ORAL ARGUMENT NOT YET SCHEDULED

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

State of West Virginia, et al., Petitioners, v. United States Environmental Protection Agency, et al., Respondents.	)	No. 15-1363 (and consolidated cases)

RESPONDENTS' OPPOSITION TO PETITIONERS' JOINT MOTION TO ESTABLISH BRIEFING FORMAT AND EXPEDITED BRIEFING SCHEDULE

Respondents United States Environmental Protection Agency ("EPA") and its Administrator, Gina McCarthy, submit this Opposition to Petitioners' Joint Motion to Establish Briefing Format and Expedited Briefing Schedule, ECF No. 1587531. There is no sound reason for the Court to entertain such a motion at this stage of the case, and the procedure suggested by Petitioners would be counterproductive, unworkable, and prejudicial to Respondents.

Petitioners ask this Court to take the highly unusual step of bifurcating, and then partially expediting, the briefing of their challenges to EPA's Clean Power Plan Rule ("Rule"). They have made that request without regard to the pendency of the nine stay motions they have filed, the resolution of which will have significant

implications for merits-briefing procedure. Moreover, the inefficient divided briefing format proposed by Petitioners would seriously impede the orderly consideration of this case. It could substantially delay ultimate resolution (and thus the certainty Petitioners claim they are seeking) by requiring two potentially duplicative rounds of briefing and multiple oral arguments in proceedings involving challenges to the same agency rule. It would introduce confusion about which of the overlapping issues are actually before the Court during each round of briefing. And it would unduly constrict Respondents' ability to effectively brief the issues.

Petitioners' motion should be denied. Instead, the Court should invite the parties to submit proposals (jointly to the extent possible) for further proceedings, including non-bifurcated merits briefing, at a reasonable time following a decision on the pending stay motions.[1]

BACKGROUND

The statutory and regulatory background are discussed in detail in Respondents' Opposition to the motions for stay. See ECF No. 1586661 ("Stay Opp.") 3-11. As explained there, the Rule challenged in this case is an exercise of

[1] In setting a briefing schedule for challenges to the Rule, it may also be appropriate to consider the briefing schedule for petitions challenging a related rule establishing emission guidelines for new power plants under Section 111(b) of the CAA, 42 U.S.C. 7411(b), which are consolidated as North Dakota v. EPA, No. 15-1381. The cases involve many of the same parties, who may benefit from staggered briefing that avoids substantially coterminous deadlines. Proposed briefing formats are due in that case on January 11, 2016. ECF No. 1586106.

EPA's authority under Section 111 of the Clean Air Act ("CAA"), 42 U.S.C. 7411, to promulgate regulations to secure critically important reductions in carbon dioxide ("CO_2") emissions from the largest emitters in the United States – fossil-fuel-fired power plants. The Rule identifies a set of highly cost-effective and proven emission-reduction strategies already widely employed by power plants as the "best system of emission reduction . . . adequately demonstrated" for existing plants. 42 U.S.C. 7411(a)(1). It then relies on those strategies to set guidelines for states (or, if a state so chooses, EPA acting on its behalf) in establishing performance standards for those plants. Pursuant to those guidelines, states have up to three years to develop plans—which may utilize the strategies identified in the Rule itself, or other strategies that the state may prefer—to meet overall statewide emissions targets. The emission targets begin in 2022 at the earliest, and the Rule requires no action by any entity in any industry before that point. The Rule will not result in any substantial increase in electricity costs to the public; will not reduce the reliability of the electricity system; and is consistent with long-term trends in the generation of energy.[2]

[2] See 80 Fed. Reg. at 64,671, 64,679-81, 64,748-51, 64,694-96, 64,709. Regulatory Impact Analysis, Docket No. EPA-HQ-OAR-2013-0602-36877, 3-35 to 3-40; Decl. of Kevin Culligan, ECF 1586661 at pages 185-204 of total; Power Companies' Stay Opposition, ECF 1587423, at 1-4, Advanced Energy Associations Stay Opposition, ECF 1587482, at 3-7; Decl. of J.D. Furstenwerth ¶¶ 16 29 (ECF 1587530 at 859-68); Decl. of Malcolm Woolf ¶¶ 38 46 (ECF 1587530 at 1184-91. See also Brian Wolff, "Utilities Are Taking Action to Reduce Carbon Emissions," (Dec. 5, 2015), https://medium.com/@brianwolff/as-negotiators-from-nearly-200-countries-gather-in-paris-to-forge-a-new-global-agreement-to-achieve-a89c6c00f0c4#.a1hgg7diw

A number of Petitioners and Petitioner-Intervenors have filed nine motions to stay the Rule, one of which also requested expedited consideration. See State Petrs. Mot., ECF No. 1579999. Petitioners have now filed a separate motion asking the Court to bifurcate the case, expedite briefing and argument on a subset of the issues raised, and delay briefing and argument on the remaining issues until the Court issues a decision on that subset.

ARGUMENT

Petitioners' motion is misconceived in both its timing and its substance. The parties and the Court cannot make a sound determination about an appropriate briefing schedule until the stay motions are resolved. And regardless of the disposition of the stay motions, Petitioners' proposal to bifurcate the proceedings—thereby inviting multiple rounds of briefing, multiple arguments, and multiple decisions—is inefficient, impractical, and unwarranted.

1. Regardless of whether a stay is entered, Respondents are committed to facilitating efficient merits consideration of this case in order that the parties, the public, and the international community can all obtain reasonably prompt certainty about the regulation of CO_2 from the highest-polluting sources in the United States. It would be premature, however, to consider Petitioners' briefing proposal while the stay motions remain pending. The Court's decision about whether to grant

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(representative of industry trade association discussing considerable efforts already taken by utilities to invest in zero-emission sources).

Petitioners the extraordinary relief of a stay will substantially affect the posture of the case, and thus the considerations that would inform the proper procedures going forward.

A decision denying the stay motions would necessarily rest on a conclusion that Petitioners have failed to show a likelihood of success on the merits, failed to show that the balance of harms favors immediate relief, or both. See Nken v. Holder, 556 U.S. 418, 434 (2009); see also D.C. Cir. R. 18(a)(1). As this Court's internal operating procedures make clear, both of those issues are highly relevant to the determination of an appropriate course of briefing. See Handbook of Practice and Internal Procedures ("D.C. Circuit Handbook") 33 (listing a showing that "delay will cause irreparable injury" and that "the decision under review is subject to substantial challenge" as general prerequisites to expedited briefing). A decision to grant a stay is likewise identified in this Court's procedures as an extremely important factor in deciding how consideration of the merits should proceed. See id. at 34 (discussing expedited briefing in stayed cases); id. at 33 (expedition appropriate in cases where third parties or the public at large have an "unusual interest" in a prompt disposition). The optimal briefing procedure could well be different in a scenario where a stay were delaying the effectiveness of the Rule's critically important regulatory initiative than in a scenario where the Court has agreed with Respondents (see Stay Opp. 52-67) that the Rule—which does not require any major action by either states or industry entities for years—does not imminently harm Petitioners.

In addition to the uncertainty created by the pending stay motions, Petitioners' motion is also premature for the additional reason that the period for filing petitions for judicial review has not yet closed. The CAA's 60-day window for challenging a regulation after its publication in the Federal Register will not close under December 22, 2015. See 42 U.S.C. § 7607(b)(1); 80 Fed. Reg. 64,510 (publication on October 23, 2015). As a result, there may be additional parties to the case, with different interests, that are not presently before the Court and able to be heard on the briefing schedule. Indeed, at least three petitions for review of the Rule have been filed since Petitioners' motion was filed,[3] and EPA has been informed of the likelihood that at least one additional petition for review, raising issues distinct from the ones that have been raised thus far, will be filed before the deadline expires.

2. Assuming it were appropriate to consider Petitioners' motion now, without knowing the disposition of the stay motions, the motion should be denied. Petitioners' proposal is inefficient, unworkable, and prejudicial to Respondents.

First, Petitioners' proposal could easily result in *delay*, rather than the expedition they claim to seek. Petitioners' exceptional suggestion for seriatim briefing would allow the case to reach final judgment more quickly only if one accepts the one-sided premise that Petitioners will prevail on their initial set of arguments, thereby obviating

[3] Indiana Utility Group v. EPA, No. 15-1459 (filed Dec. 14, 2015); North American Coal Corp. v. EPA, No. 15-1451 (filed Dec. 14, 2015); Kansas City Bd. of Pub. Utils. v. EPA, No. 15-1442 (filed Dec. 8, 2015).

the need for the second round of briefing, argument, and judicial decision. For reasons explained in the stay opposition, that premise is unsound, as Petitioners have failed to show a likelihood of success. See Stay Opp. 11-52. But even assuming (in the absence of a decision on the stay motions) that the merits questions had a roughly equal likelihood of coming out either way, it makes little sense to adopt a schedule that has a significant chance of *postponing* a final decision in this case. Considerations similar to those underlying the general federal policy against piecemeal appeals—which exists in large part to avoid unnecessary "delays" and "serves the important purpose," *inter alia*, "of promoting efficient judicial administration," Cunningham v. Hamilton Cty., 527 U.S. 198, 203-204 (1999) (internal quotation marks and citation omitted)—counsel strongly against Petitioners' proposal here.

Second, Petitioners' proposal is unworkable. The "core" issues that would be the subject of their first round of briefing and the "programmatic" issues that they would delay for a second round of briefing are vaguely defined and fundamentally interrelated with one another. For example, Petitioners would have the Court treat as a "fundamental legal" matter, apparently amenable to "speedy" resolution without assiduous "record-based" analysis, such purported "core" issues as whether EPA has properly determined particular emissions-reduction measures to be part of the "best system of emission reduction . . . adequately demonstrated" for existing power plants. Mot. 4-5, 8, 13-14. But the Court cannot fully evaluate that challenge without careful and detailed examination of the administrative record supporting EPA's

judgments and interpretations, and without considering Petitioners' more specific objections as to how EPA actually applied the "best system of emission reduction . . . adequately demonstrated" and determined the emission guidelines. EPA's determination of the "best system of emission reduction … adequately demonstrated" for power plants is based on an extensive record that demonstrates that power plants are fully capable of implementing the contested measures and have a long history of doing so. 80 Fed. Reg. at 64,795, 64,803-04.

As a further example, Petitioners ask the Court to address as a "core" issue their claim that the Rule constitutes an undue intrusion into the states' regulation of the electricity market. It would be impractical to consider that claim without considering the administrative record or addressing the specific ways that Petitioners assert that the Rule interferes with state electricity regulation. Yet Petitioners identify (for example) "Texas's objection that the Rule will force the State to redesign the [operation of the State's] … wholesale and retail electricity market" as a "programmatic" issue to be addressed only after decision on the "core" issues. Mot.10-11.[4]

[4] The nonbinding, preliminary statements of issues that Petitioners filed on December 18 provide further illustration of the difficulties that Petitioners' artificial dichotomization of the issues would create. West Virginia, et al., for example, label as "programmatic" various issues—such as how EPA determined what qualifies for emission rate or compliance credits, and how EPA considered the costs of compliance—that in fact go to fundamental aspects of EPA's overall determination of the best system of emission reduction. Issue Statement of West Virginia, et al., ECF

Petitioners posit (Mot. 12, 17) that bifurcation between "core" and "programmatic" issues may be appropriate here because some of the latter issues have been raised in pending administrative reconsideration petitions and may be unripe for review. Such a ripeness problem could exist, however, only with respect to issues that could not have been raised in comments during the rulemaking. 42 U.S.C. § 7607(d)(7)(B); Utility Air Regulatory Group v. EPA, 744 F.3d 741, 746 (D.C. Cir. 2014). Petitioners' motion does not specifically identify which administrative reconsideration petitions, if any, raise issues that would satisfy that criterion. Indeed, an examination of the reconsideration petitions demonstrates that they largely raise issues inextricable from the supposed "core" issues that Petitioners agree are ripe. See, e.g., Ameren Reconsideration Pet. (Att. 1) (challenging EPA's statutory authority to promulgate the Rule); New Jersey Reconsideration Pet. (Att. 2) (broadly challenging factual record inextricably intertwined with EPA's determination of the "best system of emissions reduction"). To the extent any administrative reconsideration petitions do, in fact, raise discrete issues that are not yet ripe, the proper course under the CAA is not the broad, amorphous, and arbitrary bifurcation that Petitioners have suggested, but instead severance and abeyance of those issues alone. See 42 U.S.C. § 7607(b), (d)(7)(b) (administrative petition for reconsideration does not render rule unripe for

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No. 1589417, at 2-6.

purposes of judicial review except as to issues that could not be raised during comment period).[5]

Third, Petitioners proposal would substantially prejudice Respondents' ability to effectively litigate the case. To begin with, in the present posture and in the context of the briefing schedule proposed by Petitioners, Respondents' suggested 33-day interval for Respondents' brief after filing of Petitioner-Intervenors' brief is unreasonably short. Furthermore, there is no sound justification for Petitioner-Intervenors to have a separate brief raising new issues, or to file that separate brief later than other Petitioners. As Petitioners' motion makes clear, the Petitioner-Intervenors intend to raise issues that are different from those raised by the other Petitioners. Mot. at 15. The rule in this circuit, however, is that Petitioner-Intervenors may not raise new issues; they "may only argue issues that have been raised by the principal parties." National Ass'n of Regulatory Utility Commissioners v. Interstate Commerce Comm'n, 41 F.3d 721, 729 (D.C. Cir. 1994).[6] Relatedly, while

[5] Over a week after the present motion was filed, Petitioners LG&E and KU Energy LLC filed a new administrative reconsideration petition, and on December 18, 2015, they moved this Court to sever and hold in abeyance the issues raised in that petition. ECF No. 1589612. Respondents have not yet had the opportunity to address that severance motion

[6] Moreover, most (if not all) of the Petitioner-Intervenors are members of at least one trade association that is a petitioner in the case. Since such associations may only participate in the litigation as representatives of their members, there is no reason to believe that Petitioner-Intervenors and the trade associations representing them cannot join in the same brief. At a minimum, they will certainly have the opportunity to review and comment on their trade associations' brief, and they do not need extra

Petitioners' vague itemization of issues in their motion makes it difficult to determine the appropriate page limits for briefing, fundamental fairness counsels that Respondents be given a number of words equal to those given to Petitioners and Petitioner-Intervenors combined if Petitioner-Intervenors are authorized, notwithstanding the rule of the circuit set forth above, to file a separate brief raising new issues.

CONCLUSION

Petitioners' motion should be denied. The Court should instead invite the parties to submit proposals (jointly to the extent possible) for further proceedings, including non-bifurcated merits briefing, at a reasonable time following a decision on the pending stay motions.

Respectfully submitted,

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Dated: December 21, 2015

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time after Petitioners' brief is filed to file any necessary separate brief.

Certificate of Service

I certify that the foregoing document was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, and that, under Circuit Rule 21(d), four paper copies of the brief were delivered to the Court by hand.

I further certify that a copy of the foregoing document was today served electronically through the court's CM/ECF system on all registered counsel for Petitioners and Intervenors.

I further certify that a copy of the foregoing document was served by electronic mail or by U.S. Mail on the following non-CM/ECF counsel for Petitioners and Intervenors:

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Dated: December 21, 2015

October 28, 2015

AMEREN PETITION FOR RECONSIDERATION, RE-PROPOSAL, AND STAY

OF THE

Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015)

and Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510 (Oct. 23, 2015)

and Federal Implementation Plan 80 Fed. Reg. 64966 (Oct. 23, 2015)

Dockets: EPA-HQ-OAR-2013-0602; EPA-HQ-OAR-2013-0495; EPA-HQ-OAR-2013-0603; EPA-HQ-OAR-2015-0199

On behalf of Ameren Corp. and its operating subsidiaries (Ameren), the undersigned requests that the U.S. Environmental Protection Agency (EPA) reconsider issuance of the above-referenced suite of rules, known herein as the Clean Power Plan (CPP or Rule) and the NSPS. The final CPP and NSPS rules were signed by you on August 3, 2015, and were published by the *Federal Register* on October 23, 2015. This petition also includes initial comments on the Federal Plan Requirements, or FIP, proposal that was signed by you on August 3, 2015, and formally proposed in the *Federal Register* on October 23, 2015. Specifically, certain provisions of the FIP materially affect and influence the CPP and NSPS and so this petition necessarily addresses those aspects of the proposed FIP and requests that the FIP be considered at the same time as the CPP and the NSPS. Because the rules are so intertwined, we refer to the CPP, NSPS, and the proposed FIP as the "suite of rules." Rules issued pursuant to Section 111 of the Clean Air Act (CAA), as this suite of rules is, are immediately effective upon publication, 42 U.S.C. § 7411, and so a stay is requested during the above reconsiderations.

Ameren challenges the suite of rules herein because they materially depart from the proposed versions of the rules in both rationale and substance, as detailed below. Accordingly, these rules are legally deficient on procedural grounds because EPA did not allow for adequate notice of and opportunity for comment on both the final rules and the technical support developed by EPA in support, as required by the CAA and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.,* 5 U.S.C. § 701 *et seq*. Ameren can demonstrate that it was impracticable to raise objections on matters of central relevance to the outcome of the suite of rules because of the lack of notice. 42 U.S.C. § 7607(d)(7)(B). Further, several aspects of the rules are arbitrary and capricious, abuse the discretion granted to EPA, or otherwise are not in accordance with the law. Reconsideration is unquestionably appropriate. 42 U.S.C. § 7607(d)(7)(B); *see also* 5 U.S.C. § 553(e). The Administrator must therefore "convene a proceeding for reconsideration of the rule[s] and provide the same procedural rights as would have been afforded had the information been available at the time the rule[s] [were] proposed." 42 U.S.C. § 7606(d)(7)(B).

The undersigned also asks EPA to grant an administrative stay of the CPP and NSPS pending the outcome of this request for reconsideration. Section 705 of the APA grants EPA the authority to stay the effectiveness of a rule pending judicial review when "justice so requires." 5 U.S.C. § 705. Further, the stay request is necessary to show that Ameren has exhausted administrative options before a judicial action may proceed. Fed. Rule App. Proc. 18(a)(1).

For the reasons stated below, justice requires EPA to issue an administrative stay before state agencies charged with implementing the CAA and the regulated community take costly and irreversible actions. Ameren requests reconsideration of each of the rules, separately and together, and a stay of each until EPA re-proposes them together, allows for public comment on each concurrently, and issues new final rules concurrently.

I. THE SUITE OF RULES CONSTITUTES A NEW PROPOSAL BECAUSE THE RULES ARE INEXTRICABLY INTERLINKED.

EPA has finalized two rules, CPP and NSPS, which were previously proposed as three rules and added a new Federal Implementation Plan (FIP) and Model Trading Rule. The "suite" of rules is:

- The Section 111(b) New Source Performance Standard, proposed at 79 Fed. Reg. 1430 and finalized at 80 Fed. Reg. 64510. This rule sets forth standards of performance for new coal-fired and natural gas-fired units, and these standards of performance apply across the nation.

- The Section 111(b) Modified and Reconstructed Unit Performance Standards, proposed at 79 Fed. Reg. 34960 and finalized at 80 Fed. Reg. 64510. This final rule sets forth standards of performance at existing units that undergo significant changes, and these standards of performance apply across the nation.

- The Section 111(d) Standards of Performance and Emission Guidelines for Existing Fossil Fuel Fired Units, proposed at 79 Fed. Reg. 34830 and finalized at 80 Fed. Reg. 64662, known as the Clean Power Plan (CPP). The CPP sets forth individual state goals, called the standards of performance, and emission guidelines that set forth requirements for states to develop and implement plans to meet the individual standard of performance.

- In addition, a fourth proposal exists, 80 Fed. Reg. 64966. The proposal, called the Federal Plan Requirements or FIP proposal, actually contains provisions to fix errors or omissions in one of the above rules, as well as a complex set of trading options that EPA will impose on a state that refuses or is unable to develop a Section 111(d) plan.

The final rules and proposals were not and could not have been expected. They are new rules, plain and simple, with new substance, new concepts and a new framework, and the benefit of public notice-and-comment is apparent from the actions of fully half the states affected by the rule. Moreover, the FIP trading proposal is in its nascence, having been drawn out of whole cloth yet presented with the final rules as an "integral" part of the final rules. Rather than re-propose the CPP – complete with its new logic, structure and regulatory approach - EPA has hastened the CPP through the rulemaking process notwithstanding its significant and material reconstruction. As a consequence, stakeholders including Ameren did not get the chance to comment on the new features of the final rules and have yet to fully digest the infant new rule. Reconsideration would allow all stakeholders including Ameren to fully evaluate and comprehend the consequences and implementation options set forth by EPA's suite of rules and would help to mitigate the significant due process deficiencies inherent in EPA's rulemaking approach. Further, during reconsideration, EPA could improve upon and repair legal or technical deficiencies that the public identifies.

The final CPP is similar to the proposed version in name only. When EPA proposed the CPP, each state was to act largely within its jurisdictional boundaries, developing state-specific programs to achieve EPA-mandated state GHG reduction goals. In the intervening months between proposed and final versions, EPA reversed its underlying regulatory rationale, which necessitated a fragmentation of regulatory requirements and obligations across three separate yet intertwined rules. EPA changed its target setting methodology in favor of an entirely new formula, and authorized in a separate rulemaking a federal market trading program that is designed to serve as a model for state trading programs. The revisions are dramatic and unforeseeable, and the public has not been given an adequate opportunity to comment on them.

Perhaps the most obvious, yet unforeseeable, changes to the CPP were the changes to the final state goals. On the surface, the goal structure looks similar. But as you read and consider the intertwined rules, the impact is quite different. Rather than an "all of the above strategy," the plan, according to many who have tried to evaluate it, requires a massive build out of wind and solar energy sources. These sources, at the levels anticipated by this rule, will cover huge amounts of sparsely developed or agricultural properties at excessive costs to ratepayers. (Ameren provides an illustration of this point on page 7.) And EPA notes that the reductions to be achieved, which are substantially less than the light-

duty vehicle rule, do not have an impact sufficient to be recognized by climate models.[1] After an appropriate comment period, stakeholders would be able to consider how the re-focus on renewable generation affects the suite of rules, and that is exactly what Ameren requests.

Because of EPA's regulatory braiding, this request for reconsideration covers all of the above rules, requesting that each be presented as a proposal *at the same time*, allowing adequate time for comment. Further, the final rules should be issued *at the same time* and should include EPA's legally required, appropriate and complete responses to comments covering the intertwined set of rules. Because of the economic and resource-intensive impact of the CPP, much of the remainder of this request is directed specifically at the CPP, while making note of its close relationship to the NSPS and FIP. Ameren will not recite in detail what the suite of rules do, as it assumes EPA is well aware of the background. Instead, Ameren provides in Section IV, its *preliminary* observations about the rules' significant changes in substance, logic, and support. Ameren would have addressed these more completely had Ameren been afforded adequate opportunity to do so during the public comment period. Ameren focuses on issues that it would raise had these rules been properly re-proposed so that the administrative record contains certain matters of central relevance, thereby preserving a reviewing court's ability to evaluate the rules.

Ameren is keenly aware of the Administration's desire to complete its rulemaking efforts. However, a rulemaking that suffers from such clear and unmistakable procedural deficiencies cannot survive judicial review. The APA exists to keep government from acting prematurely, before thoughts are publicly and adequately vetted. Political expediency does not trump legal due process.

Set forth below are but two examples, among numerous reasons, why this suite of rules is so vulnerable to process deficiency attacks that EPA must take the necessary step to allow interested parties to fully comment on the now-changed rules. The examples: Trading and set-asides.

In the CPP, trading, and likely interstate trading, is now the lynch pin of the effort to reduce carbon dioxide (CO_2) from existing power plants whereas, in the proposal, it was merely an option. Yet comments will be taken on the proposed trading plans *after* the CPP is promulgated. No one can know what comments will be made about the trading plans and how those comments may affect the contents of the final trading rule, including whether EPA will do a turn-about on the legal authority for a trading plan.[2] Since EPA changed its legal rationale for the CPP, an about-face on whether trading is legal authorized or viable would doom the carbon reduction policy goals of the CPP. Modeling may show that

[1] "Although the GHG emission reductions projected for this final rule are large (estimated reductions of about 415 million short tons of CO_2 in 2030 relative to the base case under the rate-based illustrative plan approach—see Table 14 above), the EPA evaluated larger reductions in assessing this same issue in the context of the light-duty vehicle GHG emission standards for model years 2012–2016 and 2017–2025. There the agency projected emission reductions over the lifetimes of the model years in question 1042 which are **roughly five to six times** those projected above and, based on air quality modeling of potential environmental effects, concluded that ''EPA knows of no modeling tool which can link these small, time-attenuated changes in global metrics to particular effects on listed species in particular areas." 80 Fed. Reg. 64925 (emphasis added).

[2] Under the CPP the states are encouraged to establish trading compacts. The proposed FIP provides an inkling of what EPA today considers an approvable plan, but also is a cudgel in the event the states fail to develop a satisfactory state plan.

the trading programs, as contemplated by the proposed rule and premised upon a massive build out of renewable energy, simply would not get the CO_2 emission reductions that EPA assumes possible, and that without harming reliability. The CPP, then, is *contingent* on something that cannot be known in its entirety today and in fact may not even exist in a year. The recently invalidated Mercury and Air Toxics Standard shows the undeniable harm that occurs when a rule's underpinnings are not resolved prior to the regulated community taking action in reliance on a new rule.

Further, both the CPP and the FIP contemplate allowance "set asides," or other incentives, that will benefit new renewable generation *more* than new generation that does not classify as renewable. The FIP, in fact, requires 5% set asides for such purposes. These set-asides reduce the number of tradeable credits available to existing sources, amounting to a double-whammy against existing sources that would need to turn around and purchase credits from renewable sources that operate less reliably and at capacity factors wholly insufficient to service the required load. The FIPs also serve as "model" trading rules *and*, if adopted exactly as is by a state, they are presumptively approved by EPA. This "choice"-- to devise wholesale a new trading program without knowing whether such a program will be approved by EPA, let alone work, or to simply adopt EPA's "model" which will be automatically approved -- leverages the states into adopting not only the structure that EPA has chosen but the allocation methods EPA has chosen. And, because EPA has linked the CPP and FIP in substance without bothering to link their respective timelines, states may have to adopt and implement the "model" FIP before the FIP is even finalized and before the FIP set-aside numbers have been vetted for their impact on reliability. By staggering the proposal and eventual promulgation dates of the intertwined rules yet tethering the date by which states must make program design decisions, EPA has in effect selected the outcome.[3] This simply is not what the APA contemplated for rulemaking.

EPA should allow the suite of rules to be re-proposed at the same time and finalized at the same time so that inconsistencies may be resolved in the final rules, authority issues are clearly understood, and implementation can be perceived as a straight path, not a long and winding road.

II. THE CLEAN POWER PLAN COMPONENT OF THE SUITE IS A NEW RULE, NOT A LOGICAL OUTGROWTH AS REQUIRED BY THE APA.

EPA developed the CPP, a proposal to reduce CO_2 emissions from existing sources, focusing on setting forth guidelines for state requirements and action. EPA now admits that the state-focused approach it took was legally deficient because the emitting sources could not implement the guidelines directly. 80 Fed. Reg. 64720. Therefore, EPA changed the rule to one that focuses on emitting sources, classified in traditional source categories, which simply *allows* states to remove the compliance burden from existing sources by permitting the state to impose reductions on or use voluntary reductions from "other" entities within the state. EPA admits it changed its logic, changed the "building blocks," changed the state goals and method of calculation of them, changed the outlines of the state plans, added some requirements, and took some away. In short, the rule has been altered so significantly, it is a little like

[3] Notwithstanding the fact that EPA deferred final publication of the CPP until October 23, 2015, it did not provide a corresponding extension the to the initial state submittal date of September 6, 2016. Unless EPA summarily disregards public comments, the FIP with its model trading program will not be finalized until the summer of 2016 at the earliest, thus forcing states to make decisions based on a *draft* regulatory proposal.

looking at a fun-house mirror – the pieces *should* be recognizable but they are skewed, off, murky, and bulging. How could states or the regulated community have expected this new rule?

The legality of any administrative rule is evaluated with respect to the edicts in the authorizing statute – the substantive requirements of the CAA, the procedural requirements of the APA and the CAA, and the court's precedent concerning promulgation of rules. The APA demands proper notice and opportunity for real comment on the rule. A rule cannot be so changed from the proposal that the parties could not have predicted it. The final rule differs so extensively from the proposal that it is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." 42 U.S.C. § 7607(d)(9)(A). *See also Environmental Integrity Project v. Environmental Protection Agency,* 425 F.3d 992, 996 (D.C. Cir. 2005).

This petition is well-grounded in the law. The rules must be examined as a whole, not as the parts individually, and thus Ameren requests that EPA re-propose the suite of rules as a single "animal," that can be seen in totality, not as a head, legs, and tail that Ameren must interpret to be a specific animal. Notice-and-comment must allow real examination of the interrelationship of these complex rules' parts to determine whether the rule can legally stand – or practically work. The CAA *requires* EPA to convene a proceeding for reconsideration of the rule where the petitioner can demonstrate that it was impracticable to raise an objection during the initial comment period, and where the objection is of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). In Section IV below, Ameren notes several such matters of central relevance, each of which is either new to the final rule or significantly changed from the proposal, and thus was impracticable to address during the comment period.

A. EPA shakes the logical foundation and reconstructs the energy mix – again.

The preamble identifies numerous logic shifts away from the proposal's logic. EPA develops a standard of performance for two subcategories of generating units; before, it developed only a "state goal" and no unit-specific standard existed. Shifting generation from CO_2-emitting units is an explicit process rather than one left to state policy, and re-dispatch to a fuel that emits *any* CO_2 is disfavored. This is a stark departure from the proposed CPP, which encouraged conversion of coal-fired generating units to lower emitting natural gas or similar fuels.[4] EPA now highlights "leakage," a newly defined concept,[5] as

[4] 79 Fed. Reg. 34856, 57 (Jun. 18, 2014)("The first grouping of CO_2 emission reduction options that the EPA evaluated as potential options for the BSER consists of measures that can reduce individual EGUs' CO2 emission rates . . . These measures included . . . substituting lower-carbon fuels such as natural gas for higher-carbon fuels such as coal (i.e., natural gas co- firing or conversion).").

[5] "[W]e, again, define as "leakage" the potential of an alternative form of implementation of the BSER (e.g., the rate-based and mass-based state goals) to create a larger incentive for affected EGUs to shift generation to new fossil fuel-fired EGUs relative to what would occur when the implementation of the BSER took the form of standards of performance incorporating the subcategory-specific emission performance rates representing the BSER." 80 Fed. Reg. 64822. The system of emission reduction has to include a mechanism that does not simply shift from coal to NGCC; the system must offset more. 80 Fed. Reg. 64747.

a driver for the shift from emission guidelines that encouraged the shift to *any* lower emitting fuel to the new logic of giving strong preference to renewable wind and solar energy projects.[6]

Such regulatory preferences are not realistic and supplant the state's traditional role of determining the appropriate, reliable generation mix and regulatory structure for its citizens. A MW of capacity is not necessarily fungible with another MW of capacity as shown by Ameren's recent practice. In 2014, Ameren placed into service a 5.7 MW solar farm in O'Fallon, Missouri. The sun does not shine at all hours though, so the 81-acre facility does not produce energy at night, and even when clouds pass, energy is greatly reduced. During peak sunny times, O'Fallon produces 4-5 MW of energy, declining to 0.5 to 1.0 MW on overcast days, and those overcast days are equivalent to 3 or 4 months out of the year. In contrast and at a 75% capacity factor, the 2374 MW Labadie Energy Center would produce on an annual basis 15,768,000 MWh of power around the clock, 12 months a year.[7] To replace this power with a renewable energy resource in Missouri would take a gargantuan solar farm large enough to virtually cover the 49,000-acre Lake of the Ozarks, or would require the purchase of energy from sunnier parts of the country, transferring rate payer dollars from supporting the Missouri economy to subsidizing out of state renewable developers. While wind has a higher capacity factor (EPA estimates 42% nationwide but this is not possible at all locations at all times), its availability factor renders it non-reliable for base load operations. [8] The acreage needed to build a 4,300 MW wind farm (operating at a 42% capacity factor) to replace the energy provided by Labadie is even more dramatic – 129,000 acres, one hundred and fifty three (153) times the size of Central Park.

EPA relies on claims that the public was notified of potential changes in the goal setting structure from the "NODA," released on October 28, 2014, published in the Federal Register on November 13, 2014, a mere two weeks prior to the proposal's comment deadline of December 1, 2014.[9] EPA ignored requests at the time to extend the public comment period to allow for adequate understanding and implications of the NODA. The NODA requested comment on an alternative approach, a complex "techno-regional" analysis that required significant grounding in modeling to understand. The request for comments simply came too late in the game for EPA to credibly claim that changes "signaled" in the NODA were adequate to constitute proper and sufficient notice, yet that is just what EPA is now saying.

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[6] 80 Fed. Reg. 64903 (Oct. 23, 2015) ("In light of the emissions leakage concerns, and in consideration of these comments, the EPA is not allowing shifting generation to new NGCC units to be used as a measure for adjusting CO_2 emission rates for affected EGUs in rate-based state plans.").

[7] Under normal operations and absent the mandates of the CPP, Labadie is projected to operate at an 85% annual capacity factor and generate 17,700,000 MWh.

[8] The capital cost to build an 8,696 MW solar or a 4,306 MW wind farm (equivalent to the generation of Labadie Energy Center) is beyond exorbitant: $17.4 and $8.6 billion respectively. See Attachment 5. That assumes, of course, that one could assemble the acreage to construct the facilities.

[9] Contrast that two week timeframe to the time between EPA's August 3 "prepublication notice" of the final rule to its actual publication in the Federal Register on October 23, 2015. EPA had more time to "proof" its final rule than it allotted to the regulated community to understand the implications of what became the basis for a significant logic shift VERY late in the proposal comment period.

To find evidence that the CPP component of the suite is a new rule, one need only compare the text of the proposed rule to the final rule. We have done so and attach it as Attachment 1. The proposed language, typed in normal font with normal spacing, is 18 pages. The final rule, typed the same way, is 60 pages. To make the changes clear, in the final rule text we have highlighted the language that appears for the first time in the final rule. The two just simply do not bear any resemblance to each other.

These are not mere refinements; they are fundamental reconstructions. EPA cannot change the fabric of a rule so greatly as a result of the millions of comments it received, and then say that the regulated community should have seen these changes coming. The regulated community and the states simply could not have predicted the shape and substance of the final rule.

B. Justice requires reconsideration because the suite is not a logical outgrowth.

Established legal principles compel EPA to reconsider these rules and "justice so requires." This Petition is filed pursuant to CAA Section 307(d)(7)(B), 42 U.S.C. §7607(d)(7)(B), and section 705(b) of the Administrative Procedures Act (APA), 5 U.S.C. § 705(b).[10] Under CAA Section 307, judicial review is limited to issues raised in the administrative record. 42 U.S.C. § 7607(d)(7)(A). When it is impracticable to raise objections during the rulemaking or the grounds arose after promulgation of the rule, the EPA is authorized to reconsider its final determination. For matters of central relevance to the outcome of the rule, the "Administrator shall convene a proceeding for reconsideration and provide the same procedural rights" as would have been available the first time. 42 U.S.C. § 7607(d)(7)(B).

The final Rule differs so extensively from the proposal that it can be said EPA has impermissibly pulled a "switcheroo," something that the D.C. Circuit has "refused to allow," *Environmental Integrity Project v. Environmental Protection Agency,* 425 F.3d 992, 996 (D.C. Cir. 2005), demonstrating that the rule is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." 42 U.S.C. § 7607(d)(9)(A). The CPP fails in meeting the "logical outgrowth" test, *South Terminal Corp. v. EPA,* 504 F.2d 646 (1st Cir. 1974), in which the court held that final rule changes must be "in character with the original scheme" and "a logical outgrowth" of the notice and comment already given. The final CPP is not a logical outgrowth of the proposal because key provisions were changed in ways that interested parties could not "have anticipated that the change was possible." *CSX Transportation, Inc. v. Surface Transportation Board,* 584 F.3d 1076, 1079-1080 (D.C. Cir. 2009). Rather, "interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Id.* Federal courts have enjoined agencies from enforcing two recently promulgated environmental rules for failing the "logical outgrowth" test. In *State of North Dakota, et al. v. U.S. EPA,* Civil No. 3:15-cv-59 (D.N.D. 2015), the court struck down EPA's Waters of the United States final rule because it was "different in degree and kind" from the proposal, holding that an agency cannot "transmogrify" its final rule. In *States of Wyoming, et al. v. U.S. Dept. of the Interior, et al., ,* Case No. 2:15-CV-04-SWS (D. Wyo. 2015*),* the court struck down the Bureau of Land Management's (BLM's) federal hydraulic fracturing rule, citing the rule's failure to pass the "logical outgrowth" test in several key areas.

[10] Also, the APA requires that an agency give interested parties advance notice by publication of impending regulations so that they can have an opportunity to give their public comments to the administrator and participate in making the regulations. 5 U.S.C. § 552, 553.

While the 1540-page final Clean Power Plan, and thousands of pages of supporting material, may contain more detail than the proposal, simply providing additional rationale, logic, more refined calculations, and more information does not satisfy the requirement that a final rule must be a "logical outgrowth" of the proposal. While EPA repeatedly uses the phrase "response to comments," the D.C. Circuit has long-held that "[c]ommenting parties cannot be expected to monitor all comments submitted to an agency." *Fertilizer Institute v. EPA,* 935 F.2d 1302, 1312 (D.C. Cir. 1991). Rather, "the EPA *itself* must provide notice of a regulatory proposal." *Id.* EPA's changed approach results in a remarkably different rule, and affected entities must have a chance to review the rule in its complete and newly propounded form.

Courts have long held that, while an agency is within its authority to simply not adopt a proposed rule, it errs in adopting a "reinterpretation," and that such a "flip-flop complies with the APA only if preceded by adequate notice and opportunity for public comment. *Environmental Integrity Project* at 997. In other words, "a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration." *Id.* "A contrary rule would allow an agency to reject innumerable alternatives in its Notice of Proposed Rulemaking only to justify *any* final rule it might be able to devise by whimsically picking and choosing within the four corners of the lengthy 'notice.'" *Id.* A reasonable commenter clearly cannot "trust" EPA's representations, where it has done an about-face on the basic logical framework for its rule.

The proposal (not including the Technical Support Documents) included well over 250 requests for comment on substantive choices that EPA could, did, or did not make in the proposal.[11] EPA ran afoul

[11] For example, in the proposal, EPA states: "We note that some stakeholders have argued that CAA section 111(a)(1) does not authorize the EPA to identify re-dispatch, low-or-zero emitting generation, or demand-side energy efficiency measures (building blocks 2, 3, and 4) as components of the 'best system of emission reduction…adequately demonstrated.' According to these stakeholders, as a legal matter, the BSER is limited to measures that may be undertaken at the affected units, and not measures that are beyond the affected units; the measures in building blocks 2, 3, and 4 are 'beyond-the-unit' or 'beyond-the-fenceline' measures because they are implemented outside of the affected units and outside their control; and as a result, those measures cannot be considered components of the BSER. We welcome comment on this issue." 79 Fed. Reg. 34829, 34888 (June 18, 2014). So EPA took a position then asked whether its position was correct, and in the final rule, decided that its initial position was wrong. While the issue was raised, EPA never told the regulated public that it would change its stance on this basic underlying logic for the rule.

Similarly, in the proposal, EPA states: "Because CAA section 111(d) does not address whether an existing source that is subject to a CAA section 111(d) program remains subject to that program even after it modifies or reconstructs, the EPA has authority to provide a reasonable interpretation, under the Supreme Court's decision in *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 842-844 (1984). The EPA's interpretation is that under these circumstances, the source remains subject to the CAA section 111(d) plan, for two reasons. The first is to assure the integrity of the CAA section 111(d) plan. The EPA believes that many states will develop integrated plans that include all of their EGUs, such as rate- or mass-based trading programs. Uncertainty about whether units would remain in the program could be very disruptive to the operation of the program. The second reason is to avoid creating incentives for sources to seek to avoid their obligations under a CAA section 111(d) plan by undertaking modifications. The EPA is concerned that owners or operators of units might have incentives to modify purely because of potential discrepancies in the stringency of the two programs, which would undermine the emission

of the CAA and APA by simply noting issues, taking comment, and then switching positions between the proposed and final rules. In sum, while EPA could have chosen to simply not adopt its proposal, or could have changed its approach following proper notice of the change through a re-proposal, EPA erred in adopting such a fundamental re-interpretation without providing for notice-and-comment.

Rather than engaging other interested parties in protracted court proceedings, EPA should grant this petition to reconsider the matters raised herein, or better yet, withdraw it and re-propose the rule to allow for adequate public review of the combined, final suite of rules.

III. THE SUITE OF RULES IS NOT ONLY NEW BUT IT EXISTS IN SEPARATE RULEMAKINGS.

Whether the suite of rules will work together is anyone's guess; EPA certainly has not made that transparent. Deciphering from the numerous puzzle pieces on how the new provisions have changed the final rules, how the FIP proposed rule *might* impact the final rules, and how the numerous technical support documents and guidance documents impact the rules, is simply a gamble. As noted above, EPA has finalized two rules (originally proposed in three separate rulemakings) and proposed a third rule. These rules are inextricably intertwined. Tellingly, EPA acknowledges holes in the "final" rules (which it refers to as "enhancements") and claims to address those holes through the companion proposed FIP rulemaking. See 80 Fed. Reg. 64969. Neither the states nor the regulated public, given the complete reconstruction of these rules to date, have reason to trust that the FIP rule will look in the end like the FIP proposal.

For example, the combined rules impact each other with respect to the state goals themselves, including which units are subject to which program. The combined rules interact on new banking concepts, the Emission Reduction Credit (ERC) and allowance interplay, and the new "major major" modification for NSR purposes.[12] Moreover, the combined rules have created new and different concerns about reliability from those that were raised in the comments to the June 2014 proposals. While the final rules resolved certain planning issues, the actual implementation of the rules becomes more uncertain due to the interlinked nature of the rules and the yet-to-be proved interlinked trading plans. Specifically, how the new trading regimes will be adopted is uncertain at best. EPA has not modeled the possible outcomes, nor has it polled the states on the plan options they are most likely to use. Thus, it has not modeled the range of plant closures and other measures that may affect the reliable and economic supply of electricity. 80 Fed. Reg. 64879.

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reduction goals of CAA section 111(d). The EPA invites comments on this interpretation of CAA section 111(d)(1), including whether this interpretation is supported by the statutory text and whether this interpretation is sensible policy and will further goals of the statute." 79 Fed. Reg. at 34904. In the final rule, EPA took the opposite position without allowing comment on how this issue could change the intertwining of the Section 111(b) and Section 111(d) rules.

[12] EPA's phraseology is oddly prophetic. EPA's rulemaking schedule certainly places states in a "Catch 22," as they decide how to act in the best interests of their citizens. Will they concede, at least in the short term, that EPA's plan is legally valid or risk having state plans rejected, all the while waiting for the United States Supreme Court to determine the legitimacy of the Agency's regulatory reach.

Ameren's additional concerns include:

- Whether the changes to the goal setting structure and the state goals are justified. The new approach in the CPP changes all of the state goals. Some are lower; most are higher. Missouri's proposed target was 1544 lbs CO_2/MWHr and the final target is 1271 lbs CO_2/MWHr. Changing the target is not minor. It affects the compliance planning that states and regulated entities already began. Because modified sources cannot be part of the CPP (unless a mass based trading program exists, the state opts to include new sources in and authorizes a different cap that includes new sources, and there are sufficient allowances to build a new unit in a mass-based state), the goal of the CPP seems to be to shutter existing units, not just shift some generation to new sources.

- Whether sufficient allowances/ERCs exist at commercially reasonable prices. EPA's promise that they are seems entirely hypothetical. In fact, EPA's cost/benefit analysis specifically notes that the proffered costs are "illustrative" since EPA cannot predict the requirements and impact of plans that states will submit. Further, when the NOx and Sow markets first began, price volatility was marked, and no reason exists to suggest this would not be the case in this market.

- Whether sufficient allowances/ERCs will exist for a new NGCC unit to be built in Missouri.

EPA implies that all the issues will be figured out later. This is not good enough.

EPA's failure to properly sequence the development of these rules has created a rulemaking maze, and one cannot comprehend the consequences of one rule without understanding the whole series. The public could have commented on a suite of rules that had a clear path from here to there. Accordingly, the finalization of the entire suite of rules should occur at the same time so that judicial review can occur in a coherent and judicially economical manner.

IV. FUNDAMENTALLY CHANGED MATTERS OF CENTRAL RELEVANCE HAVE NOT RECEIVED SUFFICIENT NOTICE AND COMMENT.

Because the final rules are so fundamentally changed from the proposals, Ameren cannot fully evaluate the impact of the final rules for the reasons stated above. The CAA requires EPA to convene a proceeding for reconsideration where a petitioner can demonstrate that it was impracticable to raise an objection during the comment period, and where such objection is of central relevance to the outcome of the rule. Accordingly, the matters listed below are believed to be of "central relevance" to the rule, and because they are either new or significantly changed from the proposal, Ameren had no way of addressing them during the comment period. 42 U.S.C. § 7607(d)(7)(B).

The intertwined nature of the issues noted below does not lend itself to a structure of "most" important to "least" important. While each of these issues relate directly to the CPP, many are closely linked to the NSPS and FIP.

1. **IMPLEMENTATION BY STATES JETTISONED.** EPA now claims that in order to lawfully promulgate the CPP, each building block must be implementable by the owners and operators of the units themselves. This change drives everything in the rule. *Moreover, this logic is diametrically opposite to that EPA employed in the proposal*, where it vigorously defended its right to include building blocks that did not need to be implementable by affected EGUs themselves and where the state could stand in the stead of the affected sources. Where an agency has done a complete turnaround

on its logic, as EPA has done here, courts have determined that the final rule fails the "logical outgrowth" test. Rather, the courts have found that while an agency may choose to not adopt its proposal, it errs in adopting a "reinterpretation" of its proposal, noting that such a "flip flop complies with the APA only if preceded by adequate notice and opportunity for public comment." See *Environmental Integrity Project* at 997.

In the proposed rule, EPA used the "integrated grid" to justify an approach to regulation that allowed the states to stand in the stead of the affected emission units. EPA now says the proposal was wrong and it was legally unauthorized to adopt a rule on that basis. This alone is a logic shift that bears, at the least, the scrutiny of public comment.

But by jettisoning the part of the argument that allows the states to stand in the units' stead, EPA has broken the logic chain that justified the use of the "integrated grid" to regulate sources of carbon dioxide. Most significantly, by creating a new system that takes away the "flexibility" formerly granted to the state as the "theoretical" operator of the grid, it creates a new system that ignores the historic geographic development of "load serving entities" that provide affordable, reliable electricity. The final rule treats *companies* interchangeably, not just the electricity from the companies.

These shifts have consequences throughout the combined suite of rules, and the public should be allowed to consider those consequences before being subject to them.

2. **CATEGORIES AND IMPLEMENTATION.** EPA changed its regulatory approach in the final CPP to align itself with more traditional CAA practices. EPA regulates a single source category and adds standards of performance, or CO_2 emission performance rates, for two subcategories of the source category. These CO_2 emission performance rates, applied to source categories, are new, and certainly warrant public comment and scrutiny.

   EPA readily admits that its policy objective of 30% reduction in carbon emissions cannot be achieved by **the source**. Rather than revise its policy objective to match what is achievable at the source, i.e. efficiency improvements EPA estimates to be between 4-5%, EPA re-writes the statutory language to now require **a Company** (owner or operator) to achieve a designated performance standard through a variety of non-source measures ranging from building renewable energy (an entirely different source) to implementing energy efficiency projects throughout the state. The CAA statutory source no longer is the target of the reduction plan; something else is. Thus, while respecting aspects of traditional CAA regulatory structure, EPA leapfrogs over statutory and regulatory logic because it fails to fit its newly interpreted paradigm.

3. **BEST SYSTEM OF EMISSIONS REDUCTION.** Unpacking EPA's overview of the BSER, 80 Fed. Reg. 64723-24, reveals that, in the final CPP, EPA has fundamentally changed its approach to setting BSER and it must accept comment on this new approach. EPA weaves into its analysis the statutorily required elements of "useful life," cost reasonableness, technology options, appropriateness of emissions reductions, and appropriateness of actions by a single affected EGU, just as it did in the proposal.[13] What EPA fundamentally changed was that, in order to achieve the end result, the

[13] EPA's analysis concerning these elements is incorrect or deficient, as stakeholders will note if comments are allowed. For thus matter of central relevance, we note that EPA does attempt to frame its BSER pursuant to the statute.

owner or **operator** of each affected EGU must presume that it must, in EPA's words, ***implement the BSER.***[14] This leads to an avalanche of changes that are made throughout the final rule to align the

[14] The overview description of the new BSER exactly explains why this approach must be subject to public comment. *See* 80 Fed. Reg. 64723-24. The flexibility of the state-responsible approach has been replaced with an EGU-specific responsibility, and the impact on sources and operators of sources has not been viewed in this new context.

> In order to establish the BSER we have considered the subcategory of the steam affected EGUs as a whole, and the subcategory of the combustion turbine affected EGUs as a whole, and have identified the BSER for each subcategory as the measures that the sources, viewed together and operating under the standards of performance established for them by the states, can implement to reduce their emissions to an appropriate amount, and that meet the other requirements for the BSER including, for example, cost reasonableness.(fn omitted) . . .
>
> In establishing the BSER the EPA also considered the set of actions that an EGU, operating under a standard of performance established by its state, may take to achieve the applicable performance rate . . . and that meet the other requirements for the BSER. **These actions implement the BSER and may therefore be understood as part of the BSER.**
>
> An example illustrating the relationship between the measures determined to constitute the BSER for the source category and the actions that may be undertaken by individual sources that are therefore also part of the BSER is the substitution of zero-emitting generation for CO_2-emitting generation. This measure involves two distinct actions: Increasing the amount of zero- emitting generation and reducing the amount of CO_2-emitting generation. **From the perspective of the source category, the two actions are halves of a single balanced endeavor, but from the perspective of any individual affected EGU, the two actions are separable**, and a particular affected EGU may decide to implement either or both of the actions. Further, an individual source may choose to invest directly in actions at its own facility or an affiliated facility or to cross-invest in actions at other facilities on the interconnected electricity system.
>
> To reiterate the overall context for the BSER: In this rule, the EPA determined the BSER, and applied it to the category of affected EGUs to determine the performance levels—that is, the CO_2 emission performance rates—for steam generators and for combustion turbines. States must impose standards of performance on their sources that implement the CO_2 emission performance rates, or, as an alternative method of compliance, in total, achieve the equivalent emissions performance level that the CO_2 emission performance rates would achieve if applied directly to each source as the standard or emissions limitation it must meet.(fn omitted) Each state has flexibility in how it assigns the emission limitations to its affected EGUs—and in fact, the state can be more stringent than the guidelines require—but one of the state's choices is to convert the CO_2 emission performance rates into standards of performance—which may incorporate emissions trading—for each of its affected EGUs. After identifying the BSER in this manner, the EPA determines the performance levels—in this case, the CO_2 emission performance rates—for the steam generators and for the combustion turbines. If a state does so, then the affected EGUs may achieve their emission limits by taking the actions that qualify as the BSER. Since the BSER and, in this case its constituent elements, reflect the criteria of reasonable cost and other BSER criteria, the BSER assures that there is at least one

new definition and its underpinnings to a similar structure as the proposal. The similarities and alignments bear scrutiny, though, through notice and comment because much of what appears aligned on the surface becomes muddy when examined more acutely.

4. **ELEMENTS OF BSER CHANGED.** In the CPP, EPA has modified the elements of BSER, which it calls the "building blocks." EPA removed, as it should, the energy efficiency/demand response building block 4. Even though it retained the other three building blocks, the approach in each has changed. More to the point, the changes to the approach that are seen include: changes to the assumptions for the reduction methodology within each block, changes to the ordering of reductions and lastly, changes to the overall calculation steps. These changes, some of which are discussed in more detail below, fundamentally changed the emission reductions required in each state. For Missouri and Illinois, the reductions are substantially more than they were under the proposal. Because the comments submitted by Ameren were geared toward a possible pathway to meeting the reduction challenge as proposed, the new methodology with its attendant steep additional reductions was not and could not have been commented upon in the proposal.

5. **NEW APPROACH TO BUILDING BLOCK 1 HEAT RATE IMPROVEMENT**. In the final CPP, EPA employs a completely different, and much more complicated, approach to calculating the potential for heat rate reductions at affected sources. In the proposal, EPA used national continuous emissions monitoring data and a single Sargent & Lundy report to arrive at a national heat-rate improvement assumption for coal-fired EGUs throughout the nation. In the final rule, EPA developed criteria for putting unit heat rate data into 168 "bins" based on ambient temperature and hourly capacity factor. EPA applies a "consistency factor" to each EGU's data to determine what heat rate that EGU *could have* achieved between 2002 and 2012. EPA then compares that improved heat rate to each EGU's actual 2012 heat rate, and uses a false premise that theory that "a coal unit is a coal unit is a coal unit." EPA then averaged the resulting potential heat rate improvement among all EGUs within each of the three regions to arrive at regional projections of heat rate improvement. Because EPA did not provide affected sources with an opportunity to comment on its new heat rate calculation, companies are unable to determine whether this calculation is supportable or not. More importantly, comments concerning this methodology are not a part of the administrative record and thus are not available for consideration on judicial review.

6. **BUILDING BLOCK 3 IS ENTIRELY REVAMPED.** In the final CPP, EPA rebuilds building block 3, including *only* solar and wind renewable energy in the BSER. It allows only uprated existing nuclear and hydropower, clearly excellent zero-energy resources, to be used for compliance purposes. Previously constructed renewable resources are not part of the plan. This changes Missouri and Illinois targets and Missouri and Illinois compliance options such that additional public comment is most certainly warranted.

   Moreover, the favoritism shown to renewable energy throughout the suite of rules is an unlawful transfer of wealth. Indeed, Robin Hood himself could not have envisioned such a wealth transfer scheme. The transfer of wealth occurs across state lines. It occurs from regulated utilities that cannot get permission to build their own renewables but must purchase ERCs or allowances

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pathway—the CO_2 emission performance rates—for the state and its affected EGUs to take that achieves the requisite level of emission reductions, while, again, assuring that the affected EGUs can achieve those emission limits at reasonable cost and consistent with the other factors for the BSER. *Emphasis added.*

generated by a renewable resource somewhere to meet the state goal. It occurs when ERCs or allowances are awarded under the CEIP. In short, the significant changes in building block 3 warrant comment and the implications of the changes are not part of the current administrative record.

7. **REGIONAL ASSUMPTIONS APPLIED TO NATIONAL GENERATION TO CALCULATE SUBCATEGORY STANDARD OF PERFORMANCE**. In the CPP proposal, EPA used national assumptions for 3 of its 4 building blocks, and then applied those national assumptions to each state's power fleet to determine that state's goal.

   In contrast, the final rule uses a different "regional approach" to develop uniform national emission performance rates for two subcategories of EGUs. EPA now divides the nation into three regional electricity interconnections: Eastern, Western, and the Electric Reliability Council of Texas. To determine the reductions that are "achievable," EPA evaluated the emission reductions actually achieved by region and building block. For building blocks 1 and 2, the possible reductions were calculated by source subcategory for coal-fired and NGCC units. EPA then applied regionally-achieved rates in all of the three building blocks to the coal and gas-fired plants within each subcategory and region, and then chose the most readily achievable rate for each category as BSER. These new performance standards of 1305 lbs CO_2/MWhr net for coal and oil fired steam EGUs and 771 lbs CO_2/MWhr net for combustion turbines are not found in the proposal and the procedure and outcome of setting the performance standard should be subject to comment.[15]

8. **NEW STATE GOALS.** EPA applies the uniform national performance rate, by weighted generation from each subcategory, to all affected sources in a state to arrive at individual state goals. This new, regional approach, not contemplated at all in the proposal, has a drastic impact on each state goal and on coal-fired sources, in particular.

   For example, the regional approach includes Missouri in the Eastern regional interconnect which had a 2012 CO_2 emission rate of 2,160 lb/MWh. Missouri data shows a CO_2 emission rate of 2,083 lb/MWh. Since the Missouri units are more efficient than the other units in the eastern interconnect, it will be harder for Missouri to achieve the 4.3% reduction associated with Building Block 1. Therefore, the "uniform rate" has a differential impact on states, rather than a uniform one, and this change in approach must be subject to comment. Had Ameren been afforded the opportunity to comment on this extra-innings NODA, Ameren could have made determinations about whether the 4.3% reduction rate is achievable for the Missouri fleet.

9. **INTERIM AND FINAL STATE GOALS.** Like the proposal, the final CPP contains state-specific interim and final emission rate targets. The interim and final targets, however, differ from those in the proposal. In the final rule, EPA established emission performance standards for two subcategories of affected sources and calculated annual emission rates using the regional approach as described above. The mass-based targets are based on the emission rate targets but do not "translate" exactly equivalent to the rate-based goals. In all cases, however, the targets are now different than they

[15] Contrast the existing source coal standard to the *new* source coal standard of 1400 lbs CO_2/MWhr gross. EPA determined after significant comment that the proposed new source standard of 1100 lbs CO_2/MWhr gross was not achievable and finalized a standard that was different and arguably less stringent than the standard set for existing sources. This interlinked issue departs from the proposals and should be subject to comment. 80 Fed. Reg. 64509, 64513 (October 23, 2015).

were in the proposal and the differences affect whether states and affected sources would provide comments on aspects of the rules. That is, the attention to comments is affected by the real-world impact of the requirements. So substantial are the changes that they affect both the nature and development of comments by the public and, because, the rates are so different, the rule should be re-proposed.

10. **MASS-BASED TRANSLATION.** The mass-based translation methodology was not present in the proposed CPP. Parties requested it in comments. However, the details of the translation are revealed here in the final rule. Such an important aspect of the rule should not be finalized without comment.

    While the translation appears to be more liberal than the rate-based approach, and therefore appears to encourage states to adopt a mass-based approach, EPA's preferences should not be embodied in this way without comment.

    Moreover, the perceived liberality of the approach may well be a chimera because of the required set-asides in the trading programs. Again, the public has not had the opportunity to comment on these approaches, depriving the appellate court of an adequate administrative record.

11. **GENERATION SHIFTING.** The final CPP makes it clear that shifting generation to zero-emitting resources is the most desirable result of the rule and favors these resources through the BSER process, the compliance process and the trading process. New ways to accomplish this shift appeared in the final rule that have not been the subject of comment:

    a. Calculating BB3 before BB2.

    b. Clean Energy Incentive Program (CEIP).

    c. Tougher goals for coal heavy states.

    d. Disfavoring new CO_2 emitting units that are in the baseline.

    e. Disfavoring new CO_2 emitting units after the compliance period begins.

12. **COERCION, NOT FLEXIBILITY.** The combined suite of rules does not provide the purported flexibility that EPA indicates is a cornerstone of the CPP. By changing the building block structure and state goal calculation, EPA has forced states with coal-heavy fleets to require investment in renewable generation, either within or outside the state, because the only way to achieve the goal is the reinvestment in renewables. If within the state, such a forced transition may result in early retirements and increased cost to replace coal units that can still reliably provide electricity within all other environmental parameters. If outside the state, electricity consumers are simply supporting the renewable businesses in other states, transferring money from state X to support state Y. This is not flexibility. Moreover, this type of coercion does not meet the tests outlined in *Burwell*.[16]

[16] *King v. Burwell*, 135 S. Ct. 475 (No. 14-114) (Jun. 25, 2015) (finding the Affordable Care Act did not constitute state coercion).

13. **TRADING INTEGRAL.** While trading was merely a conceptual compliance option under the proposed CPP, EPA states that it is now "integral" to the final rule. 80 Fed. Reg. 64733-34. EPA introduces for the first time in this rule a critical component called the Emission Reduction Credit; this term did not appear in the proposal. The state goals may not be achievable without trading. Critical to such an approach is the assumption that an abundant supply of MWhrs generated from low CO_2-emitting sources exists such that ERCs or allowances can be purchased across jurisdictional boundaries. The final rule relies heavily on trading as the least-cost, efficient way to meet the state goals and, in fact, without trading, most coal-heavy states – like Missouri – will be hard pressed to meet their goals. Indeed, it appears that, in most states, the options have been reduced to coal plant retirement or trading. The cost implications, potential for unrealized capital investment or stranded capital, and reliability impacts are given short shrift in the final rule, with EPA apparently believing that these issues are to be addressed only at the state level. However, due to time and logistical constraints, EPA is all but forcing states to adopt the FIP which – by requiring an astronomical buildout of renewable energy and blind faith in the abundance of allowances/ERCs - will not allow states to adequately ensure reliability and avoid substantial stranded capital. This is a fundamental shift away from the proposal though and is a matter of central relevance for which adequate comment should be addressed.

    Indeed, concurrently with finalizing the CPP, EPA is proposing a FIP, that includes model trading rules for states to adopt. These plans make clear what EPA expects, but these expectations should have been included as a part of the initial proposal. Indeed, the proposal is not expected to be finalized until Summer 2016, and states must notify EPA of initial state plans on September 6, 2016. (In fact, the State's own regulatory clock will require authorizations and rulemaking to commence well in advance of the September 2016 initial plan date.) EPA thus is building in no time for states and regulated entities to consider and adopt what might be a significantly changed federal trading program after comments are reviewed. (The CPP and NSPS both changed significantly after comment; no reason exists to think the FIP will fare differently.)

    Moreover, the proposal made no representation about the consequences of a failure to adopt a Section 111(d) program. Now, EPA demonstrates that it can and will establish a trading program in any state that refuses to develop its own state plan. EPA should take comment on this approach.

    Notwithstanding EPA's strong arm push for trading, until state plans are actually developed that include interlinked trading programs, no basis exists in the record to assume the achievability of the greatly revised BSER. Indeed, technical support documents underlying EPA's rationale for that plan were not made publicly available until October 26, 2015, after the publication of the final rule in the *Federal Register*. These rulemakings are greatly intertwined, yet significant portions of them were not available at prepublication, were only recently made available or are still in proposed form. This prevents Ameren from being able to comment on all of the available facts and prevents the Court of Appeals from considering what is not in the administrative record.

    EPA, in addition to making trading "integral" to the final rule, includes "trading ready" platforms that states can adopt and supposedly begin trading with greater ease. Unfortunately, because these plans were not available, in even a sketchy form, in the proposed rules, public comment has not fleshed out whether the platforms are feasible, achievable, and reliable.

    Despite EPA's confidence that such trading ready platforms will be easy for states to adopt and implement, how can it have any confidence that sufficient allowances and/or ERCs will be available

such that any trading program will have legs? Where a state has adopted a trading ready platform, or trading program of any kind, but sufficient allowances and/or ERCs do not exist, how does EPA plan to enforce state compliance? Thus, understanding the interrelatedness of the suite of rules becomes acute when states begin to plan, as they have in reliance on the proposal, and no opportunity to seek advice from the regulated community about possible workable options has been possible. Rather than making it easier for states to comply, trading platforms may have indeed upset plans already underway as EPA pulled its switcheroo.

14. **TRADING – CAPACITY SHORTAGE**. In the final CPP, EPA claims to make a multitude of measures and options available to states that allow compliance flexibility. The primary mechanism EPA uses is interlinked trading programs. However, the final rule does not demonstrate that sufficient ERCs or allowances will be available for trading. Under the proposal, trading strategies did not require the closure of coal-fired units to achieve state targets. EPA has provided no model that shows states can comply using BSER without retiring coal capacity and replacing it with carbon-free or lower-carbon sources and without creating a capacity shortage. Some states, notably Washington, are indicating that even if they have allowances to trade they will not allow cross-border trading, and nothing in the plan requires them to do so. Moreover, trading shortages could be created when a unit is modified and removed from the Section 111(d) program. This may have an immediate impact on a state program. This matter should be subject to review and comment.

15. **THE MESSAGE: TRADING CONQUERS ALL AND SWEEPS AWAY THE 'MINOR' DEFICIENCIES OF PROCEEDING TO THE FINAL CPP.** The new approach that "trading conquers all" is akin to announcing the answer in class before doing the homework to understand the answer. The combined suite of rules must be considered as a totality to understand the interplay between adequate capacity and shifting capacity to renewable sources, allowance and ERC allocation, multi-state and single state plans, etc. Without understanding and modeling the whole suite of rules, the regulated public is deprived of its right to comment.

    In past EPA trading rules, the trading portion of the rule was in the rule proper, not in a trailing FIP proposal. EPA was clearly reluctant to develop the trading proposal, but, now that it is 'integral' to the achievability of the rule, the trading platforms should be included in the CPP and subject to comment.

16. **CLEAN ENERGY INCENTIVE PROGRAM IS A NEW ELEMENT.** In the final CPP, EPA introduces a Clean Energy Incentive Program, which will provide matching allowances or Emission Rate Credits to states for solar or wind projects which generate or save MWh in 2020 and/or 2021. EPA claims that it "will address design and implementation details of the CEIP in a subsequent action. Prior to doing so, the EPA will engage with states, utilities and other stakeholders to gather information regarding their interest and priorities with regard to the implementation of the CEIP." Again, an important component of the CPP final rules did not exist at all in the proposed rule and exists only in concept in the final rule as EPA admits its final form will be developed in the Federal Plan at a later date.

    Importantly, though, while voluntary, the CEIP requires states to match whatever allowances or ERCs are awarded to projects within its state. Left fairly undefined is the fact that the match *reduces* the ERCs or allowances that would have been available to affected EGUs. In other words, whatever the state has to allocate to existing sources must be reduced to support the CEIP. Without the opportunity for comment, the real world implication of this program is undeveloped in the administrative record.

Further, the CEIP only rewards wind and solar projects wherein construction (for RE) or operations (for EE) has commenced after a state has submitted its final SIP and where the projects save MWh during 2020-2021. However, such wind and solar projects can take months or even years to obtain financing, regulatory approval and get off the ground. Moreover, the CEIP as proposed places a disincentive for any renewable projects between now and 2019, and in 2019, obtaining equipment or labor for a renewable project may be impossible as operators race to receive CEIP ERCs. Given that EPA has still not addressed design and implementation details of this program, nor even met with stakeholders regarding it, does EPA's timeline make sense? These are exactly the questions that should be addressed during a comment period.

17. **AVOIDANCE OF NEW CO_2 EMITTING RESOURCES BY PROHIBITING LEAKAGE AND REQUIRING SET ASIDES.** Shifting generation to zero or low-carbon renewable energy sources is a tool that affected EGUs in states adopting mass-based performance standards can use to achieve compliance under the final CPP. However, now EPA states that the system of emission reduction has to include a mechanism that does not simply shift generation from coal to NGCC; the system now must offset more emissions than just a switch from coal to natural gas would achieve. 80 Fed. Reg. 64747.

    EPA expressed concern that using a mass-based emissions cap could shift energy generation to new NGCC facilities that are not subject to the cap on emissions or the CPP at all (they would be subject instead to the NSPS). The final rule suggests measures to address this "leakage" including the option of including new sources under a state-based cap. This approach would increase the emissions budget with a new source allowance complement to reflect these new sources. However, as a preliminary review shows, the new source complement would not support even one new gas unit. Because leakage was not addressed in the proposal, the administrative record is deficient. Moreover, legal questions exist as to whether an NSPS source can be subject to the CPP cap, and comment should be taken on this issue.

    EPA encourages the development of new renewable generation over new NGCC generation by effectively encouraging states to set aside a percentage of their allowance caps and issue them only to qualifying renewable energy or energy efficiency projects. The proposed FIP and model rule implementing mass-based plans set aside 5% of the state's allowance budget for such qualifying renewable energy projects. The details were not considered in the proposal or even in the final rule because they were proposed in a separate rulemaking on August 3, 2015. The changes are intended to ratchet coal and natural gas generation downward from existing units but no means to assure adequate electric supply exists.

    The proposal required states to transition to a "renewable centric" energy portfolio through the increased reliance on NGCCs in the near term. The final rule removes incentives to increase NGCC capacity and instead replaces those with incentives to transition directly to renewable sources of electricity with features such as set asides and renewable-only allowances. These leakage concepts are issues of central relevance for which comment must be allowed.

18. **STATE MEASURES INSTEAD OF PORTFOLIO APPROACH.** EPA introduces a new "state measures" approach in the final CPP. It allows states to account for reductions from non-EGUs and use those reductions toward the compliance obligation of affected EGUs by relying on measures that would not be federally enforceable. Under this approach, the state can set a more lenient standard of performance for the affected EGUs themselves but total state EGU emissions must still meet the state goal. To do so, the state will rely on other state-law programs, like a Renewable Portfolio

Standard, building codes, or other energy efficiency programs, to make up the difference, and the state can choose how to apply the emissions reductions "earned" from those other programs to the affected EGUs. Even then, though, the state must adopt the EPA-dictated standards of performance as a "backstop," or corrective action, to be implemented if the state programs fail to meet the state goal. In essence, EPA tells the states to adopt *two* programs – one of its own choosing and one that the federal government "chooses" if the state programs fail. Again, nothing like this requirement existed in the proposed rule.

19. **NOTICE OF DATA AVAILABILITY.** EPA published information regarding how to translate emission rate-based goals to mass-based equivalents in the *Federal Register* on November 13, 2014, a mere two weeks before the CPP comment deadline. The NODA also included hints of the regional approach found in the final rule. This two-week period was wholly insufficient to review and comment on the proposed mass-based goals, translation and regional approach. In fact, Ameren predicted in its December 1, 2014, comment that the NODA approach, if followed to its conclusion, would result in a fundamentally changed rule.

    After the regulated public began to understand the proposal in the late summer and early fall of 2014, numerous concerns were raised with the "carbon cliff" that would result from the early compliance timeframes and the interim goals set in the proposal. In addition, the concerns raised with the legality of several of EPA's interpretations – the lack of source category compliance being one – were also raised in nearly every forum considering the proposal. The "carbon cliff" led to reliability concerns and the legal challenges became deafening, so much so that EPA knew it had to change its approach long before the initial comment period ended on December 1, 2014.

    The NODA demonstrates that EPA knew it needed to and was in the process of changing its approach to standard setting setting but also knew it needed to buttress the administrative record for a revised approach to setting the standard. But rather than withdraw and re-propose the rule, EPA, in releasing a cryptic NODA, air dropped thousands of pages of additional support documents into the record merely days before the comments were due. This was not appropriate notice.

20. **COMPLIANCE CERTIFICATION.** The final CPP now requires the affected EGUs to certify compliance with the standard of performance in their Title V permits. This is true even though the compliance with the state standard may require certifications from numerous entities, some of which may require years to document (EE or building code reductions, for example). In other words, the affected source will have little control over whether the state goal is met and yet will have to certify compliance. Title V compliance certifications are serious matters to those who sign them, as criminal penalties may personally accrue for false certification. This matter flows directly from the initial change in logic, must be addressed, and EPA has taken no comments on this specific issue.

21. **NEW COST ESTIMATES**. In the final CPP, EPA introduces new cost estimates for each BSER building block. In other words, EPA has finalized a rule without allowing the public an opportunity to review its fundamental cost estimates. Moreover, EPA has stated:

    > In this rulemaking, our determination that the costs are reasonable means that the costs meet the cost standard in the case law no matter how that standard is articulated, that is, whether the cost standard is articulated through the terms that the case law uses, *e.g.,* ''exorbitant,'' ''excessive,'' etc., or through the term we use for convenience, ''reasonableness''. 80 Fed. Reg. 64723 FN 349.

In the end, EPA concludes the new cost estimates for each building blocks - $23/ton for CO_2 reductions for building block 1, $24/ton for building block 2, and $37/ton for building block 3, 80 Fed. Reg. 64752 -- are reasonable with the understanding noted above. As the MATS case recently demonstrated, EPA must justify its estimates. States and affected sources must be afforded the opportunity to comment on, and scrutinize, these cost estimates because they are critical in determining which building blocks, or other tools, states may choose to utilize for compliance.

22. **USEFUL LIFE IS A LEGAL REQUIREMENT.** In the CPP proposal, EPA claimed that allowing states to consider remaining useful life in their SIPs, *as required under Section 111(d),* was "unnecessary" because of the purported flexibility of the rule. EPA now claims that it does allow states to consider remaining useful life in developing each state's plan, thereby offering flexibility. EPA has changed its logic, but not its ultimate conclusion. The agency still does not allow states to adjust their goals in consideration of remaining useful life, and still offers no explicit way in which states may consider remaining useful life in their state plans above and beyond simply complying with the rule.[17]

    The Preamble states "with trading, an affected EGU with a limited remaining useful life can avoid the need to implement long-term emission reduction measures and can instead purchase ERCs or other tradable instruments, such as mass-based allowances, thereby allowing the state to meet the requirements of this rule." Ameren disputes this conclusion since the source-specific emission rate also applies and there is no guarantee there will be adequate numbers of allowances at prices that will allow EGUs with remaining useful life to avoid having to shut down to meet the interim or final state goals.

    Further, the CPP fails to consider the statutory requirement that useful life be <u>considered in setting the standard</u>, not just in implementation of the state plans. EPA has changed the logic as to how they consider remaining useful life and this is a significant change from the proposal. Because this divests owners of property rights without due process, this issue deserves to be addressed through comment.

23. **NEW SECTION 112 CIRCUMVENTION LOGIC.** Similar to its treatment of remaining useful life, EPA has offered a new logic to explain why it believes that it can circumvent the 112 Exclusion without altering its ultimate conclusion. The 112 Exclusion bars EPA from promulgating an existing source performance standard for any source category also regulated under Section 112; EGUs are regulated under Section 112 under the MATS rule. EPA still concludes that Section 111 does not bar regulation of GHGs under Section 111(d), even if the source category is regulated under Section 112. However, EPA claims that it had improperly read the House and Senate amendments as conflicting in the proposal. Instead, EPA now relies on the "context" of the amendments and the statutes. It changes the logic from the proposal to conclude that Section 111 allows regulation of non-hazardous air pollutants from a source category already regulated under Section 112, and comment is warranted even in this situation.

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[17] Interestingly, EPA did publish a technical support document *as part of the support for the final rule* entitled "Alternative Compliance Option Technical Support Document." EPA has requested comment on this document. This proposal would allow states to designate units that will be retired by December 31, 2029, as units that would not be included in the state plans. However, no allowances could be assigned for those units during the interim compliance periods. This simply shows that EPA is *still* writing this rule.

24. **MODIFICATIONS, RECONSTRUCTIONS, NEW SOURCE REVIEW.** In the CPP proposal, a unit that became subject to the CPP stayed subject to the CPP regardless of future changes at the units. EPA now claims that this does not comport with the law. Sources that undergo major modifications or reconstructions will be removed from the CPP and will be subject only to the NSPS requirements. This is a significant change from the proposal for which comment should be allowed. Moreover, EPA does not even complete this thought. It saves for another day the full understanding of how changes at the units will be treated; the issue is not fully addressed in any of the suite of rules.

    The failure to address NSR leaves unit operators open to questions as to whether maintenance of existing coal-fired generating units is a good idea. EPA has refused to provide an exemption for units undergoing a large modification to comply with a court order or the Clean Power Plan. EPA suggests that permitting authorities include "avoidance" or "synthetic minor" conditions in permits to ensure that operations remain below a particular regulatory threshold. This unfairly burdens coal-fired electric generating units and simply encourages owners and operators to accept restricted operating conditions or refrain from implementing modifications at the units that are otherwise required for compliance and instead prematurely close coal-fired electric generating units with no regard to the remaining useful life of the unit.

    This is very different from the treatment of NGCCs that undergo modifications. EPA withdrew its proposal for modified natural gas plants, stating that it did not have sufficient information to set a standard at this time. This disparate treatment clearly favors the use and remaining useful life of NGCCs while disincentivizing continued operation of coal-fired generating units.

V. JUDICIAL REVIEW SHOULD BE HAD UPON A COMPLETE RECORD.

On judicial review, a court will apply the four-factor test typically used to evaluate requests for preliminary injunction or stay to demonstrate that a judicial stay of the CPP is merited. *See Ohio v. NRC*, 812 F.2d 288, 290 (6th Cir. 1987) (holding that a motion for a CAA § 705 stay should be judged by the same standard as a motion for a preliminary injunction); *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam). The four parts of the test for preliminary injunction are as follows:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? *WMATA v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Petitioners can successfully show that the four factors weigh strongly in favor of granting a stay pending a challenge of the suite of rules in federal court.

A. The Petitioners can make a strong showing on the merits.

The Petitioners are likely to succeed on the merits because the rules fail to comport with applicable law. As discussed in detail above, failure to allow sufficient or any notice and opportunity for public comment on fundamental aspects of the CPP constitutes reversible error. Moreover, justice dictates that a stay be granted so that the legal sufficiency of the rule can be addressed. The following grounds, each to itself,

challenge the legal sufficiency of the rule and are reasons that the rule should be stayed pending challenge in federal court.

1. The Clean Power Plan violates federal and state sovereignty.

The CPP violates the Tenth Amendment of the U.S. Constitution by commanding the States to take actions in violation of sovereign State authority. U.S. CONST., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Indeed, the CPP requires states to take actions that EPA cannot force the affected emitting sources to take directly. The CPP establishes mandatory state-wide emission rate caps and forces States to restructure their power systems to meet the targets in the CPP. The CPP thus requires States t to implement EPA-mandated policies in areas where EPA lacks authority. Because this exceeds the scope of EPA's authority under the CAA, it is *per se* coercive and unconstitutional. *See FERC v. Mississippi*, 456 U.S. 742, 795 (1982) ("States retain the power to govern as sovereigns in fields that Congress cannot or will not preempt."); *see also New York v. United States*, 505 U.S. 144, 188 (1992) (federal government cannot "compel the States to enact or administer a federal regulatory program").

Further, the CPP violates the Federal Power Act, which grants exclusive authority to regulate the interstate electricity system to the Federal Energy Regulatory Commission (FERC), 16 U.S.C. § 824(b)(1), and confirms the States' authority to regulate intrastate electricity, generation, distribution, and retail sales, *Id*.; *see also Id.* § 824(a) (federal power regulation "extend[s] only to those matters which are not subject to regulation by the States."). EPA's intrusion into the states' sovereign right to dictate their unique mix of generation within their borders is particularly harmful to Missouri, where the state has taken specific and proactive measures to increase renewable energy generation and lower greenhouse gas emissions. Despite the fact that 83% of the state's electricity came from coal in 2013, making Missouri the nation's fifth most coal-dependent state, Missouri has adopted an RPS which set a renewable energy target of 15% by 2021, Governor Nixon recently finalized a Comprehensive State Energy Plan, and the state legislature passed a new law requiring CO_2 emission standards for each unit in the state, which unlike the Clean Power Plan, requires such standards to take into consideration economic impact and remaining useful life. Moreover, Ameren has filed with the state regulatory commission its Integrated Resource Plan, detailing its plan to retire, at the end of their useful lives, 1,800 MW from its coal-fired fleet, add 500 MW of renewable energy generation, extend the license of its 1,200 MW Callaway Nuclear Energy Center (already complete) and construct a 600 MW NGCC unit by 2035. Notwithstanding EPA's lofty intentions, EPA's Clean Power Plan will impede, and contravene, all of this progress which the state is making in the realm of greenhouse gas emission reduction, and thus violates the FPA's requirement that the state be allowed to control its own generation mix. By compelling a complete overhaul of how electricity is generated, sold, and consumed in this country, EPA has overstepped its authority under the CAA in violation of the FPA. By interfering and conflicting with FERC's exclusive authority under the FPA, EPA also violates section 310(a) of the CAA, which states that the Act "shall not be construed as superseding or limiting the authorities and responsibilities, under any other provision of law, of the Administrator or any other Federal officer, department, or agency." 42 U.S.C. § 7610(a). Indeed, the U.S. District Court in Wyoming recently stayed the Bureau of Land Management's (BLM's) federal hydraulic fracturing rule for this very reason – BLM usurped the authority of the EPA and the states over hydraulic fracturing as provided for in the Safe Drinking Water Act.[18]

[18] *State of Wyoming, et al. v. U.S. Department of Interior, et al.,* Case No. 2:15-CV-04-SWS (D. Wyo 2015).

2. The New Source Performance Standard fails as a required condition precedent.

To be lawful, a performance standard must be achievable and feasible, and the NSPS is neither. The NSPS requires carbon capture and sequestration (CCS) for coal-fired EGUs, and inexplicably contains a standard that is higher than (less stringent than) the CPP standard. CCS is not commercially viable as recognized by the Obama Administration failure to support the permitting and financing of the FutureGen 2.0 project in Illinois because it was not commercially viable.

> CCS facilities for electric power plants are currently operating at pilot scale, and a commercial scale demonstration project is under construction. Although the potential opportunities are large, many uncertainties remain, including cost, demonstration at scale, environmental impacts, and what constitutes a safe, long-term geologic repository for sequestering carbon dioxide.

U.S. Global Change Research Program, *2014 Climate Assessment* (May 2014), accessible at http://nca2014.globalchange.gov/report/sectors/energy-water-and-land, p 241. The NSPS does not meet the "achievability" and "feasibility" requirements since carbon sequestration is not a proven technology for a standard of performance. Consequently, a substantial likelihood exists that the NSPS will not withstand judicial scrutiny**.** If the NSPS fails, a statutory precondition to promulgation of the CPP has not been met and the CPP cannot be implemented. Therefore, a stay is warranted until issues regarding the NSPS are litigated.

3. The Clean Power Plan constitutes unlawful double regulation of affected sources.

Having chosen to regulate power plants under Section 112 (the Mercury and Air Toxics Standard), EPA cannot also regulate under Section 111(d). EPA has changed its rationale for its interpretation of the language of Section 111(d), as it relates to the inconsistent language enacted by Congress in 1990 concerning the Section 112 hazardous emission standards. EPA states that it can do this because the law, specifically the House version of the 1990 amendment, is ambiguous. We assert that no ambiguity exists and EPA's interpretation is not due deference. Deference is particularly not warranted when EPA has changed this interpretation several times over the years, and, between the proposed and final rule, has done an about face. If a court finds no ambiguity and/or EPA's current interpretation fails, a precondition to promulgation of the CPP has not been met and the CPP cannot be implemented.

4. The Clean Power Plan unlawfully reaches beyond the fence line of affected sources.

By basing its BSER on actions that will take place beyond the boundaries of the affected sources, indeed that are premised on "shifting" generation away from affected sources to non-emitting sources, and "substituting" generation from non-emitting sources for coal-fired generation, EPA dismisses the statutory boundaries of Section 111. While EPA claims that its building blocks 2 and 3--the re-dispatch to NGCCs and a ramp up in renewable energy generation, respectfully--can *theoretically* be implemented by the units themselves, they cannot. And relying on "owner/operators" to implement them is still not the source implementing the building blocks, because, even then, owners and operators may in reality be subsidizing OTHER owner/operators. Indeed, such a system does not meet the standards of achievability or feasibility as historically understood and the standard cannot be implemented directly by the affected source category. Consequently, the CPP does not implement Section 111(d). Even if EPA's changed rationale in the final rule were acceptable, it differs substantially

from the proposal and is, thus, not a logical outgrowth, so the court should return the rule to EPA for further proceedings.

Further, the BSER determination mandates a fundamental change in the delivery of electric energy throughout the country, stretching the boundaries of the Clean Air Act to sources that EPA itself admits it cannot regulate. This fundamental and expansive jurisdictional overreach lacks Congressional authorization and is unlawful.

5. The Clean Power Plan will force Missouri to adopt more stringent standards than the federal requirements in violation of state law.

In Missouri, the Missouri Legislature made known very clearly its position that any emission reduction plan developed for carbon dioxide sources could not be more stringent than applicable federal emission guidelines. *See* R.S.Mo. 643.640.4 ("The commission may develop, on a unit-by-unit basis for individual existing affected sources and emissions of carbon dioxide at these existing affected sources, consistent with 40 CFR 60.24(f), emission standards that are less stringent, but not more stringent, than applicable federal emission guidelines or longer compliance schedules than those required by federal regulations.").

Yet, through the never-before-seen structure and elements of the CPP, EPA has crafted an approach which forces states to make choices that could result in state requirements that are, in actuality, more stringent than requirements that are or could be required at the federal level. Doing so in Missouri would require a legislative amendment that violates the state's sovereignty by forcing policy changes within the state. EPA's directive of forced legislative change will also cost the state time and money. These economic and sovereign harms are irreparable. *See Odebrecht Constr., Inc. v. Sec. Fl. Dept. of Transp*., 715 F3d 1268, 1289 (11th Cir. 2013) ("courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."). In other words, the CPP backs states into making hard political decisions that could leave the states no choice but to force one or more affected units to bear more stringent regulatory burden than could have been required of that unit or units through EPA's authority under the CAA. This substitution of federal policy for state policy is most remarkable – and unlawful – because EPA could not require the stringent level of state reductions under federal law.

B. Irreparable injury will result if the Clean Power Plan is not stayed.

As the Sixth Circuit recently noted in In re: Environmental Protection Agency and Department of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," State of Ohio, et al v. U.S. Army Corps of Engineers, et al., Case No. 15-3751 (Oct. 9, 2015), a stay "allows for a more deliberate determination whether the exercise of Executive power… is proper " and will serve to silence "the whirlwind of confusion" that springs from uncertainty as to whether a rule will survive legal challenge. There, the Court noted that the public did not have adequate notice that the federal government intended to adopt a bright line distance test as a basis for jurisdiction. The procedural failure in WOTUS pales in comparison to EPA's CPP rulemaking. As this Petition for Reconsideration exhaustively details, the substantive revisions, deviations and newly crafted creations presented by the final CPP are not the "logical outgrowth" of the proposal. Accordingly, the public's statutory right to proper notice and comment has been violated. EPA's haste in issuing a final rule that departs so dramatically from its proposal simply fails to comply with the requirements of the APA and warrants a stay be issued.

Due to the time limits within the CPP, absent an immediate stay of the CPP, the states, including Missouri and Illinois, will need to commence a rulemaking process before knowing whether EPA's assertion of authority over the means, mechanisms and market of energy production will survive legal challenge. Because the rule reaches far and wide into state economies, requires the State to muster numerous "stakeholders;" educate the public about the rule and its consequences; and make political, economic, and environmental choices in the near future (choices that the state has already made through its Public Service Commission proceedings and that it must now change), this rule should be stayed until either EPA reconsiders the rule and/or the courts have an opportunity to rule on its legality.

C. The public health and welfare will not be appreciably harmed if the Clean Power Plan is stayed.

The public will not suffer any harm as a result of temporarily staying the legal effectiveness of the CPP. EPA admits that the reductions required by the CPP will have little direct impact on public health and welfare, absent actions from other countries which it *hopes* will be spurred on by the CPP.[19] 80 Fed. Reg. 64699. (stating the CPP encourages other major economies to take similar steps towards carbon emission reductions); see also 80 Fed. Reg. 64899 (referring to new Canadian hydropower projects). Moreover, EPA itself has missed several self-imposed deadlines for issuing the CPP, including missing deadlines set forth in the settlement agreement with environmental groups and states. *See* 75 Fed. Reg. 82392, 82392 (Dec. 30, 2010) ("EPA will take final action with respect to the [Section 111(d) Rule] no later than May 26, 2012."). An additional delay which allows stakeholders to meaningfully respond to new aspects of the CPP will not harm, but benefit the public.

D. The public interest favors a stay.

A stay while EPA considers the issues raised for reconsideration would greatly favor the public interest. The petitioners seek a new notice and comment period allowing the public to comment on the radical changes found in the CPP. A thorough evaluation of public comments concerning EPA's new approach may allow EPA to establish a foundation for the CPP and potentially limit the grounds for legal challenge and uncertainty about the future of the CPP.

A judicial stay serves those ends even more. The public should not expend the resources necessary to understand, develop plans, and comply with this rule, only for it to be found unlawful during judicial proceedings. Recently, the Supreme Court found that the Mercury and Air Toxics Standard was unlawful because of procedural errors. This was so even though four years of actions to implement the standard at a cost of billions had passed. Given the astronomical price tag of this rule, the public interest favors a stay until the legality of the rule can be tested.

[19] In fact, forest fires in Indonesia last month produce more greenhouse gas emissions than all U.S. economic activity each day, according to a report issued by the World Resources Institute (http://www.wri.org/blog/2015/10/indonesia%E2%80%99s-fire-outbreaks-producing-more-daily-emissions-entire-us-economy). This report is a sobering reminder that natural events such as large fires or volcanoes can easily overcome humankind's effort to tackle climate change.

VI. CONCLUSION

Courts – even the Supreme Court – have admonished EPA over its approach to rulemaking. The Mercury and Air Toxics Standard, a rule implemented at great cost at the same sources subject to this rule, was deficient because EPA failed in a predicate requirement - to correctly consider costs when it decided whether to issue the rule at all. The GHG "tailoring" rule was held to be an overreach of EPA's authority. The Cross-State Air Pollution Rule went through years of revision and challenge in the courts. And EPA's recently promulgated "waters of the U.S" Clean Water Act rule has been stayed due to EPA's failure to provide adequate notice of a single, yet fundamental change in the jurisdictional criteria the rule was intended to clarify.

EPA's desire to promote "the international leadership of the U.S. in the global effort to address climate change," 80 Fed. Reg. 64663, is not an excuse for ignoring the requirements of both the CAA and the APA. Its regulatory actions are subject to the requirements of the law.

Reconsideration of the suite of rules must be granted to afford the public the opportunity to comment on matters of central relevance to the final CPP, NSPS, and Modified and Reconstructed Source rules and align those rulemakings with the newly proposed FIP. There can be no question that the suite of rules would change had stakeholders been given the opportunity to provide public comment on them. The final suite of rules differs so extensively from the proposals and suffers from such severe procedural infirmities that it is highly likely a reviewing court will conclude that EPA's rulemaking process violates the APA and is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. Rather than wait to have a court issue such a ruling, EPA should withdraw and re-propose the suite of rules so as to address the multitude of issues identified herein.

Attachments:

1. Final CPP Rule - Comparison to Proposal
2. Matters of Central relevance for the CPP
3. Matters of Central Relevance for the NSPS
4. Matters of Central Relevance for the Modified and Reconstructed Rule
5. Work Papers: Land Use and Cost Estimates for Wind and Solar

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Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

September 2, 2015

The Honorable Gina McCarthy, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Final Rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

Dear Administrator McCarthy:

The State of New Jersey opposes the unprecedented regulatory overreach represented by the United States Environmental Protection Agency's (EPA) Final Rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (the Rule or Final Rule), as announced on August 3, 2015, and respectfully requests that you exercise your authority as Administrator to issue an Administrative Stay of the implementation of the Rule and convene a proceeding for Reconsideration of the Rule.

When this Rule was proposed on June 18, 2014, the New Jersey Department of Environmental Protection (DEP) undertook an extensive and detailed analysis of the proposal. Our analysis found that the Proposed Rule was fundamentally flawed and could not be redeemed through mere revisions. We also concluded that the proposal was incomplete, needlessly complex, and would be difficult to implement.

Our examination of the Final Rule has confirmed the conclusions we reached based on our study of the Proposed Rule and which we transmitted to you in writing on November 26, 2014. New Jersey supports clean power – and has demonstrated that support time and again over the course of at least three decades. The State cannot, however, support EPA's ill-conceived Clean Power Plan, which is uncommonly cumbersome, difficult and costly to implement, could undermine reliability, and would yield insufficient results given the effort to comply. The Final Rule is riddled with vague, ambiguous, and uncertain provisions and the cost-benefit analysis lacks credibility.

The Final Rule punishes states, including New Jersey, that have already achieved significant reductions in carbon emissions, by setting even stricter goals for them, even though many other states have made much less progress in reducing emissions and are given less stringent emission targets than New Jersey under the Final Rule.

The Final Rule adds disproportionate costs to states like New Jersey that have already invested heavily in renewable energy and energy efficiency measures. This is especially egregious because EPA disallows credit for any measures that predate 2013, and compromises the value of facilities developed prior to 2018, as part of the Clean Energy Incentive Program (CEIP).

The Final Rule also sets goals that squander real opportunities for addressing both carbon emissions and pollutants such as sulfur dioxide, nitrogen oxides, and particulates that cause cross-state air pollution. The incomplete, overly complicated, and inconsistent Final Rule fails to establish a solid foundation for future emission reductions that would benefit the public health.

New Jersey has the fifth-lowest carbon emission rate in the country, with an emission rate less than half of most other states, including all other states within the PJM region, and lower than seven of the nine Regional Greenhouse Gas Initiative (RGGI) states.

Accordingly, an Administrative Stay and Reconsideration of the Rule is justified to ensure that EPA does not unfairly burden the State of New Jersey with this Final Rule.

The bases for issuing an Administrative Stay and for Reconsideration of the Rule are enumerated below.

Request for a Stay

The State of New Jersey hereby moves for a stay of the Rule.[1]

When considering a stay request, an agency must apply the same four-factor test applied at the judicial level.[2] Namely, the agency must consider: (1) whether the petitioner is likely to prevail on the merits of the appeal; (2) whether the petitioner is likely to suffer irreparable harm in the absence of a stay; (3) the relative harms of issuing a stay; and (4) the public interest.[3] As explained below, each of these factors, in addition to the general interests of justice, compel issuance of a stay.

[1] See Fed. R. App. P. 18(a)(1) (requiring a petitioner to move first before the agency for a stay); see also 5. U.S.C. § 705 (authorizing the Administrator to stay its actions "when justice so requires").
[2] *Sierra Club. v. Jackson*, 833 F. Supp. 2d 11, 29-30 (D.D.C. 2012).
[3] *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977).

1. **The State of New Jersey is likely to succeed on the merits in its challenge of the Final Rule.**[4]

   a. EPA's Final Rule reflects an improper interpretation of the phrase "performance standard" because the Rule regulates "beyond the fence," which includes such sources as nuclear power, renewable energy, energy efficiency, and hydropower, which Congress did not provide authority to EPA to regulate because they are not sources of emissions. Even if EPA is found to have authority to regulate existing power plants under Section 111(d), the Clean Air Act only authorizes the EPA to regulate the source of emissions. However, in the Final Rule, EPA ignored this regulatory limit and set its performance standards based on outside-the-fence assumptions about renewable energy generation and statewide dispatch rates from regulated sources.

   Furthermore, the Final Rule goes well beyond EPA's jurisdiction for the regulation of emissions from existing electric generating units. The Final Rule invades the jurisdiction of the Federal Energy Regulatory Commission (FERC), the North American Electric Reliability Corporation (NERC), the Nuclear Regulatory Commission (NRC), regional transmission organizations such as PJM, and the jurisdiction exclusively reserved to the states and, in doing so, introduces legal, economic, reliability and other unintended consequences.

   b. EPA is ignoring the clear intent of Congress by setting a performance rate for existing power plants (under Section 111(d)) that is more stringent than the performance rate for new power plants (under Section 111(b)). Section 111(d) expressly instructed states and EPA to consider "the remaining useful life" of existing sources. This language clearly conveys two things: 1) Congress intended for existing sources to be given less stringent standards than new sources; and 2) within a class of existing sources, older sources are to have less stringent standards than more recent sources. EPA inverted both of these commonsense inferences; the Final Rule creates performance standards for existing sources that are more stringent than the standards for new sources. In addition, EPA applies a single performance standard to all existing sources, thereby ignoring the fact that older sources likely have a different "remaining useful life" than newer sources. Indeed, EPA's Final Rule completely ignores the intent of the Congress and represents an egregious and unjustified expansion of its regulatory authority.

   c. EPA's interpretation of Section 111(d) is contrary to the text of the statute and Congressional intent. The text of Section 111(d) provides, "[t]he Administrator shall . . . establish a procedure . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing

[4] This is not an exhaustive list of the legal flaws in the Final Rule, but rather a highlight of the most glaring shortcomings. New Jersey does not waive any argument not raised in this section.

source for any air pollutant."[5] A plain reading of the text makes clear that Congress intended for states to establish standards of performance under Section 111(d), and for EPA to establish a procedure for states' submission of plans to implement the standard. However, in its Final Rule, EPA established both a procedure and binding emission targets that apply to affected sources. Therefore, EPA's proposal is inconsistent with the delegation of authority provided for in Section 111(d).

d. EPA is precluded from regulating greenhouse gases from existing power plants under Section 111(d) of the Clean Air Act. The source category is already regulated under Section 112 of the Act.

2. **The State of New Jersey will suffer irreparable harm should the Final Rule not be stayed.** Among other reasons, the Final Rule will cause irreparable harm to the State of New Jersey because:

a. Voluntary compliance by the State of New Jersey would cede to the Federal government the State's existing authority to manage and oversee its own energy future. The State of New Jersey has been a national leader in advancing thoughtful, future-oriented energy policy. Guided by the New Jersey Energy Master Plan, which was issued in 2011 and is in the process of being updated, the State has succeeded in driving down emission rates to among the lowest in the country, promoting a diverse portfolio of new, low-emission in-state generation, lowering energy costs for consumers, and rewarding energy efficiency and conservation. New Jersey also is on target to meet its renewable energy portfolio standard interim target of 22.5 percent renewable generation by 2021. The enormous regulatory overreach represented by the Final Rule could put these achievements – and future progress – at risk.

b. The Final Rule disallows credit for renewable energy sources and increases in nuclear power plant capacity developed before 2013. As a national leader in the development and use of clean and renewable energy, New Jersey would be punished for that leadership in the Final Rule because all of the State's efforts before 2013 are entirely ignored.

As a result, the value of older renewable energy will decline in favor of renewable energy produced in 2018 and beyond. The State of New Jersey believes that this arbitrary cut-off date will damage the viability of New Jersey's investments in renewable energy, as power plants will only want to purchase renewable energy that provides credit for both the federal and the state programs. Without a stay, New Jersey and its citizens will be irreparably harmed because their investments will be undermined.

[5] 42 U.S.C. § 7411(d)(1)(A).

It is unfair that a solar panel or a wind turbine that predates 2013 is not allowed to generate emission rate credits (ERCs), and that renewable energy facilities that predate 2018 are not eligible for the extra federal credits available in 2020 and 2021.

It also is unfair that nuclear power plants that increased capacity before 2013 are not allowed to generate ERCs, while those that waited until after 2012 will. New Jersey will be irreparably harmed because the costs borne by ratepayers and the environmental benefits of capacity increases in New Jersey's nuclear plants that were performed before 2013 will not be recognized by EPA for compliance credit.

c. In setting the mass based goal for a state, the Final Rule only provides for the then-existing usage of the total capacity of regulated units that were operating in 2012. This could forever limit the ability of those existing units to expand the usage of their capacity no matter how clean they are. Conversely, and illogically, an identical new Natural Gas Combined Cycle (NGCC) unit subject to Section 111(b) has no limit on its capacity or on the usage of that capacity.

   While 52 percent of New Jersey's power is generated by carbon-free nuclear energy, New Jersey's fossil fuel baseline is made up of 92 percent NGCC units, many of which are relatively new and not yet working at full capacity. Should New Jersey elect to pursue a mass-based goal, it would be unable to ramp up NGCC units to full capacity. It would also be faced with shutting down or reducing the use of existing, low emitting NGCC units, even as other states are building similar units to replace coal units. A limit for existing sources should not be more stringent than a limit for a new source. This both harms New Jersey and its ratepayers and defies simple logic.

d. Billions of dollars invested by New Jersey in renewable energy are ignored in the Final Rule. From 2001-2012, $3.27 billion was invested in renewable energy and energy efficiency in New Jersey. New Jersey ratepayers should not be expected to shoulder the burden of additional costs just because the Final Rule does not recognize the multi-billion dollar investments already made in renewable energy and energy efficiency.

e. The Final Rule will increase the cost of energy for New Jersey ratepayers while providing little if any benefit. EPA's purported average national cost savings cannot rationally be applied on a state-by-state basis, especially given that EPA set individual state goals. Although the State has not yet completed its cost-benefit analysis of the Final Rule, New Jersey can state with a high level of certainty that complying with this Rule will not save money for New Jersey ratepayers but will, instead, further increase their energy costs with insignificant if

any benefit. If the Final Rule is ultimately overturned, ratepayers will bear the costs of EPA's failed effort because suppliers will pass on those costs to their ratepayers.

f. The State of New Jersey will needlessly expend taxpayers' dollars to analyze this complex and often contradictory Final Rule, which is likely to be successfully challenged. At least as many resources would be required to develop a plan to implement the Final Rule. This represents a needless and wasteful expenditure over the next three years if, as is likely, the Final Rule is overturned in the courts due to its numerous flaws.[6] Those resources would be much better spent addressing lawful and effective efforts to further advance the already substantial improvements New Jersey has made in reducing carbon emissions. New Jersey's past efforts helped it become the State with the fifth-lowest carbon emission rate, even though it is the twenty-second largest producer of electricity.

3. **The balancing of harms and public interest favors issuance of a stay.** New Jersey will be harmed if a stay is not granted, whereas there will be no resultant harm if a stay is issued. It is therefore in the public interest to stay implementation of the Rule.

a. If the Rule is not stayed New Jersey and its citizens will suffer significant harm. New Jersey will be forced to expend significant state resources to comply with the Rule even though it is likely to be invalidated. As discussed, New Jersey would be required to immediately begin designing the State plan, at a significant cost to New Jersey taxpayers. Moreover, ratepayers in New Jersey would see their electricity bills increase as a result of the Rule. These increased expenditures are not in the public interest.

b. There would be no resultant harm if the Rule is stayed, because the compliance deadlines in the Rule would remain unchanged. In the unlikely event that the Rule is upheld, the 2022 initial compliance deadline and 2030 final compliance deadline will likely remain in place. Thus, a stay would only postpone the development and submission of State plans until after the validity of the Rule is adjudicated. Staying the Rule will ensure that time and resources are not wasted on a regulation that will later be invalidated. Moreover, EPA cannot plausibly claim that a stay will cause harm given that EPA missed its own stated deadline to finalize this Rule by more than three years.[7]

c. The public interest favors granting a stay of the Rule. Given the harm to New Jersey if a stay is not granted, and the lack of any harm if a stay is granted, the public interest favors granting a stay of the Rule.

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[6] *See, e.g., Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").
[7] *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010) (stating that EPA will finalize Section 111(d) rule by May 26, 2012).

Accordingly, New Jersey's Request for a Stay of the Final Rule should be granted until EPA's authority for promulgating this rule is adjudicated.

Request for Reconsideration of the Final Rule

The State of New Jersey hereby requests Reconsideration of the Rule for the following reasons:

1. **New Jersey has objections to the Final Rule that were impracticable to raise during the public comment period and are of central relevance to the outcome of the Rule.** The Final Rule contains significant, material elements that were not identified in the Proposed Rule.

   As Mark Rupp, EPA's deputy associate administrator for intergovernmental affairs, said in June, "The final rule will not look like the proposed rule."[8] And as you stated earlier this year, "I think one of the things I'm most proud of is how much this rule changed between proposal and final."[9]

   As a result, the Final Rule includes changes that could not be raised during the public comment period but are of central relevance to the outcome of the Final Rule. In such instances, the Clean Air Act requires the Administrator to convene a proceeding for reconsideration of the Rule to "provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed."[10]

   These changes, discussed below, also constitute a violation of the Administrative Procedure Act because they are not a "logical outgrowth" of the Proposed Rule. Neither the State of New Jersey nor members of the public could have reasonably anticipated these changes. This has the practical effect of depriving the State and the public of the opportunity to comment on these new, unexpected provisions. EPA's approach violates both the spirit and the letter of the law by depriving the public of a meaningful notice and comment period for this massive new regulatory regime.

   Below is a list of some aspects of the Final Rule for which notice was not properly given in the proposal:

   a. EPA issued voluminous highly technical data and support documents essential to a thorough evaluation of the Proposed Rule as late as October and November 2014, just days before the close of the public comment period. These documents covered fundamental aspects of the Proposed Rule, ranging from building block methodology, the calculation of state-specific goals, emission reduction compliance trajectories, and the translation of emission rate-based goals to mass-

[8] E&E News, June 8, 2015
[9] E&E News, August 12, 2015
[10] 42 U.S.C. § 7607(d)(7)(B).

based equivalents. This left insufficient time for New Jersey to meaningfully study, evaluate, and comment on the Proposed Rule.

b. EPA failed to identify in the Proposed Rule all of the changes it intended to make to allowances and compliance credits and its intention to undermine existing state Renewable Portfolio Standards programs with its ill-defined Emission Reduction Credit (ERC) program and the mass-based and rate-based trading programs. EPA's decision to include in the Final Rule provisions that disallow credit for a significant portion of New Jersey's existing renewable energy is not a logical outgrowth of the Proposed Rule and could not be anticipated.

c. EPA did not identify in the Proposed Rule that renewable energy facilities constructed before 2013 would not receive compliance credits during compliance years. Nor did EPA identify that those constructed before 2018 would be denied extra compliance credit from 2020-2021 under the Clean Energy Incentive Program (CEIP) because the CEIP does not credit any facilities built before the final program submittal, which is due on or about September 6, 2018.

d. EPA revised its "Building Blocks" without giving the public an opportunity to comment on the changes. The Rule's Building Blocks are the foundation of the performance standards, yet New Jersey did not have an opportunity to comment on the new assumptions for heat-rate improvements for coal plants, dispatch rates for natural gas plants, and expansion of renewable generation.

In addition, EPA applied the Building Blocks to affected sources in a new manner. The performance standards in the Final Rule were developed by applying the Building Blocks to three regional interconnection systems. This novel approach was not contemplated in the proposal. In sum, the Building Blocks and the manner in which they were applied are indisputably of central relevance to the Final Rule, and therefore New Jersey's Reconsideration request should be granted.

2. **The Final Rule cannot be implemented because it contains vague, ambiguous, uncertain provisions that remain unresolved and/or will not be resolved until adoption of the Proposed Federal and Proposed Model Rules.** Accordingly, the Final Rule must be considered a Proposed Rule. Among the vague, ambiguous, and uncertain provisions in the Final Rule are:

a. The Final Rule contains dozens of issues that await resolution through the adoption of the Proposed Federal Plan and Proposed Model Rules during the summer of 2016, which makes it difficult if not impossible to evaluate the requirements and implications of the Rule.

b. The EPA failed to perform a state-by-state cost-benefit analysis of compliance with the rule. The EPA purports that the Final Rule will actually reduce the cost of electricity to ratepayers but offers no credible analysis to support that assertion since it did not perform a state-by-state analysis, which would be appropriate given the fact that each state has its own target for emissions reduction. The State of New Jersey does not believe that the Clean Power Plan will result in cost savings to New Jersey's ratepayers; indeed, we expect that the cost of compliance would increase the costs of electricity in our State.

c. EPA acknowledges that Section 111(d) of the Clean Air Act does not explicitly authorize multi-state plans; nevertheless such plans are authorized by the Final Rule. Furthermore, the Final Rule suggests that mass-based goals and multi-state plans can be used as a method for "moving pollutants around," rather than actually achieving net reductions in pollutants, even while the Rule acknowledges that such an approach could create problems for low income communities.

d. It is unclear by what authority EPA will develop an Emission Reduction Credit (ERC) program because some details about the ERC are not contained in the Final Rule, but instead will not be revealed until adoption of the Proposed Federal Plan and proposed Model Rule. Equally, it is uncertain how EPA will enforce such a program, ensure that pricing is reasonable, and ensure that sufficient credits are available.

e. Under the Final Rule, EPA makes it unlikely that energy suppliers will buy New Jersey's Renewable Energy Credits (RECs) that do not qualify under EPA's ERC program. Because EPA's ERC program provides advantages to renewable energy facilities constructed in 2018, EPA's ERC program may well leave states and developers with stranded renewable energy assets, since it will limit early action credit and will preclude any credit for renewable energy facilities constructed prior to 2013.

f. EPA's arbitrary and unexplained decision to change the methods for measuring emissions to an unconventional and uncertain new method could have unintended consequences and may actually hinder compliance. Furthermore, by disallowing the early reduction benefit, the Final Rule may harm the zero carbon renewable and nuclear energy that comprises approximately 60 percent of New Jersey's in-state generation.

As I wrote to you on November 26, 2014, the State of New Jersey shares EPA's goal of improving the quality of the air every American breathes. New Jersey is proud to have achieved significant improvements in air quality, both to improve the health of our environment and the health of our people. These improvements reflect forward-thinking policy and significant investments over the course of several decades.

Unfortunately, the Final Rule will not advance that shared goal. Instead, it will burden the citizens of our state with unjustifiable increases in electricity costs while also complicating New Jersey's efforts to make further reductions in carbon emissions.

Consistent with our 2011 Energy Master Plan, New Jersey has already promoted cleaner and more efficient energy. Adding this cumbersome and poorly designed federal regulation is counter-productive and unfair to the people of New Jersey. Therefore, on behalf of the State of New Jersey, I respectfully and urgently request that you exercise your authority as Administrator to issue an Administrative Stay and to convene a proceeding for Reconsideration of the Rule.

Sincerely,

Bob Martin
Commissioner