUIDANCE.

(a) TRANSPORTATION PLANNING GUIDANCE.—Section 108(e) of the Clean Air Act is amended by deleting the first sentence and inserting in lieu thereof the following: "The Administrator shall, after consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, and with State and local officials, within nine months after enactment of the Clean Air Act Amendments of 1989 and periodically thereafter as necessary to maintain a continuous transportation-air quality planning process, update the June 1978 Transportation-Air Quality Planning Guidelines and publish guidance on the development and implementation of transportation and other measures necessary to demonstrate and maintain attainment of national ambient air quality standards.". 42 USC 7408.

(b) TRANSPORTATION CONTROL MEASURES.—Section 108(f)(1) of the Clean Air Act is amended by deleting all after "(f)" through the end of subparagraph (A) and inserting in lieu thereof the following:

"(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after enactment of the Clean Air Act Amendments of 1990, and from time to time thereafter— Public information.

"(A) information prepared, as appropriate, in consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, regarding the formulation and emission reduction potential of transportation control measures related to criteria pollutants and their precursors, including, but not limited to—

"(i) programs for improved public transit;

"(ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles;

"(iii) employer-based transportation management plans, including incentives;

"(iv) trip-reduction ordinances;

"(v) traffic flow improvement programs that achieve emission reductions;

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need for revision, or implementation of any plan or plan revision required under this Act.".

(e) NEW SOURCE STANDARDS OF PERFORMANCE.—(1) Section 111(b)(1)(B) of the Clean Air Act (42 U.S.C. 7411(b)(1)(B)) is amended as follows:

(A) Strike "120 days" and insert "one year".

(B) Strike "90 days" and insert "one year".

(C) Strike "four years" and insert "8 years".

(D) Immediately before the sentence beginning "Standards of performance or revisions thereof" insert "Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard.".

(E) Add the following at the end: "When implementation and enforcement of any requirement of this Act indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.".

(2) Section 111(f)(1) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended to read as follows:

"(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) before the date of the enactment of the Clean Air Act Amendments of 1990 and for which regulations had not been proposed by the Administrator by such date, the Administrator shall— Regulations.

"(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after the date of the enactment of the Clean Air Act Amendments of 1990;

"(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after the date of the enactment of the Clean Air Act Amendments of 1990; and

"(C) propose regulations for the remaining categories of sources within 6 years after the date of the enactment of the Clean Air Act Amendments of 1990.".

(f) SAVINGS CLAUSE.—Section 111(a)(3) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended by adding at the end: "Nothing in title II of this Act relating to nonroad engines shall be construed to apply to stationary internal combustion engines.".

(g) REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) of the Clean Air Act (42 U.S.C. 7411(d)(1)(A)(i)) is amended by striking "or 112(b)(1)(A)" and inserting "or emitted from a source category which is regulated under section 112".

(h) CONSULTATION.—The penultimate sentence of section 121 of the Clean Air Act (42 U.S.C. 7421) is amended to read as follows: "The Administrator shall update as necessary the original regulations required and promulgated under this section (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) to ensure adequate consultation.". Regulations.

(i) DELEGATION.—The second sentence of section 301(a)(1) of the Clean Air Act (42 U.S.C. 7601(a)(1)) is amended by inserting "subject to section 307(d)" immediately following "regulations".

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and sources subject to the provisions of this section and shall include aggregate information from the database in each annual report. The report shall include, but not be limited to—

"(1) a status report on standard-setting under subsections (d) and (f);

"(2) information with respect to compliance with such standards including the costs of compliance experienced by sources in various categories and subcategories;

"(3) development and implementation of the national urban air toxics program; and

"(4) recommendations of the Chemical Safety and Hazard Investigation Board with respect to the prevention and mitigation of accidental releases.".

SEC. 302. CONFORMING AMENDMENTS.

42 USC 7411.

(a) Section 111(d)(1) of the Clean Air Act is amended by striking "112(b)(1)(A)" and inserting in lieu thereof "112(b)".

(b) Section 111 of the Clean Air Act is amended by striking paragraphs (g)(5) and (g)(6) and redesignating the succeeding paragraphs accordingly. Such section is further amended by striking "or section 112" in paragraph (g)(5) as redesignated in the preceding sentence.

42 USC 7414.

(c) Section 114(a) of the Clean Air Act is amended by striking "or" after "section 111," and by inserting ", or any regulation of solid waste combustion under section 129," after "section 112".

42 USC 7418.

(d) Section 118(b) of the Clean Air Act is amended by striking "112(c)" and inserting in lieu thereof "112(i)(4)".

42 USC 7602.

(e) Section 302(k) of the Clean Air Act is amended by adding before the period at the end thereof ", and any design, equipment, work practice or operational standard promulgated under this Act.".

42 USC 7604.

(f) Section 304(b) of the Clean Air Act is amended by striking "112(c)(1)(B)" and inserting in lieu thereof "112(i)(3)(A) or (f)(4)".

42 USC 7607.

(g) Section 307(b)(1) is amended by striking "112(c)" and inserting in lieu thereof "112".

(h) Section 307(d)(1) is amended by inserting—

"(D) the promulgation of any requirement for solid waste combustion under section 129,"

after subparagraph (C) and redesignating the succeeding subparagraphs accordingly.

42 USC 7412 note.

SEC. 303. RISK ASSESSMENT AND MANAGEMENT COMMISSION.

(a) ESTABLISHMENT.—There is hereby established a Risk Assessment and Management Commission (hereafter referred to in this section as the "Commission"), which shall commence proceedings not later than 18 months after the date of enactment of the Clean Air Act Amendments of 1990 and which shall make a full investigation of the policy implications and appropriate uses of risk assessment and risk management in regulatory programs under various Federal laws to prevent cancer and other chronic human health effects which may result from exposure to hazardous substances.

(b) CHARGE.—The Commission shall consider—

(1) the report of the National Academy of Sciences authorized by section 112(o) of the Clean Air Act, the use and limitations of risk assessment in establishing emission or effluent standards, ambient standards, exposure standards, acceptable concentration levels, tolerances or other environmental criteria for hazardous substances that present a risk of carcinogenic effects

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1 U.S.C. § 112. Statutes at Large; contents; admissibility in evidence

The Archivist of the United States shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress; all proclamations by the President in the numbered series issued since the date of the adjournment of the regular session of Congress next preceding; and also any amendments to the Constitution of the United States proposed or ratified pursuant to article V thereof since that date, together with the certificate of the Archivist of the United States issued in compliance with the provision contained in section 106b of this title. In the event of an extra session of Congress, the Archivist of the United States shall cause all the laws and concurrent resolutions enacted during said extra session to be consolidated with, and published as part of, the contents of the volume for the next regular session. The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

* * *

1 U.S.C. § 204. Codes and Supplements as evidence of the Laws of United States and District of Columbia; citation Codes and Supplements

(a) United States Code.--The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

* * *

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

* * *

42 U.S.C. § 7401. Congressional findings and declaration of purpose

* * *

(b) Declaration. The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

* * *

42 U.S.C. § 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants.

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970] publish, and shall from time to time thereafter revise, a list which includes each air pollutant--

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on--

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant:

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

* * *

42 U.S.C. § 7409. National primary and secondary ambient air quality standards

(a) Promulgation.

(1) The Administrator--

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall be regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare.

(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

* * *

42 U.S.C. § 7411. 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 and any nonair quality health and environmental impact and energy requirements) 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. Nothing in title II of this Act [42 USCS §§ 7621 et seq.] relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(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.

(7) The term "technological system of continuous emission reduction" means--

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 USCS § 792(a)] or any

amendment thereto, or any subsequent enactment which supersedes such Act, or (B) which qualifies under section 113(d)(5)(A)(ii) of this Act shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(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 in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year 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 one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(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.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

* * *

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance 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 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(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 7410(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 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

* * *

42 U.S.C. § 7411 (1988). Statutes at Large; contents; admissibility in evidence

* * *

(d) Standards of performance for existing sources; remaining useful life of source.

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance 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 7408(a) or 7412(b)(1)(A) of this title but (ii) to which a standard of performance under this section would apply if such exiting source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

* * *

42 U.S.C. § 7412. Hazardous air pollutants

(a) Definitions
For purposes of this section, except subsection (r) of this section--

(1) Major source
The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

(2) Area source
The term "area source" means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under subchapter II of this chapter.

(3) Stationary source
The term "stationary source" shall have the same meaning as such term has under section 7411(a) of this title.

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

(5) Modification
The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results

in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) Hazardous air pollutant
The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect
The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

(8) Electric utility steam generating unit
The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

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

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

(11) Carcinogenic effect
Unless revised, the term "carcinogenic effect" shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment. Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

(b) List of pollutants

(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS number	Chemical name
75070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
98862	Acetophenone
53963	2-Acetylaminofluorene
107028	Acrolein
79061	Acrylamide
79107	Acrylic acid
107131	Acrylonitrile
107051	Allyl chloride
92671	4-Aminobiphenyl
62533	Aniline
90040	o-Anisidine
1332214	Asbestos
71432	Benzene (including benzene from gasoline)
92875	Benzidine
98077	Benzotrichloride
100447	Benzyl chloride
92524	Biphenyl
117817	Bis(2-ethylhexyl)phthalate (DEHP)
542881	Bis(chloromethyl)ether
75252	Bromoform
106990	1,3-Butadiene
156627	Calcium cyanamide
105602	Caprolactam
133062	Captan
63252	Carbaryl
75150	Carbon disulfide

56235	Carbon tetrachloride
463581	Carbonyl sulfide
120809	Catechol
133904	Chloramben
57749	Chlordane
7782505	Chlorine
79118	Chloroacetic acid
532274	2-Chloroacetophenone
108907	Chlorobenzene
510156	Chlorobenzilate
67663	Chloroform
107302	Chloromethyl methyl ether
126998	Chloroprene
1319773	Cresols/Cresylic acid (isomers and mixture)
95487	o-Cresol
108394	m-Cresol
106445	p-Cresol
98828	Cumene
94757	2,4-D, salts and esters
3547044	DDE
334883	Diazomethane
132649	Dibenzofurans
96128	1,2-Dibromo-3-chloropropane
84742	Dibutylphthalate
106467	1,4-Dichlorobenzene(p)
91941	3,3-Dichlorobenzidene
111444	Dichloroethyl ether (Bis(2-chloroethyl)ether)
542756	1,3-Dichloropropene
62737	Dichlorvos
111422	Diethanolamine
121697	N,N-Diethyl aniline (N,N-Dimethylaniline)
64675	Diethyl sulfate
119904	3,3-Dimethoxybenzidine
60117	Dimethyl aminoazobenzene

119937	3,3'-Dimethyl benzidine
79447	Dimethyl carbamoyl chloride
68122	Dimethyl formamide
57147	1,1-Dimethyl hydrazine
131113	Dimethyl phthalate
77781	Dimethyl sulfate
534521	4,6-Dinitro-o-cresol, and salts
51285	2,4-Dinitrophenol
121142	2,4-Dinitrotoluene
123911	1,4-Dioxane (1,4-Diethyleneoxide)
122667	1,2-Diphenylhydrazine
106898	Epichlorohydrin (1-Chloro-2,3-epoxypropane)
106887	1,2-Epoxybutane
140885	Ethyl acrylate
100414	Ethyl benzene
51796	Ethyl carbamate (Urethane)
75003	Ethyl chloride (Chloroethane)
106934	Ethylene dibromide (Dibromoethane)
107062	Ethylene dichloride (1,2-Dichloroethane)
107211	Ethylene glycol
151564	Ethylene imine (Aziridine)
75218	Ethylene oxide
96457	Ethylene thiourea
75343	Ethylidene dichloride (1,1-Dichloroethane)
50000	Formaldehyde
76448	Heptachlor
118741	Hexachlorobenzene
87683	Hexachlorobutadiene
77474	Hexachlorocyclopentadiene
67721	Hexachloroethane
822060	Hexamethylene-1,6-diisocyanate
680319	Hexamethylphosphoramide
110543	Hexane
302012	Hydrazine

7647010	Hydrochloric acid
7664393	Hydrogen fluoride (Hydrofluoric acid)
123319	Hydroquinone
78591	Isophorone
58899	Lindane (all isomers)
108316	Maleic anhydride
67561	Methanol
72435	Methoxychlor
74839	Methyl bromide (Bromomethane)
74873	Methyl chloride (Chloromethane)
71556	Methyl chloroform (1,1,1-Trichloroethane)
78933	Methyl ethyl ketone (2-Butanone)
60344	Methyl hydrazine
74884	Methyl iodide (Iodomethane)
108101	Methyl isobutyl ketone (Hexone)
624839	Methyl isocyanate
80626	Methyl methacrylate
1634044	Methyl tert butyl ether
101144	4,4-Methylene bis(2-chloroaniline)
75092	Methylene chloride (Dichloromethane)
101688	Methylene diphenyl diisocyanate (MDI)
101779	4,4'-Methylenedianiline
91203	Naphthalene
98953	Nitrobenzene
92933	4-Nitrobiphenyl
100027	4-Nitrophenol
79469	2-Nitropropane
684935	N-Nitroso-N-methylurea
62759	N-Nitrosodimethylamine
59892	N-Nitrosomorpholine
56382	Parathion
82688	Pentachloronitrobenzene (Quintobenzene)
87865	Pentachlorophenol
108952	Phenol

106503	p-Phenylenediamine
75445	Phosgene
7803512	Phosphine
7723140	Phosphorus
85449	Phthalic anhydride
1336363	Polychlorinated biphenyls (Aroclors)
1120714	1,3-Propane sultone
57578	beta-Propiolactone
123386	Propionaldehyde
114261	Propoxur (Baygon)
78875	Propylene dichloride (1,2-Dichloropropane)
75569	Propylene oxide
75558	1,2-Propylenimine (2-Methyl aziridine)
91225	Quinoline
106514	Quinone
100425	Styrene
96093	Styrene oxide
1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin
79345	1,1,2,2-Tetrachloroethane
127184	Tetrachloroethylene (Perchloroethylene)
7550450	Titanium tetrachloride
108883	Toluene
95807	2,4-Toluene diamine
584849	2,4-Toluene diisocyanate
95534	o-Toluidine
8001352	Toxaphene (chlorinated camphene)
120821	1,2,4-Trichlorobenzene
79005	1,1,2-Trichloroethane
79016	Trichloroethylene
95954	2,4,5-Trichlorophenol
88062	2,4,6-Trichlorophenol
121448	Triethylamine
1582098	Trifluralin
540841	2,2,4-Trimethylpentane

108054	Vinyl acetate
593602	Vinyl bromide
75014	Vinyl chloride
75354	Vinylidene chloride (1,1-Dichloroethylene)
1330207	Xylenes (isomers and mixture)
95476	o-Xylenes
108383	m-Xylenes
106423	p-Xylenes
0	Antimony Compounds
0	Arsenic Compounds (inorganic including arsine)
0	Beryllium Compounds
0	Cadmium Compounds
0	Chromium Compounds
0	Cobalt Compounds
0	Coke Oven Emissions
0	Cyanide Compounds[1]
0	Glycol ethers[2]
0	Lead Compounds
0	Manganese Compounds
0	Mercury Compounds
0	Fine mineral fibers[3]
0	Nickel Compounds
0	Polycylic Organic Matter[4]
0	Radionuclides (including radon)[5]
0	Selenium Compounds

NOTE: For all listings above which contain the word "compounds" and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemical (i.e., antimony, arsenic, etc.) as part of that chemical's infrastructure.

[1] X'CN where X = H' or any other group where a formal dissociation may occur. For example KCN or $Ca(CN)_2$

[2] Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol $R\text{-}(OCH_2CH_2)_n\text{-}OR'$ where

n = 1, 2, or 3

R = alkyl or aryl groups

R' = R, H, or groups which, when removed, yield glycol ethers with the structure: R-$(OCH_2CH)_n$-OH. Polymers are excluded from the glycol category.

[3] Includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral derived fibers) of average diameter 1 micrometer or less.

[4] Includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100°C.

[5] A type of atom which spontaneously undergoes radioactive decay.

(2) Revision of the list

The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a

written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects[1] of the pollutant or other evidence adequate to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

(B) The Administrator shall add a substance to the list upon a showing by the petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.

(C) The Administrator shall delete a substance from the list upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

(D) The Administrator shall delete one or more unique chemical substances that contain a listed hazardous air pollutant not having a CAS number (other than coke oven emissions, mineral fibers, or polycyclic organic matter) upon a showing by the petitioner or on the Administrator's own determination that such unique chemical substances that contain the named chemical of such listed hazardous air pollutant meet the deletion requirements of subparagraph (C). The Administrator must grant or deny a deletion petition prior to promulgating any emission standards pursuant to subsection (d) of this section applicable to any source category or subcategory of a listed hazardous air pollutant without a CAS number listed under subsection (b) of this section for which a deletion petition has been filed within 12 months of November 15, 1990.

(4) Further information
If the Administrator determines that information on the health or environmental effects of a substance is not sufficient to make a determination required by this subsection, the Administrator may use any authority available to the Administrator to acquire such information.

(5) Test methods
The Administrator may establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants.

(6) Prevention of significant deterioration
The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

(7) Lead
The Administrator may not list elemental lead as a hazardous air pollutant under this subsection.

(c) List of source categories

(1) In general
Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards
For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources
The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate)

warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

(4) Previously regulated categories
The Administrator may, in the Administrator's discretion, list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990.

(5) Additional categories
In addition to those categories and subcategories of sources listed for regulation pursuant to paragraphs (1) and (3), the Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants according to the same criteria for listing applicable under such paragraphs. In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later.

(6) Specific pollutants
With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to promulgate standards for such pollutants emitted by electric utility steam generating units.

(7) Research facilities
The Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities. For purposes of this section, "research or laboratory facility" means any stationary source whose primary purpose is to conduct research and development into new processes and products, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing
When establishing emissions standards for styrene, the Administrator shall list boat manufacturing as a separate subcategory unless the Administrator finds that such listing would be inconsistent with the goals and requirements of this chapter.

(9) Deletions from the list

(A) Where the sole reason for the inclusion of a source category on the list required under this subsection is the emission of a unique chemical substance, the Administrator shall delete the source category from the list if it is appropriate because of action taken under either subparagraphs (C) or (D) of subsection (b)(3) of this section.

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator's own motion, whenever the Administrator makes the following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

The Administrator shall grant or deny a petition under this paragraph within 1 year after the petition is filed.

(d) Emission standards

(1) In general
The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods
Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which--

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources
The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than--

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold
With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources
With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision
The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved
No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate--

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate--

(i) the use of sodium silicate (or equivalent) luting compounds, if the Administrator determines that use of sodium silicate is an effective means of emissions control and is achievable, taking into account costs and reasonable commercial warranties for doors and related equipment; and

(ii) door and jam cleaning practices.

Notwithstanding subsection (i) of this section, the compliance date for such work practice regulations for coke oven batteries shall be not later than the date 3 years after November 15, 1990.

(C) For coke oven batteries electing to qualify for an extension of the compliance date for standards promulgated under subsection (f) of this section in accordance with subsection (i)(8) of this section, the emission standards under this subsection for coke

oven batteries shall require that coke oven batteries not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries seeking an extension shall be not later than the date 3 years after November 15, 1990.

(9) Sources licensed by the Nuclear Regulatory Commission
No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act [42 U.S.C.A. § 2011 et seq.] for such category or subcategory provides an ample margin of safety to protect the public health. Nothing in this subsection shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date
Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

* * *

(n) Other provisions

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress

alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

(B) The Administrator shall conduct, and transmit to the Congress not later than 4 years after November 15, 1990, a study of mercury emissions from electric utility steam generating units, municipal waste combustion units, and other sources, including area sources. Such study shall consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than 3 years after November 15, 1990, a study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur. Such study shall include a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health.

(2) Coke oven production technology study

(A) The Secretary of the Department of Energy and the Administrator shall jointly undertake a 6-year study to assess coke oven production emission control technologies and to assist in the development and commercialization of technically practicable and economically viable control technologies which have the potential to significantly reduce emissions of hazardous air pollutants from coke oven production facilities. In identifying control technologies, the Secretary and the Administrator shall consider the range of existing coke oven operations and battery design and the availability of sources of materials for such coke ovens as well as alternatives to existing coke oven production design.

(B) The Secretary and the Administrator are authorized to enter into agreements with persons who propose to develop, install and operate coke production emission control technologies which have the potential for significant emissions reductions of hazardous air pollutants provided that Federal funds shall not exceed 50 per centum of the cost of any project assisted pursuant to this paragraph.

(C) On completion of the study, the Secretary shall submit to Congress a report on the results of the study and shall make recommendations to the Administrator identifying practicable and economically viable control technologies for coke oven production facilities to reduce residual risks remaining after implementation of the standard under subsection (d) of this section.

(D) There are authorized to be appropriated $5,000,000 for each of the fiscal years 1992 through 1997 to carry out the program authorized by this paragraph.

(3) Publicly owned treatment works
The Administrator may conduct, in cooperation with the owners and operators of publicly owned treatment works, studies to characterize emissions of hazardous air pollutants emitted by such facilities, to identify industrial, commercial and residential discharges that contribute to such emissions and to demonstrate control measures for such emissions. When promulgating any standard under this section applicable to publicly owned treatment works, the Administrator may provide for control measures that include pretreatment of discharges causing emissions of hazardous air pollutants and process or product substitutions or limitations that may be effective in reducing such emissions. The Administrator may prescribe uniform sampling, modeling and risk assessment methods for use in implementing this subsection.

(4) Oil and gas wells; pipeline facilities

(A) Notwithstanding the provisions of subsection (a) of this section, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this section.

(B) The Administrator shall not list oil and gas production wells (with its associated equipment) as an area source category under subsection (c) of this section, except that the Administrator may establish an area source category for oil and gas production

wells located in any metropolitan statistical area or consolidated metropolitan statistical area with a population in excess of 1 million, if the Administrator determines that emissions of hazardous air pollutants from such wells present more than a negligible risk of adverse effects to public health.

(5) Hydrogen sulfide
The Administrator is directed to assess the hazards to public health and the environment resulting from the emission of hydrogen sulfide associated with the extraction of oil and natural gas resources. To the extent practicable, the assessment shall build upon and not duplicate work conducted for an assessment pursuant to section 8002(m) of the Solid Waste Disposal Act [42 U.S.C.A. § 6982(m)] and shall reflect consultation with the States. The assessment shall include a review of existing State and industry control standards, techniques and enforcement. The Administrator shall report to the Congress within 24 months after November 15, 1990, with the findings of such assessment, together with any recommendations, and shall, as appropriate, develop and implement a control strategy for emissions of hydrogen sulfide to protect human health and the environment, based on the findings of such assessment, using authorities under this chapter including sections[3] 7411 of this title and this section.

(6) Hydrofluoric acid
Not later than 2 years after November 15, 1990, the Administrator shall, for those regions of the country which do not have comprehensive health and safety regulations with respect to hydrofluoric acid, complete a study of the potential hazards of hydrofluoric acid and the uses of hydrofluoric acid in industrial and commercial applications to public health and the environment considering a range of events including worst-case accidental releases and shall make recommendations to the Congress for the reduction of such hazards, if appropriate.

(7) RCRA facilities
In the case of any category or subcategory of sources the air emissions of which are regulated under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], the Administrator shall take into account any regulations of such emissions which are promulgated under such subtitle and shall, to the maximum extent practicable and consistent with the provisions of this section, ensure that the requirements of such subtitle and this section are consistent.

* * *

42 U.S.C. § 7416. Retention of State authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction. Except as provided in subsection (b), any person may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I [42 USCS §§ 7470 et seq.] (relating to significant deterioration of air quality) or part D of title I [42 USCS §§ 7501 et seq.] (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 307(b) [42 USCS § 7607(b)] which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 307(b) [42 USCS § 7607(b)]. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) shall be provided 180 days before commencing such action.

* * *

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[2] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for

reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * *

(d) Rulemaking

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon

by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or

if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized
Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

101st Congress 2d Session | HOUSE OF REPRESENTATIVES | Rept. 101-490 Part 1

CLEAN AIR ACT AMENDMENTS OF 1990

REPORT

OF THE

COMMITTEE ON ENERGY AND COMMERCE U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 3030

together with

ADDITIONAL, SUPPLEMENTAL, AND DISSENTING VIEWS

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Also provided is injunctive authority to restrain violations of fuels regulations, as is already available for violations of vehicle and stationary source requirements.

Section 224. High altitude testing

This section requires that EPA promptly establish at least one new testing center at a site that represents high altitude conditions.

Section 225. Technical amendments

Section 225 revises various sections of the Act to delete outdated provisions and to improve the organization of Title II.

Title III: Provisions for Control of Hazardous Air Pollution

INTRODUCTION

Title III amends section 112 of the Clean Air Act to establish a new program for the control of hazardous air pollutants. Pollutants controlled under this section tend to be less widespread than those regulated under the NAAQS established under section 109 of the Act, but are often associated with more serious health impacts, such as cancer, neurological disorders, and reproductive dysfunctions. Because of their serious impacts, hazardous air pollutants are subject nationally to uniform, source category and subcategory specific controls.

BACKGROUND

Hazardous air pollutants are air pollutants that can cause serious illnesses, such as cancer, or death. In theory, they were to be stringently controlled under the existing Clean Air Act section 112. However, as already noted, only seven of the hundreds of potentially hazardous air pollutants have been regulated by EPA since section 112 was enacted in 1970.

SUMMARY OF TITLE III

"Hazardous air pollutants" versus "criteria air pollutants"

The Clean Air Act distinguishes between two categories of pollutants: hazardous air pollutants and criteria or conventional air pollutants. Criteria air pollutants, as noted earlier, are defined as pollutants that "endanger public health or welfare" and "result from numerous or diverse mobile or stationary sources." These pollutants tend to be more pervasive, but less potent, than hazardous air pollutants. Examples include ozone, CO, and PM-10. The Act requires EPA to set National Ambient Air Quality Standards (NAAQS) for these pollutants, which the States have responsibility for achieving through State Implementation Plans (SIPs).

Hazardous air pollutants are pollutants that pose especially serious health risks. Under existing law, they are pollutants that "cause or contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." They may reasonably be anticipated to cause cancer, neurological disorders, reproductive dysfunctions, other chronic health effects, or adverse acute human health effects.

101st Congress
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Report
101-952

CLEAN AIR ACT AMENDMENTS OF 1990

CONFERENCE REPORT

TO ACCOMPANY

S. 1630

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1630) to amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. Certain matters agreed to in conference are noted below.

The Conference agreement on S. 1630, the Clean Air Act Amendments of 1990, includes provisions addressing attainment and maintenance of ambient air quality standards, mobile sources of air pollution, toxic air pollution, acid rain, permits, enforcement, stratospheric ozone protection, miscellaneous provisions, and clean air research. A summary of the conference agreement follows.

TITLE I—NONATTAINMENT PROVISIONS

Title I of the conference agreement, which adopts the House Title I except with respect to transportation related issues and with a change concerning the regulation of oxides of nitrogen, divides areas that fail to meet any one of the pollution standards listed above into categories, depending on the severity of the problem, and sets out requirements of different levels of stringency for each category.

Depending on the severity of the pollution problem, nonattainment areas for any of the pollutants must attain the health standard for ozone within five, ten, fifteen, or seventeen years (twenty years for Los Angeles).

In the case of ozone, areas must reduce emissions of volatile organic compounds (VOCs), a precursor of ozone, by 3 percent per year (with waivers for certain specified conditions) until the standard is attained.

Vehicle inspection and maintenance programs must be upgraded in ozone and carbon monoxide areas that already have such programs and must be instituted in most other areas that do not already have them.

The Environmental Protection Agency (EPA) is required to impose one of the following sanctions in an area that fails to pre-

FOIA EPA-HQ-2016-009655

pare or implement a plan to attain an air quality standard: limited use of Federal highway funds or a requirement that new industry offset emissions at a 2 to 1 ratio.

Under the safety exemption to highway sanctions, the principal purpose of the project must be to improve highway safety, but the project may also have other important benefits.

The definition of major sources in current law is modified so that smaller sources of VOCs are required to control emissions (50 tons in moderate and serious areas; 25 tons in severe areas; 10 tons in extreme areas).

When a State fails to develop a plan that meets the requirements of the law, the EPA is required to promulgate a Federal Implementation Plan.

The EPA is required to issue control requirements for a number of sources of pollution, including commercial and consumer products.

A new program is established to address the interstate transport of ozone air pollution.

The conferees adopt the House language on rocket testing with the agreement that the appropriate Federal agency may find that testing required for a civilian or commercial launch program is essential to the national security.

Title II—Motor Vehicle-Related Provisions

Title II is based on the House bill with a number of significant modifications.

Reformulated gasoline

Cleaner, reformulated gasoline would be mandated in the nine cities with the most severe ozone pollution beginning in 1995. States could elect to have the requirements apply in other cities with ozone pollution problems. In comparison with conventional gasoline, reformulated gasoline would be required to have 15 percent lower emissions of VOCs and toxic chemicals by 1995, and greater reductions by 2000. The agreement also contains additional standards for oxygen, benzene, and aromatics.

Under section 211(k)(4), a petition for the certification of a fuel formulation or slate of fuel formulations is deemed certified if the Administrator fails to act on the petition within 180 days of its receipt. Such a petition is deemed certified until the Administrator completes action on the petition. In the event that the Administrator subsequently denies such a petition, the conferees intend that the Administrator will take appropriate steps to ensure orderly and prompt compliance.

Section 219 of the bill includes a credit program to provide flexibility in meeting the bill's requirements on the oxygen, aromatic hydrocarbon, and benzene content of reformulated gasoline. A credit program is the mechanism by which persons subject to these requirements will be allowed to pool gasoline sold in a given covered area for purposes of determining compliance with these requirements.

Under this credit program, a person may earn credit for gasoline with a higher oxygen content, lower aromatic hydrocarbon content,

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Permits

It is the conferees' intent that EPA not use the permit hammer approach (case-by-case) to avoid or delay meeting MACT requirements.

Routine Emissions From "Area" Sources

Based on the list of pollutants mentioned above, EPA can also list an area source category just as the agency would list a major source category, and can require MACT. EPA must list sufficient source categories to assure that 90% of the emissions of the 30 most serious area source pollutants are regulated.

Five years after enactment, EPA is to propose a national urban air toxics strategy to reduce cancer risks associated with urban air toxics by 75%. EPA is to report on reductions achieved in 8 and 12 years intervals.

Accidental Releases

The agreement contains provisions that are designed to prevent chemical accidents.

EPA is to publish a list of at least 100 regulated substances, of which 16 are listed in the agreement.

EPA is authorized to promulgate accident prevention regulations.

The conferees do not intend the term "stationary source" to apply to transportation, including the storage incident to such transportation, of any regulated substance or other extremely hazardous substance under the provisions of this subsection.

The prohibition on listing substances for the accident prevention program which have been listed under this section 108(a) does not preclude the listing of anhydrous sulfur dioxide which is on the initial list.

The conference agreement establishes a Chemical Safety and Hazard Investigation Board, similar to the National Transportation Safety board, to investigate chemical accidents.

The Board is authorized to investigate accidental releases which cause substantial property damage. Substantial damage would include fires, explosions, and other events which cause damages that are very costly to repair or correct, and would not include incidental damage to equipment or controls.

Hazard assessments required under this section shall include:

(1) basic data on the source, units at the source facility which contain or process regulated substances (including the longitude and latitude of such units), operating procedures, population of nearby communities, and the meteorology of the area where the source is located;

(2) an identification of the potential points of accidental releases from the source of regulated substances;

(3) an identification of any previous accidental releases from the source including the amounts released, frequencies, and durations;

(4) an identification of a range (including worst case events) of potential releases from the source, including an estimate of

The conferees intend that termination of the seasonal or temporary use of a cleaner fuel shall not be considered a modification for purposes of section 111 or part C of Title I.

TITLE V—PERMIT PROVISIONS

The conference agreement includes provisions that require various sources of air pollution to obtain operating permits which would ensure compliance with all applicable requirements of the Clean Air Act.

Permit programs

EPA is required to issue permit program regulations within one year. States are required to develop programs consistent with those regulations. The programs would be in effect within four years, and the requirement to have a permit would be phased-in over the ensuing three years.

Consistent with the general provisions of section 116 of the Clean Air Act, the conferees understand that a State may establish additional, more stringent permitting requirements, but a State may not establish permit requirements that are inconsistent with the national permitting requirements of this Act, including this title.

EPA Oversight of Permit Programs

The conference agreement provides EPA with the authority to review permits proposed to be issued by a State and to object to permits that violate the Clean Air Act. EPA would also have the opportunity to waive review of permits for small sources.

State response to EPA objections

Under the conference agreement, States would be granted 90 days to revise permits to meet any EPA objection. If the State fails to revise the permit, EPA will issue or deny the permit.

Permit shield

The agreement provides that compliance with a permit is deemed compliance with the requirements of the permit program. Permit compliance also may be deemed compliance with other applicable provisions of the Clean Air Act if the permit has been issued in accordance with Title V and includes those provisions, or if the permitting authority includes in the permit a specific determination that such provisions are not applicable.

Operational flexibility

Facilities will be authorized to make changes in operations without the necessity for a permit revision so long as: (i) the changes are not "modifications" under Title I of the Act, (ii) the changes will not result in emissions that exceed emissions allowable under the permit, and (iii) the facility provides EPA and the permitting authority with seven days written notice in advance of the changes.

Processing permit applications

Except for applications submitted within the first year of the permit program (for which a 3-year phased review is allowed),

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are subsequently destroyed is too broad and does not include adequate safeguards to preclude abuse. In the course of implementing this Act, however, EPA shall consider whether an exclusion will be allowed on a case-by-case basis for the manufacture of controlled substances that are (1) coincidental, unavoidable byproducts of a manufacturing process and (2) immediately contained and destroyed by the producer using maximum available control technologies.

TITLE VII—FEDERAL ENFORCEMENT

The conference agreement includes a number of provisions that enhance the enforcement authority of the Federal government under the Clean Air Act while at the same time providing substantive procedural safeguards. In general terms, the agreement increases the range of civil and criminal penalties for violations of the Clean Air Act.

SIP and permit violations

The conference agreement revises and strengthens EPA enforcement authority regarding violations of State Implementation Plans and permits, including authority to bring civil actions for injunctive relief and penalties, as well as new authority to issue administrative penalty orders in response to violations. These authorities can also be used by EPA when States fail to enforce SIPs or permit requirements.

Violations of other requirements

EPA is authorized to initiate a range of enforcement actions for a number of violations of specified sections and titles of the Act. Included is authority to issue administrative penalty orders, file civil actions, and initiate criminal proceedings via the Attorney General.

It is the conferees' intention to provide the Administrator with prosecutorial discretion to decide not to seek sanctions under Section 113 for de minimis or technical violations in civil and criminal matters.

Criminal penalties

Criminal fines and penalties are included for a range of violations of the Act, including negligent or knowing violations that result in the endangerment of others, knowing violations of SIPs that occur after the violator is on notice of the violation, knowing violations of certain sections in the permit title, and knowing violations of the acid rain title or the stratospheric ozone protection title. In addition, the agreement provides criminal fines and penalties for the knowing filing of false statements and other similar recordkeeping, monitoring, and reporting violations. Consistent with other recent environmental statutes, criminal violations of the Clean Air Act are upgraded from misdemeanors to felonies.

The amendments add new criminal sanctions for recordkeeping, filing and other omissions. These provisions are not meant to penalize inadvertent errors. For criminal sanctions to apply, a source

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CLEAN AIR ACT AMENDMENTS OF 1989

REPORT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 1630

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that does not meet the standard is to be designated nonattainment. An area that meets the standard and does not contribute to another area that exceeds the standard is to be designated attainment. An area that cannot be classified on the basis of available information as meeting the standard is to be designated unclassifiable.

Revised section 107(f)(3) of the Act designated any area that did not meet the primary ambient air quality standard for ozone or carbon monoxide as of the last calendar year before the date of enactment of the bill as nonattainment. Revised section 107(f)(4) designates each area that was identified by EPA as a Group I area in the August 7, 1987, promulgation of the revised particulate standard (PM-10) or which contains a site for which monitoring data shows a violation of the air quality standard for PM-10 before the date of enactment as nonattainment.

Revised section 107(d)(5) of the Act provides that areas may be redesignated by the Administrator upon the request of the Governor of a State or on the Administrator's own motion. The Administrator must act to redesignate an area not currently designated as nonattainment as a nonattainment area within one hundred eighty days of receiving evidence that the area exceeds the national ambient air quality standard for any pollutant. In order to redesignate an area from nonattainment to attainment, the Administrator must promulgate the redesignation by rule, must determine that the area has attained the air quality standard and that attainment is due to permanent reductions in emissions, must have approved a maintenance plan, and determine that the State containing the area has met requirements of the Act applicable to the area. The Administrator may not redesignate an area from nonattainment to unclassified.

New paragraphs (2) and (3) of section 107(d) of the Act provide that the boundaries of an area that is designated nonattainment for ozone and that is located within a metropolitan statistical area (MSA) or a consolidated metropolitan statistical area (CMSA) are the boundaries of the MSA or CMSA, unless the State demonstrates that some portion of the MSA or CMSA does not contribute to violations of the air quality standard and that there is a geographical basis for excluding the portion. With respect to a serious carbon monoxide area, the Administrator may, by rule, include the entire MSA or CMSA in the nonattainment area.

DISCUSSION

This section of the bill restructures and clarifies the process for designating and redesignating areas of the country depending on their emissions and ambient air quality. The bill gives significant authority to the Administrator in order to overcome the deficiencies in current law that have failed to allow the Administrator to respond to new information about pollution levels and control needs.

Existing law, as interpreted by EPA, precludes the Administrator from issuing new designations or revising existing ones when an ambient standard is revised, as occurred with the promulgation in 1987 of the ambient standard for PM-10. Current law is also

currently recognized within the structure of section 112 and have no other statutory authorization.

There is now a broad consensus that the program to regulate hazardous air pollutants under section 112 of the Clean Air Act should be restructured to provide EPA with authority to regulate industrial and area source categories of air pollution (rather than the pollutants) with technology-based standards in the near term.

In light of these conclusions, the reported legislation makes fundamental changes in the basic provisions of section 112 of the Clean Air Act. The bill establishes a list of 191 air pollutants and a mandatory schedule for issuing emissions standards for the major sources of these pollutants. The standards are to be based on the maximum reduction in emissions which can be achieved by application of best available control technology. These new, technology-based standards will become the principal focus of activity under section 112. Authority to issue health-based standards is preserved in modified form to be used for especially serious pollution problems.

This approach to regulation of toxic pollutants is not without precedent. It follows the general model which has been employed since the mid-1970's to control toxic effluents discharged to surface waters by major industrial point sources.

Under the 1972 amendments to the Clean Water Act, industrial dischargers were given two deadlines to control *conventional* pollutants (biological oxygen demand, suspended solids, and acidity): 1) by July 1, 1977 each facility was required to meet emissions limitations reflecting "best practicable control technology currently available" (so-called BPT limits); and 2) by July 1, 1983 each facility was to meet emissions limitations set according to "best available technology economically achievable" (BAT).

Toxic pollutants under the 1972 Act were to be treated differently. The Administrator was to publish a list of toxic pollutants within 90 days and within a year promulgate effluent standards that would provide an "ample margin of safety" to protect the most affected (aquatic) organisms. Thus, the structure of this authority to regulate toxic discharges to surface waters was very similar to the current structure of section 112 of the Clean Air Act.

During the five-year period following passage of the 1972 Clean Water Act, EPA promulgated standards for only six toxic pollutants. In 1975 the Environmental Defense Fund and the Natural Resources Defense Council brought suit against the Agency for failure to list more toxics and to promulgate standards as mandated by the Act. In June 1976, EPA and the plantiffs entered into a consent decree that established a new formula for the development of effluent standards for toxic water pollutants. This agreement created a list of 120 priority pollutants and required EPA to promulgate effluent guidelines based on best available control technology for each pollutant and each industrial category not later than December 31, 1980. Industrial dischargers were to be in compliance with these standards by July 1, 1983, the same deadline as established by the Act for BAT control of conventional pollutants. There were 14,000 dischargers divided into 21 industrial categories and 399 subcategories potentially subject to these new toxics standards.

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A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990

TOGETHER WITH

A SECTION-BY-SECTION INDEX

PREPARED BY THE

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CLEAN AIR ACT AMENDMENTS OF 1990
CHAFEE-BAUCUS STATEMENT OF SENATE MANAGERS

Mr. President, the conference report that is before us includes some 800 pages of legislative language and less than 40 pages--double spaced--of explanatory text. Due to time constraints, we do not have a particularly useful statement of managers.

To help rectify this problem, we have prepared a detailed explanation of five important titles. The explanation is in the form of a traditional statement of managers. It has not been reviewed or approved by all of the conferees but it is our best effort to provide the agency and the courts with the guidance that they will need in the course of implementing and interpreting this complex act.

The titles covered by the "Chafee-Baucus Statement of Senate Managers" are: title I on nonattainment; title II on mobile sources; title V on permits; title VI on stratospheric ozone; and title VII on enforcement.

Mr. President, I ask unanimous consent that this document be printed in the Record.

There being no objection, the material was ordered to be printed on the Record, as follows:

CHAFEE-BAUCUS STATEMENT OF SENATE MANAGERS, S. 1630, THE CLEAN AIR ACT AMENDMENTS OF 1990

Title I--Provisions for Attainment and Maintenance of National Ambient Air Quality Standards.
Title II--Mobile Sources.
Title V--Permits.
Title VI--Stratospheric Ozone Protection.
Title VII--Enforcement.

TITLE I--PROVISIONS FOR ATTAINMENT AND MAINTENANCE OF NATIONAL AMBIENT AIR QUALITY STANDARDS

SECTION 101--GENERAL PLANNING REQUIREMENTS

Senate bill. In sections 101 and 104 the Senate bill amends the Clean Air Act with respect to processes for designating areas of the country based on air quality and with respect to requirements for preparation, contents, submittal, and review of State implementation plans.

In section 106 the Senate bill amends section 176(c) of the Clean Air Act which requires conformity of Federal activities and federally funded activities with the State implementation plan.

House amendment. In section 101 the House bill amends the Clean Air Act to establish a somewhat different structure from existing law for State and EPA action following promulgation of new or revised national ambient air quality standards, including procedures for designating areas based on air quality and for preparation, submittal and review of State implementation plans.

Conference agreement. The Senate recedes to the House except that, by reference to the provisions in section 103 of the agreement, transportation control requirements applicable in severe ozone nonattainment areas--including the requirement applicable to employers of 100 or more employees--are also applied in serious CO nonattainment areas.

SECTION 105--ADDITIONAL PROVISIONS FOR PARTICULAR MATTERS (PM-10) NONATTAINMENT AREAS

Senate bill. Section 109 of the Senate bill provides for classification of PM-10 areas based on the severity of pollution, deadlines for attaining the PM-10 primary standard, requirements applicable to PM-10 nonattainment areas depending on their classification, and consequences for failure to comply with requirements or meet deadlines.

House amendment. The House amendment is similar in structure and content to the Senate bill but differs in details.

Conference agreement. The Senate recedes to the House.

SECTION 107--PROVISIONS RELATED TO INDIAN TRIBES

Senate bill. Section 113 of the Senate bill authorizes the Administrator to treat Indian tribes as States under the Clean Air Act and requires the Administrator to issue regulations that specify which provisions of the Act may be administered by Indian tribes.

House amendment. The House amendment provides similar authority and directives to the Administrator regarding treatment of Indian tribes.

Conference agreement. The Senate recedes to the House.

SECTION 108--MISCELLANEOUS PROVISIONS

Senate bill. In section 103 the Senate bill revises sections 108 (e) and (f) of the Clean Air Act to require the Administrator and the Secretary of Transportation to update air quality/transportation planning guidance and to add to the transportation control measures to be evaluated by the Administrator after consultation, when appropriate, with the Secretary.

House amendment. The House amendment contains a similar provision to the one in the Senate bill regarding amendments to section 108 of the Clean Air Act. In addition, the House amendment contains provisions for a technology clearinghouse to be established by the Administrator, for amending section 111 of the Clean Air Act relating to new and existing stationary sources, for amending section 302 of the Clean Air Act which contains definitions, to provide a savings clause, to state that reports that are to be submitted to Congress are not subject to judicial review, and for other purposes.

Conference agreement. The Senate recedes to the House except that with respect to the requirement regarding judicial review of reports, the House recedes to the Senate and with respect to transportation planning, the House recedes to the Senate with certain modifications.

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RIDDICK'S
SENATE PROCEDURE

A SENATOR, from the committee of conference, submitted the following:

CONFERENCE REPORT

(To accompany H.R. _____)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to an amendment of the Senate to the bill (H.R. _____), _____ (title of bill), having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House of Representatives recede from its amendment to the amendment of the Senate and concur therein.

_____
_____
_____

Managers on the Part of the Senate.

_____
_____
_____
_____
_____

Managers on the Part of the House.

[Form of a conference report when it is proposed that the Senate recede from its amendment to an amendment of the House to a Senate bill.]

A SENATOR, from the committee of conference, submitted the following:

CONFERENCE REPORT

(To accompany S. _____)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to an amendment of the House to the bill (S. _____), _____ (title of bill), having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendment to the amendment of the House of Representatives and concur therein.

_____
_____
_____
Managers on the Part of the Senate.

_____
_____
_____
_____
_____
Managers on the Part of the House.

[Form of conference report on a Senate bill when conferees agree on entirely new text instead of the amendment by the House of Representatives in the nature of a substitute for the bill, or the language of the bill as passed by the Senate.]

A SENATOR, from the committee of conference, submitted the following:

CONFERENCE REPORT

(To accompany S. _____)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. _____), _____ (title of bill), having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

* * * * * * *

That the Senate recede from its disagreement to the amendment of the House to the bill, and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

* * * * * * *

And the House agree to the same.

_____
_____
_____
Managers on the Part of the Senate.

_____
_____
_____
_____
_____
Managers on the Part of the House.

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ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1146

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,

Respondent.

On Petition for Review

FINAL BRIEF FOR RESPONDENT EPA

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

Of Counsel:

Elliott Zenick
Scott Jordan
United States Environmental
Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

March 4, 2015

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Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rules 28(a)(1)(A) and 21(d), Respondent the United States Environmental Protection Agency states as follows:

Parties and Amici:

All parties appearing in this Court are listed by Petitioners, except:

Amici for Petitioners: The American Chemistry Council; the American Coatings Ass'n; the American Fuel and Petrochemical Manufacturers; the American Iron and Steel Institute; the Chamber of Commerce; the Council of Industrial Boiler Owners; the Independent Petroleum Ass'n of America; the Metals Service Center Institute; and the Pacific Legal Foundation.

Amicus for Respondent: The Institute for Policy Integrity at New York University School of Law.

Rulings under Review:

Petitioners purport to challenge a settlement agreement executed in 2010 and finalized by EPA on March 2, 2011, but ask the Court enjoin EPA from finalizing the following proposed rule: *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34, 380 (June 18, 2014).

Related Cases:

This case is related to, and has been designated by the Court for argument on the same day as, the following two consolidated cases:

(1) Murray Energy Corp. v. EPA, No. 14-1112 (D.C. Cir. filed June 18, 2014) (petition for extraordinary writ to "prohibit" ongoing rulemaking); and

(2) Murray Energy Corp. v. EPA, No. 14-1151 (D.C. Cir. filed Aug. 15, 2014) (challenging proposed rule *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,380 (June 18, 2014)).

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GLOSSARY

CO_2	Carbon dioxide
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards

Jurisdiction and Standing

As explained in Arguments I through V below, Petitioners lack standing and the Court lacks jurisdiction over this challenge to a 2010 settlement agreement.

Statement of Issues

1. Whether Petitioners lack Article III standing to seek declaratory and injunctive relief in connection with a settlement agreement that sets rulemaking deadlines but does not limit EPA's discretion over the final rulemaking action;

2. Whether the Court also lacks jurisdiction because the settlement itself is not a final action, because the challenge to the settlement is both moot and untimely, and because the pendency of an ongoing rulemaking that will consider the same legal questions renders the asserted dispute unripe for review; and

3. Whether Petitioners' interpretation of 42 U.S.C. § 7411(d) as barring EPA from addressing harmful carbon dioxide ("CO_2") emissions from existing power plants because EPA previously regulated, under 42 U.S.C. § 7412, different pollutants emitted by these plants is the only permissible interpretation of that text.

Statutes and Regulations

All relevant statutes and regulations are set forth in Respondent's Statutory Addendum.

Statement of the Case

Greenhouse gas pollution threatens Americans' welfare by causing "damaging and long-lasting changes in our climate that can have a range of severe negative effects on human health and the environment." 79 Fed. Reg. 34,830, 34,833 (June 18, 2014) ("Proposed Rule"). Fossil fuel-fired power plants are "by far, the largest emitters" of greenhouse gases – primarily CO_2 – among U.S. stationary sources. Id. Last year, EPA took a historic step towards addressing those emissions, proposing that states submit plans for achieving CO_2 emissions goals under section 111(d) of the Clean Air Act ("Act"), 42 U.S.C. § 7411(d). Id. at 34,832-35.

Petitioners seek to stop this ongoing rulemaking. To avoid the requirement that a rule be final before judicial review occurs, they purport to challenge an obsolete 2010 settlement agreement wherein EPA agreed to propose a rule addressing power plant greenhouse gas emissions by mid-2011, arguing that EPA's regulation of power plants' *hazardous* pollutant emissions in 2012 rendered that prior agreement unlawful.

The premise of Petitioners' suit is wrong; the Proposed Rule is not the result of that settlement agreement, but rather part of an Administration initiative to address the most critical environmental problem of our time. Petitioners are also wrong on the merits; section 7411(d) need not be read to have the illogical result of barring regulation of CO_2 because power plants' emissions of *other* pollutants have been regulated under section 7412. Above all, Petitioners are wrong to think that they can preempt a rulemaking. This Court has never so allowed, and it should not do so now.

Background

I. THE CLEAN AIR ACT

The Act was enacted in 1970 to "[r]espond[] to the growing perception of air pollution as a serious national problem." Ala. Power Co. v. Costle, 636 F.2d 323, 346 (D.C. Cir. 1979). It sets out a comprehensive scheme for air pollution control, "address[ing] three general categories of pollutants emitted from stationary sources": (1) criteria pollutants; (2) hazardous pollutants; and (3) "pollutants that are (or may be) harmful to public health or welfare but are not" hazardous or criteria pollutants "or cannot be controlled under" those programs. 40 Fed. Reg. 53,340 (Nov. 17, 1975).

Pollutants in the first category (criteria pollutants) are regulated under the National Ambient Air Quality Standards (NAAQS) program. See 42 U.S.C. §§ 7408 & 7410. Pollutants in the second category (hazardous pollutants) are regulated under 42 U.S.C. § 7412. Other harmful pollutants not regulated under the NAAQS or hazardous pollutant programs fall into the third category, and are subject to regulation under 42 U.S.C. § 7411. Together, these three programs establish a comprehensive scheme for protecting the nation's air quality and public health and welfare.

The section 7411 program has two main components. First, section 7411(b) requires EPA to promulgate federal "standards of performance" addressing *new* stationary sources that cause or contribute significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Once EPA has set new source standards addressing emissions of a

particular pollutant under section 7411(b), section 7411(d) obligates EPA to promulgate regulations requiring *states* to establish standards of performance for existing stationary sources of the same pollutant. 42 U.S.C. § 7411(d)(1). If a state fails to submit a satisfactory plan, EPA is authorized to prescribe a plan for the state, and also to enforce plans where states fail to do so. Id. § 7411(d)(2).

II. THE 1990 AMENDMENTS

The Act was amended extensively in 1990. Among other things, Congress wanted to address EPA's slow progress in regulating hazardous air pollutants under section 7412. See New Jersey v. EPA, 517 F.3d 574, 578 (D.C. Cir. 2008) (prior to 1990, "EPA listed only eight [hazardous pollutants]" and "addressed only a limited selection of possible pollution sources"). To that end, Congress established a comprehensive list of hazardous air pollutants; set criteria for listing different "source categories" of such pollutants; and required EPA to "establish[] emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation." 42 U.S.C. § 7412(a), (b)(1) & (2), & (d)(1). These changes were intended to "eliminate[] much of EPA's discretion" in regulating hazardous pollutant emissions. 517 F.3d at 578.

In the course of overhauling the regulation of hazardous air pollutants under section 7412, Congress also edited section 7411(d), which cross-referenced a provision of old section 7412 that was to be eliminated. Specifically, the pre-1990 version of section 7411(d) obligated EPA to require standards of performance:

> 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 [7408(a)] or [7412(b)(1)(A)] . . . .

42 U.S.C. § 7411(d)(1) (1988); Pub. L. No. 91-604, 84 Stat. 1676, 1684 (1970).

To address the obsolete cross-reference to section 7412(b)(1)(A), Congress passed two differing amendments – one from the House and one from the Senate – that were never reconciled in conference. The House amendment replaced the cross-reference with the phrase "emitted from a source category which is regulated under section [7412]." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). The Senate amendment replaced the same text with a simple cross-reference to new section 7412. Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). Both amendments were included in the Statutes at Large, which supersedes the U.S. Code if there is a conflict. 1 U.S.C. §§ 112 & 204(a); Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988).

III. THE 2010 SETTLEMENT AGREEMENT

In New York v. EPA, D.C. Cir. No. 06-1322 (ECF No. 1068502), states and environmental groups petitioned for judicial review of a final rule issued under 42 U.S.C. § 7411, contending that the rule should have included standards of performance for greenhouse gas emissions from power plants. Following Massachusetts v. EPA, 549 U.S. 497, 558 (2007) (holding that greenhouse gases are "air pollutants" as defined in the Act), this Court granted EPA's requested remand for

further consideration of the issues related to greenhouse gas emissions in light of that decision. ECF No. 1068502, September 24, 2007 Order (Case No. 06-1322).

After the remand, EPA executed a settlement agreement in December 2010 with the New York v. EPA petitioners ("Settlement Agreement" or "Agreement"). EPA agreed, *inter alia*, to sign "a proposed rule under [Clean Air Act] section 111(d) that includes emissions guidelines" for greenhouse gases for existing electric utility steam generating units ("power plants") by July 26, 2011. Agreement ¶ 2 (JA 3). EPA further agreed that, *if* it separately elected to finalize standards of performance for new and modified sources, and after considering any comments, it would take final action with respect to the proposed rule by May 26, 2012. Id. ¶ 4 (JA 4). The Agreement was modified in June 2011, changing the date by which EPA was to sign a proposed rule addressing greenhouse gas emissions from existing power plants to September 30, 2011. JA 24-26 ("Modification Agreement").

In the Settlement Agreement, EPA preserved all discretion accorded to it by the Act and general principles of administrative law, see Agreement ¶ 11 (JA 6), including the discretion to withdraw the proposed guidelines for existing power plants. The deadlines set forth in the Agreement were not strictly enforceable. The sole remedy provided in the event EPA did not take action by the deadlines was for the other settling parties to file a motion or petition, or initiate a new action, seeking to compel EPA to take action in response to this Court's remand order in New York v. EPA, No. 06-1322 (ECF No. 1068502). Agreement ¶ 7 (JA 4-5).

Prior to finalizing its entry into the Settlement Agreement, EPA published the Agreement in the Federal Register for public comment, as required by 42 U.S.C. § 7413(g). See 75 Fed. Reg. 82,392 (Dec. 30, 2010) (notice soliciting comments). EPA did not receive any comments questioning its authority to conduct a section 7411(d) rulemaking for power plants as a consequence of having listed them as a source category regulated under section 7412 (infra Section IV). Petitioners submitted no comments at all. After considering the comments it did receive, EPA finalized the Agreement on March 2, 2011. See Modification Agreement at 1 (JA 24) (noting date Agreement was finalized); 77 Fed. Reg. 22,392, 22,404 (Apr. 13, 2012) (publicly announcing finalization).

EPA did *not* issue a proposed or final rule under section 7411(d) concerning greenhouse gas emissions from existing power plants by the deadlines in the Settlement Agreement. The other parties to the Agreement did not seek relief.

IV. THE MATS RULE

In 2000, EPA found, under 42 U.S.C. § 7412(n)(1)(A), "that regulation of [hazardous pollutant] emissions from coal- and oil-fired [power plants] under section 112 of the [Act] is appropriate and necessary," and added those power plants to the section 7412(c) list of source categories. 65 Fed. Reg. 79,825, 79,826-30 (Dec. 20, 2000). EPA promulgated a final rule regulating power plants' emissions of mercury and other hazardous pollutants in 2012. 77 Fed. Reg. 9304 (Feb. 16, 2012) ("MATS Rule"). This Court upheld the MATS Rule in White Stallion Energy Center, LLC v.

EPA, 748 F.3d 1222 (D.C. Cir. 2014). The Supreme Court has granted certiorari to address one issue raised by that decision. See Michigan v. EPA, 135 S. Ct. 702 (U.S. Nov. 25, 2014) (No. 14-46).

The MATS Rule regulates only coal and oil-fired plants; thus, it does not cover all of the power plants addressed by the Proposed Rule, which covers natural gas-fired plants as well. Compare 77 Fed. Reg. 9304 with 79 Fed. Reg. at 34,855.

V. THE PROPOSED RULE

Independent of the Settlement Agreement, and over a year after EPA was supposed to have taken any *final* action under that Agreement, the President announced his "Climate Action Plan," wherein he directed EPA to work expeditiously to promulgate CO_2 emission standards for fossil fuel-fired power plants. In accordance with the President's directive, EPA proposed performance standards for new power plants on January 8, 2014.[1] 79 Fed. Reg. 1430. On June 18, 2014, EPA proposed rate-based emissions guidelines for states to follow in developing state plans to address CO_2 emissions from existing power plants under 42 U.S.C. § 7411(d).[2] 79 Fed. Reg. at 34,830-34. Petitioners challenge the latter proposal.

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[1] EPA proposed CO_2 standards for new power plants in 2012, but withdrew the proposal after taking comment. 77 Fed. Reg. 22,392 (Apr. 13, 2012); 79 Fed. Reg. 1352 (Jan. 8, 2014).

[2] EPA also proposed standards for modified and reconstructed sources. 79 Fed. Reg. 34,959 (June 18, 2014).

The Proposed Rule has two main elements: (1) state-specific emission rate-based CO_2 goals, to be achieved collectively by all of a state's regulated coal- and natural gas-fired sources; and (2) guidelines for the development, submission, and implementation of state plans. 79 Fed. Reg. at 34,833. While the proposal lays out individualized CO_2 goals for each state, it does not prescribe how a state should meet its goal. Id. Rather, each state would have the flexibility to design a program that reflects its circumstances and energy and environmental policy objectives. Id.

EPA solicited comments on all aspects of the Proposed Rule. 79 Fed. Reg. at 34,830. The comment period closed on December 1, 2014. See 79 Fed. Reg. 57,492 (Sept. 25, 2014). More than two million comments were submitted, and EPA is currently reviewing those comments. EPA intends to take final action later this year.[3]

Summary of Argument

No matter how urgent Petitioners believe their concerns regarding EPA's legal authority to be, they have chosen both the wrong context and the wrong time in which to raise them. First, their challenge to the Settlement Agreement is not justiciable because the Agreement does not "injure" Petitioners in any way that could give rise to Article III standing. The Agreement sets dates for rulemaking, but does not limit EPA's discretion concerning what final action to take, alter any applicable

[3] EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards Key Dates, at http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-carbon-pollution-standards-key-dates (JA 535-36).

rulemaking procedures, or purport to make any change in a regulatory program. Nor does the Agreement, standing alone, impose obligations on Petitioners or any other entity. This Court has long held that non-settlors lack Article III standing to seek judicial review for the purpose of blocking or setting aside such settlements.

Second, for related reasons, the Settlement Agreement cannot be considered a "final agency action." It does not determine the rights or obligations of, or impose legal consequences on, any non-party to the Agreement. Rather, legal consequences could be imposed only if EPA promulgates a final regulation following notice and comment, which would then be reviewable in this Court.

Third, any challenge concerning the Settlement Agreement has become moot. EPA already has published the "proposed" rule that was due under the Agreement, and the Agreement does not require final *promulgated* standards because EPA retains its discretion to decide what final action to take.

Fourth, the Act requires that petitions for review be brought within sixty days after the relevant Federal Register publication, which in this case occurred on April 23, 2012. Petitioners waited more than two years after that date to file this case, and that time limit is jurisdictional.

Finally, because EPA is currently in the midst of a notice-and-comment rulemaking process in which it will evaluate and respond to comments on the very issue Petitioners would have this Court prematurely decide, this petition is not "fit" for a judicial decision and must be dismissed as unripe.

If this Court reaches the merits, it should conclude that Petitioners' interpretation of section 7411(d) as barring regulation of all pollutants under that section once a source category has been regulated in regard to hazardous pollutants under section 7412 is not the only way to read the convoluted text at issue. That text – which includes both the House's and Senate's 1990 amendments – is ambiguous and can be read multiple ways, allowing for reasonable Agency interpretation. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984). One reasonable interpretation is that EPA may regulate, under section 7411(d), any pollutant that is not a "hazardous" or "criteria" pollutant regulated elsewhere under the Act. Unlike Petitioners' contrary reading, such an interpretation of section 7411(d) would be consistent with the statutory context and legislative history. Thus, the Court cannot conclude at this preliminary stage of the rulemaking process that Petitioners' reading of section 7411(d) is the only permissible reading.

Argument

I. PETITIONERS LACK ARTICLE III STANDING.

A. EPA's Entry Into the Settlement Agreement Caused No Injury.

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013). "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent [referred to as "injury-in-fact"]; fairly traceable to the

challenged action; and redressable by a favorable ruling." Id. at 1147 (internal quotation and citations omitted). "[A]llegations of *possible* future injury are not sufficient." Id. (emphasis in original; internal quotation omitted).

The Settlement Agreement contains no provision that could credibly be deemed to cause "concrete, particularized, and actual or imminent" injury to Petitioners or any other entity. To begin with, although the Agreement set a schedule for EPA to conduct rulemakings pursuant to section 7411, it does not limit EPA's administrative discretion in deciding, at the end of that rulemaking process: (1) whether to promulgate final standards; and (2) if EPA does so promulgate, what the form or content of the final standards should be.

For example, while Paragraphs 1 and 2 of the Settlement Agreement established deadlines for "*proposed* rule[s] [under sections 7411(b) and (d), respectively] that include[] standards of performance for GHGs," Paragraphs 3 and 4 do *not* similarly state that EPA "shall promulgate" such standards by the identified dates. Agreement ¶¶ 1-4 (JA 3-4). Instead, the latter paragraphs provide only that EPA "will sign . . . a final rule [by each respective date] that *takes final action with respect to* the proposed rule[s] described in [Paragraphs 1 and 2, respectively]." Id. ¶¶ 3, 4 (JA 3-4) (emphasis added).[4] Paragraph 11 further states that, "[e]xcept as expressly provided

[4] The Act distinguishes "proposed rules" from "promulgated" regulations in its general rulemaking provision, 42 U.S.C. § 7607(d), which expressly applies to rules issued under section 7411. Compare id. § 7607(d)(3), with id. § 7607(d)(6)(A)(ii), (B). Judicial review, in turn, is authorized (in relevant part) for action "*promulgating* . . . any

herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the [Act] or by general principles of administrative law." Agreement ¶ 11 (JA 6). Thus, the Agreement sets rulemaking deadlines but does not limit EPA's discretion, after considering the comments on a proposed rule, to make a final decision *not* to promulgate it.

Additionally, EPA's obligation under Paragraph 4 to "take final action" under section 7411(d) is conditional – it only arises "*if* EPA finalizes standards of performance for GHGs [for new and modified sources] pursuant to Paragraph 3." Agreement ¶ 4 (JA 4) (emphasis added). Thus, not only does EPA retain its discretion regarding what final action to take, it need not take final action under section 7411(d) *at all* unless it promulgates standards under section 7411(b).

The Agreement, moreover, contains no provision that purports to alter notice and comment requirements or any other procedures applicable to EPA rulemaking under the Act or other authority. Nor does it prescribe any other change in any regulatory program. Rather, it does nothing more than set deadlines for the rulemakings referred to in Paragraphs 1 through 4, with EPA retaining its administrative discretion regarding the substance of final action as shown above.

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standard of performance or requirement under [42 U.S.C. § 7411]." Id. § 7607(b)(1) (emphasis added).

Under both longstanding and recent decisions of this Court, non-settling parties lack standing to seek judicial review of settlements that set schedules for federal agency rulemaking without limiting the agency's administrative discretion concerning the substance of final action. Just two years ago, the Court considered this question in Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013), where non-settlors asserted standing to oppose a consent decree establishing a schedule for rulemaking "pertaining to revisions to . . . Effluent Guidelines under the Clean Water Act." Id. at 1321. Using language essentially identical to that employed by the Settlement Agreement here, the consent decree in Perciasepe established a deadline for "a notice of proposed rulemaking pertaining to [such] revisions," followed by a second deadline for "a decision *taking final action* following notice and comment rulemaking pertaining to [such] revisions." Id. (emphasis added). The consent decree also mirrored this Agreement by expressly providing that it did not "limit or modify the discretion accorded EPA by the Clean Water Act or by general principles of administrative law." Id. at 1322. This Court concluded that the non-settlors lacked standing. Id. at 1323-26. In particular, the Court observed that the consent decree "merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule – the content of which is not in any way dictated by the consent decree – using a specific timeline." Id. at 1324. The Court explained that such an agreement cannot "injure" any third party, because "Article III standing requires more than the *possibility* of potentially adverse regulation." Id. at 1324-25

(emphasis added) (citing Nat'l Ass'n of Home Builders ("NAHB") v. EPA, 667 F.3d 6, 13 (D.C. Cir. 2011)) (other citations omitted).

Perciasepe is consistent with earlier cases likewise holding that third parties lacked standing to bring suits attempting to prevent federal agencies from agreeing to negotiated rulemaking schedules. See Alternative Research & Dev. Found. v. Veneman, 262 F.3d 406, 411 (D.C. Cir. 2001) (non-settling party's rights not impaired by stipulation of dismissal requiring U.S. Department of Agriculture to conduct rulemaking, because it "will not be precluded from participating in the rulemaking and, if USDA decides to issue a final rule, [it] is not precluded from challenging that rule"); In re Endangered Species Act Section 4 Deadline Litig. – MDL No. 2165, 704 F.3d 972, 976-79 (D.C. Cir. 2013) (no standing to oppose consent decree); Envt'l Defense v. EPA, 329 F. Supp. 2d 55, 67-69 (D.D.C. 2004) (same); cf. Ctr. for Biological Diversity v. EPA, 274 F.R.D. 305, 309-12 (D.D.C. 2011) (aircraft engine manufacturers lacked standing to intervene in lawsuit to compel agency action relating to regulation of greenhouse gas air emissions). Indeed, "[i]t has never been supposed that one party . . . could preclude other parties from settling their own disputes and thereby withdrawing from litigation." Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 528-29 (1986).

This Court has found it appropriate, however, to reach the merits of such a claim in the highly unusual circumstance – not present here – of a proposed settlement that expressly purported to limit EPA's discretion to decide *not* to regulate.

See Natural Res. Def. Council ("NRDC") v. Costle, 561 F.2d 904, 908-10 (D.C. Cir. 1977). In Perciasepe, the Court found Costle distinguishable because the settlement agreement in Costle, unlike the consent decree in Perciasepe, "permitted EPA to decline to issue any new rule . . . only if it met certain requirements set forth in the agreement and 'promptly submit[ted] a statement under oath to the parties explaining and justifying the exclusion,'" which was then subject to district court enforcement proceedings if NRDC disagreed with EPA's explanation. Perciasepe, 714 F.3d at 1325 (quoting Costle, 561 F.2d at 909); see also 714 F.3d at 1326 (stipulated dismissal in Alternative Research did not resemble Costle settlement because the stipulated dismissal "d[id] not bind the agency in its rulemaking"). Because of these distinctions, the Court in Perciasepe concluded that Costle "does not dictate the outcome here." Id. at 1325. The Court further observed that Costle did not address standing "and therefore has no precedential effect on th[at] jurisdictional question." Id.

As shown above, the Settlement Agreement here mirrors the provisions of the consent decree in Perciasepe and the stipulated dismissal in Alternative Research by referring only to deadlines to "take final action" at the conclusion of the rulemaking schedules, thus preserving EPA's administrative discretion. Agreement ¶¶ 3-4 (JA 3-4). Such language "does not *require* EPA to promulgate" standards under section 7411, but instead merely requires EPA to meet a rulemaking schedule "and then *decide* whether to promulgate a new rule." Perciasepe, 714 F.3d at 1324 (emphasis added). Moreover, the Agreement does not even require a "final action" under section

7411(d) unless EPA, in its discretion, "finalizes standards" under section 7411(b). Agreement ¶ 4 (JA 4). That the Agreement "prescribes a date by which regulation *could* occur does not establish Article III standing." Perciasepe, 714 F.3d at 1325 (emphasis added); accord Alternative Research, 262 F.3d at 411. Finally, because the Settlement Agreement contains no provision purporting to limit notice and comment requirements or otherwise alter any statutory procedures governing rulemaking, Petitioners "[are] not . . . precluded from participating in the rulemaking and, if [EPA] decides to issue a final rule, . . . [are] not precluded from challenging that rule." Alternative Research, 262 F.3d at 411; Envt'l Defense, 329 F. Supp. 2d at 68 (same).[5]

Petitioners cite cases from other circuits where courts considered the merits of objections to a settlement or affirmed an order preliminarily enjoining implementation of a settlement. E.g., Pet.Br. 25, 27 n.4. But each of those settlements included provisions that immediately altered existing regulatory programs, unlike here.[6] Petitioners identify *no* authority recognizing a non-settlor's standing to attempt to block a settlement that merely establishes a rulemaking schedule.

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[5] In contrast, granting the declaratory and injunctive relief Petitioners seek *would* impair the procedural rights of other stakeholders by preventing EPA from considering their comments and making a final decision that takes their comments into account.

[6] See Conserv. Nw. v. Sherman, 715 F.3d 1181, 1185-88 (9th Cir. 2013) (consent decree altered the "Survey and Manage Standard" of the Northwest Forest Plan without prior notice and comment); Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 245-46 (3d Cir. 2011) (settlement imposed immediately effective moratorium on oil and gas drilling in the Allegheny National Forest until completion of forest-wide environmental impact statement).

B. Petitioners' Claims Of Injury From Publication Of The Proposed Rule Are Insufficient.

Petitioners do not identify any "injury" that allegedly resulted directly from EPA's entry into the Settlement Agreement. Rather, Petitioners assert that they were injured by EPA's publication of the Proposed Rule because they "expended substantial state resources as a direct result of the proposal, including thousands of hours of employee time." Pet.Br. 26. Petitioners then assert that the Settlement Agreement was at least a "substantial factor" that "motivated" EPA to issue the proposal and that this alleged injury therefore is traceable to the Agreement. Pet.Br. 26-27. Petitioners also claim a second injury resulting from the "obligation to submit a State Plan after the [Proposed Rule] is final." Pet.Br. 28.[7] Neither of these claims establishes Article III standing.

Addressing Petitioners' second asserted injury first, the "obligation" to submit a State Plan after final standards are promulgated is only hypothetical. As even Petitioners acknowledge, it could only arise "*after* the Section 111(d) rule is final," Pet.Br. 28 (emphasis added) – in other words, it will only become an "obligation" if and when EPA *promulgates* a final rule. Speculation about possible future government action cannot meet the requirement of "concrete, particularized, and actual or imminent" injury. See Clapper, 133 S. Ct. at 1147-50; NAHB, 667 F.3d at 13. Moreover, despite Petitioners' belief that promulgation of the Proposed Rule is

[7] Petitioners do not allege any "procedural injury." See Perciasepe, 714 F.3d at 1323.

inevitable, recent experience demonstrates that EPA does not always finalize its rulemaking proposals. See, e.g., 79 Fed. Reg. 1352 and 79 Fed. Reg. 1430 (Jan. 8, 2014) (withdrawing proposed rule addressing CO_2 emissions from new power plants and publishing a new proposal based on a different legal theory).

Petitioners' other asserted injury – the staff time and resources expended in advance preparation for meeting possible future state planning requirements – cannot be considered "traceable" to any EPA action because neither the Settlement Agreement nor the Proposed Rule *requires* any state to conduct such efforts. Rather, only a final rule promulgating the proposal could require such action by states.[8] To the extent Petitioners have voluntarily undertaken such efforts, their asserted injury is "self-inflicted" and, as such, "not fairly traceable to the challenged government conduct." Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 177 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 2880 (2013) (where final rule permitted but did not "force" or "require" manufacturers to use new alternative fuel, majority held that petroleum refiners and importers did not have Article III standing based on the alleged costs and liabilities associated with that fuel); cf. NAHB, 667 F.3d at 12 (organizational staff

[8] The Administrator's statements *encouraging* advance planning (Pet.Br. 20) are not the same as a promulgated regulation imposing a binding deadline for submitting state plans, and no provision of the Agreement imposes such a deadline. See Perciasepe, 714 F.3d at 1325 n.7 (claimant "has the burden to establish that the consent decree – not EPA's throat-clearing – will cause the injury of which it complains").

time and money expended in response to Clean Water Act jurisdictional determination did not constitute injury-in-fact).[9]

This Court has acknowledged that *promulgated* air rules may cause an Article III "injury" by increasing a state's burden of developing an approvable plan or otherwise meeting implementation requirements; but, consistent with separation-of-powers principles, the Court has never suggested that a "proposed" rule could do so. E.g., West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004) (states had standing to seek review of EPA's promulgated "NO_X SIP Call" rule, which "direct[ed] each state to revise its SIP in accordance with EPA's NO_X emissions budget"); Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1226-28 (D.C. Cir. 2007) (recognizing standing to challenge promulgated rule); Oklahoma Dep't of Envtl. Quality ("ODEQ") v. EPA, 740 F.3d 185, 189-90 (D.C. Cir. 2014) (same)[10]; compare with Alternative Research, 262 F.3d at 411 ("the initiation of a rulemaking" pursuant to settlement did not cause injury); Las Brisas Energy Ctr., LLC v. EPA, No. 12-1248 &

[9] Petitioners explain at length their concern that the Proposed Rule, if promulgated, would require planning efforts that a number of states believe cannot be achieved within the deadlines EPA has proposed. Pet.Br. 16-22. EPA sought rulemaking comments regarding, *inter alia*, the adequacy of the proposed planning deadlines, and many of the comments expressed that same concern. Thus, in addition to deciding as a threshold matter whether to promulgate the Proposed Rule, EPA will have to decide whether to make any changes to the planning deadlines in light of these comments.

[10] Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301 (D.C. Cir. 2001) (Pet.Br. 27, 29), also involved a genuinely final agency action taken after notice and comment, not a proposal. 271 F.3d at 306-07.

consolidated cases (Order dated Dec. 13, 2012) (dismissing challenges to April 2012 proposed section 7411(b) rule on jurisdictional grounds) (Attach. A).

In Massachusetts, the Supreme Court likewise recognized a state's standing to challenge EPA's *final* action denying a rulemaking petition. See 549 U.S. at 526. The Court acknowledged a "special solicitude" in its standing analysis for a challenge brought by a state; it reasoned that Congress had "ordered EPA to protect [states] by prescribing standards applicable to the emission of any air pollutant . . . which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," and, importantly, that Congress also "recognized a concomitant procedural right to challenge the rejection of [the state's] rulemaking petition as arbitrary and capricious." Id. at 519-20 (citing 42 U.S.C. §§ 7521(a)(1), 7607(b)(1)) (internal quotation omitted). The petition here, in contrast to Massachusetts, was filed in the midst of an *ongoing* rulemaking process, and essentially asks the judiciary to assume the administrative function Congress delegated to EPA by deciding issues that are the ongoing subject of public comments when EPA has yet to respond to those comments and has neither denied a rulemaking petition, nor promulgated a regulation. Unlike in Massachusetts, the Act supports no "procedural right" to a judicial order thwarting this statutory process. Such a claim, whether brought by states, regulated entities or other stakeholders, is not justiciable.

C. Petitioners Fail to Show Redressability.

Petitioners also fail to explain how their alleged injuries would be redressed

if the Court "h[e]ld 'unlawful' and 'set aside' the settlement agreement's Section [74]11(d) provisions." Pet.Br. 59 (quoting 5 U.S.C. § 706(2)(A)). The Agreement contains no provisions that purport to "determine" whether power plants should be subject to promulgated standards of performance for CO_2 emissions, and EPA's schedule for completing the rulemaking process was not derived from the Agreement. Indeed, the Proposed Rule was issued as part of the "Climate Action Plan," a major initiative by the current administration to address climate change. See 79 Fed. Reg. at 34,833/3 (identifying Climate Action Plan as impetus for Proposed Rule). EPA would have taken the step of proposing a section 7411(d) rule for power plants pursuant to the Act and the Climate Action Plan whether or not this Agreement existed, or were vacated.

II. THE SETTLEMENT AGREEMENT IS NOT A "FINAL ACTION."

Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), governs judicial review of EPA's nationally applicable air regulations and is an exclusive remedy. See id. § 7607(e); ODEQ, 740 F.3d at 191. It lists specific, nationally applicable actions that are subject to judicial review – including action "*promulgating* . . . any standard of performance or requirement under [42 U.S.C. § 7411]" – along with "any other nationally applicable regulations *promulgated*, or *final action* taken, by the Administrator under this chapter." 42 U.S.C. § 7607(b)(1) (emphasis added).

"[T]he phrase 'final action' . . . bears the same meaning in [section 7607(b)(1)] that it does under the Administrative Procedure Act" and, accordingly, is subject to

the familiar standard articulated in Bennett v. Spear, 520 U.S. 154 (1997), to determine whether EPA actions taken under the Act are "final." Whitman v. American Truck Ass'ns, 531 U.S. 457, 478 (2001); see, e.g., Nat'l Envtl. Dev. Ass'n's Clean Air Project ("NEDA-CAP") v. EPA, 686 F.3d 803, 808-09 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 983 (2013). "As a general matter, two conditions must be satisfied for action to be considered 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process . . . it must not be of a merely tentative or interlocutive nature." Bennett, 520 U.S. at 177-78 (internal citation omitted). "And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Id. (internal citation omitted); see also Devon Energy Corp. v. Kempthorne, 551 F.3d 1030, 1040-41 (D.C. Cir. 2008) (action must impose "legal," not just "practical" consequences, and the change in legal rights must be "certain") (internal quotations and citations omitted).

The Settlement Agreement does not meet either of Bennett's criteria because, as shown above, it does not resolve what the final outcome of the rulemaking process will be and does not "determine" any "rights or obligations" of or impose any "legal consequences" on Petitioners or any other non-settling entity.[11] In short, the Agreement has no legally binding effect on any non-settlor that could render it a

[11] Petitioners here do not argue that the Proposed Rule is a separate "final action." See Pet.Br. 52-54.

"final action." See Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1034 (D.C. Cir. 2007) (consent agreement was not a "rule" subject to judicial review, as it did not "bind" EPA to a "substantive interpretation of the statute"); see also NEDA-CAP, 686 F.3d at 809 (preamble statements describing anticipated future implementation plans for revised NAAQS did not "impose[] definite requirements upon states or regulated industries" and thus were not final action).

That the Settlement Agreement went through notice and comment under 42 U.S.C. § 7413(g) does not, by itself, establish finality. Pet.Br. 52-53 (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162 (1967)).[12] In NEDA-CAP, for example, this Court held that a preamble statement concerning future implementation of a NAAQS was not reviewable although EPA had published the statement in the Federal Register following notice and comment. 686 F.3d at 808-09. Here, even if the Agreement represented the "consummation of EPA's decisionmaking" concerning whether and how to settle the threatened litigation regarding the timing of its response to the remand in New York v. EPA, Pet.Br. 53, that is not the *relevant* decisionmaking process in this case,[13] because Petitioners' claim is focused exclusively

[12] Toilet Goods did not address whether a settlement agreement is judicially reviewable after going through notice and comment. Rather, the Court found that when a *regulation* is published following notice and comment, it represents the culmination of the rulemaking process – a point no one here contests. Id. at 162.

[13] If Petitioners' view were correct, then *every* rulemaking settlement could constitute "final agency action," potentially subjecting the federal courts to a flood of collateral litigation challenging such settlements and leaving the United States with no effective

on the scope of EPA's regulatory authority, not on the timeframe in which the rulemaking will be conducted. EPA has *not* concluded its process for deciding questions concerning its regulatory authority, as its solicitation of public comments on that very issue clearly demonstrates.

Petitioners' other cases are readily distinguishable. Pet.Br. 52-53. Makins v. District of Columbia, 277 F.3d 544 (D.C. Cir. 2002), was a suit brought to *enforce* a settlement agreement against a *settling* party. Id. at 545-47. The remaining cases involved settlements that imposed *immediate* legal consequences (not just hypothetical future legal consequences) on non-settlors. See United States v. Carpenter, 526 F.3d 1237, 1238-42 (9th Cir. 2008) (settlement authorized road repairs near federal wilderness area, thus allegedly impairing nearby residents' interest in preserving that area); Exec. Business Media, Inc. v. U.S. Dept. of Def., 3 F.3d 759, 761-64 (4th Cir. 1993) (business competitor challenged settlement that authorized contract award without going through competitive bidding).

III. PETITIONERS' CHALLENGE TO THE AGREEMENT IS MOOT.

For several reasons, this petition should be considered moot. See generally Daimler Trucks North Am. LLC v. EPA, 745 F.3d 1212, 1216 (D.C. Cir. 2013) (A case is moot "if events have so transpired that the decision will neither presently

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means of settling suits alleging that it has failed to respond to a judicial remand or meet a statutory deadline for final regulatory action. Such an outcome is untenable and would be contrary to Firefighters. See 478 U.S. at 428-29.

affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.") (internal quotation and citation omitted); Util. Air Reg. Group ("UARG") v. EPA, 744 F.3d 741, 749-50 (D.C. Cir. 2014). First, the deadlines in the Settlement Agreement have long since passed. The Agreement called for EPA to take final action with respect to its proposal under section 7411(d) – only if it elected to promulgate standards for power plants under section 7411(b) – by May 2012. Agreement ¶ 4 (JA 4); Modification Agreement ¶ 2 (JA 26). EPA took no such action by that deadline, and the settling parties have not pursued the limited remedy that the Agreement authorizes in the event of breach, which is to "file an appropriate motion or petition . . . seeking to compel EPA to take action responding to the Remand Order" in New York v. EPA, No. 06-1322. Agreement ¶ 7 (JA 4-5).[14]

Second, EPA has *already* published the section 7411(d) proposal, which is the only step EPA was *required* to take under the Settlement Agreement, since (1) the obligation to take final action under section 7411(d) was conditional on whether EPA promulgated section 7411(b) standards; and (2) EPA retained its discretion to make a

[14] The Agreement contains no specific performance remedy, and it is not enforceable in Court. Id. ¶ 7. Petitioners' contrary arguments concerning the Agreement's "enforceability" (Pet.Br. 27 & n.4, 57-58) fail to address its language limiting the remedy for breach and rely on cases that did not involve similar contractual language. See, e.g., Am. Sec. Vanlines, Inc. v. Gallagher, 782 F.2d 1056, 1059 (D.C. Cir. 1986); Vill. of Kaktovik v. Watt, 689 F.2d 222, 228-30 (D.C. Cir. 1982); Minard Run, 670 F.3d at 247 n.4; see also Marks v. United States, 24 Cl. Ct. 310, 319 (Cl. Ct. 1991) ("[P]arties to a contract are free to limit remedies in accordance with their desire . . . at the time the contract is executed . . . .").

final decision *not* to promulgate section 7411(d) standards. Granting judicial relief now would not "un-do" EPA's publication of the proposal.

IV. THIS PETITION IS UNTIMELY.

A petition under 42 U.S.C. § 7607(b)(1) "shall be filed within sixty days from the date notice of [a final] promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day," then it "shall be filed within sixty days after such grounds arise." Id.; see Utah v. EPA, 750 F.3d 1182, 1184 (10th Cir. 2014) ("grounds" means "a sufficient legal basis for granting the relief sought") (internal quotation and citation omitted). These time limits are jurisdictional. E.g., Med. Waste Inst. & Energy Recovery Council v. EPA, 645 F.3d 420, 427 (D.C. Cir. 2011); ODEQ, 740 F.3d at 191.[15]

Assuming that EPA's entry into the Settlement Agreement on March 2, 2011, did not immediately trigger the sixty-day filing period, as EPA did not publish a Federal Register notice at that time, that period began to run no later than April 3, 2012, when EPA published a Federal Register notice stating that it had "finalized" the Agreement. 77 Fed. Reg. at 22,404. On that date, the claims and arguments that Petitioners seek to assert in this case were available to them, because by then EPA: (1) had promulgated a final rule regulating power plants under section 7412,[16] which

[15] But see Clean Water Action Council of Ne. Wis., Inc. v. EPA, 765 F.3d 749, 751 (7th Cir. 2014).

[16] 77 Fed. Reg. 9304.

according to Petitioners "prohibits EPA from requiring States to regulate [the same source category] under Section [74]11(d)," Pet.Br. 30; and (2) had *subsequently* announced in the Federal Register its finalization of the settlement setting deadlines for a section 7411(d) rulemaking for power plants. Thus, the legal dispute Petitioners wish to raise now already had crystallized, at the latest, by April 3, 2012, making the "arising after" exception inapplicable to this petition.

V. THE PENDENCY OF AN ONGOING RULEMAKING PROCESS RENDERS THIS PETITION UNRIPE FOR JUDICIAL REVIEW.

Petitioners claim that this case became "fit for judicial decision" in June 2014 when EPA published the Proposed Rule and accompanying Legal Memorandum. Pet.Br. 55. EPA published those documents, however, for the specific purpose of obtaining public comments to help inform a rulemaking decision it has *not yet made*.

In assessing the ripeness of a case, this Court "focus[es] on two aspects: the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" Am. Petroleum Inst. ("API") v. EPA, 683 F.3d 382, 387 (D.C. Cir. 2012) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). "The fitness requirement is primarily meant to protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting." API, 683 F.3d at 387 (internal quotation omitted).

To uphold these interests, the Court determines fitness by evaluating not just

whether an issue is "purely legal," but also "whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." Id. (internal quotation omitted). "[E]ven purely legal issues may be unfit for review," and "a claim is not ripe . . . if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Atlantic States Legal Found. v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003) (internal quotation omitted). "Courts decline to review tentative agency positions because," among other consequences, "the integrity of the administrative process is threatened by piecemeal review of the substantive underpinnings of a rule, and judicial economy is disserved because judicial review might prove unnecessary if persons seeking such review are able to convince the agency to alter a tentative position." API, 683 F.3d at 387 (quotation omitted).

Reviewing the merits of this case, at this time, would lead the Court into the very pitfalls against which it warned in API. The legal analyses EPA set forth in the Legal Memorandum accompanying its Proposed Rule preamble are quite obviously "tentative," notwithstanding Petitioners' characterization of that document. Pet.Br. 55-56. The preamble made clear that EPA "solicits comment on all aspects of its legal interpretations, *including the discussion in the Legal Memorandum*." 79 Fed. Reg. at 34,853/2 (emphasis added). EPA also sought "public comment on all aspects of this proposal" including technical as well as legal issues. Id. at 34,835/2. The legal positions presented to this Court in Petitioners' brief have also been presented to EPA in the rulemaking; and many other stakeholders – often expressing *different*, and

in some cases diametrically opposed legal interpretations – have presented their comments as well. EPA had not yet had the opportunity, however, to complete its evaluation of these comments and determine what final action to take.

Importantly, the Act *requires* EPA to evaluate and respond to any significant written or oral comments on the proposal when taking final action. 42 U.S.C. § 7607(d)(6)(A)(ii). Indeed, if EPA attempted to treat the Legal Memorandum as a document that conclusively decided the legal issues of concern to Petitioners for purposes of this rulemaking, it would be subject to reversal for failure to respond to comments. See Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 950 (D.C. Cir. 2004). Thus, to say that EPA's legal interpretations are currently "tentative" is not an exercise in self-serving labelling; it is an accurate description of a rulemaking process that the Act *mandates* EPA follow before it decides whether to promulgate standards.

Furthermore, even if Petitioners' showing of "hardship" were sufficient to meet the second element of the ripeness test,[17] it could not overcome the demonstrable unfitness of the case for review at this time. "Although both the fitness and hardship prongs encompass a number of considerations, a dispute is not ripe if it is not fit . . . and . . . it is not fit if it does not involve final agency action." Holistic

[17] As discussed above, Petitioners have not demonstrated an "injury-in-fact" sufficient to establish Article III standing. Supra Argument I.A, B.

Candlers and Consumers Ass'n v. Food & Drug Admin., 664 F.3d 940, 943 n.4 (D.C. Cir. 2012) (internal citations omitted).

Because fitness is so plainly lacking when a claimant seeks judicial review of a legal dispute that may be mooted by the outcome of a pending notice and comment rulemaking process, this Court historically has found such claims unripe. See, e.g., API, 683 F.3d at 386; Atlantic States, 325 F.3d at 284; UARG v. EPA, 320 F.3d 272, 278-79 (D.C. Cir. 2003); Action on Smoking & Health v. Dep't of Labor, 28 F.3d 162, 165 (D.C. Cir. 1994). More recently, when confronted with petitions seeking review of the April 2012 proposed section 7411(b) rule, the Court summarily dismissed the petitions because the "proposed rule [was] not final agency action subject to judicial review." Las Brisas (Order dated Dec. 13, 2012) (Attach. A). EPA then withdrew the proposal, which only confirms that further judicial review at that time would have been a wasteful use of the Court's resources. See 79 Fed. Reg. at 1352.

Petitioners ask the Court to ignore the lessons of Las Brisas and exacerbate the premature intrusion of judicial review into the administrative rulemaking process by hearing this case now, when it would be more prudent to wait until EPA makes a final rulemaking decision. The Court should decline their request, and dismiss the petition.

VI. PETITIONERS' CHALLENGE FAILS ON THE MERITS.

Petitioners argue that, in 1990, Congress impaled EPA on the horns of a dilemma: EPA can regulate a source category's "hazardous" pollutant emissions under section 7412 of the Act, *or* it can regulate other dangerous emissions from the source category under section 7411(d), but not both. If correct, EPA would have to pick one set of health and environmental issues to address, while ignoring another.

Petitioners believe this pick-your-poison approach to regulation is mandated by a "literal reading" of section 7411(d) as set forth in the U.S. Code. Pet.Br. 23. But that convoluted text can be read "literally" multiple ways, leading to opposite conclusions regarding the scope of EPA's authority, and is replete with ambiguous terms. The textual ambiguity is compounded by the fact that two amendments to the relevant text were enacted into law in 1990, at least one of which would unquestionably allow EPA to regulate CO_2 emissions from existing power plants.

To prevail here, Petitioners must show that *no* reading of section 7411(d) other than the one they advance could possibly be reasonable. See Chevron, 467 U.S. at 837. They cannot. Given the many ambiguities in the text, along with supporting legislative history and statutory context, EPA could reasonably conclude that it has the authority to address power plant emissions of CO_2 under section 7411(d) so long as it has not regulated power plants' emissions of CO_2 under section 7412. Thus, if it reaches the merits, the Court's inquiry should end with the conclusion that Petitioners have not cornered the market on the meaning of section 7411(d).

A. The Text of § 7411(d) Does not Mandate Petitioners' Reading.

Section 7411(d) is a grammatical mess. Overburdened with dependent clauses and lacking in punctuation, the relevant *sentence* from the U.S. Code reads as follows:

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance 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 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source . . .

42 U.S.C. § 7411(d)(1).

Petitioners argue that this text (reflecting the House Amendment alone) is only capable of a single interpretation and *must* be read as barring regulation of any source category previously regulated under 42 U.S.C. § 7412, even if in regard to *different* pollutants. Because EPA regulated emissions of certain hazardous pollutants from certain coal- and oil-fired power plants in its 2012 MATS Rule,[18] the argument continues, EPA cannot now promulgate a section 7411(d) rule addressing power plant emissions of CO_2 – or any other nonhazardous pollutant from any fossil-fuel fired power plants (including natural gas-fired plants not regulated under MATS). This reading of section 7411(d) would largely eviscerate EPA's authority under that

[18] Most of the State Petitioners are also challenging the legality of MATS, and that case is pending in the Supreme Court. Michigan v. EPA, S. Ct. No. 14-46 (cert. granted Nov. 25, 2014).

provision, as 146 source categories have been regulated in regard to their hazardous emissions under section 7412.

Even if Petitioner's convoluted take on section 7411(d) is *a* possible interpretation of that text, it is hardly the *only* possible interpretation.[19] Rather, the text of 42 U.S.C. § 7411(d) lends itself to multiple "literal" readings and is rife with ambiguous terms. The existence of two different amendments to section 7411(d) in the Statutes at Large further complicates the task of interpreting that provision. Thus,

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[19] Petitioners and amici claim that the Supreme Court has read the text as they do. Pet.Br. 23; Br. of Amici Trade Ass'ns et al. ("Trade Amici") at 8, 13. It has not. In a footnote in Am. Elec. Power Co. ("AEP") v. Connecticut, the Court stated: "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program," essentially paraphrasing section 7411(d) as set forth in the U.S. Code. 131 S. Ct. 2527, 2537 n.7 (2011). But Petitioners' argument here was not raised or briefed in AEP. The actual holding in AEP – issued *after* EPA had already proposed the MATS Rule – was that section 7411 "speaks directly to emissions of [CO_2] from the defendants' plants," and therefore preempts state law nuisance claims. Id. at 2537. That holding undercuts Petitioners' position. Indeed, at oral argument in AEP – a month *after* the MATS proposal – counsel for industry petitioners (now counsel for Trade Amici) assured the Court that EPA could regulate greenhouse gas emissions under section 7411(d). Transcript, 2011 WL 1480855, at *16-17 ("We believe that the EPA can consider, as it's undertaking to do, regulating existing . . . sources under section 111 of the Clean Air Act, and that's the process that's engaged in now. . . . Obviously, at the close of that process there could be APA challenges on a variety of grounds, but we do believe that they have the authority to consider standards under section 111."). Likewise, industry petitioners averred in their brief that "EPA may . . . require States to submit plans to control" greenhouse gases under 42 U.S.C. § 7411(d). Brief for Pet's, No. 10-174, 2011 WL 334707, at *6-7. All of this demonstrates that Petitioners' reliance on the AEP footnote is misplaced.

42 U.S.C. § 7411(d) can be interpreted a number of ways, and Petitioner's way is the *least* consistent with legislative history and statutory context.

1. There are multiple "literal" readings of 42 U.S.C. § 7411(d).

In addition to Petitioners' proposed reading of section 7411(d), which emphasizes certain portions of the text in order to reach a certain conclusion, there are at least two other "literal"[20] readings of that text that would compel an opposite conclusion. The existence of multiple contradictory ways to read the same text shows that the text is neither plain nor unambiguous.

First, because Congress used the conjunction "or" rather than "and," the string of qualifying clauses set forth in subsection (d)(1)(A)(i) could be read as alternatives, rather than requirements to be imposed simultaneously. Numbering these clauses and highlighting the conjunctive term "or," the provision reads:

> The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source for any air pollutant **[1]** for which air quality criteria have not been issued **or [2]** which is not included on a list published under section 7408(a) of this title **or [3]** emitted from a source category which is regulated under section 7412 of this title . . . .

[20] Petitioners conflate "literal" with "unambiguous." But "literal" means "involving the ordinary or usual meaning of a word," or "giving the meaning of each individual word," while "unambiguous" means "clearly expressed or understood." Merriam-Webster Dictionary, available at http://www.merriam-webster.com/. A text can be read so as to give ordinary meaning to each word, but that does not mean it is clear.

42 U.S.C. § 7411(d)(1). Giving the term "or" its ordinary meaning,[21] section 7411(d) literally provides that the Administrator may require states to establish standards for an air pollutant so long as *either* air quality criteria have not been established for that pollutant, *or* one of the other remaining criteria is met. See Reiter v. Sonotone Corp., 442 U.S. 330, 338 (1979) (rejecting a "construction [that] would have us ignore the disjunctive 'or'"). No air quality criteria have been issued for CO_2, and CO_2 is not listed under Section 7408(a). Thus, under this "literal" reading, section 7411(d)(1) poses no bar to regulation of CO_2 emissions.[22]

Petitioners argue that "'when an exclusion clause contains multiple disjunctive subsections, the exclusion applies if any one of the multiple conditions is met." Pet.Br. 37-38 (internal quotation omitted). As discussed below, it is debatable whether the relevant text should be considered an "exclusion clause." And unlike Petitioners' example of a landlord seeking a tenant "who is not a smoker or a pet

[21] Merriam Webster defines "or" as "a function word [used] to indicate an alternative <coffee *or* tea> <sink *or* swim>". At http://www.merriam-webster.com/dictionary/or.

[22] Trade Amici criticize this as a "new position" concocted by "litigation counsel," and argue that EPA must be tied to the "reasoning supplied by the [agency] itself in its rulemaking." Trade Amici at 12-13. But the rulemaking is ongoing; there is no final "agency reasoning" until EPA issues a final rule supplying such. Trade Amici are simply wrong to suggest that EPA may not revisit its interpretation of section 7411(d) in the context of an *ongoing* rulemaking.

owner or married" (id. at 38),[23] the text at issue is not one clause with three direct objects, but rather a string of three clauses, each with its own internal grammatical structure. The disjunctive "or" plays a different role in that context.

Next, although Petitioners want to read 42 U.S.C. 7411(d) "literally," they ignore that the third clause differs from the first two in that it does not contain a negative. Rather, Petitioners presume that the negative from the second clause was intended to carry over, and would implicitly rewrite the statute as follows:

> [EPA must require states to submit plans establishing standards for] 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 7408(a) of this title or [*which is not*] emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source . . . . . .

42 U.S.C. § 7411(d)(1) (emphasis added). Without the addition of the bracketed language, the text can be read to say that, once EPA has regulated a source category under section 7411(b), it must require states to establish standards for that source category under section 7411(d) if that source category *is* regulated under section 7412 – the exact opposite of what Petitioners argue. See 42 U.S.C. § 7411(d)(1) (EPA must

[23] In fact, Petitioners' example would be more correctly written as: The landlord advertised for a tenant who is not a smoker, a pet owner, or married. See Strunk & White, The Elements of Style, p.3 (The Penguin Press, 2003).

require state standards for "any air pollutant . . . emitted from a source category which is regulated under section 7412").[24]

All of these "literal" readings (including Petitioners') must be considered in light of the structure, history, and purpose of the Act, as well as common sense, and EPA may conclude that none of them are reasonable in light thereof. The point here is simply that there is more than one way to read the convoluted – and ambiguous – text of section 7411(d), and EPA must have the opportunity to consider all of them.

2. 42 U.S.C. § 7411(d) is replete with ambiguous terminology.

In addition to being subject to multiple literal readings, section 7411(d) contains ambiguous terminology, which EPA must have the opportunity to interpret.

For example, the clause "emitted from a source category which is regulated under section 7412" modifies the phrase "any air pollutant." 42 U.S.C. § 7411(d). As the Supreme Court recently noted, the phrase "any air pollutant" is routinely given a "context-appropriate meaning." Util. Air Regulatory Group v. EPA ("UARG"), 134 S. Ct. 2427, 2439 (2014). Here, context suggests that the phrase "any air pollutant" "emitted from a source category which is regulated under section 7412" should be

[24] Petitioners argue that this reading would render third clause superfluous. Pet.Br. 37. But that clause would then reinforce that EPA must comprehensively address all harmful pollutants a regulated source category emits, regulating hazardous pollutants under section 7412 and other dangerous pollutants under section 7411. This would be consistent with 42 U.S.C. § 7412 (c)(1), which instructs EPA to list source categories consistently as between sections 7411 and 7412.

understood as referring only to any *hazardous* air pollutants, since hazardous pollutants are what the section 7412 program addresses.

Furthermore, the phrase "which is regulated under section 7412" could be reasonably interpreted as modifying both the immediately-preceding term "source category" *and* the further antecedent term "air pollutant." "As enemies of the dangling participle well know, the English language does not always force a writer to specify [to what] . . . a modifying phrase relates." Young v. Cmty. Nutrition Inst., 476 U.S. 974, 980-81 (1986) (concluding that FDA's interpretation of a complex provision therefore gets Chevron deference). So interpreted, regulation under section 7411(d) would be barred only where the subject source category is already regulated under section 7412 *for the same pollutant EPA seeks to regulate under section 7411(d)*.

Moreover, as pointed out by commenters,[25] the ambiguous term "regulated" can, on its own, be reasonably interpreted as hazardous-pollutant specific. As the Supreme Court has explained, when interpreting that term, an agency must consider *what* is being regulated. See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 366 (2002) (It is necessary to "pars[e] . . . the 'what'" of the term "regulates."); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 363 (1999) (the term "'regulates insurance' . . . requires interpretation, for [its] meaning is not plain.") Here, the

[25] See, e.g., Environmental Defense Fund's Comments at 88 (JA 504) ("A source category is 'regulated' under section 112 not in the abstract, but with respect to particular pollutants.").

"what" being "regulated under section 7412" is a source category's emission of one or more specific hazardous pollutants. Thus, EPA could reasonably conclude that it is only precluded from regulating sources in regard to a particular pollutant under section 7411(d) if those sources are already "regulated under section 7412" *with respect to that same (hazardous) pollutant.* This is again precisely the sort of "reasonable, context-appropriate meaning" that the Supreme Court has directed EPA to give such ambiguous statutory terms. UARG, 134 S. Ct. at 2440.

3. The Senate Amendment compounds the ambiguity.

Contrary to Petitioners' argument, it is also appropriate to consider that two competing amendments to section 7411(d) were enacted into law in 1990 in the same public law. Unlike the ambiguous House text, the Senate's amendment is straightforward. If implemented alone, it authorizes regulation:

> for any existing source for any air pollutant for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or section 7412(b) . . .

See Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). This text would undisputedly allow regulation of a source category under section 7411(d) so long as *the same pollutant* is not regulated under section 7412. The Senate's clear intent in this regard must be considered when interpreting section 7411(d).

Petitioners' primary argument for ignoring the Senate amendment is that it was placed under the heading "Conforming Amendments." Pet.Br. 41-44. But the Supreme Court has cautioned that parties should not "place[] more weight on the

'Conforming Amendments' caption than it can bear," as that heading does not mean that the provision is not "substantive." Burgess v. United States, 553 U.S. 124, 135 (2008). This Court has acted accordingly.[26] Washington Hosp. Ctr. v. Bowen, 795 F.2d 139, 149 (D.C. Cir. 1986) (giving full effect to a "conforming" amendment, intended to conform one part of the statute to significant structural changes in another part, because "Congress has directly expressed its intentions").

Moreover, Petitioners' premise that the House amendment is "substantive" while the Senate amendment is "conforming" is a fallacy. As noted in Burgess, "conforming" amendments may be "substantive" in nature. 553 U.S. at 135. And based on the Petitioners' own definition of "conforming amendments" as "amendments . . . necessitated by the substantive amendments of provisions of the bill," see Pet.Br. 42 (citing Senate Legislative Drafting Manual § 126(b)(2)), the House amendment also qualifies as "conforming." Section 7411(d) was amended because it cross-referenced a soon-to-be nonexistent provision of section 7412, and the text replaced by both houses was that cross-reference alone. Thus, like the Senate

[26] Petitioners cite Am. Petroleum Inst. v. SEC, 714 F.3d 1329, 1336 (D.C. Cir. 2013), as suggesting otherwise. Pet.Br. 44. It does not. In that case, the Court rejected the assertion that Congress' failure to update a statutory cross-reference when enacting the 2010 Dodd-Frank Wall Street Reform Act suggested that Congress might have also forgotten to add a cross-reference into another provision. 714 F.d at 1336-37. Thus, the Court did not ignore a conforming amendment; rather, it refused to act based on a non-existent conforming amendment. Further, it reminded the petitioners of the "basic interpretive canon that a statute should be construed so that effect is given to all its provisions." Id. at 1334 (internal quotation omitted).

amendment, the House amendment was also "necessitated by the substantive amendments of provisions of the bill." Id. Moreover, the heading under which the House amendment was enacted – "Miscellaneous Guidance" – no more indicates substantive import than the Senate's "Conforming Amendments" heading.

Petitioners also assert that the Senate amendment was a mere "clerical error." Pet.Br. 41. The legislative history indicates otherwise. First, a Senate bill introduced in mid-1989 contained the same text to replace the obsolete cross-reference as the House bill. S. 1490 § 108 (July 27, 1989). But that text was removed in late 1989, and the new bill provided that "112(b)(1)(A)" should be changed to "112(b)." S.1630, as reported (Dec. 20, 1989). Later in the process, the House deleted the Senate amendment, but it was added back into the final bill in conference. Compare S. 1630, 101st Cong. (passed by the House on May 23, 1990) with Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). This history strongly indicates that the Senate consciously chose not to adopt the House's language.

Petitioner's suggestion that the Court should give weight to the fact that the House's Office of Law Revision Counsel did not execute the Senate amendment when publishing the U.S. Code (Pet.Br. 46) is also misguided. That office does not make law. On its website, the Office describes its job as simply to "prepare[] and publish[] the United States Code." [27] It has no authority to decide between competing

[27] At http://uscode.house.gov/about/info.shtml.

amendments to a provision that may have significantly different implications for the meaning of the text, and its mechanical decisions not to execute one amendment where it is functionally impossible to incorporate both into the U.S. Code are entitled to "no weight." United States v. Weldon, 377 U.S. 95, 98 n.4 (1964).[28]

Rather, if dueling amendments to a bill may have meaningfully different results, they should be interpreted – first by the agency to which administration of the statute has been delegated, subject to judicial review – to reconcile them if possible. See Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 872 (D.C. 1979) (where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course."); see also Scialabba v. Cuellar de Osorio. 134 S. Ct. 2191, 2203 (2014) (where "internal

[28] Petitioners claim to have identified twelve instances where the Office addressed competing amendments to the same bill. Pet.Br. 43 & n.10. In eleven of those examples, the amendments were either duplicative (e.g., Revisor's Note, 11 U.S.C. § 101 (amendment substituting a period for a semicolon could not be executed because another amendment had already done so)); very different in scope (e.g., Revisor's Note, 26 U.S.C. § 1201 (one amendment replaced a cross-reference but the other deleted the subparagraph)); or there was an obvious error (e.g., Revisor's Note, 21 U.S.C. § 355 (language amended did not exist)). The remaining instance is distinguishable because while two amendments deleted the same text, only one of those amendments replaced the deleted text, so there was no conflict. See Revisor's Note, 42 U.S.C. § 9874. Indeed, instances in which competing amendments have meaningfully different implications that require reconciliation will necessarily be rare, and courts can address the question of how to interpret the statute in such rare instances without creating "disruptive result[s]." Pet.Br. 48.

tension" in provision "makes possible alternative reasonable constructions, . . . Chevron dictates that a court defer to the agency's . . . expert judgment about which interpretation fits best with, and makes the most sense of, the statutory scheme.") (Kagan, J, plurality); id. at 2228 ("before concluding that Congress has legislated in conflicting and unintelligible terms," "traditional tools of statutory construction" should be used to "allow [the provision] to function as a coherent whole") (Sotomayor, J. dissenting).

Petitioners argue that, if the Senate amendment is given effect, the two amendments should be interpreted "additively," so as to exclude from regulation under section 7411(d) all source categories previously regulated under section 7412 (per Petitioners' reading of the House amendment), *and* all hazardous pollutants (per the Senate amendment). See Pet.Br. 48-50. This even more restrictive interpretation of section 7411(d) is no reasonable "middle course" (Spencer Cnty., 600 F.2d at 872), and it does not "fit[] best with, and make[] the most sense of, the statutory scheme" (Scialabba, 134 S. Ct. at 2203), as it would leave a huge gap in the Act's coverage of harmful pollutants. Furthermore, it belies Petitioners' assertion that section 7411(d) can only be read one way.

Here, EPA is still in the middle of the rulemaking process; it has not yet determined how best to reconcile the House and Senate amendments and otherwise interpret the ambiguous language in section 7411(d). But it is at least plausible that EPA could reach a reasonable final conclusion that the statute allows it to regulate

CO_2 emissions from power plants, whether because the House amendment should be interpreted as having the same effect as the Senate amendment, or because the two amendments can be reconciled, or for some other reason. Separation of powers principles require that EPA be given that chance.

B. The Legislative History Does Not Support Petitioners' Reading.

As discussed above,[29] in 1970 Congress provided comprehensive coverage of three groups of harmful pollutants (criteria, hazardous, and other) under three different programs (the NAAQS program, the section 7412 program, and the section 7411(d) program). There is not a scintilla of evidence in the legislative history supporting Petitioners' proposition that, in 1990, Congress intended to strip EPA of most of its authority to regulate under the third of those programs. To the contrary, Congress consistently expressed its desire to expand EPA's authority under the Act.

1. Congress sought to broaden EPA's authority in 1990, not narrow it.

The legislative history of the 1990 Amendments is replete with language indicating that Congress sought to expand EPA's regulatory authority, compelling the Agency to regulate more pollutants, under more programs, more quickly

Expediting the regulation of hazardous pollutants under section 7412 was a key focus. See S. Rep. No. 101-228 at 133 ("There is now a broad consensus that the program to regulate hazardous air pollutants . . . should be restructured to provide

[29] *Supra* p. 3.

EPA with authority to regulate industrial and area sources of air pollution . . . in the near term"), reprinted in 5 A Legislative History of the Clean Air Act Amendments of 1990 ("Legis. Hist.") 8338, 8473 (Comm. Print 1993). But Congress also enhanced EPA's authority under other programs, such as the NAAQS, Title V, and mobile source programs, and established new programs, such as the stratospheric ozone, chemical accident prevention, and acid rain programs. See H.R. Rep. No. 101-952 at 335, reprinted in 5 Legis. Hist. at 1785 (summarizing bill as "includ[ing] provisions addressing attainment and maintenance of ambient air quality standards, mobile sources of air pollution, toxic air pollution, acid rain, permits, enforcement, stratospheric ozone protection, miscellaneous provisions, and clean air research.").[30]

In contrast, the standards of performance program was *not* a focal point of the 1990 Amendments. There is no mention of it in the Conference Committee's summary of the bill. See id. And Petitioners have not identified a single statement in the legislative history showing Congressional intent to change – let alone dramatically reduce – the scope of section 7411(d). Petitioners would have the Court conclude that Congress made a major change to the existing source performance standards program *sub silentio*. But Congressional silence merits an opposite conclusion. See United States v. Neville, 82 F.3d 1101, 1105 (D.C. Cir. 1996).

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[30] See also S. Rep. No. 101-228 at 14 & 123, reprinted in 5 Legis. Hist. at 8354, 8463; H.R. Rep. No. 101-952 at 336, 340, 345 & 347, reprinted in 5 Legis. Hist. at 1786, 1790, 1795, & 1997.

2. The legislative history is far more consistent with an intent to preserve the scope of section 7411(d) – or to broaden it.

Given Congress' pervasive expression of its desire to have EPA address the emission of *more* pollutants, through *more* programs, than ever before, coupled with the absence of any evidence of an intent to reduce the scope of section 7411(d), the legislative history of the 1990 Amendments strongly suggests that both houses simply sought to edit section 7411(d) to reflect the structural changes made to section 7412; i.e., EPA's new mandate to list and regulate *source categories* of hazardous pollutants Congress itself had identified. See S. Rep. No. 101-228 at 133 (under restructured hazardous pollutant program, EPA should regulate "source categories of air pollutants (rather than the pollutants)"), reprinted at 5 Legis. Hist. at 8473.

Viewed in this context, the House's insertion of the phrase "or emitted from a source category which is regulated under section 7412" in lieu of a bare cross-reference to new section 7412 makes sense -- not because the House was trying to bar regulation of entire source categories in regard to all pollutants under section 7411(d), but because it was trying to reflect the fact that regulation under section 7412 would no longer proceed on a pollutant-by-pollutant basis, but instead on a source category-by-source category basis. Indeed, analyzing the 1990 Amendments shortly after enactment, the Congressional Research Service characterized the House and Senate's dueling edits to section 7411(d) as "duplicative" amendments that simply "change the reference to section 112" using "different language." 1 Legis. Hist. at 46 n.1.

Moreover, even if the Senate Amendment were considered subsidiary to the House Amendment as Petitioners argue, it is nonetheless "the most telling evidence of congressional intent." CBS, Inc. v. FCC, 453 U.S. 367, 381 (1981) (discussing import of contemporaneous conforming amendment). It is affirmative evidence supporting the conclusion that the 101st Congress, as a whole, did not intend to dramatically reduce the scope of section 7411(d). Petitioners, in contrast, have no such affirmative evidence supporting their contrary view of Congress' intent.

3. Congress was not seeking to avoid "double regulation," and none results from regulating different pollutants under different programs.

Lacking historical evidence of – let alone explanation for – Congress' supposed desire to scale back section 7411(d), Petitioners theorize that Congress sought to avoid "double regulation." Pet.Br. 33. But no "double regulation" results from authorizing EPA to address *hazardous pollutants* emitted from a source under section 7412, and *non-hazardous pollutants* emitted from the source under section 7411(d).

Nor is there any evidence that Congress was preoccupied with eliminating any "double regulation" of source categories regulated under section 7412. To the contrary, Congress authorized states to require sources already regulated under section 7412 or other national standards to impose additional, *more stringent* state controls. 42 U.S.C. § 7416. Congress also expressly addressed the potential burdens on power plants from being subject to regulation under section 7412 *and* under other programs by prescribing a higher standard for regulation under section 7412. See 42 U.S.C. §

7412(n)(1)(A) (EPA must conclude that regulation of power plants is "appropriate and necessary" after studying the hazards remaining *despite* the imposition of other programs). See also 42 U.S.C. § 7412(d)(7) ("[n]o emission standard or other requirement promulgated under [section 7412] shall be interpreted . . . to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title"). Thus, Congress knew and intended that power plants might be subject to multiple regulatory programs.

Instead of avoiding "double regulation," [31] Petitioners' interpretation of section 7411(d) would open a yawning gap up in the Act's regulatory regime, leaving pollutants that are undisputedly dangerous, but not "hazardous" as defined in section 7412, outside of EPA's reach. That result is entirely inconsistent with the legislative history and goals of both the Act and the 1990 Amendments.

C. The Statutory Context Does Not Support Petitioners' Theory.

As the Supreme Court recently reminded EPA, a "reasonable statutory interpretation must account for both the specific context in which . . . language is used, and the broader context of the statute as a whole." UARG, 134 S. Ct. at 2442 (quotation omitted). Petitioners' reading of section 7411(d) accounts for neither.

[31] Even under Petitioners' reading, double regulation is permissible under sections 7411(d) and 7412 so long as EPA regulates under section 7411(d) first.

First, Petitioners' interpretation is inconsistent with 42 U.S.C. § 7412(d)(7), which provides that "no emission standard or other requirement promulgated under this section shall be interpreted . . . to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 . . . ." This language reflects a clear intent that the section 7411 and 7412 programs are to operate additively, so as to address the full spectrum of dangerous emissions from a source. Under Petitioner's reading, section 7412 standards for hazardous pollutants would, in fact, effectively "diminish" (by eliminating) regulation of non-hazardous emissions from the subject source category under 7411(d). That result cannot be squared with the text of section 7412(d)(7).

Furthermore, Petitioners' interpretation of section 7411(d) is inconsistent with the broader scheme of the Act. As discussed above, supra p. 3, section 7411(d) was designed to work in tandem with the NAAQS and hazardous pollutant programs such that, together, the three programs comprehensively cover the full range of dangerous emissions from stationary sources. But under Petitioner's reading, there would be a gaping hole in that coverage, which would leave sources' emissions of certain dangerous pollutants outside the Act's scope. Such a result is entirely inconsistent with the comprehensive scheme designed by Congress in 1970 as well as the Act's purpose: to protect "public health and welfare." 42 U.S.C. § 7401(b)(1).

D. EPA Has Never Adopted Petitioner's Interpretation of § 7411(d).

Petitioners argue that EPA has previously read section 7411(d) as they do, and is doing an "about face." Pet.Br. 36. As proof, Petitioners point to statements made by EPA in the context of a 2005 Rule ("the Mercury Rule"), Pet.Br. 8-9, that was vacated by this Court in New Jersey v. EPA, 517 F.3d 574 (2008).[32] But Petitioners are attempting to spin hay into gold, ignoring context and mischaracterizing EPA's statements while omitting mention of their own inconsistent position in that litigation.

To be clear, EPA has never reached the conclusion that Petitioners advance here: that 7411(d) should be read as barring regulation of *all* pollutants under that subsection where a source category has previously been regulated in regard to *hazardous* pollutants under section 7412. Rather, EPA's conclusion regarding how to interpret section 7411(d) in the Mercury Rule was the same as the interpretation EPA proposed in the Legal Memorandum accompanying the Proposed Rule at issue here: i.e., that section 7411(d) only bars regulation in regard to a source category's emissions

[32] Petitioners incorrectly characterize New Jersey as vacating the section 7411(d) portion of the Mercury Rule "because it violated the Section 112 Exclusion." Pet.Br. 37. The Court only stated that, having concluded that EPA improperly de-listed power plants under section 7412, "under EPA's own interpretation" EPA could not regulate under 7411. 517 F.3d at 583. As explained above, EPA's conclusion in the Mercury Rule was only that it could not regulate a source category's *hazardous pollutant emissions* under both sections, and only hazardous air pollutants were at issue in New Jersey. See id. at 137 ("Before the court are petitions for review of two final rules . . . regarding the emission of hazardous air pollutants.")

of *hazardous pollutants* regulated under section 7412. *Compare* 70 Fed. Reg. 15,994, 16,029-32 (Mar. 29, 2005), *with* Mem. at 21-27 (JA 136-139, *with* JA 392-398).

Critically, the question raised in the Mercury Rule, and addressed in briefing in New Jersey v. EPA, was a different one: whether section 7411(d) bars regulation of emissions of a pollutant only *listed* as hazardous under section 7412, as opposed to actually *regulated* under that section. EPA concluded that Congress intended the latter. 70 Fed. Reg. at 16,032. On the path to reaching that conclusion, EPA "note[d]" that "*a* literal reading"[33] of the House Amendment "is that a standard of performance under section 111(d) cannot be established for any air pollutant – [hazardous] and non-[hazardous] – emitted from a source category regulated under section 112." 70 Fed. Reg. at 16,031 (emphasis added). But it concluded that such an interpretation of section 7411(d) was not the best interpretation, not only because of the Senate amendment, but also because:

> Such a reading would be inconsistent with the general thrust of the 1990 amendments which, on balance, reflects Congress' desire to require EPA to regulate more substances, not to eliminate EPA's ability to regulate large categories of pollutants like non-[hazardous pollutants]. . . . We do not believe that Congress sought to eliminate regulation for a large category of sources in the 1990 Amendments and our proposed interpretation of the two amendments to section 111(d) avoids this result.

70 Fed. Reg. at 16,032.

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[33] "Literal" does not mean unambiguous, supra n.20, and thus EPA's use of "literal" does not mean that EPA believed that this was the only possible way to read the House amendment. To the contrary, EPA stated that it was "interpret[ing]" that amendment. 70 Fed. Reg. at 16,031.

EPA may or may not reaffirm the conclusion it reached in the context of the Mercury Rule, and even if it does, EPA may refine its thinking about how the House and Senate amendments should be interpreted. Contrary to Petitioners' suggestion, there is nothing inappropriate about that. Indeed, that is exactly what an agency is supposed to do through the rulemaking process.

While condemning EPA for revisiting its prior analysis of the House and Senate amendments, Petitioners fail to mention that, in their own brief in the Mercury Rule litigation, they *agreed* with EPA that section 7411(d) is ambiguous and that EPA can reasonably read it as barring regulation only in regard to hazardous pollutants actually regulated under section 7412. Joint Brief of State Respondent-Intervenors, New Jersey v. EPA, No. 05-1097, 2007 WL 3231261, at *25 (D.C. Cir. Aug. 3, 2007) (JA 230) ("EPA developed a reasoned way to reconcile the conflicting language and the Court should defer to EPA's interpretation.").[34] That position is obviously inconsistent with Petitioners' argument here.

Petitioners – like EPA – may reasonably reconsider an issue when it is presented in a different context. But the fact that some of them previously adopted an opposite interpretation of the relevant text undermines their claim that the *only possible reading* of section 7411(d) is the one they currently advance, and therefore EPA

[34] The parties that filed this brief included Petitioners Alabama, Nebraska, West Virginia, and Wyoming.

should be prohibited from considering alternatives. Rather, EPA must be left to "develop a reasonable interpretation [of the statutory] provisions" (Whitman, 531 U.S. at 486) in regard to the question posed here: whether regulation of a source category's hazardous pollutant emission under section 7412 bars regulation of that source category's non-hazardous emissions under section 7411(d). Only then can EPA's interpretation be fairly subjected to judicial scrutiny, in accordance with the principles set forth in Chevron, to determine whether that interpretation is reasonable.

Conclusion

The Court should dismiss or deny the Petition for Review.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

March 4, 2015

Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, as counted by the word count feature of Microsoft Office Word, it contains 13,950 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1); and

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) because it was prepared using Microsoft Office Word 2013 in a proportionally spaced typeface, Garamond, in 14 pt. font.

/s/ Amanda Shafer Berman
Amanda Shafer Berman
Counsel for Respondent EPA

Dated: March 4, 2015

Certificate of Service

I certify that the Brief of Respondent EPA was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, and that, pursuant to Circuit Rule 31(b), five paper copies of the brief were delivered to the Court by hand.

I further certify that a copy of the foregoing Brief of Respondent EPA was today served electronically through the court's CM/ECF system on all registered counsel for Petitioners, Intervenors and Amici.

/s/ Amanda Shafer Berman
Counsel for Respondent

Dated: March 4, 2015

Attachment A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 **September Term, 2012**

EPA-77FR22392

Filed On: December 13, 2012

Las Brisas Energy Center, LLC,

Petitioner

v.

Environmental Protection Agency and Lisa Perez Jackson,

Respondents

Conservation Law Foundation, et al.,
Intervenors

Consolidated with 12-1251, 12-1252, 12-1253, 12-1254, 12-1257

BEFORE: Rogers, Garland, and Brown, Circuit Judges

ORDER

Upon consideration of the motions to dismiss, the oppositions thereto, and the replies; and the motion for declaratory relief, the oppositions thereto, and the replies, it is

ORDERED that the motions to dismiss be granted. The challenged proposed rule is not final agency action subject to judicial review. See 42 U.S.C. § 7607(b)(1); Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (holding that final agency action "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow") (internal quotations omitted). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 **September Term, 2012**

FURTHER ORDERED that the motion for declaratory relief be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1146

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,

Respondent.

On Petition for Review

RESPONDENT'S STATUTORY ADDENDUM

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

Of Counsel:

Elliott Zenick
Scott Jordan
United States Environmental
Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

March 4, 2015

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42 U.S.C. § 7411(b) & (d) ADD9

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H.R. Rep. No. 101-952 at 335, 336, 340, 345 & 347 ..... ADD48

S. 1490 § 108 (July 27, 1989) ADD54

S. 1630, as reported (Dec. 20, 1989) ADD57

S. 1630, 101st Cong. (passed by the House on May 23, 1990) ADD59

FOIA EPA-HQ-2016-009655

Public Law 101-549
101st Congress

An Act

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

Nov. 15, 1990
[S. 1630]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Air pollution control.

TITLE I—PROVISIONS FOR ATTAINMENT AND MAINTENANCE OF NATIONAL AMBIENT AIR QUALITY STANDARDS

Sec. 101. General planning requirements.
Sec. 102. General provisions for nonattainment areas.
Sec. 103. Additional provisions for ozone nonattainment areas.
Sec. 104. Additional provisions for carbon monoxide nonattainment areas.
Sec. 105. Additional provisions for particulate matter (PM-10) nonattainment areas.
Sec. 106. Additional provisions for areas designated nonattainment for sulfur oxides, nitrogen dioxide, and lead.
Sec. 107. Provisions related to Indian tribes.
Sec. 108. Miscellaneous provisions.
Sec. 109. Interstate pollution.
Sec. 110. Conforming amendments.
Sec. 111. Transportation system impacts on clean air.

SEC. 101. GENERAL PLANNING REQUIREMENTS.

Intergovernmental relations.

(a) AREA DESIGNATIONS.—Section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)) is amended to read as follows:

"(d) DESIGNATIONS.—

"(1) DESIGNATIONS GENERALLY.—

"(A) SUBMISSION BY GOVERNORS OF INITIAL DESIGNATIONS FOLLOWING PROMULGATION OF NEW OR REVISED STANDARDS.—By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 109, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

"(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

"(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

"(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not

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exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

"(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and all applicable regulations.

"(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

"(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

"(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 105.".

SEC. 108. MISCELLANEOUS GUIDANCE.

(a) TRANSPORTATION PLANNING GUIDANCE.—Section 108(e) of the Clean Air Act is amended by deleting the first sentence and inserting in lieu thereof the following: "The Administrator shall, after consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, and with State and local officials, within nine months after enactment of the Clean Air Act Amendments of 1989 and periodically thereafter as necessary to maintain a continuous transportation-air quality planning process, update the June 1978 Transportation-Air Quality Planning Guidelines and publish guidance on the development and implementation of transportation and other measures necessary to demonstrate and maintain attainment of national ambient air quality standards.". 42 USC 7408.

(b) TRANSPORTATION CONTROL MEASURES.—Section 108(f)(1) of the Clean Air Act is amended by deleting all after "(f)" through the end of subparagraph (A) and inserting in lieu thereof the following:

"(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after enactment of the Clean Air Act Amendments of 1990, and from time to time thereafter— Public information.

"(A) information prepared, as appropriate, in consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, regarding the formulation and emission reduction potential of transportation control measures related to criteria pollutants and their precursors, including, but not limited to—

"(i) programs for improved public transit;

"(ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles;

"(iii) employer-based transportation management plans, including incentives;

"(iv) trip-reduction ordinances;

"(v) traffic flow improvement programs that achieve emission reductions;

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need for revision, or implementation of any plan or plan revision required under this Act.".

(e) NEW SOURCE STANDARDS OF PERFORMANCE.—(1) Section 111(b)(1)(B) of the Clean Air Act (42 U.S.C. 7411(b)(1)(B)) is amended as follows:

(A) Strike "120 days" and insert "one year".

(B) Strike "90 days" and insert "one year".

(C) Strike "four years" and insert "8 years".

(D) Immediately before the sentence beginning "Standards of performance or revisions thereof" insert "Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard.".

(E) Add the following at the end: "When implementation and enforcement of any requirement of this Act indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.".

(2) Section 111(f)(1) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended to read as follows:

"(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) before the date of the enactment of the Clean Air Act Amendments of 1990 and for which regulations had not been proposed by the Administrator by such date, the Administrator shall— Regulations.

"(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after the date of the enactment of the Clean Air Act Amendments of 1990;

"(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after the date of the enactment of the Clean Air Act Amendments of 1990; and

"(C) propose regulations for the remaining categories of sources within 6 years after the date of the enactment of the Clean Air Act Amendments of 1990.".

(f) SAVINGS CLAUSE.—Section 111(a)(3) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended by adding at the end: "Nothing in title II of this Act relating to nonroad engines shall be construed to apply to stationary internal combustion engines.".

(g) REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) of the Clean Air Act (42 U.S.C. 7411(d)(1)(A)(i)) is amended by striking "or 112(b)(1)(A)" and inserting "or emitted from a source category which is regulated under section 112".

(h) CONSULTATION.—The penultimate sentence of section 121 of the Clean Air Act (42 U.S.C. 7421) is amended to read as follows: "The Administrator shall update as necessary the original regulations required and promulgated under this section (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) to ensure adequate consultation.". Regulations.

(i) DELEGATION.—The second sentence of section 301(a)(1) of the Clean Air Act (42 U.S.C. 7601(a)(1)) is amended by inserting "subject to section 307(d)" immediately following "regulations".

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Public Law 101-549
101st Congress

An Act

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

Nov. 15, 1990
[S. 1630]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Air pollution control.

TITLE I—PROVISIONS FOR ATTAINMENT AND MAINTENANCE OF NATIONAL AMBIENT AIR QUALITY STANDARDS

Sec. 101. General planning requirements.
Sec. 102. General provisions for nonattainment areas.
Sec. 103. Additional provisions for ozone nonattainment areas.
Sec. 104. Additional provisions for carbon monoxide nonattainment areas.
Sec. 105. Additional provisions for particulate matter (PM-10) nonattainment areas.
Sec. 106. Additional provisions for areas designated nonattainment for sulfur oxides, nitrogen dioxide, and lead.
Sec. 107. Provisions related to Indian tribes.
Sec. 108. Miscellaneous provisions.
Sec. 109. Interstate pollution.
Sec. 110. Conforming amendments.
Sec. 111. Transportation system impacts on clean air.

SEC. 101. GENERAL PLANNING REQUIREMENTS.

Inter-governmental relations.

(a) AREA DESIGNATIONS.—Section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)) is amended to read as follows:

"(d) DESIGNATIONS.—

"(1) DESIGNATIONS GENERALLY.—

"(A) SUBMISSION BY GOVERNORS OF INITIAL DESIGNATIONS FOLLOWING PROMULGATION OF NEW OR REVISED STANDARDS.—By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 109, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

"(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

"(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

"(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not

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and sources subject to the provisions of this section and shall include aggregate information from the database in each annual report. The report shall include, but not be limited to—

"(1) a status report on standard-setting under subsections (d) and (f);

"(2) information with respect to compliance with such standards including the costs of compliance experienced by sources in various categories and subcategories;

"(3) development and implementation of the national urban air toxics program; and

"(4) recommendations of the Chemical Safety and Hazard Investigation Board with respect to the prevention and mitigation of accidental releases.".

SEC. 302. CONFORMING AMENDMENTS.

42 USC 7411.

(a) Section 111(d)(1) of the Clean Air Act is amended by striking "112(b)(1)(A)" and inserting in lieu thereof "112(b)".

(b) Section 111 of the Clean Air Act is amended by striking paragraphs (g)(5) and (g)(6) and redesignating the succeeding paragraphs accordingly. Such section is further amended by striking "or section 112" in paragraph (g)(5) as redesignated in the preceding sentence.

42 USC 7414.

(c) Section 114(a) of the Clean Air Act is amended by striking "or" after "section 111," and by inserting ", or any regulation of solid waste combustion under section 129," after "section 112".

42 USC 7418.

(d) Section 118(b) of the Clean Air Act is amended by striking "112(c)" and inserting in lieu thereof "112(i)(4)".

42 USC 7602.

(e) Section 302(k) of the Clean Air Act is amended by adding before the period at the end thereof ", and any design, equipment, work practice or operational standard promulgated under this Act.".

42 USC 7604.

(f) Section 304(b) of the Clean Air Act is amended by striking "112(c)(1)(B)" and inserting in lieu thereof "112(i)(3)(A) or (f)(4)".

42 USC 7607.

(g) Section 307(b)(1) is amended by striking "112(c)" and inserting in lieu thereof "112".

(h) Section 307(d)(1) is amended by inserting—

"(D) the promulgation of any requirement for solid waste combustion under section 129,"

after subparagraph (C) and redesignating the succeeding subparagraphs accordingly.

42 USC 7412 note.

SEC. 303. RISK ASSESSMENT AND MANAGEMENT COMMISSION.

(a) ESTABLISHMENT.—There is hereby established a Risk Assessment and Management Commission (hereafter referred to in this section as the "Commission"), which shall commence proceedings not later than 18 months after the date of enactment of the Clean Air Act Amendments of 1990 and which shall make a full investigation of the policy implications and appropriate uses of risk assessment and risk management in regulatory programs under various Federal laws to prevent cancer and other chronic human health effects which may result from exposure to hazardous substances.

(b) CHARGE.—The Commission shall consider—

(1) the report of the National Academy of Sciences authorized by section 112(o) of the Clean Air Act, the use and limitations of risk assessment in establishing emission or effluent standards, ambient standards, exposure standards, acceptable concentration levels, tolerances or other environmental criteria for hazardous substances that present a risk of carcinogenic effects

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1 U.S.C. § 112. Statutes at Large; contents; admissibility in evidence

The Archivist of the United States shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress; all proclamations by the President in the numbered series issued since the date of the adjournment of the regular session of Congress next preceding; and also any amendments to the Constitution of the United States proposed or ratified pursuant to article V thereof since that date, together with the certificate of the Archivist of the United States issued in compliance with the provision contained in section 106b of this title. In the event of an extra session of Congress, the Archivist of the United States shall cause all the laws and concurrent resolutions enacted during said extra session to be consolidated with, and published as part of, the contents of the volume for the next regular session. The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

* * *

1 U.S.C. § 204. Codes and Supplements as evidence of the Laws of United States and District of Columbia; citation Codes and Supplements

(a) United States Code.--The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

* * *

42 U.S.C. § 7401. Congressional findings and declaration of purpose

* * *

(b) Declaration. The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

* * *

42 U.S.C. § 7411. Standards of performance for new stationary sources

* * *

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(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 in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year 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 one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(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.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

* * *

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance 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 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(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 7410(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 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

* * *

42 U.S.C. § 7411 (1988). Statutes at Large; contents; admissibility in evidence

* * *

(d) Standards of performance for existing sources; remaining useful life of source.

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance 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 7408(a) or 7412(b)(1)(A) of this title but (ii) to which a standard of performance under this section would apply if such exiting source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

* * *

42 U.S.C. § 7412. Hazardous air pollutants

(a) Definitions
For purposes of this section, except subsection (r) of this section--

(1) Major source
The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

(2) Area source
The term "area source" means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under subchapter II of this chapter.

(3) Stationary source
The term "stationary source" shall have the same meaning as such term has under section 7411(a) of this title.

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

(5) Modification
The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results

in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) Hazardous air pollutant
The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect
The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

(8) Electric utility steam generating unit
The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

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

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

(11) Carcinogenic effect
Unless revised, the term "carcinogenic effect" shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment. Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

(b) List of pollutants

(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS number	Chemical name
75070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
98862	Acetophenone
53963	2-Acetylaminofluorene
107028	Acrolein
79061	Acrylamide
79107	Acrylic acid
107131	Acrylonitrile
107051	Allyl chloride
92671	4-Aminobiphenyl
62533	Aniline
90040	o-Anisidine
1332214	Asbestos
71432	Benzene (including benzene from gasoline)
92875	Benzidine
98077	Benzotrichloride
100447	Benzyl chloride
92524	Biphenyl
117817	Bis(2-ethylhexyl)phthalate (DEHP)
542881	Bis(chloromethyl)ether
75252	Bromoform
106990	1,3-Butadiene
156627	Calcium cyanamide
105602	Caprolactam
133062	Captan
63252	Carbaryl
75150	Carbon disulfide

56235	Carbon tetrachloride
463581	Carbonyl sulfide
120809	Catechol
133904	Chloramben
57749	Chlordane
7782505	Chlorine
79118	Chloroacetic acid
532274	2-Chloroacetophenone
108907	Chlorobenzene
510156	Chlorobenzilate
67663	Chloroform
107302	Chloromethyl methyl ether
126998	Chloroprene
1319773	Cresols/Cresylic acid (isomers and mixture)
95487	o-Cresol
108394	m-Cresol
106445	p-Cresol
98828	Cumene
94757	2,4-D, salts and esters
3547044	DDE
334883	Diazomethane
132649	Dibenzofurans
96128	1,2-Dibromo-3-chloropropane
84742	Dibutylphthalate
106467	1,4-Dichlorobenzene(p)
91941	3,3-Dichlorobenzidene
111444	Dichloroethyl ether (Bis(2-chloroethyl)ether)
542756	1,3-Dichloropropene
62737	Dichlorvos
111422	Diethanolamine
121697	N,N-Diethyl aniline (N,N-Dimethylaniline)
64675	Diethyl sulfate
119904	3,3-Dimethoxybenzidine
60117	Dimethyl aminoazobenzene

119937	3,3'-Dimethyl benzidine
79447	Dimethyl carbamoyl chloride
68122	Dimethyl formamide
57147	1,1-Dimethyl hydrazine
131113	Dimethyl phthalate
77781	Dimethyl sulfate
534521	4,6-Dinitro-o-cresol, and salts
51285	2,4-Dinitrophenol
121142	2,4-Dinitrotoluene
123911	1,4-Dioxane (1,4-Diethyleneoxide)
122667	1,2-Diphenylhydrazine
106898	Epichlorohydrin (1-Chloro-2,3-epoxypropane)
106887	1,2-Epoxybutane
140885	Ethyl acrylate
100414	Ethyl benzene
51796	Ethyl carbamate (Urethane)
75003	Ethyl chloride (Chloroethane)
106934	Ethylene dibromide (Dibromoethane)
107062	Ethylene dichloride (1,2-Dichloroethane)
107211	Ethylene glycol
151564	Ethylene imine (Aziridine)
75218	Ethylene oxide
96457	Ethylene thiourea
75343	Ethylidene dichloride (1,1-Dichloroethane)
50000	Formaldehyde
76448	Heptachlor
118741	Hexachlorobenzene
87683	Hexachlorobutadiene
77474	Hexachlorocyclopentadiene
67721	Hexachloroethane
822060	Hexamethylene-1,6-diisocyanate
680319	Hexamethylphosphoramide
110543	Hexane
302012	Hydrazine

7647010	Hydrochloric acid
7664393	Hydrogen fluoride (Hydrofluoric acid)
123319	Hydroquinone
78591	Isophorone
58899	Lindane (all isomers)
108316	Maleic anhydride
67561	Methanol
72435	Methoxychlor
74839	Methyl bromide (Bromomethane)
74873	Methyl chloride (Chloromethane)
71556	Methyl chloroform (1,1,1-Trichloroethane)
78933	Methyl ethyl ketone (2-Butanone)
60344	Methyl hydrazine
74884	Methyl iodide (Iodomethane)
108101	Methyl isobutyl ketone (Hexone)
624839	Methyl isocyanate
80626	Methyl methacrylate
1634044	Methyl tert butyl ether
101144	4,4-Methylene bis(2-chloroaniline)
75092	Methylene chloride (Dichloromethane)
101688	Methylene diphenyl diisocyanate (MDI)
101779	4,4'-Methylenedianiline
91203	Naphthalene
98953	Nitrobenzene
92933	4-Nitrobiphenyl
100027	4-Nitrophenol
79469	2-Nitropropane
684935	N-Nitroso-N-methylurea
62759	N-Nitrosodimethylamine
59892	N-Nitrosomorpholine
56382	Parathion
82688	Pentachloronitrobenzene (Quintobenzene)
87865	Pentachlorophenol
108952	Phenol

106503	p-Phenylenediamine
75445	Phosgene
7803512	Phosphine
7723140	Phosphorus
85449	Phthalic anhydride
1336363	Polychlorinated biphenyls (Aroclors)
1120714	1,3-Propane sultone
57578	beta-Propiolactone
123386	Propionaldehyde
114261	Propoxur (Baygon)
78875	Propylene dichloride (1,2-Dichloropropane)
75569	Propylene oxide
75558	1,2-Propylenimine (2-Methyl aziridine)
91225	Quinoline
106514	Quinone
100425	Styrene
96093	Styrene oxide
1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin
79345	1,1,2,2-Tetrachloroethane
127184	Tetrachloroethylene (Perchloroethylene)
7550450	Titanium tetrachloride
108883	Toluene
95807	2,4-Toluene diamine
584849	2,4-Toluene diisocyanate
95534	o-Toluidine
8001352	Toxaphene (chlorinated camphene)
120821	1,2,4-Trichlorobenzene
79005	1,1,2-Trichloroethane
79016	Trichloroethylene
95954	2,4,5-Trichlorophenol
88062	2,4,6-Trichlorophenol
121448	Triethylamine
1582098	Trifluralin
540841	2,2,4-Trimethylpentane

108054	Vinyl acetate
593602	Vinyl bromide
75014	Vinyl chloride
75354	Vinylidene chloride (1,1-Dichloroethylene)
1330207	Xylenes (isomers and mixture)
95476	o-Xylenes
108383	m-Xylenes
106423	p-Xylenes
0	Antimony Compounds
0	Arsenic Compounds (inorganic including arsine)
0	Beryllium Compounds
0	Cadmium Compounds
0	Chromium Compounds
0	Cobalt Compounds
0	Coke Oven Emissions
0	Cyanide Compounds[1]
0	Glycol ethers[2]
0	Lead Compounds
0	Manganese Compounds
0	Mercury Compounds
0	Fine mineral fibers[3]
0	Nickel Compounds
0	Polycylic Organic Matter[4]
0	Radionuclides (including radon)[5]
0	Selenium Compounds

NOTE: For all listings above which contain the word "compounds" and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemical (i.e., antimony, arsenic, etc.) as part of that chemical's infrastructure.

[1] X'CN where X = H' or any other group where a formal dissociation may occur. For example KCN or $Ca(CN)_2$

[2] Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol $R\text{-}(OCH_2CH_2)_n\text{-}OR'$ where

n = 1, 2, or 3

R = alkyl or aryl groups

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R' = R, H, or groups which, when removed, yield glycol ethers with the structure: R-$(OCH_2CH)_n$-OH. Polymers are excluded from the glycol category.

[3] Includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral derived fibers) of average diameter 1 micrometer or less.

[4] Includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100°C.

[5] A type of atom which spontaneously undergoes radioactive decay.

(2) Revision of the list

The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a

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written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects[1] of the pollutant or other evidence adequate to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

(B) The Administrator shall add a substance to the list upon a showing by the petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.

(C) The Administrator shall delete a substance from the list upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

(D) The Administrator shall delete one or more unique chemical substances that contain a listed hazardous air pollutant not having a CAS number (other than coke oven emissions, mineral fibers, or polycyclic organic matter) upon a showing by the petitioner or on the Administrator's own determination that such unique chemical substances that contain the named chemical of such listed hazardous air pollutant meet the deletion requirements of subparagraph (C). The Administrator must grant or deny a deletion petition prior to promulgating any emission standards pursuant to subsection (d) of this section applicable to any source category or subcategory of a listed hazardous air pollutant without a CAS number listed under subsection (b) of this section for which a deletion petition has been filed within 12 months of November 15, 1990.

(4) Further information
If the Administrator determines that information on the health or environmental effects of a substance is not sufficient to make a determination required by this subsection, the Administrator may use any authority available to the Administrator to acquire such information.

(5) Test methods
The Administrator may establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants.

(6) Prevention of significant deterioration
The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

(7) Lead
The Administrator may not list elemental lead as a hazardous air pollutant under this subsection.

(c) List of source categories

(1) In general
Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards
For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources
The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate)

warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

(4) Previously regulated categories
The Administrator may, in the Administrator's discretion, list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990.

(5) Additional categories
In addition to those categories and subcategories of sources listed for regulation pursuant to paragraphs (1) and (3), the Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants according to the same criteria for listing applicable under such paragraphs. In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later.

(6) Specific pollutants
With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to promulgate standards for such pollutants emitted by electric utility steam generating units.

(7) Research facilities
The Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities. For purposes of this section, "research or laboratory facility" means any stationary source whose primary purpose is to conduct research and development into new processes and products, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing
When establishing emissions standards for styrene, the Administrator shall list boat manufacturing as a separate subcategory unless the Administrator finds that such listing would be inconsistent with the goals and requirements of this chapter.

(9) Deletions from the list

(A) Where the sole reason for the inclusion of a source category on the list required under this subsection is the emission of a unique chemical substance, the Administrator shall delete the source category from the list if it is appropriate because of action taken under either subparagraphs (C) or (D) of subsection (b)(3) of this section.

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator's own motion, whenever the Administrator makes the following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

The Administrator shall grant or deny a petition under this paragraph within 1 year after the petition is filed.

(d) Emission standards

(1) In general
The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods
Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which--

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources
The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than--

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold
With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources
With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision
The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved
No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate--

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate--

(i) the use of sodium silicate (or equivalent) luting compounds, if the Administrator determines that use of sodium silicate is an effective means of emissions control and is achievable, taking into account costs and reasonable commercial warranties for doors and related equipment; and

(ii) door and jam cleaning practices.

Notwithstanding subsection (i) of this section, the compliance date for such work practice regulations for coke oven batteries shall be not later than the date 3 years after November 15, 1990.

(C) For coke oven batteries electing to qualify for an extension of the compliance date for standards promulgated under subsection (f) of this section in accordance with subsection (i)(8) of this section, the emission standards under this subsection for coke

oven batteries shall require that coke oven batteries not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries seeking an extension shall be not later than the date 3 years after November 15, 1990.

(9) Sources licensed by the Nuclear Regulatory Commission
No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act [42 U.S.C.A. § 2011 et seq.] for such category or subcategory provides an ample margin of safety to protect the public health. Nothing in this subsection shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date
Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

* * *

(n) Other provisions

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress

alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

(B) The Administrator shall conduct, and transmit to the Congress not later than 4 years after November 15, 1990, a study of mercury emissions from electric utility steam generating units, municipal waste combustion units, and other sources, including area sources. Such study shall consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than 3 years after November 15, 1990, a study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur. Such study shall include a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health.

(2) Coke oven production technology study

(A) The Secretary of the Department of Energy and the Administrator shall jointly undertake a 6-year study to assess coke oven production emission control technologies and to assist in the development and commercialization of technically practicable and economically viable control technologies which have the potential to significantly reduce emissions of hazardous air pollutants from coke oven production facilities. In identifying control technologies, the Secretary and the Administrator shall consider the range of existing coke oven operations and battery design and the availability of sources of materials for such coke ovens as well as alternatives to existing coke oven production design.

(B) The Secretary and the Administrator are authorized to enter into agreements with persons who propose to develop, install and operate coke production emission control technologies which have the potential for significant emissions reductions of hazardous air pollutants provided that Federal funds shall not exceed 50 per centum of the cost of any project assisted pursuant to this paragraph.

(C) On completion of the study, the Secretary shall submit to Congress a report on the results of the study and shall make recommendations to the Administrator identifying practicable and economically viable control technologies for coke oven production facilities to reduce residual risks remaining after implementation of the standard under subsection (d) of this section.

(D) There are authorized to be appropriated $5,000,000 for each of the fiscal years 1992 through 1997 to carry out the program authorized by this paragraph.

(3) Publicly owned treatment works

The Administrator may conduct, in cooperation with the owners and operators of publicly owned treatment works, studies to characterize emissions of hazardous air pollutants emitted by such facilities, to identify industrial, commercial and residential discharges that contribute to such emissions and to demonstrate control measures for such emissions. When promulgating any standard under this section applicable to publicly owned treatment works, the Administrator may provide for control measures that include pretreatment of discharges causing emissions of hazardous air pollutants and process or product substitutions or limitations that may be effective in reducing such emissions. The Administrator may prescribe uniform sampling, modeling and risk assessment methods for use in implementing this subsection.

(4) Oil and gas wells; pipeline facilities

(A) Notwithstanding the provisions of subsection (a) of this section, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this section.

(B) The Administrator shall not list oil and gas production wells (with its associated equipment) as an area source category under subsection (c) of this section, except that the Administrator may establish an area source category for oil and gas production

wells located in any metropolitan statistical area or consolidated metropolitan statistical area with a population in excess of 1 million, if the Administrator determines that emissions of hazardous air pollutants from such wells present more than a negligible risk of adverse effects to public health.

(5) Hydrogen sulfide
The Administrator is directed to assess the hazards to public health and the environment resulting from the emission of hydrogen sulfide associated with the extraction of oil and natural gas resources. To the extent practicable, the assessment shall build upon and not duplicate work conducted for an assessment pursuant to section 8002(m) of the Solid Waste Disposal Act [42 U.S.C.A. § 6982(m)] and shall reflect consultation with the States. The assessment shall include a review of existing State and industry control standards, techniques and enforcement. The Administrator shall report to the Congress within 24 months after November 15, 1990, with the findings of such assessment, together with any recommendations, and shall, as appropriate, develop and implement a control strategy for emissions of hydrogen sulfide to protect human health and the environment, based on the findings of such assessment, using authorities under this chapter including sections[3] 7411 of this title and this section.

(6) Hydrofluoric acid
Not later than 2 years after November 15, 1990, the Administrator shall, for those regions of the country which do not have comprehensive health and safety regulations with respect to hydrofluoric acid, complete a study of the potential hazards of hydrofluoric acid and the uses of hydrofluoric acid in industrial and commercial applications to public health and the environment considering a range of events including worst-case accidental releases and shall make recommendations to the Congress for the reduction of such hazards, if appropriate.

(7) RCRA facilities
In the case of any category or subcategory of sources the air emissions of which are regulated under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], the Administrator shall take into account any regulations of such emissions which are promulgated under such subtitle and shall, to the maximum extent practicable and consistent with the provisions of this section, ensure that the requirements of such subtitle and this section are consistent.

* * *

42 U.S.C. § 7416. Retention of State authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[2] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for

reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * *

(d) Rulemaking

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon

by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or

if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized
Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

Calendar No. 427

101st Congress, 1st Session | SENATE | Report 101-228

CLEAN AIR ACT AMENDMENTS OF 1989

REPORT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 1630

December 20, 1989.—Ordered to be printed

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that does not meet the standard is to be designated nonattainment. An area that meets the standard and does not contribute to another area that exceeds the standard is to be designated attainment. An area that cannot be classified on the basis of available information as meeting the standard is to be designated unclassifiable.

Revised section 107(f)(3) of the Act designated any area that did not meet the primary ambient air quality standard for ozone or carbon monoxide as of the last calendar year before the date of enactment of the bill as nonattainment. Revised section 107(f)(4) designates each area that was identified by EPA as a Group I area in the August 7, 1987, promulgation of the revised particulate standard (PM–10) or which contains a site for which monitoring data shows a violation of the air quality standard for PM–10 before the date of enactment as nonattainment.

Revised section 107(d)(5) of the Act provides that areas may be redesignated by the Administrator upon the request of the Governor of a State or on the Administrator's own motion. The Administrator must act to redesignate an area not currently designated as nonattainment as a nonattainment area within one hundred eighty days of receiving evidence that the area exceeds the national ambient air quality standard for any pollutant. In order to redesignate an area from nonattainment to attainment, the Administrator must promulgate the redesignation by rule, must determine that the area has attained the air quality standard and that attainment is due to permanent reductions in emissions, must have approved a maintenance plan, and determine that the State containing the area has met requirements of the Act applicable to the area. The Administrator may not redesignate an area from nonattainment to unclassified.

New paragraphs (2) and (3) of section 107(d) of the Act provide that the boundaries of an area that is designated nonattainment for ozone and that is located within a metropolitan statistical area (MSA) or a consolidated metropolitan statistical area (CMSA) are the boundaries of the MSA or CMSA, unless the State demonstrates that some portion of the MSA or CMSA does not contribute to violations of the air quality standard and that there is a geographical basis for excluding the portion. With respect to a serious carbon monoxide area, the Administrator may, by rule, include the entire MSA or CMSA in the nonattainment area.

DISCUSSION

This section of the bill restructures and clarifies the process for designating and redesignating areas of the country depending on their emissions and ambient air quality. The bill gives significant authority to the Administrator in order to overcome the deficiencies in current law that have failed to allow the Administrator to respond to new information about pollution levels and control needs.

Existing law, as interpreted by EPA, precludes the Administrator from issuing new designations or revising existing ones when an ambient standard is revised, as occurred with the promulgation in 1987 of the ambient standard for PM–10. Current law is also

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of title II recordkeeping or reporting requirements are calculated on a per day basis.

Fourth, new authority is provided to the Administrator to assess administrative penalties for violations of sections 203(a) (motor vehicle and engine provisions), 211(d) (fuel and fuel additive provisions), 216(b) (carbon dioxide emission standards), and 217(e) (nonroad engine and vehicle provisions). The maximum civil penalty that may be assessed by the Administrator under this authority is $200,000. Any such assessment can only be made after an opportunity for a hearing before the Administrator is provided, and the amount of the penalty assessed is to be based on the consideration of statutorily-prescribed factors. The Administrator is also authorized (as at present) to bring a civil action in Federal district court to assess and recover any civil penalty prescribed in title II of the Act, and similar factors are prescribed for consideration by the court in determining the penalty amount.

Fifth, this section revises the section 211(d) penalty provision, which currently provides for a mandatory forfeiture of $10,000 per day for violations of section 211 or fuel or fuel additive regulations issued under that section. The mandatory forfeiture provision is replaced with a provision for a civil penalty of up to $25,000 per day for each violation. In addition, the section clarifies that where violations of fuel standards are based on a multi-day averaging period, each day during the averaging period constitutes a separate day of violation. This section of the bill also provides injunctive authority to restrain violations of fuel statutory provisions and regulation, as is already available in the Act for violations of motor vehicle and stationary source requirements.

DISCUSSION

Experience with the mobile source provisions in title II of the Act has shown that the enforcement authorities in this title need to be strengthen and broadened in several ways. Most of the title II enforcement authorities have not been amended since 1970, and the impacts of inflation and nearly two decades of enforcement experience need to be accounted for by updating these authorities.

Anti-tampering.—Current law prohibits manufacturers, dealers, service station or garage operators, fleet owners or those in the business of leasing vehicles from removing or disabling ("tampering with") components of vehicle emission control systems. Individual owners or operators of vehicles are not currently prohibited from performing the same activities.

In its 1988 Motor Vehicle Tampering Survey, EPA concluded that 23 percent of the passenger cars and light-duty trucks surveyed in areas not covered by inspection/maintenance (I/M) programs and/or anti-tampering programs (ATP) showed evidence of tampering with at least one component. Significant amounts of tampering were also found in ATP-only areas (17 percent) and I/M plus ATP areas (16 percent).

Tampering can cause dramatic increases in emissions of hydrocarbons (HC), carbon monoxide (CO) and nitrogen oxides (NO_x). For example, a missing or damaged catalytic converter can increase HC and CO emissions by an average of 475 percent and 425 percent,

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currently recognized within the structure of section 112 and have no other statutory authorization.

There is now a broad consensus that the program to regulate hazardous air pollutants under section 112 of the Clean Air Act should be restructured to provide EPA with authority to regulate industrial and area source categories of air pollution (rather than the pollutants) with technology-based standards in the near term.

In light of these conclusions, the reported legislation makes fundamental changes in the basic provisions of section 112 of the Clean Air Act. The bill establishes a list of 191 air pollutants and a mandatory schedule for issuing emissions standards for the major sources of these pollutants. The standards are to be based on the maximum reduction in emissions which can be achieved by application of best available control technology. These new, technology-based standards will become the principal focus of activity under section 112. Authority to issue health-based standards is preserved in modified form to be used for especially serious pollution problems.

This approach to regulation of toxic pollutants is not without precedent. It follows the general model which has been employed since the mid-1970's to control toxic effluents discharged to surface waters by major industrial point sources.

Under the 1972 amendments to the Clean Water Act, industrial dischargers were given two deadlines to control *conventional* pollutants (biological oxygen demand, suspended solids, and acidity): 1) by July 1, 1977 each facility was required to meet emissions limitations reflecting "best practicable control technology currently available" (so-called BPT limits); and 2) by July 1, 1983 each facility was to meet emissions limitations set according to "best available technology economically achievable" (BAT).

Toxic pollutants under the 1972 Act were to be treated differently. The Administrator was to publish a list of toxic pollutants within 90 days and within a year promulgate effluent standards that would provide an "ample margin of safety" to protect the most affected (aquatic) organisms. Thus, the structure of this authority to regulate toxic discharges to surface waters was very similar to the current structure of section 112 of the Clean Air Act.

During the five-year period following passage of the 1972 Clean Water Act, EPA promulgated standards for only six toxic pollutants. In 1975 the Environmental Defense Fund and the Natural Resources Defense Council brought suit against the Agency for failure to list more toxics and to promulgate standards as mandated by the Act. In June 1976, EPA and the plantiffs entered into a consent decree that established a new formula for the development of effluent standards for toxic water pollutants. This agreement created a list of 120 priority pollutants and required EPA to promulgate effluent guidelines based on best available control technology for each pollutant and each industrial category not later than December 31, 1980. Industrial dischargers were to be in compliance with these standards by July 1, 1983, the same deadline as established by the Act for BAT control of conventional pollutants. There were 14,000 dischargers divided into 21 industrial categories and 399 subcategories potentially subject to these new toxics standards.

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101st Congress
2d Session

HOUSE OF REPRESENTATIVES

Report
101-952

CLEAN AIR ACT AMENDMENTS OF 1990

CONFERENCE REPORT

TO ACCOMPANY

S. 1630

October 26, 1990.—Ordered to be printed

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1630) to amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. Certain matters agreed to in conference are noted below.

The Conference agreement on S. 1630, the Clean Air Act Amendments of 1990, includes provisions addressing attainment and maintenance of ambient air quality standards, mobile sources of air pollution, toxic air pollution, acid rain, permits, enforcement, stratospheric ozone protection, miscellaneous provisions, and clean air research. A summary of the conference agreement follows.

TITLE I—NONATTAINMENT PROVISIONS

Title I of the conference agreement, which adopts the House Title I except with respect to transportation related issues and with a change concerning the regulation of oxides of nitrogen, divides areas that fail to meet any one of the pollution standards listed above into categories, depending on the severity of the problem, and sets out requirements of different levels of stringency for each category.

Depending on the severity of the pollution problem, nonattainment areas for any of the pollutants must attain the health standard for ozone within five, ten, fifteen, or seventeen years (twenty years for Los Angeles).

In the case of ozone, areas must reduce emissions of volatile organic compounds (VOCs), a precursor of ozone, by 3 percent per year (with waivers for certain specified conditions) until the standard is attained.

Vehicle inspection and maintenance programs must be upgraded in ozone and carbon monoxide areas that already have such programs and must be instituted in most other areas that do not already have them.

The Environmental Protection Agency (EPA) is required to impose one of the following sanctions in an area that fails to pre-

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pare or implement a plan to attain an air quality standard: limited use of Federal highway funds or a requirement that new industry offset emissions at a 2 to 1 ratio.

Under the safety exemption to highway sanctions, the principal purpose of the project must be to improve highway safety, but the project may also have other important benefits.

The definition of major sources in current law is modified so that smaller sources of VOCs are required to control emissions (50 tons in moderate and serious areas; 25 tons in severe areas; 10 tons in extreme areas).

When a State fails to develop a plan that meets the requirements of the law, the EPA is required to promulgate a Federal Implementation Plan.

The EPA is required to issue control requirements for a number of sources of pollution, including commercial and consumer products.

A new program is established to address the interstate transport of ozone air pollution.

The conferees adopt the House language on rocket testing with the agreement that the appropriate Federal agency may find that testing required for a civilian or commercial launch program is essential to the national security.

Title II—Motor Vehicle-Related Provisions

Title II is based on the House bill with a number of significant modifications.

Reformulated gasoline

Cleaner, reformulated gasoline would be mandated in the nine cities with the most severe ozone pollution beginning in 1995. States could elect to have the requirements apply in other cities with ozone pollution problems. In comparison with conventional gasoline, reformulated gasoline would be required to have 15 percent lower emissions of VOCs and toxic chemicals by 1995, and greater reductions by 2000. The agreement also contains additional standards for oxygen, benzene, and aromatics.

Under section 211(k)(4), a petition for the certification of a fuel formulation or slate of fuel formulations is deemed certified if the Administrator fails to act on the petition within 180 days of its receipt. Such a petition is deemed certified until the Administrator completes action on the petition. In the event that the Administrator subsequently denies such a petition, the conferees intend that the Administrator will take appropriate steps to ensure orderly and prompt compliance.

Section 219 of the bill includes a credit program to provide flexibility in meeting the bill's requirements on the oxygen, aromatic hydrocarbon, and benzene content of reformulated gasoline. A credit program is the mechanism by which persons subject to these requirements will be allowed to pool gasoline sold in a given covered area for purposes of determining compliance with these requirements.

Under this credit program, a person may earn credit for gasoline with a higher oxygen content, lower aromatic hydrocarbon content,

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Permits

It is the conferees' intent that EPA not use the permit hammer approach (case-by-case) to avoid or delay meeting MACT requirements.

Routine Emissions From "Area" Sources

Based on the list of pollutants mentioned above, EPA can also list an area source category just as the agency would list a major source category, and can require MACT. EPA must list sufficient source categories to assure that 90% of the emissions of the 30 most serious area source pollutants are regulated.

Five years after enactment, EPA is to propose a national urban air toxics strategy to reduce cancer risks associated with urban air toxics by 75%. EPA is to report on reductions achieved in 8 and 12 years intervals.

Accidental Releases

The agreement contains provisions that are designed to prevent chemical accidents.

EPA is to publish a list of at least 100 regulated substances, of which 16 are listed in the agreement.

EPA is authorized to promulgate accident prevention regulations.

The conferees do not intend the term "stationary source" to apply to transportation, including the storage incident to such transportation, of any regulated substance or other extremely hazardous substance under the provisions of this subsection.

The prohibition on listing substances for the accident prevention program which have been listed under this section 108(a) does not preclude the listing of anhydrous sulfur dioxide which is on the initial list.

The conference agreement establishes a Chemical Safety and Hazard Investigation Board, similar to the National Transportation Safety board, to investigate chemical accidents.

The Board is authorized to investigate accidental releases which cause substantial property damage. Substantial damage would include fires, explosions, and other events which cause damages that are very costly to repair or correct, and would not include incidental damage to equipment or controls.

Hazard assessments required under this section shall include:

(1) basic data on the source, units at the source facility which contain or process regulated substances (including the longitude and latitude of such units), operating procedures, population of nearby communities, and the meteorology of the area where the source is located;

(2) an identification of the potential points of accidental releases from the source of regulated substances;

(3) an identification of any previous accidental releases from the source including the amounts released, frequencies, and durations;

(4) an identification of a range (including worst case events) of potential releases from the source, including an estimate of

The conferees intend that termination of the seasonal or temporary use of a cleaner fuel shall not be considered a modification for purposes of section 111 or part C of Title I.

TITLE V—PERMIT PROVISIONS

The conference agreement includes provisions that require various sources of air pollution to obtain operating permits which would ensure compliance with all applicable requirements of the Clean Air Act.

Permit programs

EPA is required to issue permit program regulations within one year. States are required to develop programs consistent with those regulations. The programs would be in effect within four years, and the requirement to have a permit would be phased-in over the ensuing three years.

Consistent with the general provisions of section 116 of the Clean Air Act, the conferees understand that a State may establish additional, more stringent permitting requirements, but a State may not establish permit requirements that are inconsistent with the national permitting requirements of this Act, including this title.

EPA Oversight of Permit Programs

The conference agreement provides EPA with the authority to review permits proposed to be issued by a State and to object to permits that violate the Clean Air Act. EPA would also have the opportunity to waive review of permits for small sources.

State response to EPA objections

Under the conference agreement, States would be granted 90 days to revise permits to meet any EPA objection. If the State fails to revise the permit, EPA will issue or deny the permit.

Permit shield

The agreement provides that compliance with a permit is deemed compliance with the requirements of the permit program. Permit compliance also may be deemed compliance with other applicable provisions of the Clean Air Act if the permit has been issued in accordance with Title V and includes those provisions, or if the permitting authority includes in the permit a specific determination that such provisions are not applicable.

Operational flexibility

Facilities will be authorized to make changes in operations without the necessity for a permit revision so long as: (i) the changes are not "modifications" under Title I of the Act, (ii) the changes will not result in emissions that exceed emissions allowable under the permit, and (iii) the facility provides EPA and the permitting authority with seven days written notice in advance of the changes.

Processing permit applications

Except for applications submitted within the first year of the permit program (for which a 3-year phased review is allowed),

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are subsequently destroyed is too broad and does not include adequate safeguards to preclude abuse. In the course of implementing this Act, however, EPA shall consider whether an exclusion will be allowed on a case-by-case basis for the manufacture of controlled substances that are (1) coincidental, unavoidable byproducts of a manufacturing process and (2) immediately contained and destroyed by the producer using maximum available control technologies.

TITLE VII—FEDERAL ENFORCEMENT

The conference agreement includes a number of provisions that enhance the enforcement authority of the Federal government under the Clean Air Act while at the same time providing substantive procedural safeguards. In general terms, the agreement increases the range of civil and criminal penalties for violations of the Clean Air Act.

SIP and permit violations

The conference agreement revises and strengthens EPA enforcement authority regarding violations of State Implementation Plans and permits, including authority to bring civil actions for injunctive relief and penalties, as well as new authority to issue administrative penalty orders in response to violations. These authorities can also be used by EPA when States fail to enforce SIPs or permit requirements.

Violations of other requirements

EPA is authorized to initiate a range of enforcement actions for a number of violations of specified sections and titles of the Act. Included is authority to issue administrative penalty orders, file civil actions, and initiate criminal proceedings via the Attorney General.

It is the conferees' intention to provide the Administrator with prosecutorial discretion to decide not to seek sanctions under Section 113 for de minimis or technical violations in civil and criminal matters.

Criminal penalties

Criminal fines and penalties are included for a range of violations of the Act, including negligent or knowing violations that result in the endangerment of others, knowing violations of SIPs that occur after the violator is on notice of the violation, knowing violations of certain sections in the permit title, and knowing violations of the acid rain title or the stratospheric ozone protection title. In addition, the agreement provides criminal fines and penalties for the knowing filing of false statements and other similar recordkeeping, monitoring, and reporting violations. Consistent with other recent environmental statutes, criminal violations of the Clean Air Act are upgraded from misdemeanors to felonies.

The amendments add new criminal sanctions for recordkeeping, filing and other omissions. These provisions are not meant to penalize inadvertent errors. For criminal sanctions to apply, a source

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FOIA EPA-HQ-2016-009655

101st CONGRESS
1st SESSION

S. 1490

To amend the Clean Air Act to provide for the attainment and maintenance of the national ambient air quality standards, the control of toxic air pollutants, the prevention of acid deposition, and other improvements in the quality of the Nation's air.

IN THE SENATE OF THE UNITED STATES

AUGUST 3 (legislative day, JANUARY 3), 1989

Mr. CHAFEE (for himself, Mr. SIMPSON, Mr. DURENBERGER, Mr. WARNER, Mr. JEFFORDS, Mr. HUMPHREY, Mr. BOSCHWITZ, Mr. D'AMATO, Mr. DOLE, Mr. DOMENICI, Mr. EXON, Mr. GORTON, Mr. HATCH, Mr. HATFIELD, Mrs. KASSEBAUM, Mr. MCCAIN, Mr. MCCLURE, Mr. MURKOWSKI, Mr. RIEGLE, Mr. RUDMAN, Mr. STEVENS, Mr. THURMOND, Mr. WALLOP, Mr. BREAUX, and Mr. LEVIN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

---

A BILL

To amend the Clean Air Act to provide for the attainment and maintenance of the national ambient air quality standards, the control of toxic air pollutants, the prevention of acid deposition, and other improvements in the quality of the Nation's air.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.**

4 This Act may be cited as the "Clean Air Act Amend-
5 ments of 1989".

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1 "(3) The Administrator may promulgate regula-
2 tions which establish the elements of tribal implemen-
3 tation plans and procedures for approval or disapproval
4 of tribal implementation plans and portions thereof.
5 "(4) In any case in which the Administrator de-
6 termines that the treatment of Indian tribes as identical
7 to States is inappropriate or administratively infeasible,
8 the Administrator may provide, by regulation, other
9 means by which the Administrator will directly admin-
10 ister such provisions so as to achieve the appropriate
11 purpose.
12 "(5) Until such time as the Administrator promul-
13 gates regulations pursuant to this subsection, the Ad-
14 ministrator may continue to provide financial assistance
15 to eligible Indian tribes under section 105.".
16 **SEC. 108. MISCELLANEOUS.**
17 (a) TRANSPORTATION PLANNING GUIDANCE.—Section
18 108 of the Clean Air Act is amended by—
19 (1) revising the first sentence of subsection (e) to
20 read as follows:
21 "(e) Within nine months after the date of enactment of
22 the Clean Air Act Amendments of 1989 and periodically
23 thereafter as necessary to maintain a continuous process of
24 transportation and air quality planning, including emissions
25 inventory development, the Administrator shall, after consul-

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FOIA EPA-HQ-2016-009655

1 "(B) propose regulations establishing standards of
2 performance for at least 50 per centum of such catego-
3 ries of sources within four years of the date of enact-
4 ment of the Clean Air Act Amendments of 1989; and
5 "(C) propose regulations for the remaining catego-
6 ries of sources within six years of the date of enact-
7 ment of the Clean Air Act Amendments of 1989;".
8 (d) REGULATION OF EXISTING SOURCES.—Section
9 111(d)(1)(A)(i) of the Clean Air Act is amended by striking
10 "or 112(b)(1)(A)" and inserting "or emitted from a source
11 category which is regulated under section 112.".
12 (e) AUTHORITY TO OBTAIN INFORMATION.—Section
13 114(a)(1) of the Clean Air Act is amended by—
14 (1) striking the term "or" and inserting a comma
15 immediately after the phrase "any emission source";
16 and
17 (2) inserting "or who manufactures emission con-
18 trol equipment or process equipment, or who the Ad-
19 ministrator believes may have information necessary
20 for the purposes set forth in this subsection" immedi-
21 ately after "any person who owns or operates an emis-
22 sion source.".
23 (f) CONSULTATION.—The second-to-last sentence of
24 section 121 of the Clean Air Act is amended to read as fol-
25 lows: "The Administrator shall update as necessary the origi-

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FOIA EPA-HQ-2016-009655

Calendar No. 427

101st CONGRESS
1st SESSION

S. 1630

[Report No. 101–228]

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14 (legislative day, SEPTEMBER 6), 1989

Mr. BAUCUS (for himself, Mr. CHAFEE, Mr. BURDICK, Mr. DURENBERGER, Mr. GRAHAM, Mr. JEFFORDS, Mr. LAUTENBERG, Mr. LIEBERMAN, Mr. MITCHELL, Mr. MOYNIHAN, Mr. WARNER, Mr. COHEN, and Mr. CRANSTON) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

DECEMBER 20, 1989

Reported, under authority of the order of the Senate of November 22 (legislative day, November 6, 1989), by Mr. BURDICK, with an amendment

[Strike all after the enacting clause and insert the part printed in italic]

A BILL

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

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1 *assign release prevention, mitigation, or response authorities*
2 *otherwise established by law.*
3 *"(k) STATE AUTHORITY.—Nothing in this section*
4 *shall preclude, deny, or limit any right of a State or political*
5 *subdivision thereof to adopt or enforce any regulation, re-*
6 *quirement, or standard (including any procedural require-*
7 *ment) that is more stringent than a regulation, requirement,*
8 *or standard in effect under this section or that applies to a*
9 *substance not subject to this section.*
10 *"(l) AUTHORIZATION.—There are authorized to be ap-*
11 *propriated to the Administrator such sums as may be neces-*
12 *sary to carry out the provisions of this section.".*
13 *CONFORMING AMENDMENTS*
14 *SEC. 305. (a) Section 111(d)(1) of the Clean Air Act is*
15 *amended by striking "112(b)(1)(A)" and inserting in lieu*
16 *thereof "112(b)".*
17 *(b) Section 111 of the Clean Air Act is amended by*
18 *striking paragraphs (g)(5) and (g)(6) and redesignating the*
19 *succeeding paragraphs accordingly. Such section is further*
20 *amended by striking "or section 112" in paragraph (g)(5) as*
21 *redesignated in the preceding sentence.*
22 *(c) Section 114(a) of the Clean Air Act is amended by*
23 *striking "or" after "section 111," and by inserting ", or any*
24 *accident prevention regulation under section 129," after "sec-*
25 *tion 112".*

FOIA EPA-HQ-2016-009655

IB

Printed as Passed

May 23, 1990

Ordered to be printed as passed by the

House of Representatives

101ST CONGRESS
2D SESSION

S. 1630

AN ACT

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

Strike out all after the enacting clause and insert:

1 ***SECTION 1. SHORT TITLE, REFERENCE, AND TABLE OF CON-***
2 ***TENTS.***

3 *(a) SHORT TITLE.—This Act may be cited as the*
4 *"Clean Air Act Amendments of 1990".*

5 *(b) REFERENCE.—Whenever in this Act an amend-*
6 *ment or repeal is expressed in terms of an amendment to, or*
7 *repeal of, a section or other provision, the reference shall be*
8 *considered to be made to a section or other provision of the*
9 *Clean Air Act.*

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Sec. 101. General planning requirements.
Sec. 102. General provisions for nonattainment areas.
Sec. 103. Additional provisions for ozone nonattainment areas.
Sec. 104. Additional provisions for carbon monoxide nonattainment areas.

ED_000948_00008407-00134

FOIA EPA-HQ-2016-009655

1 *of sources within 2 years after the date of the enact-*
2 *ment of the Clean Air Act Amendments of 1990;*
3 *"(B) propose regulations establishing standards of*
4 *performance for at least 50 percent of such categories*
5 *of sources within 4 years after the date of the enact-*
6 *ment of the Clean Air Act Amendments of 1990; and*
7 *"(C) propose regulations for the remaining catego-*
8 *ries of sources within 6 years after the date of the en-*
9 *actment of the Clean Air Act Amendments of 1990.".*
10 *(e) SAVINGS CLAUSE.—Section 111(a)(3) (42 U.S.C.*
11 *7411(f)(1)) is amended by adding at the end: "Nothing in*
12 *title II of this Act relating to nonroad engines shall be con-*
13 *strued to apply to stationary internal combustion engines.".*
14 *(f) REGULATION OF EXISTING SOURCES.—Section*
15 *111(d)(1)(A)(i) (42 U.S.C. 7411(d)(1)(A)(i)) is amended by*
16 *striking "or 112(b)(1)(A)" and inserting "or emitted from a*
17 *source category which is regulated under section 112".*
18 *(g) CONSULTATION.—The penultimate sentence of sec-*
19 *tion 121 (42 U.S.C. 7421) is amended to read as follows:*
20 *"The Administrator shall update as necessary the original*
21 *regulations required and promulgated under this section (as*
22 *in effect immediately before the date of the enactment of the*
23 *Clean Air Act Amendments of 1990) to ensure adequate*
24 *consultation.".*

ED_000948_00008407-00135

From: McCabe, Janet
Location: WJC-N 5400 + Video with RTP + Conf Code ; Participant Code: Conf Code
Conf Code
Importance: Normal
Subject: CPP Reconsideration Petition Topics (Tier 1, SAN 5548)
Start Date/Time: Wed 9/7/2016 7:00:00 PM
End Date/Time: Wed 9/7/2016 8:00:00 PM
McCabe Meeting Request - CPP Reconsideration Petition Topics (Tier 1 SAN....docx
CPP Reconsid Petition Topics Part V 9_7_16.docx

To: McCabe, Janet; Goffman, Joseph; Banister, Beverly; Niebling, William; Page, Steve; Koerber, Mike; Tsirigotis, Peter; Culligan, Kevin; Fruh, Steve; Boswell, Colin; Kornylak, VeraS; Santiago, Juan; Wood, Anna; Dunham, Sarah; Harvey, Reid; Adamantiades, Mikhail; Schmidt, Lorie; Zenick, Elliott; Hoffman, Howard
Cc: South, Peter; Henigin, Mary; Thompson, Fred; Srivastava, Ravi; McLamb, Marguerite; Vasu, Amy; Conner, Lisa; Alston, Lala; Sanders, Maria; Johnson, Tanya; Garrett, Pamela; Eck, Janet

From: Atkinson, Emily
Location: Aspen, CO
Importance: Normal
Subject: Aspen Clean Energy Event (Confirmed)
Categories: Green Category
Start Date/Time: Mon 7/25/2016 12:00:00 PM
End Date/Time: Mon 7/25/2016 9:00:00 PM
RE: Aspen Clean Energy - July 22-25

From: Washington, Yvette
Location: Washington Hilton Hotel, 1919 Connecticut Avenue, NW
Importance: Normal
Subject: EIA Annual Conference (Confirmed)
Categories: Green Category
Start Date/Time: Mon 7/11/2016 2:00:00 PM
End Date/Time: Mon 7/11/2016 4:00:00 PM
RE: Aspen Clean Energy - July 22-25
Attendee list - Name, org, affil pdf.pdf
Joseph Goffman Event Form_10 15.docx
Agenda _ Draft 4_12.docx
FW: 2016 EIA Conference Speaker Logistics - Clean Power Plan
2016 EIA Conference Agenda.pdf

From: Bailey, KevinJ
Location: Call: Conf Code code: Conf Code
Importance: Normal
Subject: Call w/ House Science and HEC staff, re: HEC stay letter
Start Date/Time: Fri 5/20/2016 7:00:00 PM
End Date/Time: Fri 5/20/2016 7:30:00 PM
051316 EPA Clean Power Plan.pdf

All,

We'll be speaking with like Pamitha Weerasinghe of House Science minority and Jean Fruci of HEC minority about the HEC letter regarding the CPP stay.

Call-in#: Conf Code
Code: Conf Code

From: Atkinson, Emily
Location: WJC-N 5400
Importance: Normal
Subject: Meet with Affordable Housing Working Group re: CPP (Confirmed)
Categories: Blue Category
Start Date/Time: Thur 5/5/2016 5:00:00 PM
End Date/Time: Thur 5/5/2016 5:45:00 PM
RE: Meeting request with Affordable Housing Working Group
Confirmed 5/5 at 1pm: Meeting request with Affordable Housing Working Group

To: Joe Goffman, Jacob Moss, Cate Hight, Reid Harvey, Sarah Dunham, Kevin Culligan
Outside Attendees (in person):

Claire Rosenberger
Ethan Handelman
Rebekah King
Saru Nerukar
Lauren Ross
Michael McKnight
Dawone Robinson
Khalil Shahyd
Todd Nedwick
Ellen Lurie Hoffman
Elizabeth Beardsley

From: Atkinson, Emily
Location: 50 F Street NW
Importance: Normal
Subject: North Dakota Association of Rural Electric Cooperatives (NDaREC) Meeting (Confirmed)
Categories: Blue Category
Start Date/Time: Tue 5/3/2016 6:15:00 PM
End Date/Time: Tue 5/3/2016 7:00:00 PM
RE: EPA Staffer Request for 3 May 2016
Fwd: North Dakota event next Tuesday May 3rd
2016 Leg. Rally Agenda with ND Activities.pdf

To: Goffman, Joe; Lewis, Josh; Bailey, Kevin
FYI: Niebling, William

To: Shahyd, Khalil[kshahyd@nrdc.org]
Cc: tnedwick@nhtinc.org[tnedwick@nhtinc.org]; Ethan Handelman[ehandelman@nhc.org]
From: Atkinson, Emily
Sent: Fri 4/22/2016 7:20:43 PM
Subject: Confirmed 5/5 at 1pm: Meeting request with Affordable Housing Working Group

You are confirmed for a 45 minute meeting on Thursday, May 5 at 1:00pm with Joe Goffman.

Directions and procedures to 1200 Pennsylvania Avenue NW:

Metro: If you come by Metro get off at the Federal Triangle metro stop. Exit the metro station and go up two sets of escalators to the surface level and turn right. You will see a short staircase and wheelchair ramp leading to a set of glass doors with the EPA logo - that is the William Jefferson Clinton Federal Building, North Entrance.

Taxi: Direct the taxi to drop you off on 12th Street NW, between Constitution and Pennsylvania Avenues, at the elevator for the Federal Triangle metro stop - this is almost exactly half way between the two avenues on 12th Street NW. Facing the building with the EPA logo and American flags, walk toward the building and take the glass door on your right hand side with the escalators going down to the metro on your left – that is the North Lobby of the William Jefferson Clinton building.

Security Procedures: A government issued photo id is required to enter the building and it is suggested you arrive 15 minutes early in order to be cleared and arrive at the meeting room on time. Upon entering the lobby, the meeting attendees will be asked to pass through security and provide a photo ID for entrance. Let the guards know that you were instructed to call 202-564-7404 for a security escort.

Please send me a list of participants in advance of the meeting and feel free to contact me should you need any additional information.

Emily

Emily Atkinson
Staff Assistant

Immediate Office of the Acting Assistant Administrator
Office of Air and Radiation, USEPA
Room 5406B, 1200 Pennsylvania Avenue NW
Washington, DC 20460
Voice: 202-564-1850
Email: atkinson.emily@epa.gov

From: Shahyd, Khalil [mailto:kshahyd@nrdc.org]
Sent: Friday, April 22, 2016 1:58 PM
To: Atkinson, Emily <Atkinson.Emily@epa.gov>
Cc: tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>
Subject: RE: Meeting request with Affordable Housing Working Group

Hello Emily,

Thanks for setting this up so quickly. That date and time works for us.

Khalil Shahyd – Project Manager

Urban Solutions Program

Natural Resources Defense Council

1152 15th Street NW, Washington, DC 20005

|202.513.6264| http://www.nrdc.org | kshahyd@nrdc.org

http://www.energyefficiencyforall.org/

From: Atkinson, Emily [mailto:Atkinson.Emily@epa.gov]
Sent: Thursday, April 21, 2016 11:30 AM
To: Shahyd, Khalil
Cc: tnedwick@nhtinc.org; Ethan Handelman
Subject: RE: Meeting request with Affordable Housing Working Group

Hi Kahlil,

It looks like we could fit this in as a 45 minute meeting on Thursday, May 5 at 1:00pm. Let me know if this could work on your end.

Thank you.

Emily

Emily Atkinson
Staff Assistant

Immediate Office of the Acting Assistant Administrator
Office of Air and Radiation, USEPA
Room 5406B, 1200 Pennsylvania Avenue NW
Washington, DC 20460
Voice: 202-564-1850
Email: atkinson.emily@epa.gov

From: Shahyd, Khalil [mailto:kshahyd@nrdc.org]
Sent: Thursday, April 21, 2016 11:10 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Moss, Jacob <Moss.Jacob@epa.gov>; tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Meeting request with Affordable Housing Working Group

Great, we look forward to the discussion.

Thanks,

Khalil Shahyd – Project Manager

Urban Solutions Program

Natural Resources Defense Council

1152 15th Street NW, Washington, DC 20005

|202.513.6264| http://www.nrdc.org | kshahyd@nrdc.org

http://www.energyefficiencyforall.org/

From: Goffman, Joseph [mailto:Goffman.Joseph@epa.gov]
Sent: Thursday, April 21, 2016 10:57 AM
To: Shahyd, Khalil
Cc: Moss, Jacob; tnedwick@nhtinc.org; Ethan Handelman; Atkinson, Emily
Subject: RE: Meeting request with Affordable Housing Working Group

Sounds good, Khalil. Thanks for getting in touch on this. We can set something up.

From: Shahyd, Khalil [mailto:kshahyd@nrdc.org]
Sent: Thursday, April 21, 2016 10:16 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Browne, Cynthia <Browne.Cynthia@epa.gov>
Cc: Moss, Jacob <Moss.Jacob@epa.gov>; tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>
Subject: Meeting request with Affordable Housing Working Group

Good morning Mr. Goffman,

I hope you are well. Our Affordable Housing CPP working would like to request a follow-up meeting with you and colleagues to discuss the status of key elements of the Clean Power Plan in light of the stay.

We have continued to support local affordable housing groups and other advocates in states to continue working progressively on planning, but have also received many questions from them

as to we might expect from final CEIP and model rules going forward.

We would also like to know if there are any outstanding questions that we might assist your office in thinking through?

Are there any dates in May that would be available for a follow up meeting?

Thank you,

Khalil Shahyd – Project Manager

Urban Solutions Program

Natural Resources Defense Council

1152 15th Street NW, Washington, DC 20005

|202.513.6264| http://www.nrdc.org | kshahyd@nrdc.org

http://www.energyefficiencyforall.org/

To: Atkinson, Emily[Atkinson.Emily@epa.gov]
From: Goffman, Joseph
Sent: Thur 4/21/2016 3:13:41 PM
Subject: RE: Meeting request with Affordable Housing Working Group

Just me. Plus Jacob, Cate Hight, Reid, Sarah and Kevin. Thanks.

From: Atkinson, Emily
Sent: Thursday, April 21, 2016 11:12 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: RE: Meeting request with Affordable Housing Working Group

Is this a Janet meeting to or just you?

How long would you like to meet with them and what staff should be included on the invite?

From: Goffman, Joseph
Sent: Thursday, April 21, 2016 10:57 AM
To: Shahyd, Khalil <kshahyd@nrdc.org>
Cc: Moss, Jacob <Moss.Jacob@epa.gov>; tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Meeting request with Affordable Housing Working Group

Sounds good, Khalil. Thanks for getting in touch on this. We can set something up.

From: Shahyd, Khalil [mailto:kshahyd@nrdc.org]
Sent: Thursday, April 21, 2016 10:16 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Browne, Cynthia <Browne.Cynthia@epa.gov>
Cc: Moss, Jacob <Moss.Jacob@epa.gov>; tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>
Subject: Meeting request with Affordable Housing Working Group

Good morning Mr. Goffman,

I hope you are well. Our Affordable Housing CPP working would like to request a follow-up meeting with you and colleagues to discuss the status of key elements of the Clean Power Plan in light of the stay.

We have continued to support local affordable housing groups and other advocates in states to continue working progressively on planning, but have also received many questions from them as to we might expect from final CEIP and model rules going forward.

We would also like to know if there are any outstanding questions that we might assist your office in thinking through?

Are there any dates in May that would be available for a follow up meeting?

Thank you,

Khalil Shahyd – Project Manager

Urban Solutions Program

Natural Resources Defense Council

1152 15th Street NW, Washington, DC 20005

|202.513.6264| http://www.nrdc.org | kshahyd@nrdc.org

http://www.energyefficiencyforall.org/

To: Atkinson, Emily[Atkinson.Emily@epa.gov]; Cyran, Carissa[Cyran.Carissa@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]
From: Goffman, Joseph
Sent: Wed 4/27/2016 3:03:34 PM
Subject: Fwd: North Dakota event next Tuesday May 3rd
2016 Leg. Rally Agenda with ND Activities.pdf
ATT00001.htm

FYI

- Joseph Goffman
Sent from my iPhone

Begin forwarded message:

From: "Lewis, Josh" <Lewis.Josh@epa.gov>
Date: April 27, 2016 at 8:19:35 AM EDT
To: "Goffman, Joseph" <Goffman.Joseph@epa.gov>
Cc: "Niebling, William" <Niebling.William@epa.gov>, "Bailey, KevinJ" <Bailey.KevinJ@epa.gov>
Subject: North Dakota event next Tuesday May 3rd

Joe,

Attached is the agenda for the ND Rural Coops meeting – you'll see you're on the agenda for 45 mins, from 2:15 -3. The tentative plan is for you to give a CPP update for 10-15 minutes and then answer questions. Though the focus is CPP, I could see them asking about methane and other OAR rules too during the Q/A.

Here's the 2 line summary from most recent email from Liam (Sen Heitkamp staffer): These guys are all really good guys – they have major concerns with EPA's bump up to a 45% reduction in the final rule – but they'll want to focus on what they should be doing in the interim and how EPA can be helpful as they continue to look at planning for some level of major reductions under the existing CPP or a revised one depending on what the courts decide.

Additional background (from an older Liam email): The North Dakota Association of Rural Electric Cooperatives (NDaREC) is holding a legislative conference in Washington,

DC on 3 May 2016. They expect to have 25-30 North Dakotans at the conference, with a handful of Washington based folks from NRECA and a few other like-minded groups to the state organization. They generally want to hear mostly about CPP, what they should be thinking about while the stay is in place, what work EPA is doing while the stay remains in place – and take some questions/concerns from the group.

Josh Lewis

EPA/Office of Congressional Affairs

Office: 202 564 2095

Cell: Personal Cell/email

To: Lewis, Josh[Lewis.Josh@epa.gov]; Atkinson, Emily[Atkinson.Emily@epa.gov]
Cc: Bailey, KevinJ[Bailey.KevinJ@epa.gov]
From: Niebling, William
Sent: Tue 4/19/2016 5:55:31 PM
Subject: RE: EPA Staffer Request for 3 May 2016

Would be happy to be optional but will probably not join.

From: Lewis, Josh
Sent: Tuesday, April 19, 2016 1:47 PM
To: Atkinson, Emily <Atkinson.Emily@epa.gov>
Cc: Niebling, William <Niebling.William@epa.gov>; Bailey, KevinJ <Bailey.KevinJ@epa.gov>
Subject: FW: EPA Staffer Request for 3 May 2016

Joe is confirmed for 2:15-3 pm the 3rd. Kevin or I will probably go over too (given Sen Heitkamp's involvement), and cc'ing Will in case he's interested in the details.

Josh

From: Forsythe, Liam (Heitkamp) [mailto:Liam_Forsythe@heitkamp.senate.gov]
Sent: Tuesday, April 19, 2016 12:36 PM
To: Lewis, Josh <Lewis.Josh@epa.gov>
Cc: Dorgan, Brendon (Heitkamp) <Brendon_Dorgan@heitkamp.senate.gov>; Bailey, KevinJ <Bailey.KevinJ@epa.gov>
Subject: RE: EPA Staffer Request for 3 May 2016

2.15-3pm on the 3rd is perfect.

Thanks Josh!

From: Lewis, Josh [mailto:Lewis.Josh@epa.gov]
Sent: Tuesday, April 19, 2016 10:25 AM
To: Forsythe, Liam (Heitkamp)
Cc: Dorgan, Brendon (Heitkamp); Bailey, KevinJ
Subject: RE: EPA Staffer Request for 3 May 2016

How about 2:15-3 pm on May 3rd?

Josh Lewis

EPA/Office of Congressional Affairs

Office: 202 564 2095

Cell: Personal Cell/email

From: Forsythe, Liam (Heitkamp) [mailto:Liam_Forsythe@heitkamp.senate.gov]
Sent: Monday, April 18, 2016 2:12 PM
To: Lewis, Josh <Lewis.Josh@epa.gov>
Cc: Dorgan, Brendon (Heitkamp) <Brendon_Dorgan@heitkamp.senate.gov>; Distefano, Nichole <DiStefano.Nichole@epa.gov>; Brown, Tristan <Brown.Tristan@epa.gov>; Bailey, KevinJ <Bailey.KevinJ@epa.gov>
Subject: RE: EPA Staffer Request for 3 May 2016

That's fantastic Josh. Let us know what works for Joe and will make sure to build in the time for him.

Liam

From: Lewis, Josh [mailto:Lewis.Josh@epa.gov]

Sent: Monday, April 18, 2016 8:22 AM
To: Forsythe, Liam (Heitkamp)
Cc: Dorgan, Brendon (Heitkamp); Distefano, Nichole; Brown, Tristan; Bailey, KevinJ
Subject: FW: EPA Staffer Request for 3 May 2016

Hi Liam,

Joe Goffman will be happy to do this meeting. Just waiting to hear from his assistant on what time would be best for him on the afternoon of May 3. Should know in the next day or 2 and will circle back then.

Josh

From: Forsythe, Liam (Heitkamp) [mailto:Liam_Forsythe@heitkamp.senate.gov]
Sent: Monday, April 11, 2016 12:10 PM
To: Vaught, Laura <Vaught.Laura@epa.gov>; Distefano, Nichole <DiStefano.Nichole@epa.gov>
Cc: Dorgan, Brendon (Heitkamp) <Brendon_Dorgan@heitkamp.senate.gov>
Subject: EPA Staffer Request for 3 May 2016

Laura/Nichole –

The North Dakota Association of Rural Electric Cooperatives (NDaREC) is holding a legislative conference in Washington, DC on 3 May 2016. They are holding the afternoon portion of the conference over in a conference room right off the Hill in the building next to Kelly's Irish Times – 50 F Street NW. The head of NDaREC reached out and asked if it was possible to get a staffer/a couple of staffers from EPA over to the conference for no more than 30-45mins. to go over some of the major EPA issues effecting utilities.

They expect to have 25-30 North Dakotans at the conference, with a handful of Washington based folks from NRECA and a few other like-minded groups to the state organization. They generally want to hear mostly about CPP, what they should be

thinking about while the stay is in place, what work EPA is doing while the stay remains in place – and take some questions/concerns from the group. Is this something that you'd be able to send someone over for – it obviously does not need to be high-level, just someone with familiarity of what EPA continues to do on CPP during the stay and understand enough of the details of the CPP to take questions.

Liam

Liam Taggart Forsythe

Senior Counsel

U.S. Senator Heidi Heitkamp (D-ND)

Hart 110

Liam_Forsythe@heitkamp.senate.gov

202.224.2043

www.heitkamp.senate.gov

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Washington, Yvette[Washington.Yvette@epa.gov]; Atkinson, Emily[Atkinson.Emily@epa.gov]
From: Drinkard, Andrea
Sent: Tue 5/31/2016 2:14:30 PM
Subject: RE: Aspen Clean Energy - July 22-25

Sorry to get ahead of myself…☺

From: Goffman, Joseph
Sent: Tuesday, May 31, 2016 10:14 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Washington, Yvette <Washington.Yvette@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

Let me touch base with Janet first. Thanks.

From: Drinkard, Andrea
Sent: Tuesday, May 31, 2016 10:13 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Washington, Yvette <Washington.Yvette@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

One thing of note is that the ECOS STEP meeting is here in DC on the 21st and 22nd. I don't think you were planning to attend, but wanted to flag it nonetheless. Provided you have no interest in the STEP meeting, Yvette can you add this to Joe's calendar and I'll confirm him once you do.

Thanks!

From: Goffman, Joseph
Sent: Tuesday, May 31, 2016 10:10 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>

Cc: Washington, Yvette <Washington.Yvette@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

Ex. 5 - Deliberative

From: Drinkard, Andrea
Sent: Tuesday, May 31, 2016 9:56 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

I think you should do it!!! Sounds like a good event, they've been after you for a couple of years now… **Not Responsive**

From: Goffman, Joseph
Sent: Tuesday, May 31, 2016 9:46 AM
To: Roger Ballentine <roger@greenstrategies.com>
Cc: Gershuny, Greg <Greg.Gershuny@aspeninstitute.org>; Alexiev, Nicole <nicole.alexiev@aspeninstitute.org>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: Re: Aspen Clean Energy - July 22-25

I may actually be able to pull this off this year. Stay tuned later today or tomorrow AM. Thanks for pinging me!

Sent from my iPhone

On May 31, 2016, at 9:42 AM, Roger Ballentine <roger@greenstrategies.com> wrote:

> C'mon Joe! We want you there.

Roger S. Ballentine

President

Green Strategies, Inc.

816 Connecticut Ave N.W Suite 200

Washington D.C. 20006

(202) 328-1123

roger@greenstrategies.com

www.greenstrategies.com

This email message contains confidential, privileged information intended solely for the addressee. Please do not read, copy, save, or disseminate it unless you are the addressee. Nothing in this message is to be construed as tax advice and may not be used as such.

From: Gershuny, Greg [mailto:Greg.Gershuny@aspeninstitute.org]
Sent: Friday, May 27, 2016 8:25 AM
To: Goffman.joseph@Epa.gov
Cc: Roger Ballentine <roger@greenstrategies.com>; Alexiev, Nicole <nicole.alexiev@aspeninstitute.org>
Subject: Aspen Clean Energy - July 22-25

Hi Joe, I hope you are well. I wanted to follow up on our previous invitation to make sure you go the information for our clean energy forum July 22-25. I've also cc'd Nicole Alexiev and Roger Ballentine here who can provide more info or answer any of your questions.

Best, Greg

The Aspen Clean Energy Innovation Forum
Turbulence & Transition: Winning the Clean Energy Race

July 22 - 25, 2016
Aspen, Colorado

We hope you can join us for the **Aspen Clean Energy Innovation Forum, July 22 - 25 in Aspen, CO**, co-chaired by **Roger Ballentine**, President of Green Strategies and **Andy Karsner**, Managing Partner, Emerson Collective & Space Cowboy, GoogleX.

REGISTER HERE TO HOLD YOUR SEAT

The 7th year of the Forum will focus on "**Winning the Clean Energy Race**" in this current atmosphere of uncertainty with turbulence in the market and political transition on the horizon. The Paris Climate Agreement, the Supreme Court stay on the Clean Power Plan, the recent failure of some clean energy companies, and a major election which may put all three branches of government in play mark 2016 as a transitional year for clean energy where even the near term direction is unknown.

The Forum will convene ~60 energy executives, financiers, entrepreneurs, innovators, and policy experts for an in-depth and forward-looking examination of the needed market and policy drivers for clean energy innovation to prevail. The Forum is by invitation-only and offers a unique platform and unparalleled networking opportunities not available in a conventional conference setting. Participants interact and engage in values-based dialogue during 3 days of intimate roundtable discussions - over meals and during hikes - all within the beauty of the Colorado mountains.

Past forum participants have included U.S. Senators, Fortune 500 and utility CEOs, top state energy regulators, senior White House and Department of Energy staff, founders of tech startups, and senior energy sector officers from major financial institutions. Exchanges are enhanced by an informal atmosphere and a not-for-attribution rule that encourages creative thinking and candid speaking. The report from the 2015 forum can be found **here**.

More details are included at the following website
https://www.regonline.com/2016CleanEnergyInnovation.

We expect the forum to be full by mid-June so please register as soon as possible:

We hope to see you in Aspen!

Best,

Greg Gershuny

Energy and Environment Program

The Aspen Institute

Greg.Gershuny@AspenInstitute.org

202-736-3576

To: Atkinson, Emily[Atkinson.Emily@epa.gov]
Cc: Loving, Shanita[Loving.Shanita@epa.gov]
From: Drinkard, Andrea
Sent: Fri 6/3/2016 6:28:48 PM
Subject: RE: Aspen Clean Energy - July 22-25

The full length of the conference. I don't have additional info yet, but as soon as I do, I'll share it.

From: Atkinson, Emily
Sent: Friday, June 03, 2016 2:14 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Loving, Shanita <Loving.Shanita@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

What day has Joe committed to? And adding in Shanita since she will do Joe's travel to Aspen ☺

From: Drinkard, Andrea
Sent: Friday, June 03, 2016 2:11 PM
To: Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: Re: Aspen Clean Energy - July 22-25

It's confirmed for the full time. Care to come over and chat?

Andrea Drinkard

(o) 202.564.1601

Personal Cell/email

On Jun 3, 2016, at 2:09 PM, Atkinson, Emily <Atkinson.Emily@epa.gov> wrote:

I am taking on Joe's calendar again . . . any movement on this speech?

From: Drinkard, Andrea

Sent: Tuesday, May 31, 2016 10:15 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Washington, Yvette <Washington.Yvette@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

Sorry to get ahead of myself…☺

From: Goffman, Joseph
Sent: Tuesday, May 31, 2016 10:14 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Washington, Yvette <Washington.Yvette@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

Let me touch base with Janet first. Thanks.

From: Drinkard, Andrea
Sent: Tuesday, May 31, 2016 10:13 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Washington, Yvette <Washington.Yvette@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

One thing of note is that the ECOS STEP meeting is here in DC on the 21st and 22nd. I don't think you were planning to attend, but wanted to flag it nonetheless. Provided you have no interest in the STEP meeting, Yvette can you add this to Joe's calendar and I'll confirm him once you do.

Thanks!

From: Goffman, Joseph

Sent: Tuesday, May 31, 2016 10:10 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Washington, Yvette <Washington.Yvette@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

Ex. 5 - Deliberative

From: Drinkard, Andrea
Sent: Tuesday, May 31, 2016 9:56 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

I think you should do it!!! Sounds like a good event, they've been after you for a couple of years now.. **Not Responsive**

From: Goffman, Joseph
Sent: Tuesday, May 31, 2016 9:46 AM
To: Roger Ballentine <roger@greenstrategies.com>
Cc: Gershuny, Greg <Greg.Gershuny@aspeninstitute.org>; Alexiev, Nicole <nicole.alexiev@aspeninstitute.org>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: Re: Aspen Clean Energy - July 22-25

I may actually be able to pull this off this year. Stay tuned later today or tomorrow AM. Thanks for pinging me!

Sent from my iPhone

On May 31, 2016, at 9:42 AM, Roger Ballentine <roger@greenstrategies.com> wrote:

> C'mon Joe! We want you there.

Roger S. Ballentine

President

Green Strategies, Inc.

816 Connecticut Ave N.W Suite 200

Washington D.C. 20006

(202) 328-1123

roger@greenstrategies.com

www.greenstrategies.com

This email message contains confidential, privileged information intended solely for the addressee. Please do not read, copy, save, or disseminate it unless you are the addressee. Nothing in this message is to be construed as tax advice and may not be used as such.

From: Gershuny, Greg [mailto:Greg.Gershuny@aspeninstitute.org]
Sent: Friday, May 27, 2016 8:25 AM
To: Goffman.joseph@Epa.gov
Cc: Roger Ballentine <roger@greenstrategies.com>; Alexiev, Nicole <nicole.alexiev@aspeninstitute.org>
Subject: Aspen Clean Energy - July 22-25

Hi Joe, I hope you are well. I wanted to follow up on our previous invitation to make sure you go the information for our clean energy forum July 22-25. I've also cc'd Nicole Alexiev and Roger Ballentine here who can provide more info or answer any of your questions.

Best, Greg

The Aspen Clean Energy Innovation Forum
Turbulence & Transition: Winning the Clean Energy Race

July 22 - 25, 2016
Aspen, Colorado

We hope you can join us for the **Aspen Clean Energy Innovation Forum, July 22 - 25 in Aspen, CO**, co-chaired by **Roger Ballentine**, President of Green Strategies and **Andy Karsner**, Managing Partner, Emerson Collective & Space Cowboy, GoogleX.

REGISTER HERE TO HOLD YOUR SEAT

The 7th year of the Forum will focus on "**Winning the Clean Energy Race**" in this current atmosphere of uncertainty with turbulence in the market and political transition on the horizon. The Paris Climate Agreement, the Supreme Court stay on the Clean Power Plan, the recent failure of some clean energy companies, and a major election which may put all three branches of government in play mark 2016 as a transitional year for clean energy where even the near term direction is unknown.

The Forum will convene ~60 energy executives, financiers, entrepreneurs, innovators, and policy experts for an in-depth and forward-looking examination of the needed market and policy drivers for clean energy innovation to prevail. The Forum is by invitation-only and offers a unique platform and unparalleled networking opportunities not available in a conventional conference setting. Participants interact and engage in values-based dialogue during 3 days of intimate roundtable discussions - over meals and during hikes - all within the beauty of the Colorado mountains.

Past forum participants have included U.S. Senators, Fortune 500 and utility CEOs, top state energy regulators, senior White House and Department of Energy staff, founders of tech startups, and senior energy sector officers from major financial institutions. Exchanges are enhanced by an informal atmosphere and a not-for-attribution rule that encourages creative thinking and candid speaking. The report from the 2015 forum can be found **here**.

More details are included at the following website
https://www.regonline.com/2016CleanEnergyInnovation.

We expect the forum to be full by mid-June so please register as soon as possible:

We hope to see you in Aspen!

Best,

Greg Gershuny

Energy and Environment Program

The Aspen Institute

Greg.Gershuny@AspenInstitute.org

202-736-3576

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Administrator McCarthy, Gina
Sent: Mon 8/8/2016 6:48:38 PM
Subject: Re: Detail on CA Proposal

Cool. Thanks. You or Janet may want to let Dan know although I doubt he needs the heads up.

Sent from my iPhone

On Aug 8, 2016, at 1:52 PM, Goffman, Joseph <Goffman.Joseph@epa.gov> wrote:

The CA proposal is titled "California's Proposed Compliance Plan for the Federal Clean Power Plan Under Clean Air Act Section 111(d)." The introductory narrative acknowledges the stay and says ARB staff "anticipates submitting this Proposed Plan, if approved by the Board, to US EPA once the stay has been lifted." The plan is expected to be presented for final approval in Spring 2017 – so the public and other forthcoming process is expected to take some time. With regard to CEIP, the plan says that ARB "continues to be interested in this program, and will evaluate it, taking further regulatory or planning action as appropriate."

Not Responsive

Joseph Goffman

Associate Assistant Administrator for Climate

and Senior Counsel

Office of Air and Radiation

US EPA

Washington, DC.

To: Distefano, Nichole[DiStefano.Nichole@epa.gov]
From: Administrator McCarthy, Gina
Sent: Tue 12/1/2015 3:44:20 PM
Subject: RE: Statements of Administration Policy on S.J.Res. 23 and S.J.Res. 24

Great

From: Distefano, Nichole
Sent: Tuesday, December 01, 2015 10:36 AM
To: Administrator McCarthy, Gina **Administrator** >; McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Purchia, Liz <Purchia.Liz@epa.gov>; Fritz, Matthew <Fritz.Matthew@epa.gov>; Meiburg, Stan <Meiburg.Stan@epa.gov>
Subject: FW: Statements of Administration Policy on S.J.Res. 23 and S.J.Res. 24

Final SAPs for House CRA votes. Same strong veto language as previous CRAs

Nichole Distefano

Acting Associate Administrator

Office of Congressional and Intergovernmental Relations

Environmental Protection Agency

(202) 564-5200

Distefano.Nichole@epa.gov

From: FN-White House Office of Legislative Affairs [mailto:WhiteHouse-Office-Legislative-Affairs@who.eop.gov]
Sent: Tuesday, December 01, 2015 10:19 AM
To: FN-White House Office of Legislative Affairs <WhiteHouse-Office-Legislative-Affairs@who.eop.gov>
Subject: Statements of Administration Policy on S.J.Res. 23 and S.J.Res. 24

Good morning,

We wanted to make sure that you had seen the Statements of Administration Policy below on S.J.Res. 23 – *Disapproving EPA Rule on Greenhouse Gas Emissions from New, Modified, and Reconstructed Electric Utility Generating Units* and S.J.Res. 24 – *Disapproving EPA Rule on Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* that will be voted on later today.

Thank you,

White House Office of Legislative Affairs

November 17, 2015

(Senate)

STATEMENT OF ADMINISTRATION POLICY

S.J.Res. 23 – Disapproving EPA Rule on Greenhouse Gas Emissions from New, Modified, and Reconstructed Electric Utility Generating Units

(Sen. McConnell, R-KY, and 47 cosponsors)

The Administration strongly opposes S.J.Res. 23, which would undermine the public health protections of the Clean Air Act (CAA) and stop critical U.S. efforts to reduce dangerous carbon pollution from power plants. In 2007, the Supreme Court ruled that the CAA gives the U.S. Environmental Protection Agency (EPA) the authority to regulate greenhouse gas (GHG) pollution. In 2009, EPA determined that GHG pollution threatens Americans' health and welfare by leading to long-lasting changes to the climate that can, and are already, having a range of negative effects on human health and the environment. This finding is consistent with conclusions of the U.S. National Academy of Sciences, the Intergovernmental Panel on Climate Change, and numerous other national and international scientific bodies. Power plants account for roughly one-third of all domestic GHG emissions. While the United States limits dangerous emissions of arsenic, mercury, lead, particulate matter, and ozone precursor pollution from

power plants, the Carbon Pollution Standards and the Clean Power Plan put into place the first national limits on power plant carbon pollution. The Carbon Pollution Standards will ensure that new, modified, and reconstructed power plants deploy available systems of emission reduction to reduce carbon pollution.

S.J.Res. 23 would nullify carbon pollution standards for future power plants and power plants undertaking significant modifications or reconstruction, thus slowing our country's transition to cleaner, cutting-edge power generation technologies. Most importantly, the resolution could enable continued build-out of outdated, high-polluting, and long-lived power generation infrastructure and impede efforts to reduce carbon pollution from new and modified power plants – when the need to act, and to act quickly, to mitigate climate change impacts on American communities has never been more clear.

Since it was enacted in 1970, and amended in 1977 and 1990, each time with strong bipartisan support, the CAA has improved the Nation's air quality and protected public health. Over that same period of time, the economy has tripled in size while emissions of key pollutants have decreased by more than 70 percent. Forty-five years of clean air regulation have shown that a strong economy and strong environmental and public health protection go hand-in-hand.

Because S.J.Res. 23 threatens the health and economic welfare of future generations by blocking important standards to reduce carbon pollution from the power sector that take a flexible, common sense approach to addressing carbon pollution, if the President were presented with S.J.Res. 23, he would veto the bill.

* * *

November 17, 2015

(Senate)

STATEMENT OF ADMINISTRATION POLICY

S.J.Res. 24 – Disapproving EPA Rule on Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units

(Sen. Capito, R-WV, and 48 cosponsors)

The Administration strongly opposes S.J.Res. 24, which would undermine the public health protections of the Clean Air Act (CAA) and stop critical U.S. efforts to reduce dangerous carbon pollution from power plants. In 2007, the Supreme Court ruled that the CAA gives the U.S. Environmental Protection Agency (EPA) the authority to regulate greenhouse gas (GHG) pollution. In 2009, EPA determined that GHG pollution threatens Americans' health and welfare by leading to long-lasting changes to the climate that can, and are already, having a range of negative effects on human health and the environment. This finding is consistent with conclusions of the U.S. National Academy of Sciences, the Intergovernmental Panel on Climate Change, and numerous other national and international scientific bodies. Power plants account for roughly one-third of all domestic GHG emissions. While the United States limits dangerous emissions of arsenic, mercury, lead, particulate matter, and ozone precursor pollution from power plants, the Clean Power Plan and the Carbon Pollution Standards put into place the first national limits on power plant carbon pollution. The Clean Power Plan empowers States to costeffectively reduce emissions from existing sources and provides States and power plants a great deal of flexibility in meeting the requirements. EPA expects that under the Clean Power Plan, by 2030, carbon pollution from power plants will be reduced by 32 percent from 2005 levels.

By nullifying the Clean Power Plan, S.J.Res. 24 seeks to block progress towards cleaner energy, eliminating public health and other benefits of up to $54 billion per year by 2030, including thousands fewer premature deaths from air pollution and tens of thousands of fewer childhood asthma attacks each year. Most importantly, the resolution would impede efforts to reduce carbon pollution from existing power plants – the largest source of carbon pollution in the country – when the need to act, and to act quickly, to mitigate climate change impacts on American communities has never been more clear.

Since it was enacted in 1970, and amended in 1977 and 1990, each time with strong bipartisan support, the CAA has improved the Nation's air quality and protected public health. Over that same period of time, the economy has tripled in size while emissions of key pollutants have decreased by more than 70 percent. Forty-five years of clean air regulation have shown that a strong economy and strong environmental and public health protection go hand-in-hand.

Because S.J.Res. 24 threatens the health and economic welfare of future generations by blocking important standards to reduce carbon pollution from the power sector that take a flexible, common sense approach to addressing carbon pollution, if the President were presented with S.J.Res. 24, he would veto the bill.

* * * * * * *

To: Purchia, Liz[Purchia.Liz@epa.gov]
Cc: Emerson, Michael[Emerson.Michael@epa.gov]
From: Administrator McCarthy, Gina
Sent: Fri 10/23/2015 6:37:39 PM
Subject: Re: Clean Power Plan Clips

Thanks Liz.

Michael can you please print for me? Thanks

Sent from my iPhone

On Oct 23, 2015, at 2:26 PM, Purchia, Liz <Purchia.Liz@epa.gov> wrote:

Talked to Mark and he is going to follow up and provide you with more specifics, but here are a couple stories so far that continue to be updated.

The states joining West Virginia are Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, Arizona and North Carolina.

The WV AG held a press call today. We are making sure all reporters have our statement, blog from you and that they understand that an AG does not speak for the entire state. There was a press call with on the legal standing by Tom Miller, Iowa AG, Michael J. Myers, New York Assistant AG and Ricky Revez.

This AP story is the most widely distributed story and I think captures what all sides are saying today.

The Associated Press

States reliant on fossil fuels sue over new clean air rules

Originally published October 23, 2015 at 8:40 am Updated October 23, 2015 at 11:20 am

WASHINGTON (AP) — States and industry groups dependent on fossil fuels began filing court challenges Friday to President Barack Obama's Clean Power Plan, which aims to reduce greenhouse gas emissions.

A flurry of lawsuits was expected at the U.S. Court of Appeals as the Environmental Protection Agency published its final version of the new regulations. All but two of the 24 states filing challenges are led by Republicans. They deride the plan as an "unlawful power grab by Washington bureaucrats" that will kill coal mining jobs and drive up electricity costs.

"The Clean Power Plan is one of the most far-reaching energy regulations in this nation's history," said West Virginia Attorney General Patrick Morrisey, among those leading the challenges. "I have a responsibility to protect the lives of millions of working families, the elderly and the poor, from such illegal and unconscionable federal government actions."

The Obama administration and environmental groups counter that the rules are needed to cut carbon emissions while curbing the worst impacts of climate change and sea-level rise. They also say the plan will spur new clean-energy jobs.

The new rules would require states to cut carbon emissions by 30 percent by 2030. Each state has a customized target and is responsible for drawing up an effective plan to meet its goal.

"We expect polluters and their allies to throw everything they've got at the Clean Power Plan, and we expect them to fail," said Sierra Club Executive Director Michael Brune, among those defending the law. "The Clean Power Plan is based on a law passed by Congress, upheld by the Supreme Court, and demanded by the American people."

The EPA says it has authority to enact the plan under the Clean Air Act. At issue are dueling provisions added to the law by the House and Senate in 1990. The EPA's interpretation relies on the Senate language, but opponents argue that the House version

should win out.

"We are confident we will again prevail against these challenges and will be able to work with states to successfully implement these first-ever national standards to limit carbon pollution, the largest source of carbon emissions in the United States," said EPA Administrator Gina McCarthy.

EPA already regulates other power-plant pollutants under a different section of the Clean Air Act, and the opponents claim the law prohibits "double regulation."

Morrisey said he will seek a stay barring the plan from taking effect while the court challenges proceed, a question that will likely be up to the Supreme Court.

The states challenging the plan in court are Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas, Utah, West Virginia, Wyoming and Wisconsin.

There is some political variation within the list. Governors in Colorado, Michigan and New Mexico will comply with the new EPA rules even as attorneys general from their states joined the lawsuit. In North Carolina, the state environmental agency controlled by the Republican governor joined the opposition after the Democratic attorney general declined.

Members of Congress from coal-mining states also said Friday they will introduce new legislation aimed at blocking the EPA from enforcing the plan.

On the other side, 15 states and the District of Columbia say they are backing the Obama administration and will begin working to comply with the new rules.

Under the Clean Air Act, certain challenges to agency rules skip the federal district court

and go directly to the appeals court in Washington, D.C.

The Hill:

http://thehill.com/policy/energy-environment/257856-24-states-coal-company-sue-obama-over-climate-rule

Two dozen states sue Obama over coal plant emissions rule

Timothy Cama

A coalition of 24 states and a coal mining company filed lawsuits Friday to challenge the most significant piece of President Obama's environmental agenda, his signature climate change rule for power plants.

The litigants accuse the Environmental Protection Agency (EPA) of going far beyond the authority Congress granted to it by ordering a significant transformation of states' electricity generation, moving away from fossil fuels like coal and toward lower-carbon sources like wind and solar power.

They are asking the Court of Appeals for the District of Columbia Circuit to overturn the rule. They also want the court to immediately stop its implementation while it works its way through the courts.

West Virginia Attorney General Patrick Morrisey (R), who is leading the legal fight against the plan, called it "the single most onerous and illegal regulations that we've seen coming out of D.C. in a long time."

On a call with reporters, Morrisey repeated many of the long-held arguments against the rule: that it will hurt his state's coal mining industry, raise power rates for consumers and risk electricity reliability.

"EPA's rule is flatly illegal and one of the most aggressive executive branch power grabs we've seen in a long time," he said. "The EPA cannot do what it intends to do legally."

Morrissey said he wants the court to rule on a stay "as soon as possible." He noted it took a federal judge about a month to delay an EPA water regulation earlier this month, and said that could be a "guidepost" for how long litigation might take.

The climate rule, dubbed the Clean Power Plan, seeks a 32 percent cut in the power sector's carbon emissions by 2030, compared with 2005 levels. Each state has been assigned a specific emissions goal based on its unique circumstances, with flexibility in how the goals are met.

West Virginia and Murray led a similar coalition in two lawsuits earlier this year against the regulation that were deemed premature by the D.C. court. The first was before the final rule had been announced, and the second was in August, before it was published in the Federal Register.

The Obama administration has been steadfast in its defense of the legal backing of the rule.

The EPA said its rule is legal and will pass all court challenges.

"The Clean Power Plan has strong scientific and legal foundations, provides states with broad flexibilities to design and implement plans, and is clearly within EPA's authority under the Clean Air Act," EPA Administrator Gina McCarthy said in a Friday statement.

"We are confident we will again prevail against these challenges and will be able to work with states to successfully implement these first-ever national standards to limit carbon pollution the largest source of carbon emissions in the United States," she said.

The West Virginia and Murray lawsuits came the day the rule was published in the Federal Register, the first day court challenges can legally be filed.

The states joining West Virginia are Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, Arizona and North Carolina.

The attorneys general of 15 liberal states, along with the District of Columbia and New York City, are planning to intervene in the lawsuit to support the EPA.

Those state and city officials, led by New York State, said in August that they "fully anticipate defending the rules if they are challenged in court."

Friday also marks the first day lawmakers can file challenges under the Congressional Review Act, which allows Congress to quickly overturn regulations.

Lawmakers are mobilizing quickly against the new climate change rule from President Obama, announcing they will file formal congressional challenges on Monday.

Senate Majority Leader Mitch McConnell (R-Ky.) on Friday said he and Sen. Joe Manchin (D-W.Va.) will introduce a CRA resolution to block the Environmental Protection Agency (EPA) pollution standards for new power plants.

Sens. Shelley Moore Capito (R-W.Va.) and Heidi Heitkamp (D-N.D.) will introduce a resolution opposing the EPA's existing power plant rule at the same time. McConnell's office said he will schedule a vote on the resolutions shortly afterward.

"I have vowed to do all I can to fight back against this administration on behalf of the

thousands of Kentucky coal miners and their families, and this CRA is another tool in that battle," McConnell said in a statement.

"The CRAs that we will file will allow Congress the ability to fight these anti-coal regulations."

In the House, Rep. Ed Whitfield (R-Ky.) will introduce the resolutions.

Devin Henry contributed.

This story was last updated at 12:24 a.m.

Washington Times:

http://www.washingtontimes.com/news/2015/oct/23/two-dozen-states-file-lawsuit-against-clean-power-/?utm_source=RSS_Feed&utm_medium=RSS

Two dozen states file lawsuit against Clean Power Plan

Valerie Richardson

DENVER — A coalition of 24 states and a power company filed a lawsuit Friday challenging the Obama administration's Clean Power Plan, calling it an unlawful federal bid to control state power grids.

The lawsuit was filed in the U.S. Court of Appeals for the District of Columbia on the same day that the Environmental Protection Agency published the plan, also known as the 111(d) rule, in the Federal Register.

"The EPA's latest power grab — disguised as a 'Clean Power Plan' — takes already burdensome federal regulations a step further by driving up energy costs, stagnating job growth, threatening the reliability of our electric grid and treading all over the State of Texas' sovereignty," Texas Gov. Greg Abbott said in a statement.

"With seemingly no concept of what it costs to support a family, start a business or save for retirement, the federal government has yet again proven its readiness to sacrifice American jobs in the name of expanding bureaucratic authority and pushing its liberal agenda," Mr. Abbott said.

As part of the lawsuit, the states seek to place a hold on the Clean Power Plan's deadlines for meeting its carbon emissions goals, which supporters have described as necessary to improve air quality but foes have criticized as arbitrary and unrealistically strict.

Meanwhile, Senate Majority Leader Mitch McConnell announced Friday that he and Sen. Joe Manchin, West Virginia Democrat, will file a resolution of disapproval under the Congressional Review Act in an effort to stop the agency's rule against new coal-fired plants from taking effect.

"Here's what is lost in this Administration's crusade for ideological purity: the livelihoods of our coal miners and their families," Mr. McConnell said in a statement. "Folks who haven't done anything to deserve a 'war' being declared upon them."

He said he plans to join another CRA effort spearheaded by Sens. Shelley Capito, West Virginia Republican, and Heidi Heitkamp, North Dakota Democrat, against the plan's limits on existing coal-fired plants.

EPA administrator Gina McCarthy defended the Clean Power Plan in a Friday statement and predicted the agency would "again prevail against these challenges."

"The Clean Power Plan has strong scientific and legal foundations, provides states with broad flexibilities to design and implement plans, and is clearly within EPA's authority under the Clean Air Act," Ms. McCarthy said.

A previous coalition of states had attempted to challenge the rule before it was published, but the lawsuit was ruled premature.

Environmental groups rushed Friday to defend the Clean Power Plan, a key piece of the Obama administration's climate-change agenda, saying the clampdown on coal emissions are needed to combat global warming.

"Global warming is here and it's affecting us now," said Anna Aurilio, director of Environment America's office in Washington, D.C. "2015 is almost certain to be the hottest year on record. Extreme storms have caused unusually large floods from South Carolina to Texas. California is still in the middle of a drought that is causing huge losses to agriculture and to the states' forests. Today North America braces for the landfall of Hurricane Patricia, called the strongest hurricane ever recorded."

Colorado Attorney General Cynthia H. Coffman argued that the plan fails to take into account her state's aggressive moves to improve air quality, saying Colorado "continues to be a national leader in establishing clean energy standards."

"We've proven again and again that good environmental policy can be developed and implemented successfully by Coloradans, and within the bounds of the law," she said. "This rule fits neither description."

The 24 states challenging the Clean Power Plan are Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin and Wyoming.

The Guardian:

http://www.theguardian.com/us-news/2015/oct/23/obama-carbon-coal-power-plant-epa-lawsuit-republicans

Obama's carbon reduction plan under attack from 24 states and Republicans

Coal groups and almost half of US states sued EPA for rules on cutting power plant pollution, as congressmen prepare to overturn crux of climate change plan

Suzanne Goldenberg, US environment correspondent

Friday 23 October 2015 13.22 EDT Last modified on Friday 23 October 2015 13.29 EDT

Twenty-four states have filed lawsuits against Barack Obama's rules for cutting carbon pollution from power plants, the first wave of a much-anticipated legal and political onslaught against his climate change plan.

The challenge filed on Friday asked a federal court in Washington DC, to strike down the power plant rules, thus gutting the heart of Obama's climate plan.

Republicans in Congress are planning to introduce measures next week seeking to overturn the rules.

Administration officials have said repeatedly they believe they are in a strong position to beat back both sets of challenges.

But the lawsuits and the initiatives in Congress send a powerful message to the international community ahead of the Paris climate conference next month that Obama faces significant opposition to his efforts to cut America's carbon pollution and sign on to a global deal to fight climate change.

Obama is leaning heavily on the power plant rules as evidence of his efforts to fight climate change in the US – and so help lead other countries to an international agreement. In addition to their efforts against the EPA rules, Republicans in Congress are trying to block Obama from joining an international climate agreement without first securing Senate approval.

The EPA rules under attack on Friday would reduce greenhouse gas emissions from power plants by 32% by 2030 on 2005 levels, delivering the biggest single cut in America's carbon pollution.

In the first wave of lawsuits, filed in the US court of appeals for the DC circuit, the states and Murray Energy Corp, a coalmining company, accuse the Environmental Protection Agency of exceeding its authority by requiring states to lower their carbon pollution, a standard which will compel power companies to shutter coal-fired power plants and source more of their electricity from cleaner forms of energy.

"The Clean Power Plan is one of the most far-reaching energy regulations in this nation's history," Patrick Morrisey, West Virginia's attorney general, said in a statement.

He called the rules a "blatant and unprecedented attack on coal".

Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, the Arizona corporations commission, and the North Carolina department of environmental quality have also joined the lawsuit.

The National Mining Association, a leading coal lobbying group, also sued the EPA on Friday.

Gina McCarthy, the EPA administrator, said the agency was on solid legal ground.

"The Clean Power Plan has strong scientific and legal foundations, provides states with broad flexibilities to design and implement plans, and is clearly within EPA's authority under the Clean Air Act," McCarthy said in a statement.

"We are confident we will again prevail against these challenges and will be able to work with states to successfully implement these first-ever national standards to limit carbon pollution, the largest source of carbon emissions in the United States."

Obama launched his climate change plan in mid-2013, and the EPA rules were issued in early August. But the lawsuits could not go ahead until Friday, when the rules were finally published.

In addition to the legal challenges, Mitch McConnell, the Senate majority leader, has said he will invoke a little-used piece of legislation that enables members of Congress to vote down new rules by a simple majority.

The White House has said it would veto any effort in Congress to overturn the EPA rules.

Republicans are also trying to block the US from signing on to a climate deal in Paris by requiring Obama to submit any agreement to approval by the Senate.

"I believe we, as the Senate, should support basic oversight responsibilities," Jim Inhofe, an Oklahoma Republican, said this week. "President Obama and his administrative officials are going out of their way to circumvent the role of the US Senate in this negotiating process."

From: Browne, Cynthia
Location: DCRoomARN5415PolyPCTB/DC-ARN-OAR
Importance: Normal
Subject: CPP Stay Litigation
Start Date/Time: Tue 10/6/2015 7:30:00 PM
End Date/Time: Tue 10/6/2015 8:00:00 PM

From: Browne, Cynthia
Location: DCRoomARN5415PolyPCTB/DC-ARN-OAR
Importance: Normal
Subject: CPP Stay Litigation | WJC-N 5415
Start Date/Time: Fri 9/18/2015 3:30:00 PM
End Date/Time: Fri 9/18/2015 4:00:00 PM

To: Hoffman, Howard; Schmidt, Lorie; Zenick, Elliott

To: Wortman, Eric[Wortman.Eric@epa.gov]; Air Division Directors Call List[Air_Division_Directors_Call_List@epa.gov]; Donaldson, Guy[Donaldson.Guy@epa.gov]; Lupinacci, Jean[Lupinacci.Jean@epa.gov]; Lewis, Josh[Lewis.Josh@epa.gov]; Whitlow, Jeff[Whitlow.Jeff@epa.gov]; Mitchell, Ken[Mitchell.Ken@epa.gov]; Moraff, Kenneth[Moraff.Ken@epa.gov]; Goold, Megan[Goold.Megan@epa.gov]; Elleman, Robert[Elleman.Robert@epa.gov]; Downey, Scott[Downey.Scott@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Maldonado, Zelma[Maldonado.Zelma@epa.gov]; Hassett-Sipple, Beth[Hassett-Sipple.Beth@epa.gov]; Iglesias, Ariel[Iglesias.Ariel@epa.gov]; Dewey, Amy[Dewey.Amy@epa.gov]; Spagg, Beverly[Spagg.Beverly@epa.gov]; Adams, Elizabeth[Adams.Elizabeth@epa.gov]; Ceron, Heather[Ceron.Heather@epa.gov]; Stewart, Lori[Stewart.Lori@epa.gov]; Wesson, Karen[Wesson.Karen@epa.gov]; Scavo, Kimber[Scavo.Kimber@epa.gov]; Keating, Martha[keating.martha@epa.gov]; Terry, Sara[Terry.Sara@epa.gov]; Hamjian, Lynne[Hamjian.Lynne@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Jay, Michael[Jay.Michael@epa.gov]; Hyde, Courtney[Hyde.Courtney@epa.gov]; Worley, Gregg[Worley.Gregg@epa.gov]; Lubetsky, Jonathan[Lubetsky.Jonathan@epa.gov]; Iglesias, Amber[Iglesias.Amber@epa.gov]; Kornylak, Vera S.[Kornylak.Vera@epa.gov]; Singelis, Nikos[Singelis.Nikos@epa.gov]; Cohen, Janet[cohen.janet@epa.gov]; Harris, Michael[harris.michael@epa.gov]; Snyder, Carolyn[Snyder.Carolyn@epa.gov]; Knapp, Kristien[Knapp.Kristien@epa.gov]; Douglass, Norma[Douglass.Norma@epa.gov]; Smith, Kristi[Smith.Kristi@epa.gov]; McArthur, Lisa[McArthur.Lisa@epa.gov]; Gunning, Paul[Gunning.Paul@epa.gov]; Breneman, Sara[breneman.sara@epa.gov]; Anderson, Kate[Anderson.Kate@epa.gov]; Edwards, Jonathan[Edwards.Jonathan@epa.gov]; Wilson, Wenona[Wilson.Wenona@epa.gov]; Lemon, Mollie[Lemon.Mollie@epa.gov]; Costa, Dan[Costa.Dan@epa.gov]; Jordan, Scott[Jordan.Scott@epa.gov]; Caparoso, Jennifer[Caparoso.Jennifer@epa.gov]; Barnett, Keith[Barnett.Keith@epa.gov]
Cc: Toney, Anthony[Toney.Anthony@epa.gov]; Rapp, Steve[Rapp.Steve@epa.gov]; Perrin, Alan[Perrin.Alan@epa.gov]; Ruvo, Richard[Ruvo.Richard@epa.gov]; Burns, Ward[Burns.Ward@epa.gov]
CPP.111(b).Key Issues in 111(b) Litigation.OGC.4.8.16.doc
CPP.Key Issues in 111(d) Litigation.SJJ.4.7.16.doc
CPP.Litigation Status.4.25.16.docx
CPP.Litigation Status.One-Pager.SJJ.4.25.16.doc

PLEASE CALL THIS NEW NUMBER **Conf Code**

Biweekly Air Division Directors Conference Call

Conference Line: **Conf Code**
Participant Passcode: **Conf Code**

Date: Monday, April 25th, 2016
Time: 4:00 to 5:00 Eastern Time

Agenda

4:00 - Roll Call

Attendees	
R1:	OAQPS:
R2:	OAP:

R3:	OTAQ:
R4:	ORIA:
R5:	OGC:
R6:	OAPPS:
R7:	ORD:
R8:	OECA:
R9:	OPMO:
R10:	IO:

4:05 – Clean Power Plan Update: Scott Jordan (OGC)

CPP.Litigation Status.One-Pager.SJJ.4.25.16.doc CPP.Litigation Status.4.25.16.docx CPP.Key Issues in 111(d) Litigation.SJJ.4.7.16.doc CPP.111(b).Key Issues in 111(b) Litigation.OGC.4.8.16.doc

Not Responsive

Eric Wortman | OAR Lead Region Coordinator
U.S. Environmental Protection Agency – Region 8
1595 Wynkoop Street (8P-AR), Denver, Colorado 80202
Telephone: (303) 312-6649 Email: wortman.eric@epa.gov
OAR Lead Region SharePoint Site

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Shaw, Betsy[Shaw.Betsy@epa.gov]
From: McCabe, Janet
Sent: Mon 8/29/2016 10:41:18 PM
Subject: FW: GNEB - Chapter 2 Addition - Clean Power Plan
GNEB-Chapter 2-CPP.docx

It was nice of Sam to give us so much time to review this.

We do have standard language we include about the stay whenever we say anything about the CPP, so we'll take a look at this and get some comments back to Sam, with a cc to you, Betsy, so you know we've done it.

Thanks.

From: Shaw, Betsy
Sent: Friday, August 26, 2016 3:51 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>
Subject: FW: GNEB - Chapter 2 Addition - Clean Power Plan

Sharing so you can decide whether and what you'd like send in this context.

From: Coleman, Sam
Sent: Friday, August 26, 2016 3:38 PM
To: Shaw, Betsy <Shaw.Betsy@epa.gov>
Cc: Stenger, Wren <stenger.wren@epa.gov>; Jordan, Deborah <Jordan.Deborah@epa.gov>
Subject: FW: GNEB - Chapter 2 Addition - Clean Power Plan

Hi Betsy,

I am working on the Good Neighbor Environmental Board's annual report, which is focused on climate change this year. I would like to include a section on the Clean Power Plan as this is a

major effort that will have a positive impact along the US-Mexico border. We have developed a couple of paragraphs taken from EPA fact sheets that I'd like your office's approval on adding. It would be great if we could get feedback by Sept 9.

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

Personal Cell/email

From: Shade, Kevin
Sent: Friday, August 26, 2016 2:34 PM
To: Coleman, Sam <Coleman.Sam@epa.gov>
Cc: Manheimer, Jenna <Manheimer.Jennifer@epa.gov>
Subject: GNEB - Chapter 2 Addition - Clean Power Plan

Hi Betsy,

I am working on the Good Neighbor Environmental Board's annual report, which is focused on climate change this year. I would like to include a section on the Clean Power Plan as this is a major effort that will have a positive impact along the US-Mexico border. We have developed a couple of paragraphs taken from EPA fact sheets that I'd like your office's approval on adding. It would be great if we could get feedback by Sept 9.

Thank you

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Harrison, Melissa[Harrison.Melissa@epa.gov]
Cc: Culligan, Kevin[Culligan.Kevin@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]; Wilson, Erika[Wilson.Erika@epa.gov]; Stewart, Lori[Stewart.Lori@epa.gov]; Millett, John[Millett.John@epa.gov]; Barbery, Andrea[Barbery.Andrea@epa.gov]; Mckelvey, Laura[Mckelvey.Laura@epa.gov]
From: Drinkard, Andrea
Sent: Thur 8/25/2016 7:23:26 PM
Subject: CEIP Comment Extension
CommPlan CEIP comment Period extension Aug19 v6.docx
Keller.pdf

Hi all—

The notice and the letters have been signed. The notice is posted at: https://www.epa.gov/sites/production/files/2016-08/documents/fr_notice_ceip_comm_peri_ext_8_25_16_w_disclaimer.pdf

OCIR will email the letters to the states at 3:30 and OAP/OAQPS can make any other notifications at that time. I've attached 1 of the 31 letters here for awareness.

The final statement is below and the attached comm plan has the final set of Q&As.

Please let me know if anyone has any questions.

Thanks so much to everyone on this email for all of your help!!

-Andrea-

Statement:

EPA is extending the public comment period on the proposed Clean Energy Incentive Program Design Details Rule by 60 days to November 1, 2016 to provide additional time for tribal

consultations. Extending the comment period is in line with our extensive outreach and engagement process around the CEIP, and provides all stakeholders, including Tribes, with additional time to review and comment on the proposal.

Background

With the final Clean Power Plan, EPA established the CEIP, which was designed to help states and tribes with sources meet their goals under the Plan by encouraging early investments in renewable energy generation, and by removing barriers to investment in energy efficiency measures in low-income communities. In this action, EPA is proposing certain design details for the CEIP. Once finalized, the design elements in this proposal will guide states and tribes that choose to participate in the CEIP when the CPP becomes effective. Key provisions in this proposal include project eligibility criteria, an approach for states and tribes to use one or more existing definitions for low income community, and how to divide the 300 million short ton pool of CO2 emissions between low-income community projects and renewable energy projects.

To: McCabe, Janet[McCabe.Janet@epa.gov]; Harrison, Melissa[Harrison.Melissa@epa.gov]; Benenati, Frank[benenati.frank@epa.gov]
Cc: Culligan, Kevin[Culligan.Kevin@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]; Wilson, Erika[Wilson.Erika@epa.gov]; Stewart, Lori[Stewart.Lori@epa.gov]
From: Drinkard, Andrea
Sent: Wed 8/24/2016 5:18:34 PM
Subject: RE: CEIP Comment Extension
Response to AX-16-001-1134_Lin2.docx
CommPlan CEIP comment Period extension Aug19 v6.docx

Hi all—

We're going to post the comment extension notice tomorrow (instead of today). We received a few comments on the statement and Q&As, so I'm reattaching an updated comm plan. I'm also attaching a draft of the letter that we are planning to send to the AGs tomorrow.

Please let me know if you have any questions and I'll keep folks posted on timing.

-AD-

From: McCabe, Janet
Sent: Tuesday, August 23, 2016 6:00 PM
To: Harrison, Melissa <Harrison.Melissa@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Benenati, Frank <benenati.frank@epa.gov>
Cc: Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: RE: CEIP Comment Extension

We will need to have an A for the Q: "so doesn't this mean that you do not intend to finalize this rule during this Administration."

From: Harrison, Melissa
Sent: Tuesday, August 23, 2016 4:33 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Benenati, Frank

<benenati.frank@epa.gov>
Cc: Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: RE: CEIP Comment Extension

Thanks Andrea-this looks good.

Melissa J. Harrison

Deputy Associate Administrator

Office of Public Affairs

U.S. Environmental Protection Agency

Office: (202) 564-8421

Personal Cell/email

Harrison.Melissa@epa.gov

From: Drinkard, Andrea
Sent: Tuesday, August 23, 2016 4:24 PM
To: Harrison, Melissa <Harrison.Melissa@epa.gov>; Benenati, Frank <benenati.frank@epa.gov>
Cc: Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: CEIP Comment Extension

Hi Melissa and Frank (and Janet and Joe),

Tomorrow, we're going to sign a notice to extend the comment period for the CEIP details proposal. We will post the notice and do some email notifications post posting. The notice is very short/straightforward and it states that we are extending the comment period to provide

additional time for tribal consultations. We have drafted an even shorter statement (with some additional background on the rule that should be helpful for reporters in case they forget what we proposed) that we can use if we get asked.

Melissa/Frank/Janet/Joe, let me know if you have any edits to the following:

Statement

EPA is extending the public comment period on the proposed Clean Energy Incentive Program Design Details Rule by 60 days to November 1, 2016 to provide additional time for tribal consultations. Extending the comment period is in line with our extensive outreach and engagement process around the CEIP, and provides all stakeholders, including Tribes, with additional time to review and comment on the proposal.

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Please let me know if you need additional information.

-Andrea-

To: McCabe, Janet[McCabe.Janet@epa.gov]
Cc: Harrison, Melissa[Harrison.Melissa@epa.gov]; Benenati, Frank[benenati.frank@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Drinkard, Andrea
Sent: Tue 8/23/2016 10:14:41 PM
Subject: Re: CEIP Comment Extension

In case it's easier for folks to see, I've copy and pasted the Q&As from the document below:

Questions & Answers:

Ex. 5 - Deliberative

Ex. 5 - Deliberative

Ex. 5 - Deliberative

From: Harrison, Melissa
Sent: Tuesday, August 23, 2016 4:33 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Benenati, Frank <benenati.frank@epa.gov>
Cc: Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: RE: CEIP Comment Extension

Thanks Andrea-this looks good.

Melissa J. Harrison

Deputy Associate Administrator

Office of Public Affairs

U.S. Environmental Protection Agency

Office: (202) 564-8421

Personal Cell/email

Harrison.Melissa@epa.gov

From: Drinkard, Andrea
Sent: Tuesday, August 23, 2016 4:24 PM
To: Harrison, Melissa <Harrison.Melissa@epa.gov>; Benenati, Frank <benenati.frank@epa.gov>
Cc: Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph

<Goffman.Joseph@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
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Please let me know if you need additional information.

-Andrea-

To: Harrison, Melissa[Harrison.Melissa@epa.gov]; Benenati, Frank[benenati.frank@epa.gov]
Cc: Culligan, Kevin[Culligan.Kevin@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Drinkard, Andrea
Sent: Tue 8/23/2016 8:23:41 PM
Subject: CEIP Comment Extension
CommPlan CEIP comment Period extension Aug19 v5.docx

Hi Melissa and Frank (and Janet and Joe),

Tomorrow, we're going to sign a notice to extend the comment period for the CEIP details proposal. We will post the notice and do some email notifications post posting. The notice is very short/straightforward and it states that we are extending the comment period to provide additional time for tribal consultations. We have drafted an even shorter statement (with some additional background on the rule that should be helpful for reporters in case they forget what we proposed) that we can use if we get asked.

Melissa/Frank/Janet/Joe, let me know if you have any edits to the following:

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Please let me know if you need additional information.

-Andrea-

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Drinkard, Andrea
Sent: Thur 8/18/2016 7:04:11 PM
Subject: FW: ACTION: E&E News RE: Impacts of Nuclear Retirements Under the Clean Power Plan

FYI....a consulting group put out a paper saying our view of nuclear in the CPP was too optimistic. We are responding with the following general statement, just wanted to you to be aware that this was happening.

From: Wilson, Erika
Sent: Thursday, August 18, 2016 2:56 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Davis, Alison <Davis.Alison@epa.gov>
Cc: Ashley, Jackie <Ashley.Jackie@epa.gov>; Bremer, Kristen <Bremer.Kristen@epa.gov>
Subject: RE: ACTION: E&E News RE: Impacts of Nuclear Retirements Under the Clean Power Plan

Ex. 5 - Deliberative

Ex. 5 - Deliberative

From: Jones, Enesta
Sent: Thursday, August 18, 2016 1:26 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Wilson, Erika <Wilson.Erika@epa.gov>; Davis, Alison <Davis.Alison@epa.gov>
Cc: Jones, Enesta <Jones.Enesta@epa.gov>
Subject: ACTION: E&E News RE: Impacts of Nuclear Retirements Under the Clean Power Plan

Reporter: Hannah Northey

I'd like to get a comment from EPA in response to this FTI Consulting paper.. the white paper says EPA was "overly optimistic" to assume nuclear would continue and help the US comply with the Clean Power Plan. MY deadline is 3:15pm.

The EPA has assumed that carbon-free electricity generation provided by nuclear plants across the U.S. will continue to be available throughout the compliance period of the CPP. However, the EPA has failed to recognize that the nuclear industry has been under significant economic, regulatory, and political pressures. The current stream of announcements of closures and retirements since the final CPP was released, indicates that the EPA was overly optimistic to simply assume that the nuclear industry would continue to be available to produce clean electricity.

From: Bashalany, Matthew [mailto:Matthew.Bashalany@fticonsulting.com]
Sent: Thursday, August 18, 2016 11:18 AM

To: Rod Kuckro <rkuckro@eenews.net>; Hannah Northey <hnorthey@eenews.net>
Subject: Impacts of Nuclear Retirements Under the Clean Power Plan

Hi Rod and Hannah:

My name is Matt Bashalany, and I work in media relations at FTI Consulting. I wanted to share with you a recently released FTI white paper examining the role of nuclear energy in the U.S. Environmental Protection Agency's Clean Power Plan, in case it would be of interest.

According to an analysis in "The Impacts of Nuclear Retirements Under the Clean Power Plan," CO_2 emission prices and wholesale electricity prices in the U.S. Eastern Interconnect could increase significantly if nuclear power plant closures are accelerated. The EPA assumed that nuclear capacity would increase slightly to 98.7 GW in 2030 from 96.8 GW in 2016 when setting emission reduction targets. However, if nuclear capacity is lost due to economic, regulatory or political pressures, wholesale electricity prices in the Eastern Interconnect could be 6 percent to 8 percent higher from 2022 to 2032, and nearly 15 percent higher by 2035, according to one scenario modeled in the white paper.

More analysis may be found here: http://www.fticonsulting.com/~/media/Files/us-files/insights/white-papers/nuclear-retirement-impact-white-paper.pdf. If you are interested in more details, I would be happy to connect you with someone from FTI Consulting.

Thanks.

Matt

Matthew E. Bashalany

Senior Communications Manager

FTI Consulting

+1.617.897.1545 T | +1.617.418.9382 M

matthew.bashalany@fticonsulting.com

200 State Street | 8th Floor

Boston, MA 02109

www.fticonsulting.com

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To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Culligan, Kevin[Culligan.Kevin@epa.gov]
From: Kornylak, Vera S.
Sent: Mon 8/8/2016 4:55:23 PM
Subject: RE: CA Proposal/CPP Implementation Plan

Joe – probably more than you need. But let me know if you do need more. It's definitely a draft CPP compliance plan, and that's how the state and other are casting it.

***

The CA proposal is titled "California's Proposed Compliance Plan for the Federal Clean Power Plan Under Clean Air Act Section 111(d)." The plan is a proposed state measures approach with a mass-based limit, single state approach, that is based on the continued implementation of the suite of CA's existing climate programs, along with some proposed amendments intended to support CPP compliance. Note: CA leaves open the possibility of potential connections with other states but doesn't propose that at this time. With regard to CEIP, the plan says that ARB "continues to be interested in this program, and will evaluate it, taking further regulatory or planning action as appropriate." The introductory narrative acknowledges the stay and says ARB staff "anticipates submitting this Proposed Plan, if approved by the Board, to US EPA once the stay has been lifted." The plan is expected to be presented for final approval in Spring 2017 – so the public and other forthcoming process is expected to take some time.

It's an extremely substantial proposal including (in CA's own description):

• An identification of all CPP affected EGUs in California and a calculation of California's federal emissions limits under the CPP;

• Amendments to monitoring, recordkeeping, and reporting to ensure that all EGUs covered by the CPP report and maintain records consistent with CPP requirements;

• Amendments to the Cap-and-Trade Regulation aligning Cap-and-Trade compliance periods with the CPP;

• Amendments to the Cap-and-Trade Regulation requiring, as a federally-enforceable matter, CPP affected EGUs to maintain compliance with its terms, including compliance instrument surrender requirements;

• A federally-enforceable backstop program, based on tradeable compliance instruments, that will be triggered in the unlikely event that affected EGU emissions exceed federal limits, and which will require all affected EGUs to reduce their emissions to come back into compliance; and

• Extensive modeling and analysis demonstrating that these measures will ensure compliance with the CPP.

The draft plan is supported by 10 appendices + some sub-appendices. We have not carefully reviewed each part. But a quick review reveals that CA made some of the changes that EPA had previously discussed, and not others, as well as making changes not necessarily related to prior discussions (e.g., CA proposes a revised list of affected EGUs, excluding some that EPA included.)

Vera Kornylak || Air Quality Policy Division || OAQPS

919-541-4067 || kornylak.vera@epa.gov

From: Goffman, Joseph
Sent: Monday, August 08, 2016 11:45 AM
To: Kornylak, Vera S. <Kornylak.Vera@epa.gov>
Cc: Culligan, Kevin <Culligan.Kevin@epa.gov>
Subject: CA Proposal/CPP Implementation Plan
Importance: High

For purposes of responding to a question from Gina, could you please send me a few sentences describing what the CA proposal entails and how CA is characterizing the proposal and how CA is characterizing it? Thanks.

Joseph Goffman

Associate Assistant Administrator for Climate

and Senior Counsel

Office of Air and Radiation

US EPA

Washington, DC.

To: Harrison, Melissa[Harrison.Melissa@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
Cc: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Hoffman, Howard[hoffman.howard@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: McCabe, Janet
Sent: Wed 8/3/2016 2:24:42 AM
Subject: RE: FINAL CPP Blog PLEASE REVIEW 2 WH Edits

Ex. 5 - Deliberative

From: Harrison, Melissa
Sent: Tuesday, August 02, 2016 4:30 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Cc: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Hoffman, Howard <hoffman.howard@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: Re: FINAL CPP Blog PLEASE REVIEW 2 WH Edits

Final below. Thanks!!

One Year Later: Climate Action and the Clean Power Plan

2016 is on pace to be the hottest year ever recorded – by a significant margin while 2015 currently holds the title, and 2014 before that. The facts and the trends are clear, and the threat is real.

Just yesterday, the latest climate indicators report confirmed that the impacts of climate change are getting stronger and stronger—average temperatures and sea levels keep rising, coastal flooding is getting worse, and arctic sea ice is melting at alarming rates.

As President Obama has made very clear, we are the first generation to feel the effects of climate change, and we may be the last generation who can do something about it.

That's why in 2013, President Obama announced his Climate Action Plan, a bold and achievable plan that does everything in our power to combat climate change – from reducing emissions in nearly every sector of our economy, to increasing energy efficiency, to investing in renewable energy. And taking action here at home has allowed the United States to lead the world in getting a historic international agreement in Paris last year an agreement that reduces greenhouse gas emissions and limits global warming to two degrees Celsius.

One of the centerpieces in U.S. efforts to limit the effects of climate change and lead the world on this issue was reducing dangerous carbon pollution from power plants. One year ago today, I signed the Clean Power Plan, which set the first-ever national standards on reducing carbon pollution from existing power plants. EPA's charge from the President was clear: to exercise our statutory authority to lay out steady, responsible steps to cut carbon pollution under the Clean Air Act. And that's what we did – by setting limits that reflected the growing momentum in the power sector to provide the American public with cleaner sources of energy.

The trend toward investment in renewables and energy efficiency is unfolding all around us:

- Electricity generated from renewables is expected to grow by 9% in 2016 alone;

- Utilities are investing $8 billion a year in energy efficiency, a four-fold increase from just eight years ago, and more companies than ever are leveraging EPA's ENERGY STAR platform;

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- The private sector is also stepping up. Google, Apple, Goldman Sachs, Walmart, and Unilever – and other large U.S. companies are choosing to cut emissions and committing

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As we look to the future, let's take stock of what we've done—we 've taken action to cut carbon pollution from power plants,extended tax credits for renewable energy, enabled the production of a new generation of clean cars and trucks, reducedmethane emissions from the oil and gas sector, fostered a global climate change agreement, and so much more. These actions are rooted in science, codified in our laws, and broadly supported by our citizens. And they will make a difference! I'm excited for what the future holds. At EPA we remain ready to take advantage of smart and effective opportunities to safeguard public health and the environment for this generation and those that follow.

Melissa J. Harrison

Deputy Associate Administrator

Office of Public Affairs

U.S. Environmental Protection Agency

Office: (202) 564-8421

Mobile: **Personal Cell/email**

Harrison.Melissa@epa.gov

On Aug 2, 2016, at 3:42 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:

Atty-Client

Lorie J. Schmidt

Associate General Counsel for Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

Sent from my iPhone

On Aug 2, 2016, at 3:30 PM, Harrison, Melissa <Harrison.Melissa@epa.gov> wrote:

Supreme

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
Cc: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Hoffman, Howard[hoffman.howard@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Harrison, Melissa
Sent: Tue 8/2/2016 8:30:22 PM
Subject: Re: FINAL CPP Blog PLEASE REVIEW 2 WH Edits

Final below. Thanks!!

One Year Later: Climate Action and the Clean Power Plan

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Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Hoffman, Howard[hoffman.howard@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Harrison, Melissa
Sent: Tue 8/2/2016 7:30:30 PM
Subject: Re: FINAL CPP Blog PLEASE REVIEW 2 WH Edits

Hi everyone-I need to get this to the web team for posting by 4pm. Any concerns? Thanks!
Melissa

Melissa J. Harrison
Deputy Associate Administrator
Office of Public Affairs
U.S. Environmental Protection Agency
Office: (202) 564-8421
Mobile: **Personal Cell/email**
Harrison.Melissa@epa.gov

On Aug 2, 2016, at 1:29 PM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:

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Cc: Harrison, Melissa[Harrison.Melissa@epa.gov]
From: Drinkard, Andrea
Sent: Tue 8/2/2016 5:29:55 PM
Subject: FINAL CPP Blog PLEASE REVIEW 2 WH Edits

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To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: McCabe, Janet[McCabe.Janet@epa.gov]
From: Drinkard, Andrea
Sent: Tue 8/2/2016 4:14:16 PM
Subject: Re: Updated blog NEW DEADLINE

Thanks so much to both of you for your edits. I'll get these incorporated!!

Andrea Drinkard
(o) 202.564.1601
(c) Personal Cell/email

On Aug 2, 2016, at 12:11 PM, Goffman, Joseph <Goffman.Joseph@epa.gov> wrote:

signs of climate change are getting stronger and stronger -- "signs or climate change are becoming clearer and clearer" and "signals of climate change are getting stronger and stronger" both read better to me.

Also, see a few edits below, mostly using brackets and caps/blue.

Just my PoV, not essential. Really nice piece.

Thanks.

From: McCabe, Janet
Sent: Tuesday, August 02, 2016 11:35 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: Re: Updated blog NEW DEADLINE

I think this is really good. Three comments, which may or may not be valid since I'm looking at this on my phone.

1st paragraph--there's punctuation problem in the "significant margin" sentence.

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I like how the stay was worked in, but do we want to say stayed by the Supreme Court "until the litigation is resolved"?

Sent from my iPhone

On Aug 2, 2016, at 10:33 AM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:

> New deadline: we need edits by 2pm. We have to get this loaded into the system tonight.
>
> Andrea Drinkard
>
> (o) 202.564.1601
>
> (c) Personal Cell/email
>
> On Aug 2, 2016, at 10:23 AM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:
>
>> Hi Janet and Joe,
>>
>> Here's how the draft came back from Frank and Gina. Please let me know if you have any last minute edits by COB today so we can get this teed up for tomorrow
>>
>> Andrea Drinkard
>>
>> (o) 202.564.1601
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>> (c) Personal Cell/email
>>
>> Begin forwarded message:
>>
>> **From:** "Harrison, Melissa" <Harrison.Melissa@epa.gov>
>> **Date:** August 2, 2016 at 10:13:01 AM EDT
>> **To:** "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>

Subject: Updated blog

Just shared with the WH. Will you share with DOJ? I asked for comments/edits by 1pm today. Thanks! Melissa

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Mobile: **Personal Cell/email**

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To: Drinkard, Andrea[Drinkard.Andrea@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: McCabe, Janet
Sent: Tue 8/2/2016 3:34:30 PM
Subject: Re: Updated blog NEW DEADLINE

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Subject: Re: Updated blog NEW DEADLINE

New deadline: we need edits by 2pm. We have to get this loaded into the system tonight.

Andrea Drinkard
(o) 202.564.1601
(c) Personal Cell/email

On Aug 2, 2016, at 10:23 AM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:

Hi Janet and Joe,

Here's how the draft came back from Frank and Gina. Please let me know if you have any last minute edits by COB today so we can get this teed up for tomorrow

Andrea Drinkard
(o) 202.564.1601
(c) Personal Cell/email

Begin forwarded message:

From: "Harrison, Melissa" <Harrison.Melissa@epa.gov>
Date: August 2, 2016 at 10:13:01 AM EDT
To: "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>
Subject: Updated blog

Just shared with the WH. Will you share with DOJ? I asked for comments/edits by 1pm today. Thanks! Melissa

One Year Later: Climate Action and the Clean Power Plan

2016 is on pace to be the hottest year ever recorded – by a significant margin while 2015 currently holds the title, and 2014 before then. The facts and the trends are clear, and the threat is real.

Just yesterday, the latest climate indicators report confirmed that the signs of climate

change are getting stronger and stronger—average temperatures and sea levels keep rising, coastal flooding is getting worse, and arctic sea ice is melting at alarming rates.

As President Obama has made very clear, we are the first generation to feel the effects of climate change, and we may be the last generation who can do something about it

That's why in 2013, President Obama announced his Climate Action Plan, a bold and achievable plan that does everything in our power to combat climate change – from reducing emissions in every sector of our economy, to increasing energy efficiency, to investing in renewable energy. And taking action here at home, has allowed the United States to lead the world in getting a historic international agreement in Paris last year. An agreement which reduces greenhouse gas emissions and limits global warming to two degrees Celsius.

One of centerpieces in U.S. efforts to limit the effects of climate change and lead the world on this issue was reducing dangerous carbon pollution from power plants. One year ago today, I signed the Clean Power Plan which set the first-ever national limits on reducing carbon pollution from existing power plants. EPA's charge from the President was clear: to lay out steady, responsible steps to cut carbon pollution under the Clean Air Act. And that's what we did – by setting limits that reflected the growing momentum in the power sector to provide the American public with cleaner sources of energy.

The trend toward investment in renewables and energy efficiency is unfolding all around us:

•□□□□□□□□ Electricity generated from renewables is expected to grow by 9% in 2016 alone;

•□□□□□□□□ Utilities are investing $8 billion a year in energy efficiency, a four-fold increase from just eight years ago, and more companies than ever are leveraging EPA's ENERGY STAR platform;

•□□□□□□□□ States are leading the way—29 states have adopted mandatory renewable portfolio standards, and an additional eight states have voluntary renewable goals. Twenty-three states have mandatory energy efficiency provisions and 10 states have

implemented market-based trading programs to reduce greenhouse gas emissions; and

•□□□□□□□□ The private sector is also stepping up. Google, Apple, Goldman Sachs, Walmart, and Unilever – and other large U.S. companies are choosing to cut emissions and committing hundreds of billions of dollars to finance clean energy innovation.

It's not an accident that the Clean Power Plan mirrors this trend. It is by design and it's the result of our unprecedented outreach and engagement with states, utilities, energy regulators, environmental groups, communities, tribes and the public. Through this process we committed to listen. We did. We committed to put the states in the driver's seat. We did. We committed to cutting carbon pollution in a way that is in line with where the power sector is headed. We did. We committed to lead on climate action. And that's exactly what we did.

Sometimes our efforts to protect public health and environment face opposition and/or litigation. The Clean Power Plan is no different and was stayed by the Supreme Court. However, it will see its day in court and EPA remains fully confident in its legal merits. While the courts review the plan, and during the stay, no state is required to comply with it. However, many states and tribes have indicated they plan to move forward voluntarily to reducing carbon pollution from power plants. They have asked the agency to continue to develop tools to support them in their voluntary efforts. We are.

As we look to the future, let's take stock of what we've done—we 've taken action to cut carbon pollution from power plants, enabled the production of a new generation of clean cars and trucks, reduced methane emissions from the oil and gas sector, fostered a global climate change agreement, and so much more. These actions are rooted in science, codified in our laws, and broadly supported by our citizens. And they will make a difference! I'm excited for what the future holds. At EPA we remain ready to take advantage of smart and effective opportunities to safeguard public health and the environment for this generation and those that follow.

Melissa J. Harrison

Deputy Associate Administrator

Office of Public Affairs

U.S. Environmental Protection Agency

Office: (202) 564-8421

Mobile: **Personal Cell/email**

Harrison.Melissa@epa.gov

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Drinkard, Andrea
Sent: Tue 8/2/2016 2:23:17 PM
Subject: Fwd: Updated blog

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(o) 202.564.1601
(c) Personal Cell/email

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Melissa J. Harrison

Deputy Associate Administrator

Office of Public Affairs

U.S. Environmental Protection Agency

Office: (202) 564-8421

Mobile: **Personal Cell/email**

Harrison.Melissa@epa.gov

Elbert Lin
Solicitor General
State Capitol Building 1, Room 26-E
Charleston, WV 25305

Dear Mr. Lin:

Thank you for your letter of August 1, 2016, requesting an extension of the comment period for the Clean Energy Incentive Program (CEIP) Design Details proposed rule until 60 days after the stay of the Clean Power Plan (CPP) is lifted. We are continuing to consider your request. In the interim, please note that separately we have announced, via a notice to be published in the Federal Register and placed on the CPP website: https://www.epa.gov/cleanpowerplan/proposed-rule-about-ceip-design-details on August 25, 2016 that we are extending the comment period on this proposal until November 1, 2016.

Again, thank you for your letter. I appreciate the opportunity to be of service.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator
Office of Air and Radiation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 26 2016

OFFICE OF
AIR AND RADIATION

Mr. Scott A. Keller
Solicitor General
P.O. Box 12548
Austin, Texas 78711-2548

Dear Mr. Keller:

Thank you for your letter of August 1, 2016, requesting an extension of the comment period for the Clean Energy Incentive Program (CEIP) Design Details proposed rule until 60 days after the stay of the Clean Power Plan (CPP) is lifted.

We are continuing to consider your request. In the interim, please note that separately we have announced, via a notice to be published in the *Federal Register* and a pre-publication copy posted on the EPA's CPP website (at https://www.epa.gov/cleanpowerplan/proposed-rule-about-ceip-design-details) on August 25, 2016, that we are extending the public comment period for this proposal by 60 days. The comment period will now close on November 1, 2016.

Again, thank you for your letter. I appreciate the opportunity to be of service.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Cyran, Carissa
Sent: Thur 7/28/2016 10:01:48 PM
Subject: E-folder for Friday, July 29, 2016
CAP Tool 7-15-2016.xlsx
Interagency Review CTG 7_29_16.docx

8:30 am - 9:00 am	**Management Roundtable - 5400**
10:00 am - 10:30 am	**Region Meeting with Eric Wortman - 5400**
11:00 am - 11:30 am	**Scheduling Meeting - 5400**
11:30 am - 12:00 pm	**3rd Concurrence Discussion - 5415**
12:30 pm - 1:00 pm	**Meeting RE: Climate Action Plan - Administrator's Office**
2:00 pm - 3:00 pm	**CTG Discussion - 5400**
5:30 pm - 6:00 pm	**General Discussion - Administrator's Office**

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Cyran, Carissa
Sent: Mon 7/25/2016 9:46:34 PM
Subject: E-folder for Tuesday, July 26, 2016
AEE 7 26 16.docx
CPP Petitions for Reconsid Part 2 7_26_16.docx

8:30 am - 9:00 am	**Management Roundtable - 5400**
9:00 am - 9:30 am	**Meeting with Advanced Energy Economy - Alm Conference room**
9:30 am - 10:00 am	**Motorpool with the Administrator**
10:00 am - 11:00 am	**CPP and Vehicles Meeting - Brian Deese's Office**
11:00 am - 11:30 am	**Motorpool with the Administrator**
1:00 pm - 2:00 pm	**GHG EGU CPP Emission Guidelines Petition Requests - 5400**
2:00 pm - 3:40 pm	**HOLD**
3:45 pm - 4:00 pm	**Clean Energy Policy and CPP Discussion with Adam Scheps - 5415**
4:10 pm - 5:00 pm	**Follow-up on leakage with FERC - 5415**
6:00 pm - 7:00 pm	**Private Event**

To: McCabe, Janet[McCabe.Janet@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Harrison, Melissa[Harrison.Melissa@epa.gov]; Ohrel, Sara[Ohrel.Sara@epa.gov]; DeLuca, Isabel[DeLuca.Isabel@epa.gov]; Millett, John[Millett.John@epa.gov]
From: Zenick, Elliott
Sent: Tue 7/12/2016 1:58:27 PM
Subject: RE: WSJ LTE -- USE THIS VERSION

Atty-Client Thank you.

From: McCabe, Janet
Sent: Tuesday, July 12, 2016 9:22 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: RE: WSJ LTE -- USE THIS VERSION

Great.

Ex. 5 - Deliberative

The Truth about Biomass

Mr. Dale's opinion piece "Old MacDonald Had a . . . Climate Offender" paints a picture of the Clean Power Plan – and the underlying science – that is far from reality. First, EPA's Clean Power Plan, which is stayed while legal challenges proceed, applies to power plants, not farms. Under the program, states determine their own strategies for cutting carbon emissions from power plants, including the opportunity to use qualified biomass in place of fossil fuels. The agency recognizes that a wide range of agricultural and forest biomass can provide carbon benefits, including controlling atmospheric carbon dioxide levels. Contrary to Mr. Dale's claim that this program creates an "unjustified carbon tax," it actually creates a market for biomass and an economic opportunity for American farmers. Second, ~~the article's~~ **his** basic premise that biogenic emissions cannot contribute to climate change is out of step with the science. Peer-reviewed scientific literature reflects that all carbon emissions (both biogenic and fossil) once in the atmosphere drive climate change equally and endanger public health and welfare.

Mr. Dale also ignores the fact that determining how emissions from using biomass at power plants impacts atmospheric carbon levels is a complex scientific question – one that must take into account the way biomass is produced and, in some cases, what would happen to the biomass if it is not used for energy. This is exactly why EPA is in the midst of a very open and public process, working with the agency's independent Science Advisory Board, to explore this topic. We've invited input from all stakeholders to help find policy solutions that are based on sound science, provide states with a clear path for using biomass and protect our health and climate for future generations.

From: Drinkard, Andrea
Sent: Tuesday, July 12, 2016 9:20 AM
To: McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: RE: WSJ LTE -- USE THIS VERSION

Hi all—

Here's the final—with edits from Sara and Janet incorporated. Melissa, this should be good to go under Janet's name.

The Truth about Biomass

Ex. 5 - Deliberative

Ex. 5 - Deliberative

From: McCabe, Janet
Sent: Tuesday, July 12, 2016 8:41 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: RE: WSJ LTE -- USE THIS VERSION

Can we say:

The Truth about Biomass

Ex. 5 - Deliberative

Ex. 5 - Deliberative

From: Drinkard, Andrea
Sent: Tuesday, July 12, 2016 8:23 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: RE: WSJ LTE -- USE THIS VERSION

Same as below except incorporates Janet's edits. I didn't take the edit to the first sentence (though I did like it) and I walked Joe's initial edit back a bit. If I'm being too much of a nervous nelly, let me know.

Melissa, let me know if you have any edits and/or what the next step is.

The Truth about Biomass

Ex. 5 - Deliberative

Ex. 5 - Deliberative

From: Drinkard, Andrea
Sent: Tuesday, July 12, 2016 8:15 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: RE: WSJ LTE

Disregard this email. Janet, I didn't get your edits last night. Sara just forwarded them to me, and I'll look at them now. My apologies.

From: Drinkard, Andrea
Sent: Tuesday, July 12, 2016 8:12 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: RE: WSJ LTE

Morning,

This version includes Joe's comments, cuts a few words, adds a title, and includes a reference to the fact that the CPP is currently stayed (Elliott, let me know if this will suffice). With the title, it's running about 279. Janet let me know if you have any edits and I'll get those incorporated.

The Truth about Biomass

Ex. 5 - Deliberative

From: Goffman, Joseph
Sent: Monday, July 11, 2016 4:44 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; OAR Briefings <OAR_Briefings@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: RE: WSJ LTE

Some suggestions.

From: Drinkard, Andrea
Sent: Monday, July 11, 2016 4:32 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; OAR Briefings <OAR_Briefings@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: RE: WSJ LTE

Hi Janet, Joe, and Melissa,

Here's a crack at a response for the WSJ. This is a bit long abt 300 words, but I wanted to send the version as is to get your input and then I can work to shorten it up tomorrow (unless that's accomplished through your review). I'm also adding Elliott to see whether we need to include some sort of disclaimer about the stay.

I also need to land on a headline/title for it.

Ex. 5 - Deliberative

Ex. 5 - Deliberative

From: McCabe, Janet
Sent: Monday, July 11, 2016 7:53 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Harrison, Melissa <Harrison.Melissa@epa.gov>; Millett, John <Millett.John@epa.gov>; Benenati, Frank <benenati.frank@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: Re: WSJ LTE

Ex. 5 - Deliberative

Sent from my iPhone

On Jul 11, 2016, at 6:35 AM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:

I'll work with folks in OAP and OAQPS to pull something together this morning.

Andrea Drinkard

(o) 202.564.1601

(c) Personal Cell/email

On Jul 11, 2016, at 4:39 AM, McCabe, Janet <McCabe.Janet@epa.gov> wrote:

Ex. 5 - Deliberative

Sent from my iPhone

On Jul 10, 2016, at 10:14 PM, Goffman, Joseph <Goffman.Joseph@epa.gov> wrote:

Ex. 5 - Deliberative

Sent from my iPhone

On Jul 10, 2016, at 10:05 PM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:

Ex. 5 - Deliberative

Joe/Janet, thoughts?

Andrea Drinkard

(o) 202.564.1601

(c) **Personal Cell/email**

On Jul 10, 2016, at 9:21 PM, Harrison, Melissa <Harrison.Melissa@epa.gov> wrote:

FYI. Any reason to push back?

http://www.wsj.com/articles/old-macdonald-had-a-climate-offender-1468183862

Old MacDonald Had a . . . Climate Offender

Worried about carbon from crops, the Environmental Protection Agency wants to regulate America's farms.

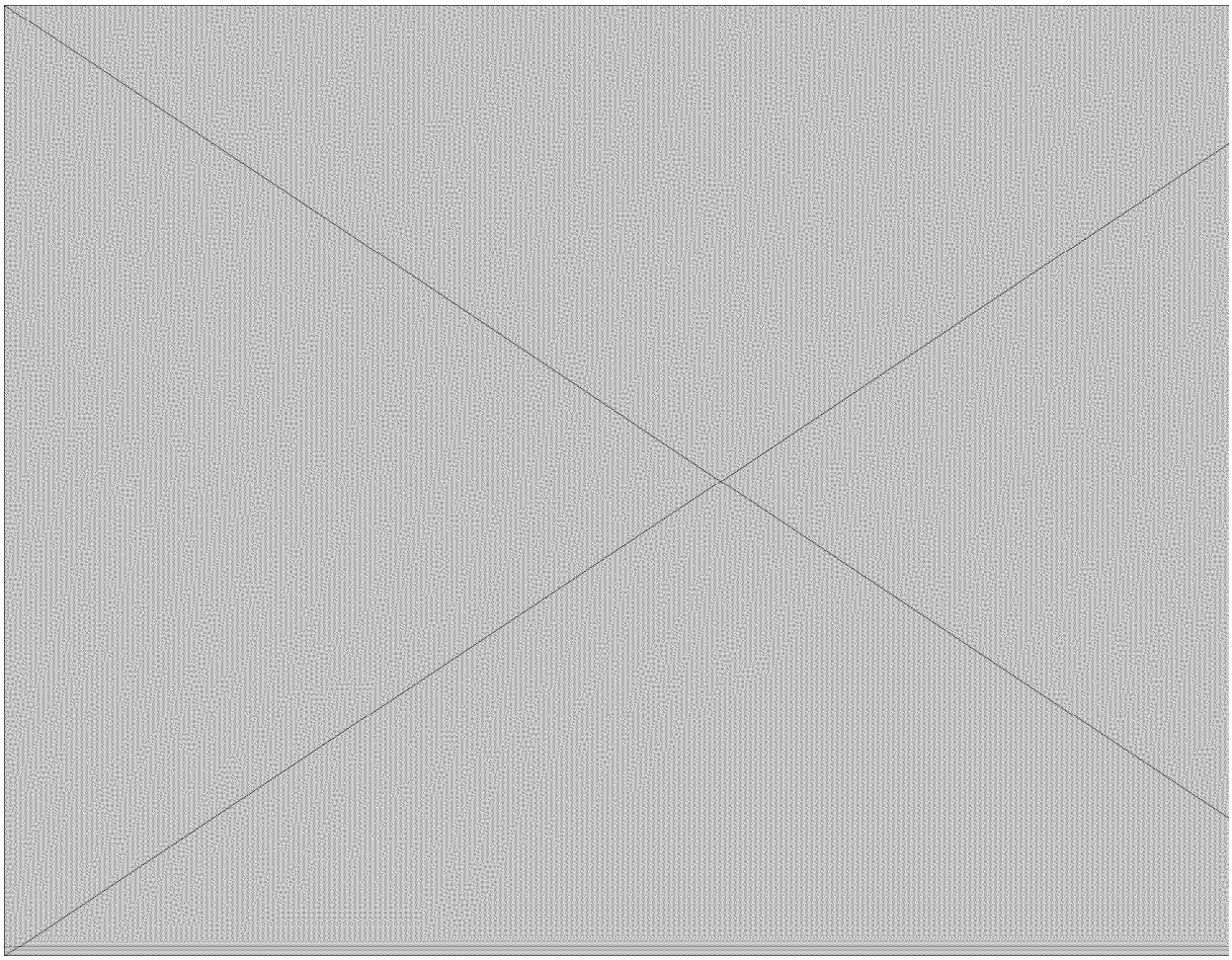

PHOTO: BLOOMBERG NEWS

SHARE

-
-
-
-

By

Bruce E. Dale

July 10, 2016 4:51 p.m. ET

A basic fact about agricultural products such as grains and oilseeds is that the carbon in them, called biogenic carbon, came from the atmosphere. Biogenic carbon will return to the atmosphere when these products are consumed, such as when human beings eat bread and then breathe out the carbon dioxide resulting from the breakdown of bread in the body. Biogenic carbon therefore cannot contribute to climate change.

Why is the Environmental Protection Agency denying this basic fact of climate science? The EPA is counting biogenic-carbon emissions as if they were the same as fossil-carbon emissions. They are not the same. Carbon atoms emitted by burning fossil fuels are, in effect, on a one-way trip from the ground to the atmosphere, where they will stay for hundreds of millions of years. In contrast, carbon atoms taken from the atmosphere to make agricultural products are on a round trip from the atmosphere to farms then back to the atmosphere.

The EPA intends to penalize American farmers and those who make modern energy and bioproducts such as plastics from agricultural feedstocks by treating biogenic carbon like fossil carbon. As part of its approach, the EPA is now attempting to regulate "sustainability" in the farm field.

ADVERTISEMENT

The agency's new Clean Power Plan proposes to penalize biogenic carbon emissions unless food processors (bakeries, brewers, grain processors) or energy producers (like utilities using seed hulls to produce electricity) can prove that they used "sustainably-derived" agricultural feedstocks. The definition of "sustainably-derived" and the proposed penalties go on for many pages in the proposed regulations. They defy easy summary. But the proposed regulation on biogenic carbon is simply and clearly an unjustified carbon tax on American farmers.

The EPA is trying to put itself in charge of regulating farms—an outstanding example of "mission creep" and bureaucratic overreach. Regulating agriculture is not the EPA's job—we already have an Agriculture Department. The EPA's approach would demand proof of

exactly which farm produced every pound of corn, wheat, soy or cottonseed used by customers of those farms—a practical impossibility in the U.S. agricultural system.

There is a growing world-wide effort to establish the "bioeconomy," an economy based on use of renewable raw materials to make the products that humans need, and to reduce and eventually eliminate dependence on fossil carbon. The aim is essential—the world will eventually run out of fossil carbon. Yet sound policy must be informed by sound science. The EPA's treatment of biogenic carbon and fossil carbon as if they were identical is wrong at the most basic scientific level. America's farmers and the consumers of what they produce would be collateral damage of the EPA's misguided plans.

Mr. Dale, a professor of chemical engineering and materials science at Michigan State University, is a fellow of the American Institute of Chemical Engineers and of the American Institute of Medical and Biological Engineers.

Melissa J. Harrison

Press Secretary

U.S. Environmental Protection Agency

Office: (202) 564-8421

Mobile: **Personal Cell/email**

Harrison.Melissa@epa.gov

To: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Harrison, Melissa[Harrison.Melissa@epa.gov]; Ohrel, Sara[Ohrel.Sara@epa.gov]; DeLuca, Isabel[DeLuca.Isabel@epa.gov]; Millett, John[Millett.John@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: McCabe, Janet
Sent: Tue 7/12/2016 1:22:23 PM
Subject: RE: WSJ LTE -- USE THIS VERSION

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Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
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The Truth about Biomass

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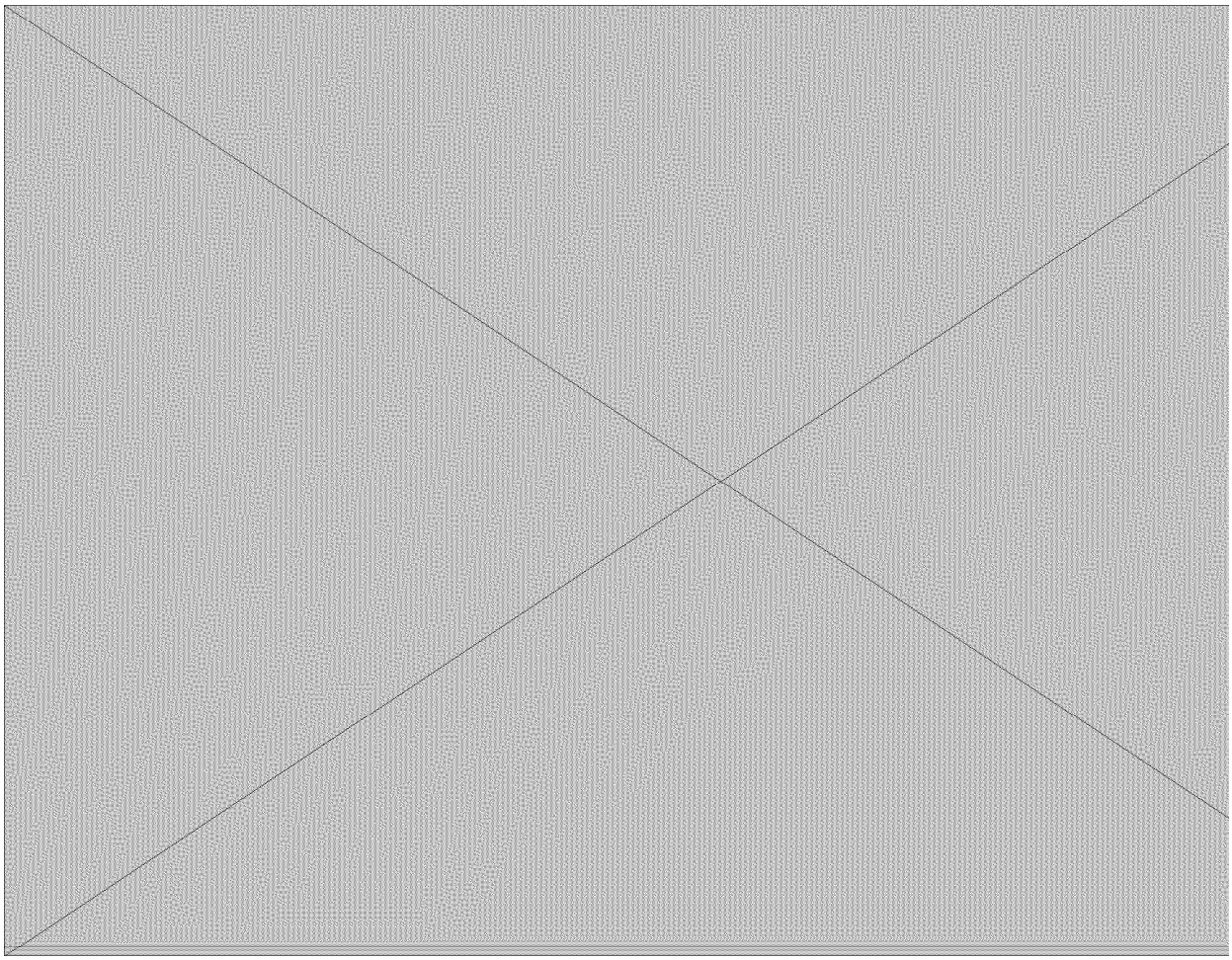

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July 10, 2016 4:51 p.m. ET

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The Truth about Biomass

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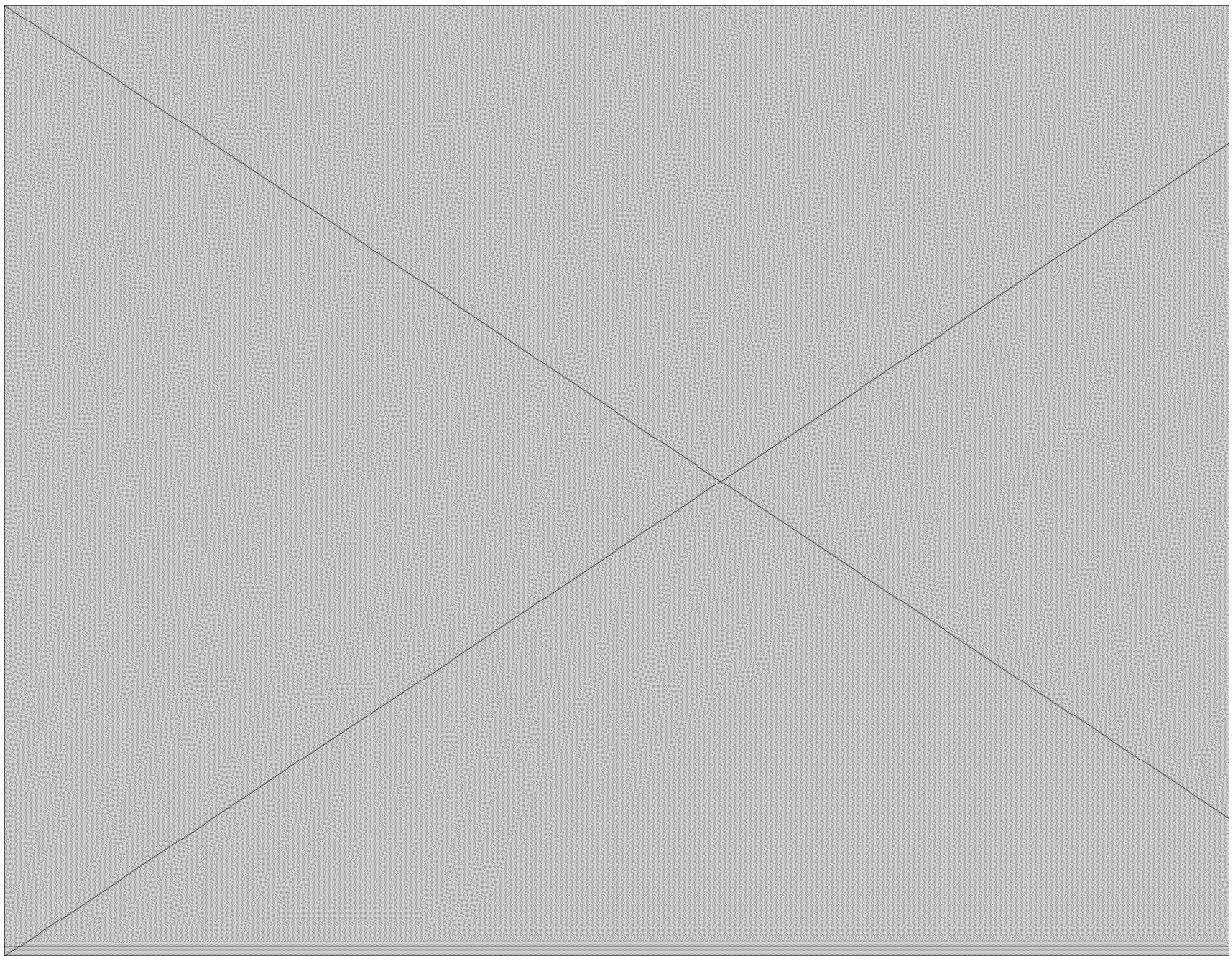

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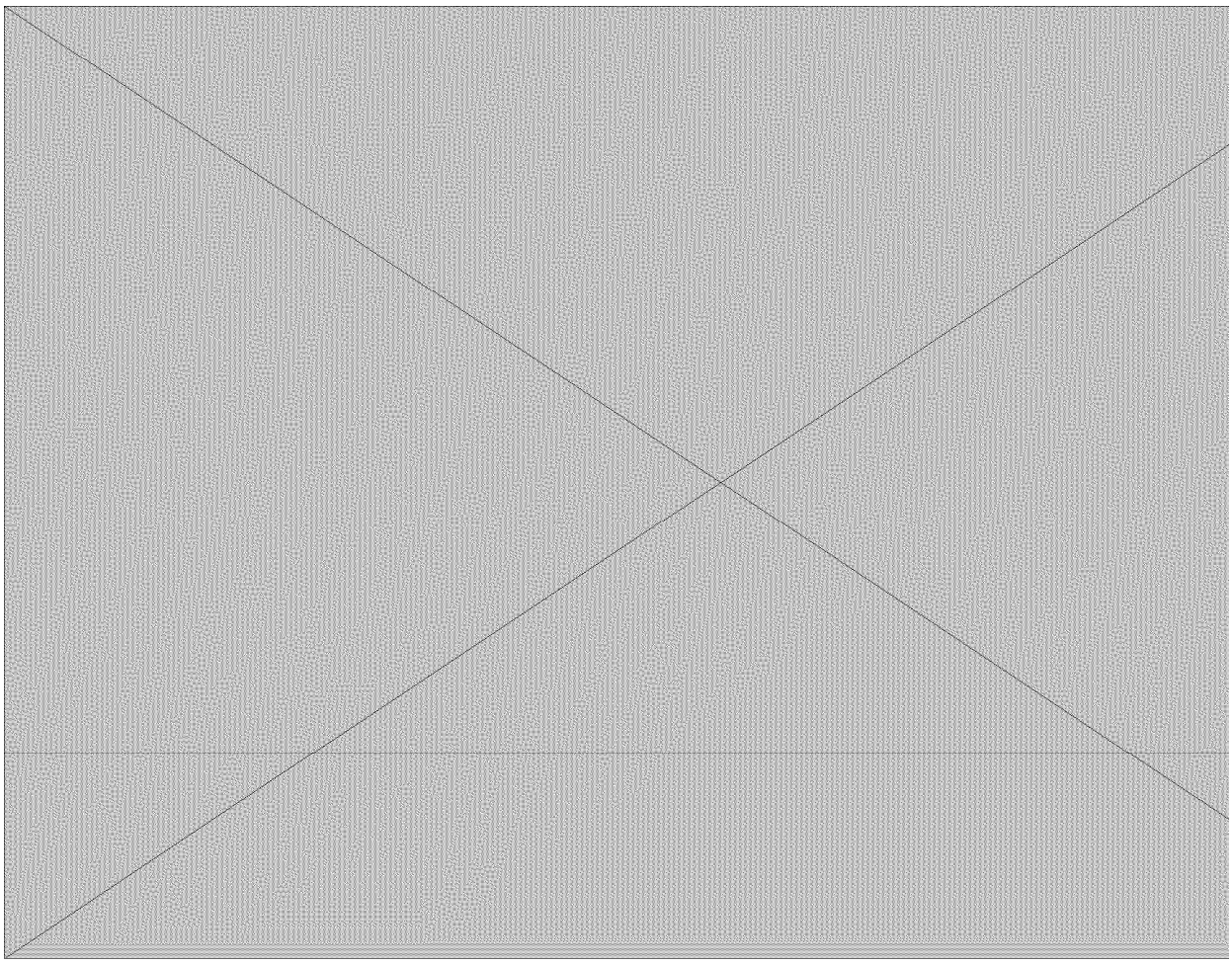

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By

Bruce E. Dale

July 10, 2016 4:51 p.m. ET

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Mobile: **Personal Cell/email**

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From: Drinkard, Andrea
Sent: Tue 7/12/2016 1:07:13 PM
Subject: RE: WSJ LTE -- USE THIS VERSION

Yep, thanks!

From: McCabe, Janet
Sent: Tuesday, July 12, 2016 8:41 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
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The Truth about Biomass

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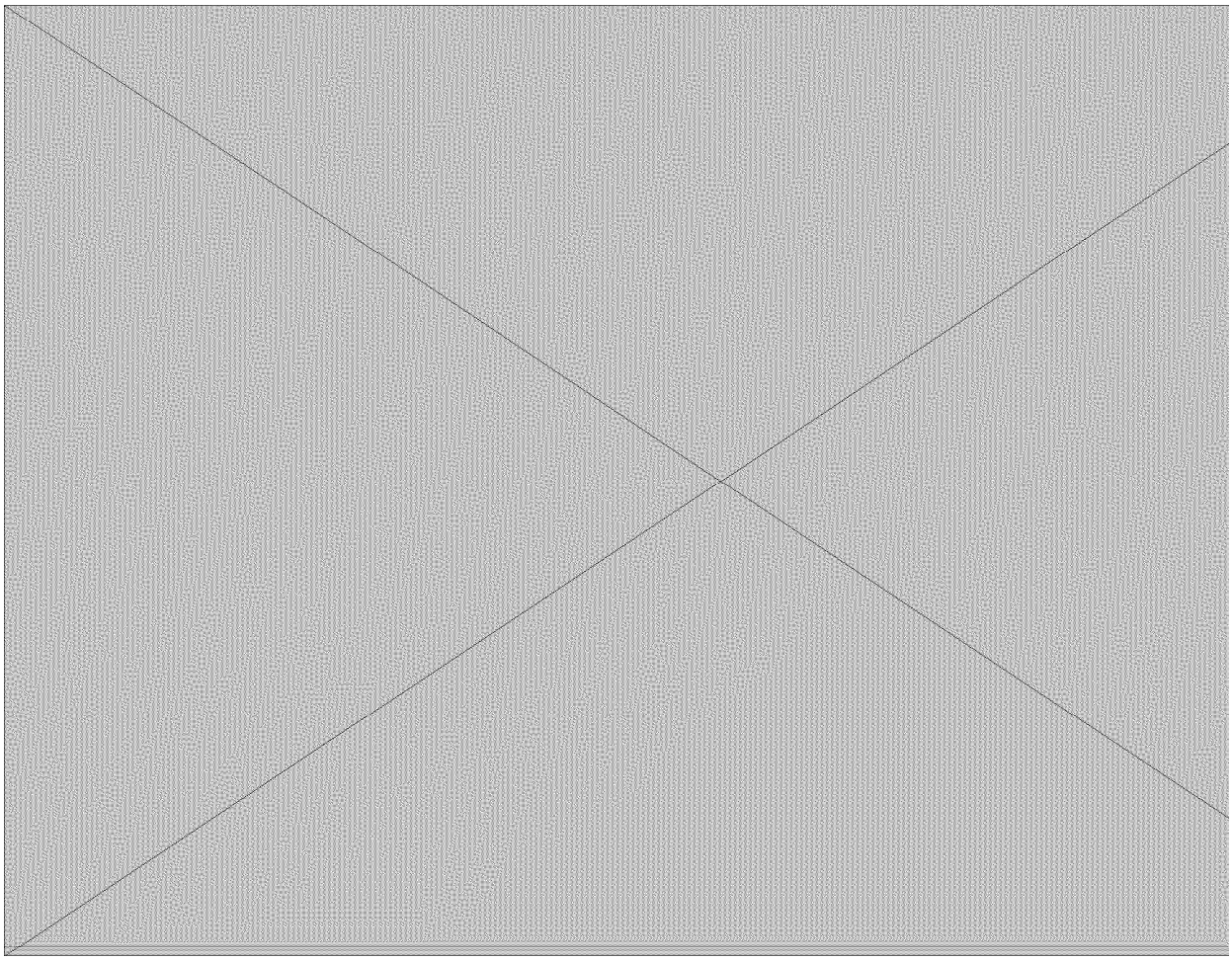

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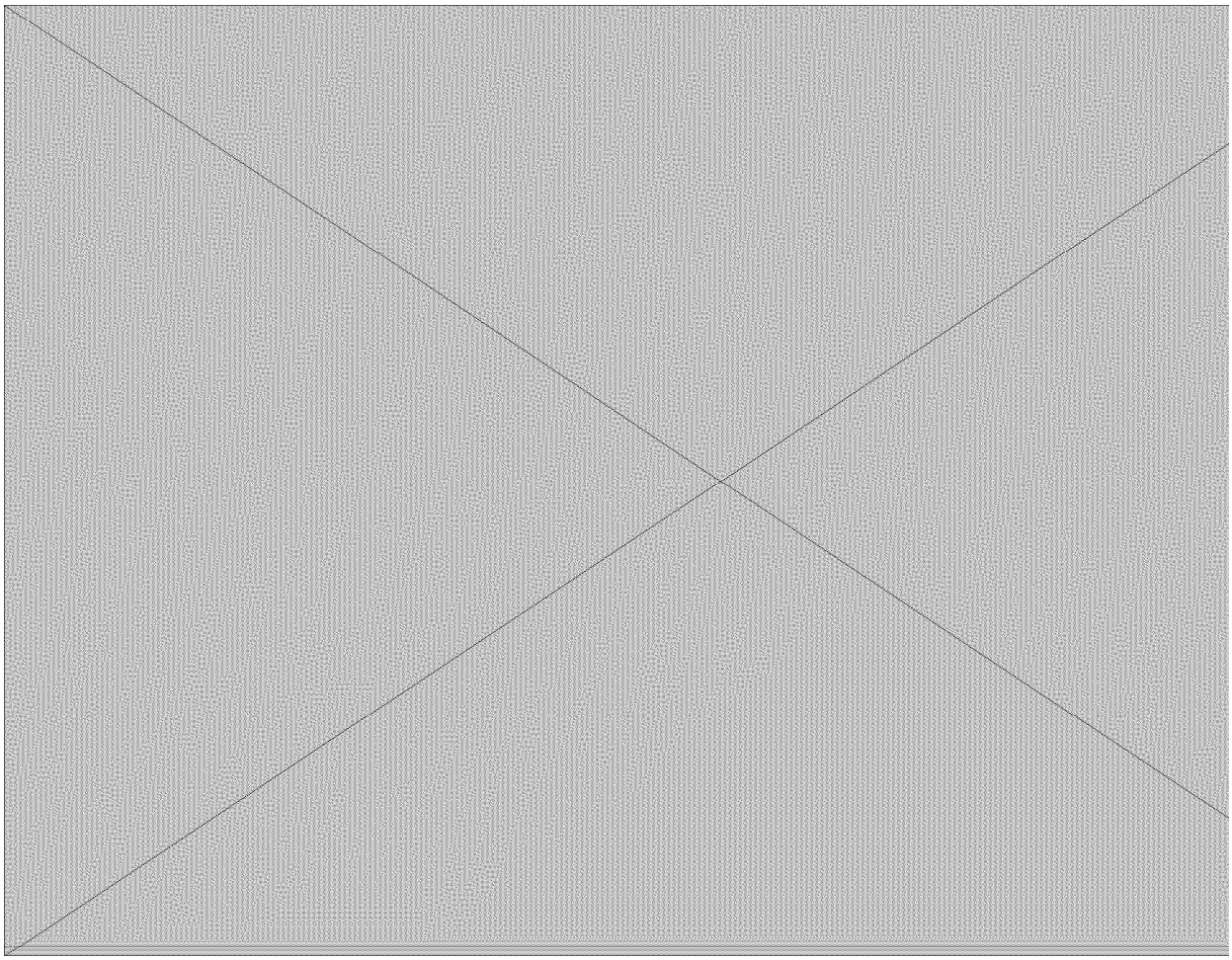

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From: Ohrel, Sara
Sent: Tue 7/12/2016 12:38:02 PM
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Hello everyone,

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Sara

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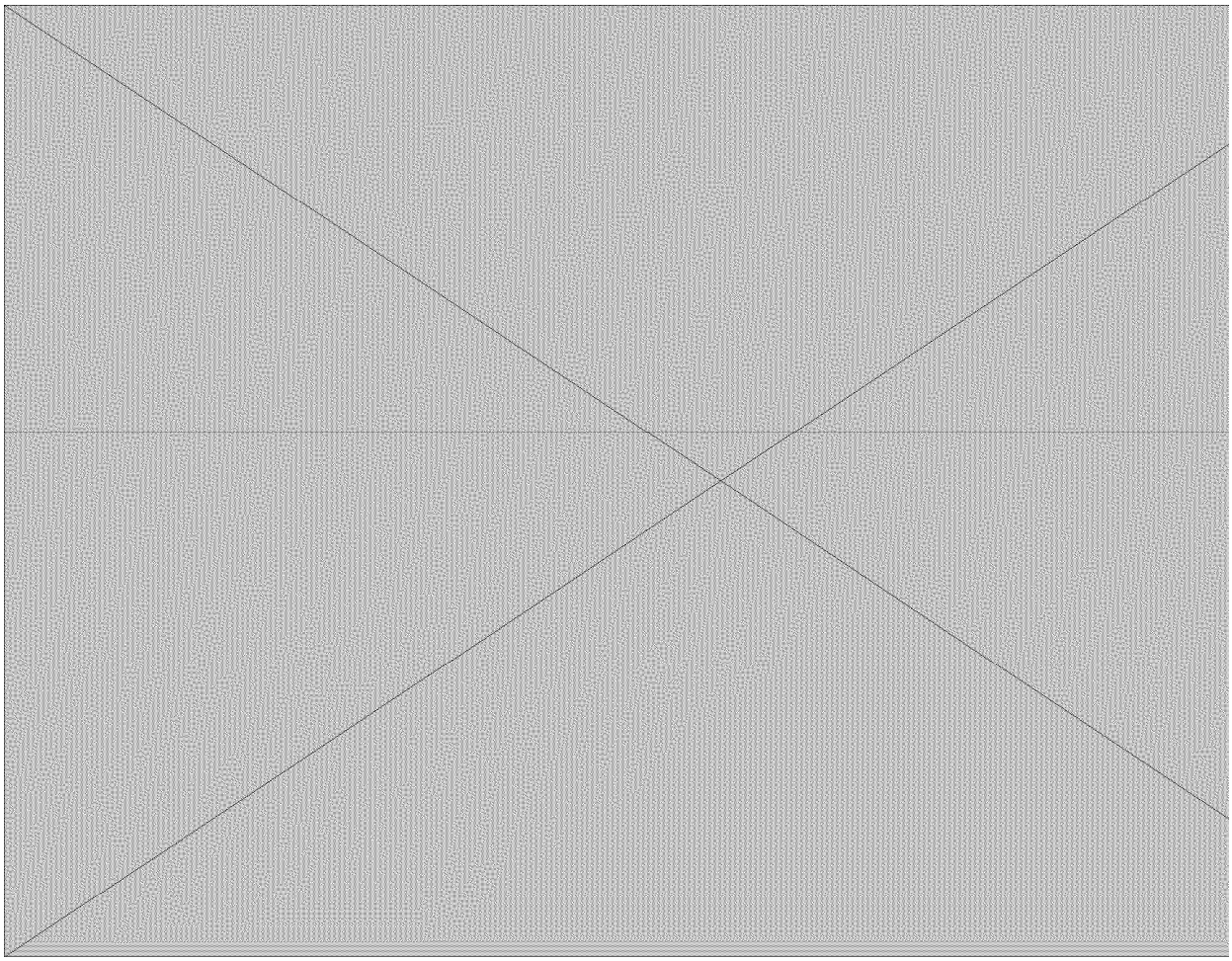

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By

Bruce E. Dale

July 10, 2016 4:51 p.m. ET

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From: Drinkard, Andrea
Sent: Tue 7/12/2016 12:23:20 PM
Subject: RE: WSJ LTE -- USE THIS VERSION

Same as below except incorporates Janet's edits. I didn't take the edit to the first sentence (though I did like it) and I walked Joe's initial edit back a bit. If I'm being too much of a nervous nelly, let me know.

Melissa, let me know if you have any edits and/or what the next step is.

The Truth about Biomass

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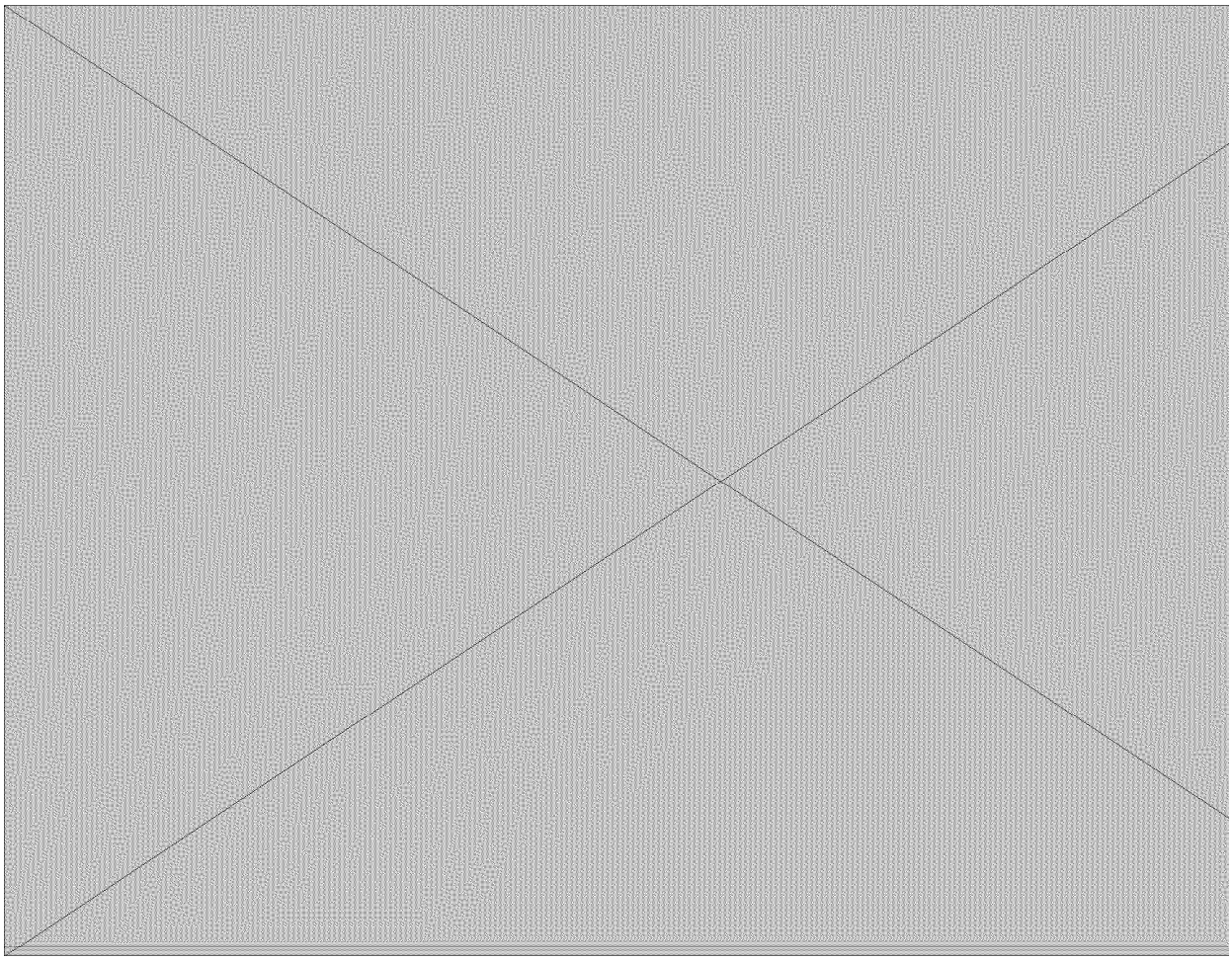

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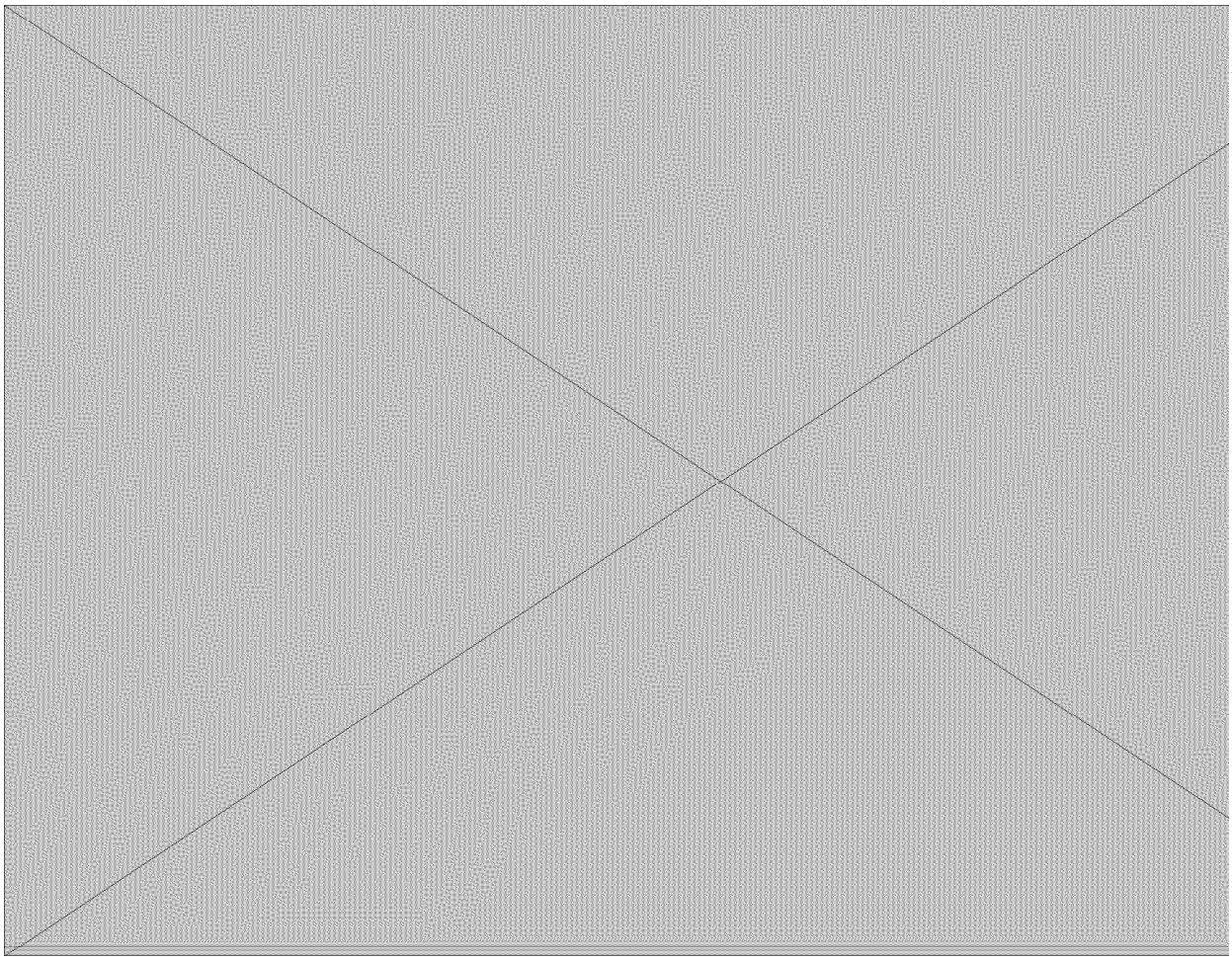

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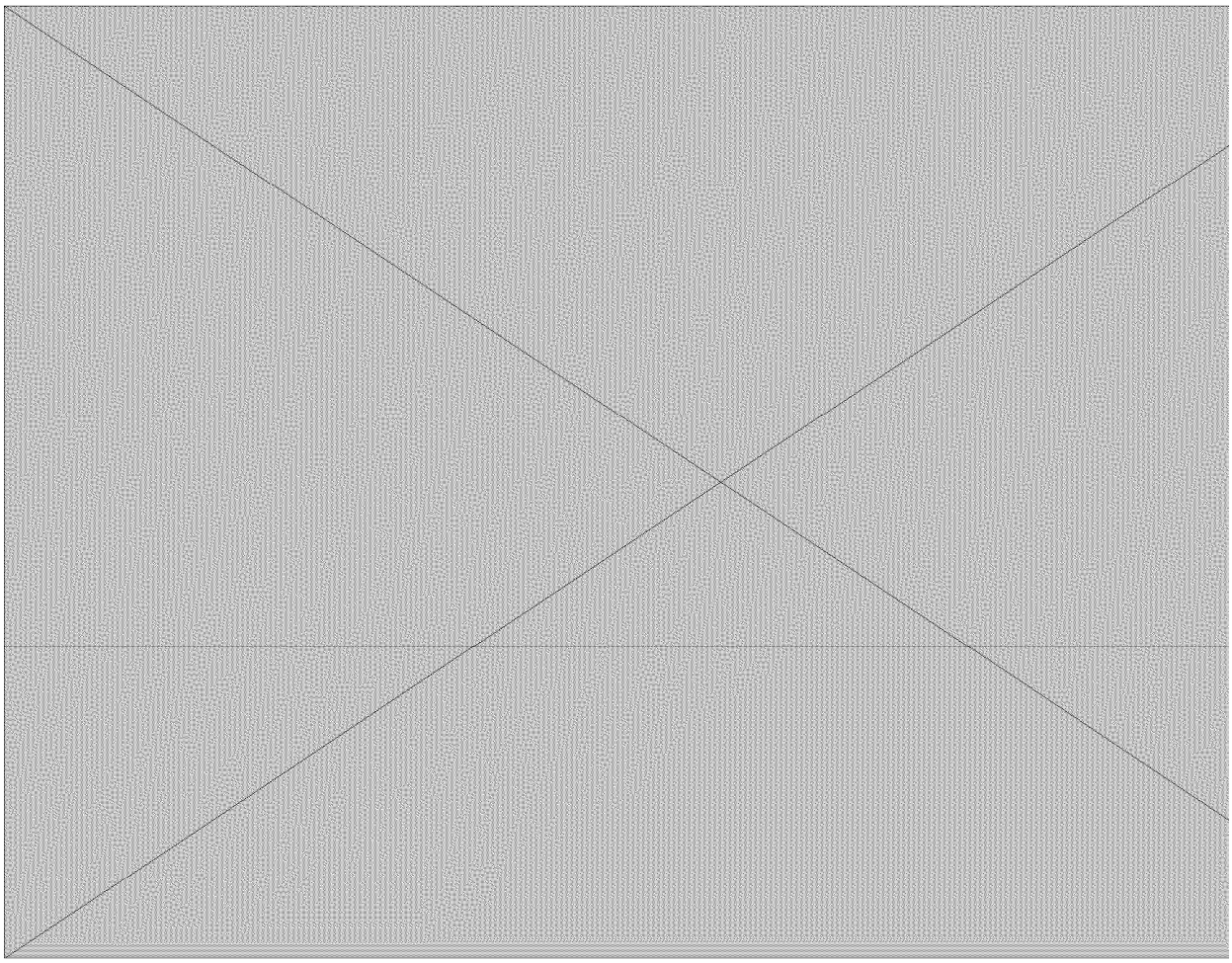

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There is a growing world-wide effort to establish the "bioeconomy," an economy based on use of renewable raw materials to make the products that humans need, and to reduce and eventually eliminate dependence on fossil carbon. The aim is essential—the world will eventually run out of fossil carbon. Yet sound policy must be informed by sound science. The EPA's treatment of biogenic carbon and fossil carbon as if they were identical is wrong at the most basic scientific level. America's farmers and the consumers of what they produce would be collateral damage of the EPA's misguided plans.

Mr. Dale, a professor of chemical engineering and materials science at Michigan State University, is a fellow of the American Institute of Chemical Engineers and of the American Institute of Medical and Biological Engineers.

Melissa J. Harrison

Press Secretary

U.S. Environmental Protection Agency

Office: (202) 564-8421

Mobile: **Personal Cell/email**

Harrison.Melissa@epa.gov

To: Harrison, Melissa[Harrison.Melissa@epa.gov]
Cc: McCabe, Janet[McCabe.Janet@epa.gov]; Millett, John[Millett.John@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Ohrel, Sara[Ohrel.Sara@epa.gov]; DeLuca, Isabel[DeLuca.Isabel@epa.gov]
From: Zenick, Elliott
Sent: Tue 7/12/2016 1:30:44 AM
Subject: RE: Biomass CPP WSJ LTE jg.docx

Ex. 5 - Deliberative Thank you.

From: Harrison, Melissa
Sent: Monday, July 11, 2016 9:16 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: McCabe, Janet <McCabe.Janet@epa.gov>; Millett, John <Millett.John@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>
Subject: Re: Biomass CPP WSJ LTE jg.docx

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Harrison.Melissa@epa.gov

On Jul 11, 2016, at 7:13 PM, Zenick, Elliott <Zenick.Elliott@epa.gov> wrote:

Atty-Client

From: McCabe, Janet
Sent: Monday, July 11, 2016 9:01 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Millett, John <Millett.John@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>
Subject: Re: Biomass CPP WSJ LTE jg.docx

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Sent from my iPhone

On Jul 11, 2016, at 8:59 PM, Zenick, Elliott <Zenick.Elliott@epa.gov> wrote:

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> **From:** McCabe, Jan
> **Sent:** Monday, July 11, 2016 8:53 PM
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> **Subject:** Re: Biomass CPP WSJ LTE jg.docx

> Elliott--would you be ok with it being worked into the letter in a way that doesn't sound awkward?
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> Sent from my iPhone
>
> On Jul 11, 2016, at 8:23 PM, Zenick, Elliott <Zenick.Elliott@epa.gov> wrote:
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> >
> > Sent from my iPhone
> >
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Harrison.Melissa@epa.gov

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<Biomass CPP WSJ LTE jg.docx>

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From: Harrison, Melissa
Sent: Tue 7/12/2016 1:15:34 AM
Subject: Re: Biomass CPP WSJ LTE jg.docx

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Cc: Harrison, Melissa[Harrison.Melissa@epa.gov]; Millett, John[Millett.John@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Ohrel, Sara[Ohrel.Sara@epa.gov]; DeLuca, Isabel[DeLuca.Isabel@epa.gov]
From: Zenick, Elliott
Sent: Tue 7/12/2016 1:13:47 AM
Subject: RE: Biomass CPP WSJ LTE jg.docx

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From: McCabe, Janet
Sent: Monday, July 11, 2016 9:01 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>; Millett, John <Millett.John@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Ohrel, Sara <Ohrel.Sara@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>
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<Biomass CPP WSJ LTE jg.docx>

To: Harrison, Melissa[Harrison.Melissa@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Drinkard, Andrea
Sent: Mon 7/11/2016 12:18:51 PM
Subject: Re: hey

I think that makes sense. I'm sitting at Emily's desk covering the phones this morning give me a call at 564-7404 if you'd like to chat first thing, otherwise I'll call you later this morning.

+Joe for awareness

Andrea Drinkard
(o) 202.564.1601
(c) Personal Cell/email

On Jul 11, 2016, at 8:12 AM, Harrison, Melissa <Harrison.Melissa@epa.gov> wrote:

Can we chat about this one? I'd to send the letter from states we got a few weeks back.

Melissa J. Harrison

Press Secretary

U.S. Environmental Protection Agency

Office: (202) 564-8421

Mobile: Personal Cell/email

Harrison.Melissa@epa.gov

Begin forwarded message:

From: "Benenati, Frank" <benenati.frank@epa.gov>
Date: July 8, 2016 at 10:48:52 AM EDT
To: "Harrison, Melissa" <Harrison.Melissa@epa.gov>
Subject: Fwd: hey

Let's talk about this too

Begin forwarded message:

From: "Davenport, Coral" <coral.davenport@nytimes.com>
Date: July 8, 2016 at 10:48:17 AM EDT
To: "Benenati, Frank" <benenati.frank@epa.gov>
Subject: Re: hey

No problem!
The story is about the fact that despite the SCOTUS hold and the 27-state lawsuit, many states -- including some that are suing -- are still moving forward in some way with preparing their CPP plans. In some cases, the governors of some states that are suing, such as Matt Meade of Wyoming, are clear that they oppose the plan, but are open about saying it's simply prudent to prepare to have a plan on hand if they lose. In other cases, the governors of some states that are suing have stated publicly that they oppose the plan and have not said anything publicly about preparing, but behind the scenes at state environmental agencies, the regulators and pencil-pushers have been given a quiet nod to go ahead and at least hold meetings and try to assess and sketch out how they might comply. In some cases, such as in Indiana, the Gov. has given a clear "pencils-down" order. But even in those states, businesses and career regulators are concerned about what might happen if they lose the lawsuit and have done literally nothing to prepare. The thought among those regulators and businesses is that if there's even a chance they might eventually have to comply, they'd all still rather have a state plan than submit to the EPA plan.

So here's what I'm interested in from EPA: who has the agency heard from in the states THAT ARE SUING? Particularly: AZ, SC, Indiana, Wisconsin, Ohio, Florida, Georgia, Alabama, Arkansas, NJ, Texas, Utah, Michigan.

Have regulators or businesses in those states reached out to EPA to ask for help or advice or information? How much has EPA been hearing requests for advise on how to do this overall since the stay? If they are talking w. regulators, public utilities, or businesses in the states that are suing, what has been the dynamic? A sense that they are reaching out discreetly, or w. the blessing of the governor?

I understand that in some of the states that are suing, regulators and state employees may be hesitant to talk about this, so if there's a way to convey this dynamic that requires background or one or two blind quotes, we could make that work. Also, if EPA could point me toward some of the folks in those states that they've talked to, that would be great.

Hope that makes sense. At my desk most of the day.

Can we set of the Seats of Power pic?

Cheers,
cd

On Fri, Jul 8, 2016 at 10:21 AM, Benenati, Frank <benenati.frank@epa.gov> wrote:

Thanks again for lunch, it was good to catch up.

Can you do me a favor (sorry if this is annoying), but send me a note about the CPP request you have? I want to be sure I didn't miss anything from our convo yesterday.

--
Coral Davenport
Energy and Environment Correspondent
The New York Times
Washington Bureau
1627 I St. NW, Suite 700
Washington, DC 20006
coral.davenport@nytimes.com
O 202-862-0359
C 703-618-0645
Twitter @CoralMDavenport

To: McCabe, Janet[McCabe.Janet@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]; Harrison, Melissa[Harrison.Melissa@epa.gov]; Millett, John[Millett.John@epa.gov]; Benenati, Frank[benenati.frank@epa.gov]; DeLuca, Isabel[DeLuca.Isabel@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Drinkard, Andrea
Sent: Mon 7/11/2016 10:35:48 AM
Subject: Re: WSJ LTE

I'll work with folks in OAP and OAQPS to pull something together this morning.

Andrea Drinkard
(o) 202.564.1601
(c) Personal Cell/email

On Jul 11, 2016, at 4:39 AM, McCabe, Janet <McCabe.Janet@epa.gov> wrote:

Ex. 5 - Deliberative

Sent from my iPhone

On Jul 10, 2016, at 10:14 PM, Goffman, Joseph <Goffman.Joseph@epa.gov> wrote:

Ex. 5 - Deliberative

Sent from my iPhone

On Jul 10, 2016, at 10:05 PM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:

Ex. 5 - Deliberative

Joe/Janet, thoughts?

Andrea Drinkard
(o) 202.564.1601
(c) Personal Cell/email

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http://www.wsj.com/articles/old-macdonald-had-a-climate-offender-1468183862

Old MacDonald Had a . . . Climate Offender

Worried about carbon from crops, the Environmental Protection Agency wants to regulate America's farms.

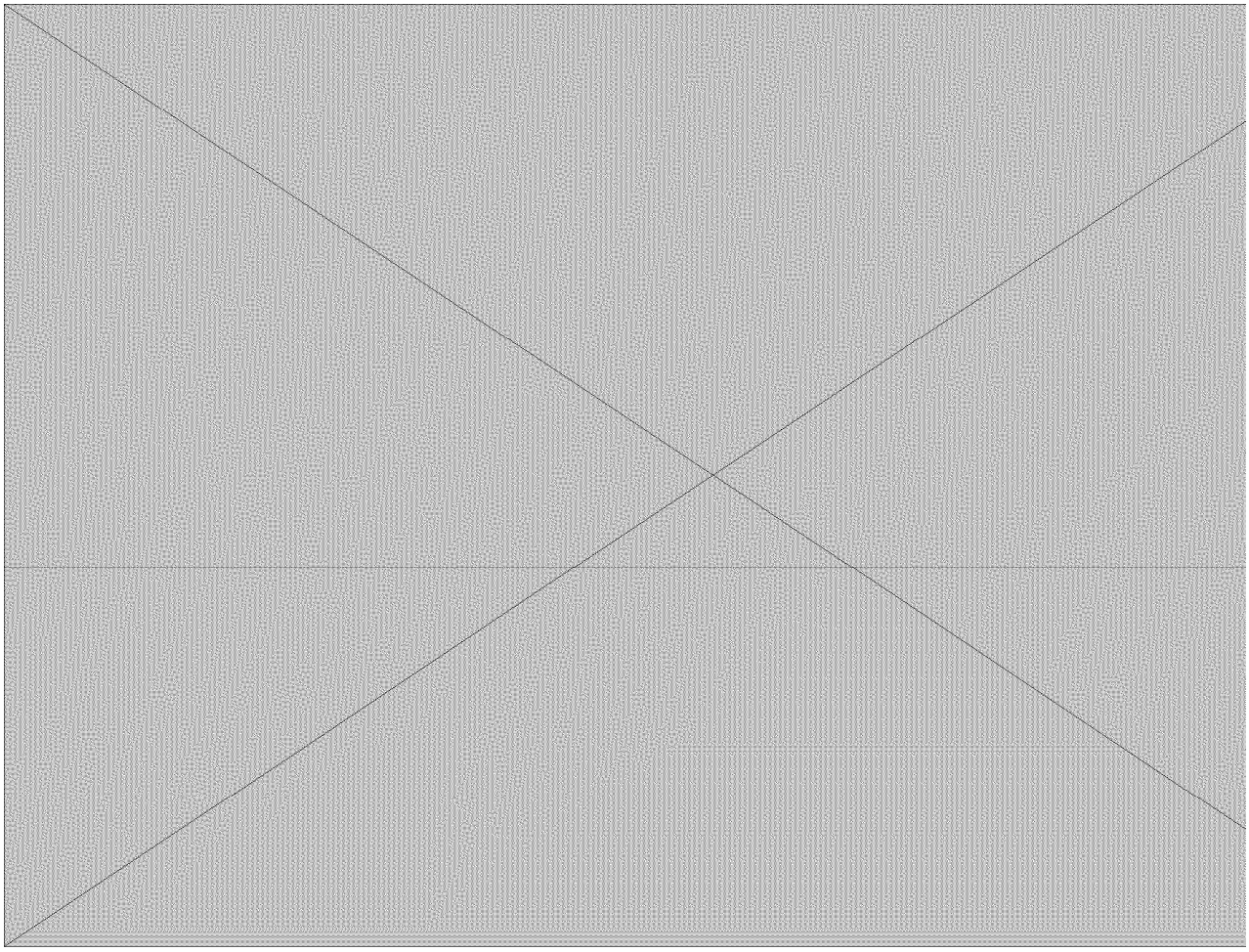

PHOTO: BLOOMBERG NEWS

SHARE

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By

Bruce E. Dale

July 10, 2016 4:51 p.m. ET

A basic fact about agricultural products such as grains and oilseeds is that the carbon in them, called biogenic carbon, came from the atmosphere. Biogenic carbon will return to the atmosphere when these products are consumed, such as when human beings eat bread and then breathe out the carbon dioxide resulting from the breakdown of bread in the body. Biogenic carbon therefore cannot contribute to climate change.

Why is the Environmental Protection Agency denying this basic fact of climate science? The EPA is counting biogenic-carbon emissions as if they were the same as fossil-carbon emissions. They are not the same. Carbon atoms emitted by burning fossil fuels are, in effect, on a one-way trip from the ground to the atmosphere, where they will stay for hundreds of millions of years. In contrast, carbon atoms taken from the atmosphere to make agricultural products are on a round trip from the atmosphere to farms then back to the atmosphere.

The EPA intends to penalize American farmers and those who make modern energy and bioproducts such as plastics from agricultural feedstocks by treating biogenic carbon like fossil carbon. As part of its approach, the EPA is now attempting to regulate “sustainability” in the farm field.

ADVERTISEMENT

The agency’s new Clean Power Plan proposes to penalize biogenic carbon emissions unless food processors (bakeries, brewers, grain processors) or energy producers (like utilities using seed hulls to produce electricity) can prove that they used “sustainably-derived” agricultural feedstocks. The definition of “sustainably-derived” and the proposed penalties go on for many pages in the proposed regulations. They defy easy summary. But the proposed regulation on biogenic carbon is simply and clearly an unjustified

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Cc: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Harrison, Melissa[Harrison.Melissa@epa.gov]; Millett, John[Millett.John@epa.gov]; Benenati, Frank[benenati.frank@epa.gov]
From: McCabe, Janet
Sent: Mon 7/11/2016 8:39:55 AM
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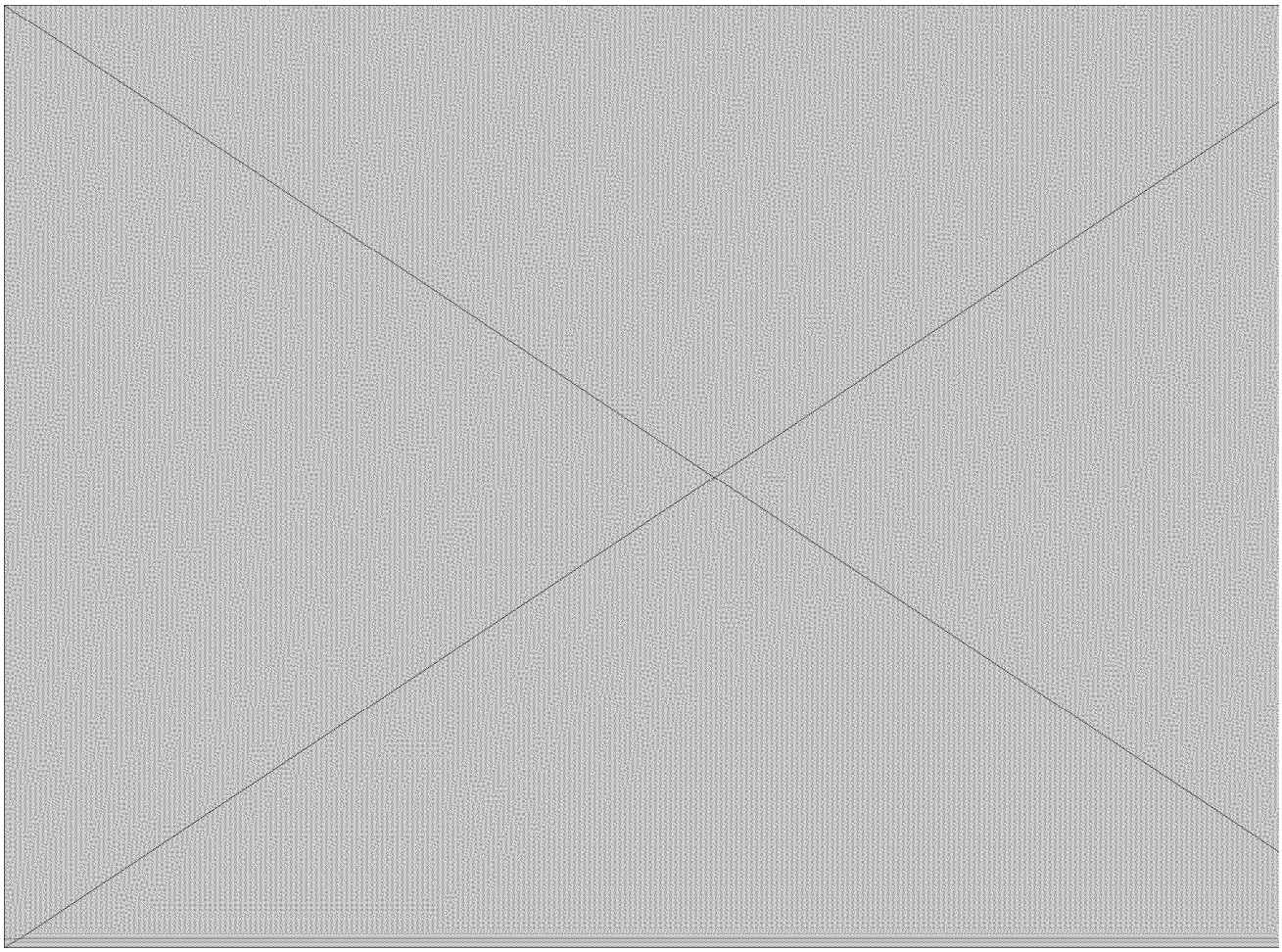

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From: Drinkard, Andrea
Sent: Mon 7/11/2016 2:05:42 AM
Subject: Re: WSJ LTE

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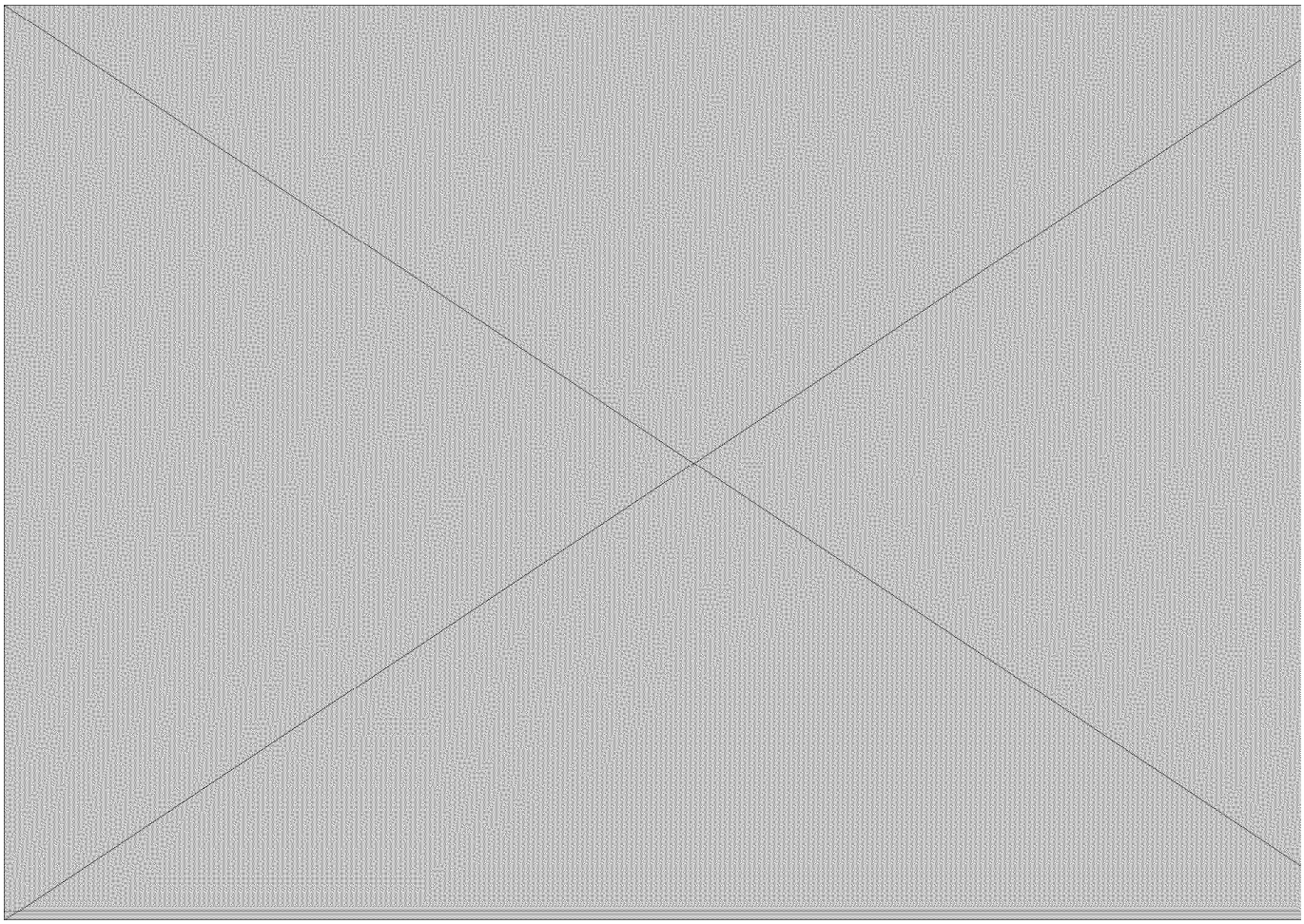

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There is a growing world-wide effort to establish the "bioeconomy," an economy based on use of renewable raw materials to make the products that humans need, and to reduce and eventually eliminate dependence on fossil carbon. The aim is essential—the world will eventually run out of fossil carbon. Yet sound policy must be informed by sound science. The EPA's treatment of biogenic carbon and fossil carbon as if they were identical is wrong at the most basic scientific level. America's farmers and the consumers of what they produce would be collateral damage of the EPA's misguided plans.

Mr. Dale, a professor of chemical engineering and materials science at Michigan State University, is a fellow of the American Institute of Chemical Engineers and of the American Institute of Medical and Biological Engineers.

Melissa J. Harrison

Press Secretary

U.S. Environmental Protection Agency

Office: (202) 564-8421

Mobile: **Personal Cell/email**

Harrison.Melissa@epa.gov

To: McCabe, Janet[McCabe.Janet@epa.gov]
Cc: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: McMichael, Nate
Sent: Sat 7/9/2016 1:21:32 PM
Subject: Fwd: NAM Materials for Joe
Joseph Goffman Event Form_10 15.docx
ATT00001.htm
NAM TPs V2.docx
ATT00002.htm

Janet- here are the talking points that we prepared for Joe. There are one or two places in the intro that I'll tweak on Monday to make them from you. I can also add more on topics like PM and SO2, if you would like. Please let me know if you have any additional edits/suggestions.

Thank you!

Sent from my iPhone

Begin forwarded message:

From: "McMichael, Nate" <McMichael.Nate@epa.gov>
Date: July 8, 2016 at 3:57:56 PM EDT
To: OAR Briefings <OAR_Briefings@epa.gov>
Subject: NAM Materials for Joe

Hi - can we please include the attached materials in Joe's book for review. Thank you!

Nate McMichael

Office of Air and Radiation

202-564-0382 (o)

Personal Cell/email

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Cyran, Carissa
Sent: Fri 7/8/2016 9:09:57 PM
Subject: E-folder for Monday, July 11, 2016
Kentucky 2008 Ozone Transport FIP Obligation - Sierra Club Litigation Me....docx
Joseph Goffman Event Form_10 15.docx
NAM TPs V2.docx
2016 EIA Conference Agenda.pdf
Joseph Goffman Event Form_10 15.docx
EIA Presentation_CPP_Panel_2016 Annual Conference_v4.pptx
Tubman EIA July 2016.pptx
AEO 2016 update 6-16.docx
Goffman_EIA_FINAL_WithNotes.pptx
Background for Administrator_mj bradley 7_11_16.docx
Final_StatesLettertoEPARequestingAdditionalCPPInformation_GCC.PDF

9:30 am - 10:00 am Management Roundtable - 5400

10:00 am - 12:00 pm EIA Annual Conference - Washington Hilton Hotel - 1919 Connecticut Ave. NW
Final Slide Deck with Notes

Background on the final AEO scenarios (more background/analysis to come)

Michael Tubman's Presentation

Thaddeus Huetteman's Presentation

General Background Information

Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

12:00 pm - 12:30 pm Mexico follow up activities - 5415

2:00 pm - 3:00 pm Next Steps on Kentucky 2008 Ozone Transport FIP Litigation and the 176A Petition - 5400

FOR REVIEW:
NAM Environmental and Energy Policy Committee Meeting - Talking Points

FYI: Backgrounder for the Administrator for the Michael Bradley meeting

Overview of Recent Air Rulemakings
National Association of Manufacturers
July 12, 2016
12:00 PM – 12:30 PM

INTRO

- Thank you for the introduction.
- And, thank you to everyone in the room for your interest in this regulatory update.
- I see a lot of familiar faces here and I am sure that many, if not all, of you have, at one time or another, provided input or formal comments to help shape EPA rulemaking.
- We might not always see things the same way, but please know that the comments we receive from industry groups like the National Association of Manufacturers and your individual companies are critical in helping us develop rules that achieve our environmental goals and meet the needs of industry.
- So, keep them coming.
- I echo what both the Administrator and the head of my office, Janet McCabe, have said before -- I have never seen a rule **not** get better due to the public comment process.
- From addressing global climate change to meeting the demands of the Clean Air Act, we all have a lot of on our plate.
- But one fact remains that should give us all confidence as we

look to the challenges ahead**: In the 45 years EPA has been around we've cut air pollution by nearly 70 percent, while our economy has more than tripled.**

- Clearly, we have been successful in our shared goals of growing our nation's economy and protecting our environment.

CPP

- Over the next half hour, I want to discuss some of the major rulemakings from EPA's Office of Air and Radiation.
- Let me start with the Clean Power Plan
- For the remainder of 2016, we will continue to focus on implementing the President's Climate Action Plan.
- The cornerstone of his plan is the Clean Power Plan.
- Last August, EPA finalized the CPP to reduce carbon pollution from power plants, the nation's largest source of CO2, while maintaining energy reliability and affordability.
- These are the first-ever national standards that address carbon pollution from power plants.
- The Clean Power Plan establishes an approach to cut significant amounts of power plant carbon pollution while supporting advancements in clean energy innovation, development and deployment, and it lays the foundation for the

long-term strategy needed to tackle the threat of climate change.

- It moves us in the right direction as a country because, as you all know, climate change is a significant threat and the evidence of its impacts keeps getting stronger.
- As I am sure you also know, in February, the Supreme Court stayed the Clean Power Plan while the courts are reviewing it.
- Right now, states, tribes and utilities do not have to comply with the Clean Power Plan while the stay is in effect.
- Nothing that the EPA is currently doing would require anyone to take steps now to comply with the CPP.
- The Court, however, did not tell the EPA to stop all work related to the Clean Power Plan, and many stakeholders – including more than a dozen states – have asked the agency to continue providing assistance so that they can move forward on a voluntary basis.
- For example, in April, 14 states requested additional information and technical assistance related to the final Clean Power Plan because they noted, "additional information and assistance will be important to our state efforts to prudently plan for and implement a variety of state and federal obligations."
- They noted state environmental agencies' "important

obligations to protect public health and the environment."

- EPA is allowed, and in fact fully intends, to continue providing assistance and resources to states and other stakeholders interested in controlling harmful carbon dioxide pollution from fossil fuel-fired power plants.
- This work will also assist timely state and tribal decisions regarding options for plan development when the stay is lifted.
- EPA believes that the Clean Power Plan is on solid legal and scientific footing and ultimately will be upheld by the courts. When that happens, it will be important that implementation of the Plan proceed in a timely fashion.
- Many states, including those opposed to the Clean Power Plan, have said that for states to comply with the Clean Power Plan when the stay is lifted, they would benefit from additional information, including model trading rules and details for the Clean Energy Incentive Program or CEIP, which I will discuss more in a minute.
- EPA is moving forward with these actions so that states, tribal and power plants will have that additional information when the stay is lifted and at that time can promptly develop state and tribal plans to comply with the Clean Power Plan.
- The Supreme Court orders granting the stay did not address the question of whether and to what extent tolling is

appropriate. That question will need to be resolved once the validity of the CPP is finally adjudicated.

- The stay does not stop states, tribes, or utilities from continuing to act on climate.
- And many are.
- So, we will continue to work with states and tribes that want to work with us on a voluntary basis.
- That is why we issued a proposal for the CEIP last month.
- The CEIP will help states and tribes with affected sources meet their goals under the CPP by removing barriers to investment

in energy efficiency and solar measures in low - income

communities and by encouraging early investments in zero

- emitting renewable energy generation.

- Once finalized, the design elements in this proposal will help guide states and tribes that choose to participate in the CEIP when the Clean Power Plan becomes effective.
- People are also asking about the proposed model trading rules.
- We are evaluating the comments we received from the public comment process and I'll note that:
  - Commenters have shown a lot of support to the agency in finalizing both a rate-based model rule and a mass-based model rule
  - Commenters have also shown support for model rules that are ready for interstate trading
- We will move forward developing these actions in a way that is consistent with the stay.
- As always, we are happy to talk with utilities, states and other stakeholders like you as we move forward.
- There is still a lot of analysis and planning work going on.

METHANE

Not Responsive

Not Responsive

Not Responsive

Not Responsive

Not Responsive

Not Responsive

Not Responsive

Not Responsive

Not Responsive

U.S. ENVIRONMENTAL PROTECTION AGENCY
Washington D.C.

July 25, 2016

Meeting with Advanced Energy Economy

DATE: July 26, 2016
LOCATION: Alm Conference Room
TIME: 9:00 AM – 9:30 AM
FROM: Kristien Knapp

I. PURPOSE

Advanced Energy Economy requested this meeting to discuss their input on the state Model Rules and the Clean Energy Incentive Program. AEE has formed this coalition to develop consensus views on selected model rule and CEIP topics. OAR staff have met with these groups on several occasions, though not with this specific coalition of groups.

Model Rules

- The likely focus of the discussion will be on allocation and leakage topics in the model rules.
- The group is seeking a level playing field for energy efficiency and renewable energy technologies generally.

CEIP

- Several groups may ask that EPA provide CEIP credit to all EE, not just EE in low-income communities.
- Some groups may note that CEIP emissions verification and measurement methods should not be burdensome for states that adopt mass-based programs.
- Some groups may ask about the rationales for not specifically mentioning or excluding specific technologies, such as CHP and biomass.

AEE's Coalition

- Advanced Energy Economy (AEE)
- American Wind Energy Association (AWEA)
- American Council for an Energy-Efficient Economy (ACEEE)
- Business Council for Sustainable Energy (BCSE)
- National Association of Energy Service Companies (NAESCO)
- Alliance to Save Energy (ASE)
- Exelon Corporation

II. KEY PARTICIPANTS

Participants

- Chris Hessler, Partner, AJW, Inc.
- Tom Vinson, Vice President, Federal Regulatory Affairs, AWEA
- Kelly Speakes-Backman, Senior Vice President of Policy & Research, ASE
- Lisa Jacobson, President, BCSE
- Kathleen Robertson, Environmental Policy Manager, Exelon
- Rick Umoff, Regulatory Counsel and Director, State Affairs, SEIA
- Donald Gilligan, President, NAESCO
- Sara Hayes, Senior Manager and Researcher, ACEEE
- Mona Sheth, Senior Associate, AJW
- Steve Nadel, Executive Director, ACEEE
- Michael Goggin, Senior Director of Research, AWEA
- Gene Grace, Senior Counsel, AWEA
- Cassandra Kubes, Research Analyst, ACEEE
- Jon Norman, Vice President - Government & Regulatory Affairs, Brookfield Renewable
- Ted Michaels, Partner, AJW
- Caitlin Marquis, Associate, AEE
- Malcolm Woolf, Senior Vice President, AEE
- Arvin Ganesan, Vice President, AEE
- Matt Stanberry, Vice President, AEE

Staff

- Janet McCabe, Joe Goffman, Sarah Dunham, Reid Harvey, Kevin Culligan, OAR

III. BACKGROUND

AEE Background

AEE and its state and regional partners (active in 26 states) represent more than 1,000 companies and organizations that span the advance energy industry and its value chains. Technologies represented include energy efficiency, demand response, natural gas, wind, solar, smart grid, nuclear power, and advanced transportation.

AEE has been an active participant in proceedings involving the CPP including:

- Submitting comments on CPP proposal design (March 2014);
- Submitting comments on CPP proposal (November and December 2014);
- Providing several public papers related to the CPP; and
- Filing a motion in support of EPA in litigation in the U.S. Court of Appeals on the CPP.

Previous AEE-OAR Meetings

AEE has met with OAR on the CPP three times since August 2015. In total, there have been about 10 meetings in the last 2 years. Their comments of December 15, 2015, to the non-regulatory docket for the CEIP are highlighted below and reflect the key points made at these recent meetings.

- October 20, 2015: The Climate Registry (TCR) met with Sarah Dunham and OAP staff to discuss energy efficiency registry. TCR team included representatives from APX, Conservation Services Group, and AEE (Arvin Ganesan).
- November 24, 2015:
    - CEIP-focused meeting with Joe Goffman, Sarah Dunham, Kevin Culligan, and OAR staff.
    - Meeting on energy efficiency in the Federal Plan with OAP staff.

<u>AEE's Comments to the Non-Regulatory Docket for CEIP Design and Implementation</u>
"AEE welcomes the concept of the CEIP as a tool to accelerate the deployment of EE and RE prior to the start of the CPP. However, AEE believes the current structure contains significant flaws that could harm RE and EE markets, preventing the program from achieving its goals."
More Highlights of AEE's Comments:

- AEE urges EPA to amend the CEIP timeline to 1) avoid creating an incentive to delay action, 2) ensure that project developers have a sufficient window of time to take advantage of the CEIP, 3) ensure that the CEIP is fully utilized, and 4) enhance the environmental and economic benefits of the CEIP. Specifically, AEE recommends:
    - Moving the the *project eligibility* start date to September 6, 2016 (i.e., the initial plan submission deadline);
    - Moving the *credit generation* eligibility start date to the earlier of either 1) the date a state submits its final state plan or 2) September 6, 2018; and
    - Clarifying the CEIP *project eligibility* start date under the federal plan, because it is ambiguous and could lead to uncertainty for project providers seeking CEIP credit.
- AEE recommends that EPA adopt definitions of "commence construction" and "commence operation" that minimize perverse incentives to delay the deployment of RE and EE projects. Specifically, AEE recommends:
    - A definition of "commence construction" that is based on actual physical on-site construction of a significant nature and that explicitly excludes pre-construction planning and development activities; and
    - A definition of "commence operation" that is based on when an EE project starts to generate MWh savings and explicitly excludes installation, planning and development activities.
- AEE recommends that EPA should expand and broadly define the scope of eligibility for the CEIP program in order to harness more advance energy opportunities in the years prior to 2022.
    - EPA should expand the scope of eligibility for the CEIP to all demand-side EE resources (i.e., not limiting to low-income).
        - Support the 2 for 1 match for low-income EE and recommend allowing for a 1 to 1 match for all other EE resources.
    - EPA should adopt an inclusive definition of low-income community that 1)

captures households, businesses, and infrastructure in low-income communities, 2) includes low-income households and buildings/infrastructure serving low-income communities that may not fall within the boundary of a low-income community, and 3) recognizes complementary criteria from state programs.
  - EPA should continue to broadly define metered wind and solar to encompass all types of wind and solar, including distributed generation and offshore wind.
  - EPA should expand eligibility for the CEIP to RE resources other than metered wind or solar, as long as they meet the other CEIP eligibility requirements.
- AEE supports the first of the two examples provided by EPA to ensure maintenance of CPP stringency under rate-based plans (i.e., during the interim performance period, ERCs could be retired in an amount equivalent to the number of early action ERCs that were awarded through the CEIP).
- AEE recommends use of a constant factor of 0.8 tons/MWh for converting between short tons and MWh for the CEIP.

To: Huetteman, Thaddeus[Thaddeus.Huetteman@eia.gov]; Michael Tubman[tubmanm@c2es.org]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Kelsey.Brasher@eia.gov[Kelsey.Brasher@eia.gov]
From: Drinkard, Andrea
Sent: Fri 7/8/2016 7:11:00 PM
Subject: RE: EIA presentation- Clean Power Plan panel
Goffman_EIA_FINAL.pptx

Hi all—

Here's Joe's presentation. Looking forward to Monday.

-Andrea-

From: Huetteman, Thaddeus [mailto:Thaddeus.Huetteman@eia.gov]
Sent: Friday, July 08, 2016 2:32 PM
To: Michael Tubman <tubmanm@c2es.org>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: Fwd: EIA presentation- Clean Power Plan panel

Dear all

Here is my presentation for our panel. See you Monday.

Have a great weekend

Thad

Begin forwarded message:

From: "Huetteman, Thaddeus" <Thaddeus.Huetteman@eia.gov>
Date: July 7, 2016 at 6:12:04 PM EDT

To: "Brasher, Kelsey (CONTR)" <Kelsey.Brasher@eia.gov>
Cc: "Diefenderfer, Jim" <Jim.Diefenderfer@eia.gov>, "Namovicz, Christopher" <chris.namovicz@eia.gov>, "Martin, Laura" <Laura.Martin@eia.gov>, "Jones, Jeffrey" <Jeffrey.Jones@eia.gov>
Subject: EIA presentation- Clean Power Plan panel

Kelsey

Here is the EIA hand-out for the Clean Power Plan panel on Monday.

Please let me know if you have any questions. I am accessible by cell tomorrow 678.575.4460.

Thanks again for your help.

Thad

Thad

Thad Huetteman

Electricity Analysis Team

Office of Electricity, Coal, Nuclear, and Renewables Analysis

U.S. Energy Information Administration

U.S. Department of Energy

1000 Independence Ave., SW EI-34

Washington, DC 20585

(202) 586-7238

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Washington, Yvette[Washington.Yvette@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]
From: Stewart, Lori
Sent: Wed 7/6/2016 8:11:19 PM
Subject: FW: For Joe's Review--EIA Slide Deck and Background
Goffman_EIA_v2.pptx
FW: Updated CPP scenarios from EIA
Tubman EIA July 2016.pptx
Joseph Goffman Event Form_10 15.docx
2016 EIA Conference Agenda.pdf

Joe, Yvette is printing these, but I'm also sharing the efiles (at the moment, the Tubman file is proving difficult to print).

From: Washington, Yvette
Sent: Wednesday, July 06, 2016 4:06 PM
To: Stewart, Lori <Stewart.Lori@epa.gov>
Subject: FW: For Joe's Review--EIA Slide Deck and Background

I need the Michael Tubman presentation only.

From: Drinkard, Andrea
Sent: Wednesday, July 06, 2016 2:02 PM
To: OAR Briefings <OAR_Briefings@epa.gov>
Subject: For Joe's Review--EIA Slide Deck and Background

Please print and include the following in Joe's folder and e-folder tonight. Please note that I need any edits back on the slides tomorrow, so we can get the deck to the other presenters and the organizers. Thanks.

Draft Slide Deck (note there are notes in the notes section of a few slides) Please review and provide feedback tomorrow (7-7-16)

Background on the final AEO scenarios (more background/analysis to come)

Below is a link to the "Issues in Focus" section on CPP (please print)

https://www.eia.gov/forecasts/aeo/section_issues.cfm#cpp

Here is a link to the results tables and sections (for reference only, do not print due to length)

https://www.eia.gov/forecasts/aeo/index.cfm

Michael Tubman's Presentation

General Background Information

To: Goffman, Joseph[Goffman.Joseph@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Snyder, Carolyn[Snyder.Carolyn@epa.gov]; Rosenberg, Julie[Rosenberg.Julie@epa.gov]
Cc: Drinkard, Andrea[Drinkard.Andrea@epa.gov]
From: Rupp, Mark
Sent: Wed 6/22/2016 1:05:22 PM
Subject: Alliance for a Sustainable Future

Janet, et al. Given stated interest in the trade press, below, what do you think about seeing if the USCM would like an individual briefing on the CEIP for their member-mayors? (Could also invite members of the National League of Cities.) The USCM is meeting in Indianapolis beginning Friday…I can inquire about interest while I'm there. (And realizing I'll be in your hometown, Janet, will take recommendations about what to do! ☺)

Mark

Mayors, climate group join forces on planning for rule

Elizabeth Harball, E&E reporter

Published: Tuesday, June 21, 2016

The nonprofit Center for Climate and Energy Solutions (C2ES) announced plans today to team up with the U.S. Conference of Mayors and businesses to urge carbon reductions from U.S. power plants.

One of the alliance's main goals is getting cities and businesses to work with states on implementing U.S. EPA's Clean Power Plan, a rule aimed at reducing power plant emissions 32 percent from 2005 levels by 2030.

Judy Sheahan, assistant executive director for the U.S. Conference of Mayors, said the group intends to take advantage of the Supreme Court stay of the rule to strategize how cities can be a more active part of the Clean Power Plan planning process.

"A lot of times, unfortunately, for state implementation plans, mayors are not usually at the table," said Sheahan. "What sometimes happens is things get implemented on a city rather than with a city.

"The plan is to have mayors and businesses work together, create some model best practices and, ideally, approach the state together," she said.

C2ES President Bob Perciasepe, former U.S. EPA deputy administrator, said cities will leverage commitments they have already made through other groups like the Compact of Mayors, which was active during the Paris climate talks last year.

"How do we get that translated into both the Clean Power Plan work that can help states and regulated power companies implement the plan, but also, is there a way for some of that to start filling the gap that exists between what the U.S. has committed to do in Paris and what still needs to be done over the next 10 years?" Perciasepe said.

Perciasepe and Sheahan said cities are especially interested in working on EPA's Clean Energy Incentive Program, a voluntary program under the Clean Power Plan that gives extra credit to states that start installing renewable energy and energy efficiency in low-income areas before the compliance period begins. EPA released a formal proposal on the CEIP program last week.

Perciasepe confirmed that the alliance would work in states that officially have halted work on the federal climate rule due to the Supreme Court stay, but whether this will result in those states resuming work on the Clean Power Plan "remains to be seen," he said.

"What we do hope is that when more states get back to publicly working on their plans, that we will have a set of practices and approaches that will help cities and businesses participate in that," Perciasepe said.

No businesses have signed onto the alliance yet, but C2ES will be approaching them through its Business Environmental Leadership Council whose members include BP PLC, Dominion Resources Inc., Bank of America Corp. and Microsoft Corp. The Conference of Mayors also plans to approach its own business council, Sheahan said.

In a statement, Conference of Mayors President and Baltimore Mayor Stephanie Rawlings-Blake called the Clean Power Plan "the cornerstone of the nation's strategy" to reduce greenhouse gas emissions.

Rawlings-Blake has appointed Santa Fe Mayor Javier Gonzales to lead the alliance.

"Cities are our nation's economic powerhouses, making them a key proving ground for policies to increase energy efficiency, deploy clean energy, and foster clean transportation," Gonzales said in a statement.

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Cyran, Carissa
Sent: Fri 6/17/2016 9:50:55 PM
Subject: E-folder for Monday, June 20, 2016
HFC Update briefing 6-20-16 Janet McCabe 6-16-16.docx
Sensenbrenner QA for June 2016 House Science hearing.docx
June 20 Luminant Update.docx
CPP Stay CEIP Model Rule 06 17 16_dps v2.docx
Stay Language.Talking points.OGC Draft with DOJ comments incorporated.6.....docx
FS-CEIP proposal June 16 2016.pdf

Not Responsive

To: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: McCabe, Janet
Sent: Thur 6/16/2016 9:54:05 PM
Subject: RE: CEIP Clips - 6/16/16

Seriously……

From: Drinkard, Andrea
Sent: Thursday, June 16, 2016 4:50 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: Fwd: CEIP Clips - 6/16/16

Current summary of clips. As a reminder, Amanda was on the stakeholder call, so she pulled some quotes from there. I don't see any issues, but let me know if you do. We're working on the Examiner story, we clearly said that the rule was stayed in multiple places. I'm not sure what happened, but we're trying to get it corrected.

Andrea Drinkard

(o) 202.564.1601

(c) **Personal Cell/email**

Begin forwarded message:

From: "Scheps, Adam" <scheps.adam@epa.gov>
Date: June 16, 2016 at 4:37:27 PM EDT
To: "Jones, Enesta" <Jones.Enesta@epa.gov>, "Harrison, Melissa" <Harrison.Melissa@epa.gov>, "Ashley, Jackie" <Ashley.Jackie@epa.gov>, "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>, "Bremer, Kristen" <Bremer.Kristen@epa.gov>
Cc: "Hull, George" <Hull.George@epa.gov>
Subject: CEIP Clips - 6/16/16

E&E News PM

http://www.eenews.net/eenewspm/2016/06/16/stories/1060038961

EPA details plans to give states credit for early progress

By Amanda Reilly on 6/16/16

U.S. EPA released a proposal today for a voluntary program to give states and tribes credit for taking early action under the Clean Power Plan.

The Clean Energy Incentive Program (CEIP) proposal would award states for "zero-emitting" renewable energy projects in all communities, and solar and energy efficiency measures in low-income communities.

States would need the projects in place before 2022. That's when they are supposed to start reducing carbon dioxide emissions from power plants under the final Clean Power Plan.

"Today's proposal will help guide states and tribes that choose to participate in the program when the Clean Power Plan becomes effective," EPA acting air chief Janet McCabe said today.

The proposal outlines criteria for types of renewable energy and energy efficiency projects that would be eligible, expanding the list of projects for which states can receive credit. It would also allow states and tribes to define "low-income" for efforts to help those communities.

EPA today also laid out how the agency would dole out a pool of allowances and emissions rate credits equal to 300 million short tons of carbon dioxide to participating states and tribes. The agency proposed making half of the pool available for low-income projects.

The CEIP was designed as "a clear way to get infrastructure investment into low-income communities," McCabe said.

States would then provide those allowances and credits, which are the compliance instruments for the Clean Power Plan, to providers of renewable energy and low-income projects.

Included in today's proposal is example text on the CEIP that states can incorporate into plans they submit to EPA.

The agency will accept comments on the proposal for 60 days after it's published in the Federal Register. EPA also intends to hold a public hearing in Chicago on Aug. 3 -- exactly one year after it announced the final Clean Power Plan.

Rule 'will be upheld'

EPA first released some details of the CEIP in the final Clean Power Plan. But, in a 5-4 decision in February, the Supreme Court froze the rule until complex litigation is resolved.

Agency officials, however, have said they would continue to roll out the CEIP and model rules to guide states on emissions trading programs.

Congressional Republicans, state officials who are challenging the Clean Power Plan and industry critics have accused EPA of trying to work around the high court stay by continuing to work on the related programs.

"EPA's blatant disregard for the rule of law and the decision by the U.S. Supreme Court to stay the harmful Clean Power Plan is its latest assault against energy-producing states like West Virginia," Sen. Shelley Moore Capito (R-W.Va.) said today in a statement. "By choosing to advance the president's climate agenda despite its pending legal status, EPA is not only skirting the law, it is wasting significant taxpayer dollars while putting American jobs at risk."

EPA defended today's proposal as "consistent" with the Supreme Court's order.

While McCabe noted that states do not have to comply with the program while the stay is in

place, she said that "EPA firmly believes that the Clean Power Plan will be upheld when the merits are considered by the courts."

The Supreme Court, she added, "did not tell EPA to halt all work related to the Clean Power Plan."

Fourteen states earlier this spring requested that the agency provide more information about the CEIP.

Today's proposal contains some changes from details EPA released last year. McCabe said the changes reflected conversations with stakeholders and informal comments that EPA received.

EPA received more than 5,000 comments in a nonregulatory docket, held four listening sessions and had dozens of meetings on the CEIP.

Timelines unclear

Among the changes in today's release: EPA proposed expanding the types of projects that are eligible for early-action credit.

The new list of eligible projects includes community and residential solar projects in low-income communities, along with energy efficiency projects.

EPA also expanded its list of zero-emitting renewable energy technologies to include geothermal and hydropower along with solar and wind energy.

Renewable energy projects would be eligible for credit if they begin commercial operation

in 2020 and 2021, in contrast to the final Clean Power Plan, which said that projects can get credit when they "commence construction."

Low-income energy efficiency projects would be eligible after Sept. 6, 2018, when they begin "delivering quantifiable and verifiable electricity savings."

EPA said it could adjust time frames in the CEIP depending on progress and the ruling surrounding Clean Power Plan litigation.

But EPA also maintained that, at this point, "it's not clear whether and to what extent" the Clean Power Plan's deadlines may be tolled if the rule is eventually upheld.

Advanced Energy Economy, a business association that promotes renewable energy and energy efficiency, applauded the release of the proposal.

"The CEIP is an important program that promises to accelerate investment in the electric power system and reduce the cost of compliance with the Clean Power Plan for states and customers," Matt Stanberry, the association's vice president of market development, said in a statement.

4:05pm

The Washington Examiner

http://www.washingtonexaminer.com/epa-moves-ahead-on-clean-energy-despite-court-stay/article/2594133

EPA moves ahead on clean energy despite court stay

By John Siciliano on 6/16/16 at 3:36pm

The Obama administration is moving ahead with a key part of its climate regulations despite the rules being placed on hold by the Supreme Court.

The Environmental Protection Agency issued a proposal Thursday detailing a Clean Energy Incentive Program meant to drive states' adoption of renewable energy to meet the demands of the agency's far-reaching Clean Power Plan, which is being challenged in federal appeals court by more than two dozen states and dozens of other groups.

"Today's proposal will help guide states and tribes that choose to participate in the program when the Clean Power Plan becomes effective," the EPA said in announcing the clean energy proposal.

EPA acting assistant administrator Janet McCabe said the agency has been working on the program for almost a year and Thursday's proposal "keeps that conversation moving forward."

"Taking these steps will help cut carbon pollution by encouraging investment in renewable energy and energy efficiency, which will help give our kids and grandkids a healthier and safer future," McCabe said.

The EPA wants states, industry and others to comment on the proposal so they can get the incentive program right once the Clean Power Plan goes into effect.

The agency made no mention that the Clean Power Plan, the centerpiece of President Obama's climate agenda, has been halted by the Supreme Court until the merits of the case against it have been heard in appeals court in late September.

The EPA climate plan directs states to cut greenhouse gas emissions, which many scientists blame for driving climate change, by one-third by 2030. States and dozens of industry

groups opposing the rule say it far surpasses EPA's authority to implement it and is illegal.

The EPA has said it is confident the plan will hold up under court review and it will triumph in the end.

3:57pm

Inside EPA

http://insideepa.com/news-briefs/epa-proposes-esps-clean-energy-incentive-program

EPA Proposes ESPS Clean Energy Incentive Program

On 6/16/16 at 3:10pm

EPA is formally proposing its Clean Energy Incentive Program (CEIP) -- the early action incentive program for its signature power plant greenhouse gas rule -- brushing aside concerns from critics that the agency's work on the measure violates a high court stay on the power plant rule and that the agency lacks authority to develop the rule.

The agency June 16 unveiled the proposal, providing additional design elements for a measure intended "to help states meet their goals under the plan by encouraging early investments in zero-emitting renewable energy generation, and by removing barriers to investment in energy efficiency and solar measures in low-income communities."

Officials are hosting webinars on the measure June 16 for environmental justice stakeholders, with additional webinars June 28 for states and another July 19 for community groups, the agency announced. The agency will hold a public hearing on the proposal Aug. 3 in Chicago.

The CEIP is a voluntary incentive program for EPA's power plant existing source performance standards (ESPS) under which states would receive compliance credits during the two years prior to the rule's compliance period for solar and wind projects and for energy efficiency projects in low-income areas.

But opponents to the ESPS have taken aim at EPA's work on the CEIP, charging that it is inconsistent with the Supreme Court stay of the rule pending resolution of legal challenges.

Speaking to Inside EPA after a Senate hearing last week, industry attorney Allison Wood, with Hunton & Williams, noted that once the proposed CEIP is published, it triggers a notice and comment -- effectively requiring action for states and utilities.

"If this were only something that were being given to states that wanted to work and didn't affect the states that didn't, that would be OK," Wood said. But because the proposed CEIP will trigger a comment period, "if you're a state that didn't want to be working during the stay, you have to pick up your pen and write comments and evaluate this rule, otherwise if at the end of the day the rule comes back, you're going to be in a position where you didn't have any opportunity to have any input on this part of the program," she said.

Others, like Marlo Lewis of the Competitive Enterprise Institute, have charged that the agency lacks legal authority to develop such a rule.

According to EPA's release, the new CEIP proposal offers stakeholders opportunity to comment on a number of the program's design elements -- including project eligibility, flexibility around how to define a "low-income community" and the manner in which CEIP allowances should be made available.

"For nearly a year we have collaborated with communities and other stakeholders, listening closely to ideas about how to design a range of elements of the CEIP. Today's proposal keeps that conversation moving forward," EPA's acting air chief Janet McCabe said in a statement.

3:25pm

Power Magazine

http://www.powermag.com/epa-proposes-details-of-clean-power-plan-voluntary-incentive-program/

Despite Stay, EPA Proposes Details of Clean Power Plan Voluntary Incentive Program

By Sonal Patel on 6/16/16 at 2:50pm

The Environmental Protection Agency (EPA) has unveiled details of the Clean Energy Incentive Program (CEIP), a voluntary measure central to the judicially stalled Clean Power Plan that seeks to provide guidance to states and tribes that want to meet goals under the plan when it becomes effective.

The final Clean Power Plan, finalized in August 2015, included the CEIP, which was designed to help states and tribes with affected power plants meet goals by removing barriers to investment in energy efficiency and solar measures in low-income communities. It also encouraged early investment of renewable generation.

A state or tribe that chooses to opt-in to the CEIP may allocate allowances (under a mass-based plan) or issue emission rate credits (ERCs, under a rate-based plan) to eligible CEIP projects for energy generation or savings that occur over 2020 through 2021. The CEIP-eligible project that receives allowances or ERCs (and, in the process, gains a matching award from the EPA) may then sell or transfer them to affected power plants. Those plants may then use them for compliance with an emission standard under the Clean Power Plan.

A Voluntary Proposal

The design details of the CEIP proposed on June 16 were formulated with extensive outreach and more than 5,000 public comments, the EPA said in a statement.

Among the proposal's key provisions are more details on how the EPA matching pool of allowances and ERCs (equivalent to 300 million short tons of carbon dioxide emissions) will be made available to states and tribes that choose to participate in the CEIP. The agency proposed that the matching pool be divided evenly between two reserves, with 50% made available for low-income community projects and 50% in a reserve for renewable energy projects.

The proposal also expands the types of projects that are eligible for the CEIP and clarifies that they will be eligible once they commence operation. For low-income community projects, both demand-side energy efficiency and solar projects will be eligible. For renewables projects, the CEIP-eligible technologies that were originally limited to solar and wind will now include geothermal and hydropower.

The EPA also re-proposed an optional example of regulatory text specific to the CEIP that a state or tribe may choose to incorporate into its plan.

Public comment on the proposal will be open for 60 days, and the agency will conduct a hearing on the design details in Chicago on August 3.

2:15pm

The Hill

http://thehill.com/policy/energy-environment/283776-epa-proposes-climate-rule-incentives-despite-court-hold

EPA proposes climate rule incentives despite court hold

By Timothy Cama on 6/16/16 at 1:38pm

The Obama administration is moving ahead with an incentive program for its contentious climate change rule, despite the Supreme Court's action halting the regulation.

Under the program, known as the Clean Energy Incentive Program, the Environmental Protection Agency (EPA) would give states compliance credits for renewable energy and efficiency projects that are undertaken earlier than the Clean Power Plan would require them.

It's meant to be a carrot to the stick of the Clean Power Plan and to try to get some significant deployment of renewables and efficiency projects before the regulation kicks in in 2022.

"Taking these steps will help cut carbon pollution by encouraging investment in renewable energy and energy efficiency, which will help give our kids and grandkids a healthier and safer future," Janet McCabe, head of the EPA's air pollution office, said in a Thursday statement.

The basic details of the incentive program were outlined when the climate rule was made final last August, but Thursday's announcement formally proposes more details about it.

The climate rule itself, which seeks a 32 percent cut in the power sector's carbon emissions, is under a judicial stay from the Supreme Court's February 2016 order.

But the EPA believes that actions like the incentive program and helping states voluntarily comply with the regulation are permissible under the court stay — an opinion Republicans and the rule's opponents disagree with.

"EPA is attempting to downplay the significance of the stay and argue against clear legal precedence as a last-ditch effort to scare states into spending scarce resources complying with a rule that could very well be overturned," Sen. James Inhofe (R-Okla.), chairman of the Environment and Public Works Committee, said at a hearing last week about the issue.

Following formal publication of the Thursday proposal in the Federal Register, the EPA will take comments from the public for 60 days before considering them and making the program final.

1:24pm

From: "Jones, Enesta" <Jones.Enesta@epa.gov>
Date: June 16, 2016 at 1:24:24 PM EDT
To: "Jones, Enesta" <Jones.Enesta@epa.gov>, "Harrison, Melissa" <Harrison.Melissa@epa.gov>, "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>, "Bremer, Kristen" <Bremer.Kristen@epa.gov>, "Ashley, Jackie" <Ashley.Jackie@epa.gov>, "Scheps, Adam" <scheps.adam@epa.gov>, "Hull, George" <Hull.George@epa.gov>
Subject: CEIP News Clips: 6/16/16

Politico Pro

1. **EPA proposes rule to prod states for early climate rule action**

2.

By Alex Guillén

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Republicans have slammed the agency's work on the incentive program, as well as other implementation regulations, amid the Supreme Court's stay of the Clean Power Plan. Sen. Shelley Moore Capito this morning offered but withdrew an amendment that would block EPA's work on the CEIP and similar CPP implementation rules.

The CEIP is a voluntary program under which states can secure extra credit for

power from renewables generated in 2020 and 2021, the two years before the first compliance deadline, though the agency notes there may be changes to those dates given the stay.

The proposal expands the previous eligibility list for technologies from just solar and wind to include geothermal and hydropower. The rule also provides double credit for low-income communities that deploy demand-side efficiency programs or solar projects. States will be able to adopt several definitions to identify which communities qualify as low-income.

The proposal also includes details for how 300 million short tons of carbon dioxide emissions savings will be translated into allowances for states that go with mass-based plans and emission-rate credits for states that choose rate-based plans.

The agency will take public comment for 60 days after publication in the Federal Register, and will hold a public hearing on Aug. 3 in Chicago.

Click for the proposed rule, an agency fact sheet and data tables.

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Zenick, Elliott[Zenick.Elliott@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Shenkman, Ethan[Shenkman.Ethan@epa.gov]
From: Schramm, Daniel
Sent: Thur 6/16/2016 9:32:44 PM
Subject: RE: CEIP Clips - 6/16/16

Thanks, and sorry I missed Andrea's note on that. Great!

Daniel Schramm

U.S. EPA Office of General Counsel

(202) 564-3377

schramm.daniel@epa.gov

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

From: Goffman, Joseph
Sent: Thursday, June 16, 2016 5:31 PM
To: Schramm, Daniel <Schramm.Daniel@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Harvey, Reid <Harvey.Reid@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Shenkman, Ethan <Shenkman.Ethan@epa.gov>
Subject: Re: CEIP Clips - 6/16/16

Per Andrea's note comms team working on addressing. Thanks.

Sent from my iPhone

On Jun 16, 2016, at 5:28 PM, Schramm, Daniel <Schramm.Daniel@epa.gov> wrote:

Atty-Client

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Subject: Fwd: CEIP Clips - 6/16/16

Probably not news to you given last week's vintage, but note Allison Wood statements in Inside EPA story below. Thanks.

Sent from my iPhone

Begin forwarded message:

> **From:** "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>
> **Date:** June 16, 2016 at 4:50:17 PM EDT
> **To:** "McCabe, Janet" <McCabe.Janet@epa.gov>, "Goffman, Joseph" <Goffman.Joseph@epa.gov>
> **Subject: Fwd: CEIP Clips - 6/16/16**
>
> Current summary of clips. As a reminder, Amanda was on the stakeholder call, so she pulled some quotes from there. I don't see any issues, but let me know if you do. We're

working on the Examiner story, we clearly said that the rule was stayed in multiple places. I'm not sure what happened, but we're trying to get it corrected.

Andrea Drinkard

(o) 202.564.1601

(c) Personal Cell/email

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From: "Scheps, Adam" <scheps.adam@epa.gov>
Date: June 16, 2016 at 4:37:27 PM EDT
To: "Jones, Enesta" <Jones.Enesta@epa.gov>, "Harrison, Melissa" <Harrison.Melissa@epa.gov>, "Ashley, Jackie" <Ashley.Jackie@epa.gov>, "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>, "Bremer, Kristen" <Bremer.Kristen@epa.gov>
Cc: "Hull, George" <Hull.George@epa.gov>
Subject: CEIP Clips - 6/16/16

E&E News PM

http://www.eenews.net/eenewspm/2016/06/16/stories/1060038961

EPA details plans to give states credit for early progress

By Amanda Reilly on 6/16/16

U.S. EPA released a proposal today for a voluntary program to give states and tribes credit for taking early action under the Clean Power Plan.

The Clean Energy Incentive Program (CEIP) proposal would award states for "zero-emitting" renewable energy projects in all communities, and solar and energy efficiency measures in low-income communities.

States would need the projects in place before 2022. That's when they are supposed to start reducing carbon dioxide emissions from power plants under the final Clean Power Plan.

"Today's proposal will help guide states and tribes that choose to participate in the program when the Clean Power Plan becomes effective," EPA acting air chief Janet McCabe said today.

The proposal outlines criteria for types of renewable energy and energy efficiency projects that would be eligible, expanding the list of projects for which states can receive credit. It would also allow states and tribes to define "low-income" for efforts to help those communities.

EPA today also laid out how the agency would dole out a pool of allowances and emissions rate credits equal to 300 million short tons of carbon dioxide to participating states and tribes. The agency proposed making half of the pool available for low-income projects.

The CEIP was designed as "a clear way to get infrastructure investment into low-income communities," McCabe said.

States would then provide those allowances and credits, which are the compliance instruments for the Clean Power Plan, to providers of renewable energy and low-income projects.

Included in today's proposal is example text on the CEIP that states can incorporate into plans they submit to EPA.

The agency will accept comments on the proposal for 60 days after it's published in the Federal Register. EPA also intends to hold a public hearing in Chicago on Aug. 3 -- exactly one year after it announced the final Clean Power Plan.

Rule 'will be upheld'

EPA first released some details of the CEIP in the final Clean Power Plan. But, in a 5-4 decision in February, the Supreme Court froze the rule until complex litigation is resolved.

Agency officials, however, have said they would continue to roll out the CEIP and model rules to guide states on emissions trading programs.

Congressional Republicans, state officials who are challenging the Clean Power Plan and industry critics have accused EPA of trying to work around the high court stay by continuing to work on the related programs.

"EPA's blatant disregard for the rule of law and the decision by the U.S. Supreme Court to stay the harmful Clean Power Plan is its latest assault against energy-producing states like West Virginia," Sen. Shelley Moore Capito (R-W.Va.) said today in a statement. "By choosing to advance the president's climate agenda despite its pending legal status, EPA is not only skirting the law, it is wasting significant taxpayer dollars while putting American jobs at risk."

EPA defended today's proposal as "consistent" with the Supreme Court's order.

While McCabe noted that states do not have to comply with the program while the stay is in place, she said that "EPA firmly believes that the Clean Power Plan will be upheld when the merits are considered by the courts."

The Supreme Court, she added, "did not tell EPA to halt all work related to the Clean Power Plan."

Fourteen states earlier this spring requested that the agency provide more information about the CEIP.

Today's proposal contains some changes from details EPA released last year. McCabe said the changes reflected conversations with stakeholders and informal comments that EPA received.

EPA received more than 5,000 comments in a nonregulatory docket, held four listening sessions and had dozens of meetings on the CEIP.

Timelines unclear

Among the changes in today's release: EPA proposed expanding the types of projects that are eligible for early-action credit.

The new list of eligible projects includes community and residential solar projects in low-income communities, along with energy efficiency projects.

EPA also expanded its list of zero-emitting renewable energy technologies to include geothermal and hydropower along with solar and wind energy.

Renewable energy projects would be eligible for credit if they begin commercial operation in 2020 and 2021, in contrast to the final Clean Power Plan, which said that projects can get credit when they "commence construction."

Low-income energy efficiency projects would be eligible after Sept. 6, 2018, when they begin "delivering quantifiable and verifiable electricity savings."

EPA said it could adjust time frames in the CEIP depending on progress and the ruling surrounding Clean Power Plan litigation.

But EPA also maintained that, at this point, "it's not clear whether and to what extent" the Clean Power Plan's deadlines may be tolled if the rule is eventually upheld.

Advanced Energy Economy, a business association that promotes renewable energy and energy efficiency, applauded the release of the proposal.

"The CEIP is an important program that promises to accelerate investment in the electric power system and reduce the cost of compliance with the Clean Power Plan for states and customers," Matt Stanberry, the association's vice president of market development, said in a statement.

4:05pm

The Washington Examiner

http://www.washingtonexaminer.com/epa-moves-ahead-on-clean-energy-despite-court-stay/article/2594133

EPA moves ahead on clean energy despite court stay

By John Siciliano on 6/16/16 at 3:36pm

The Obama administration is moving ahead with a key part of its climate regulations despite the rules being placed on hold by the Supreme Court.

The Environmental Protection Agency issued a proposal Thursday detailing a Clean Energy Incentive Program meant to drive states' adoption of renewable energy to meet the demands of the agency's far-reaching Clean Power Plan, which is being challenged in federal appeals court by more than two dozen states and dozens of other groups.

"Today's proposal will help guide states and tribes that choose to participate in the program when the Clean Power Plan becomes effective," the EPA said in announcing the clean energy proposal.

EPA acting assistant administrator Janet McCabe said the agency has been working on the program for almost a year and Thursday's proposal "keeps that conversation moving forward."

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The EPA wants states, industry and others to comment on the proposal so they can get the incentive program right once the Clean Power Plan goes into effect.

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The Hill

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(o) 202.564.1601

(c) **Personal Cell/email**

Begin forwarded message:

From: "Scheps, Adam" <scheps.adam@epa.gov>
Date: June 16, 2016 at 4:37:27 PM EDT
To: "Jones, Enesta" <Jones.Enesta@epa.gov>, "Harrison, Melissa" <Harrison.Melissa@epa.gov>, "Ashley, Jackie" <Ashley.Jackie@epa.gov>, "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>, "Bremer, Kristen" <Bremer.Kristen@epa.gov>
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Subject: CEIP Clips - 6/16/16

E&E News PM

http://www.eenews.net/eenewspm/2016/06/16/stories/1060038961

EPA details plans to give states credit for early progress

By Amanda Reilly on 6/16/16

U.S. EPA released a proposal today for a voluntary program to give states and tribes credit for taking early action under the Clean Power Plan.

The Clean Energy Incentive Program (CEIP) proposal would award states for "zero-

emitting" renewable energy projects in all communities, and solar and energy efficiency measures in low-income communities.

States would need the projects in place before 2022. That's when they are supposed to start reducing carbon dioxide emissions from power plants under the final Clean Power Plan.

"Today's proposal will help guide states and tribes that choose to participate in the program when the Clean Power Plan becomes effective," EPA acting air chief Janet McCabe said today.

The proposal outlines criteria for types of renewable energy and energy efficiency projects that would be eligible, expanding the list of projects for which states can receive credit. It would also allow states and tribes to define "low-income" for efforts to help those communities.

EPA today also laid out how the agency would dole out a pool of allowances and emissions rate credits equal to 300 million short tons of carbon dioxide to participating states and tribes. The agency proposed making half of the pool available for low-income projects.

The CEIP was designed as "a clear way to get infrastructure investment into low-income communities," McCabe said.

States would then provide those allowances and credits, which are the compliance instruments for the Clean Power Plan, to providers of renewable energy and low-income projects.

Included in today's proposal is example text on the CEIP that states can incorporate into plans they submit to EPA.

The agency will accept comments on the proposal for 60 days after it's published in the Federal Register. EPA also intends to hold a public hearing in Chicago on Aug. 3 -- exactly one year after it announced the final Clean Power Plan.

Rule 'will be upheld'

EPA first released some details of the CEIP in the final Clean Power Plan. But, in a 5-4 decision in February, the Supreme Court froze the rule until complex litigation is resolved.

Agency officials, however, have said they would continue to roll out the CEIP and model rules to guide states on emissions trading programs.

Congressional Republicans, state officials who are challenging the Clean Power Plan and industry critics have accused EPA of trying to work around the high court stay by continuing to work on the related programs.

"EPA's blatant disregard for the rule of law and the decision by the U.S. Supreme Court to stay the harmful Clean Power Plan is its latest assault against energy-producing states like West Virginia," Sen. Shelley Moore Capito (R-W.Va.) said today in a statement. "By choosing to advance the president's climate agenda despite its pending legal status, EPA is not only skirting the law, it is wasting significant taxpayer dollars while putting American jobs at risk."

EPA defended today's proposal as "consistent" with the Supreme Court's order.

While McCabe noted that states do not have to comply with the program while the stay is in place, she said that "EPA firmly believes that the Clean Power Plan will be upheld when the merits are considered by the courts."

The Supreme Court, she added, "did not tell EPA to halt all work related to the Clean Power Plan."

Fourteen states earlier this spring requested that the agency provide more information about the CEIP.

Today's proposal contains some changes from details EPA released last year. McCabe said the changes reflected conversations with stakeholders and informal comments that EPA received.

EPA received more than 5,000 comments in a nonregulatory docket, held four listening sessions and had dozens of meetings on the CEIP.

Timelines unclear

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The new list of eligible projects includes community and residential solar projects in low-income communities, along with energy efficiency projects.

EPA also expanded its list of zero-emitting renewable energy technologies to include geothermal and hydropower along with solar and wind energy.

Renewable energy projects would be eligible for credit if they begin commercial operation in 2020 and 2021, in contrast to the final Clean Power Plan, which said that projects can get credit when they "commence construction."

Low-income energy efficiency projects would be eligible after Sept. 6, 2018, when they begin "delivering quantifiable and verifiable electricity savings."

EPA said it could adjust time frames in the CEIP depending on progress and the ruling surrounding Clean Power Plan litigation.

But EPA also maintained that, at this point, "it's not clear whether and to what extent" the Clean Power Plan's deadlines may be tolled if the rule is eventually upheld.

Advanced Energy Economy, a business association that promotes renewable energy and energy efficiency, applauded the release of the proposal.

"The CEIP is an important program that promises to accelerate investment in the electric power system and reduce the cost of compliance with the Clean Power Plan for states and customers," Matt Stanberry, the association's vice president of market development, said in a statement.

4:05pm

The Washington Examiner

http://www.washingtonexaminer.com/epa-moves-ahead-on-clean-energy-despite-court-stay/article/2594133

EPA moves ahead on clean energy despite court stay

By John Siciliano on 6/16/16 at 3:36pm

The Obama administration is moving ahead with a key part of its climate regulations

despite the rules being placed on hold by the Supreme Court.

The Environmental Protection Agency issued a proposal Thursday detailing a Clean Energy Incentive Program meant to drive states' adoption of renewable energy to meet the demands of the agency's far-reaching Clean Power Plan, which is being challenged in federal appeals court by more than two dozen states and dozens of other groups.

"Today's proposal will help guide states and tribes that choose to participate in the program when the Clean Power Plan becomes effective," the EPA said in announcing the clean energy proposal.

EPA acting assistant administrator Janet McCabe said the agency has been working on the program for almost a year and Thursday's proposal "keeps that conversation moving forward."

"Taking these steps will help cut carbon pollution by encouraging investment in renewable energy and energy efficiency, which will help give our kids and grandkids a healthier and safer future," McCabe said.

The EPA wants states, industry and others to comment on the proposal so they can get the incentive program right once the Clean Power Plan goes into effect.

The agency made no mention that the Clean Power Plan, the centerpiece of President Obama's climate agenda, has been halted by the Supreme Court until the merits of the case against it have been heard in appeals court in late September.

The EPA climate plan directs states to cut greenhouse gas emissions, which many scientists blame for driving climate change, by one-third by 2030. States and dozens of industry groups opposing the rule say it far surpasses EPA's authority to implement it and is illegal.

The EPA has said it is confident the plan will hold up under court review and it will triumph in the end.

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Inside EPA

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EPA Proposes ESPS Clean Energy Incentive Program

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EPA is formally proposing its Clean Energy Incentive Program (CEIP) -- the early action incentive program for its signature power plant greenhouse gas rule -- brushing aside concerns from critics that the agency's work on the measure violates a high court stay on the power plant rule and that the agency lacks authority to develop the rule.

The agency June 16 unveiled the proposal, providing additional design elements for a measure intended "to help states meet their goals under the plan by encouraging early investments in zero-emitting renewable energy generation, and by removing barriers to investment in energy efficiency and solar measures in low-income communities."

Officials are hosting webinars on the measure June 16 for environmental justice stakeholders, with additional webinars June 28 for states and another July 19 for community groups, the agency announced. The agency will hold a public hearing on the proposal Aug. 3 in Chicago.

The CEIP is a voluntary incentive program for EPA's power plant existing source performance standards (ESPS) under which states would receive compliance credits during the two years prior to the rule's compliance period for solar and wind projects

and for energy efficiency projects in low-income areas.

But opponents to the ESPS have taken aim at EPA's work on the CEIP, charging that it is inconsistent with the Supreme Court stay of the rule pending resolution of legal challenges.

Speaking to Inside EPA after a Senate hearing last week, industry attorney Allison Wood, with Hunton & Williams, noted that once the proposed CEIP is published, it triggers a notice and comment -- effectively requiring action for states and utilities.

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Others, like Marlo Lewis of the Competitive Enterprise Institute, have charged that the agency lacks legal authority to develop such a rule.

According to EPA's release, the new CEIP proposal offers stakeholders opportunity to comment on a number of the program's design elements -- including project eligibility, flexibility around how to define a "low-income community" and the manner in which CEIP allowances should be made available.

"For nearly a year we have collaborated with communities and other stakeholders, listening closely to ideas about how to design a range of elements of the CEIP. Today's proposal keeps that conversation moving forward," EPA's acting air chief Janet McCabe said in a statement.

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Power Magazine

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Despite Stay, EPA Proposes Details of Clean Power Plan Voluntary Incentive Program

By Sonal Patel on 6/16/16 at 2:50pm

The Environmental Protection Agency (EPA) has unveiled details of the Clean Energy Incentive Program (CEIP), a voluntary measure central to the judicially stalled Clean Power Plan that seeks to provide guidance to states and tribes that want to meet goals under the plan when it becomes effective.

The final Clean Power Plan, finalized in August 2015, included the CEIP, which was designed to help states and tribes with affected power plants meet goals by removing barriers to investment in energy efficiency and solar measures in low-income communities. It also encouraged early investment of renewable generation.

A state or tribe that chooses to opt-in to the CEIP may allocate allowances (under a mass-based plan) or issue emission rate credits (ERCs, under a rate-based plan) to eligible CEIP projects for energy generation or savings that occur over 2020 through 2021. The CEIP-eligible project that receives allowances or ERCs (and, in the process, gains a matching award from the EPA) may then sell or transfer them to affected power plants. Those plants may then use them for compliance with an emission standard under the Clean Power Plan.

A Voluntary Proposal

The design details of the CEIP proposed on June 16 were formulated with extensive

outreach and more than 5,000 public comments, the EPA said in a statement.

Among the proposal's key provisions are more details on how the EPA matching pool of allowances and ERCs (equivalent to 300 million short tons of carbon dioxide emissions) will be made available to states and tribes that choose to participate in the CEIP. The agency proposed that the matching pool be divided evenly between two reserves, with 50% made available for low-income community projects and 50% in a reserve for renewable energy projects.

The proposal also expands the types of projects that are eligible for the CEIP and clarifies that they will be eligible once they commence operation. For low-income community projects, both demand-side energy efficiency and solar projects will be eligible. For renewables projects, the CEIP-eligible technologies that were originally limited to solar and wind will now include geothermal and hydropower.

The EPA also re-proposed an optional example of regulatory text specific to the CEIP that a state or tribe may choose to incorporate into its plan.

Public comment on the proposal will be open for 60 days, and the agency will conduct a hearing on the design details in Chicago on August 3.

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The Hill

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By Timothy Cama on 6/16/16 at 1:38pm

The Obama administration is moving ahead with an incentive program for its contentious climate change rule, despite the Supreme Court's action halting the regulation.

Under the program, known as the Clean Energy Incentive Program, the Environmental Protection Agency (EPA) would give states compliance credits for renewable energy and efficiency projects that are undertaken earlier than the Clean Power Plan would require them.

It's meant to be a carrot to the stick of the Clean Power Plan and to try to get some significant deployment of renewables and efficiency projects before the regulation kicks in in 2022.

"Taking these steps will help cut carbon pollution by encouraging investment in renewable energy and energy efficiency, which will help give our kids and grandkids a healthier and safer future," Janet McCabe, head of the EPA's air pollution office, said in a Thursday statement.

The basic details of the incentive program were outlined when the climate rule was made final last August, but Thursday's announcement formally proposes more details about it.

The climate rule itself, which seeks a 32 percent cut in the power sector's carbon emissions, is under a judicial stay from the Supreme Court's February 2016 order.

But the EPA believes that actions like the incentive program and helping states voluntarily comply with the regulation are permissible under the court stay — an opinion Republicans and the rule's opponents disagree with.

"EPA is attempting to downplay the significance of the stay and argue against clear

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Following formal publication of the Thursday proposal in the Federal Register, the EPA will take comments from the public for 60 days before considering them and making the program final.

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offered but withdrew an amendment that would block EPA's work on the CEIP and similar CPP implementation rules.

The CEIP is a voluntary program under which states can secure extra credit for power from renewables generated in 2020 and 2021, the two years before the first compliance deadline, though the agency notes there may be changes to those dates given the stay.

The proposal expands the previous eligibility list for technologies from just solar and wind to include geothermal and hydropower. The rule also provides double credit for low-income communities that deploy demand-side efficiency programs or solar projects. States will be able to adopt several definitions to identify which communities qualify as low-income.

The proposal also includes details for how 300 million short tons of carbon dioxide emissions savings will be translated into allowances for states that go with mass-based plans and emission-rate credits for states that choose rate-based plans.

The agency will take public comment for 60 days after publication in the Federal Register, and will hold a public hearing on Aug. 3 in Chicago.

Click for the proposed rule, an agency fact sheet and data tables.

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Drinkard, Andrea
Sent: Thur 6/16/2016 8:50:17 PM
Subject: Fwd: CEIP Clips - 6/16/16

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EPA today released its proposed Clean Energy Incentive Program, part of the implementation scheme for the Clean Power Plan.

Republicans have slammed the agency's work on the incentive program, as well as other implementation regulations, amid the Supreme Court's stay of the Clean Power Plan. Sen. Shelley Moore Capito this morning offered but withdrew an amendment that would block EPA's work on the CEIP and similar CPP implementation rules.

The CEIP is a voluntary program under which states can secure extra credit for power from renewables generated in 2020 and 2021, the two years before the first compliance deadline, though the agency notes there may be changes to those dates given the stay.

The proposal expands the previous eligibility list for technologies from just solar and wind to include geothermal and hydropower. The rule also provides double credit for low-income communities that deploy demand-side efficiency programs or solar projects. States will be able to adopt several definitions to identify which communities qualify as low-income.

The proposal also includes details for how 300 million short tons of carbon

dioxide emissions savings will be translated into allowances for states that go with mass-based plans and emission-rate credits for states that choose rate-based plans.

The agency will take public comment for 60 days after publication in the Federal Register, and will hold a public hearing on Aug. 3 in Chicago.

Click for the proposed rule, an agency fact sheet and data tables.

To: Rennert, Kevin[Rennert.Kevin@epa.gov]; Henigin, Mary[Henigin.Mary@epa.gov]
Cc: Stewart, Lori[Stewart.Lori@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Tsirigotis, Peter[Tsirigotis.Peter@epa.gov]; Knapp, Kristien[Knapp.Kristien@epa.gov]; Vaught, Laura[Vaught.Laura@epa.gov]; Harrison, Melissa[Harrison.Melissa@epa.gov]; Fraser, Scott[Fraser.Scott@epa.gov]; Jones, Enesta[Jones.Enesta@epa.gov]; Atkinson, Emily[Atkinson.Emily@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]; Wilson, Erika[Wilson.Erika@epa.gov]; Lewis, Josh[Lewis.Josh@epa.gov]; Bailey, KevinJ[Bailey.KevinJ@epa.gov]; Bowles, Jack[Bowles.Jack@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Moss, Jacob[Moss.Jacob@epa.gov]; Wilson, Erika[Wilson.Erika@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Hight, Cate[Hight.Cate@epa.gov]; Green, Gregory[Green.Gregory@epa.gov]; Mckelvey, Laura[Mckelvey.Laura@epa.gov]; Noonan, Jenny[Noonan.Jenny@epa.gov]; Page, Steve[Page.Steve@epa.gov]; Enobakhare, Rosemary[Enobakhare.Rosemary@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]; Jones, Enesta[Jones.Enesta@epa.gov]
From: Drinkard, Andrea
Sent: Thur 6/16/2016 3:33:47 PM
Subject: Final Tick Tock and Final Materials
R102-06 16 16_WH.docx
FS-CEIP proposal June 16 2016.pdf
state-by-state reserve tables.pdf
QA-CEIP proposal_June 16 2016 FINAL.docx
CEIP-DRAFT-Heads up call talkers v2.docx
CommPlan_CEIPproposal-DRAFT June 15 2016.docx
CEIP-stakeholder call talkers_FINAL.docx

Hearing no objections, this is the final tick tock for the day. You can start making your heads up calls.

Thursday, June 16

- 11:30 Targeted heads up calls, including Congressional, community leaders, EE/RE leaders
- 12:00 Target signature time
- 12:15 Web posting (rule, fact sheet, data tables, etc.)
- 12:30 Press release
- 12:30 Invitation to stakeholder call goes out
- 2:45-3:30 Stakeholder call (open to all stakeholders)

Here are the final materials:
Press release (minor edits from last night's version)

Fact Sheet (minor edits from last night's version)

State by State table (new, will be posted on the website)

Q&As (minor edits from last night)

Heads up call talking points (same as last night)

Call list/Comm plan (same as last night)

Stakeholder call talking points (same as last night)

From: Drinkard, Andrea
Sent: Thursday, June 16, 2016 11:01 AM
To: Rennert, Kevin <Rennert.Kevin@epa.gov>; Henigin, Mary <Henigin.Mary@epa.gov>
Cc: Stewart, Lori <Stewart.Lori@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Knapp, Kristien <Knapp.Kristien@epa.gov>; Vaught, Laura <Vaught.Laura@epa.gov>; Harrison, Melissa <Harrison.Melissa@epa.gov>; Fraser, Scott <Fraser.Scott@epa.gov>; Jones, Enesta <Jones.Enesta@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>; Wilson, Erika <Wilson.Erika@epa.gov>; Lewis, Josh <Lewis.Josh@epa.gov>; Bailey, KevinJ <Bailey.KevinJ@epa.gov>
Subject: RE: CEIP was cleared

Excellent. Here's an updated tick tock for the day, let me know if any one has any issues with this:

Thursday, June 16

- 11:30 Targeted heads up calls, including Congressional, community leaders, EE/RE leaders
- 12:00 Target signature time (pending clearance from OMB this event and approval process to morning)
- 12:15 Web posting (rule, fact sheet, data tables, etc.)
- 12:30 Press release
- 12:30 Invitation to stakeholder call goes out
- 2:45-3:30 Stakeholder call (open to all stakeholders)

From: Rennert, Kevin
Sent: Thursday, June 16, 2016 10:54 AM
To: Henigin, Mary <Henigin.Mary@epa.gov>
Cc: Stewart, Lori <Stewart.Lori@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Knapp, Kristien <Knapp.Kristien@epa.gov>; Vaught, Laura <Vaught.Laura@epa.gov>; Harrison, Melissa <Harrison.Melissa@epa.gov>
Subject: Re: CEIP was cleared

Yes - have it now. Thanks.

On Jun 16, 2016, at 10:53 AM, Henigin, Mary <Henigin.Mary@epa.gov> wrote:

Good morning, it was delivered to Stephanie Brown.

Thank you
Mary

On Jun 16, 2016, at 10:47 AM, Stewart, Lori <Stewart.Lori@epa.gov> wrote:

My understanding (from Mary Henigin) is that the package is in OP.

From: Rennert, Kevin
Sent: Thursday, June 16, 2016 10:44 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: McCabe, Janet <McCabe.Janet@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Stewart, Lori <Stewart.Lori@epa.gov>; Knapp, Kristien <Knapp.Kristien@epa.gov>; Vaught, Laura <Vaught.Laura@epa.gov>; Harrison, Melissa <Harrison.Melissa@epa.gov>
Subject: Re: CEIP was cleared

We're ready in OP to turn this quickly we just need the package from the air office.

On Jun 16, 2016, at 10:39 AM, Drinkard, Andrea <Drinkard.Andrea@epa.gov> wrote:

Provided we can get it signed by noon, which I look to Kevin/Laura/Kristien for guidance on that, I think we can go today.

From: McCabe, Janet
Sent: Thursday, June 16, 2016 10:37 AM
To: Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Stewart, Lori <Stewart.Lori@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Knapp, Kristien <Knapp.Kristien@epa.gov>; Rennert, Kevin <Rennert.Kevin@epa.gov>; Vaught, Laura <Vaught.Laura@epa.gov>
Subject: RE: CEIP was cleared

Woo hoo!!!!

So....what does that mean about announcing today?

From: Culligan, Kevin
Sent: Thursday, June 16, 2016 10:33 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: CEIP was cleared

From: Szabo, Aaron **EOP email/phone**
Sent: Thursday, June 16, 2016 10:31 AM
To: Ndoh, Tina <Ndoh.Tina@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>
Cc: Harvey, Reid <Harvey.Reid@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Rennert,

Kevin <Rennert.Kevin@epa.gov>; Barnett, Keith <Barnett.Keith@epa.gov>; Szabo, Aaron
EOP email/phone
Subject: Conclusion of EO 12866 and 13563 Review: EPA Proposed Rule -- Clean Energy Incentive Program Design and Implementation (RIN 2060-AS84)

This email serves as notice that the Office of Management and Budget (OMB) has concluded its review with a finding of consistent with change under Executive Orders 12866 and 13563 of the U.S. Environmental Protection Agency's (EPA) proposed rule originally entitled "Clean Energy Incentive Program Design and Implementation" (RIN 2060-AS84).

Please let me know if you have any questions or comments. Thank you.

Aaron L. Szabo
Policy Analyst
Office of Information and Regulatory Affairs
Office of Management and Budget
202-395-3621
EOP email/phone

To: Harrison, Melissa[Harrison.Melissa@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Benenati, Frank[benenati.frank@epa.gov]
From: Drinkard, Andrea
Sent: Thur 6/16/2016 2:43:08 PM
Subject: RE: CEIP materials
R102-06 16 16_WH.docx
FS-CEIP proposal June 16 2016.docx

We accepted all the changes on the fact sheet. Made one minor edit on the press release, reflected here in track changes. OGC is in touch with Megan and DOJ on the edits to the first Q&A and we should wrap those up momentarily.

Thanks.

From: Harrison, Melissa
Sent: Thursday, June 16, 2016 6:28 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Benenati, Frank <benenati.frank@epa.gov>
Subject: Fwd: CEIP materials

Andrea & Joe-see below and attached. Anything major?

Melissa J. Harrison

Press Secretary

U.S. Environmental Protection Agency

Office: (202) 564-8421

Mobile: **Personal Cell/email**

Harrison.Melissa@epa.gov

Begin forwarded message:

From: "Utech, Dan G. EOP/WHO" **EOP email/phone**
Date: June 15, 2016 at 11:21:23 PM EDT

To: "Benenati, Frank" <benenati.frank@epa.gov>, "Ceronsky, Megan M. EOP/WHO" EOP email/phone, "Duke, Rick D. EOP/CEQ" EOP email/phone "Vahlsing, Candace M. EOP/WHO" EOP email/phone, "Nielsen, Noreen A. EOP/CEQ" EOP email/phone, "Zakaria, Rama A. EOP/CEQ" EOP email/phone, "Hornung, Daniel Z. EOP/WHO" EOP email/phone
Cc: "Harrison, Melissa" <Harrison.Melissa@epa.gov>
Subject: RE: CEIP materials

Frank - comments on the PR and fact sheet attached. Comments on the Q/A to follow in the morning.

-----Original Message-----
From: Utech, Dan G. EOP/WHO
Sent: Wednesday, June 15, 2016 5:45 PM
To: 'Benenati, Frank' <benenati.frank@epa.gov>; Ceronsky, Megan M. EOP/WHO EOP email/phone; Duke, Rick D. EOP/CEQ EOP email/phone; Vahlsing, Candace M. EOP/WHO EOP email/phone>; Nielsen, Noreen A. EOP/CEQ EOP email/phone; Zakaria, Rama A. EOP/CEQ EOP email/phone; Hornung, Daniel Z. EOP/WHO EOP email/phone
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>
Subject: RE: CEIP materials

+ rick at correct address. We will look now. Thanks.

-----Original Message-----
From: Benenati, Frank [mailto:benenati.frank@epa.gov]
Sent: Wednesday, June 15, 2016 5:42 PM
To: Utech, Dan G. EOP/WHO EOP email/phone; Ceronsky, Megan M. EOP/WHO EOP email/phone>; EOP email/phone; Vahlsing, Candace M. EOP/WHO EOP email/phone>
Cc: Harrison, Melissa <Harrison.Melissa@epa.gov>
Subject: CEIP materials
Importance: High

Hey team,

So apologies - just getting started here and was unaware that you all didn't know about this potential rollout tomorrow. Ex. 5 - Deliberative

Ex. 5 - Deliberative

Ex. 5 - Deliberative

To: McCabe, Janet[McCabe.Janet@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Drinkard, Andrea
Sent: Thur 6/16/2016 12:54:09 PM
Subject: Edits from the WH
QA-CEIP proposal DRAFT June 15 2016 (mc).docx
R102-06 16 16 (mc) rz cv.docx
FS-CEIP proposal June 15 2016 FINAL (mc) rz cv.docx

Hi Janet,

We got very minor edits from the WH on the PR, fact sheet and Q&As. I think we're in a position to accept most, if not all of them. I'm running them by OAQPS and OGC now. We will replace "renewables" with "solar" in Candace's edit to the PR.

Thanks.

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Cyran, Carissa
Sent: Wed 6/15/2016 9:55:32 PM
Subject: E-folder for Thursday, June 16, 2016
Coming Clean pager_Goffman_061516.docx
Next Steps for CSAPR Update Rule 6-15-16 FINAL.DOCX
CommPlan_CEIPproposal-DRAFT June 15 2016.docx
FS-CEIP proposal June 15 2016 FINAL.docx
QA-CEIP proposal DRAFT June 15 2016.docx
R102-06 16 16.docx
CEIP-stakeholder call talkers_FINAL.docx

Not Responsive

1:00 pm - 1:45 pm **Proposed rule on CEIP details - stakeholder call info - 5400**

Not Responsive

4:00 pm - 5:00 pm **DOE-FERC CPP Reliability Meeting - 5415**

Not Responsive

FOR REVIEW : CEIP Rollout Material
Run of the show

- AM Targeted heads up calls, including Congressional, community leaders, EE/RE leaders
- 10:15AM Target signature time (pending clearance from OMB this event and approval process to morning)
- 10:45AM Web posting (rule, fact sheet, data tables, etc.)
- 11:00AM Press release
- 11:00AM Invitation to stakeholder call goes out
- 1:00-1:45PM Stakeholder call (open to all stakeholders)

Communication plan and call list **Press Release**

Fact Sheet **Q&As**

Stakeholder Call Talking Points

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: South, Peter[South.Peter@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Wood, Anna[Wood.Anna@epa.gov]
From: Kornylak, Vera S.
Sent: Wed 6/15/2016 1:23:44 PM
Subject: Brief Overview of NACAA Model Plan.docx
Brief Overview of NACAA Model Plan.docx

Joe, here's a quick overview of the NACAA model plan – pretty high level. If you feel that you need more info, please let me know!

Thanks,

Vera

Vera Kornylak || Air Quality Policy Division || OAQPS

919-541-4067 || kornylak.vera@epa.gov

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Cyran, Carissa
Sent: Tue 6/14/2016 9:42:08 PM
Subject: E-folder for Wednesday, June 15, 2016

CPP McCabe Check In Agenda 6 15 16.docx
CPP 2 WH Agenda 6 15 16.docx
FS-CEIP proposal DRAFT June 14 2016 V9.docx
CommPlan_CEIPproposal-DRAFT June 14 2016.docx
QA-CEIP proposal DRAFT June 14 2016.docx
CEIP-stakeholder call talkers_v1+JA.DOCX
Stay Language.Talking points.OGC Draft with DOJ comments incorporated.6.....docx
CEIP_Proposal_Draft_PR_v4.docx
3a. Race Car Exemption talking points_June 2016.docx
3b. VW one-pager_June 2016.docx
3c. HD GHG.docx
3d. Mobile Source GHG one-pgr.docx
UintaBasinOzoneOARBriefing.pptx
CPP model rule leakage 6_15_16.pptx
3f. Background Ozone revised 05 31 16 clean 2pp.docx
3g. Oil and Natural Gas 06 02 16.docx
3h. ozone NAAQS+CSAPR one-pager June1-2016 + OAP_revisions tracked.docx

Not Responsive

11:00 am - 12:00 pm CPP Model Rule Policy Issues III - 5400

Not Responsive

12:00 pm - 1:00 pm CPP Check In - 5400

Not Responsive

3:00 pm - 4:00 pm CPP Check-In hosted by Brian Deese - Brian Deese's Office

Not Responsive

FOR REVIEW:
CEIP Rollout Material

FACT SHEET
PROPOSED RULE ABOUT DESIGN DETAILS
OF THE CLEAN ENERGY INCENTIVE PROGRAM (CEIP) UNDER THE CLEAN POWER PLAN

OVERVIEW

- On June 16, 2016, the Environmental Protection Agency (EPA) proposed certain design details for the optional Clean Energy Incentive Program (CEIP). Once finalized, the design elements in this proposal will help guide states and tribes that choose to participate in the CEIP when the Clean Power Plan becomes effective.
- The final CPP included the CEIP, which was designed to help states and tribes with affected sources meet their goals under the plan by removing barriers to investment in energy efficiency and solar measures in low-income communities and by encouraging early investments in zero-emitting renewable energy generation.
- States may, but are not required to, participate in this incentive program for early action.
    - Tribes have additional options, as discussed in the Tribal Authority Rule, tribes generally have the opportunity, but not the obligation, to submit a plan to implement the elements of the CAA for their respective areas of Indian country. Similarly, if a tribe with affected sources chooses to establish its own plan to implement the CEIP, it must seek and be approved by EPA for "treatment in the same manner as a state" (TAS) status.
- Following through on commitments EPA made when we established the CEIP framework in the final Clean Power Plan[1], this action is informed by an extensive pre-proposal outreach and engagement process to gather input from stakeholders and the public on how best to design the details of the CEIP. In addition to dozens of stakeholder meetings, trainings and Q&A sessions on the CEIP, EPA held four listening sessions attended by more than 750 participants and established a non-regulatory docket that received more than 5,000 public comments.
- This proposal is an opportunity for stakeholders and the public to provide further feedback on several key design elements. Key proposed provisions include:
    - criteria for eligible CEIP low-income community projects (demand-side energy-efficiency (EE) and solar projects implemented to serve low-income communities) and zero-emitting renewable energy projects (wind, solar, geothermal and hydropower in all communities);
    - a flexible approach for states and tribes to use definitions of the term "low-income community" under current programs aimed at benefitting those communities; and
    - how the EPA matching pool of allowances and emission rate credits (ERCs) equivalent to 300 million short tons of CO_2 emissions will be made available to states and tribes that choose to participate in the CEIP.
- In this action, EPA is also re-proposing optional example regulatory text specific to the CEIP that a state or tribe may choose to incorporate into its plan.

[1] On February 9, 2016, the Supreme Court stayed the CPP pending judicial review before the U.S. Court of Appeals for the D.C. Circuit and any subsequent proceedings in the Supreme Court. The stay means that no one has to comply with the Clean Power Plan while the stay is in effect.

- EPA will accept public comment on this proposal for 60 days after publication in the Federal Register and will hold a public hearing in Chicago on August 3, 2016.

PROPOSED CLARIFICATIONS ABOUT PROJECT ELIGIBILITY

- EPA is proposing a limited expansion of the types of projects that are eligible for the CEIP.
    - For low-income community projects, EPA is proposing that **both demand-side energy efficiency and solar renewable energy projects implemented to serve low-income communities** be eligible.
    - For renewable energy projects, EPA is proposing **a limited expansion of the list of CEIP-eligible technologies beyond solar and wind to include geothermal and hydropower,** two other zero-emitting renewable technologies that meet the criteria established in the Clean Power Plan.

During the pre-proposal outreach process, we heard several comments requesting that we clarify when the period of CEIP eligibility begins for low-income community projects and renewable energy projects, so that project developers may plan their investments. EPA is proposing the following clarifications:

- Renewable energy projects in all communities would be eligible based on when they **commence commercial operation,** which is defined as when a project begins selling "useable" electricity or, in the case of some low-income community solar projects, when a project begins generating electricity that receives financial credit. The term "commence commercial operation" replaces the term "commence construction" included in the final CPP. We are also proposing to revise the date for renewable energy project eligibility to January 1, 2020.
- As finalized in the CPP, energy efficiency projects in low-income communities would be eligible based on when they **commence operation.** We propose to define this as the date on which an eligible CEIP project in a low-income community is delivering quantifiable and verifiable electricity savings. We are proposing that such projects would be eligible if they commence operation on or after September 6, 2018.

- It is currently unclear what adjustments, if any, will need to be made to implementation timing. The EPA recognizes that the timing elements of the CEIP may need to be adjusted in concert with other timing elements of the Clean Power Plan. We address this issue in the proposal.

PROPOSED APPROACH FOR STATES AND TRIBES TO ESTABLISH DEFINITIONS OF LOW-INCOME COMMUNITY

- During the pre-proposal outreach process, we heard comments about the value of building on successful existing local, state and federal programs that serve low-income communities, as well as the importance of affording states and tribes the choose to participate in CEIP the flexibility to address their specific economic and demographic conditions rather than EPA establishing a single definition of "low-income community."

- In this action, EPA is proposing to **enable states and tribes to use one or more existing definitions for "low-income community**," including local, state or federal definitions from programs that provide benefits to low-income households and populations.
    - Any definition used must have been established prior to the publication of the final CPP on October 23, 2015.
    - Selected definition(s) may be based on a geographic area that includes low-income households, and/or may be based on a household-level income determination.
- States and tribes would then apply their selected definition(s) to determine eligibility of energy efficiency and solar projects that are implemented to serve low-income communities.

PROPOSED DISTRIBUTION OF THE EPA MATCHING POOL TO STATES AND TRIBES

- In the final CPP, EPA committed to providing more details on how the EPA matching pool of 300 million short tons of CO_2 emissions would be expressed in terms of both allowances (for states and tribes with mass-based plans) and ERCs (for states and tribes with rate-based plans).
- The number of allowances and ERCs is different because the two compliance instruments are measured in different units.
    - Allowances, measured in tons, and ERCs, measured in MWh, are distinct compliance instruments that are not interchangeable.
- EPA is proposing to define the matching pool, in terms of allowances and ERCs, as follows:
    - For mass-based programs, EPA is proposing that the matching pool is 300 million allowances.
    - For rate-based programs, EPA is proposing that the matching pool is 375 million ERCs.
- In the final CPP, we also committed to provide more detail on what portion of the matching pool would be reserved for low-income community projects, and what portion would be reserved for renewable energy projects.
- EPA is proposing that **the matching pool be divided evenly** between the two reserves, with 50 percent of the matching pool (150 million allowances, or 187.5 million ERCs) made available in a reserve for low-income community projects (i.e., EE and solar implemented to serve low-income communities), and 50 percent of the matching pool (150 million allowances, or 187.5 million ERCs) made available in a reserve for renewable energy projects.
- EPA is proposing **an approach to determining each state's and tribe's pro rata share** of the match.
    - As finalized in the CPP, the share of the pool for each state and tribe with affected sources is calculated in proportion to the amount of CO_2 reductions required of the affected power plants in that state or tribe relative to those in other states or tribes.
    - The proposal lists the number of matching allowances or ERCs each state or tribe with affected sources is eligible to receive under the CEIP. The tables are available at [PLACEHOLDER FOR TABLE, OR LINK TO TABLE ON THE WEB].

BACKGROUND: HOW DOES THE CEIP WORK?

- As provided in the CPP, a state or tribe that chooses to opt-in to the CEIP may allocate allowances (under a mass-based plan) or issue ERCs (under a rate-based plan) to eligible CEIP projects for energy generation or energy savings that occurs during 2020-2021. Following an award of early action allowances or ERCs by a state or tribe, EPA will provide *matching* awards (of allowances or ERCs) up to a national limit equal to 300 million shorts tons of CO_2 emissions.
- The size of the matching CEIP award is different depending on the project type. For example, under a rate-based plan,
    - **Eligible CEIP renewable energy projects** may receive an award of two ERCs for every two MWh of renewable energy generated. This is based on the issuance of one early action ERC by the state or tribe and the award of one matching ERC by EPA.
    - **Eligible CEIP low-income community projects** may receive a "double" award of four ERCs for every two MWh of demand-side energy-efficiency savings or solar generation. This is based on the issuance of two early action ERCs by the state or tribe and the award of two matching ERCs by EPA.
- The CEIP eligible project that obtains the awards may then sell or otherwise transfer the allowances or ERCs to affected power plants, who may use them for compliance with an emission standard under the CPP.

HOW TO COMMENT

- To ensure that EPA considers and responds to your comments on the CEIP topics addressed in today's proposal, you must submit your comments to the docket for this rulemaking. If you previously submitted comments on the CEIP during the outreach period preceding this rulemaking, and you would like for them to be considered with regard to this proposal, you must re-submit them to the docket for this rulemaking.
- EPA will accept comment on the proposal for 60 days after publication in the *Federal Register*. Comments, identified by Docket ID No. EPA-HQ-OAR-2016-0033, may be submitted by one of the following methods:
    - www.regulations.gov: follow the on-line instructions for submitting comments.
    - Email: Comments may be sent by electronic mail (email) to a-and-r-Docket@epa.gov. Include Docket ID No. EPA-HQ-OAR-2016-0033 in the subject line of the message.
    - Fax: Fax your comments to: (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2016-0033.
    - Mail: Environmental Protection Agency, EPA Docket Center (EPA/DC), Mail Code 28221T, Attention Docket ID No. EPA-HQ-OAR-2016-0033, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.
    - Hand/Courier Delivery: EPA Docket Center, Room 3334, EPA WJC West Building, 1301

Constitution Avenue, NW, Washington, DC 20004, Attention Docket ID No. E EPA-HQ-OAR-2016-0033. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

FOR MORE INFORMATION

- The proposed rule is posted at http://www.epa.gov/cleanpowerplan/clean-energy-incentive-program.
- For further information about the notice, contact Dr. Tina Ndoh of EPA's Office of Air Quality Planning and Standards, Sector Policies and Programs Division, at (919) 541-2750 or by email at ndoh.tina@epa.gov.

CONTACT:
Enesta Jones
jones.enesta@epa.gov
202-564-7873
202-564-4355

FOR IMMEDIATE RELEASE
June 16, 2016

EPA Proposes Additional Details on the Clean Energy Incentive Program

Voluntary program will benefit communities by providing incentives for renewable energy and energy efficiency

WASHINGTON – After extensive engagement with community groups and other stakeholders, the U.S. Environmental Protection Agency (EPA) is proposing additional details for public comment about the optional Clean Energy Incentive Program (CEIP), which was included in the final Clean Power Plan. The CEIP was designed to help states and tribes meet their goals under the plan by encouraging early investments in zero-emitting renewable energy generation, and by removing barriers to investment in energy efficiency in low-income communities. Today's proposal will help guide states and tribes that choose to participate in the program when the Clean Power Plan becomes effective.

"For nearly a year we have collaborated with communities and other stakeholders, listening closely to ideas about how to design a range of elements of the CEIP. Today's proposal keeps that conversation moving forward," said Janet McCabe, acting assistant administrator for EPA's Office of Air and Radiation. "Taking these steps will help cut carbon pollution by encouraging investment in renewable energy and energy efficiency, which will help give our kids and grandkids a healthier and safer future."

The proposal provides a key opportunity for stakeholders to comment on several program design elements including: clarifications about project eligibility, providing states with the flexibility to choose one or more existing definitions of low-income community, and how CEIP incentives should be made available to eligible renewable energy and energy efficiency project providers.

The proposal is informed by an extensive outreach and engagement process to gather early input from stakeholders and the public on how best to design a number of features of the CEIP, including stakeholder listening sessions and a non-regulatory docket that gathered more than 5,000 comments. EPA's engagement with the public on this proposal will continue with a 60-day public comment period, webinars and a public hearing on August 3, 2016, in Chicago.

In 2015,, President Obama and EPA finalized the Clean Power Plan – the first-ever national limits on reducing carbon pollution from power plants. In February 2016 the Supreme Court stayed the Clean Power Plan while the courts review the plan. Many states and tribes have indicated that they plan to move forward voluntarily in cutting carbon pollution from power plants and have asked the agency to continue providing support and developing tools that may support those efforts, including the CEIP.

EPA is responding to these requests and is following through on our commitment to provide states with additional information on the CEIP. This work will provide states with additional clarity, which will help them make timely decisions regarding options for plan development when the stay is lifted.

Additional information on the proposal: http://www.epa.gov/cleanpowerplan/clean-energy-incentive-program

R102

FACT SHEET
PROPOSED RULE ABOUT DESIGN DETAILS
OF THE CLEAN ENERGY INCENTIVE PROGRAM (CEIP) UNDER THE CLEAN POWER PLAN

OVERVIEW

- On June 16, 2016, the Environmental Protection Agency (EPA) proposed certain design details for the optional Clean Energy Incentive Program (CEIP). Once finalized, the design elements in this proposal will help guide states and tribes that choose to participate in the CEIP when the Clean Power Plan (CPP) becomes effective.
- The final CPP included the CEIP, which was designed to help states and tribes with affected sources meet their goals under the plan by removing barriers to investment in energy efficiency and solar measures in low-income communities and by encouraging early investments in zero-emitting renewable energy generation.
- States may, but are not required to, participate in this incentive program for early action. If tribes with affected sources develop plans, they may also elect to participate in the CEIP.
- Following through on commitments EPA made when we established the CEIP framework in the final CPP[1], this action is informed by an extensive pre-proposal outreach and engagement process to gather input from stakeholders and the public on how best to design the details of the CEIP. In addition to dozens of stakeholder meetings, trainings and Q&A sessions on the CEIP, EPA held four listening sessions attended by more than 750 participants and established a non-regulatory docket that received more than 5,000 public comments.
- This proposal is an opportunity for stakeholders and the public to provide further feedback on several key design elements. Key proposed provisions include:
    - criteria for eligible CEIP low-income community projects (demand-side energy-efficiency (EE) and solar projects implemented to serve low-income communities) and zero-emitting renewable energy projects (wind, solar, geothermal and hydropower in all communities);
    - a flexible approach for states and tribes to use definitions of the term "low-income community" under current programs aimed at benefitting those communities; and
    - how the EPA matching pool of allowances and emission rate credits (ERCs) equivalent to 300 million short tons of CO_2 emissions will be made available to states and tribes that choose to participate in the CEIP.
- In this action, EPA is also re-proposing optional example regulatory text specific to the CEIP that a state or tribe may choose to incorporate into its plan.
- EPA will accept public comment on this proposal for 60 days after publication in the Federal Register and will hold a public hearing in Chicago on August 3, 2016.

[1] On February 9, 2016, the Supreme Court stayed the CPP pending judicial review before the U.S. Court of Appeals for the D.C. Circuit and any subsequent proceedings in the Supreme Court. The stay means that no one has to comply with the Clean Power Plan while the stay is in effect.

PROPOSED CLARIFICATIONS ABOUT PROJECT ELIGIBILITY

- EPA is proposing a limited expansion of the types of projects that are eligible for the CEIP.
  - For low-income community projects, EPA is proposing that **both demand-side energy efficiency and solar renewable energy projects implemented to serve low-income communities** be eligible.
  - For renewable energy projects, EPA is proposing **a limited expansion of the list of CEIP-eligible technologies beyond solar and wind to include geothermal and hydropower,** two other zero-emitting renewable technologies that meet the criteria established in the Clean Power Plan for CEIP-eligible projects.
- During the pre-proposal outreach process, we heard several comments requesting that we clarify when the period of CEIP eligibility begins for low-income community projects and renewable energy projects, so that project developers may plan their investments. EPA is proposing the following clarifications:
  - Renewable energy projects in all communities would be eligible based on when they **commence commercial operation,** which is defined as when a project begins selling "useable" electricity or, in the case of some low-income community solar projects, when a project begins providing direct electricity bill benefits to low-income community ratepayers. The term "commence commercial operation" replaces the term "commence construction" included in the final CPP. We are also proposing to those projects that commence commercial operation on or after revise the date for renewable energy project eligibility to January 1, 2020.
  - As finalized in the CPP, energy efficiency projects in low-income communities would be eligible based on when they **commence operation.** We propose to define this as the date on which an eligible CEIP project in a low-income community is delivering quantifiable and verifiable electricity savings. We are proposing that such projects would be eligible if they commence operation on or after September 6, 2018.
- It is currently unclear what adjustments, if any, will need to be made to implementation timing. The EPA recognizes that the timing elements of the CEIP may need to be adjusted in concert with other timing elements of the Clean Power Plan. We address this issue in the proposal.

PROPOSED APPROACH FOR STATES AND TRIBES TO ESTABLISH DEFINITIONS OF LOW-INCOME COMMUNITY

- During the pre-proposal outreach process, we heard comments about the value of building on successful existing local, state and federal programs that serve low-income communities, as well as the importance of affording states and tribes that choose to participate in CEIP the flexibility to address their specific economic and demographic conditions rather than EPA establishing a single definition of "low-income community."

- In this action, EPA is proposing to **enable states and tribes to use one or more existing definitions for "low-income community**," including local, state or federal definitions from programs that provide benefits to low-income households and populations.
  - Any definition used must have been established prior to the publication of the final CPP on October 23, 2015.
  - Selected definition(s) may be based on a geographic area that includes low-income households, and/or may be based on a household-level income determination.
- States and tribes would then consistently apply their selected definition(s) to determine eligibility of energy efficiency and solar projects that are implemented to serve low-income communities.

PROPOSED DISTRIBUTION OF THE EPA MATCHING POOL TO STATES AND TRIBES

- In the final CPP, EPA committed to providing more details on how the EPA matching pool of 300 million short tons of CO_2 emissions would be expressed in terms of both allowances (for mass-based plans) and ERCs (for rate-based plans).
- The number of allowances and ERCs is different because the two compliance instruments are measured in different units.
  - Allowances, measured in tons, and ERCs, measured in MWh, are distinct compliance instruments that are not interchangeable.
- EPA is proposing to define the matching pool, in terms of allowances and ERCs, as follows:
  - For mass-based programs, EPA is proposing that the matching pool is 300 million allowances.
  - For rate-based programs, EPA is proposing that the matching pool is 375 million ERCs.
- In the final CPP, we also committed to provide more detail on what portion of the matching pool would be reserved for low-income community projects, and what portion would be reserved for renewable energy projects.
- EPA is proposing that **the matching pool be divided evenly** between the two reserves, with 50 percent of the matching pool (150 million allowances, or 187.5 million ERCs) made available in a reserve for low-income community projects (i.e., EE and solar implemented to serve low-income communities), and 50 percent of the matching pool (150 million allowances, or 187.5 million ERCs) made available in a reserve for renewable energy projects.
- EPA is proposing **an approach to determining each state's and tribe's pro rata share** of the match.
  - As finalized in the CPP, the share of the matching pool for each state and tribe with affected sources is calculated in a proportional manner. The proportional share is based on CO_2 reductions from 2012 levels that affected power plants in each state or tribe are required to achieve relative to those in other states or tribes.
  - The proposal lists the number of matching allowances or ERCs each state or tribe with affected sources is eligible to receive under the CEIP. The tables are available in Section III.A

of the preamble and on the website at http://www.epa.gov/cleanpowerplan/clean-energy-incentive-program.

BACKGROUND: HOW DOES THE CEIP WORK?

- As provided in the CPP, a state or tribe that chooses to opt-in to the CEIP may allocate allowances (under a mass-based plan) or issue ERCs (under a rate-based plan) to eligible CEIP projects for energy generation or energy savings that occurs during 2020-2021.
    - Note that tribes generally have the opportunity, but not the obligation, to submit a plan to implement the elements of the Clean Air Act for their respective areas of Indian country, as discussed in the Tribal Authority Rule. Similarly, if a tribe with affected sources chooses to establish its own plan to implement the CEIP, it must seek and be approved by the EPA for "treatment in the same manner as a state" (TAS) status.
- Following an award of early action allowances or ERCs by a state or tribe with affected sources, EPA will provide *matching* awards (of allowances or ERCs) up to a national limit equal to 300 million shorts tons of CO_2 emissions.
- The size of the matching CEIP award is different depending on the project type. For example, under a rate-based plan,
    - **Eligible CEIP renewable energy projects** may receive an award of two ERCs for every two MWh of renewable energy generated. This is based on the issuance of one early action ERC by the state or tribe and the award of one matching ERC by EPA.
    - **Eligible CEIP low-income community projects** may receive a "double" award of four ERCs for every two MWh of demand-side energy-efficiency savings or solar generation. This is based on the issuance of two early action ERCs by the state or tribe and the award of two matching ERCs by EPA.
- The CEIP eligible project that obtains the awards may then sell or otherwise transfer the allowances or ERCs to affected power plants, who may use them for compliance with an emission standard under the CPP.

HOW TO COMMENT

- To ensure that EPA considers and responds to your comments on the CEIP topics addressed in today's proposal, you must submit your comments to the docket for this rulemaking. If you previously submitted comments on the CEIP during the outreach period preceding this rulemaking, and you would like for them to be considered with regard to this proposal, you must re-submit them to the docket for this rulemaking.
- EPA will accept comment on the proposal for 60 days after publication in the *Federal Register*. Comments, identified by Docket ID No. EPA-HQ-OAR-2016-0033, may be submitted by one of the following methods:
    - www.regulations.gov: follow the on-line instructions for submitting comments.

- Email: Comments may be sent by electronic mail (email) to a-and-r-Docket@epa.gov. Include Docket ID No. EPA-HQ-OAR-2016-0033 in the subject line of the message.
- Fax: Fax your comments to: (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2016-0033.
- Mail: Environmental Protection Agency, EPA Docket Center (EPA/DC), Mail Code 28221T, Attention Docket ID No. EPA-HQ-OAR-2016-0033, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.
- Hand/Courier Delivery: EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue, NW, Washington, DC 20004, Attention Docket ID No. E EPA-HQ-OAR-2016-0033. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

FOR MORE INFORMATION

- The proposed rule is posted at http://www.epa.gov/cleanpowerplan/clean-energy-incentive-program.
- For further information about the notice, contact Dr. Tina Ndoh of EPA's Office of Air Quality Planning and Standards, Sector Policies and Programs Division, at (919) 541-2750 or by email at ndoh.tina@epa.gov.

CONTACT:
Enesta Jones
jones.enesta@epa.gov
202-564-7873
202-564-4355

FOR IMMEDIATE RELEASE
June 16, 2016

EPA Proposes Additional Details on the Clean Energy Incentive Program

Voluntary program will benefit communities by providing incentives for renewable energy and energy efficiency

WASHINGTON – After extensive engagement with community groups and other stakeholders, the U.S. Environmental Protection Agency (EPA) is proposing additional details for public comment about the optional Clean Energy Incentive Program (CEIP), which was included in the final Clean Power Plan. The CEIP was designed to help states and tribes meet their goals under the plan by encouraging early investments in zero-emitting renewable energy generation, and by removing barriers to investment in energy efficiency in low-income communities. Today's proposal will help guide states and tribes that choose to participate in the program when the Clean Power Plan becomes effective.

"For nearly a year we have collaborated with communities and other stakeholders, listening closely to ideas about how to design a range of elements of the CEIP. Today's proposal keeps that conversation moving forward," said Janet McCabe, acting assistant administrator for EPA's Office of Air and Radiation. "Taking these steps will help cut carbon pollution by encouraging investment in renewable energy and energy efficiency, which will help give our kids and grandkids a healthier and safer future."

The proposal provides a key opportunity for stakeholders to comment on several program design elements including: clarifications about project eligibility including expanding eligibility to solar energy project in low-income communities, providing states with the flexibility to choose one or more existing definitions of low-income community, and how CEIP incentives should be made available to eligible renewable energy and energy efficiency project providers.

The proposal is informed by an extensive outreach and engagement process to gather early input from stakeholders and the public on how best to design a number of features of the CEIP, including stakeholder listening sessions and a non-regulatory docket that gathered more than 5,000 comments. EPA's engagement with the public on this proposal will continue with a 60-day public comment period, webinars and a public hearing on August 3, 2016, in Chicago.

In 2015, President Obama and EPA finalized the Clean Power Plan – the first-ever national limits on reducing carbon pollution from existing power plants. In February 2016, the Supreme Court stayed the Clean Power Plan. While the courts review the plan, and during the stay, no state is required to comply with the Clean Power Plan. Many states and tribes have indicated that they plan to move forward voluntarily in cutting carbon pollution from power plants and have asked the agency to continue providing support and developing tools that may support those efforts, including the CEIP.

EPA is responding to these requests and is following through on our commitment to provide states with additional information on the CEIP, consistent with the stay. This work will provide states with additional clarity, which will help them make timely decisions regarding options for plan development when the stay is lifted.

Additional information on the proposal: http://www.epa.gov/cleanpowerplan/clean-energy-incentive-program

R102

CEIP Design Details: Proposed State and Tribal Shares of Matching Pool

EPA is proposing an approach to determining each state's and tribe's pro rata share of the matching pool, and is proposing to divide each jurisdiction's share into a reserve for renewable energy projects and a reserve for low-income community projects. Thisapportionment is shown in the table below. As finalized in the CPP, the share of the matching pool for each state and tribe with affected sources is calculated in a proportional manner. The proportional share is based on CO_2 reductions from 2012 levels that affected power plants in each state or tribe are required to achieve relative to those in other states or tribes. EPA is taking comment on this approach. For more information, see Section III.A of the preamble.

	Available Matching Allowances (mass-based plan states)			Available Matching ERCs (rate-based plan states)		
	Renewable Energy Reserve (50%)	Low-Income Community Reserve (50%)	Total Share (100%)	Renewable Energy Reserve (50%)	Low-Income Community Reserve (50%)	Total Share (100%)
Alabama	4,683,458	4,683,458	9,366,916	5,854,323	5,854,323	11,708,646
Arizona	2,579,426	2,579,426	5,158,852	3,224,283	3,224,283	6,448,566
Arkansas	3,280,844	3,280,844	6,561,688	4,101,055	4,101,055	8,202,110
California	328,268	328,268	656,536	410,335	410,335	820,670
Colorado	3,334,788	3,334,788	6,669,576	4,168,485	4,168,485	8,336,970
Connecticut	104,122	104,122	208,244	130,153	130,153	260,306
Delaware	207,588	207,588	415,176	259,485	259,485	518,970
Florida	4,845,372	4,845,372	9,690,744	6,056,715	6,056,715	12,113,430
Georgia	4,133,434	4,133,434	8,266,868	5,166,792	5,166,792	10,333,584
Idaho	22,392	22,392	44,784	27,991	27,991	55,982
Illinois	8,953,081	8,953,081	17,906,162	11,191,352	11,191,352	22,382,704
Indiana	8,631,114	8,631,114	17,262,228	10,788,892	10,788,892	21,577,784
Iowa	3,286,774	3,286,774	6,573,548	4,108,467	4,108,467	8,216,934
Kansas	3,173,445	3,173,445	6,346,890	3,966,806	3,966,806	7,933,612
Kentucky	7,429,292	7,429,292	14,858,584	9,286,616	9,286,616	18,573,232
Lands of the Fort Mojave Tribe	8,827	8,827	17,654	11,034	11,034	22,068
Lands of the Navajo Nation	2,434,598	2,434,598	4,869,196	3,043,247	3,043,247	6,086,494
Lands of the Uintah and Ouray Reservation	263,264	263,264	526,528	329,080	329,080	658,160
Louisiana	2,246,141	2,246,141	4,492,282	2,807,677	2,807,677	5,615,354
Maine	31,109	31,109	62,218	38,886	38,886	77,772
Maryland	1,459,162	1,459,162	2,918,324	1,823,952	1,823,952	3,647,904

	Available Matching Allowances (mass-based plan states)			Available Matching ERCs (rate-based plan states)		
	Renewable Energy Reserve (50%)	Low-Income Community Reserve (50%)	Total Share (100%)	Renewable Energy Reserve (50%)	Low-Income Community Reserve (50%)	Total Share (100%)
Massachusetts	255,705	255,705	511,410	319,632	319,632	639,264
Michigan	5,591,791	5,591,791	11,183,582	6,989,739	6,989,739	13,979,478
Minnesota	3,004,354	3,004,354	6,008,708	3,755,443	3,755,443	7,510,886
Mississippi	535,959	535,959	1,071,918	669,949	669,949	1,339,898
Missouri	5,656,983	5,656,983	11,313,966	7,071,229	7,071,229	14,142,458
Montana	1,965,515	1,965,515	3,931,030	2,456,894	2,456,894	4,913,788
Nebraska	2,222,542	2,222,542	4,445,084	2,778,178	2,778,178	5,556,356
Nevada	504,431	504,431	1,008,862	630,539	630,539	1,261,078
New Hampshire	161,696	161,696	323,392	202,121	202,121	404,242
New Jersey	669,007	669,007	1,338,014	836,258	836,258	1,672,516
New Mexico	1,234,572	1,234,572	2,469,144	1,543,216	1,543,216	3,086,432
New York	836,656	836,656	1,673,312	1,045,820	1,045,820	2,091,640
North Carolina	4,011,884	4,011,884	8,023,768	5,014,855	5,014,855	10,029,710
North Dakota	3,225,953	3,225,953	6,451,906	4,032,441	4,032,441	8,064,882
Ohio	7,182,558	7,182,558	14,365,116	8,978,197	8,978,197	17,956,394
Oklahoma	3,100,508	3,100,508	6,201,016	3,875,635	3,875,635	7,751,270
Oregon	231,529	231,529	463,058	289,411	289,411	578,822
Pennsylvania	7,559,018	7,559,018	15,118,036	9,448,773	9,448,773	18,897,546
Rhode Island	53,511	53,511	107,022	66,889	66,889	133,778
South Carolina	2,479,202	2,479,202	4,958,404	3,099,003	3,099,003	6,198,006
South Dakota	396,310	396,310	792,620	495,387	495,387	990,774
Tennessee	3,267,125	3,267,125	6,534,250	4,083,907	4,083,907	8,167,814
Texas	15,600,288	15,600,288	31,200,576	19,500,360	19,500,360	39,000,720
Utah	2,101,783	2,101,783	4,203,566	2,627,229	2,627,229	5,254,458
Virginia	2,079,819	2,079,819	4,159,638	2,599,773	2,599,773	5,199,546
Washington	1,127,151	1,127,151	2,254,302	1,408,939	1,408,939	2,817,878

	Available Matching Allowances (mass-based plan states)			Available Matching ERCs (rate-based plan states)		
	Renewable Energy Reserve (50%)	Low-Income Community Reserve (50%)	Total Share (100%)	Renewable Energy Reserve (50%)	Low-Income Community Reserve (50%)	Total Share (100%)
West Virginia	5,260,335	5,260,335	10,520,670	6,575,419	6,575,419	13,150,838
Wisconsin	3,590,805	3,590,805	7,181,610	4,488,506	4,488,506	8,977,012
Wyoming	4,656,486	4,656,486	9,312,972	5,820,607	5,820,607	11,641,214
TOTAL	**149,999,975**	**149,999,975**	**299,999,950**	**187,499,975**	**187,499,975**	**374,999,950**

Prepared by OAQPS
For informational purposes only
June 14, 2016

Brief Overview of NACAA Model Plan
June 15, 2016

Background

- On June 1, 2016, the National Association of Clean Air Agencies (NACAA) released a "model plan" to support state efforts regarding the Clean Power Plan. The document, titled, "EPA's Clean Power Plan: Model State Plans" summarizes the Clean Power Plan (CPP) requirements, highlights key decision points in the state planning process, analyzes various plan types and components, and includes a mass-based initial submittal and model plan.
- NACAA explains that it focused on a mass-based, interstate trading approach as the model because stakeholders seem to concur that a regional or interstate plan design is preferable and many also seem inclined towards a mass-based approach.
- In both the document and related outreach, NACAA acknowledges the stay, but notes that states may still move forward and because states and others are continuing to talk about reducing carbon emissions from power plants, NACAA is providing a useful tool to facilitate those discussions and efforts, and help states with compliance strategies.
- Although NACAA has been clear that the EPA has not reviewed the document (which is correct), NACAA Executive Director Bill Becker explained that the document was written by a technical consultant with state air agency experience, and reviewed by a group of approximately 25 local and state air agencies. In addition, the document derives from conversations with other agency consortium groups.

Information Regarding the "Model Plan"

- The document begins with an in-depth summary of the Climate Action Plan and the CPP with a detailed consideration of rate-based plans; mass-based plans; and the state measures approaches.
- The actual "model" plan consists of two main components, both of which are mass-based with the new source complement (and expect to also take advantage of the Clean Energy Incentive Program – CEIP). The two components are: (1) an initial submittal; and (2) an actual model final plan submittal including both legal and technical components.
- Initial Submittal. This is based on a hypothetical PJM[1] state which includes both coal-mining communities and coastal areas and which is leaning towards a mass-based plan, the new source complement, and the CEIP. The initial submittal introduces the concept of a state-designed "allowance rewards" program to incentivize investment in the deployment of demand-side energy efficiency programs in vulnerable communities (an idea that is also carried forward into the final model plan). As explained in the model plan, the idea here is to be "beyond" the minimum requirements outlined by the EPA in previously issued guidance regarding initial submittals – particularly with regard to community outreach. The document itself is approximately 8 pages long and addresses each of the three components of the initial submittal as set forth in the CPP.
- Model Final Plan. This is a mass-based interstate trading approach located in a

[1] PJM Interconnection is a regional transmission organization including all or parts of the following states: DE, IL, IN, KY, MD, MI, NJ, NC, OH, PA, TN, VA, WV, and Washington, D.C.

hypothetical MISO state[2] with no coal mining. The plan includes state regulations, state legislation (including provisions for funding as well as the auction, sale, and allocation of allowances), and model plan checklists. The final plan uses EPA-specified mass emission goals as the plan performance goals and relies on the new source complement. Notably, it also includes different allowance allocation schemes, provides for state auctions, sales of allowances, and includes enforcement provisions.

- Allowance Allocation – Final Plan. The model plan uses a four-part allowance distribution scheme that includes: (1) the state and reserves from 15%-50% of budget for action or sale; (2) qualified energy efficiency resources which are allocated allowances based on verified and certified energy savings (but not via set-asides); (3) new affected electric generating units (EGUs) which are allocated allowances based on generation with allocations capped at the new source complement level; and (4) existing affected EGUs and qualified renewable energy and low-emitting EGUs. NACAA explains that one reason for the state to action or sell allowances under a mass-based trading plan is to fund the cost of implementing and enforcing the program. The plan also provides details regarding the different allocations described above, and explains the basis of some of the numbers provided (some stem from RGGI estimates for example).

- The model plan also includes enforceability provisions, including a severability clause to "protect the integrity" of the plan. The model adopts an automatic initial remedy requiring the surrender of "two-for-one" allowances in the event of excess emissions in violation of the allowance holding standard and also includes nondiscretionary stipulated penalties for violations of the emission standard. There are provisions also addressing permanent retirements, reliability, reporting/monitoring, and other documentation obligations.

[2] MISO is the midcontinent independent system operator and MISO states include: AR, IL, IN, IO, KY, LA, MI, MN, MS, MO, MT, ND, SD, WI, and TX.

AGENDA

CLEAN POWER PLAN

JUNE 15, 2016

I. Litigation Update
II. Rulemaking Actions
    a. CEIP
    b. Model Rule
III. Outreach
IV. Tools/Support for States and Stakeholders
V. Biomass

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Drinkard, Andrea
Sent: Mon 6/13/2016 1:16:34 AM
Subject: Re: CEIP Comms -- PR, FS, QA

Awesome, sounds good and thanks so much!

Andrea Drinkard
(o) 202.564.1601
(c) Personal Cell/email

On Jun 12, 2016, at 8:54 PM, Goffman, Joseph <Goffman.Joseph@epa.gov> wrote:

Sent from my iPhone

Begin forwarded message:

From: Joseph Goffman Personal Cell/email
Date: June 12, 2016 at 8:53:09 PM EDT
To: "Goffman, Joseph" <Goffman.Joseph@epa.gov>
Subject: CEIP Comms -- PR, FS, QA

will look at generic stay TPs later this evening or tomorrow. all looks good. thanks.

<CEIP Q A proposal DRAFT June 10 2016 jg.docx>

<CEIP FS proposal DRAFT June 10 2016 V7 jg.docx>

<CEIP_Proposal_Draft_PR_v2 jg.docx>

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Joseph Goffman
Sent: Mon 6/13/2016 12:53:09 AM
Subject: CEIP Comms -- PR, FS, QA
CEIP Q A proposal DRAFT June 10 2016 jg.docx
CEIP FS proposal DRAFT June 10 2016 V7 jg.docx
CEIP_Proposal_Draft_PR_v2 jg.docx

will look at generic stay TPs later this evening or tomorrow. all looks good. thanks.

To: OAR Briefings[OAR_Briefings@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Ashley, Jackie[Ashley.Jackie@epa.gov]; Niebling, William[Niebling.William@epa.gov]; Millett, John[Millett.John@epa.gov]
From: Drinkard, Andrea
Sent: Fri 6/10/2016 7:52:44 PM
Subject: CEIP Comms Materials
CEIP_Proposal_Draft_PR_v2.docx
FS-CEIP proposal DRAFT June 10 2016 V7.docx
CommPlan_CEIPproposal-DRAFT June 10 2016.docx
QA-CEIP proposal DRAFT June 10 2016.docx
Stay Language.Talking points.OGC Draft with DOJ comments incorporated.6.....docx

Hi Janet and Joe,

Attached are the draft comms materials for the CEIP proposal. I'm also including the draft talking points that OGC sent up on the stay. I think Will also gave you hard copies of these, but I thought I'd include them electronically here as well since we'll be incorporating the language into the CEIP documents.

We'll work to round out the call list and Q&A documents early next week. I believe that Greg is reaching out (or has already reached out) to Mustafa to make sure we're coordinated on the EJ front.

I plan to share drafts of these materials with OPA on Monday, so please let me know if you have any comments and we'll get those incorporated.

Thanks so much!!

-Andrea-

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Niebling, William
Sent: Fri 6/3/2016 5:43:21 PM
Subject: Fwd: From Greenwire -- CLEAN POWER PLAN: Emails reveal EPA disappointment after Supreme Court decision

If you see these articles and wonder, don't worry. Beyond our normal review, both ARLO and I saw every single one. No trouble expected.

Begin forwarded message:

From: "Weinstock, Larry" <Weinstock.Larry@epa.gov>
Date: June 3, 2016 at 12:37:42 PM EDT
To: "Niebling, William" <Niebling.William@epa.gov>
Subject: FW: From Greenwire -- CLEAN POWER PLAN: Emails reveal EPA disappointment after Supreme Court decision

FYI

From: Mackay, Cheryl
Sent: Friday, June 03, 2016 12:26 PM
To: Weinstock, Larry <Weinstock.Larry@epa.gov>
Subject: FW: From Greenwire -- CLEAN POWER PLAN: Emails reveal EPA disappointment after Supreme Court decision

That was fast.

From: Schramm, Daniel
Sent: Friday, June 03, 2016 12:14 PM
To: Mackay, Cheryl <Mackay.Cheryl@epa.gov>
Subject: FW: From Greenwire -- CLEAN POWER PLAN: Emails reveal EPA disappointment after Supreme Court decision

Is this the outcome of the FOIA request from a couple weeks ago (though I thought the requester was Politico, not E&E)?

Daniel Schramm

U.S. EPA Office of General Counsel

(202) 564-3377

schramm.daniel@epa.gov

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

From: schramm.daniel [mailto:email_this@eenews.net]
Sent: Friday, June 03, 2016 12:09 PM
To: Schramm, Daniel <Schramm.Daniel@epa.gov>
Subject: From Greenwire -- CLEAN POWER PLAN: Emails reveal EPA disappointment after Supreme Court decision

This Greenwire story was sent to you by: schramm.daniel@epa.gov

AN E&E PUBLISHING SERVICE

CLEAN POWER PLAN:
Emails reveal EPA disappointment after Supreme Court decision

Elizabeth Harball, E&E reporter

Published: June 3, 2016 at 11:35 AM

"There is no sugar-coating it."

That was the initial reaction Feb. 9 of Avi Garbow, U.S. EPA general counsel, to the Supreme Court's decision to stay the Obama administration's signature climate rule, sent in an email to staffers hours after the stay was announced.

Garbow called the Supreme Court's decision "difficult news" but went on to encourage EPA staffers, saying, "I just want you all to know how proud I am" of their work on the Clean Power Plan.

In a later email, acting EPA air chief Janet McCabe called the stay "obviously very disappointing."

Emails sent between top EPA officials after the Supreme Court's surprise decision to stay the Clean Power Plan, obtained by E&E through a Freedom of Information Act request, show widespread disappointment throughout the agency but also a determination to continue the agency's work on climate change.

"It is not a decision on the merits, however, and we remain as sure as we were yesterday of the sound legal basis for the rule and that the Clean Power Plan is an important, if lawful program under the Clean Air Act to address the serious threat of climate change," McCabe wrote in an email to staffers dated Feb. 10

In her first public appearance after the stay at a meeting of state regulators in Washington, D.C., EPA Administrator Gina McCarthy said she was "disappointed" in the stay but confident the rule will ultimately survive the court system (***E&ENews PM***, Feb. 11).

"One decision to stay doesn't mean that the CPP isn't alive and isn't going to survive," McCarthy said Feb. 11.

In the following months, McCarthy reiterated her confidence in the rule's legality and even dismissed the significance of the stay at one point, saying "we didn't lose anything yet" in response to a question suggesting EPA had lost a preliminary court battle over the Clean Power Plan (***Greenwire***, April 21).

The Clean Power Plan is considered the linchpin of the Obama administration's effort to address climate change on both domestic and international fronts.

EPA's regulation, rolled out in August 2015, would slash carbon emissions from U.S. power plants 32 percent from 2005 levels by 2030. The electricity sector is the No. 1 source of greenhouse gas emissions in the United States.

But soon after its release, the Clean Power Plan was challenged by 27 states and over 100 other opponents, including industries, utilities and labor groups.

Both supporters and opponents of the Clean Power Plan were caught off guard by the Supreme Court's Feb. 9 decision to stay the rule.

While it's widely expected the rule's legality will be decided by the Supreme Court, the stay was considered unprecedented. The U.S. Court of Appeals for the District of Columbia Circuit declined a request to stay the rule in January, and the challengers' subsequent stay request to the Supreme Court was considered a long shot.

The one-page decision provided no clues as to why the court decided to stay the rule.

Nevertheless, the stay has had a widespread chilling effect on the massive planning effort that was taking place across the United States in preparation for the climate rule.

EPA announced that a September deadline for states to submit initial implementation plans no longer applies. Many states have halted the technical planning work, and a number of governors and legislatures have prohibited environment agencies from expending resources on the rule unless the stay is lifted.

However, about 20 states -- many of which are supporting EPA in court -- continue to strategize ways to make the power-sector emissions cuts required by the Clean Power Plan. Many utilities also have indicated they will continue planning for increased carbon constraints.

The Supreme Court is not expected to hear the case until late 2017 or early 2018.

Reporters Emily Holden, Robin Bravender and Evan Lehmann contributed.

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www.eenews.net

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To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: McCabe, Janet
Sent: Tue 5/31/2016 3:35:43 PM
Subject: RE: Aspen Clean Energy - July 22-25

I'm not sure I see a downside….i wonder if anyone from the WH has been invited/is planning to go?

From: Goffman, Joseph
Sent: Tuesday, May 31, 2016 10:10 AM
To: McCabe, Janet <McCabe.Janet@epa.gov>
Subject: FW: Aspen Clean Energy - July 22-25

Are you comfortable with my doing this? Thanks.

From: Goffman, Joseph
Sent: Tuesday, May 31, 2016 10:10 AM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Washington, Yvette <Washington.Yvette@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

Ex. 5 - Deliberative

From: Drinkard, Andrea
Sent: Tuesday, May 31, 2016 9:56 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: RE: Aspen Clean Energy - July 22-25

I think you should do it!!! Sounds like a good event, they've been after you for a couple of years now..

Not Responsive

From: Goffman, Joseph
Sent: Tuesday, May 31, 2016 9:46 AM
To: Roger Ballentine <roger@greenstrategies.com>
Cc: Gershuny, Greg <Greg.Gershuny@aspeninstitute.org>; Alexiev, Nicole <nicole.alexiev@aspeninstitute.org>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: Re: Aspen Clean Energy - July 22-25

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Sent from my iPhone

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C'mon Joe! We want you there.

Roger S. Ballentine

President

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Washington D.C. 20006

(202) 328-1123

roger@greenstrategies.com

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Sent: Friday, May 27, 2016 8:25 AM
To: Goffman.joseph@Epa.gov
Cc: Roger Ballentine <roger@greenstrategies.com>; Alexiev, Nicole <nicole.alexiev@aspeninstitute.org>
Subject: Aspen Clean Energy - July 22-25

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Best, Greg

The Aspen Clean Energy Innovation Forum
Turbulence & Transition: Winning the Clean Energy Race

July 22 - 25, 2016
Aspen, Colorado

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We expect the forum to be full by mid-June so please register as soon as possible:

We hope to see you in Aspen!

Best,

Greg Gershuny

Energy and Environment Program

The Aspen Institute

Greg.Gershuny@AspenInstitute.org

202-736-3576

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Washington, Yvette[Washington.Yvette@epa.gov]; Atkinson, Emily[Atkinson.Emily@epa.gov]
From: Drinkard, Andrea
Sent: Tue 5/31/2016 2:13:03 PM
Subject: RE: Aspen Clean Energy - July 22-25

One thing of note is that the ECOS STEP meeting is here in DC on the 21st and 22nd. I don't think you were planning to attend, but wanted to flag it nonetheless. Provided you have no interest in the STEP meeting, Yvette can you add this to Joe's calendar and I'll confirm him once you do.

Thanks!

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Cc: Washington, Yvette <Washington.Yvette@epa.gov>; Atkinson, Emily <Atkinson.Emily@epa.gov>
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Cc: Roger Ballentine <roger@greenstrategies.com>; Alexiev, Nicole <nicole.alexiev@aspeninstitute.org>
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Energy and Environment Program

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Greg.Gershuny@AspenInstitute.org

202-736-3576

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Drinkard, Andrea
Sent: Tue 5/31/2016 1:55:55 PM
Subject: RE: Aspen Clean Energy - July 22-25

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Sent: Tuesday, May 31, 2016 9:46 AM
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Cc: Gershuny, Greg <Greg.Gershuny@aspeninstitute.org>; Alexiev, Nicole <nicole.alexiev@aspeninstitute.org>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>
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Greg Gershuny

Energy and Environment Program

The Aspen Institute

Greg.Gershuny@AspenInstitute.org

202-736-3576

To: Terry, Sara[Terry.Sara@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Bailey, KevinJ[Bailey.KevinJ@epa.gov]; Niebling, William[Niebling.William@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]; Kornylak, Vera S.[Kornylak.Vera@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Washington, Yvette
Sent: Fri 5/20/2016 6:58:52 PM
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

Keep the same number that Kevin indicated.

From: Terry, Sara
Sent: Friday, May 20, 2016 2:55 PM
To: Washington, Yvette <Washington.Yvette@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Bailey, KevinJ <Bailey.KevinJ@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

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Call: **Conf Code** code: **Conf Code**

Sara

From: Washington, Yvette
Sent: Friday, May 20, 2016 2:53 PM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Bailey, KevinJ <Bailey.KevinJ@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Terry, Sara <Terry.Sara@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

Call: **Conf Code** Code: **Conf Code**

From: Washington, Yvette
Sent: Friday, May 20, 2016 2:48 PM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Bailey, KevinJ <Bailey.KevinJ@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Terry, Sara <Terry.Sara@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

Yes, you may use 5415.

From: Goffman, Joseph
Sent: Friday, May 20, 2016 2:37 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Bailey, KevinJ <Bailey.KevinJ@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Terry, Sara <Terry.Sara@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>; Washington, Yvette <Washington.Yvette@epa.gov>
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

That would be best. Yvette – can we use 5415? Thanks.

From: Schmidt, Lorie
Sent: Friday, May 20, 2016 2:35 PM
To: Bailey, KevinJ <Bailey.KevinJ@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Terry, Sara <Terry.Sara@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

Joe and William—is there a room I should come to? I assume we'd rather be in a room together.

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Bailey, KevinJ
Sent: Friday, May 20, 2016 2:34 PM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Terry, Sara <Terry.Sara@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: Re: Call w/ House Science and HEC staff, re: HEC stay letter

Just a reminder that we'll be speaking with House Science and HEC committee staff at 3. I'm not in the office today, but will set up the call right before 3. Talk with you all soon.

Kevin J. Bailey

Congressional Liaison/Air Team

Office of Congressional Affairs

U.S. Environmental Protection Agency
bailey.kevinj@epa.gov
202.564.2998

From: Bailey, KevinJ
Sent: Wednesday, May 18, 2016 3:44 PM
To: Bailey, KevinJ; Goffman, Joseph; Niebling, William; Schmidt, Lorie; Schramm, Daniel; Kornylak, Vera S.; Zenick, Elliott
Cc: Terry, Sara; Ashley, Jackie
Subject: Call w/ House Science and HEC staff, re: HEC stay letter
When: Friday, May 20, 2016 3:00 PM-3:30 PM.
Where: Call: Conf Code code: Conf Code

All,

We'll be speaking with like Pamitha Weerasinghe of House Science minority and Jean Fruci of HEC minority about the HEC letter regarding the CPP stay.

Call-in#: **Conf Code**

Code: **Conf Code**

To: Washington, Yvette[Washington.Yvette@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Bailey, KevinJ[Bailey.KevinJ@epa.gov]; Niebling, William[Niebling.William@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]; Kornylak, Vera S.[Kornylak.Vera@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
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To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Bailey, KevinJ <Bailey.KevinJ@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Terry, Sara <Terry.Sara@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

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Cc: Terry, Sara <Terry.Sara@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>; Washington, Yvette <Washington.Yvette@epa.gov>
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Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

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Office of Congressional Affairs

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Where: Call: **Conf Code** code: **Conf Code**

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Cc: Terry, Sara[Terry.Sara@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Washington, Yvette
Sent: Fri 5/20/2016 6:53:19 PM
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

Call: **Conf Code** Code: **Conf Code**

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Sent: Friday, May 20, 2016 2:48 PM
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Cc: Terry, Sara[Terry.Sara@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Schramm, Daniel
Sent: Fri 5/20/2016 6:48:29 PM
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

I'll be there, thanks.

Daniel Schramm

U.S. EPA Office of General Counsel

(202) 564-3377

schramm.daniel@epa.gov

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

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Cc: Terry, Sara[Terry.Sara@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
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Sent: Fri 5/20/2016 6:47:47 PM
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

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From: Washington, Yvette
Sent: Fri 5/20/2016 6:47:31 PM
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

Yes

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Sent: Friday, May 20, 2016 2:37 PM
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Cc: Terry, Sara[Terry.Sara@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Schmidt, Lorie
Sent: Fri 5/20/2016 6:34:51 PM
Subject: RE: Call w/ House Science and HEC staff, re: HEC stay letter

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Cc: Terry, Sara[Terry.Sara@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Bailey, KevinJ
Sent: Fri 5/20/2016 6:33:50 PM
Subject: Re: Call w/ House Science and HEC staff, re: HEC stay letter

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Code: Conf Code

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Cyran, Carissa
Sent: Thur 5/19/2016 9:05:39 PM
Subject: E-folder for Friday, May 20, 2016
CPP MR RB Trading 5_20_16.pptx
051316 EPA Clean Power Plan.pdf

8:30 am - 9:00 am	**Management Roundtable - 5400**
10:00 am - 11:00 am	**CPP Model Rule Policy Issues Continued - 5400**
12:30 pm - 1:00 pm	**Scheduling Meeting - 5400**
3:00 pm - 3:30 pm	**Call with House Science and HEC Staff re: HEC stay letter**
3:30 pm - 4:00 pm	**Biomass Discussion - 5415**
4:45 pm - 5:45 pm	**Depart Office for RW Event**

To: Drinkard, Andrea[Drinkard.Andrea@epa.gov]
Cc: Owens, Nicole[Owens.Nicole@epa.gov]; Millett, John[Millett.John@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Germann, Sandy
Sent: Thur 5/19/2016 12:59:47 PM
Subject: RE: Reg Agenda Q&A re: to CPP

Hi Andrea, Sorry I'm just now saying thank you for this! The Agenda was released yesterday afternoon; so far, no questions…

Sandy Germann

US EPA Office of Policy

202-631-0272

germann.sandy@epa.gov

EPA Smart Growth Facebook | Twitter

From: Drinkard, Andrea
Sent: Tuesday, May 17, 2016 3:09 PM
To: Germann, Sandy <Germann.Sandy@epa.gov>
Cc: Owens, Nicole <Owens.Nicole@epa.gov>; Millett, John <Millett.John@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Ashley, Jackie <Ashley.Jackie@epa.gov>
Subject: RE: Reg Agenda Q&A re: to CPP

Hi Sandy,

Here's our Q&A. Adding Joe for awareness.

Why have the rules related to CPP changed? Shouldn't EPA stop work on all these rules?

The Spring Regulatory Agenda includes minor updates that are in line with the stay of the Clean Power Plan. Since the stay was issued, many states and tribes have indicated that they plan to move forward voluntarily to work to cut carbon pollution from power plants and have asked the agency to continue providing support and developing tools that may support those efforts. The Spring Regulatory Agenda reflects EPA's commitment to support states' voluntary efforts in a way that is consistent with the stay, including tools like the CEIP and the model trading rules.

From: Germann, Sandy
Sent: Tuesday, May 17, 2016 2:20 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Cc: Owens, Nicole <Owens.Nicole@epa.gov>; Curry, Bridgid <Curry.Bridgid@epa.gov>
Subject: RE: Reg Agenda Q&A re: to CPP

Hi Andrea, Copying Nicole and Brigid for that. Believe Caryn is out.

Sandy Germann

US EPA Office of Policy

202-631-0272

germann.sandy@epa.gov

EPA Smart Growth Facebook | Twitter

From: Drinkard, Andrea
Sent: Tuesday, May 17, 2016 11:38 AM
To: Germann, Sandy <Germann.Sandy@epa.gov>
Subject: RE: Reg Agenda Q&A re: to CPP

Could we get a copy of the reg agenda? Or at least what it has for the CPP-related rules? (Federal Plan, Model Rules and CEIP). I just want to make sure that we have the latest/final version.

thanks!

From: Germann, Sandy
Sent: Monday, May 16, 2016 4:03 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>
Subject: RE: Reg Agenda Q&A re: to CPP

Thank you!

Sandy Germann

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germann.sandy@epa.gov

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From: Drinkard, Andrea
Sent: Monday, May 16, 2016 3:39 PM
To: Millett, John <Millett.John@epa.gov>
Cc: Germann, Sandy <Germann.Sandy@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>
Subject: Re: Reg Agenda Q&A re: to CPP

We'll have something back to you tomorrow.

Andrea Drinkard

(o) 202.564.1601

(c Personal Cell/email

On May 16, 2016, at 3:35 PM, Millett, John <Millett.John@epa.gov> wrote:

+ Andrea

Thanks, Sandy – I think we'll take first crack at it.

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Sent: Monday, May 16, 2016 3:24 PM
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Cc: Owens, Nicole <Owens.Nicole@epa.gov>
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germann.sandy@epa.gov

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From: Germann, Sandy
Sent: Monday, May 16, 2016 11:15 AM
To: Lee, Monica <Lee.Monica@epa.gov>; Conger, Nick <Conger.Nick@epa.gov>; Hull, George <Hull.George@epa.gov>; Daguillard, Robert <Daguillard.Robert@epa.gov>
Cc: Kime, Robin <Kime.Robin@epa.gov>; Nickerson, William <Nickerson.William@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Curry, Bridgid <Curry.Bridgid@epa.gov>; Muellerleile, Caryn <Muellerleile.Caryn@epa.gov>
Subject: Spring Reg Agenda - May be public by Wed, 5/18 (Comm Materials attached)

All,

Good morning, OP has been told the Spring Regulatory agenda could publish online as early as Wed, May 18th. (The FR version will follow about 2 weeks later). Along w/ the routine items (list of regs expected to be developed, reviewed or signed in the next 12 months), this agenda includes a request for input on retrospective review of regulations within the preamble. We've updated the desk statement and Q&A. Please let us know if you have any questions.

Thanks,

Sandy

Sandy Germann

US EPA Office of Policy

202-631-0272

germann.sandy@epa.gov

EPA Smart Growth Facebook | Twitter

To: Germann, Sandy[Germann.Sandy@epa.gov]
Cc: Owens, Nicole[Owens.Nicole@epa.gov]; Millett, John[Millett.John@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Ashley, Jackie[Ashley.Jackie@epa.gov]
From: Drinkard, Andrea
Sent: Tue 5/17/2016 7:08:51 PM
Subject: RE: Reg Agenda Q&A re: to CPP

Hi Sandy,

Here's our Q&A. Adding Joe for awareness.

Why have the rules related to CPP changed? Shouldn't EPA stop work on all these rules?

The Spring Regulatory Agenda includes minor updates that are in line with the stay of the Clean Power Plan. Since the stay was issued, many states and tribes have indicated that they plan to move forward voluntarily to work to cut carbon pollution from power plants and have asked the agency to continue providing support and developing tools that may support those efforts. The Spring Regulatory Agenda reflects EPA's commitment to support states' voluntary efforts in a way that is consistent with the stay, including tools like the CEIP and the model trading rules.

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Cc: Owens, Nicole <Owens.Nicole@epa.gov>; Curry, Bridgid <Curry.Bridgid@epa.gov>
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Subject: Re: Reg Agenda Q&A re: to CPP

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(o) 202.564.1601

(c) **Personal Cell/email**

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Sandy Germann

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202-631-0272

germann.sandy@epa.gov

EPA Smart Growth Facebook | Twitter

To: Ragland, Micah[Ragland.Micah@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]; Enobakhare, Rosemary[Enobakhare.Rosemary@epa.gov]
From: Kurlansky, Ellen
Sent: Tue 5/17/2016 3:32:19 PM
Subject: RE: CPP and SEIU

Excellent. I guess I should have known you'd be on top of it!

Ellen Kurlansky

Office of Air and Radiation

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue NW

Washington, DC 20460

202-564-1669

From: Ragland, Micah
Sent: Tuesday, May 17, 2016 11:31 AM
To: Kurlansky, Ellen <Kurlansky.Ellen@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Enobakhare, Rosemary <Enobakhare.Rosemary@epa.gov>
Subject: RE: CPP and SEIU

Hey Ellen, thanks for flagging this. Mary Kay and SEIU have been great and we have been working with them the last several months on CPP (before the stay), methane and other clean air/climate issues. They have been absolutely great and we will definitively continue to engage them.

From: Kurlansky, Ellen
Sent: Tuesday, May 17, 2016 10:30 AM
To: Ragland, Micah <Ragland.Micah@epa.gov>

Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: CPP and SEIU

H Micah, Have we recently invited Mary Kay Henry, president of the Service Employees union (SEIU) to any of the Administrator's events? I keep running into them supporting the Clean Power Plane ever since we announced it. Their President, Mary Kay Henry issued a statement on August 3. They have supported us on the litigation including with an amicus brief. And recently I became aware of an SEIU project to make hospitals and other health care facilities more energy efficient to support CPP.

So you may know all of this and be way ahead of me. And I don't really know who gets invited to events (I know this isn't in my wheelhouse), but keep Mary Kay in mind if something appropriate comes up. OK?

Here is CPP from their website:

http://www.seiu.org/2015/08/seius-henry-we-can-address-climate-change-public-health-while-building-a-stronger-economy

http://www.seiu.org/2016/04/clean-air-for-working-families-hangs-in-balance-at-appeals-court

http://www.seiu.org/blog/2015/8/these-6-seiu-members-are-fighting-for-clean-power

Ellen Kurlansky

Office of Air and Radiation

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue NW

Washington, DC 20460

202-564-1669

To: Kurlansky, Ellen[Kurlansky.Ellen@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]; Enobakhare, Rosemary[Enobakhare.Rosemary@epa.gov]
From: Ragland, Micah
Sent: Tue 5/17/2016 3:31:05 PM
Subject: RE: CPP and SEIU

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Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: CPP and SEIU

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Ellen Kurlansky

Office of Air and Radiation

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue NW

Washington, DC 20460

202-564-1669

To: Niebling, William[Niebling.William@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Distefano, Nichole
Sent: Tue 5/17/2016 1:29:47 AM
Subject: Re: can you resend the q/a

Thanks. Let me know if we have new TPs in light of decision. We should err on the side of caution and give words to say on new decision.

Sent from my iPhone

On May 16, 2016, at 5:41 PM, Niebling, William <Niebling.William@epa.gov> wrote:

Now that I understand it is for Stan's hearing, attaching the TPs we gave Gina. Upon re-reading them, I don't think they need editing in light of breaking news. If we get any response point pulled together, I'll forward it.

From: Niebling, William
Sent: Monday, May 16, 2016 5:18 PM
To: Distefano, Nichole <DiStefano.Nichole@epa.gov>
Cc: Goffman, Joseph <goffman.joseph@epa.gov>
Subject: RE: can you resend the q/a

Attached. Adding Joe in light of breaking news in case he has updates sooner than I do.

From: Distefano, Nichole
Sent: Monday, May 16, 2016 5:05 PM
To: Niebling, William <Niebling.William@epa.gov>
Subject: can you resend the q/a

We did for GM on CPP stay and CEIP?

Nichole Distefano

Associate Administrator

Office of Congressional and Intergovernmental Relations

Environmental Protection Agency

(202) 564-5200

Distefano.Nichole@epa.gov

To: Distefano, Nichole[DiStefano.Nichole@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Niebling, William
Sent: Mon 5/16/2016 9:41:15 PM
Subject: RE: can you resend the q/a
15_CPP Stay FPMR CEIP 04 6 16.docx

With attachment.

From: Niebling, William
Sent: Monday, May 16, 2016 5:41 PM
To: Distefano, Nichole <DiStefano.Nichole@epa.gov>
Cc: Goffman, Joseph <goffman.joseph@epa.gov>
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Office of Congressional and Intergovernmental Relations

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Nichole Distefano

Associate Administrator

Office of Congressional and Intergovernmental Relations

Environmental Protection Agency

(202) 564-5200

Distefano.Nichole@epa.gov

To: Distefano, Nichole[DiStefano.Nichole@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Niebling, William
Sent: Mon 5/16/2016 9:17:57 PM
Subject: RE: can you resend the q/a
statement and qs - CEIP to OMB 4-27-15_FINAL.DOCX

Attached. Adding Joe in light of breaking news in case he has updates sooner than I do.

From: Distefano, Nichole
Sent: Monday, May 16, 2016 5:05 PM
To: Niebling, William <Niebling.William@epa.gov>
Subject: can you resend the q/a

We did for GM on CPP stay and CEIP?

Nichole Distefano

Associate Administrator

Office of Congressional and Intergovernmental Relations

Environmental Protection Agency

(202) 564-5200

Distefano.Nichole@epa.gov

To: Niebling, William[Niebling.William@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Millett, John[Millett.John@epa.gov]
From: Drinkard, Andrea
Sent: Fri 5/13/2016 7:21:18 PM
Subject: Fwd: Wash Examiner

Andrea Drinkard
(o) 202.564.1601
(c) **Personal Cell/email**

Begin forwarded message:

From: "Allen, Laura" <Allen.Laura@epa.gov>
Date: May 13, 2016 at 2:49:13 PM EDT
To: "Jones, Enesta" <Jones.Enesta@epa.gov>
Cc: "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>, "Millett, John" <Millett.John@epa.gov>
Subject: RE: Wash Examiner

Please flag any top tiers for me. Here's the statement. Feel free to send to others asking. Thanks!

We will review and respond to the letter. Many states and tribes have indicated that they plan to move forward voluntarily to work to cut carbon pollution from power plants and have asked the agency to continue providing support and developing tools that may support those efforts, including the CEIP. Sending the proposal with details about the optional Clean Energy Incentive Program (CEIP) to the Office of Management and Budget for interagency review was a routine step and it is consistent with the Supreme Court stay of the Clean Power Plan. The proposal is informed by an extensive public outreach and engagement process that began late last year and has included engagement with hundreds of interested stakeholders.

The last year has been an incredible one for progress on climate and clean energy – with major milestones both domestically and internationally, and tremendous momentum in the transition of our energy sector here in the United States. These market signals speak for themselves. The C.P.P. isn't driving these shifts; it was designed to underpin them. Even without the C.P.P. in place yet, they're happening anyway.

From: Jones, Enesta
Sent: Friday, May 13, 2016 1:51 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Millett, John <Millett.John@epa.gov>
Cc: Allen, Laura <Allen.Laura@epa.gov>; Jones, Enesta <Jones.Enesta@epa.gov>
Subject: CPP: Wash Examiner

I wanted to see if you guys had any response to the letter from the House Energy and Commerce committee questioning the CEIP proposal sent to OMB. Thanks!

-Kyle

Letter: http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/l

Enesta Jones

U.S. EPA, Office of Media Relations

Desk: 202.564.7873

Cell: Personal Cell/email

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Dunham, Sarah[Dunham.Sarah@epa.gov]; Snyder, Carolyn[Snyder.Carolyn@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]
From: Moss, Jacob
Sent: Wed 5/4/2016 9:16:40 PM
Subject: RE: Meeting request with Affordable Housing Working Group

Joe, in case it's helpful to you tomorrow, below are some thoughts to convey with this group. I'm also happy to give an update on the low-income EE/RE case studies that we are preparing.
– Jacob

Their Proposed Topics:

1. Status of key elements of CPP in light of the stay (CEIP, model rules)

2. Outstanding questions they could assist our office in thinking through

Suggestion for Topic #1:

Ex. 5 - Deliberative

Suggestions for Topic #2:

Ex. 5 - Deliberative

From: Goffman, Joseph
Sent: Thursday, April 21, 2016 10:57 AM
To: Shahyd, Khalil <kshahyd@nrdc.org>
Cc: Moss, Jacob <Moss.Jacob@epa.gov>; tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>; Atkinson, Emily <Atkinson.Emily@epa.gov>
Subject: RE: Meeting request with Affordable Housing Working Group

Sounds good, Khalil. Thanks for getting in touch on this. We can set something up.

From: Shahyd, Khalil [mailto:kshahyd@nrdc.org]
Sent: Thursday, April 21, 2016 10:16 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Browne, Cynthia <Browne.Cynthia@epa.gov>
Cc: Moss, Jacob <Moss.Jacob@epa.gov>; tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>
Subject: Meeting request with Affordable Housing Working Group

Good morning Mr. Goffman,

I hope you are well. Our Affordable Housing CPP working would like to request a follow-up meeting with you and colleagues to discuss the status of key elements of the Clean Power Plan in light of the stay.

We have continued to support local affordable housing groups and other advocates in states to continue working progressively on planning, but have also received many questions from them as to we might expect from final CEIP and model rules going forward.

We would also like to know if there are any outstanding questions that we might assist your

office in thinking through?

Are there any dates in May that would be available for a follow up meeting?

Thank you,

Khalil Shahyd – Project Manager

Urban Solutions Program

Natural Resources Defense Council

1152 15th Street NW, Washington, DC 20005

|202.513.6264| http://www.nrdc.org | kshahyd@nrdc.org

http://www.energyefficiencyforall.org/

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Enobakhare, Rosemary[Enobakhare.Rosemary@epa.gov]
From: Patterson, Jacqueline
Sent: Tue 5/3/2016 4:25:56 AM
Subject: RE: CEIP Statement

Thanks, Joe. I appreciate it!

Most warmly,

Jacqui

From: Goffman, Joseph [mailto:Goffman.Joseph@epa.gov]
Sent: Tuesday, May 3, 2016 12:24 AM
To: Patterson, Jacqueline <jpatterson@naacpnet.org>
Cc: Enobakhare, Rosemary <Enobakhare.Rosemary@epa.gov>
Subject: Re: CEIP Statement

Glad this got to you, Jacqui. Please let me know if you would like a further discussion about these issues. Thanks.

- Joseph Goffman

Sent from my iPhone

On May 2, 2016, at 10:38 PM, Patterson, Jacqueline <jpatterson@naacpnet.org> wrote:

Thanks so much, Joe! I appreciate the heads-up and the sharing of this information.

Most warmly,

Jacqui

From: Goffman, Joseph [mailto:Goffman.Joseph@epa.gov]
Sent: Wednesday, April 27, 2016 10:17 AM
To: Patterson, Jacqueline <jpatterson@naacpnet.org>
Subject: FW: CEIP Statement

Hi, again, Jacqui. This the info I wanted to make sure you saw and shared with folks. Happy to talk when you have a chance. Thanks.

From: Drinkard, Andrea
Sent: Wednesday, April 27, 2016 10:12 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: CEIP Statement

Statement

EPA has sent a proposal with details about the optional Clean Energy Incentive Program (CEIP), a component of the Clean Power Plan, to the Office of Management and Budget for interagency review. Many states and tribes have indicated that they plan to move forward voluntarily to work to cut carbon pollution from power plants and have asked the agency to continue providing support and developing tools that may support those efforts, including the CEIP.

Sending this proposal to OMB for review is a routine step and it is consistent with the Supreme Court stay of the Clean Power Plan. The proposal is informed by an extensive public outreach process that began late last year and has included engagement with hundreds of interested stakeholders. That engagement will continue, including a public comment period and an opportunity for a public hearing, once the proposal becomes available for public review and comment after the interagency review process is complete.

Background

On August 3, 2015, President Obama and EPA announced the Clean Power Plan – a historic and important step in reducing carbon pollution from power plants that takes real action on climate change. In the final Clean Power Plan, the EPA included a Clean Energy Incentive Program (CEIP) – a program that states may choose to use to incentivize early investments in wind and solar power generation, as well as in energy efficiency measures in low-income communities. State participation in the CEIP is entirely voluntary.

On February 9, 2016, the Supreme Court stayed implementation of the Clean Power Plan pending judicial review. EPA remains fully confident in the legal merits of the Clean Power Plan. While the stay is in place EPA will not take any action to implement or enforce it. However, the stay does not stop states, tribes, or utilities from continuing to act on climate. In fact, many have already said they're going to keep moving forward. The last year has been an incredible one for progress on climate and clean energy – with major milestones both domestically and internationally, and tremendous momentum in the clean energy transition of our electricity sector here in the United States. These developments have been well-documented and speak for themselves.

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Patterson, Jacqueline
Sent: Tue 5/3/2016 2:38:34 AM
Subject: RE: CEIP Statement

Thanks so much, Joe! I appreciate the heads-up and the sharing of this information.

Most warmly,

Jacqui

From: Goffman, Joseph [mailto:Goffman.Joseph@epa.gov]
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Sending this proposal to OMB for review is a routine step and it is consistent with the Supreme Court stay of the Clean Power Plan. The proposal is informed by an extensive public outreach process that began late last year and has included engagement with hundreds of interested stakeholders. That engagement will continue, including a public comment period and an opportunity for a public hearing, once the proposal becomes available for public review and comment after the interagency review process is complete.

Background

On August 3, 2015, President Obama and EPA announced the Clean Power Plan – a historic and important step in reducing carbon pollution from power plants that takes real action on climate change. In the final Clean Power Plan, the EPA included a Clean Energy Incentive Program (CEIP) – a program that states may choose to use to incentivize early investments in wind and solar power generation, as well as in energy efficiency measures in low-income communities. State participation in the CEIP is entirely voluntary.

On February 9, 2016, the Supreme Court stayed implementation of the Clean Power Plan pending judicial review. EPA remains fully confident in the legal merits of the Clean Power Plan. While the stay is in place EPA will not take any action to implement or enforce it. However, the stay does not stop states, tribes, or utilities from continuing to act on climate. In fact, many have already said they're going to keep moving forward. The last year has been an incredible one for progress on climate and clean energy – with major milestones both domestically and internationally, and tremendous momentum in the clean energy transition of our electricity sector here in the United States. These developments have been well-documented and speak for themselves.

To: Harrison, Melissa[Harrison.Melissa@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Allen, Laura[Allen.Laura@epa.gov]
Cc: McCabe, Janet[McCabe.Janet@epa.gov]
From: Drinkard, Andrea
Sent: Thur 4/28/2016 8:01:25 PM
Subject: RE: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

Sure, as background.

From: Harrison, Melissa
Sent: Thursday, April 28, 2016 4:01 PM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Allen, Laura <Allen.Laura@epa.gov>
Cc: McCabe, Janet <McCabe.Janet@epa.gov>
Subject: RE: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

Ok to also refer them to the CEIP statement we gave them?

Melissa J. Harrison

Press Secretary

U.S. Environmental Protection Agency

Office: (202) 564-8421

Mobile: **Personal Cell/email**

Harrison.Melissa@epa.gov

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Sent: Thursday, April 28, 2016 4:01 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Harrison, Melissa <Harrison.Melissa@epa.gov>; Allen, Laura <Allen.Laura@epa.gov>
Cc: McCabe, Janet <McCabe.Janet@epa.gov>

Subject: RE: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

Yes, we are reviewing. Nothing more at the moment. Thanks.

From: Drinkard, Andrea
Sent: Thursday, April 28, 2016 3:59 PM
To: Harrison, Melissa <Harrison.Melissa@epa.gov>; Allen, Laura <Allen.Laura@epa.gov>
Cc: McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: RE: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

Yes, correct. Plus Janet and Joe for awareness.

From: Harrison, Melissa
Sent: Thursday, April 28, 2016 3:58 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Allen, Laura <Allen.Laura@epa.gov>
Subject: RE: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

Just got request for comment from E&E. We are reviewing?

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Mobile: **Personal Cell/email**

Harrison.Melissa@epa.gov

From: Drinkard, Andrea
Sent: Thursday, April 28, 2016 3:31 PM
To: Harrison, Melissa <Harrison.Melissa@epa.gov>; Allen, Laura <Allen.Laura@epa.gov>
Subject: FW: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

Flagging for awareness.

From: Vicki Arroyo [mailto:arroyo@law.georgetown.edu]
Sent: Thursday, April 28, 2016 3:30 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Rupp, Mark <Rupp.Mark@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Kathryn A. Zyla <zyla@law.georgetown.edu>; Gabriel S Pacyniak <Pacyniak@law.georgetown.edu>
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Thank you for your support of -- and engagement with – states throughout this process, and please let us know if you have any questions.

All best,

Vicki

Vicki Arroyo

Executive Director, Georgetown Climate Center

Asst. Dean, Centers & Institutes, Professor from Practice, Georgetown Law

(202) 661-6556

Cell: (202) 390-0172

To: Goffman, Joseph[Goffman.Joseph@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Allen, Laura[Allen.Laura@epa.gov]
Cc: McCabe, Janet[McCabe.Janet@epa.gov]
From: Harrison, Melissa
Sent: Thur 4/28/2016 8:00:58 PM
Subject: RE: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

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EPA

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Asst. Dean, Centers & Institutes, Professor from Practice, Georgetown Law

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Cc: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Drinkard, Andrea
Sent: Thur 4/28/2016 7:59:06 PM
Subject: RE: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

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From: Harrison, Melissa
Sent: Thursday, April 28, 2016 3:58 PM
To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Allen, Laura <Allen.Laura@epa.gov>
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Cell: (202) 390-0172

To: McCabe, Janet[McCabe.Janet@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Kornylak, Vera S.
Sent: Thur 4/28/2016 7:50:13 PM
Subject: RE: Letter

Janet, yes absolutely.

Vera

Vera Kornylak || Air Quality Policy Division || OAQPS

919-541-4067 || kornylak.vera@epa.gov

From: McCabe, Janet
Sent: Thursday, April 28, 2016 3:48 PM
To: Kornylak, Vera S. <Kornylak.Vera@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: FW: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

Vera—this is the letter weve been talking about from the states working with the Georgetown Climate Cneter. Can you please circulate around to the CPP team? Thanks.

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Sent: Thursday, April 28, 2016 3:30 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Rupp, Mark <Rupp.Mark@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Kathryn A. Zyla <zyla@law.georgetown.edu>; Gabriel S Pacyniak <Pacyniak@law.georgetown.edu>
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Asst. Dean, Centers & Institutes, Professor from Practice, Georgetown Law

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Cell: (202) 390-0172

To: Kornylak, Vera S.[Kornylak.Vera@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: McCabe, Janet
Sent: Thur 4/28/2016 7:47:52 PM
Subject: FW: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA
Final_StatesLettertoEPARequestingAdditionalCPPInformation_GCC.pdf

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Sent: Thursday, April 28, 2016 3:30 PM
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Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Rupp, Mark <Rupp.Mark@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Kathryn A. Zyla <zyla@law.georgetown.edu>; Gabriel S Pacyniak <Pacyniak@law.georgetown.edu>
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Asst. Dean, Centers & Institutes, Professor from Practice, Georgetown Law

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Cell: (202) 390-0172

To: Vicki Arroyo[arroyo@law.georgetown.edu]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]; Rupp, Mark[Rupp.Mark@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Kathryn A. Zyla[zyla@law.georgetown.edu]; Gabriel S Pacyniak[Pacyniak@law.georgetown.edu]
From: McCabe, Janet
Sent: Thur 4/28/2016 7:45:12 PM
Subject: RE: Letter from 14 States Requesting Additional CPP Information and Assistance from EPA

Thanks, Vicki!

From: Vicki Arroyo [mailto:arroyo@law.georgetown.edu]
Sent: Thursday, April 28, 2016 3:30 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Rupp, Mark <Rupp.Mark@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Kathryn A. Zyla <zyla@law.georgetown.edu>; Gabriel S Pacyniak <Pacyniak@law.georgetown.edu>
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Asst. Dean, Centers & Institutes, Professor from Practice, Georgetown Law

(202) 661-6556

Cell: (202) 390-0172

To: McCabe, Janet[McCabe.Janet@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]; Rosenberg, Julie[Rosenberg.Julie@epa.gov]; Kornylak, Vera S.[Kornylak.Vera@epa.gov]; Cook-Shyovitz, Becky[Cook-Shyovitz.Becky@epa.gov]; Bowles, Jack[Bowles.Jack@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Stewart, Lori[Stewart.Lori@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]
From: Rupp, Mark
Sent: Thur 4/28/2016 12:59:38 PM
Subject: ADDENDUM: RE: State Laws and CPP

So, I forgot laws from two years ago…(how long have we been at this?!?): Would add:

KY; LA; PA; VA; WY.

So 15.

This session in PA there was legislation introduced to alter timeframes and give the legislature more time for review (likely introduced given the Wolf Administration's declarations of submitting a full plan on September 6). Gov. Wolf vetoed that.

Mark

From: Rupp, Mark
Sent: Thursday, April 28, 2016 8:31 AM
To: McCabe, Janet <McCabe.Janet@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Rosenberg, Julie <Rosenberg.Julie@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Cook-Shyovitz, Becky <Cook-Shyovitz.Becky@epa.gov>; Jack Bowles <Bowles.Jack@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Stewart, Lori <Stewart.Lori@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Reid Harvey (Harvey.Reid@epa.gov) <Harvey.Reid@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>
Subject: State Laws and CPP

Janet: Before we were so rudely interrupted by the alarm(!), you'd asked how many

states had legislation related to the Clean Power Plan. I'd said somewhere between 5-10. The answer is 10:

AZ; AR; IL; KS; MN; MO; NE; ND; TN; and WV. (Several bills introduced this session in other states like MS, FL, NC, SC, etc. I believe they didn't make it to final passage before sessions ended, but Becky and I will double-check.)

One can add an eleventh: WY insofar as a provision in the state's budget, prohibits Todd's shop from using state funds to develop a plan while the stay is in place (but does allow for attending meetings and working to stay informed).

As you know, the laws run the gamut on studies; bringing before relevant legislative committees; etc. (Minnesota's law would have had Stine's agency submit a draft plan to energy/environment committees by March 15, 2016!)

Briefly discussed yesterday in relation to the consultant's report on WV, WV's law from last year (requiring studies and submission through legislature) was amended this year to clarify the state could adopt a mass-based or rate-based state plan.

Mark

Mark W. Rupp

Deputy Associate Administrator for Intergovernmental Relations

Office of Congressional and Intergovernmental Relations

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

Washington, DC 20460

(202) 564-6074 (O)

Personal Cell/email

To: McCabe, Janet[McCabe.Janet@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]; Rosenberg, Julie[Rosenberg.Julie@epa.gov]; Kornylak, Vera S.[Kornylak.Vera@epa.gov]; Cook-Shyovitz, Becky[Cook-Shyovitz.Becky@epa.gov]; Bowles, Jack[Bowles.Jack@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Stewart, Lori[Stewart.Lori@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]
From: Rupp, Mark
Sent: Thur 4/28/2016 12:31:23 PM
Subject: State Laws and CPP

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Personal Cell/email

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Niebling, William[Niebling.William@epa.gov]; Bailey, KevinJ[Bailey.KevinJ@epa.gov]
From: Lewis, Josh
Sent: Wed 4/27/2016 12:19:35 PM
Subject: North Dakota event next Tuesday May 3rd
2016 Leg. Rally Agenda with ND Activities.pdf

Joe,

Attached is the agenda for the ND Rural Coops meeting – you'll see you're on the agenda for 45 mins, from 2:15 -3. The tentative plan is for you to give a CPP update for 10-15 minutes and then answer questions. Though the focus is CPP, I could see them asking about methane and other OAR rules too during the Q/A.

Not Responsive

Additional background (from an older Liam email): The North Dakota Association of Rural Electric Cooperatives (NDaREC) is holding a legislative conference in Washington, DC on 3 May 2016. They expect to have 25-30 North Dakotans at the conference, with a handful of Washington based folks from NRECA and a few other like-minded groups to the state organization. They generally want to hear mostly about CPP, what they should be thinking about while the stay is in place, what work EPA is doing while the stay remains in place – and take some questions/concerns from the group.

Josh Lewis

EPA/Office of Congressional Affairs

Office: 202 564 2095

Cell: **Personal Cell/email**

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Moss, Jacob[Moss.Jacob@epa.gov]; tnedwick@nhtinc.org[tnedwick@nhtinc.org]; Ethan Handelman[ehandelman@nhc.org]; Atkinson, Emily[Atkinson.Emily@epa.gov]
From: Shahyd, Khalil
Sent: Thur 4/21/2016 3:09:50 PM
Subject: RE: Meeting request with Affordable Housing Working Group

Great, we look forward to the discussion.

Thanks,

Khalil Shahyd – Project Manager

Urban Solutions Program

Natural Resources Defense Council

1152 15th Street NW, Washington, DC 20005

|202.513.6264| http://www.nrdc.org | kshahyd@nrdc.org

http://www.energyefficiencyforall.org/

From: Goffman, Joseph [mailto:Goffman.Joseph@epa.gov]
Sent: Thursday, April 21, 2016 10:57 AM
To: Shahyd, Khalil
Cc: Moss, Jacob; tnedwick@nhtinc.org; Ethan Handelman; Atkinson, Emily
Subject: RE: Meeting request with Affordable Housing Working Group

Sounds good, Khalil. Thanks for getting in touch on this. We can set something up.

From: Shahyd, Khalil [mailto:kshahyd@nrdc.org]
Sent: Thursday, April 21, 2016 10:16 AM

To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Browne, Cynthia <Browne.Cynthia@epa.gov>
Cc: Moss, Jacob <Moss.Jacob@epa.gov>; tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>
Subject: Meeting request with Affordable Housing Working Group

Good morning Mr. Goffman,

I hope you are well. Our Affordable Housing CPP working would like to request a follow-up meeting with you and colleagues to discuss the status of key elements of the Clean Power Plan in light of the stay.

We have continued to support local affordable housing groups and other advocates in states to continue working progressively on planning, but have also received many questions from them as to we might expect from final CEIP and model rules going forward.

We would also like to know if there are any outstanding questions that we might assist your office in thinking through?

Are there any dates in May that would be available for a follow up meeting?

Thank you,

Khalil Shahyd – Project Manager

Urban Solutions Program

Natural Resources Defense Council

1152 15th Street NW, Washington, DC 20005

|202.513.6264| http://www.nrdc.org | kshahyd@nrdc.org

http://www.energyefficiencyforall.org/

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Atkinson, Emily
Sent: Thur 4/21/2016 3:12:08 PM
Subject: RE: Meeting request with Affordable Housing Working Group

Is this a Janet meeting to or just you?

How long would you like to meet with them and what staff should be included on the invite?

From: Goffman, Joseph
Sent: Thursday, April 21, 2016 10:57 AM
To: Shahyd, Khalil <kshahyd@nrdc.org>
Cc: Moss, Jacob <Moss.Jacob@epa.gov>; tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>; Atkinson, Emily <Atkinson.Emily@epa.gov>
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Sent: Thursday, April 21, 2016 10:16 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>; Browne, Cynthia <Browne.Cynthia@epa.gov>
Cc: Moss, Jacob <Moss.Jacob@epa.gov>; tnedwick@nhtinc.org; Ethan Handelman <ehandelman@nhc.org>
Subject: Meeting request with Affordable Housing Working Group

Good morning Mr. Goffman,

I hope you are well. Our Affordable Housing CPP working would like to request a follow-up meeting with you and colleagues to discuss the status of key elements of the Clean Power Plan in light of the stay.

We have continued to support local affordable housing groups and other advocates in states to continue working progressively on planning, but have also received many questions from them

as to we might expect from final CEIP and model rules going forward.

We would also like to know if there are any outstanding questions that we might assist your office in thinking through?

Are there any dates in May that would be available for a follow up meeting?

Thank you,

Khalil Shahyd – Project Manager

Urban Solutions Program

Natural Resources Defense Council

1152 15th Street NW, Washington, DC 20005

|202.513.6264| http://www.nrdc.org | kshahyd@nrdc.org

http://www.energyefficiencyforall.org/

To: Goffman, Joseph[Goffman.Joseph@epa.gov]; Browne, Cynthia[Browne.Cynthia@epa.gov]
Cc: Moss, Jacob[Moss.Jacob@epa.gov]; tnedwick@nhtinc.org[tnedwick@nhtinc.org]; Ethan Handelman[ehandelman@nhc.org]
From: Shahyd, Khalil
Sent: Thur 4/21/2016 2:16:06 PM
Subject: Meeting request with Affordable Housing Working Group

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|202.513.6264| http://www.nrdc.org | kshahyd@nrdc.org

http://www.energyefficiencyforall.org/

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Niebling, William[Niebling.William@epa.gov]
From: Lubetsky, Jonathan
Sent: Tue 4/12/2016 7:57:44 PM
Subject: FW: Budget Hearing Prep Remaining Docs
Lomborg_WSJ_CHA_04-12-16.docx
15_CPP Stay FPMR CEIP 04 6 16.docx
17 Oil and Natural Gas 04 6 16.docx
STAG Multipurpose_oar 4_8_16.docx
STAG AQM Revised Formula_OAR 4_8_16.docx

Joe,

Attached are Administrator briefing prep materials for Thursday morning. CPP stay and the Oil and Gas document are updates to what the Administrator has already received. We are also providing two STAG documents, and the Q&A from the Lomborg CHA one-pager. These documents are due to OCIR by COB tomorrow. Please let us know if you have any comments.

Thank you,

Jonathan

Jonathan S. Lubetsky

Office of Air Policy and Program Support

U.S. EPA | Office of Air and Radiation

William J. Clinton North Room 5442G

202.564.3166

Learn about the Clean Air Act: https://www.epa.gov/clean-air-act-overview

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Cruden, John (ENRD)
Sent: Tue 4/12/2016 3:16:53 PM
Subject: Automatic reply: Effect of the Supreme Court's Clean Power Plan Stay

Thankyou for your message. I am out of the office through Tuesday evening. For immediate assistance, please call ENRD central office at 202 514 2701.

To: McCabe, Janet[McCabe.Janet@epa.gov]; Banister, Beverly[Banister.Beverly@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Niebling, William[Niebling.William@epa.gov]; Shaw, Betsy[Shaw.Betsy@epa.gov]
Cc: Millett, John[Millett.John@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Dennis, Allison[Dennis.Allison@epa.gov]; Cyran, Carissa[Cyran.Carissa@epa.gov]
From: Stewart, Lori
Sent: Fri 4/8/2016 9:58:32 PM
Subject: Draft Hot List
OAR Hot List 04-11-2016 draft.docx

Not Responsive

OAR Hot List

Week of April 11, 2016

Clean Power Plan - As I said last week, we didn't have many CPP-focused public meeting. For the most part, the meetings that we did have last week are covered in other parts of this hot list, so for this week's CPP blurb I'll focus on what's coming down the pike next week. I'll be at ECOS on Monday and Tuesday and will be participating in an air committee session focused on ozone and regional haze. I'm sure there will be a few questions on the Clean Power Plan - there always are. Avi will be doing a panel with Martha Rudolph and Todd Parfitt on the stay on Tuesday and I will be attending the session. On Wednesday, Joe will be meeting with the National Climate Coalition to discuss GHG regulatory issues. And on Thursday, Joe will be traveling to Chicago to participate in the MSEER and PJM state meetings. On Friday Joe will also meet with Sierra Club on CPP implementation issues.

Not Responsive

Not Responsive

Not Responsive

To: Rupp, Mark[Rupp.Mark@epa.gov]; Aguirre, Amanda[Aguirre.Amanda@epa.gov]
Cc: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]; Knapp, Kristien[Knapp.Kristien@epa.gov]; Ragland, Micah[Ragland.Micah@epa.gov]
From: Enobakhare, Rosemary
Sent: Fri 4/8/2016 4:48:04 PM
Subject: Re: Foundations on Thursday

Looping in Amanda from our team who will cover this meeting with the foundations. Micah will be in Flint and I will be in NYC prepping for the Administrator's trip to the city on Friday.

Sent from my iPhone

On Apr 8, 2016, at 12:43 PM, "Rupp, Mark" <Rupp.Mark@epa.gov> wrote:

Janet and Joe.

Chatted with Kathleen about next week's meeting on Thursday that should now be on your calendar, Janet. Sorry Joe (Chicago) and I (ECOS) won't be there but, Janet, you and the Administrator will be all they could ever want! ('Though, I may suggest that Avi and/or Lorie attend and welcome your thoughts. Sarah and others may also want to attend. Micah/Rosemary, not sure if you'll be in Flint or where.)

We requested this meeting to thank folks for all that they have done…and ask that they redouble efforts to continue to support states (and locals) on climate activities.

The main topics they will want to raise/discuss, as represented to me from the organizer (and all of which the Administrator and Janet can get animated about):

1. Clean Power Plan. How can they be helpful during the stay. What state work is important to support and any particular states.

Not Responsive

Not Responsive

Mark

To: Niebling, William[Niebling.William@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Jordan, Deborah[Jordan.Deborah@epa.gov]; Stewart, Lori[Stewart.Lori@epa.gov]; Shaw, Betsy[Shaw.Betsy@epa.gov]
From: McCabe, Janet
Sent: Fri 12/4/2015 12:04:50 AM
Subject: RE: Draft shout out

Good point—thanks.

From: Niebling, William
Sent: Thursday, December 03, 2015 7:03 PM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: McCabe, Janet <McCabe.Janet@epa.gov>; Jordan, Deborah <Jordan.Deborah@epa.gov>; Stewart, Lori <Stewart.Lori@epa.gov>; Shaw, Betsy <Shaw.Betsy@epa.gov>
Subject: Re: Draft shout out

I think the OGC effort has been greater than just ARLO attorneys (e.g. Todd's declaration) although ARLO undoubtedly has the lion's share of the sleep deprivation. No other comments from me.

On Dec 3, 2015, at 6:56 PM, Goffman, Joseph <Goffman.Joseph@epa.gov> wrote:

> Litigation discussion fine; yes, I believe regions helped with some state activity info. Thanks.

> **From:** McCabe, Janet
> **Sent:** Thursday, December 03, 2015 6:15 PM
> **To:** Jordan, Deborah <Jordan.Deborah@epa.gov>; Stewart, Lori <Stewart.Lori@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Shaw, Betsy <Shaw.Betsy@epa.gov>
> **Subject:** Draft shout out

Not Responsive

thanks

Dear Colleagues,

There have been so many great accomplishments across OAR recently that it's hard to keep up with them all in a weekly shout out, but I would be remiss if I didn't circle back and thank a truly "exceptional" team from OAQPS, OGC and the Regional Offices. Plus, there are a couple of other items to mention this week, so be sure to read all the way to the end!

Not Responsive

OK, I promised some other news too….

Not Responsive

Not Responsive And today, our lawyers also filed our opposition to the motions to stay the Clean Power Plan. Many thanks to our ARLO colleagues, DOJ attorneys and the many OAR [any reigons?] staff who have been working solidly to make the best possible case on the rule's behalf.

Not Responsive

Not Responsive

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: McCabe, Janet[McCabe.Janet@epa.gov]; Jordan, Deborah[Jordan.Deborah@epa.gov]; Stewart, Lori[Stewart.Lori@epa.gov]; Shaw, Betsy[Shaw.Betsy@epa.gov]
From: Niebling, William
Sent: Fri 12/4/2015 12:03:29 AM
Subject: Re: Draft shout out

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To: Jordan, Deborah <Jordan.Deborah@epa.gov>; Stewart, Lori <Stewart.Lori@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Shaw, Betsy <Shaw.Betsy@epa.gov>
Subject: Draft shout out

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Not Responsive

Not Responsive

To: Garbow, Avi[Garbow.Avi@epa.gov]; Hoffman, Howard[hoffman.howard@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Marks, Teresa[Marks.Teresa@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]; Shenkman, Ethan[Shenkman.Ethan@epa.gov]; Tsirigotis, Peter[Tsirigotis.Peter@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Page, Steve[Page.Steve@epa.gov]; Koerber, Mike[Koerber.Mike@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Vijayan, Abi[Vijayan.Abi@epa.gov]; Odendahl, Steve[Odendahl.Steve@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; Pilchen, Zach[Pilchen.Zach@epa.gov]; Jordan, Scott[Jordan.Scott@epa.gov]; Roder, Aileen[Roder.Aileen@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]
From: McCabe, Janet
Sent: Thur 12/3/2015 11:16:27 PM
Subject: RE: CPP Stay Opposition filing

From me too. What an effort, and what a product! You've definitely convinced me….

From: Garbow, Avi
Sent: Thursday, December 03, 2015 6:10 PM
To: Hoffman, Howard <hoffman.howard@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Marks, Teresa <Marks.Teresa@epa.gov>; Harvey, Reid <Harvey.Reid@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Shenkman, Ethan <Shenkman.Ethan@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Odendahl, Steve <Odendahl.Steve@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Pilchen, Zach <Pilchen.Zach@epa.gov>; Jordan, Scott <Jordan.Scott@epa.gov>; Roder, Aileen <Roder.Aileen@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>
Subject: RE: CPP Stay Opposition filing

Thanks – and congrats to all of you for the tremendous effort, working with DOJ, to pull together a very strong brief.

Avi

Avi Garbow

General Counsel

U.S. Environmental Protection Agency

(202) 564-8040

From: Hoffman, Howard
Sent: Thursday, December 03, 2015 5:57 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Marks, Teresa <Marks.Teresa@epa.gov>; Harvey, Reid <Harvey.Reid@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Garbow, Avi <Garbow.Avi@epa.gov>; Shenkman, Ethan <Shenkman.Ethan@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Odendahl, Steve <Odendahl.Steve@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Pilchen, Zach <Pilchen.Zach@epa.gov>; Jordan, Scott <Jordan.Scott@epa.gov>; Roder, Aileen <Roder.Aileen@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>
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Attached is our opposition to the stay of the CPP, which DOJ filed today. This includes the 87-page brief and the declarations by Janet McCabe, Teresa Marks, Reid Harvey and Kevin Culligan, along with ones by Ambassador Todd Stern and Dr. Chris Field (Stanford climate scientist).

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) Personal Cell/email Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

To: Hoffman, Howard[hoffman.howard@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Marks, Teresa[Marks.Teresa@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]; Shenkman, Ethan[Shenkman.Ethan@epa.gov]; Tsirigotis, Peter[Tsirigotis.Peter@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Vijayan, Abi[Vijayan.Abi@epa.gov]; Odendahl, Steve[Odendahl.Steve@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; Pilchen, Zach[Pilchen.Zach@epa.gov]; Jordan, Scott[Jordan.Scott@epa.gov]; Roder, Aileen[Roder.Aileen@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]
From: Garbow, Avi
Sent: Thur 12/3/2015 11:09:40 PM
Subject: RE: CPP Stay Opposition filing

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Avi

Avi Garbow

General Counsel

U.S. Environmental Protection Agency

(202) 564-8040

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Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Odendahl, Steve <Odendahl.Steve@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Pilchen, Zach <Pilchen.Zach@epa.gov>; Jordan, Scott <Jordan.Scott@epa.gov>; Roder, Aileen <Roder.Aileen@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>
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From: Hoffman, Howard
Sent: Thur 12/3/2015 10:57:16 PM
Subject: CPP Stay Opposition filing
EPA_CPP_Stay_Oppositn_w_Declaratns_12-03-15.pdf

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Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) **Personal Cell/email** Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

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OAR Hot List
Week of December 7, 2015

Clean Power Plan: This week staff from OAP and OAQPS met with a group of investors organized by UBS. We also held our last two outreach calls on the CEIP program. Joe delivered the opening remarks on the State, Local and Tribal call and I delivered the opening remarks on the general attendance call on Tuesday. Joe had a good trip to Salt Lake City to meet with the Western Electricity Coordinating Council board meeting. He reported that the meeting went well and that we're still getting credit for the extensive outreach that we did before the rule was finalized as well as the engagement that we've been doing since. On Thursday we had a productive meeting with the Navajo Nation on the CPP.

Not Responsive

Not Responsive

Court Actions: This week has been a big one for defending legal challenges to OAR rules.

Not Responsive

Not Responsive And yesterday, our lawyers filed our opposition to the motions to stay the Clean Power Plan.

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Hedman, Susan
Sent: Wed 12/2/2015 5:33:55 PM
Subject: Re: Clean Power Plan - FYI

Interesting presentation by the Wisconsin AG's office at the CPP seminar this morning in Milwaukee. Very heavy focus on arguments that CCS is not "adequately demonstrated" and that regulation under Sec 112 precludes regulation under Sec 111. Sounds like Wisconsin is unlikely to do any work to develop a plan until there's a ruling on the motion to stay.

Sent from my iPhone

On Nov 30, 2015, at 9:46 AM, Hedman, Susan <hedman.susan@epa.gov> wrote:

http://www.jsonline.com/news/opinion/why-wisconsin-is-suing-the-epa-b99622927z1-357272251.html

Why Wisconsin is suing the EPA

By Brad Schimel, Wisconsin attorney general.

As a strong supporter of capitalism and the free market, certainly I don't begrudge former New York Mayor Michael Bloomberg his billions of dollars. I do find it ironic, though, that a man who fuels a private jet and heats his penthouse advocates for federal regulation that will significantly raise electricity rates and kill jobs in Wisconsin. In fact, it will be low income and older citizens on fixed incomes who will be hit the hardest.

Bloomberg recently began spending $10 million in TV ads against the attorneys general in Wisconsin, Michigan, Missouri and Florida, for fighting the Environmental Protection Agency's unlawful "Clean Power Plan."

Two lawsuits challenging different parts of the plan have been brought by 25 states and state agencies. The states are seeking to invalidate the rule, which effectively allows EPA to set state energy policy by manipulating the electricity market and

controlling the electric grid, a role previously reserved for state regulators. The rule is an illegal expansion of EPA's authority, beyond what is permitted by the Clean Air Act. The EPA is attempting to set energy policy for the states.

As one of the top manufacturing states in the country, Wisconsin has much to lose if the Obama administration succeeds in its plan to destroy the viability of clean-coal electric generation. Manufacturing jobs in our state depends on affordable and reliable electric power. Because of the degree to which our state economies rely on manufacturing jobs, we will be disproportionately affected by the president's so-called "Clean Power Plan."

The Public Service Commission of Wisconsin estimates that costs to comply with the rule could be as high as $13 billion. What Bloomberg and the Obama administration do not want Americans to know is that those costs will be borne by homeowners and employers. The costs of the EPA rule will threaten our most reliable energy source and damage our ability to provide affordable energy to our citizens and manufacturing-based economy.

To make matters worse, the Obama EPA rule gives Wisconsin no credit for the $11 billion already invested to reduce carbon dioxide emissions since 2000. Wisconsin utilities are regulated by the Public Service Commission, which incentivizes them to improve and maintain fleets that are more efficient and produce lower emissions. As a result, over the past two decades, our utilities have closed many older coal-burning plants and have replaced them with some of the newest, most efficient and environmentally responsible coal-fired plants in the nation.

We take pride in the fact that we have been able to maintain a reliable base of electric generation while simultaneously reducing emissions. By the way, the costs for those improvements also already have been borne by consumers. But it will all be for naught if the Obama administration has its way.

We in Wisconsin have been and continue to be responsible environmental stewards while also protecting jobs. It is unfortunate, then, to see that our early, aggressive and measurable actions to reduce carbon dioxide emissions are largely ignored by the EPA. In fact, rather than recognizing and rewarding our leadership, the Clean Power Plan seriously penalizes Wisconsin relative to some other states

that have taken little to no action on renewable energy, energy efficiency and traditional "inside the fence line" controls.

Instead of wasting his money on these dishonest and deceptive attack ads, Bloomberg should consider allocating those millions to a trust fund to help families in Wisconsin with lower or fixed incomes that stand to be harmed by drastically higher energy prices if the coalition of Republican and Democrat state attorneys general do not succeed in their challenge to the EPA's edict.

This is not a discussion reserved for Wisconsin or even the United States alone. Not only will the EPA rule cause the U.S. to lose jobs to countries such as China and India, but the repercussions of the EPA rule actually may result in increased global carbon dioxide emissions. If American manufacturing jobs move to China and India, both of which rely heavily on uncontrolled coal-fired plants, there is a real potential that carbon dioxide emissions, along with emissions that actually do qualify as "pollution" under the Clean Air Act, will increase globally.

Even Bloomberg's billions will not be able to undo that damage to our planet and to America's economy.

On Nov 27, 2015, at 1:01 PM, Schramm, Daniel <Schramm.Daniel@epa.gov> wrote:

> And though this probably goes without saying, please include a note that these are for internal use (especially the background discussions), and should not be shared in writing outside the agency. Thank you, Mark --
>
> Daniel Schramm
>
> U.S. EPA Office of General Counsel
>
> (202) 564-3377
>
> schramm.daniel@epa.gov

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

From: Rupp, Mark
Sent: Friday, November 27, 2015 1:58 PM
To: Schramm, Daniel <Schramm.Daniel@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Hedman, Susan <hedman.susan@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Wood, Anna <Wood.Anna@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Brachtl, Megan <Brachtl.Megan@epa.gov>; Riha, Kristin <Riha.Kristin@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>
Subject: RE: Clean Power Plan question

Thanks, All.

Janet, per earlier, I'll circulate to all RAs.

From: Schramm, Daniel
Sent: Friday, November 27, 2015 1:29 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>; Hedman, Susan <hedman.susan@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Rupp, Mark <Rupp.Mark@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Wood, Anna <Wood.Anna@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Brachtl, Megan <Brachtl.Megan@epa.gov>; Riha, Kristin <Riha.Kristin@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>
Subject: RE: Clean Power Plan question

Janet, Susan, et al,

Thanks for checking with us to ensure accuracy in responding to these questions. We

coordinated with the team in OAQPS who maintain our CPP FAQ database. In fact, in looking at these issues more closely, we realized we needed to hone our standard responses in the database.

Here are suggested public responses, along with some background for your internal awareness.

Q1: In the event a state does not submit a plan or request for extension (aka initial submittal) prior to the September 6, 2016 deadline, how and when would the FIP be promulgated for the State?

Ex. 5 - Deliberative

Q2: Is it accurate to say that the Clean Power Plan is a plain vanilla Clean Air Act emission performance rate that applies uniformly to affected sources throughout the contiguous United States – and everything else is optional, to provide flexibility to the states?

Ex. 5 - Deliberative

Hope this is helpful. Regards,

Daniel Schramm

U.S. EPA Office of General Counsel

(202) 564-3377

schramm.daniel@epa.gov

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

From: McCabe, Janet
Sent: Thursday, November 26, 2015 10:13 AM
To: Hedman, Susan <hedman.susan@epa.gov>
Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Rupp, Mark <Rupp.Mark@epa.gov>
Subject: Re: Clean Power Plan question

Susan--thanks as always for your attention to the details of these issues and checking in.

Mark--can we circulate to the other RAs after the holiday a note that provides the two questions Susan has asked about and our Inout on responses--after OGC has weighed in of course.

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Thanks Joe – **Ex. 5 - Deliberative**
Ex. 5 - Deliberative

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Ex. 5 - Deliberative

- Joseph Goffman

Sent from my iPhone

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Ex. 5 - Deliberative

Susan Hedman

Region 5 Administrator/Great Lakes National Program Manager

U.S. Environmental Protection Agency

77 West Jackson Blvd - 19th Floor

Chicago, Illinois 60604-3590

To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]; Rave, Norman (ENRD)[Norman.Rave@usdoj.gov]; Lynk, Brian (ENRD)[Brian.Lynk@usdoj.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Hoffman, Howard
Sent: Tue 12/1/2015 10:43:31 PM
Subject: CPP Stay Lit -- McCabe Decl.
McCabe_Decl_11-30-15__12-01-15_5-30pm_to DOJ-McCabe.docx

Here's the current draft. Parts of it need a scrub, and we are working on that. In addition, we are double-checking to see if this would benefit from very discrete additions to the state plan process part.

(Joe – this version differs slightly from the earlier one you have, but we don't suggest you look at this one.)

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) Personal Cell/email Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

To: Goffman, Joseph[Goffman.Joseph@epa.gov]; Hoffman, Howard[hoffman.howard@epa.gov]
From: McCabe, Janet
Sent: Tue 12/1/2015 9:28:39 PM
Subject: RE: CPP Stay Lit -- McCabe Decl.

I will focus on it this evening.

From: Goffman, Joseph
Sent: Tuesday, December 01, 2015 4:14 PM
To: Hoffman, Howard <hoffman.howard@epa.gov>
Cc: McCabe, Janet <McCabe.Janet@epa.gov>
Subject: Re: CPP Stay Lit -- McCabe Decl.

Thanks, Howard. Could you please send me whatever you have by 5 o'clock? Otherwise I will not be able to start looking at it until very late this evening. Thanks.

- Joseph Goffman

Sent from my iPhone

On Dec 1, 2015, at 4:02 PM, Hoffman, Howard <hoffman.howard@epa.gov> wrote:

We will send you the current draft at about 5:30 today. It will be about 50 pages, double-spaced, large font.

DOJ has asked for signature by tomorrow end of the day.

Do you think you will be able to look at it by something like 2:00 pm tomorrow?

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To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Hoffman, Howard
Sent: Tue 12/1/2015 9:19:48 PM
Subject: RE: CPP Stay Lit -- McCabe Decl.

OK, thx.

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) Personal Cell/email Room 7415 WJC-North

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From: Hedman, Susan
Sent: Mon 11/30/2015 3:46:15 PM
Subject: Re: Clean Power Plan - FYI

http://www.jsonline.com/news/opinion/why-wisconsin-is-suing-the-epa-b99622927z1-357272251.html

Why Wisconsin is suing the EPA

By Brad Schimel, Wisconsin attorney general.

As a strong supporter of capitalism and the free market, certainly I don't begrudge former New York Mayor Michael Bloomberg his billions of dollars. I do find it ironic, though, that a man who fuels a private jet and heats his penthouse advocates for federal regulation that will significantly raise electricity rates and kill jobs in Wisconsin. In fact, it will be low income and older citizens on fixed incomes who will be hit the hardest.

Bloomberg recently began spending $10 million in TV ads against the attorneys general in Wisconsin, Michigan, Missouri and Florida, for fighting the Environmental Protection Agency's unlawful "Clean Power Plan."

Two lawsuits challenging different parts of the plan have been brought by 25 states and state agencies. The states are seeking to invalidate the rule, which effectively allows EPA to set state energy policy by manipulating the electricity market and controlling the electric grid, a role previously reserved for state regulators. The rule is an illegal expansion of EPA's authority, beyond what is permitted by the Clean Air Act. The EPA is attempting to set energy policy for the states.

As one of the top manufacturing states in the country, Wisconsin has much to lose if the Obama administration succeeds in its plan to destroy the viability of clean-coal electric generation. Manufacturing jobs in our state depends on affordable and reliable electric

power. Because of the degree to which our state economies rely on manufacturing jobs, we will be disproportionately affected by the president's so-called "Clean Power Plan."

The Public Service Commission of Wisconsin estimates that costs to comply with the rule could be as high as $13 billion. What Bloomberg and the Obama administration do not want Americans to know is that those costs will be borne by homeowners and employers. The costs of the EPA rule will threaten our most reliable energy source and damage our ability to provide affordable energy to our citizens and manufacturing-based economy.

To make matters worse, the Obama EPA rule gives Wisconsin no credit for the $11 billion already invested to reduce carbon dioxide emissions since 2000. Wisconsin utilities are regulated by the Public Service Commission, which incentivizes them to improve and maintain fleets that are more efficient and produce lower emissions. As a result, over the past two decades, our utilities have closed many older coal-burning plants and have replaced them with some of the newest, most efficient and environmentally responsible coal-fired plants in the nation.

We take pride in the fact that we have been able to maintain a reliable base of electric generation while simultaneously reducing emissions. By the way, the costs for those improvements also already have been borne by consumers. But it will all be for naught if the Obama administration has its way.

We in Wisconsin have been and continue to be responsible environmental stewards while also protecting jobs. It is unfortunate, then, to see that our early, aggressive and measurable actions to reduce carbon dioxide emissions are largely ignored by the EPA. In fact, rather than recognizing and rewarding our leadership, the Clean Power Plan seriously penalizes Wisconsin relative to some other states that have taken little to no action on renewable energy, energy efficiency and traditional "inside the fence line" controls.

Instead of wasting his money on these dishonest and deceptive attack ads, Bloomberg should consider allocating those millions to a trust fund to help families in Wisconsin with lower or fixed incomes that stand to be harmed by drastically higher energy prices if the coalition of Republican and Democrat state attorneys general do not succeed in their challenge to the EPA's edict.

This is not a discussion reserved for Wisconsin or even the United States alone. Not only will the EPA rule cause the U.S. to lose jobs to countries such as China and India, but the repercussions of the EPA rule actually may result in increased global carbon dioxide emissions. If American manufacturing jobs move to China and India, both of which rely heavily on uncontrolled coal-fired plants, there is a real potential that carbon dioxide emissions, along with emissions that actually do qualify as "pollution" under the Clean Air Act, will increase globally.

Even Bloomberg's billions will not be able to undo that damage to our planet and to America's economy.

On Nov 27, 2015, at 1:01 PM, Schramm, Daniel <Schramm.Daniel@epa.gov> wrote:

And though this probably goes without saying, please include a note that these are for internal use (especially the background discussions), and should not be shared in writing outside the agency. Thank you, Mark --

Daniel Schramm

U.S. EPA Office of General Counsel

(202) 564-3377

schramm.daniel@epa.gov

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From: Rupp, Mark
Sent: Friday, November 27, 2015 1:58 PM
To: Schramm, Daniel <Schramm.Daniel@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Hedman, Susan <hedman.susan@epa.gov>; Goffman, Joseph

<Goffman.Joseph@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Wood, Anna <Wood.Anna@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Brachtl, Megan <Brachtl.Megan@epa.gov>; Riha, Kristin <Riha.Kristin@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>
Subject: RE: Clean Power Plan question

Thanks, All.

Janet, per earlier, I'll circulate to all RAs.

From: Schramm, Daniel
Sent: Friday, November 27, 2015 1:29 PM
To: McCabe, Janet <McCabe.Janet@epa.gov>; Hedman, Susan <hedman.susan@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Rupp, Mark <Rupp.Mark@epa.gov>
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Janet, Susan, et al,

Thanks for checking with us to ensure accuracy in responding to these questions. We coordinated with the team in OAQPS who maintain our CPP FAQ database. In fact, in looking at these issues more closely, we realized we needed to hone our standard responses in the database.

Here are suggested public responses, along with some background for your internal awareness.

Q1: In the event a state does not submit a plan or request for extension (aka initial

submittal) prior to the September 6, 2016 deadline, how and when would the FIP be promulgated for the State?

Ex. 5 - Deliberative

Q2: Is it accurate to say that the Clean Power Plan is a plain vanilla Clean Air Act emission performance rate that applies uniformly to affected sources throughout the contiguous United States – and everything else is optional, to provide flexibility to the states?

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U.S. Environmental Protection Agency

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Chicago, Illinois 60604-3590

To: Hoffman, Howard[hoffman.howard@epa.gov]
Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: McCabe, Janet
Sent: Fri 11/27/2015 9:05:03 PM
Subject: Re: CPP Stay Lit -- Hi, Janet -- your availability for reviewing your declaration?

Ok

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Does that help?

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To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Hoffman, Howard
Sent: Fri 11/27/2015 9:00:46 PM
Subject: CPP Stay Lit -- Hi, Janet -- your availability for reviewing your declaration?

Janet – we're working hard on your declaration, but our progress has been a bit slowed by other tasks. I'd like to ask your availability for reviewing it.

It has be filed mid-afternoon on Thurs. 12/3, so it must be signed no later than Thursday morning, and DOJ might want it signed late Wed. eve. (12/2).

John Cruden wants to see a very good draft by Tuesday morning (12/1).

To give you an idea of length, it may be as long as 50 pages, single spaced, Times New Roman 12 (unless DOJ feels it must be shorter).

We have a very rough draft of about 60% of it now.

We can start sending you pieces very soon, but there are obvious benefits to sending you something that is more complete and more well-written.

So, may I ask what would work for you? When will you have time to review this?

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) Personal Cell/email Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

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To: Rupp, Mark[Rupp.Mark@epa.gov]; McCabe, Janet[McCabe.Janet@epa.gov]; Hedman, Susan[hedman.susan@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Zenick, Elliott[Zenick.Elliott@epa.gov]; Wood, Anna[Wood.Anna@epa.gov]; Kornylak, Vera S.[Kornylak.Vera@epa.gov]; Brachtl, Megan[Brachtl.Megan@epa.gov]; Riha, Kristin[Riha.Kristin@epa.gov]; Vijayan, Abi[Vijayan.Abi@epa.gov]
From: Schramm, Daniel
Sent: Fri 11/27/2015 7:01:26 PM
Subject: RE: Clean Power Plan question

And though this probably goes without saying, please include a note that these are for internal use (especially the background discussions), and should not be shared in writing outside the agency. Thank you, Mark --

Daniel Schramm

U.S. EPA Office of General Counsel

(202) 564-3377

schramm.daniel@epa.gov

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From: Rupp, Mark
Sent: Friday, November 27, 2015 1:58 PM
To: Schramm, Daniel <Schramm.Daniel@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Hedman, Susan <hedman.susan@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Wood, Anna <Wood.Anna@epa.gov>; Kornylak, Vera S. <Kornylak.Vera@epa.gov>; Brachtl, Megan <Brachtl.Megan@epa.gov>; Riha, Kristin <Riha.Kristin@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>
Subject: RE: Clean Power Plan question

Thanks, All.

Janet, per earlier, I'll circulate to all RAs.

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Subject: RE: Clean Power Plan question

Janet, Susan, et al,

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Ex. 5 - Deliberative

Ex. 5 - Deliberative

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Ex. 5 - Deliberative

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Cc: Goffman, Joseph <Goffman.Joseph@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>; Rupp, Mark <Rupp.Mark@epa.gov>
Subject: Re: Clean Power Plan question

Susan--thanks as always for your attention to the details of these issues and checking in.

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Ex. 5 - Deliberative

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Ex. 5 - Deliberative

- Joseph Goffman

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Susan Hedman

Region 5 Administrator/Great Lakes National Program Manager

U.S. Environmental Protection Agency

77 West Jackson Blvd - 19th Floor

Chicago, Illinois 60604-3590

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From: Rupp, Mark
Sent: Fri 11/27/2015 6:57:52 PM
Subject: RE: Clean Power Plan question

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Ex. 5 - Deliberative

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Ex. 5 - Deliberative

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From: Schramm, Daniel
Sent: Thur 11/26/2015 4:29:46 PM
Subject: RE: Clean Power Plan question

Susan, et al -

Please let me confirm with folks here, but I will have answers for you tomorrow.

Daniel Schramm

U.S. EPA Office of General Counsel

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schramm.daniel@epa.gov

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Cc: Goffman, Joseph[Goffman.Joseph@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]; Rupp, Mark[Rupp.Mark@epa.gov]
From: McCabe, Janet
Sent: Thur 11/26/2015 3:12:37 PM
Subject: Re: Clean Power Plan question

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To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Shenkman, Ethan[Shenkman.Ethan@epa.gov]
From: Hoffman, Howard
Sent: Thur 11/26/2015 12:02:32 PM
Subject: CPP Stay Lit -- DOJ brief
CPP_Nov_25_Draft.DOCX
CPP_Nov-20-DOJ_as revised by Nov 25.docx

Not sure if anyone sent you the draft we got yesterday from DOJ. It is attached, along w/ a compare from the last draft (Nov. 20).

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) Personal Cell/email Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

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To: Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: McCabe, Janet[McCabe.Janet@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]
From: Hedman, Susan
Sent: Thur 11/26/2015 12:48:33 AM
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Cc: Hoffman, Howard[hoffman.howard@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Zenick, Elliott
Sent: Fri 11/20/2015 6:58:43 PM
Subject: Draft of CPP stay opposition
ENV_DEFENSE-#747427-v1-CPP__NOVEMBER_20_DRAFT.DOCX

Please find attached a draft of our stay opposition for your review. Our comments are due back to DOJ by COB on Monday. Accordingly, we would appreciate any comments that you may have by 2:00 on Monday so that we can consolidate them before sending them to DOJ.

Howard and I are both available over the weekend if there are any issues that you identify that you feel we need to discuss.

Please note that ARLO staff provided comments on an earlier draft but we have not yet been able to review this draft to ensure that our comments were adequately addressed.
.

Thank you

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Hoffman, Howard
Sent: Wed 11/18/2015 4:24:39 PM
Subject: DOE -- left you a brief v-m -- RE: CPP stay lit -- left you a brief v-m -- not urgent -- thx

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) **Personal Cell/email** Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

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From: Hoffman, Howard
Sent: Wednesday, November 18, 2015 11:01 AM
To: Goffman, Joseph <Goffman.Joseph@epa.gov>
Subject: CPP stay lit -- left you a brief v-m -- not urgent -- thx

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) **Personal Cell/email** Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Hoffman, Howard
Sent: Wed 11/18/2015 4:01:27 PM
Subject: CPP stay lit -- left you a brief v-m -- not urgent -- thx

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) **Personal Cell/email** Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Drinkard, Andrea
Sent: Fri 10/30/2015 1:39:45 PM
Subject: FW: CPP ACTION: Star Ledger Ed Board; DDL: noon, 10/30

Hi Joe,

Not sure what loops have been started here, but I just heard from John that Janet is inclined to have to get on the phone with this reporter on background. I have a note in to OGC about whether or how they want us to respond to these questions due to the pending litigation. You may have some thoughts on that as well. If I hear anything from OGC I'll let you know.

Ideally we'd like to get on the phone with him as early as possible, if that is the route that we choose to take. I'll have folks in OAQPS and CAMD pull NJ-specific information. Let me know if there's a question in particular that you'd like to focus on and then we can handle the rest generally. And/or if there's any specific information you'd like from CAMD/OAQPS.

1. Martin (page 3) claims Congress intended to establish a less stringent performance rate for existing plants than new plants, and that EPA ignores that.

2. Martin (Page 4) says the Final Rule doesn't allow for credits for renewables/nuclear increases before 2013 – is he wrong to suggest NJ is being punished for its timing, given that most of its advances were done before 2013?

3. Is NJ unfairly being denied credit for the $3.27 billion it invested in renewables/efficiency prior to 2013?

4. Does your modeling refute his claim that "NJ can state with a high level of certainty that complying with the Final Rule will not save money for NJ ratepayers," as stated on Page 5?

From: Millett, John
Sent: Friday, October 30, 2015 7:35 AM
To: McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>
Cc: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Stewart, Lori <Stewart.Lori@epa.gov>
Subject: Fwd: CPP ACTION: Star Ledger Ed Board; DDL: noon, 10/30

Heads up on the inquiry below, asking some pretty detailed qs.

The two options are to respond in writing or on background by phone. For either, we'll need to determine how detailed our responses should be.

We've already provided our general statements and information that we had prepared at publication.

John Millett

202.510.1822

Begin forwarded message:

From: "Jones, Enesta" <Jones.Enesta@epa.gov>
Date: October 29, 2015 at 7:12:20 PM EDT
To: "Ashley, Jackie" <Ashley.Jackie@epa.gov>, "Bremer, Kristen" <Bremer.Kristen@epa.gov>, "Cortelyou-Lee, Jan" <Cortelyou-Lee.Jan@epa.gov>, "Dennis, Allison" <Dennis.Allison@epa.gov>, "Haeuber, Richard" <Haeuber.Richard@epa.gov>, "Lemon, Mollie" <Lemon.Mollie@epa.gov>, "McMichael, Nate" <McMichael.Nate@epa.gov>, "Millett, John" <Millett.John@epa.gov>, "Noonan, Jenny" <Noonan.Jenny@epa.gov>, "Risley, David" <Risley.David@epa.gov>, "Terry, Sara" <Terry.Sara@epa.gov>, "Wilson, Erika" <Wilson.Erika@epa.gov>, "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>
Cc: "Mears, Mary" <Mears.Mary@epa.gov>, "Jones, Enesta" <Jones.Enesta@epa.gov>
Subject: CPP ACTION: Star Ledger Ed Board; DDL: noon, 10/30

We have a large editorial on the Clean Power lawsuit Sunday, and a perfunctory EPA response about some of the points in Bob Martin's stay request from Sept. 2 would be greatly appreciated. I'm just trying to establish how the EPA feels about NJ's claim that it has done its share of emission reduction and that the regs create an uneven playing field.

Or, if you're able to be more specific, can you respond to these claims:

1. Martin (page 3) claims Congress intended to establish a less stringent performance rate for existing plants than new plants, and that EPA ignores that.

2. Martin (Page 4) says the Final Rule doesn't allow for credits for renewables/nuclear increases before 2013 – is he wrong to suggest NJ is being punished for its timing, given that most of its advances were done before 2013?

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If there are legal constraints to responding to these, I'll be glad to talk on background.

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Stewart, Lori[Stewart.Lori@epa.gov]
From: Millett, John
Sent: Fri 10/30/2015 11:34:36 AM
Subject: Fwd: CPP ACTION: Star Ledger Ed Board; DDL: noon, 10/30

Heads up on the inquiry below, asking some pretty detailed qs.

The two options are to respond in writing or on background by phone. For either, we'll need to determine how detailed our responses should be.

We've already provided our general statements and information that we had prepared at publication.

John Millett
202.510.1822

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From: "Jones, Enesta" <Jones.Enesta@epa.gov>
Date: October 29, 2015 at 7:12:20 PM EDT
To: "Ashley, Jackie" <Ashley.Jackie@epa.gov>, "Bremer, Kristen" <Bremer.Kristen@epa.gov>, "Cortelyou-Lee, Jan" <Cortelyou-Lee.Jan@epa.gov>, "Dennis, Allison" <Dennis.Allison@epa.gov>, "Haeuber, Richard" <Haeuber.Richard@epa.gov>, "Lemon, Mollie" <Lemon.Mollie@epa.gov>, "McMichael, Nate" <McMichael.Nate@epa.gov>, "Millett, John" <Millett.John@epa.gov>, "Noonan, Jenny" <Noonan.Jenny@epa.gov>, "Risley, David" <Risley.David@epa.gov>, "Terry, Sara" <Terry.Sara@epa.gov>, "Wilson, Erika" <Wilson.Erika@epa.gov>, "Drinkard, Andrea" <Drinkard.Andrea@epa.gov>
Cc: "Mears, Mary" <Mears.Mary@epa.gov>, "Jones, Enesta" <Jones.Enesta@epa.gov>
Subject: CPP ACTION: Star Ledger Ed Board; DDL: noon, 10/30

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If there are legal constraints to responding to these, I'll be glad to talk on background.

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Garbow, Avi[Garbow.Avi@epa.gov]; Shenkman, Ethan[Shenkman.Ethan@epa.gov]; Adamantiades, Mikhail[Adamantiades.Mikhail@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Hoffman, Howard[hoffman.howard@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; McDermott, Marna[McDermott.Marna@epa.gov]; Pilchen, Zach[Pilchen.Zach@epa.gov]; Roder, Aileen[Roder.Aileen@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Schramm, Daniel[Schramm.Daniel@epa.gov]; Silverman, Steven[silverman.steven@epa.gov]; Starrs, Charles[Starrs.Charles@epa.gov]; Sublett, Stacey[Sublett.Stacey@epa.gov]; Vasu, Amy[Vasu.Amy@epa.gov]; Vijayan, Abi[Vijayan.Abi@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Fisher, Brian[Fisher.Brian@epa.gov]; Eschmann, Erich[Eschmann.Erich@epa.gov]; Gordon, Jessica M[Gordon.Jessica@epa.gov]; Lifland, David[Lifland.David@epa.gov]; Tsirigotis, Peter[Tsirigotis.Peter@epa.gov]; Purchia, Liz[Purchia.Liz@epa.gov]; Drinkard, Andrea[Drinkard.Andrea@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Wood, Anna[Wood.Anna@epa.gov]; Santiago, Juan[Santiago.Juan@epa.gov]; Kornylak, Vera S.[Kornylak.Vera@epa.gov]; Niebling, William[Niebling.William@epa.gov]; Williamson, Timothy[Williamson.Tim@epa.gov]; Siegel, Joseph[Siegel.Joseph@epa.gov]; Powell, Keri[Powell.Keri@epa.gov]; Vergeront, Julie[Vergeront.Julie@epa.gov]; Dain, Gregory[Dain.Greg@epa.gov]; Koller, Mark[koller.mark@epa.gov]
From: Jordan, Scott
Sent: Thur 10/29/2015 8:13:28 PM
Subject: CPP Litigation Update - CPP/111(d) Challenge filed by Basic Electric

Basin Electric Power Company has filed a petition challenging the CPP/111(d) rule, and this petition has been consolidated with the other 111(d) petitions. No stay motion was filed with this petition.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Niebling, William
Sent: Thur 10/29/2015 12:27:57 AM
Subject: Automatic reply: CPP Litigation - (1) Stay Motion Schedule and (2) List of Intervenors to date

Thank you for your message. I will be working remotely on Thursday, October 29 but should be able to check emails. If you need immediate assistance, please contact the Office of Air and Radiation front office at 202.564.7400.

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Hoffman, Howard
Sent: Tue 10/27/2015 4:54:30 PM
Subject: Automatic reply: CPP Litigation - Update on Stay Motion Schedule and Negotiations

Will be out of the office Tues. morning, 10/27, returning early afternoon. No access to e-mail. Feel free to try 240-401-9721 if pressing.

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Page, Steve[Page.Steve@epa.gov]; Tsirigotis, Peter[Tsirigotis.Peter@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]
From: Culligan, Kevin
Sent: Sat 10/24/2015 12:07:12 AM
Subject: Fwd: Motions to Stay the CPP Rule
CPP.West Virginia.Stay Motion.10.23.15.pdf
ATT00001.htm
CPP.Coal Group.Motion to Stay.10.23.15.pdf
ATT00002.htm
CPP.US Chamber of Commerce.Stay Motion.10.23.15.pdf
ATT00003.htm
CPP_West Virginia_Stay Motion Summary_10_23_15_doc_aspx.mht
ATT00004.htm
CPP_US Chamber of Commerce_Stay Motion Summary_10_23_15_docx_aspx.mht
ATT00005.htm
CPP_Coal Group_Stay Motion Summary_10_23_15_doc_aspx.mht
ATT00006.htm

And these are the stay motions submitted today

Sent from my iPhone

Begin forwarded message:

From: "Vasu, Amy" <Vasu.Amy@epa.gov>
Date: October 23, 2015 at 7:29:28 PM EDT
To: "Culligan, Kevin" <Culligan.Kevin@epa.gov>
Cc: "Tsirigotis, Peter" <Tsirigotis.Peter@epa.gov>
Subject: Motions to Stay the CPP Rule

Kevin,

There are three motions to stay the rule that OGC has posted to the sharepoint site, and they are from:

1) Coal Industry (National Mining Assoc., Murray Energy, and the American Coalition for Clean Coal Electricity)

2) U.S. Chamber of Commerce

3) West Virginia, Texas, et al. (over 21 states)

I have attached the motions and a summary of each (drafted by OGC). I have not attached the exhibits and attachments that were filed with these, as some are very large files. I can provide them if you or anyone else would like to have those.

Thank you.

Amy

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
Cc: Page, Steve[Page.Steve@epa.gov]; Tsirigotis, Peter[Tsirigotis.Peter@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]
From: Culligan, Kevin
Sent: Sat 10/24/2015 12:03:26 AM
Subject: Fwd: Petitions for judicial review of the CPP rule
CPP.West Virginia.Petition for Review.10.23.15.pdf
ATT00001.htm
CPP.US Chamber of Commerce.Petition for Review.10.23.15.pdf
ATT00002.htm
CPP.ACCCE.Petition for Review.10.23.15.pdf
ATT00003.htm
CPP.Murray.Petition for Review.10.23.15.pdf
ATT00004.htm
CPP.NMA.Petition for Review.10.23.15.pdf
ATT00005.htm

Attached are copies of the petitions sent to the court today. I will send a second e-mail with the stay motions

Sent from my iPhone

Begin forwarded message:

From: "Vasu, Amy" <Vasu.Amy@epa.gov>
Date: October 23, 2015 at 7:53:45 PM EDT
To: "Culligan, Kevin" <Culligan.Kevin@epa.gov>
Cc: "Tsirigotis, Peter" <Tsirigotis.Peter@epa.gov>, "Boswell, Colin" <Boswell.Colin@epa.gov>, "McLamb, Marguerite" <McLamb.Marguerite@epa.gov>
Subject: Petitions for judicial review of the CPP rule

Kevin,

Attached are the five petitions for judicial review of the CPP rule that OGC has posted on the litigation sharepoint site.

They are from:

1) West Virginia and other states

2) U.S. Chamber of Commerce (on behalf of a number of industry groups)

3) Murray Energy

4) National Mining Association

5) American Coalition for Clean Coal Electricity (ACCCE)

Thank you.

Amy

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Noonan, Jenny
Sent: Fri 10/23/2015 7:30:21 PM
Subject: Automatic reply: CPP - UPDATED - Anticipated Stay Motions

Hi!

I will return to the office on Tuesday. Please contact Jan Cortelyou at 919/541-5393 if you need something immediately.

Thanks,
Jenny

From: "Saved by Internet Explorer 11"
Subject: CPP.Coal Group.Stay Motion Summary.10.23.15.doc
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From: "Saved by Internet Explorer 11"
Subject: CPP.US Chamber of Commerce.Stay Motion Summary.10.23.15.docx
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From: "Saved by Internet Explorer 11"
Subject: CPP.West Virginia.Stay Motion Summary.10.23.15.doc
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Highlights from 10-26-15 Administrator's Staff Meeting

Not Responsive

Headquarters Highlights

- OGC noted that they have received 14 – 15 petitions for review of the CPP thus far following publication of the rule in the Federal Register last Friday, the majority of the petitions they expect to receive, and that 4 motions to stay the rule have also be filed so far. OGC will work with DOJ and the courts on a schedule for the stay motions.

Not Responsive

Not Responsive

From: DCRoomARN5415PolyPCTB/DC-ARN-OAR
Location: DCRoomARN5415PolyPCTB/DC-ARN-OAR
Importance: Normal
Subject: Accepted: CPP Stay Litigation
Start Date/Time: Tue 10/6/2015 7:30:00 PM
End Date/Time: Tue 10/6/2015 8:00:00 PM

Your request was accepted.

Sent by Microsoft Exchange Server 2016

From: Schmidt, Lorie
Location: DCRoomARN5415PolyPCTB/DC-ARN-OAR
Importance: Normal
Subject: Accepted: CPP Stay Litigation | WJC-N 5415
Start Date/Time: Fri 9/18/2015 3:30:00 PM
End Date/Time: Fri 9/18/2015 4:00:00 PM

From: Zenick, Elliott
Location: DCRoomARN5415PolyPCTB/DC-ARN-OAR
Importance: Normal
Subject: Accepted: CPP Stay Litigation | WJC-N 5415
Start Date/Time: Fri 9/18/2015 3:30:00 PM
End Date/Time: Fri 9/18/2015 4:00:00 PM

From: DCRoomARN5415PolyPCTB/DC-ARN-OAR
Location: DCRoomARN5415PolyPCTB/DC-ARN-OAR
Importance: Normal
Subject: Accepted: CPP Stay Litigation | WJC-N 5415
Start Date/Time: Fri 9/18/2015 3:30:00 PM
End Date/Time: Fri 9/18/2015 4:00:00 PM

Your request was accepted.

Sent by Microsoft Exchange Server 2016

To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Browne, Cynthia
Sent: Thur 9/17/2015 3:15:05 PM
Subject: Howard Hoffman - CPP Stay Litigation

And Howard requested a meeting at 11:30 tomorrow for 30 minutes to discuss the above along with Lorie and Elliott?

Thanks,

Cynthia Browne

Immediate Office of Air and Radiation

Room 5406, WJC-North Building

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Voice: 202-564-7404

Email: browne.cynthia@epa.gov

To: McCabe, Janet[McCabe.Janet@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]; Tsirigotis, Peter[Tsirigotis.Peter@epa.gov]; Millett, John[Millett.John@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]; Stenhouse, Jeb[Stenhouse.Jeb@epa.gov]; Wood, Anna[Wood.Anna@epa.gov]; Hoffman, Howard[hoffman.howard@epa.gov]; Jordan, Scott[Jordan.Scott@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; Pilchen, Zach[Pilchen.Zach@epa.gov]; Roder, Aileen[Roder.Aileen@epa.gov]; Silverman, Steven[silverman.steven@epa.gov]; Skinner-Thompson, Jonathan[Skinner-Thompson.Jonathan@epa.gov]; Vijayan, Abi[Vijayan.Abi@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Schmidt, Lorie
Sent: Thur 9/3/2015 12:41:21 AM
Subject: FW: here's another action item
AX-15-001-3133.COR.pdf
AX-15-001-3133.CS.pdf

Just wanted to make sure you all saw this stay petition from UARG for CPP.

My apologies if this has already been circulated to you.

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Veney, Carla
Sent: Wednesday, September 02, 2015 3:38 PM
To: Schmidt, Lorie
Cc: Hooks, Samantha
Subject: here's another action item

Carla Veney

Executive Assistant to the General Counsel

Office of the General Counsel

Environmental Protection Agency

Telephone: (202) 564-1619

Fax: (202) 564-1777

To: McCabe, Janet[McCabe.Janet@epa.gov]
Cc: Stewart, Lori[Stewart.Lori@epa.gov]; Goffman, Joseph[Goffman.Joseph@epa.gov]
From: Cyran, Carissa
Sent: Tue 8/25/2015 3:14:08 PM
Subject: Briefing paper for CPP meeting today at 1:00 pm (5 pages)-- RE: CPP General
Stay-overview_08-25-15_no-tag.docx

Good morning, Janet,

Please find attached the briefing paper for today's CPP meeting at 1:00 p.m.

Thanks.

Carissa

From: Hoffman, Howard
Sent: Tuesday, August 25, 2015 9:37 AM
To: Stewart, Lori; Culligan, Kevin; Tsirigotis, Peter; Niebling, William
Cc: Schmidt, Lorie; Zenick, Elliott; Jordan, Scott
Subject: briefing paper for Janet for today's 1:00 pm (5 pages)-- RE: CPP General

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) Personal Cell/email Room 7415 WJC-North
Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

-----Original Appointment-----
From: McCabe, Janet
Sent: Thursday, August 20, 2015 9:12 AM
To: McCabe, Janet; Zenick, Elliott; Hoffman, Howard; Schmidt, Lorie; Garbow, Avi; Tsirigotis, Peter; Dunham, Sarah; Harvey, Reid; Page, Steve; Culligan, Kevin; Goffman, Joseph; Jordan, Deborah; Niebling, William; Stewart, Lori
Subject: CPP General
When: Tuesday, August 25, 2015 1:00 PM-2:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: WJC-N 5400 + Video with RTP & Janet on Jabber + Conf Code ; Participant Code: Conf Code

Re: Discuss next steps
To: McCabe, Janet; Goffman, Joe; Niebling, William; Jordan, Debbie; Zenick, Elliott; Hoffman, Howard; Schmidt, Lorie; Garbow, Avi; Tsirigotis, Peter; Dunham, Sarah; Harvey, Reid; Page, Steve; Culligan, Kevin; Stewart, Lori

Internal/EPA 8/26/15

Hot Topics for ECOS 2015 Fall Meeting
August 31 – September 2, 2015

MULTI-STATE

On Aug. 13, 2015, fifteen state attorneys general asked the U.S. Court of Appeals for the D.C. Circuit to stay implementation of the Clean Power Plan. The stay is being sought by Alabama, Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin and Wyoming.

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