ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL MINING ASSOCIATION, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Case No. 15-1367
AMERICAN COALITION FOR CLEAN COAL ELECTRICITY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Case No. 15-1368

MURRAY ENERGY CORPORATION, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Case No. 15-1366

COAL INDUSTRY MOTION FOR STAY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Movants submit this statement pursuant to Local Rule 28(a)(1):

(A) Parties and Amici.

1. Case No. 15-1367. The Petitioner is the National Mining Association. The Respondent is the Environmental Protection Agency. There are no intervenors or amici at this time.

2. Case No. 15-1368. The Petitioner is the American Coalition for Clean Coal Electricity. The Respondent is the Environmental Protection Agency. There are no intervenors or amici at this time.

3. Case No. 15-1366. The Petitioner is Murray Energy Corporation. The Respondent is the Environmental Protection Agency. There are no intervenors or amici at this time.

(B) Rulings Under Review. The ruling under review in each of the above-referenced cases is Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015).

(C) Related Cases. This case was not previously before this court or any other court. Counsel is aware that a related case, *West Virginia v. EPA*, No. 15-1363, was filed today. As of this writing, counsel is unaware of any other related cases that have been filed but is expecting related cases to be filed.

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GLOSSARY

ACCCE	American Coalition for Clean Coal Electricity
BSER	Best System of Emission Reduction
CAA	Clean Air Act
CO_2	Carbon Dioxide
EIA	Energy Information Administration
EPA	Environmental Protection Agency
FPA	Federal Power Act
GW	gigawatts
IPM	Integrated Planning Model
lb/MWh	pounds per megawatthour
MATS	Mercury and Air Toxics Standards
NMA	National Mining Association

INTRODUCTION[1]

In the words of the EPA Administrator, the Clean Power Plan[2] seeks to effect an "historic"[3] and comprehensive "transformation"[4] of the electric utility industry, with coal directly in the crosshairs. This plan will require utilities to slash their fleet of coal-fueled electric generating facilities, undertake an unprecedented expansion in their use of generation produced with renewable resources, and induce the country for the first time ever to use less electricity over time even as the economy and population grow.[5]

EPA's plan will require industry to begin this transformation away from coal immediately. Buried in the mountain of paper and electronic documents that EPA released in connection with the Rule is information showing that *EPA itself* predicts that large-scale retirements of coal-fired electric generating facilities will begin *in 2016*, well before the Rule's 2022 compliance deadline. These modeling results reflect the

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[1] Movants are the National Mining Association ("NMA"), the coal industry's national trade association; 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; and Murray Energy Corporation, one of the nation's largest coal companies. EPA has not substantively responded to NMA's August 3, 2015 petition to stay the Rule.

[2] "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Rule").

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

[4] "EPA Chief Lays Out Bold Vision for Power Plant Greenhouse Gas Rule," SNL Renewable Energy Weekly, Feb. 14, 2014.

[5] The extent of the transformation is set forth in the declaration and expert report of Seth Schwartz ("Schwartz Decl."), attached hereto as Ex. 1, ¶¶ 18-29.

reality that utilities will retire numerous coal plants immediately rather than continue to invest in them if those plants must retire in 2022 to comply with the Rule. These early electric generation retirements will result in the closure of coal mines that serve these facilities, layoffs of miners, and the economic devastation of the small, mostly rural, and relatively lower income communities that depend on coal-mining jobs.[6]

EPA's legal basis for transforming the electric sector is farfetched at best. Having been unable to obtain cap-and-trade legislation from Congress, EPA has resorted to the Section 111 New Source Performance Standards ("NSPS") program for the broad authority it seeks.[7] But to make Section 111 serve its policy aims, EPA has had to jettison 45 years of consistent agency practice in favor of a new interpretation of key statutory terms that flies in the face of Congress' purpose in enacting the NSPS program. In particular, EPA has reimagined Section 111(d)—a narrow, two-sentence provision that, in certain limited circumstances, requires states to regulate the emission rate at individual facilities—in a way that would render it "unrecognizable to the Congress that designed it."[8] Congress did not adopt Section 111(d) to transform whole industries.[9]

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[6] *See* Argument II below.
[7] 42 U.S.C. § 7411. Hereafter, citations are to the Clean Air Act ("CAA") only; parallel citations to the United States Code are included in the Table of Authorities.
[8] *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*") (quoting EPA).
[9] *See* Argument I below.

Given the enormous harm that the Rule will cause immediately and its serious legal flaws, a stay is warranted. Certainly, staying the Rule will have no effect on the climate given the sheer magnitude of global greenhouse gas emissions. The Rule, even when fully implemented in 2030, will reduce global greenhouse gas emissions by well under one percent. A short delay in implementing the Rule during the time it takes for the court to issue a decision on the merits, will therefore have no impact on the climate concerns that motivated this rulemaking.[10]

BACKGROUND

I. The NSPS Program.

Congress enacted the NSPS program as a part of the original 1970 CAA. Section 111(b) requires EPA to create a list of categories of industrial facilities ("sources") that emit pollutants which cause or significantly contribute to air pollution that endangers the public health or welfare. Once EPA lists a source category, it must establish "standards of performance" that any new source in that category must meet. Under Section 111(a)(1), a performance standard must "reflect[] 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 [EPA] Administrator determines has been adequately demonstrated." EPA refers to this "best system of emission reduction" standard as "BSER."

[10] *See* Argument III below.

Under Section 111(d)(1), once EPA has adopted Section 111(b) performance standards for new sources within a listed source category, it must issue regulations to require States to establish standards of performance "for any existing source" within that category, subject to two significant caveats. First, Section 111(d) standards cannot be adopted for pollutants that are regulated under the National Ambient Air Quality Standards program. Second, Section 111(d) standards cannot be adopted for source categories that are regulated under the Section 112 hazardous air pollutants program.

Unlike Section 111(b), Section 111(d) does not authorize EPA to promulgate performance standards once it lists a source category. Instead, Section 111(d)(1)(A) requires EPA to develop a "procedure" for States to formulate and submit plans containing State-established performance standards for existing sources within their borders. Only if EPA deems a State plan to be unsatisfactory can it adopt a federal plan containing EPA-established performance standards.[11]

II. Administrative History of the Program.

In the 45-year history of the Section 111 program, EPA has promulgated performance standards for more than 60 source categories.[12] The terms "standard of performance" and "BSER" thus are well defined by EPA in past rulemakings. Without exception, the BSER for a particular category of sources has always been a technological system, such as pollution control equipment, or a system of work

[11] *See* Section 111(d)(2)(A).
[12] *See* 40 C.F.R. 60, subpts. Cb – OOOO.

practices that can be used at the regulated facility for cost-effectively reducing emissions.[13] The standard-setting process involves collecting and examining test data or other relevant information to determine the emissions performance of various types of control technologies and work practices and determining the "best system" by considering the statutory BSER factors.[14] Based on this information, EPA typically promulgates performance standards as a numerical rate of emissions per unit of output and less often as a narrative work practice standard, in either case allowing the facility to maintain operations while reducing emissions.[15] EPA has never before deviated from this approach either in promulgating its own new source performance standards under Section 111(b) or in issuing guidelines that States must use in setting existing source performance standards under Section 111(d). At no time in the history of the program has EPA ever adopted Section 111(b) new source performance standards or Section 111(d) existing source guidelines that required facilities in the regulated category to reduce or cease operations as a means of reducing emissions.

III. The Rule.

In developing the Rule, EPA realized that its decades-old interpretation of the terms "standard of performance" and "BSER" would not achieve the

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[13] *See* EPA's NSPS regulations at 40 C.F.R. pt. 60.

[14] *See, e.g.*, how EPA today set standards of performance for *new* coal-fueled electric generating units. 80 Fed. Reg. 64,510, 64,547-597 (Oct. 23, 2015).

[15] In promulgating performance standards for refineries, EPA recently stated that "[t]he standard that the EPA develops, based on the BSER *achievable at that source*, is commonly a numerical emission limit, expressed as a performance level (*i.e.*, a rate-based standard)." 79 Fed. Reg. 36,880, 36,885 (June 30, 2014) (emphasis added).

Administration's policy goals. The President has made addressing climate change one of his highest priorities, and EPA's Section 111(d) rulemaking is a key component of his domestic and international climate change strategy.[16] Installing technology or adopting new work practices at coal plants, however, will not achieve the dramatic CO_2 emission reductions the Administration wants.[17]

To make Section 111(d) serve its policy objectives, EPA was therefore forced to reinvent the statutory language. Under the agency's outcome-driven approach, EPA determined that the BSER for reducing emissions from coal plants is not a system of reducing emissions that would be implemented at the regulated facilities themselves. Instead, BSER became the reconfiguring of the entire national electric grid to replace coal with other forms of generation that emit less or no CO_2.[18]

To accomplish this result, EPA rearranged the mix of electric generating resources in place in 2012 based on the hypothetical application of three "building blocks"–improved heat rates at coal units and shifting generation from coal units to natural gas units and renewable generation (mostly wind and solar).[19] Based on the

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[16] *See* Presidential Memorandum on Power Sector Carbon Pollution Standards, 2013 Daily Comp. Pres. Doc. 457 (June 25, 2013) and Intended Nationally Determined Contribution, and Accompanying Information (Mar. 31, 2015), *available at* http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf.

[17] 80 Fed Reg at 64,727.

[18] *See* EPA, "CO_2 Emission Performance Rate and Goal Computation Technical Support Document," attached hereto as Ex. 2.

[19] *Id.*

CO_2 emissions reductions produced by these building blocks, EPA established an emission performance rate for coal units of 1,305 pounds of CO_2 per megawatthour ("lb/MWh") and for natural gas units of 771 lb/MWh.[20] Under the Rule, States must submit plans to ensure that their coal and gas units meet these standards.[21]

But EPA recognizes that coal units cannot meet the 1,305 lb/MWh standard. The country's most modern coal plants emit more than 1,800 lb/MWh and the fleet average is more than 2,200 lb/MWh; no coal unit could be retrofitted to meet a rate even approaching 1,305 lb/MWh.[22] In fact, EPA's performance standard for existing coal units is even more stringent than EPA's performance standard for new coal units—set at 1400 lbs/MWh. That 1400 lbs/MWh is based on the use of carbon capture and sequestration,[23] a technology that the agency concedes is not feasible for existing units.[24]

EPA, however, did not set the 1,305 lb/MWh rate so that coal units could continue to operate while meeting that rate. EPA's purpose was just the opposite. In the guise of setting a performance rate, per the language of Section 111(d)(1)(A), "*for* any existing source" (emphasis added) within the coal generator category, in reality EPA is implementing a program to force the substitution of natural gas and renewable

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[20] *Id.*
[21] 80 Fed. Reg. at 64,664.
[22] Ex. 1 (Schwartz Decl.), attached report entitled "Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry" (Oct. 2015) ("Schwartz Report") at 5.
[23] 80 Fed. Reg. at 64,512, Table 1.
[24] 80 Fed. Reg. at 64,751.

power generation for coal-fired generation. In the agency's chain of reasoning, the "source" subject to regulation under Section 111(d) is not just the source itself but also the owner or operator of the source.[25] EPA then maintains that the owner or operator of a coal generating plant can comply with the 1,305 lb/MWh rate by simultaneously reducing generation at the coal unit and subsidizing the construction of low- and zero-emitting replacement resources—either by developing those resources itself or by paying others to do so.[26] Of course, building alternative generation resources does not actually lower the emissions rate of a coal-fired generating unit. But, under the Rule, the coal-fired generating unit and the alternative energy resource would effectively be treated as the same "stationary source" and the total generation and CO_2 emissions of the two facilities would be averaged together to determine an overall CO_2 emissions rate that would be imputed to the coal unit.[27]

EPA also proposes what it calls an "alternative" compliance "approach[]," [28] to "pave[] the way" [29] toward what EPA and *some* States apparently are really after—a cap-and-trade system, even though (or perhaps because) Congress has consistently rejected cap-and-trade legislation. The Rule sets forth state-by-state CO_2 budgets, calculated either as a rate of emissions or a total quantity of emissions; so long as

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[25] 80 Fed Reg. at 64,720. But *see* CAA § 111(a)(3) (defining the term "stationary source" under the NSPS program as an individual "building, structure, facility, or installation which emits or may emit any air pollutant").
[26] 80 Fed Reg. at 64,761, 64,762, 64,753-55.
[27] *Id.*
[28] *Id.* at 64,667-78.
[29] *Id.* at 64,667.

States keep within their budgets, EPA will deem the coal-fired units within the State to be in compliance with the 1,305 lb/MWh standard.[30] EPA encourages States to adopt intrastate and preferably interstate trading mechanisms to achieve those budgets and even proposes a model trading program that States may adopt.[31] EPA further says that, if States fail to submit a satisfactory compliance plan, EPA will itself impose this model cap-and-trade program on regulated facilities within the defaulting State.[32]

STANDARD FOR GRANTING STAY

This Court considers four factors in ruling on a motion for a stay: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Court grants the stay; and (4) the public interest in granting the stay.[33] All of these factors strongly favor staying the Rule.

ARGUMENT

I. Movants Are Likely to Prevail on the Merits.

Congress did not even remotely authorize EPA in Section 111(d) to order the fundamental changes to the electric sector that the Rule mandates. As the Supreme Court recently explained in overturning another EPA greenhouse gas rule:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory

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[30] *Id.* at 64,666.
[31] *Id.* at 64,667, 64,672; 80 Fed. Reg. 64,966 (Oct. 23, 2015).
[32] 80 Fed. Reg. at 64,828; 80 Fed. Reg. at 64,966.
[33] *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

> authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy' … we typically greet its announcement with a measure of skepticism.[34]

As the Court stated, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[35]

These words apply with even greater force to the Rule than they did to the regulations that the Supreme Court overturned in *UARG*. EPA has seized upon a long-extant, narrow CAA provision—Section 111(d)—to effect a massive reorganization of perhaps the most important sector of the American economy. Under the Rule, coal generation as a percentage of total generation would fall to a level never before seen, renewable resource development would skyrocket, and electric consumption would fall over the course of a decade for the first time ever.[36] EPA would thus transform itself from its Congressionally-created role as an air quality regulator to the nation's electricity czar.[37]

But not even the Federal Energy Regulatory Commission, much less EPA, has the authority it claims to order a fundamental reorganization of the electric grid.

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[34] *UARG*, 134 S. Ct. at 2444 (internal citation omitted).
[35] *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *UARG* for the same point).
[36] Ex. 1 (Schwartz Decl.), ¶¶ 23-24.
[37] *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). *See also Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("EPA is a federal agency—a creature of statute," and may exercise "only those authorities conferred upon it by Congress.").

Under the Federal Power Act ("FPA"),[38] authority over electric resource planning and development is a state, not a federal, function.[39] EPA's role under Section 111 is to set standards of performance for new stationary sources within a regulated source category—here coal plants—and, under Section 111(d), to call on States to set standards of performance for "any existing source" within that same source category. It is not to dictate wholesale changes in the way an entire industry operates.

EPA's new interpretation is so monumentally implausible as to place it far outside "the bounds of reasonable interpretation."[40] EPA's consistent past construction of the terms "standard of performance" and "BSER" makes sense because EPA, as an air quality regulator, has expertise in the types of emission control technologies or operating practices that can be implemented at the various types of industrial and manufacturing facilities that Section 111 regulates. Conversely, EPA has no special expertise or authority in electricity regulation, as EPA has assiduously maintained in other rulemakings and before this Court.[41] Thus, it makes no sense that Congress would have delegated authority to the EPA to define BSER as a comprehensive restructuring of the electric utility industry, with the myriad technical

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[38] 16 U.S.C. §§ 791 *et seq.*

[39] *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (under the FPA, "the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related concerns.").

[40] *UARG*, 134 S. Ct. at 2442 (citing *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)). *See also MCI Telcomms. Corp.* v. *AT&T*, 512 U.S. 218, 231 (1994) (disapproving agency statutory interpretation as leading to "highly unlikely" result).

[41] *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015).

electric-system judgments that EPA made in formulating that system for each State.[42] As this Court recently said, "grid reliability is not a subject of the Clean Air Act and is not the province of EPA."[43] And as the Supreme Court recently said in *Burwell*, "[i]t is especially unlikely that Congress would have delegated" critical decisionmaking to an agency "which has no expertise" in the matter.[44] So too in *Adams Fruit*: "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'"[45]

Nor does EPA's interpretation even make semantic sense within the four corners of Section 111(d). The language of Section 111(d) provides authority for EPA to devise the best system for reducing emissions from *individual* stationary sources within a particular source category. *See* Section 111(d)(1)(A) (EPA to require States to submit plans containing performance standards "for any existing *source*") (emphasis added); Section 111(d)(1)(A)(ii) (state-established performance standards apply to a source as "if such existing *source* were a new *source*") (emphasis added); Section

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[42] It will not take the Court long in reviewing the Rule and perusing the various technical supporting documents to realize that EPA is asserting expertise in practically every nook and cranny of the national power grid—deciding how much natural gas and renewable generation the system can practicably handle, how much electricity consumers can be incented to save, what could cause the system to cease operating reliably, and many more similar judgments. *See*, particularly, EPA discussion of building blocks 2 and 3, 80 Fed. Reg. at 64,795-811.

[43] *See Del. Dep't of Nat.Res.*, 785 F.3d at 18.

[44] *Burwell*, 135 S. Ct. at 2483.

[45] *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (*quoting Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

111(d)(1)(B) (States may consider "the remaining useful life of *the existing source*") (emphasis added).[46] Section 111(d) does not provide, as EPA would have it, for the agency to treat the entire electric grid—including generating facilities both within and outside the regulated source category and even facilities like renewables that produce no emissions at all—as if it were a single "source" for which EPA can fashion a "best system of emission reduction."

EPA also fundamentally misunderstands the phrase "best system of emission reduction." Under the statute, BSER must be a system that regulated facilities can adopt to meet the emissions standard. Although sources are not required to use the EPA-established BSER, by definition the agency's BSER is its conception of the "best" system for meeting the standard and is of course how EPA arrived at the standard in the first place. We urge the Court to spend some time with EPA's CO_2 Emission Performance Rate and Goal Computation Technical Support Document to try to puzzle through how EPA "applied" what it calls its "BSER" to determine the 1,305 lb/MWh emission standard for coal-fired electric generating units.[47] Whatever else EPA's convoluted national and regional-level calculations may prove, they do not set forth a system of emission reduction that any specific facility within the regulated source category could actually adopt to reduce its emissions.

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[46] *See also* CAA § 302(l) (defining "standard of performance" as "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of *a source* to assure continuous emission reduction." (Emphasis added.)

[47] *See* Ex. 2 hereto.

In the end, the most persuasive evidence of the dubious nature of EPA's new interpretation of Section 111(d) may be the facially nonsensical result that interpretation produces, where the 1,305 lb/MWh standard EPA set for *existing* coal generators is lower than the 1,400 lb/MWh standard it set for *new* coal generators. This is not only unprecedented, it stands the NSPS program on its head. It cannot plausibly be maintained that the "best system" for reducing emissions from coal plants that in many cases are 40 years old can produce better results than the "best system" that can be incorporated into the design of new coal plants today.

II. The Coal Industry, Coal Workers, and Coal Communities Will Be Irreparably Harmed Absent a Stay.

Transforming an entire industry cannot occur overnight. As is detailed in the attached expert declaration and report, the utility industry is highly capital intensive, with decadal-scale lead times for resource planning, preconstruction regulatory review, and construction.[48] The same is the case with the coal industry.[49] Thus, while actual compliance with the Rule is not due to begin until 2022, the final decisionmaking needed to enable compliance by that time must take place immediately. EPA understands the long lead times involved and has required States to submit initial plans within one year "to assure that states begin to address the urgent needs for

[48] Ex. 1 (Schwartz Decl.), ¶¶ 12-15 and attached Schwartz Report at 30-41.
[49] Schwartz Report attached to Ex. 1 (Schwartz Decl.), ¶¶ 48-52; Ex. 3 (Declaration of Colin Marshall) ("Marshall Decl."), ¶¶ 10-13; Ex. 4 (Declaration of J. Clifford Forrest, III) ("Forrest Decl."), ¶ 3.

reductions quickly."[50] EPA also understands that once the industry transformation is firmly underway, it becomes irreversible even if this Court overturns the agency's action through the normal appellate process. The EPA Administrator, for instance, dismissed the Supreme Court's decision reversing the MATS rule because "[m]ost of [the regulated facilities] are already in compliance, [and] investments have been made."[51] The market understands the same thing. From the time EPA first proposed the Rule and condemned the coal industry to a greatly diminished future, coal company share prices have plummeted, coal companies have declared bankruptcy, and access to capital has collapsed. All of this will worsen in the coming months.[52]

The coal industry must take steps immediately to adapt to the transformed market that EPA is demanding. Within the next year, decisions to close coal mines;[53] to curtail coal production and lay off workers;[54] to forego infrastructure development, reduce equipment purchases, and auction off existing equipment;[55] to forego investing millions of dollars in relocating a highway and, as a result, to strand coal reserves;[56] to

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[50] 80 Fed. Reg. at 64,675.
[51] Timothy Cama & Lydia Wheeler, *Supreme Court overturns landmark EPA air pollution rule,* THE HILL (Jun. 29, 2015), *available at* http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule.
[52] Ex. 1 (Schwartz Decl.), ¶¶ 39-40, and attached Schwartz Report at 56-59; declaration of Robert E. Murray ("Murray Decl."), ¶ 49; *see Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 n.2 (D.C. Cir. 1977) ("destruction of a business" constitutes irreparable injury).
[53] Ex. 5 (Declaration of John Siegel), ¶ 6.
[54] Ex. 3 (Marshall Decl.), ¶¶ 14-16.
[55] Ex. 4 (Forrest Decl), ¶¶ 8-10.
[56] Ex. 6 (Declaration of John D. Neumann) ("Neumann Decl."), ¶¶ 19-28.

finalize a mine plan to receive a time-sensitive government mining approval;[57] and to plan out operations of one of the nation's leading coal-hauling railroads[58] will all be made in light of the harsh new market environment that EPA has created.[59]

These decisions, once made, cannot easily be undone. Indeed, EPA's own Integrated Planning Model ("IPM"), which EPA used both to develop the Rule and assess its impact on the power grid, confirms that EPA's desired transformation will begin immediately.[60] Detailed analysis of the IPM results reveals two important factors. First, EPA manipulated its "base case" (the future 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. Rejecting the expert and unbiased forecast of the U.S. Energy Information Administration ("EIA"), EPA substituted its own forecast that assumed that, even without the Rule, a large number of coal generating units that have not announced that they intend to retire nevertheless will do so a few months from now. Second, *even with this manipulation*, IPM forecasts that the Rule will cause 53

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[57] Ex. 7 (Declaration of Chris McCourt), ¶¶ 11-12.
[58] Ex. 8 (Declaration of David T. Lawson), ¶¶ 4-18.
[59] The general rule that economic harm does not constitute irreparable injury is premised on the availability of adequate compensatory or other corrective relief at a later date in the ordinary course of litigation. *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). That premise obviously does not apply here.
[60] Ex. 1 (Schwartz Decl.), ¶¶ 27-38. The IPM results are summarized in the Agency's Regulatory Impact Analysis ("RIA") showing, among other things, how the Rule changes the utility industry's mix of generating resources. *Id.*

additional coal-fired generating units to retire *by 2016* and another 3 units to retire by 2018. These results reflect the reality that units will retire early to avoid near-term investments necessary to maintain operation—including to comply with other EPA regulations with pending compliance deadlines—given that they will be forced to close in 2022 to comply with the Rule.[61]

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.[62] Moreover, the retirement of these units will cause specific coal mines to 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 next year, according to EPA's own model.[63]

If EIA's base case forecast is used to project the future grid without the Rule instead of EPA's arbitrary base case, the projected impact of the Rule is much greater. Comparing EPA's projected coal unit retirements with EIA's base case, the Rule will cause 233 coal-fired power plants to retire in 2016 and another five in 2018. This

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[61] Ex. 1 (Schwartz Decl.), ¶¶ 18-22, 27-30, Schwartz Report at 63.
[62] *Id.*, ¶ 30.
[63] *Id.*, ¶ 31; Ex. 9 (Murray Decl.), ¶¶ 37-42 (identifying Murray Energy coal mines that are significant suppliers of the retiring units); Ex. 6 (Neumann Decl.), ¶¶ 6-18 (consequences of retiring Coal Creek and Coyote stations); Ex. 10 (Declaration of Jeremy Cottrell) ("Cottrell Decl."), ¶ 9 (consequences of retiring Naughton station); Ex. 11(Declaration of Christopher P. Jenkins), ¶¶ 7-8 (lost coal transportation). *See Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 980 (7th Cir. 2012) (finding irreparable harm where Planned Parenthood "would have to lay off dozens of workers, close multiple clinics, and stop serving a significant number of its patients").

reduces national coal production for electric power generation by 171.5 million tons of coal. Even more specific mines will close, resulting in the loss of additional specific mining jobs, the dissolution of specific mining companies, and suffering in additional specific communities—all by 2016.[64]

The impact to local communities and coal-dependent States cannot be overstated. A number of States depend on taxes and royalties from coal mining as a significant revenue source. Moreover, coal mining takes place in typically lower-income areas of the country, many of which have per capita incomes well below and poverty rates well above the national and applicable State average. In contrast, coal mining jobs are among the best-paying blue collar jobs in the country, often paying twice what the average job pays in coal mining areas. And, in some counties in coal country, coal mining jobs are a significant percentage of all jobs.[65]

III. No Parties Will Be Harmed if the Court Grants the Stay.

Granting the stay will freeze the status quo in place while the case is litigated on the merits. Participants in electric power markets therefore will continue business as usual, with none suffering injury as a result of the Court's stay order. Any States wishing to proceed with CO_2 reduction measures would continue to be able to do so if authorized under State law. As a result, entering the stay will not harm other parties.

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[64] Ex. 1 (Schwartz Decl.), ¶¶ 32-38; Exh. 10 (Cottrell Decl.), ¶¶ 8, 10 (consequences of retiring Conesville and Lewis & Clark stations).

[65] Ex. 12 (Declaration of Bill Bissett); Exh. 13 (Declaration of Bill Raney); Exh. 14 (Declaration of Jonathan Downing).

IV. The Public Interest Favors Granting the Stay.

Plainly, there is no public interest in laying off mining workers, depriving small rural communities of the revenue coal mining provides, and hollowing out State budgets that depend on taxes from coal production. Nor is there a public interest in forcing the coal and utility industries to divert otherwise productive resources into commencing the massive industrial transformation the Rule requires. It would similarly be a massive waste of time and resources for every State in the country to embark on reengineering their portions of the electric grid within the next year if ultimately the Court were to reverse the Rule. Because everyone uses electricity, a vast number of interests are affected by the rule, including the public at large. Thus, every State will have to undertake intensive and broad stakeholder processes to make the changes in their electric utility systems that EPA demands. All of this time, effort, money, and controversy will be for naught if the Rule is overturned. Worse, changes to the grid that States would not otherwise choose to make will become locked in.

On the other side of ledger, staying the Rule will not adversely affect the climate because the Rule will not affect the climate. For instance, the amount of CO_2 emission reductions that EPA predicts that the rule will create in 2030 when the Rule is fully implemented—415 million tons[66]—is well under one percent of global man-made "CO_2e" (CO_2 and other greenhouse gases expressed as CO_2 equivalent) emitted

[66] RIA, Table ES-2 at ES-6.

today.[67] Indeed, EPA does not even attempt to estimate how the rule will improve the climate. As EPA recognizes, "climate change presents a problem that the United States alone cannot solve. Even if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from enough to avoid substantial climate change."[68] Using EPA's theory of how sensitive the climate is to atmospheric CO_2 concentrations, the rule will reduce global temperatures by a mere 0.016°C by 2050 and lower sea level rise by the width of three sheets of paper.[69] Obviously, then, delaying implementation of the Rule for the time it takes to litigate this case will have no possible effect on the climate.

CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court enter an order staying the Rule.

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[67] The latest United Nations Environment Programme (UNEP) Emissions Gap Report estimated that global CO_2e emissions were 50.1 billion metric tonnes in 2010, a figure that the report estimated had increased somewhat since then. UNITED NATIONS ENVT. PROGRAMME, THE EMISSIONS GAP REPORT 2013: A UNEP SYNTHESIS REPORT, 3 (Nov. 2013), *available at* http://www.unep.org/publications/ebooks/emissionsgapreport2013/.

[68] Interagency Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (revised 2015) at 14.

[69] AM. COALITION FOR CLEAN COAL ELEC., CLIMATE EFFECTS OF EPA'S PROPOSED CARBON REGULATIONS (2014), *available at* http://www.americaspower.org/sites/default/files/Climate%20Effects%20Issue%20Paper%20June%202014.pdf.

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CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rule of Appellate Procedure 21(d) because it does not exceed 20 pages, excluding the parts of the motion exempted by 21(d). This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of October 2015, per agreement of counsel, one copy of the foregoing Coal Industry Motion for Stay was served by electronic mail on each of the following:

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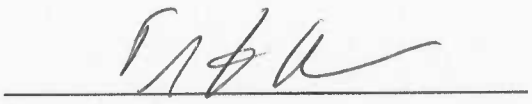

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EXHIBIT LIST

Exhibit 1	Declaration of Seth Schwartz, Energy Ventures Analysis, Inc.
Exhibit 2	EPA, "CO_2 Emission Performance Rate and Goal Computation Technical Support Document"
Exhibit 3	Declaration of Colin Marshall, Cloud Peak Energy, Inc.
Exhibit 4	Declaration of J. Clifford Forrest, III, Rosebud Mining Company
Exhibit 5	Declaration of John Siegel, Bowie Resource Partners, LLC
Exhibit 6	Declaration of John D. Neumann, North American Coal Corporation
Exhibit 7	Declaration of Chris McCourt, Colowyo Coal Company, LP
Exhibit 8	Declaration of David T. Lawson, Norfolk Southern Corporation
Exhibit 9	Declaration of Robert E. Murray, Murray Energy Corporation
Exhibit 10	Declaration of Jeremy Cottrell, Westmoreland Coal Company
Exhibit 11	Declaration of Christopher P. Jenkins, CSX Transportation, Incorporated
Exhibit 12	Declaration of Bill Bissett, Kentucky Coal Association
Exhibit 13	Declaration of William R. Raney, West Virginia Coal Association
Exhibit 14	Declaration of Jonathan Downing, Wyoming Mining Association