OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA

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January 16, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environment Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Submitted electronically via Regulations.gov

Re: Comments of the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming, and the Louisiana Public Service Commission, the Mississippi Department of Environmental Quality, and the Mississippi Public Service Commission on the proposed rule entitled *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units* (Docket No. EPA-HQ-OAR-2017-0355; FRL-9969-75-OAR).

Dear Administrator Pruitt:

The undersigned States and state agencies submit the following comments on the Environmental Protection Agency's ("EPA") proposed rule entitled *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035 (Oct. 16, 2017) ("Proposed Rule").

The Proposed Rule rescinds EPA's existing, but currently stayed, rule entitled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Power Plan"). The Proposed Rule is the first phase in EPA's anticipated two-step process to rescind the existing Rule and consider a replacement rule consistent with EPA's statutory mandate and regulatory duties. *See also State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units*, 82 Fed. Reg. 61,507 (Dec. 28, 2017). EPA has explained that, in its view, rescission of the existing Rule is necessary to correct its legal interpretation of section 111(d) of the Clean Air Act ("CAA"), the statutory provision on which the Power Plan is based. This amended interpretation of section 111(d) "is consistent with

the CAA's text, context, structure, purpose, and legislative history," as well as with the agency's previous—that is, pre-Power Plan—regulatory practice.

The undersigned States and state agencies strongly support the Proposed Rule, which recognizes that the Power Plan is both unlawful and bad policy. Specifically, rescinding the Power Plan in its entirety is necessary because the Power Plan exceeds the authority Congress has delegated to EPA in several respects. *First*, the Power Plan exceeds EPA's authority under CAA section 111(d), which is limited in the first instance to establishing a procedure by which *States* set standards of performance for existing sources. *Second*, section 111(d) authorizes only emission-reduction measures that can be applied at an individual stationary source, not generation shifting as the Power Plan requires. *Third*, section 111(d) forecloses EPA from regulating coal-fired units that are also subject to regulation under section 112. *Fourth*, section 111(d) cannot be used to override the States' authority to manage power resources or coerce States into administering federal policy concerning energy generation.

For those and other reasons discussed below, we urge EPA to adopt the Proposed Rule and rescind the Power Plan. We also urge EPA to continue with its broader two-step process for reconsidering the Power Plan and look forward to further opportunities to participate in these rulemakings as EPA considers how to fulfill its statutory mandate lawfully and responsibly after the Power Plan has been repealed.

BACKGROUND

I. The Clean Air Act And Section 111(d)

CAA section 111 directs EPA to publish categories of "stationary source[s]"—defined as "any building[s], structure[s], facilit[ies], or installation[s] which emit[] or may emit any air pollutant," 42 U.S.C. § 7411(a)(3)—that "cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," *id.* § 7411(b)(1)(A). For *new* sources, EPA must establish nationally applicable "standards of performance." *Id.* § 7411(b)(1)(B). A "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction" that has been adequately demonstrated to limit emissions from an individual source. *Id.* § 7411(a)(1).

For *existing* sources, in limited circumstances EPA may also call upon the States to submit plans containing standards of performance for the same pollutant. *Id.* § 7411(d)(1). Specifically, section 111(d) authorizes EPA to "prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan" establishing "standards of performance for any existing source" for "any air pollutant" emitted from a source category which is not already "regulated under section [1]12 . . . to which a standard of performance under this section would apply if such existing source were a new source," subject to certain exclusions. *Id.* § 7411(d)(1)(A).

Importantly, section 111(d) further provides that any "standard of performance" must be

"for" and "appl[icable] . . . to a[] *particular* source." *Id.* § 7411(d), (d)(1)(B) (emphasis added).

II. The Section 111(d) Existing Source Rule: The "Clean Power Plan"

In 2015, EPA devised national "emission performance rates" for coal and gas power plants based on a best system of emission reduction consisting of three so-called "Building Blocks." 80 Fed. Reg. at 64,719–20, 64,752. Building Block 1 is based on improved combustion efficiency at individual coal-fired generating facilities, which can result in lower CO_2 emissions per unit of electric output. *Id.* at 64,745. As EPA explained, Building Block 1 would not satisfy the Administration's policy goals on its own because it would "yield only a small amount of emission reductions." *Id.* at 64,769. EPA thus presented Building Blocks 2 and 3 as essential components of the Power Plan. Building Block 2 involves replacing existing coal-fired generation with additional natural gas-fired production. *Id.* at 64,745. Building Block 3 is based on displacing both existing coal- and gas-fired generation with generation from new renewable energy sources, such as wind and solar. *Id.* at 64,747–48. The bulk of the Power Plan's emission reductions came from Building Blocks 2 and 3—or in other words, from the fundamental restructuring of the current mix of power generation, which EPA refers to as "generation shifting."

Based on those Building Blocks, EPA set "emission performance rates" for existing fossil-fuel fired facilities at which facilities would need to operate in order to achieve the targeted emission reductions. But, as EPA admitted, no existing facility could meet those rates. The rates are only achievable by generation shifting: reducing coal-fired and gas-fired production and replacing it with increased generation from renewable sources.

EPA attempted to justify its approach by equating a "source" with its owner or operator. Specifically, EPA reasoned that its jurisdiction under section 111(d) extends to "actions that may occur off-site and actions that a third party takes." *Id.* at 64,761. Under this approach, a source owner or operator could meet the Power Plan's emission performance rates by "invest[ing] in actions at facilities owned by others." *Id.* at 64,733. Thus, the only way for an existing source to meet the new standards under the Power Plan is for a source's owner or operator to "calculate an adjusted CO_2 emission rate" using the source's actual emission data and proof of lower- or zero-emitting generation occurring *elsewhere* in the form of a tradable "emission rate credit." 40 C.F.R. § 60.5790(c)(1).

III. The Litigation

Twenty-seven States, including many of the undersigned, as well as other parties, sought judicial review of the Power Plan in the U.S. Court of Appeals for the District of Columbia Circuit. *West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.). The States argued that the Power Plan violates the CAA because section 111(d) limits EPA's role to procedure rather than substance for existing sources, and the CAA authorizes only source-specific emission reduction measures. The States also argued that EPA is prohibited from regulating under section 111(d) source categories that are already regulated under section 112 of the CAA, and that the Power Plan seeks to displace the States' role in energy generation. Reflecting the strength of those arguments,

on February 9, 2016, the U.S. Supreme Court took the unprecedented step of staying implementation of the Power Plan pending judicial review. *West Virginia v. EPA*, No. 15A773 (U.S. February 9, 2016). The *en banc* D.C. Circuit heard oral argument in the cases on September 27, 2016.[1]

On March 28, 2017, President Trump issued Executive Order 13783, which directed EPA to "suspend, revise, or rescind" the Power Plan "as appropriate and consistent with law." Exec. Order No. 13783, 82 Fed. Reg. 16,093 (Mar. 28, 2017). EPA then published an announcement in the Federal Register that it was initiating a review of the Power Plan consistent with the Executive Order. 82 Fed. Reg. 16329 (Apr. 4, 2017). EPA moved to hold the cases in abeyance in the D.C. Circuit, and on April 28, 2017, the court held the cases in abeyance for sixty days. ECF No. 1673071. On August 8, 2017, the court issued an order holding the cases in abeyance for an additional sixty days. ECF No. 1687838. On November 9, 2017, the court ordered that the cases remain in abeyance for an additional sixty days. ECF No. 1703889.

In this proceeding, EPA explains that it has concluded its initial review of the Power Plan and found that it is inconsistent with the policy articulated in the Executive Order. The Power Plan imposes massive costs on consumers and the power sector, invades a traditional area of state responsibility, and "did not adequately ensure the national interest in affordable, reliable electricity, including from coal generation." *Id.* Moreover, the Power Plan departed from the agency's longstanding regulatory practice and reading of the CAA. *Id.* EPA has accordingly proposed to return to its prior legal interpretation of section 111 as "limited to emission reduction measures that can be applied to or at an individual stationary source" only. *Id.* at 48,039. EPA explains that such reading is the best construction of the law because it is faithful to the text of the CAA, is consistent with the statute's legislative history, aligns with EPA's prior understanding and practice, avoids illogical results, and avoids interfering with the role of the States as well as another federal agency. *Id.* For those reasons, EPA has proposed to rescind the Power Plan. EPA has also made clear that this Proposed Rule is the first in a two-step process to reconsider the Power Plan, as EPA has also initiated proceedings to consider whether and how to replace the Power Plan if it is rescinded. *See* 82 Fed. Reg. 61,507 (Dec. 28, 2017).

DISCUSSION

EPA has authority to rescind the Power Plan and ought to do so. It is settled law that agencies may change direction in terms of significant policy measures. An agency need not demonstrate that its new policy is superior to the policy that it is replacing, but only that the new policy is permissible under the statute and that there are good reasons for the change of course. Nor is an agency prohibited from rescinding a rule that it believes rests on a faulty legal interpretation so long as it believes that the new legal interpretation is correct.

The Proposed Rule satisfies these standards. EPA has provided good reasons to justify its decision to rescind the Power Plan. As explained further below, the Proposed Rule is a necessary

[1] Judge Garland did not participate in this *en banc* proceeding.

step to correct EPA's previous legally flawed interpretation of its duties and authority under the CAA. Because the Power Plan violates the CAA in several respects, we strongly urge EPA to adopt the Proposed Rule rescinding the Power Plan.

I. EPA Has Authority To Rescind The Power Plan

An agency can change policy so long as it can show "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In *Fox Television*, the Supreme Court rejected the argument that an agency must meet a higher standard for rescinding an existing rule than is required for adopting a regulation in the first place. *Id.* at 514. The Court explained that the Administrative Procedure Act, which instructs courts to "'hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] . . . arbitrary [or] capricious,'" does not distinguish "between initial agency action and subsequent agency action undoing or revising that action." *Id.* at 515.

There are only two exceptions to this general rule, neither of which apply here. *First*, an agency must describe its new policy in greater detail if the policy is based on factual findings that contradict those that supported the old policy. *Fox*, 556 U.S. at 515. EPA has not claimed to rely on new factual findings in the Proposed Rule. *Second*, an agency must explain its decision in more detail if the prior policy engendered serious reliance interests. *Id.* Here, the Power Plan could not have engendered serious reliance interests. The Power Plan was in effect for only four months before being stayed almost two years ago—more than six months before the Power Plan's first deadline for States to submit compliance plans—in the face of significant challenges to the legal authority on which EPA relied.

Accordingly, EPA need only make the same showing necessary for adopting a regulation in the first instance—that the regulation is permissible under the statute and not arbitrary or capricious. Under the arbitrary or capricious standard, an agency is only required to show that the new policy is permissible under the statute and "that there are good reasons for the new policy." *Fox*, 556 U.S. at 515. Moreover, it is appropriate for an agency to change course based on a reevaluation of policy priorities under a new administration: "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 57 (1983) (Rehnquist, J., concurring in part and dissenting in part). An agency can also change its position based on its view of the correct legal interpretation of a statute. G*ood Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (an agency "is not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation.").

These principles make clear that EPA's decision to rescind the Power Plan is not arbitrary and capricious. EPA recognizes that it is changing policy based on its view as to "the most

appropriate reading of the statute," and that its view has been informed by the CAA's "text, its legislative history, prior practice under CAA section 111, statutory context, and in consideration of broader policy implications." 82 Fed. Reg. at 48,038. Specifically, EPA has explained that after reconsidering the CAA's dictates and prior agency practice, it has concluded that the term "best system of emission reduction" is "limited to emission reduction measures that can be *applied to or at* an individual stationary source." 82 Fed. Reg. at 48,039. Indeed, EPA has explained that it "believes that this is the best construction of CAA section 111(a)(1)" because it accords with the text of the CAA, aligns with congressional intent as demonstrated by legislative history, is consistent with EPA's prior understanding, avoids illogical results, and avoids transforming federal-state relations. *Id.* Although we agree with EPA that this is the *best* construction of section 111, the Proposed Rule would be legally appropriate even if EPA merely believed this interpretation to be better than the statutory theory on which the Power Plan was based.

Finally, it is entirely appropriate for EPA to propose rescinding the Power Plan without, at the same time, proposing a replacement rule. EPA has announced a two-step process for implementing the Executive Order's instruction to review the Power Plan: (1) rescinding the existing Rule; and (2) completing a separate rulemaking concerning a new rule. EPA has full authority to choose to amend its regulations in two phases. As an initial matter, EPA is not required to issue a rule under section 111(d) at least with respect to coal-fired power plants already regulated under section 112. *See infra* pp. 13–14; 42 U.S.C. § 7411(d). Because the Proposed Rule satisfies the standards discussed above for a change in regulation based on new policy priorities, the Proposed Rule stands on its own regardless of future regulatory action EPA may take in this space.

In any event, it is well established that agencies may proceed incrementally when fulfilling their statutory responsibilities. *See, e.g., City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (noting that "agencies have great discretion to treat a problem partially"); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984) (explaining that "administrative action generally occurs against a shifting background in which facts, predictions, and policies are in flux and in which an agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken"). EPA's decision to act incrementally here is particularly appropriate because, for the reasons EPA has identified and as we explain further below, the Power Plan is unlawful. EPA may not knowingly retain an unlawful regulation while it takes the full time necessary to consider the contours and technical details of any replacement rule. Considering the Proposed Rule first will also aid EPA's consideration of any replacement regulation: By identifying the Power Plan's legal flaws, this focused proceeding will help identify the limits of EPA's authority in this context and the proper legal foundations of future regulation.

Further, EPA has shown its commitment to moving forward quickly with a separate proceeding to consider replacement regulation. EPA has already published in the Federal Register an advanced notice of proposed rulemaking ("ANPR"), which seeks comment on how EPA should write a new section 111(d) rule. 82 Fed. Reg. 61,507. That action represents the beginning of the second step of EPA's process in implementing the Executive Order. The States plan to participate in that separate proceeding as well to provide additional input as EPA continues this important

process.

II. EPA Should Rescind The Power Plan Because It Is Unlawful

In addition to the authority discussed above giving EPA general authority to change direction for policy reasons, we believe that here the law *requires* EPA to do so. As an initial matter, EPA should rescind the Power Plan because it was issued without observance of the procedure required by CAA section 307. The CAA requires EPA to provide in its proposed rule the factual data on which that proposed rule is based, the methodology used in obtaining and analyzing the data, and major legal interpretations and policy considerations underlying the proposal. 42 U.S.C. § 7607(d)(3)(A)-(C). EPA failed to comply with those requirements by finalizing a rule that is different in several important respects from its proposal. For example, EPA failed to provide notice in its proposed rule—and failed to solicit comment—on uniform, nationally applicable performance rates for two types of units. 80 Fed. Reg. at 64,752. In fact, EPA stated in its proposal that it had rejected such an approach. 79 Fed. Reg. at 34,894 (adopting "the use of output-weighted-average emission rates for all affected [units] in the state rather than nationally uniform emission rates for all affected [units] of particular types."). In sum, EPA published a fundamentally different rule from its proposal and undermined the rulemaking process. These failings further underscore legal flaws in the Power Plan and provide additional support for EPA's decision to rescind the Power Plan.

EPA is also required to withdraw the Power Plan because it exceeds EPA's authority under the CAA in at least four critical respects. *First*, section 111(d) limits EPA's role in the first instance to procedure, not substance. *Second*, section 111(d) authorizes only source-level emission reduction measures. *Third*, EPA is prohibited from regulating power plants under section 111(d) that it has also regulated under section 112. *Fourth*, the CAA does not permit EPA to displace the States' authority to manage energy resources. Because the Power Plan cannot withstand legal scrutiny for these and other reasons, the EPA has a responsibility to rescind the Power Plan in light of these significant failings.

A. Section 111(d) Limits EPA's Role In The First Instance To Procedure, Not Substance.

Under section 111(d), EPA may promulgate regulations to establish a "procedure" under which States submit implementation plans that establish standards of performance for existing sources. But the States are the ones Congress envisioned would actually set the content of these "standards of performance." *See* 42 U.S.C. § 7411(d)(1) (directing EPA to "prescribe regulations which shall establish a *procedure* . . . under which each State shall submit to the Administrator a plan" that establishes standards of performance) (emphasis added). By contrast, section 111(b), which concerns new sources, gives EPA direct authority to "establish[] *Federal* standards of performance." 42 U.S.C. § 7411(b)(1)(B) (emphasis added).

To be sure, in 1975 EPA promulgated general "implementing regulations" under section 111(d) that permit EPA to promulgate substantive "emission guidelines." *State Plans for the*

Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340 (Nov. 17, 1975), *codified as amended at* 40 C.F.R. §§ 60.22-60.29. Those guidelines reflect EPA's opinion as to the degree of emission reduction achievable for existing sources under the current and "adequately demonstrated" "best system of emission reduction." *See* 40 C.F.R. §§ 60.21(e), 60.22(b)(5). But even under those regulations, EPA still recognizes that the CAA gives States power to set less stringent standards for individual sources or classes of sources based on factors such as cost, practical achievability, and a source's "remaining useful life." 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.24(f). Under the statute—and as EPA has long recognized—EPA can only prescribe binding standards for sources if the State fails to submit a satisfactory implementation plan. 42 U.S.C. § 7411(d)(2); 40 C.F.R. § 60.27(c)(3).

Nevertheless, in the Power Plan, EPA assumed for itself the authority to establish uniform performance rates setting the minimum standards of performance the States may impose. 40 C.F.R. pt. 60, subpt. UUUU, Tbl. 1. The Power Plan forbids the States from imposing less stringent emission standards even based on facility-specific factors set forth in the CAA. 80 Fed. Reg. at 64,870. Thus, the Power Plan exceeds the limits of the statutory text that grants the States power to "establish[] standards of performance" for existing sources. 42 U.S.C. § 7411(d)(1). The Power Plan also is inconsistent with the CAA's express grant of authority to States "to take into consideration, among other factors, the remaining useful life of the existing source to which [a] standard of performance applies." *Id.* Indeed, the Power Plan forbids States from relaxing the EPA-dictated emission rate even if applying that rate would force a particular source to shut down before the end of its useful life. That is precisely the situation Congress sought to prevent through the careful division of state and federal authority that section 111(d) enshrines. These statutory problems more than support EPA's Proposed Rule to rescind the Power Plan.

B. Section 111(d) Permits Only Source-Level Emission Reduction Measures

EPA's authority under section 111(d) permits regulating individual physical sources, not owners or operators of those sources or category-wide emission levels as EPA previously misinterpreted the CAA in its effort to justify the Power Plan. By its plain text, section 111(d) extends only to standards of performance set "for" and "applicable . . . to" *individual sources* within a regulatory source category. 42 U.S.C. §§ 7411(d)(1), 7411(a)(2). Further, a State-established performance standard may be set for an existing source that would be regulated under section 111(b) "if such existing *source* were a new *source*." 42 U.S.C. § 7411(d)(1) (emphases added). State plans must also "apply[] a standard of performance to any *particular source*." *Id*. (emphasis added). And EPA's role is to establish a "procedure" for States to submit plans "establish[ing] standards of performance *for any existing source.*" *Id*. (emphasis added).

The statute also expressly contemplates adjustments to standards of performance as applied to individual sources. For example, States must be permitted to take into account "the remaining useful life of the existing *source*" when "applying a standard of performance" to "any particular *source*." *Id*. (emphases added). Where EPA promulgates a federal plan in lieu of an unsatisfactory state plan, EPA similarly "shall take into consideration … [the] remaining useful lives of the *sources* in the category of *sources* to which [the] standard applies." *Id*. § 7411(d)(2) (emphases

added). Finally, Congress made individual "sources" the focus of new source regulation under section 111(b), *see id.* § 7411(b)(1)(A), authorizing EPA to set federal standards for new "*sources* within such [listed] category." *Id*. § 7411(b)(1)(B) (emphasis added); *see also id*. § 7411(a)(2) (defining the term "new source" and discussing standards of performance "which will be applicable to such source").

The Power Plan violates this statutory concept of individual-source regulation in several respects.

First, the Power Plan wrongly conflates buildings with the people who control them. By defining the term "owner or operator" separately from the term "source" in section 111, Congress confirmed its intent that performance standards be applicable to a physical facility. "Source" is defined as a "building, structure, facility, or installation." *Id*. § 7411(a)(3). "Owner or operator," by contrast, is defined as "any person who owns, leases, operates, controls, or supervises a stationary source." *Id*. § 7411(a)(5). This distinct treatment of persons and physical structures makes clear that Congress did not intend to sweep in a facility's owner or operator whenever the CAA refers to a "source."

In the Power Plan, EPA previously tried to elide this statutory distinction by reasoning that because a source is an inanimate object, the owner or operator must take action to comply with performance standards, and thus must be the ultimate object of section 111(d) regulation. 80 Fed. Reg. at 64,767. But EPA overlooks that a standard of performance must be "for" a particular "source." 42 U.S.C. § 7411(d)(1). It is one thing to recognize that an owner or operator is the decisionmaker responsible for complying with legitimate regulation—that is, regulations targeted at performance standards for a source, such as installing new equipment or implementing more efficient operations. It is quite another to say that EPA may require a standard that forces owners or operators to take actions designed to support *other* facilities, such as subsidizing facility construction or alternate energy generation.

Second, the Power Plan improperly goes beyond setting reduction requirements on a source-by-source basis, and instead mandates reductions at the level of the entire *source category*. The Power Plan admittedly "focus[es] on the . . . overall source category," 80 Fed. Reg. at 64,725-26, and sets its best system of emission reduction "for the source category as a whole," *id.* at 64,727; *see also id.* at 64,7232 (explaining that the Power Plan's "emission limits [are] for the source category as a whole"). The Power Plan's emission rates are based on regulated units *collectively* reducing operations and producing *collective* emission reductions; they do not flow from an assessment that "any particular source . . . [can] reduce its emissions." 80 Fed. Reg. at 64,779. In fact, the very standards that the Power Plan defines contemplate that emission reductions will vary for each unit in terms of timing, amount, and duration. Units able to purchase enough emission credits to meet the new rate can continue operating (and emitting) at past—or even higher—levels. Other units will have to reduce or cease operations altogether.

Further, the Power Plan's performance rates effectively force the owner or operator of an existing source to invest in lower-emitting generation elsewhere—whether by building a plant,

investing in someone else's plant, or buying emission credits from another plant. This is because the only way a source can comply with the Power Plan's performance rate is to average its actual emissions rate with the rate of a lower-emitting plant. 40 C.F.R. § 60.5790(c)(1) (providing formula "to calculate an adjusted CO_2 emission rate to demonstrate compliance"). In other words, the Power Plan's "generation shifting" mandate is expressly designed *not* to reduce emissions at particular existing sources; instead, it demands that two or more facilities *together* achieve the required rate. This approach effectively treats distant and unrelated facilities, some of which may not even be regulated sources at all, as a single "stationary source" for purposes of satisfying a performance rate under section 111(d).

The Power Plan is thus indifferent to how much—and even whether—any particular source reduces its emissions; in EPA's words, "it is the total amount of emissions from the source category that matters, not the specific emissions from any one" source. *Id*. at 64,734. As a result, the Power Plan is not based on "a requirement . . . which limits . . . emissions [from any individual regulated unit] . . . on a continuous basis," which is how *Congress* defined the terms emission limitation and emission standard. 42 U.S.C. § 7602(k).

The D.C. Circuit's decision in *ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), underscores that this atextual interpretation of section 111(d) cannot stand. As the D.C. Circuit explained, the purpose of the section 111 performance standard program is to "enhance air quality by forcing all . . . [regulated] buildings, structures, facilities, or installations *to employ pollution control systems* that will limit emissions to the level 'achievable'" by the "'best technological system of continuous emission reduction'" that is "'adequately demonstrated.'" 578 F.2d at 327 (quoting the 1977 CAA) (emphasis added). In defining "standard of performance," Congress never contemplated that such standards could be based on reductions that are impossible to achieve by regulated sources and would instead require shifting generation from one type of plant to another—including to non-emitting facilities. *Id.* at 328. The plain language of the statute and *ASARCO* preclude an approach in which standards of performance are based on achieving emission reductions from groups of sources rather than from the application of demonstrably achievable measures at individual regulated sources.

Indeed, as EPA recognizes now in the Proposed Rule, 82 Fed. Reg. 48,037, the Power Plan's approach of writing off individual sources in favor of addressing emission levels for an entire source category departed from 45 years of consistent agency practice. Each of the approximately one hundred new source performance standards that EPA has set since the CAA was enacted in more than 60 source categories has been based on a system of emission reduction that specific regulated sources can themselves achieve using technological or operational measures at that source. *See generally* 40 C.F.R. pt. 60, subpts. Cb-OOOO. In promulgating standards of performance for refineries, for instance, EPA reiterated its longstanding view that "[t]he standard that the EPA develops [is] based on the [best system of emission reduction] achievable *at that source*." 79 Fed. Reg. 36,880, 36,885 (June 30, 2014) (emphasis added). EPA took the same settled approach in promulgating its CO_2 standards of performance for *new* coal and gas plants under section 111(b). *See* 80 Fed. Reg. at 64,512-13, Tbl. 1. The Power Plan's approach for CO_2

standards of performance for *existing* sources under section 111(d) reflects a novel—and untenable—reading of the same statute.

The (correct) source-specific focus is also central to EPA's 40-year-old Subpart B regulations governing the procedure in section 111(d) by which States submit emission performance plans. 40 C.F.R. pt. 60, subpt. B (promulgated by 40 Fed. Reg. 53,340 (Nov. 17, 1975)). There, EPA determined that section 111(d) "emissions guideline[s]" must "reflect[] . . . the application of the best system of emission reduction . . . [that] has been adequately demonstrated *for designated facilities*," 40 C.F.R. § 60.21(e) (emphasis added)—where designated facility is defined as the particular facility within the regulated source category for which the standard is developed, *id.* § 60.21(b).[2] Similarly, every other section 111(d) guideline EPA has promulgated defines the particular "designated facility" at issue,[3] and is based on emission reduction systems that the "designated facility" can implement.[4] As EPA stated in one of its earliest guidelines, "[t]he emission guidelines will reflect the degrees of emission reduction attainable with the best adequately demonstrated systems of emission reduction, considering costs[,] *as applied to existing facilities*."[5]

Third, the Power Plan's attempt to rearrange the entire energy grid, rather than regulating achievable emission reductions at the individual source level, contravenes the nature of "standards of performance" that Congress established in the CAA. Thus, even if a standard of performance

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[2] *See also* 40 C.F.R. § 60.22(b)(3) (guideline document to include "[i]nformation on the . . . costs and environmental effects of *applying each system to designated facilities*") (emphasis added); *id.* § 60.24(b)(3) ("[e]missions standards *shall apply to all designated facilities* within the State") (emphasis added).

[3] *See, e.g.*, 40 C.F.R. § 60.32c(a) (setting forth "each [municipal solid waste] landfill" constructed before May 30, 1991, as the "designated facility to which the guidelines apply"); 44 Fed. Reg. 29,828, 29,829 (May 22, 1979) ("[T]he guideline document for kraft pulp mills is written in terms of standards of performance for each designated facility.").

[4] 61 Fed. Reg. at 9914 (landfill guideline based on "[p]roperly operated gas collection and control systems achieving 98 percent emission reduction"); 45 Fed. Reg. 26,294, 26,294 (Apr. 17, 1980) (aluminum plant guideline based on "effective collection of emissions, followed by efficient fluoride removal by dry scrubbers or by wet scrubbers"); 44 Fed. Reg. at 29,829 (pulp mill guideline based on digester systems, multiple-effect evaporator systems, and straight kraft recovery furnace systems); 41 Fed. Reg. 48,706, 48,706 (Nov. 4, 1976) (proposed guideline for sulfuric acid production units based on "fiber mist eliminators"); 41 Fed. Reg. 19,585, 19,585 (May 12, 1976) (draft guideline for fertilizer plants based on "spray cross-flow packed scrubbers").

[5] EPA, Primary Aluminum: Guidelines for Control of Fluoride Emissions From Existing Primary Aluminum Plants, at 1-2 (Dec. 1979), http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=2000M9HS.pdf ("Primary Aluminum Guidelines") (emphasis added).

were not unambiguously required to be applicable to an individual source, the Power Plan would still be unlawful—making the justification for the Proposed Rule rescinding it stronger still.

As an initial matter, the Power Plan gives no meaning to Congress's use of the word "performance" in the phrase "standard of performance." "Performance" means "[t]he accomplishment, execution, carrying out, working out of anything ordered or undertaken; the doing of any action or work." 11 Oxford English Dictionary 544 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). Generation shifting, however—the hallmark of the Power Plan—does not involve any particular source improving the emission rate at which it performs work. To the contrary, it relies on *non*-performance by requiring existing plants to reduce or stop work. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*").

More specifically, section 111 defines "standard of performance" as a "standard for emissions," a concept that reflects the "degree of emission limitation" that a source may "achiev[e]" using the "best system of emission reduction." 42 U.S.C. § 7411(a)(1). The Power Plan, however, does not reflect a "degree of emission limitation" actually achievable by any source. In fact, EPA admitted that the Power Plan's ideas of increasing generation at existing gas plants (*e.g.*, under Building Block 2) and reducing generation at existing coal plants (*e.g.*, under Building Blocks 2 and 3) both typically *increase* those plants' CO_2 emission rates. 79 Fed. Reg. at 34,980. Whatever effect generation shifting might have on emission rates as a whole, this fundamental restructuring of the energy grid does not fit within section 111(d)'s rubric of "standards of performance" for limiting the emissions of particular regulated sources.

Moreover, the Power Plan violates the statutory concept of "emission limitation" as a "requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*." 42 U.S.C. § 7602(k) (emphasis added). The Power Plan imposes "intermittent controls," such as temporarily reducing operations or shifting production to other facilities. But Congress's intent is clear: the term "continuous" was added to the CAA's definition of "emission limitation" in 1977 to signify that "the basis of the standard" would be technological or low-polluting processes designed to achieve pollutant reductions during energy production. H.R. Rep. No. 95-294, at 11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1088. As the legislative history explains, Congress chose this language specifically to *preclude* "intermittent controls." *Id.* at 92, *reprinted in* 1977 U.S.C.C.A.N. 1170; *see id*. at 81, 86-87, *reprinted in* 1977 U.S.C.C.A.N. 1159-60, 1164-65.[6]

Indeed, Congress was specifically concerned that performance standards not be construed to include "load switching from one powerplant . . . to another," *id*. at 81, 89, 92, *reprinted in* 1977

[6] The word "technological" was inserted in the definition of "standard of performance" in 1977 to require certain sources to comply by installing technological controls (e.g., scrubbers) rather than burning low-sulfur fuel without controls. *See, e.g., Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 918-19 (7th Cir. 1990). Congress removed "technological" from section 111(a)(1)'s definition in

U.S.C.C.A.N. 1159, 1167, 1170—which, of course, is precisely what the Power Plan requires. The Power Plan's generation-shifting mandate is the antithesis of a "standard of performance" as Congress intended that term to be applied under the CAA. A standard of performance must be derived from *better* emission performance at individual regulated sources, not (as in the Power Plan) unachievable rates that rely on the performance of *other* facilities.

Further, section 111(d) reflects a broader programmatic distinction Congress drew between control programs focused on a source's performance and air quality programs focused on the health and welfare impact of a source category's aggregate emissions. For control programs, including section 111(d), Congress required sources to incorporate available, low-emitting production processes or control technologies into their design and operations. *See, e.g.*, 42 U.S.C. § 7411 (new source performance standards); *id*. § 7412(d) (maximum achievable control technology standards); *id*. § 165(a)(4) (best achievable control technology standards); Clean Water Act § 306, 33 U.S.C. § 1316 (standards of performance for source pollutant discharge). These programs do not limit a source's ability to operate, but do require that the source limit emissions during operations. In air quality-based programs, by contrast, Congress gave EPA authority to pursue a particular air quality objective by capping *overall* levels of emissions and by using mechanisms such as trading that result in aggregate reductions from a category of sources. *See, e.g.*, CAA §§ 108-110 (national ambient air quality standards); *id*. §§ 401 *et seq*. (acid rain cap-and-trade program); *see also Nat'l-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 837 n.3 ("An ambient air quality standard differs from an emission or performance standard . . . . An ambient air quality standard specifies a maximum pollutant concentration in the ambient air, while a performance standard specifies the maximum rate at which an individual source may emit pollution.").

EPA has also failed to show that its so-called "standard of performance" is "achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). To satisfy the requirement that a standard be "adequately demonstrated," EPA must show that it has selected technology that "has been shown to be reasonably reliable, reasonably efficient, and [not] exorbitantly costly in an economic or environmental way." *Essex Chem. Corp. v. Ruckelhaus*, 486 F.2d 427, 433 (D.C. Cir. 1973). EPA must also show that the performance rate is achievable and not "purely theoretical or experimental." *Id.* at 433–34. In the context of the Power Plan's "system of alternative electric generation," as opposed to traditional technological or operations process regulations, this standard required EPA to show that such a system could actually achieve its emission reductions, and do so without impairing the reliability of the nation's electric supply.

EPA failed to show that each Building Block, as well as the Power Plan as a whole, is achievable and adequately demonstrated. *First*, EPA created the Building Block 1 targets based on its unsupported assumption that units could sustain the best historical efficiency ever achieved

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1990 to allow sources to comply by using either technological *or* low-polluting operational processes (e.g., low-sulfur fuel). 80 Fed. Reg. at 64,702.

for every year in the future—where in fact the record showed the opposite. *Second*, with respect to Building Block 2, EPA failed to support its target for increased utilization of existing gas units, erroneously counted hypothetical unused capacity from under-construction gas units, and improperly relied on capacity from gas units' duct burners for redispatch. *Third*, EPA based Building Block 3 on unsupported and unrealistic assumptions about the future growth of renewable energy generation. 80 Fed. Reg. at 64,803, 64,807–09. *Finally*, because the Power Plan's emission guidelines cannot be achieved by any individual source but only by shutting down a substantial number of sources, the Power Plan cannot be achieved without threatening the national electric supply.

The Power Plan erases Congress's decades-long distinction between control programs limiting emissions from individual sources, and air quality-based programs involving trading programs and other collective measures. Section 110 itself highlights that distinction: It provides for "emission limitations" (like section 111), but also (unlike section 111) "other control measures" including "marketable permits[] and auctions of emissions rights." 42 U.S.C. §§ 7410(a)(2)(A), 7411(a)(1). The Power Plan co-opts authority Congress delegated in certain, limited areas to effect an unauthorized and unprecedented national transformation of electric generation. Because section 111(d) does not allow this type of sweeping change, EPA should rescind the Power Plan.

C. The CAA Prohibits EPA From Regulating Power Plants Under Section 111(d) That Are Also Regulated Under Section 112

The repeated violations of section 111(d), discussed above, are more than sufficient to support EPA's Proposed Rule to rescind the Power Plan. Beyond these arguments, the CAA also prohibits EPA from using section 111 to regulate "any air pollutant" emitted from a source category already "regulated under section [1]12." 42 U.S.C. § 7411(d)(1).

This limitation reflects the logic of the statutory and legislative history of the 1990 amendments to the CAA. Before 1990, section 112 covered an extremely narrow category of pollutants. But in 1990, Congress greatly expanded the section's scope to include pollutants "which present, or may present . . . a threat of adverse human health effect . . . or adverse environmental effects," and also made regulation under section 112 more stringent. 42 U.S.C. § 7412(b)(2). As EPA has previously acknowledged, barring regulation of sources under section 111(d) that are already regulated under 112 was intended to avoid undue burdens on existing sources, particularly in light of the significant capital investments and sunk costs that emission regulations often require. 70 Fed. Reg. at 16,031–32. In other words, Congress acted to avoid "duplicative or overlapping regulation" by requiring EPA to choose between regulating existing power plants under the expanded section 112 national standards, or under the state-proposed standards of section 111(d). *Id.* at 16,031.

Because it is undisputed that coal-fired generating units are already regulated under section 112, 77 Fed. Reg. 9,304 (Feb. 16, 2012), this exclusion prohibits EPA from regulating those same plants under section 111(d). Prior to promulgating the Power Plan, EPA had repeatedly agreed that "a standard of performance under section 111(d) cannot be established for any air pollutant . . .

emitted from a source category regulated under section 112."[7] The Proposed Rule would return EPA to this reasonable position.

D. Section 111(d) Cannot Be Used To Override State Authority To Manage Power Resources

Finally, the Power Plan is unlawful because it seeks to override one of the States' core responsibilities to manage the generation of energy within its borders. The Power Plan also seeks unconstitutionally to commandeer and coerce States to enact federal policy regarding energy generation. For those reasons, EPA must rescind the Power Plan.

First, the Power Plan infringes on an area of traditional state authority without the clear statement from Congress that would be necessary to authorize so expansive a regulatory change. No agency may "alter[] the federal-state framework by permitting federal encroachment on a traditional state power" unless Congress has clearly authorized such intrusion. *SWANCC*, 531 U.S. at 172–73. Further, the Federal Power Act ("FPA") expressly preserves the States' jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). In other words, the FPA recognizes and preserves the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). In fact, the States' authority over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

The Power Plan impermissibly invades this traditional state responsibility. The Power Plan's binding emission limits require States to shift electricity generation from coal-fired plants to natural gas-fired plants and renewable sources. This federally imposed policy interferes with the States' authority to manage the mix of energy generation within their own borders, and to assess independently their "[n]eed for new power facilities, their economic feasibility, and rates and services." *Pac. Gas*, 461 U.S. at 205. Nothing in section 111(d) suggests hidden congressional

[7] 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004); *see also* EPA, Air Emissions from Municipal Solid Waste: Information for Final Standards and Guidelines at 1-6 (Dec. 1995), https://nepis.epa.gov/Exe/ZyNET.exe/2000IN3H.txt?ZyActionD=ZyDocument&Client=EPA&Index=1991%20Thru%201994&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5CZYFILES%5CINDEX%20DATA%5C91THRU94%5CTXT%5C00000015%5C2000IN3H.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=22; 70 Fed. Reg. 45,994, 16,031 (Mar. 29, 2005); Final Br. of Resp't EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 (D.C. Cir. July 23, 2007).

intent to allow EPA to establish a *de facto* national energy policy and fundamental reordering of the nation's energy grid—much less clear authorization. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). To the contrary, section 111(d) limits EPA's role in the first instance to establishing a procedure by which States establish their own standards of performance, and allows EPA to impose standards only where a State fails to do so. 42 U.S.C. § 7411(d).

Second, the Power Plan unconstitutionally commandeers the States and their officials. "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999); *see also* 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."). Among the powers that the Constitution denies to the federal government is the power to "use the States as implements of regulation"—in other words, to commandeer them to carry out federal law. *New York*, 505 U.S. 144, 161 (1992). On that basis, the Supreme Court struck down a provision that required States either to legislate to provide for the disposal of radioactive waste according to the statute or to take title to such waste and assume responsibility for its storage and disposal. *Id*. at 153–54. The Court explained that the federal government may "offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." *Id*. at 167. But merely providing States flexibility in how to carry out federal policy is unlawful because it "only underscores the critical alternative a State lacks: A State may not decline to administer the federal program." *Id*. at 176–77; *see also Printz v. United States*, 521 U.S. 898, 928 (1997) (reaffirming and extending these principles to the commandeering of state officials).

The Power Plan violates this anti-commandeering principle by forcing States to use their sovereign powers to upend their utility sectors and remake them in the image of federal policy. Under the Power Plan, state actors are required to enforce the Power Plan's generation-shifting and other requirements through such means as "[public utility commission] orders," 80 Fed. Reg. at 64,848, and "state measures" that make unregulated renewable energy generators "responsible for compliance and liable for violations" if they do not fill the gap, 40 C.F.R. § 60.5780(a)(5)(iii). And this cooption of state actors is even more egregious because the Power Plan would cause massive disruptions in the electricity markets through (state-facilitated) elimination or reduction of extensive quantities of fossil-fuel-fired generation—all while putting the onus on States to exercise their "responsibility to maintain a reliable electric system." 80 Fed. Reg. at 64,678.

* * *

We urge EPA to adopt the Proposed Rule rescinding the unlawful Power Plan.

Sincerely,

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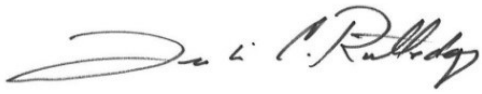

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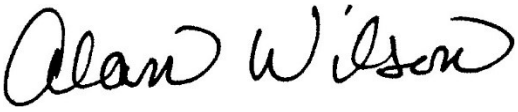

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