No. ___-_____

IN THE

Supreme Court of the United States

MURRAY ENERGY CORPORATION,
PEABODY ENERGY CORPORATION, ET AL.,
Applicants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency,
Respondents.

COAL INDUSTRY APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING JUDICIAL REVIEW

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants provide the following disclosure statements:

Murray Energy Corporation has no parent corporation and no publicly held corporation holds 10% or more of its stock. Murray Energy is the largest privately-held coal company and largest underground coal mine operator in the United States.

Peabody Energy Corporation has no parent corporation and no publicly held corporation owns more than 10% of Peabody's outstanding shares. Peabody is the world's largest public sector coal company, the largest coal producer in the United States, and a publicly-traded company on the New York Stock Exchange ("NYSE") under the symbol "BTU."

The National Mining Association (NMA) is a non-profit, incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

The American Coalition for Clean Coal Electricity (ACCCE) is a partnership of companies involved in the production of electricity from coal. ACCCE has no parent corporation.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Applicants Murray Energy Corporation, Peabody Energy Corporation, National Mining Association, and American Coalition for Clean Coal Electricity ("Coal Industry Applicants") respectfully request an immediate stay of the final rule of the United States Environmental Protection Agency ("EPA") entitled Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units. 40 C.F.R. Part 60, Subpart UUUU; 80 Fed. Reg. 64,662 (Oct. 23, 2015).[1]

The Coal Industry Applicants filed timely Petitions for Review of EPA's so-called "Clean Power Plan" (hereinafter "Power Plan") on the same day as publication of EPA's final rule in the Federal Register. Applicants Murray Energy Corporation, Peabody Energy Corporation and National Mining Association and others—including 27 States, multiple labor unions, and over one hundred other businesses and trade associations—also sought an immediate stay of the Power Plan from the United States Court of Appeals for the District of Columbia Circuit, again on the same day as publication. Those motions were denied on January 21, 2016, and EPA has refused to grant an administrative stay.

The Coal Industry Applicants support and incorporate by reference the Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review filed on January 26, 2016 (No. 15-

[1] A copy of EPA's Power Plan is included in Appendix B of the States' Stay Application, at App. 39B.

A-773) ("States' Stay Application").[2] The Coal Industry submits this separate Application given its unique position: the Power Plan's purpose is to dramatically lower the use of coal for electric power generation. When proposal of the Plan was announced, Secretary of State John Kerry described its expected impact on coal-fueled power plants: "We're going to take a bunch of them out of commission."[3] As explained in Section II below, *EPA's own modeling shows* that the Power Plan will cause the closure of 53 coal-fired electric generating units *in 2016* and another three in 2018. The evidence shows that EPA's projection is a substantial underestimate, but in any event the near-term shutdowns represent tens of millions of tons of lost coal production, thousands of lost jobs in the mining industry, and rippling unemployment effects for those dependent on the coal industry. The number will grow as the Power Plan moves towards full implementation.

Awaiting the completion of judicial review, even on an expedited basis, is not an option. The coal industry is suffering irreparable harm *now*, as the Power Plan forces utilities to make investment decisions away from coal *today* and States begin the restructuring of the power sector within their respective borders *today*. Irreparable injury will occur long before the panel decision in the Court of Appeals

[2] The Coal Industry Applicants also support the Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review and the Application of Business Associations for Immediate Stay of Final Agency Action Pending Appellate Review, which they understand have been or soon will be filed with the Court.

[3] *See* Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, N.Y. TIMES (Dec. 11, 2014).

(let alone possible *en banc* review and ultimate review by this Court). The time to act is now.

INTRODUCTION

The Power Plan comes on the heels of decisions in each of the last two Terms reining in similar EPA attempts to aggrandize its authority under the Clean Air Act by adopting ambitious policy-driven regulations without a clear statutory basis. In *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"), this Court rejected a major part of EPA's first set of greenhouse gas regulations, concluding that the agency rule "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.* at 2444 (quotation omitted). The Court held that permitting EPA to exercise such authority "would deal a severe blow to the Constitution's separation of powers." *Id.* at 2446. Last Term, the Court rejected another set of aggressive EPA power sector regulations, finding that "EPA strayed far beyond" the bounds of reasonable interpretation. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

Both decisions highlight the need for a stay, and *Michigan* underscores the irreparable harm that will befall industry in its absence. On the eve of that decision, EPA Administrator Gina McCarthy boasted in a press interview that the Court's ruling would not matter because "[m]ost of the [regulated facilities] are already in compliance, [and] investments have been made."[4] EPA repeated that view after the

[4] Timothy Cama and Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, THE HILL, June 29, 2015.

decision.[5] By the time this Court rejected the legal basis of the EPA rule in *Michigan*, about one-sixth of all coal-fired electric generation either had retired or (for 2016, when final compliance is required) had announced retirement because of the extraordinary high cost of complying with the rule. Schwartz Decl. ¶¶ 44-45; EVA Report 74-83 (attached to Schwartz Decl.).[6] The rest of the fleet spent billions of dollars on pollution controls, with consumers ultimately bearing the cost in the form of higher electric rates. *Id*. This Court's decision finding that EPA had improperly adopted the rule was a practical nullity.

EPA is using the same playbook with the Power Plan. In the words of the EPA Administrator, the Plan seeks to effect an "historic"[7] and comprehensive "transformation"[8] of the electric utility industry. The Plan is based on so-called "building blocks" that will severely reduce coal generation and instead favor electricity produced from natural gas and renewable resources. 80 Fed. Reg. at

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[5] Janet McCabe, EPA Acting Assistant Administrator for the Office of Air and Radiation, stated that *Michigan* came too late to have meaningful effect because "many plants ha[d] already installed controls and technologies" demanded by the regulation and "the majority of power plants [were] already in compliance or well on their way to compliance." *EPA Connect, Official Blog of the EPA Leadership* (June 30, 2015). An EPA spokeswoman commented: "EPA is disappointed that the Court did not uphold the rule, but this rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance." Timothy Cama and Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, THE HILL, June 29, 2015.

[6] All supporting declarations from the proceeding below that are referenced in this Application are reproduced in the Appendix.

[7] *See* nine of ten EPA Fact Sheets describing the Power Plan, *available* at http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants.

[8] *EPA Chief Lays Out Bold Vision for Power Plant Greenhouse Gas Rule*, SNL RENEWABLE ENERGY WEEKLY, Feb. 14, 2014.

64,667. The Power Plan will more than halve coal generation in the United States, reducing it far below its lowest level since the government began systematically tracking energy developments. EVA Report 28. It will result in more shuttered coal mines, tens of thousands of additional layoffs, and the economic devastation of the States and rural, economically depressed communities that rely on coal. Schwartz Decl. ¶ 4; EVA Report 69-72; Schwartz Reply Decl. ¶ 18.

These impacts will become locked in unless the Court issues a stay. Decisions to implement the Power Plan's comprehensive transformation of the electric power system are already occurring, with the Administrator declaring that the rule is now in the process of being "bak[ed] into the system."[9] As an unrebutted declaration in the court below explained: "Once utility decisions are made, they will be locked in. They will not be undone no matter how the Court rules months or years from now." Galli Decl. ¶ 21. A vast amount of new infrastructure development is required: a tripling of renewable generation; long-line, high-voltage electric transmission lines to bring this generation from the windy areas of the country to population centers; and a major expansion of the interstate natural gas pipeline system to accommodate large increases in natural gas-fired generation. Schwartz Decl. ¶¶ 12-15; EVA Report 30-47. The planning, design, engineering, siting, permitting, financing, and construction of this infrastructure require long lead times, are massively expensive, and will not be undone, even if the Power Plan is later vacated. *Id.*

[9] Interview of EPA Administrator Gina McCarthy (Dec. 7, 2015), available at https://archive.org/details/KQED_20151207_235900_BBC_World_News_America#start/1020/end/1080.

Far from clearly authorizing this extraordinary assertion of authority, the Clean Air Act plainly bars it. EPA has premised the Power Plan on a little-used statutory provision—Section 111(d) of the Act—that affirmatively *prohibits* what EPA seeks to do. Section 111(d) expressly applies only to a pollutant "which is not . . . emitted from a source category which is regulated under section [112] of this title." Coal-fueled power plants are a "source category" regulated under Section 112.[10] Thus, the Power Plan is directly contrary to this Court's description of Section 111(d) in *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011) ("*AEP*"). In addition, the Power Plan is contrary to a long-standing and bipartisan understanding of Section 111(d) that was shared by the Clinton Administration in 1995 and the George W. Bush Administration in 2005. As recently as 2014, EPA acknowledged that "a literal" application of section 111(d) would likely preclude its proposal and that, "[a]s presented in the U.S. Code," the statute "appears by its terms to preclude" the Power Plan.[11]

Further, Section 111(d) limits EPA to requiring "standards of performance" for "any existing source" based on "the best system of emission reduction" that will "assure continuous emission reduction" from that type of source. Until now, Section 111(d) rules have involved technological means of controlling emissions when a source is operating. The Power Plan is different. It shuts down coal-fired

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[10] *See Michigan*, 135 S. Ct. at 2705.

[11] LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS at 22, EPA-HQ-OAR-2013-0602-0419 ("PROPOSED RULE LEGAL MEMO").

power plants and compels the construction and operation of EPA-favored generating facilities, as well as a vast new transmission system, to replace the electricity previously generated from coal. By regulatory fiat, the Power Plan will take a large amount of business away from coal-fired plants and award it to sources favored by EPA. According to EPA, it may regulate generation of electricity far beyond the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), rendering moot the limits on FERC authority noted in *FERC v. Electrical Power Supply Ass'n.*, No. 14-840 (Jan. 25, 2016).

EPA appeals to the deference under *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council*, 467 U.S. 837, 844 (1984). Section 111(d) is not ambiguous, however, and so no deference is due. Moreover, the Court's recent decision in *King v. Burwell*, 135 S. Ct. 2480 (2015), makes clear that *Chevron* does not apply here. "This is hardly an ordinary case," *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159 (2000), and the Power Plan is not an example of interstitial rulemaking. Rather, the statutory question is one of "deep 'economic and political significance,'" such that, "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King*, 135 S. Ct. at 2489 (quoting *UARG*, 134 S. Ct. at 2444). In addition, it is "especially unlikely" that Congress would have delegated the authority in question to EPA, an agency with "no expertise" in regulating electricity production and transmission. *Id.* (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)). If Congress had intended to confer on EPA the authority to restructure the domestic power sector, it would have said so clearly. Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking*

Assn's, Inc., 531 U.S. 457, 468 (2001). If ever there were an elephant in a mousehole, the Power Plan is it.

The changes wrought by the Power Plan are unprecedented in their magnitude and resemble those arising from landmark legislation rather than from agency rulemaking. Tellingly, EPA expects that the Power Plan will be implemented through the adoption of a cap-and-trade system similar to the program that the Administration proposed but that Congress rejected in 2009. 80 Fed. Reg. at 64,665. Under EPA's view of Section 111(d), there would have been no need for new legislation seven years ago. EPA is trying to adopt its Power Plan in the face of congressional rejection of cap-and-trade.[12] But Congress rejected such legislation partly out of concern for disproportionate harm to coal-reliant States.[13] Now, EPA is forcing those States (and their consumers, communities, businesses, and utilities) to bear the burden for a stated objective that is global in nature. EPA seeks to pit different parts of the country against one another and to foist potentially ruinous burdens on coal-reliant communities. Balancing competing interests of such magnitude is the job of Congress, not an unelected agency.

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[12] *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

[13] *See, e.g., Bradford Plumer, Analyzing the House Vote on Waxman Markey*, NEW REPUBLIC June 29, 2009 (quoting Sen. Claire McCaskill as expressing concern about "unfairly punish[ing] businesses and families in coal dependent states like Missouri").

To support its newfound authority, EPA advances an astonishing theory that the U.S. Code has contained the wrong "version" of Section 111(d) for the past 25 years. According to EPA, Congress unwittingly enacted two "versions" of Section 111(d) in 1990, one in a set of substantive amendments and the other in a subsequent set of clerical amendments, and the Office of the Law Revision Counsel mistakenly codified only one. *See* 80 Fed. Reg. at 64,711-15. EPA's extravagant theory flatly misreads the legislative record. But even if there were two "versions" of Section 111(d) (and there are not), EPA would lack the authority to decide which "version" to make legally operative. *Chevron* does not allow an agency to toss two "versions" of a statute into the air and choose which one to catch.

Additionally, the Power Plan violates the Tenth Amendment and principles of federalism by forcing States to implement EPA's Power Plan—to enact new state legislation, promulgate new state rules, and create entirely new state regulatory structures to carry out the federal mandate. If a State refuses to submit a "State Plan" as part of EPA's effort to reengineer the energy sector, EPA will impose a "Federal Plan." That plan will require a significant curtailment of coal-fueled generation and, as a consequence, it will force States to take a number of legislative and regulatory actions to ensure that the power needs of the public are met. The State government will have no choice but to adopt new or strengthened laws requiring the development of renewable resources, and it will have to make power plant siting decisions, issue permits, grant certificates of public convenience and necessity, and make innumerable other decisions to ensure the power stays on. A State cannot simply remain passive in the face of the Power Plan. Otherwise, it will

face the very real danger that EPA's shutdown of coal power plants will lead to brownouts and blackouts for its consumers and businesses, unless new generation is built and new transmission lines are constructed. Under any scenario, the States are dragooned as foot soldiers in EPA's revolution, whether they like it or not.

A stay is needed to preserve the status quo, afford meaningful judicial review, and ensure that the *Michigan* experience is not repeated on a much grander scale. Any suggestion that an agency order of the Power Plan's magnitude should be implemented without careful judicial scrutiny is inconsistent with the basic principles on which our legal system is founded. "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). Such an outcome cannot be abided in a polity that prizes an independent judiciary with the power to say "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

INTERESTS OF THE APPLICANTS

Coal Industry Applicants are Murray Energy Corporation and Peabody Energy Corporation, two of the nation's largest coal companies; the National Mining Association, the coal industry's national trade association; and the American Coalition for Clean Coal Electricity, an association of coal producers, coal-hauling railroads, utilities that use coal for electric generation, and associated companies.

OPINION BELOW

On January 21, 2016, the D.C. Circuit issued an Order denying the motions to stay the Power Plan.[14]

JURISDICTION

The D.C. Circuit's judgment with respect to the Power Plan will be subject to review by this Court under 28 U.S.C. § 1254(1), and the Court therefore has jurisdiction to entertain and grant a request for a stay pending review under 28 U.S.C. § 2101(f). The Court has authority to issue a stay pursuant to 5 U.S.C. § 705, as well as under 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 23. *See, e.g.*, *Nken v. Mukasey*, 555 U.S. 1042 (2008) (granting application to stay agency action while petition for review was pending before the Fourth Circuit after stay was denied by that court).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The pertinent constitutional, statutory and regulatory provisions are provided in Appendix B to the States' Stay Application.

STATEMENT OF THE CASE

On June 18, 2014, EPA issued its proposed rule. 79 Fed. Reg. 34,830 (June 18, 2014). After announcing to great ceremony the signing of the final rule in early August 2015, EPA published the final Power Plan in the Federal Register on October 23, 2015. 80 Fed. Reg. 64,662 (Oct. 23, 2015). The National Mining Association, the American Coalition for Clean Coal Energy, and Murray Energy

[14] Order, State of West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016) (included in the Appendix to this Application).

Corporation filed petitions for review on that same day. *See West Virginia v. EPA*, Case No. 15-1363, et al. (D.C. Cir.). Four motions to stay the Power Plan were filed that day—including the Coal Industry Motion to Stay (filed jointly by Applicants National Mining Association, the American Coalition for Clean Coal Electricity, and Murray Energy Corporation). In all, 39 petitions for review have been filed by 157 petitioners, as well as ten motions to stay the Power Plan. On January 21, 2016, the D.C. Circuit denied the motions to stay and issued an expedited briefing schedule with oral argument set for June 2, 2016.

REASONS FOR GRANTING THE STAY

A stay may issue where an applicant demonstrates: (1) a reasonable probability of prevailing on the merits—i.e., a reasonable chance that four Justices will vote to grant certiorari and that, if the case is taken, a majority of the Court will vote to reverse; (2) a likelihood of irreparable harm; and (3) that the balance of the equities and the public interest militate in favor of a stay. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice). All three requirements are met.

I. Applicants Have Demonstrated a Reasonable Probability of Prevailing on the Merits.

In light of this Court's decisions in *UARG*, *Michigan*, *AEP*, and *King*, as well as the serious statutory and constitutional questions raised by EPA's Power Plan, there is more than a reasonable probability that four Justices will vote to grant certiorari and that a majority of the Court will vote to reverse.

A. The Power Plan Violates an Express Statutory Prohibition.

The Power Plan is an assertion of lawmaking power, not interstitial gap-filling. EPA's breathtaking exercise of power rests on its novel reinterpretation of a narrow provision of the Clean Air Act, Section 111(d), whose plain meaning *prohibits* rather than authorizes the Power Plan. The relevant portion of Section 111(d)—known as the "Section 112 Exclusion"—provides that Section 111(d) applies only to a pollutant "which is not . . . emitted from a source category which is regulated under section [112] of this title." 42 U.S.C. § 7411(d). Since coal power plants are "a source category" regulated under Section 112, the Clean Air Act expressly prohibits their regulation under Section 111(d).

1. The Clean Air Act Unambiguously Prohibits Using Section 111(d) to Regulate Emissions from Source Categories that Are Already Regulated under Section 112.

In *AEP*, a case involving regulation of carbon dioxide emissions, this Court correctly understood the plain meaning of the Section 112 Exclusion: "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) (emphases added).

The Section 112 Exclusion dates to the 1990 Clean Air Act amendments, which revised Section 112 by replacing its prior pollution-specific focus (*see* 42 U.S.C. § 7412 (1988)) with an expansive new "source category" structure and aligned Section 111(d) with this new source-category approach. *See* Pub. L. 101-549, § 108, 104 Stat. 2,399, 2,467 (1990). The Section 112 Exclusion provides that existing sources may be subjected to national standards under Section 112 *or* state-

by-state standards under Section 111(d), but they may not simultaneously be subjected to both. This safeguard protects against inconsistent, unaffordable, and excessive regulation of existing sources. EPA officials supported this provision, testifying before Congress in 1990 that imposing emission standards on existing sources *seriatim*, even for different pollutants, would be "ridiculous."[15]

With respect to power plants in particular, Congress directed EPA to subject them to a Section 112 national emission standard only if "appropriate and necessary," 42 U.S.C. § 7412(n)(1), giving EPA the choice of whether to proceed with a Section 112 national standard or to proceed by mandating state-by-state standards for power plants under the Section 111(d) program. *See Michigan*, 135 S. Ct. at 2705-06. EPA chose to use the Section 112 national emission standard program for coal-fueled power plants and is now precluded from using Section 111(d) to impose the Power Plan.

Since the 1990 amendments, EPA has used Section 111(d) only twice, and both instances support Applicants' interpretation of the Section 112 Exclusion. In 1995, in adopting a rule involving existing municipal landfills (which were not at the time being regulated under Section 112), the Clinton Administration EPA noted that Section 111(d) does not permit standards for emissions "from a source category

[15] *Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Comm. on Energy & Natural Res.*, 101st Cong. 603 (1990).

that is actually being regulated under section 112"[16]—i.e., precisely the circumstance here.

Ten years later, the Bush Administration EPA agreed, recognizing that "a literal reading" of the text of Section 111(d) found in the United States Code provides that "EPA cannot" issue a mandate "under CAA section 111(d) for 'any pollutant' . . . that is emitted from a particular source category regulated under section 112," so "if a source category X is 'a source category' regulated under section 112, EPA could not regulate" any emissions "from that source category under section 111(d)." 70 Fed. Reg. 15,994, 16,031 (March 29, 2005).[17]

EPA acknowledges that its interpretation of Section 111(d) in support of the final Power Plan is contrary to its prior interpretations in 1995 and 2005. 80 Fed. Reg. at 64,714. EPA's new interpretation also contradicts the agency's own 2014 acknowledgement in connection with the proposed rule that "[a]s presented in the U.S. Code, the Section 112 Exclusion appears by its terms to preclude from Section 111(d) any pollutant if it is emitted from a source category that is regulated under

[16] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AIR EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS – BACKGROUND INFORMATION FOR FINAL STANDARDS AND GUIDELINES 1-5 to 1-6 (1995) ("1995 BIFSG").

[17] In the 2005 rule, EPA had "listed" coal- and oil-fired power plants for regulation under Section 112 but subsequently decided to regulate those plants under Section 111(d). Recognizing that it could not simultaneously regulate these plants under both programs, EPA sought to "delist" those plants under Section 112. The D.C. Circuit found the delisting improper and therefore held that the Section 111(d) standard was invalid in light of the Section 112 Exclusion. *See New Jersey v. EPA*, 517 F. 3d 574, 583 (D.C. Cir. 2008) ("under EPA's own interpretation of [section 111(d)], it cannot be used to regulate sources listed under section 112").

Section 112."[18] EPA's view of the plain meaning of this language in Section 111(d) was correct in 1995, 2005, and 2014, and EPA is wrong today. The language plainly prohibits rather than authorizes the Power Plan.

2. EPA's Theory of Competing "Versions" Distorts the Legislative Record and Triggers a Separation of Powers Violation.

EPA has attempted to cast aside the text of the Clean Air Act based upon the assertions that (i) Congress enacted two "versions" of Section 111(d) as part of the 1990 Clean Air Amendments, one in a substantive "House" amendment and the other in a clerical "Senate" amendment; (ii) the Law Revision Counsel mistakenly codified the substantive one; and (iii) the United States Code has been wrong for 25 years. 80 Fed. Reg. at 64,711-15. Such an ambitious argument cannot help EPA. The decision of which "version" of a statute to make legally operative is a quintessential exercise of lawmaking power, not agency authority. *See Whitman*, 531 U.S. at 473 ("The very choice of which portion of the power to exercise . . . would itself be an exercise of the forbidden legislative authority."). EPA's theory would entail a classic violation of the separation of powers. Even under EPA's mistaken view that there are two "versions" of Section 111(d), at best its job would be to reconcile them by applying both prohibitions to the extent possible, *see Brown & Williamson*, 529 U.S. at 133, not by throwing the substantive amendment into the trashcan, as the Power Plan effectively does. Indeed, one could easily harmonize the two "versions" by applying both prohibitions simultaneously: EPA would be prohibited from using Section 111(d) *both* for *source categories* regulated under Section 112 *and* for *pollutants*

[18] PROPOSED RULE LEGAL MEMO at 22.

regulated under Section 112. This reconciliation would still mean that the Power Plan must fall because coal-fueled power plants are a "source category" regulated under Section 112 and are therefore excluded entirely from regulation under Section 111(d).

In any event, EPA's innovative theory misreads the legislative record. The substantive amendment is located in § 108 of Public Law 101-549 (the 1990 amendments), as part of a substantive provision occupying five pages of the Statutes at Large (Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,465-69 (1990)), which rewrote Section 111 to mirror the new source-category focus and structure of Section 112. The clerical amendment was placed some 107 pages later, in a grab-bag section of eight small conforming changes to six different parts of the Clean Air Act. The clerical amendment provided, in its entirety:

> **SEC. 302. CONFORMING AMENDMENTS.**
>
> (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)".

Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,574 (1990). This clerical amendment simply deleted six characters ("(1)(A)"), four of which were parentheses. It was not a separate "version" of Section 111(d) and therefore could not possibly authorize EPA to do anything.[19] The amendment was in error; it purported to replace pre-existing

[19] EPA's claim that the Statutes at Large contains "two versions" of the Section 112 Exclusion can be traced to 2004, when EPA mistook for the Statutes at Large a document prepared by a paralegal at the Congressional Research Service that was included in the Committee Print of the 1990 Amendments legislative history. A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 46 (Comm. Print 1993). This document renders the relevant section using brackets: "any air pollutant . . . which is not . . . included on a list published under section

language that no longer existed due to the prior execution of the earlier substantive amendment in § 108(g). The Senate Managers expressly noted in their "detailed explanation" to supplement the Conference Report that the "Senate recedes to the House" with respect to the § 108(g) amendment. 136 CONG. REC. 36067 (Oct. 27, 1990).

Thus, the Law Revision Counsel properly concluded that the clerical amendment was an inadvertent and superfluous instruction that simply could not be executed:

> Subsec. (d)(1)(A)(i). Pub. L. 101–549, §302(a), which directed the substitution of "7412(b)" for "7412(b)(1)(A)", could not be executed, because of the prior amendment by Pub. L. 101–549, §108(g), see below.
>
> Pub. L. 101–549, §108(g), substituted "or emitted from a source category which is regulated under section 7412 of this title" for "or 7412(b)(1)(A)".

42 U.S.C. § 7411, Amendments, 1990, Subsec. (d)(1)(A)(i) (2012). The Clinton EPA came to the same conclusion in 1995, explaining that the substantive amendment was "the correct amendment" to codify and follow because it tracked the "revised section 112 to include regulation of source categories," while the conforming amendment "is a simple substitution of one subsection citation for another."[20] This Court has also distinguished between substantive amendments and conforming

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108(a) **[**or emitted from a source category which is regulated under section 112**]** **[**or 112(b)**]**." *Id*. In 2004, EPA quoted from this document in the Federal Register, identifying it as the Statutes at Large, and as a result of this error stated incorrectly that "two amendments are reflected in parentheses in the Statutes at Large." 69 Fed. Reg. 4,652, 4,684 (Jan. 30, 2004).

[20] 1995 BIFSG at 1-5.

amendments. *See, e.g.*, *Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001) (treating "conforming amendment" as non-substantive); *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82 (1981) (same).

The situation of a conforming amendment rendered moot by an earlier amendment in the same bill is quite common, and Congress and the Law Revision Counsel have an established rule to resolve it: An amendment fails to execute if a prior amendment in the same bill removes or alters the text that the subsequent amendment purports to amend.[21] The Law Revision Counsel consistently and frequently applies this rule.[22] Thus, in executing the 1990 Amendments, the Law Revision Counsel simply followed standard practice.

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[21] *See* UNITED STATES SENATE, OFFICE OF LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL § 126(d) (1997) ("If, after a first amendment to a provision is made . . . the provision is again amended, the assumption is that the earlier (preceding) amendments have been executed."); UNITED STATES HOUSE OF REPRESENTATIVES, OFFICE OF LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE § 332(d) (1995) ("The assumption is that the earlier (preceding) amendments have been executed.")

[22] *See, e.g.*, 15 U.S.C. § 2064, Amendments, 2008, Subsec. (d)(2); 15 U.S.C. § 2081, Amendments, 2008, Subsec. (b)(1); 29 U.S.C. § 1053, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 290bb-25, Amendments, 2000, Subsec. (m)(5); 42 U.S.C. § 300aa-15, Amendments, 1989, Subsec. (e)(2); 42 U.S.C. § 300ff-13, Amendments, 1996, Subsec. (b)(4)(B); 42 U.S.C. § 300ff-15, Amendments, 1996, Subsec. (c)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (a)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (b)(1); 42 U.S.C. § 677, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(B); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(C); 42 U.S.C. § 1395*l*, Amendments, 1990, Subsec. (a)(1)(K); 42 U.S.C. § 1395u, Amendments, 1994, Subsec. (b)(3)(G); 42 U.S.C. § 1395x, Amendments, 1990, Subsec. (aa)(3); 42 U.S.C. § 1395cc, Amendments, 2010, Subsec. (a)(1)(V); 42 U.S.C. § 1395ww, Amendments, 2003, Subsec. (d)(9)(A)(ii); 42 U.S.C. § 1396(a), Amendments, 1993, Subsec. (a)(54); 42 U.S.C. § 1396b, Amendments, 1993, Subsec. (i)(10); 42 U.S.C. § 1396r, Amendments, 1988, Subsec. (b)(5)(A); 42 U.S.C. § 3025, Amendments, 1992, Subsec. (a)(2); 42 U.S.C. § 3793, Amendments, 1994, Subsec. (a)(9); 42 U.S.C. § 5776, Amendments, 1988; 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(4); 42 U.S.C.

EPA has conceded, in an identical circumstance, that an amendment was "obviously in error" because the "section amended had been repealed" by an earlier amendment in the same bill.[23] Indeed, the U.S. Code would be turned upside down if superfluous clerical amendments caused prior versions of substantively amended statutory provisions to spring back to life.

In the last several months, EPA has taken the highly unusual step of attempting to block the routine positive law codification of the Clean Air Act, in a vain bid to rescue its meritless statutory interpretation.[24] The codification of the Clean Air Act recently completed by the Law Revision Counsel, submitted to Congress, and approved by the House Judiciary Committee simply restates the familiar form of Section 111(d) as it has existed in the U.S. Code for 25 years.[25] After not participating in the process for eight years, EPA submitted an eleventh-hour objection taking issue with the entire codification process and complaining that the Law Revision Counsel's codification of Section 111(d) "fails to include legislative language that is relevant to whether EPA has statutory authority to issue the Clean Power Plan and regulate greenhouse gas emissions from power

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§ 6302, Amendments, 2007, Subsec. (a)(5); 42 U.S.C. § 6991e, Amendments, 2005, Subsec. (d)(2)(B); 42 U.S.C. § 7414, Amendments, 1990, Subsec. (a); 42 U.S.C. § 8622, Amendments, 1994, Par. (2); 42 U.S.C. § 9601, Amendments, 1986, Par. (20)(D); 42 U.S.C. § 9607, Amendments, 1986, Subsec. (f)(1); 42 U.S.C. § 9874, Amendments, 1990, (d)(1); 42 U.S.C. § 9875, Amendments, Subsec. (c).

[23] Brief for Respondent in Nos. 14-1112, 14-1151 (D.C. Cir. ECF 1541205) at 48 n.23 (filed Mar. 9, 2015) (discussing 15 U.S.C. § 2081(b)(1)).

[24] *See* Letter of House Energy & Commerce Comm. to EPA dated Nov. 2, 2015, included in the Appendix ("Energy & Commerce Letter").

[25] *See id*. at 2.

plants and other stationary sources."[26] The Law Revision Counsel responded with a five-page letter rebutting EPA's specious argument point-by-point.[27] EPA's interference reveals its own recognition that the text of Section 111(d) in the United States Code repudiates the statutory basis for the Power Plan, and represents a back-door attempt by EPA to rewrite Section 111(d).

3. Section 111(d) Contains No Ambiguity.

Given the weakness of its arguments relying on the clerical amendment, EPA also argues that the phrase "regulated under section 112" is ambiguous as to whether the Section 112 Exclusion applies to pollutants regulated under Section 112 or source categories regulated under Section 112. 80 Fed. Reg. at 64,713–15. Yet EPA's own Legal Memorandum accompanying the proposed rule found no such ambiguity, properly recognizing that "[a]s presented in the U.S. Code, the Section 112 Exclusion appears by its terms to preclude from Section 111(d) ***any*** pollutant if it is emitted from a source category that is regulated under Section 112."[28]

Congress' handiwork is clear and unambiguous. The statute refers to "a source category which is regulated under section [112]"—not to "a pollutant which is regulated under section [112]."[29] EPA's gambit flies in the face of this Court's

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[26] EPA Letter of July 27, 2015, at 3, included as Attachment 1 to Energy & Commerce Letter.

[27] *See* Law Revision Counsel Letter of Sept. 16, 2015, included as Attachment 2 to Energy & Commerce Letter.

[28] PROPOSED RULE LEGAL MEMO 22 (emphasis added).

[29] The only natural reading is that the clause "which is regulated under section [112]" modifies the phrase "source category" because it immediately follows that phrase in the statute. Moreover, the phrase "any air pollutant" cannot refer solely to hazardous air pollutants because that same phrase is also modified by the

teaching in *UARG* that EPA cannot "replace[]" statutory terms "with others of its own choosing" without going "well beyond the bounds of its statutory authority." 134 S. Ct. at 2445 (quotation omitted). "The power of executing the laws" "does not include a power to revise clear statutory terms that turn out not to work in practice," or to revise them "to suit [EPA's] own sense of how the statute should operate." *Id*. at 2446. The highly "specific" language in Section 111(d) is the end of the matter, leaving nothing for EPA to add or subtract because Congress "has already" made its own "judgment." *Id*. at 2448. EPA can only execute the law, not change it.

Moreover, what EPA claims is a vice in the statute is actually a virtue. Applying the Section 112 Exclusion on the basis of source categories is a natural consequence of Congress' decision in 1990 to rewrite Section 111(d) to mirror the "source category" structure of the newly amended Section 112. In 1990, Congress fundamentally expanded the scope of what substances are regulated under Section 112 and required regulation under Section 112 by "source category." Compare Pub. L. 101-549, § 301, 104 Stat. 2,399, 2,531-74 (1990) (creating new Section 112), with 42 U.S.C. § 7412 (1988). The ordinary reading of the 112 Exclusion is better (not worse) because it aligns Section 111(d) with the "source category" focus of post-1990 Section 112. Section 111(d) as amended in 1990 still plays a significant role—that of regulating source categories not regulated under Section 112. Hence, EPA's last-

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words "for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] of this title." "[A]ny air pollutant" must be broader than "hazardous air pollutants" because it must also include these other two categories, which overlap but are not coextensive.

ditch reinterpretation of the statutory language violates the express terms of Section 111(d), this Court's decision in *UARG*, and the structure of the 1990 amendments to the Clean Air Act.

B. The Power Plan Is an Attempt to Shut Down Coal Power Plants in Favor Of Sources Preferred By EPA, Not a "Performance Standard" Under Section 111(d).

Even if, *arguendo*, EPA had authority to regulate electric generating units under both Sections 111(d) and 112 of the Act (which it does not), the Power Plan far exceeds EPA's authority under Section 111(d), as shown in the States' Stay Application. Section 111(d) limits EPA to promulgating "standard[s] of performance," which requires EPA to identify, after considering cost and other factors, the "best system of emission reduction" that (1) has been "adequately demonstrated" for the type of "source" to be regulated and (2) will "assure continuous emission reduction" when the source is operating. 42 U.S.C. §§ 7411(a)(1), 7602(k), 7602*(l)*. Section 111 further provides that a standard of performance must be "achievable through the application of the best system of emission reduction" to an individual "source," which the CAA defines as a "building, structure, facility, or installation" that emits air pollution. 42 U.S.C. § 7411(a)(3). Over the last 45 years, during which EPA has established more than a hundred "standards of performance" for new and existing sources under Section 111, all of these performance standards have been based on technological means of reducing emissions from a source. *See* States' Stay Application at 7.

EPA now says that the term "system of emission reduction" is "deliberately broad" and can include virtually anything that reduces emissions, including "actions

that may occur off-site" across the electric grid. 80 Fed. Reg. at 64,671. According to the agency, it can also mean "the application of a system" to the entire U.S. power sector, including renewable generating facilities and transmission over which EPA has no jurisdiction, given "the integrated nature of the utility power sector." *Id.* at 64,769.

EPA's interpretation conflicts with the plain language of the Clean Air Act. Under Section 111(d), a performance standard must "assure [a] continuous emission reduction" and must be applied to "any existing source" that would be subject to a new source standard "if such existing source were a new source"; and States must be permitted, "in applying a standard of performance to any particular source . . . to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d); 42 U.S.C. §7206*(l)* All these statutory terms refer to individual sources, not the U.S. electricity system as a whole.

EPA's limitless view of its own power also runs headlong into this Court's rejection of a similarly expansive view of FERC's jurisdiction. *See FERC v. Electrical Power Supply Ass'n.*, No. 14-840, slip op. at 15 (Jan. 25, 2016) ("Taken for all it is worth, that statutory grant could extend FERC's power to some surprising places. . . . We cannot imagine that was what Congress had in mind.").

In sum, the Power Plan is an unauthorized attempt by EPA to take business away from coal-fired power plants and award it to other energy sources favored by the agency.

C. The Power Plan Violates the Tenth Amendment and Principles of Federalism.

More than half the States in the Union have challenged the Power Plan — the most ever to challenge an EPA rule—representing almost 80% of the Power Plan's emissions reductions.[30] The States have convincingly shown that EPA's interpretation would "confer on federal agencies ultimate decisionmaking authority, relegating States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect." *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting). "If cooperative federalism is to achieve Congress' goal of allowing state governments to be accountable to the democratic process in implementing environmental policies, federal agencies cannot consign States to . . . ministerial tasks . . . , while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight." *Id.*

Private parties as well as States can invoke the protections of federalism. As the Court has observed, "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity . . . . 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (citation omitted). Hence, "the individual liberty secured by federalism is not simply derivative of the rights of the States." *Id.* "Federalism also protects the liberty of all

[30] The 18 States that have filed in support of the Power Plan represent 12% of the emissions reductions — including two states that the Power Plan does not affect at all (Vermont and Hawaii). Robin Bravender, *"44 States Take Sides in Expanding Legal Brawl,"* GREENWIRE, Nov. 4, 2015.

persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Id.*

"Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999). The Court has made clear that the federal government may not compel the States to implement federal regulatory programs. *See Printz v. United States*, 521 U.S. 898, 926 (1997); *New York v. United States*, 505 U.S. 144, 176-77 (1992). Because this limitation on federal power arises from a structural constitutional principle, "a 'balancing' analysis" is "inappropriate." *Printz*, 521 U.S. at 932. Further, the anti-commandeering principles bar unlawful complicity as much as coercion. *See id.* at 921 (federal-state separation is one of the "structural protections of liberty" designed to "reduce the risk of tyranny and abuse *from either front*") (emphasis added). Thus, no State—including the States that support the Power Plan—can permissibly collude with EPA to aggrandize the agency's authority. *See New York*, 505 U.S. at 181-82.

Whether coercive or collusive, federal commandeering blurs the lines of political accountability by making it appear as though the harmful effects of federal policies are attributable to State choices. *Printz*, 521 U.S. at 930. That is exactly what will occur here. The Power Plan will force States to adopt policies that will raise energy costs, kill jobs, threaten consumers on fixed and limited incomes, and

deprive the States of tax revenue from coal royalties and severance payments, which States use to fund schools and social services.[31] Those policies will be cloaked in the Emperor's garb of State "choice," even though they are, in fact, compelled by EPA.

Significantly, Congress did not delegate power to EPA in a way that clearly set up this entirely avoidable constitutional confrontation. It certainly did not expressly authorize, much less direct, the EPA to interpret the Clean Air Act so as to violate federalism and the Tenth Amendment. At the very least, the serious constitutional questions raised by the Power Plan eliminate any agency claim to *Chevron* deference and require that this Court construe Section 111(d) as not authorizing EPA's extravagant assertion of authority. *See Edward J. DeBartolo Corp. v. Florida Gulf Construction Trades Council*, 485 U.S. 568, 574-75 (1988).

EPA's response is that, if a State declines to propose a State Plan, the agency will impose a Federal Plan instead. *See* 80 Fed. Reg. at 64,942. But even under a Federal Plan, inaction is not an option for the States. Rather, state agencies will be forced to undertake extensive efforts to ensure that the Power Plan's shut down of coal plants does not lead to brownouts or blackouts, or otherwise imperil the supply of reliable electricity to state consumers and businesses. For example, state officials will be forced to review siting decisions, grant permit applications, and issue certificates of public convenience for EPA's preferred generation sources and for the associated new transmission lines that EPA's transformation of the power sector

[31] State of North Dakota, Motion for Stay, No. 15-1380, *North Dakota v. EPA*, (ECF 1580920), at 13-15 (D.C. Cir.) (filed Oct. 29, 2015).

will require. *See, e.g.*, 220 Ill. Comp. Stat. 5/8-406(b) (utility must obtain certificate of public convenience and necessity before beginning construction). The States' ability to "choose" not to authorize new generation or transmission is no choice at all; it is a gun to the head. That is the very defect that the Court identified in striking down the congressional measure pressuring States to accept the Affordable Care Act's Medicaid expansion in *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

Moreover, the Court has instructed that state participation in federal programs is "in the nature of a contract," with the key question being "whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *NFIB*, 132 S. Ct. at 2602 (internal quotation marks and citations omitted). The Power Plan improperly remakes the agreement between States and the Federal Government that has existed since the Clean Air Act was enacted in 1970. States could not have expected, when they adopted plans to regulate conventional pollutants like nitrogen oxides, sulfur dioxide, and particulate matter, that EPA would seek to dictate State energy policies by forcing the phase-out of the most reliable and affordable sources of electricity and their replacement with EPA's preferred renewable sources. The Power Plan is completely unlike examples of cooperative federalism; it is entirely different from anything EPA has ever attempted under Section 111(d).

The circumstances of *New York v. United States* (on which EPA relies) were completely different. There, the back-up federal option, 505 U.S. at 174, entailed no direct regulation of anything in a noncomplying State. Rather, it simply authorized States with waste disposal sites to raise fees and ultimately shut their sites to waste from freeloading States that were not managing their own waste. Moreover,

the "federal option" in *New York* was enacted by Congress, where States, through their representation in the Senate and in other ways, retain an assured avenue of direct political influence over how the legislature will decide to regulate their citizens under Article I. The situation is entirely different if, as here, a *federal agency* makes the decision of how the people of noncomplying States will be regulated, because an agency is not open to the structurally assured state influence that rescued the fallback in *New York* from constitutional infirmity.

The Power Plan therefore violates the Tenth Amendment and principles of federalism.

II. A Stay of the Power Plan Is Necessary to Prevent Irreparable Injury and Preserve the Status Quo and Rights of Applicants Pending Judicial Review.

The Power Plan will cause extensive irreparable harm during the pendency of judicial review, even expedited review.[32] *EPA's own modeling shows* that the Power Plan will cause the closure of 53 coal-fired generating units *in 2016* and the closure of another 3 units by 2018. Schwartz Decl. ¶¶ 4, 16-22, 27-31, EVA Report 11-15, 62-64. The near-term retirement of these 56 units will reduce annual national coal production by nearly 55 million tons, creating an obvious and immediate impact to the business of coal mining and to coal employment. Schwartz Decl. ¶ 30. Moreover, the retirement of these units will cause specific coal mines to

[32] The Sixth Circuit stayed a Clean Water Act rule even without any showing of irreparable harm, in light of the "whirlwind of confusion" caused by the regulation. *In re EPA*, Nos. 15-3799, 2015 WL 589381, *3 (6th Cir. Oct. 9, 2015). The "whirlwind of confusion" caused by the Power Plan is no less, and indeed substantially worse. Accordingly, the D.C. Circuit's failure to grant a stay in this case is inconsistent with the Sixth Circuit's decision.

close, specific miners to lose their jobs, and specific communities and States to lose the economic benefits that these mining jobs create—virtually all occurring in *2016*, according to EPA's own model.[33]

In the court below, EPA downplayed the accuracy of its modeling, but such self-criticism flies in the face of the agency's own statements that its modeling produces the "best assessment of likely impacts of the CPP under a range of approaches that states may adopt," and is "a state-of-the-art, peer-reviewed, dynamic linear programming model that can be used to project power sector behavior" and "to project likely future electricity market conditions with and without the Clean Power Plan Final Rule."[34] EPA's modeling not only provides the basis for the Regulatory Impact Assessment (RIA) of the Power Plan, but also is the basis for the design and level of the performance standards that constitute the

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[33] Schwartz Decl. ¶ 31; Schwartz Reply Decl. ¶ 18; Murray Decl. ¶¶ 37-42 (identifying Murray Energy coal mines that are significant suppliers of the retiring units); Neumann Decl. ¶¶ 6-18 (consequences of retiring Coal Creek and Coyote stations); Cottrell Decl. ¶ 9 (consequences of retiring Naughton station); Jenkins Decl. ¶¶ 7-8 (lost coal transportation).

[34] Regulatory Impact Assessment for Final Rule at 3-1, 3-11 (emphasis added). According to EPA, "[t]he analysis is a reasonable expectation of the incremental effects of the rule." *Id.* at 3-11. "This type of analysis, using IPM, has undergone peer review and been upheld in federal courts." 76 Fed. Reg. 48,208, 48,314 (Aug. 8, 2011). EPA recently told the D.C. Circuit that "the Integrated Planning Model ('IPM'), [is] an economic model widely used throughout private industry and the government to forecast how the power sector produces electricity at least cost while meeting energy demand, reliability constraints, and environmental requirements. This Court has previously recognized the use of IPM as reasonable for this purpose." EPA Respondents' Brief, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, at 40 (D.C. Cir. filed Jan. 16, 2015), Doc. No. 1532516 (citing *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1052-53 (D.C. Cir. 2001)).

Power Plan. Schwartz Reply Decl. ¶¶ 19-31. EPA cannot disavow its own modeling without rendering the Power Plan fatally defective.

In fact, the evidence shows that EPA's modeling actually understates the harmful effects of the Power Plan. EPA manipulated its "base case" (the future electric grid without the Rule) by arbitrarily reducing the amount of coal generation assumed to be in existence at the beginning of 2016 so as to make it seem as if the Rule causes fewer coal unit retirements than it really does. Schwartz Decl. ¶¶ 4, 18-26, 32-38; EVA Report 17-24, 64-68. The expert and unbiased forecast of the U.S. Energy Information Administration shows that the impact of the Rule will be much greater: the shutdown on 233 coal-fired power plants *in 2016* and another five in 2018. *Id.*; Schwartz Reply Decl. ¶¶ 14-16. These shutdowns represent 171.5 million tons of lost coal production, about 20 percent of the current level. EVA Report 64.[35]

Regardless of their precise magnitude, the substantial shutdowns beginning in 2016 demonstrate that even expedited judicial review will not avoid irreparable injury. Decisions to implement those closures must begin immediately, and planning for future retirements is underway *now*. Both the utility industry and the coal business are highly capital-intensive, with long lead times measured in years and decades, not months. *See* Schwartz Decl. ¶¶ 12-15; EVA Report 30-47; Cottrell Decl. ¶ 5; Marshall Decl. ¶ 10; Murray Decl. ¶ 32; Galli Decl. ¶¶ 16-22; Neumann ¶ 25. Moreover, as the federal government itself has observed, even *pending*

[35] EPA's modeling already takes account of alternative explanations of coal's hardship, such as market trends and low natural gas prices. The Power Plan, not alternative causes, is responsible for the harm documented here. *See also* Schwartz Reply Decl. ¶¶ 3-13.

regulation strongly affects the economics of the coal industry. U.S. ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK, E-14 (2014).

Accordingly, the shutdowns will become locked in, long before any decision by the D.C. Circuit panel (let alone *en banc* review and this Court's review). As one expert has opined, "the electric power industry requires long lead times to plan, permit and construct new power plants to generate electricity and new transmission lines to connect the power plants and deliver the electricity to customers." Schwartz Decl. ¶ 12. "Once utility decisions are made, they will be locked in. They will not be undone no matter how the Court rules months or years from now." Galli Decl. ¶ 21. Customers have already started making planning decisions, and the pace of closure and curtailment decisions will only accelerate, leading to irreparable losses of coal sales. *See id*. at ¶¶ 12–13, 16–22.

Absent a stay, the Power Plan's targeted attack on the coal industry will artificially eliminate buyers of coal, forcing the coal industry to curtail production, idle operations, lay off workers, and close mines. *See, e.g.*, Schwartz Decl. ¶¶ 4, 39-40; EVA Report 69-72; Siegel Decl. ¶ 6; Marshall Decl. ¶ 11–18; Cottrell Decl. ¶ 7; McCourt Decl. ¶ 7–8. Forced shut-downs will render completely worthless hundreds of millions of dollars of investments in power plants and in the mines supplying them. Motion to Intervene of Dixon Bros., No. 15-1363, ECF Doc. 1584767, at 9-10 (D.C. Cir. November 20, 2015). The market understands these realities. From the time EPA first proposed the Rule and condemned the coal industry to a greatly diminished future, coal company share prices have plummeted and coal companies

have declared bankruptcy. Schwartz Decl. ¶¶ 39-40; EVA Report 56-59; Murray Decl. ¶ 49. All of this will worsen in the coming months.

EPA has ensured immediate irreparable harm. By design, EPA has set overaggressive deadlines for states to finalize plans to comply with the Power Plan. 80 Fed. Reg. at 64,855. The Power Plan seeks "to promote early action," *id*. at 64,669, and to "establish the path towards emissions reductions as early as possible." *Id*. at 64,675. In light of these deadlines and the substantial changes necessary for compliance, EPA's Power Plan coerces states, businesses, and the energy industry to undergo immediate and irreversible changes, in an apparent attempt to change the facts on the ground before meaningful judicial review can be completed. EPA is using the same strategy it successfully employed for the *Michigan* rule.

Indeed, absent a stay, a future decision that the Power Plan is unlawful may in a sense exacerbate the irreparable harm. For example, a utility in Montana and the Dakotas already has spent approximately $350 million on upgrades to comply with EPA's Section 112 national emission standard for power plants. Galli Decl. ¶ 28. However, in light of the Court's decision in *Michigan*, the Montana Public Service Commission has not decided whether to approve a rate increase needed for the utility to pay for the upgrades. *Id*. Therefore, the utility faces the prospect of being left holding the bag for the compliance costs it has already incurred, with no practical way to recoup those costs. *Id*.

Here, too, EPA's strategy is to use the Power Plan to force enormously expensive immediate changes "on the ground," all across the country, making after-

the-fact judicial relief a Pyrrhic victory. A stay is required to prevent EPA from manipulating ripeness to manufacture mootness—from delaying judicial review of the Power Plan while insisting on compliance with an unlawful Rule *now*. EPA hopes that, by the time the judiciary adjudicates the legality of the Power Plan, the judicial action will come too late to make much if any practical difference. As with the *Michigan* rule, the principal damage will be done. Compliance will be a *fait accompli*, and judicial review will be—for most practical purposes—an afterthought.

III. The Balance of Equities and Public Interest Support a Stay.

A stay will merely preserve the status quo while the courts consider the lawfulness of the Power Plan. In this instance, "[t]he injury against which a court would protect is not merely the expense to the plaintiff, . . . but . . . the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry." *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 187 (2d Cir. 1972) (Friendly, C.J.).

EPA cannot genuinely protest urgency during the period necessary for judicial review. EPA tellingly declined to quantify *any impact* of the Power Plan on global temperatures or the environment—not a thousandth of a degree of temperature or single millimeter of sea level change (*see* Regulatory Impact Analysis ("RIA") for the Clean Power Plan Final Rule (Aug. 2015), at ES-10 through ES-14)—let alone one that would irreversibly occur during the short window during which judicial review is pending. EPA's Administrator testified before the Senate Environment and Public Works Committee on July 23, 2014: "The great thing about this [EPA Power Plan] proposal is that it really is an investment opportunity. *This*

is not about pollution control."[36] In fact, EPA has waited years to regulate power plant carbon dioxide emissions, has already allowed its deadlines to slip numerous times,[37] and argued in the D.C. Circuit that the Power Plan does not require carbon dioxide reductions until after the year 2022.[38]

Power plants that begin to shut down and States that begin to implement the Power Plan will essentially lock in EPA's policy preferences. The likelihood—indeed, the near certainty–that such a fundamentally important agency action would inflict irreversible harm before judicial review can occur risks unacceptable impairment of the judicial function and thereby raises serious separation of powers concerns. As Federalist No. 48 explained, "none of [the branches] ought to possess, *directly or indirectly*, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that *power . . . of an encroaching nature . . . ought to be effectually restrained* . . . . After discriminating . . . *in theory*, the several classes of power . . . [between] legislative, executive or judiciary, the next and most difficult task is to provide some *practical security* for each against invasion of the others." (James Madison, February 1, 1788) (emphasis added).)

Absent a stay, the "*practical security*" necessary to protect diminishing judicial power and aggrandizing executive power will be lost, and judicial review

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[36] U.S. House Energy Commerce Comm. Press Release, Pollution vs. Energy: Lacking Proper Authority, EPA Can't Get Carbon Message Straight (Jul. 23, 2014) (emphasis added).

[37] *See* Settlement Agreement ¶¶ 1–4, EPA-HQ-OGC-2010-1057-0002 (settlement obligating EPA to adopt carbon dioxide regulation by May 26, 2012).

[38] EPA Opp. to Stay Motion in D.C. Cir. Nos. 15-1363, et al., at 10 (ECF 1586661) (filed Dec. 3, 2015).

will—for all *practical purposes*—become irrelevant. Only granting an immediate stay will enable this Court's ultimate review of the Power Plan to come in time to prevent, rather than merely lament, those profoundly damaging and dangerous departures from our constitutional scheme.

CONCLUSION

The Power Plan's magnitude and scope are unprecedented. It should be stayed, and all deadlines in it suspended, pending the completion of all judicial review.

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CERTIFICATE OF SERVICE

I certify that on this 27th day of January, 2016, I caused to be served the above document on the following by overnight commercial carrier and electronic mail where available:

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