ORAL ARGUMENT NOT YET SCHEDULED
No. 15-1363 (and consolidated cases)

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

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY;
REGINA A. MCCARTHY, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petition for Review of a Final Rule of the
United States Environmental Protection Agency

JOINT REPLY OF UTILITY, COAL, LABOR, AND BUSINESS MOVANTS IN SUPPORT OF MOTIONS FOR STAY OF EPA'S FINAL RULE

December 23, 2015

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GLOSSARY

Act (or CAA)	Clean Air Act, 42 U.S.C. §7401, *et seq.*
Basin Mot.	Basin Electric Power Cooperative's Motion to Stay Final Rule in No. 15-1393 (ECF No. 1582159)
Bus. Mot.	Motion for Stay of EPA's Final Rule filed by U.S. Chamber of Commerce, *et al.* in No. 15-1382 (ECF No. 1580020)
CAMR	EPA, *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units*, 70 FR 28606 (May 18, 2005)
Coal Mot.	Coal Industry Motion for Stay in Nos. 15-1366, 15-1367, and 15-1368 (ECF No. 1580004)
EIA	United States Energy Information Administration
EPA	United States Environmental Protection Agency
EPA *EME Homer* Br.	Respondents' Br., *EME Homer City Gen., L.P. v. EPA*, No. 11-1302 (filed D.C. Cir. Jan. 16, 2015), Doc. No. 1532516
FERC	Federal Energy Regulatory Commission
Legal Mem.	EPA, *Legal Memorandum Accompanying Clean Power Plan for Certain Issues*
Mercury Rule	EPA, *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 FR 9304 (Feb. 16, 2012)
Movants	Utility, Coal, Labor, and Business Movants for a stay in the following consolidated cases: Nos. 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1382, 15-1386, and 15-1393
MW	Megawatt
ND Mot.	Motion for Stay of EPA's Final Rule filed by State of

	North Dakota in No. 15-1380 (ECF No. 1580920)
NERC	North American Electric Reliability Corporation
New Source Rule	EPA, *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*, 80 FR 64510 (Oct. 23, 2015)
Power Intervenors Br.	Brief in Opposition of Intervenors Calpine Corporation *et al.* (ECF No. 1587423)
Rule	EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 FR 64662 (Oct. 23, 2015)
Transport Rule	EPA, *Proposed Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 80 FR 75706 (Dec. 3, 2015)
Util. Mot.	Motion of Utility and Allied Petitioners for Stay of Rule in Nos. 15-1365, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, and 15-1378 (ECF No. 1580014)

INTRODUCTION AND SUMMARY OF ARGUMENT

Movants—a nationwide coalition of utilities, coal producers, labor, and business organizations—have demonstrated that EPA's unprecedented and unlawful attempt to "aggressive[ly] transform[] … the domestic energy industry," White House Factsheet, Bus. Mot. 8-E, necessitates a stay to prevent the irreparable harm this fundamental restructuring will impose on the energy industry, businesses, and local communities during judicial review.[1]

EPA contends (Br. 14) the Rule requires only "generation-shifting" activities "already widely employed by power plants." But EPA has "only those authorities conferred upon it by Congress," *Michigan v. EPA*, 213 F.3d 663, 695 (D.C. Cir. 2000) (per curiam), and forcing private companies to shut down one facility and build another elsewhere is not one of them. The Rule transgresses EPA's statutory authority by applying a standard of performance to the power sector as a single entity rather than to individual sources. Indeed, the standard cannot be met by *any* existing source.

EPA's response elides the statute's dispositive text and pleads for deference instead. Even if the Rule were not foreclosed by the Act's text, structure, and history—which it is—*Chevron* deference could not save it. EPA may not "regulate 'a significant portion of the American economy'" unless clearly authorized by Congress. *UARG v. EPA*, 134 S. Ct. 2427, 2444 (2014). EPA cannot establish that §111(d), a "long-extant statute," clearly authorizes the exercise of hitherto "unheralded power"

[1] Movants join the arguments advanced by the State movants in their reply brief.

to restructure the country's power sector. *Id.*

Without a stay, the Rule will inflict widespread irreparable harm, even during expedited judicial review. EPA does not deny that its own modeling shows the Rule will force the immediate shutdown of many power plants; EPA only disputes *which* power plants will have to shut down immediately. That distinction is irrelevant. Shutdowns will occur and will cause immediate irreparable harm to power producers whose businesses will suffer; to communities dependent on these power plants for jobs and tax revenues that cannot be replaced; to the ancillary businesses, including the mines, the railways, and the equipment manufacturers, that keep the power plants operating; and to the low-income and minority communities that will be disproportionately affected by the resulting significant increase in electricity prices.

Moreover, Movants have also demonstrated that, contrary to EPA's unsupported claim, the Rule will require extensive new infrastructure—new generation to replace closed power plants, transmission systems to bring the new generation to market, and additional natural gas pipelines and storage to provide fuel for the new and increased gas generation on which the Rule relies. None of this can happen overnight, or even a few years before 2022. Designing, planning, permitting, and siting this new infrastructure must commence now.

Finally, EPA cannot demonstrate any harm to the public from a stay of its Rule. EPA acknowledges the Rule will neither produce near-term benefits nor by itself measurably affect climate change. And the Rule is one of many government

efforts to address climate change. A stay will thus have no impact on emission reduction goals but will avoid immediate irreparable harm throughout the economy.

BACKGROUND

EPA's response depends upon an incomplete description of the Rule. The Rule's "chief regulatory requirement" consists of numerical emission rates—1,305 lbs. CO_2/MW-hour for coal plants and 771 lbs. CO_2/MW-hour for natural gas plants. 80 FR 64662, 64667, 64823 (Oct. 23, 2015).[2] These rates represent a cap on the CO_2 emissions plants may emit per MW-hour of generation. *Id.* at 64667. Reduced operations alone cannot satisfy the rates, because producing fewer MW-hours of generation does not change how much CO_2 a source emits per MW-hour it produces. The Rule's rates are far more stringent than existing coal- and gas-fired plants can meet with any combination of onsite pollution controls or efficiency improvements. *Id.* at 64727, 64769. Indeed, the rates are more stringent than can be achieved even by "state-of-the-art" systems at *new* sources. *See id.* at 64626-27, 64667; 80 FR 64510, 64512-13, 64540 (Oct. 23, 2015); *see also* Bus. Mot. 4.

The Rule's rates were set *not* on the basis of what individual sources could achieve, but on the basis of actions source owners could take to shift production to *other* "cleaner" generation. 80 FR at 64728 ("generation-shifting" involves "replacement of higher emitting generation with lower- or zero-emitting generation").

[2] The average rate for existing coal-fired units (including minimal generation from other existing units) is 2,160 lbs. CO_2/MW-hour. EPA TSD 11, Coal Mot. Ex. 2.

EPA says owners of existing plants can "shift generation" by, *e.g.*, purchasing an interest in a renewable plant or buying emission reduction credits from such a plant. But *each* such measure forces plant owners to pay for construction and generation of renewable energy that will displace generation from coal- and gas-fired plants. *Id.* at 64728, 64731. Thus, the Rule's rates can be achieved only if existing fossil fuel-fired generation is replaced by lower-emitting generation, *id.* at 64728, which "necessarily" decreases generation by fossil fuel-fired plants, EPA Br. 25 n.13. Generation-shifting accounts for the vast majority of the Rule's emission reductions. 80 FR at 64728 ("most" of the reductions come from "replacement of higher emitting generation with lower- or zero-emitting generation"). EPA projects coal-fired generation will fall nearly 50% from current levels. *See* RIA 2-3, 3-24, Bus. Mot. Ex. 6-B.

As such, the Rule "does not require any particular amount of reductions by any particular source at any particular time." EPA Br. 9. It demands that the industry, including regulated *and* non-regulated generators, *in aggregate* achieve the total emission rate reductions EPA has targeted for each State's total grid. 80 FR at 64667.

ARGUMENT

I. Movants Are Likely To Prevail On The Merits.

A. The Rule's unlawful generation-shifting requirement. Our stay motions demonstrated that EPA—determined to achieve deep emission reductions but stymied by the inability of onsite improvements to achieve them, *see* 80 FR at 64787—resorted to regulating beyond regulated sources, claiming authority to require

owners/operators of sources to subsidize new renewable generation. Section 111 prohibits EPA from mandating such industry-transformative generation shifts disguised as "standards of performance." Basin Mot. 5-8; Bus. Mot. 6-13; Coal Mot. 12-13; Util. Mot. 11-12. EPA's response confirms the Rule's unlawfulness.

1. EPA's central "textual" argument is that the Rule's rates are lawful because they are the product of the "best system of emission reduction" and the term "system" "encompasses any set of measures for reducing emissions," including grid-wide rather than source-specific measures. EPA Br. 14, 19-20. But as EPA found *in the Rule itself*, "[b]ecause the emission guidelines ... must reflect 'the degree of emission limitation achievable *through the application of* the best system of emission reduction ... adequately demonstrated,' the system must be limited to measures that can be implemented—'appl[ied]'—*by the sources themselves*." 80 FR at 64720 (second emphasis added). No weight can be given to the *post hoc* argument by EPA's counsel, which contradicts the Rule. *NRDC v. EPA*, 755 F.3d 1010, 1020-21 (D.C. Cir. 2014).

EPA now says instead (Br. 23) that §111(a)(3)'s definition of "source" as a single "building, structure, facility, or installation" is irrelevant because the definition merely identifies the category of sources subject to regulation. This not only contradicts EPA's reasoning in the Rule, but also overlooks that §111(d) addresses standards of performance only "*for any existing source*," CAA §111(a)(3), (d) (emphasis

added)—rather than a "category" of sources.[3] The Rule, however, goes even further and regulates not merely "entities … subject to Section 111 standards" in the aggregate, EPA Br. 23, but the power sector as a single entity, requiring source owners to shift generation to renewable facilities not governed by §111. *See supra* 3-4.

In any event, EPA's arguments are foreclosed by *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), which holds EPA may not "change the basic unit to which" standards of performance "apply from a single building, structure, facility, or installation ... to a combination of such units," *id.* at 327. EPA seeks (Br. 25 n.12) to distinguish *ASARCO* because the Court did not interpret the phrase "best system of emission reduction." This distinction is irrelevant. The issue in *ASARCO*, as here, is whether the standard of performance obligation can be extended beyond "the units to which" it applies to a combination of facilities. *See* 578 F.2d at 322, 326-27.[4]

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[3] Congress knows how to identify source "categories," but it did not do so here. Section 111 regulation begins with designating a "category of sources," CAA §111(b), but EPA may only "establish[] … standards of performance *for new sources within such category*," *id.* §111(b)(1)(B) (emphasis added), not the category as a whole, and States must do the same for existing sources, *id.* §111(d).

[4] *ASARCO* was not overruled by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Cf.* EPA Br. 25 n.12. *Chevron* concerned whether a source may be defined, for a program not under §111, as all emitting buildings within a single plant or whether each individual building must be a separate source. 467 U.S. at 840, 860-61. The Supreme Court agreed that EPA may define a source as all the emitting buildings within a plant's boundaries, *id.* at 865—a definition with which Movants take no issue. *Chevron* never suggested that §111's definition of "source" as a "building, structure, facility, or installation" may include all existing generating sources connected to the grid, as under the Rule. Indeed, the Court acknowledged that §111 was "not literally applicable to the permit program" at issue there. *Id.* at 860-61.

2. In the Rule, EPA advanced a different justification. EPA reasoned the Rule's rates are lawful because "the 'source' [regulated under §111(d)] includes the 'owner or operator' of" the source, who can implement generation-shifting measures. 80 FR at 64762. EPA now abandons that argument, *see* EPA Br. 23 n.10 (denying the Rule "redefined the 'source' to include the owner"), and for good reason: §111(a)(3) specifically limits the term "stationary source" to the "building, structure, facility, or installation which emits or may emit any air pollutant," and §111(e) *separately* forbids "any owner or operator of any new source to operate such source in violation of any standard of performance," thereby distinguishing between owners/operators and sources themselves. *See* Bus. Mot. 9-10. Conflating owners with sources, as the Rule does, would render §111(e) superfluous and eviscerate Congress's command that EPA regulate at the level of individual sources—a limitation that permits EPA to regulate only *how* individual sources operate, not *which* sources operate. *See infra* 10-13. And individual sources cannot "shift generation," *i.e.*, they cannot move generation from themselves to themselves. The Rule does not reflect an emission limitation achievable by individual sources and is thus unlawful. *Cf.* EPA Br. 23 n.10.

3. EPA's responses to Movants' structural arguments fare no better. Foremost, EPA disregards the structure of §111(d) itself. Coal Mot. 12. Section 111(d) allows States to adjust performance rates for "*any particular source*," which presupposes that standards of performance must be implemented at individual sources, not sources in the aggregate. *See also supra* 5-6.

EPA also cannot explain how the term "best system of emission reduction" can mean "any set of measures for reducing emissions" for purposes of this Rule when, in the New Source Rule, EPA construed the very same term on the very same day to mean measures that can be undertaken only by a source itself. *Cf.* Bus. Mot. 11-12. EPA does not dispute that statutorily defined terms are presumptively given a consistent definition throughout the Act, *id.*, but instead tries to justify (Br. 37 n.21) its inconsistent statutory interpretation by claiming that, in practice, new sources may be few in number and thus the trading compliance option may be difficult for such sources. The Rule, however, finds that new sources *can* engage in the same "beyond-the-source" actions as existing sources and even participate in the same trading program. *See* 80 FR at 64724, 64734, 64834 n.793. The Rule itself thus forecloses EPA's purported justification for adopting conflicting interpretations of "system."[5]

EPA cites §110 as providing "[c]ontextual" support for its capacious reading of §111, but that provision confirms that EPA's construction is erroneous. EPA Br. 20. Specifically, EPA points (Br. 21) to the fact that States may adopt "marketable permits" and "auctions of emissions rights" in developing separate programs to meet ambient air quality standards under §110. This simply highlights that Congress knows how to authorize tradable permits when it wishes, and it did not do so here. *See, e.g.*,

[5] EPA dismisses Movants' point regarding the "PSD" permitting program, Bus. Mot. 13, by claiming that only §111(b) standards can set the regulatory floor for the program, Br. 27 n.14. However, §111(b) and §111(d) both apply §111(a)'s "standard of performance" definition; thus, if §111(b) standards must be source-specific because they form the regulatory floor, the same must be true for §111(d) standards.

BP Am. Prod. Co. v. Burton, 549 U.S. 84, 92 (2006). Plans under §110 may include both "emission limitations" *and* "other control measures"; "marketable permits" and "auctions of emissions rights" are examples of the latter. CAA §110(a)(2)(A). By including these "other control measures" within a §111 "emission limitation," EPA ignores Congress's decision to distinguish these two types of controls. Moreover, the reference in §111(d) to the "procedure" in §110 cannot justify transporting the *substantive* provisions of §110 into §111(d).

4. Bereft of textual justifications, EPA argues that the Rule does not in fact require "beyond-the-source" emission reductions. EPA Br. 34. But EPA may only justify the Rule on the basis of the "best system of emission reduction" it selected. *See* CAA §111(a)(1) (performance standard must reflect emission limitation "achievable *through the application of the best system of emission reduction*") (emphasis added). Reductions that may be achieved through *other* onsite measures cannot be required under §111.

In any event, the Rule does force "beyond-the-source" measures. EPA set rates for existing sources far more stringent than even the best system of emission reduction for *new* sources implementing onsite measures. *See supra* 3-4; Bus. Mot. 4 (comparing rates). Thus, even if every existing source in the nation adopted the "best" technologies that could be adopted by entirely new plants unconstrained by existing design, those sources still could not achieve the Rule's demanded reductions. Existing sources cannot reasonably achieve reductions more stringent than those reached by the "*best* system of emission reduction" for *new* sources. The Rule itself finds that

"most of the CO_2 controls need to come in the form of … replacement of higher emitting generation with lower- or zero-emitting generation." 80 FR at 64728.

5. Finally, EPA's unprecedented reading of §111 would give it power to demand "any set of measures" in a wide array of industries. EPA claims (Br. 14-15) the interconnected grid makes the power sector uniquely suitable for generation-shifting measures. Many industries, however, likewise involve both sales of interchangeable products or services and the potential to achieve lower emissions by mandating that production be shifted to "cleaner" existing plants with excess capacity or newly constructed plants, as the Rule requires. Congress in §111 did not give EPA that broad power over the American economy.

B. The Rule's unlawful standard of *non*-performance. As shown, Movants are likely to prevail for a related but distinct reason: the Rule sets an unprecedented mandate that individual sources *cease producing* electricity, rather than setting a "standard of performance" for *how* sources produce electricity, as §111 requires. Basin Mot. 10-11; Util. Mot. 10. EPA's responses are unpersuasive.

1. EPA says (Br. 26) that "standard of performance" is a sufficiently broad term to encompass "generation-shifting." A "standard," however, is simply "a rule or principle that is used as a basis for judgment"; performance is "the execution or accomplishment of work." *Random House Webster's Unabridged Dictionary* 1439, 1857 (2d ed. 2001). A "standard of performance" is thus a principle to judge the execution of work by the source, not an order to stop working.

EPA also asserts the term "system" gives it authority to erect a generation-shifting regime. EPA Br. 26. But that reading overlooks the Act's text, which defines a "standard of performance" in relevant part as an "emission limitation" that must be "continuous." Section 111 defines "standard of performance" 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." CAA §111(a)(1) (emphasis added). Section 302(k), in turn, defines "emission limitation" as "a requirement … which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." (emphasis added). "The Rule's generation-shifting, however, is the antithesis of "continuous." To comply with the Rule, plants will run sometimes (with their emissions exceeding the Rule's rates) and stop running at other times as they shift generation elsewhere (thus bringing their emissions to zero).

In fact, Congress inserted the term "continuous" in the definition of "emission limitation" to *preclude* "intermittent controls," such as cutting or shifting production, and to ensure that "constant or continuous means of reducing emissions must be used." H.R. Rep. No. 95-294, at 92 (1977); *see id.* at 81, 86-87. Congress intended to force sources to deploy new technology or operational innovations, rather than cutting or shifting production, and specifically sought to prevent "load switching from one powerplant ... to another." *Id.* at 81, 89, 92.

2. The foregoing also disposes of EPA's argument (Br. 20) that §111(a)(1)'s "best system of emission reduction," which defines standards of performance, must be broader than §111(a)(7)'s "technological system of continuous emission reduction." Even if that were true, systems of emission reduction under *both* provisions must nevertheless be "continuous." *Compare* CAA §111(a)(7) ("system of continuous emission reduction"), *with* §§111(a)(1), 302(k). The Rule does not impose continuous emission reductions.[6]

Section 111's history confirms this. First, Congress inserted the word "continuous" to prevent use of "intermittent controls." Second, Congress inserted the word "technological" to require some sources to comply by making technological or operational improvements rather than burning untreated "clean" fuels onsite. *See, e.g.*, H.R. Rep. No. 94-1175, at 160-61 (1976). Congress removed "technological" from §111(a)(1)'s definition in 1990 to permit more widespread compliance by burning clean fuels. 1 *Leg. History of the Clean Air Act Amendments of 1990* 1040-41 (1993). Thus, the only difference between "technological" systems and other systems is that the latter may achieve reductions by burning clean fuels onsite.

3. As we showed, Basin Mot. 10; Util. Mot. 9, and as the Rule acknowledged,

[6] This analysis also refutes EPA's attempt to distinguish the relevance of CAA §407. EPA contends (Br. 21 n.9) that §407's reference to "retrofit application" of a "system of continuous emission reduction" simply "cabin[s] EPA's discretion" further than in §111. Because a §111 standard must be "continuous," a "best system of emission reduction" under §111 and a "best system of continuous emission reduction" under §407 are equivalent. If the latter is capable of being required in "retrofitting," the former must be as well. *See* Bus. Mot. 12-13.

EPA's "traditional interpretation and implementation of CAA [§]111 has allowed regulated entities to produce as much of a particular good as they desire provided that they do so through an appropriately clean (or low-emitting) process." 80 FR at 64738. EPA now suggests (Br. 35) that §111(d) precludes only performance rates that do not reduce "aggregate production levels within an industry." EPA's gloss on prior rules does not hold up. Util. Mot. 9. Every previous §111(d) rule allowed each *individual* regulated source to produce as much as desired, provided the source complied with its continuous emission reduction obligations.[7] Here, EPA requires massive generation reductions by regulated units.

C. The Rule's usurpation of State authority to adjust standards of performance. The Rule also violates the CAA because it forbids States from exercising their statutory authority to adjust EPA's performance rates to ensure that individual existing sources can achieve them. Basin Mot. 12; Util. Mot. 5; *see also* ND Mot. 16 (showing EPA lacks authority to set standards of performance). EPA's response confirms the Rule's unlawfulness.

When "applying" a standard of performance to "any particular source," a State may "take into consideration, among other factors, the remaining useful life of the existing source." CAA §111(d)(1). Congress added this language to codify the

[7] *See* 61 FR 9905, 9907 (1996); EPA, *Primary Aluminum: Guidelines for Control of Fluoride Emissions from Existing Primary Aluminum Plants*, EPA-450/2-78-049b at 1-17 – 1-19 (1979); 44 FR 29828, 29829 (1979); 42 FR 55796, 55797 (1977); EPA, *Final Guideline Document: Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants*, EPA 450/2-77-05 at 1-7 – 1-9 (1977).

availability of State variances from performance rates that EPA's regulations already provided. *See* Legal Mem. 32; 40 FR 53340, 53344, 53347 (1975) (§111(d) gives States the right to grant "variances" based on "economic hardship," thus "provid[ing] for the application of less stringent emission standards" on a "case-by-case basis").

EPA admits the Rule forbids States from exercising their statutory authority to alter emission performance rates for individual sources. 80 FR at 64870 (the Rule's rates "do not provide for states to make additional goal adjustments based on remaining useful life and other facility-specific factors"). EPA argues (Br. 50) the Rule satisfies §111(d) by including *other* "flexibilities" for States "to consider remaining useful life." By "flexibilities," however, EPA means States may give some sources less stringent rates if the State also imposes on other sources rates harsher than the Rule finds warranted by the "best" reduction techniques. 80 FR at 64871. EPA may not impose "substantive condition[s]" on rights §111(d) guarantees to States. *Felder v. Casey*, 487 U.S. 131, 152 (1988). EPA certainly may not condition exercise of those rights on imposing emission requirements that are more stringent than those reflecting the degree of emission limitation achievable through the best system of emission reduction and that EPA therefore lacks authority to require. *See New York v. United States*, 505 U.S. 144, 176 (1992) (government "lacks the power to offer the States a choice between ... two" options it cannot separately require).

Nor can trading programs save the Rule. *Cf.* EPA Br. 50. Trading treats sources with short remaining useful lives just like every other source, rather than permitting

States to adjust the performance rates for "any particular source" to reflect its remaining useful life. CAA §111(d). Further, trading allows some sources to continue operating only by paying for emission credits—even when such payments would impair a source's economic viability. Nor does trading alter the Rule's fundamental dynamic: Its rates can be met only by forcing the retirement of existing coal- and gas-fired sources and constructing new renewable generation intended to displace those existing sources. *See supra* 3-4. That some existing plants in a trading system might be able to purchase credits and continue operations does not alter the fact that other plants—to which States could have granted variances but for the Rule—will not.

D. EPA must point to clear authorization for the Rule, but fails to do so.

Not only do §111's text, structure, and history foreclose EPA's Rule, but controlling canons of statutory construction demand clear congressional authorization for the vast changes the Rule requires. *See* Bus. Mot. 13-17; Coal Mot. 11-12; Util. Mot. 10-13. EPA responds (Br. 26) that Congress delegated it authority to resolve any ambiguity under *Chevron*. But "ambiguity is not enough *per se* to warrant deference …. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." *ABA v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005). Given "a scheme of the length, detail, and intricacy" of the one here, it is "difficult to believe that Congress, by any remaining ambiguity, intended" to give EPA the authority the Rule asserts. *Id.* Moreover, *Chevron* itself requires courts to apply these "traditional tools of statutory construction" at *Chevron* "step 1" before

deferring to agencies. *Chevron*, 467 U.S. at 843 n.9.

1. Courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'"—particularly where, as here, an "agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *UARG*, 134 S. Ct. at 2444; Bus. Mot. 14-15; Coal Mot. 9-10; Util. Mot. 9. Throughout its brief, EPA suggests the Rule is not of great significance, but the government's own statements foreclose that claim. *See* Bus. Mot. 1, 15; Coal Mot. 1. EPA also claims *UARG* does not apply because it is not "straining the interpretation of a clear statutory provision," EPA Br. 31, *i.e.*, the text does not clearly foreclose EPA's interpretation. EPA has it backwards: under *UARG*, where "decisions of vast 'economic and political significance'" are concerned, the statute must "speak clearly" to *allow* EPA's interpretation.

Similarly meritless is EPA's suggestion that it is not claiming unheralded power through a long-extant statutory provision. EPA has never claimed power to impose performance rates deliberately set lower than *any* source can meet for the express purpose of forcing generation-shifting to other sources—including sources outside the source category. EPA claims (Br. 28-29) that in its CAMR rulemaking it exercised the same power as in the Rule, but this Court vacated the CAMR rule shortly after promulgation. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Further, unlike the Rule, the CAMR cap-and-trade program was "based on control technology available in the relevant timeframe" that could be installed at each regulated source. 70 FR

28606, 28617, 28620 (May 18, 2005). CAMR did *not* set rates that *no* source could meet, nor was it designed to force generation-shifting. CAMR *certainly* did not purport to "aggressive[ly] transform[]" the industry by shifting generation outside the regulated source category. EPA points to an isolated reference in CAMR to "dispatch changes," EPA Br. 29 n.16, but that merely referred to an alternative compliance option for a standard based on "control technology," and was in no way used to set the standard. EPA also points (Br. 29) to prior performance rates based on fuel-cleaning which may occur offsite before onsite combustion, but this is no different than setting standards based on particular technology manufactured by third parties. In any event, burning pre-cleaned fuel is an operational change that continuously reduces emissions at the source, nothing like the Rule's generation-shifting mandate.[8]

2. EPA does not confront *ABA v. FTC*, which confirms EPA lacks authority over areas of traditional State sovereignty unless Congress makes its conferral of such authority "'unmistakably clear in the language of the statute.'" 430 F.3d at 471-72; *see* Bus. Mot. 15. Nor does EPA dispute that setting the power generation mix is an "area[] that ha[s] been characteristically governed by the States," *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983), or that

[8] EPA claims (Br. 30) that *other* environmental programs support the Rule, but none of these programs contain §111's textual limits. EPA cites Title IV, *see* 80 FR at 64770, but Title IV demonstrates that Congress knows how to authorize generation-shifting when it wishes. *See* CAA §408(c)(1)(B). EPA also cites (Br. 30) a 1995 waste combustor rule, but this rule authorized a trading program only for *compliance*, not to set rates. *See* 60 FR 65387, 65401, 65415-17 (Dec. 19, 1995).

Congress has repeatedly guaranteed such State authority, *see, e.g.*, 16 U.S.C. §§824(a), 824(b)(1), 824o(i)(2). Instead, EPA claims (Br. 33) that the Rule, like other regulations, has only tangential effects on energy markets and that EPA is simply exercising its authority over environmental matters. But the Rule, unlike other environmental regulations that merely set emission limits for sources that choose to run, requires the construction of some types of plants and retirement of others. *See supra* 3-4, 13, 16-17. That is "direct regulation of energy markets" traditionally regulated by States. Util. Mot. 7-8.

3. As Movants demonstrated, Bus. Mot. 14-15; Coal Mot. 11; Util. Mot. 2, 9-10, had Congress wanted to vest authority in an agency to oversee "generation-shifting," it would not have chosen EPA, given the agency's conceded lack of expertise over the electric grid. *Del. Dep't of Nat. Res. v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015); EPA Response, Ex. H (admitting that "issues related [to] management of energy markets and competition between various forms of electric generation are far afield from EPA's responsibilities for setting standards under the CAA"). Congress is "especially unlikely" to make an implicit delegation of enormous regulatory power to an agency with "no expertise" in the relevant subject matter. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). EPA provides no response to these points.

II. The Rule Is Causing Immediate, Irreparable Injury.

EPA's principal theory (Br. 18) for why the Rule does not require immediate action by the utility industry is that the Rule does not, in EPA's view, require industry

to do very much. The Rule merely nudges along an extant "market trend" toward lower carbon resources, EPA says, and therefore utilities face no urgent pressure to take action to prepare for the first compliance period in 2022. *Id.* EPA's attempt to minimize the Rule as a "market trend" is belied not only by the government's public statements trumpeting the Rule as "aggressive[ly] transform[ing]" the power sector, *see supra* 1, but the government's own data.

EIA—the agency Congress created to collect energy information and monitor energy trends, 42 U.S.C. §7135—projects that, without the Rule, coal-fired generating units would supply 38%-41% of the nation's electricity through 2030, in line with historic norms. Schwartz Decl. ¶3, Coal Mot. Ex. 1. With the Rule, EPA projects that coal-fired generation's share of power supply will drop to 33% by 2020 and to 27% by 2030—the lowest recorded level. *Id.* EPA projects that the coal plants shuttered by the Rule will be replaced by new renewable generation and increased production from natural gas generators. EPA TSD 2, Coal Mot. Ex. 2. *Id.* By any measure, this is transformational. NERC, the body charged with protecting the grid's reliability, agrees: EPA "proposes a very different mix of power resources than we have today." NERC Media Release 1, Ex. B; *see* Schwartz Reply ¶¶3-18, Ex. A.[9]

EIA also does not detect underlying market trends that, with or without the

[9] If EPA's implausible assumption that electricity demand will fall between 2022 and 2030 (even as the economy and population grow) proves inaccurate, coal's share of generation will decline to a mere 20%, half of what it is today (and renewable generation will have to increase even further). Schwartz Report 27, Att. to Coal Mot. Ex. 1.

Rule, are supposedly fast rendering coal-fired power all but obsolete. *Cf.* EPA Br. 59. While EIA's comprehensive 2015 industry assessment reports significant coal retirements commencing with the adoption of EPA's Mercury Rule in 2012, those retirements largely cease with the end of the rule's compliance period in 2016. That is because the remaining fleet of coal plants made the multi-billion dollar investments needed to comply with that rule with the expectation that those plants would be able to continue operating years in the future. EIA thus forecasts little additional coal retirements absent the Rule. Schwartz Report 22, Att. to Coal Mot. Ex. 1.

Having mischaracterized the Rule's transformative effect, EPA's opposition severely understates the length of time necessary to bring about the required industry changes and hence ignores the need for irrevocable action *now*. The reality is that almost every State and everyone connected to the power sector is now engaged in intense efforts to reengineer the power sector in time to meet the 2022 compliance deadline. *See* Joint States Reply Br., Ex. A. Executives from large and small utility companies have filed declarations in support of the Stay Motions to describe the long lead times needed to plan, finance, and construct the new generation and associated infrastructure the Rule requires.[10] Administrator McCarthy is correct: the Rule *today* is

[10] The Environmental Intervenors' claim that States can easily meet the standards, Br. 9-10, is based on a study that shows no such thing, as it concededly "is not intended … to illustrate the most likely or cost-effective compliance outcomes under the Rule." P. 23 of slides att. to Munns Decl., Int. Joint App. Ex. B337.

in the process of being "bak[ed] into the system."[11]

Because the Rule seeks to fundamentally transform the power sector, a stay is warranted so this Court can pronounce judgment before this convulsive regulatory shift occurs and cannot be undone. A stay is all the more necessary when, even in the short term, the Rule will shutter scores of plants, devastating not only the mines that supply them, but local communities and economies that depend on these operations. EPA's contrary arguments all proceed from either a flawed premise or a misstatement of the sweeping changes the Rule mandates.

A. EPA's flawed legal standard. EPA's arguments (Br. 52, 58) proceed from a fundamental legal error: that economic harm does not warrant a stay unless a movant's "very existence" is threatened. As this Court recently reaffirmed, economic injury is irreparable "where no 'adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.'" *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015). EPA is forced to concede as much in a footnote. EPA Br. 59 n.39. Here, no damages action will lie against EPA for the costs imposed on States, industry, and local communities. Even if some regulated utilities may someday be reimbursed for their costs through rate recovery, *id.*, those harms will simply be passed on to consumers. This presents a classic

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

instance of irreparable harm. *Mexichem*, 787 F.3d at 555.[12] Moreover, Movants show much more than mere economic loss, including many permanent plant closures, massive job losses, and severe impacts on local governments and businesses during the period of judicial review. *See, e.g.*, Harbert Decl. ¶¶17, 21-27, Bus. Mot. 7-A.

B. The Rule's mandate causes irreversible investment today. Movants have shown the Rule is causing irreparable harm *now*, notwithstanding its 2022 compliance start date. Despite EPA's unsupported assertion (Br. 60), the Rule's demanded generation-shifting requires planning, designing, engineering, siting, permitting, funding, and constructing an extensive new infrastructure—new generation to replace the retired coal generation, long-haul transmission systems to bring this generation to market, and build-out of natural gas pipelines to provide fuel for the increased gas generation on which the Rule relies. Schwartz Report 30-45, Att. to Coal Mot. Ex. 1. None of this can happen overnight, or even during the few years before 2022. It must commence now. As Administrator McCarthy herself recently explained, the Rule is *already* causing significant shifts in the energy investment mix in the United States. McCarthy Remarks, Bus. Mot. 8-F.

NERC confirmed the Rule will require immediate efforts, emphasizing to EPA the need for significant new infrastructure and the danger to grid reliability if the long lead times necessary for such infrastructure are not accommodated. *Reliability Impacts*

[12] EPA also errs by arguing (Br. 61) that Movants must show irreparable harm with "certainty" (emphasis omitted). *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (movant must show "irreparable injury is 'likely' to occur").

2, Ex. E. NERC estimated that construction of gas-fired facilities takes more than 5 years and that development of new transmission infrastructure takes 6-15 years. *Id.* at 36-41; *see also generally* Stoltz Reply, Ex. G. Regional grid coordinators alerted EPA to these facts. The Southwest Power Pool, for instance, which oversees the grid in all or parts of 14 States, warned that the Rule as proposed would lead to "cascading outages and voltage collapse" because it will take up to 8.5 years to build the transmission lines necessary for the alternative resources the Rule requires. SPP Comments 6, 8, Ex. F; *see also* MISO Comments 3, Ex. I (due to lead time needed to build infrastructure, the new generation needed to safeguard reliability will be available in 2024 at the earliest).

A host of utility company declarants reached the same conclusion: The Rule will force utilities to retire coal plants and to replace them with new generation and accompanying transmission and pipeline infrastructure, and this process must commence imminently.[13] EPA itself notes that developing replacement generation

[13] *See, e.g.*, McInnes Decl. ¶15, Util. Mot. Ex. L (3-10 years lead time for new transmission projects); Schwartz Decl. ¶¶4, 11, Coal Mot. Ex. 1 (5-11 years lead time for transmission lines to connect new capacity); Pemberton Decl. ¶23, Util. Mot. Ex. B (5-8 years lead time for new line and substation projects and 2-3 years for existing lines and substations); Rasmussen Decl. ¶¶13-14, Util. Mot. Ex. J. (6 years lead time for baseload resource development); Witham Decl. ¶13, Bas. Mot. Att. 3 (environmental assessments for wind power projects take 1.5-3 years and environmental impact statements take 3-5 years); *see also, e.g.*, Heidell & Repsher Decl. ¶12, Util. Mot. Ex. C; Frenzel Decl. ¶27, Util. Mot. Ex. Q; Campbell Decl. ¶¶2-3, Util. Mot. Ex. P; Hines-Cashell Decl. ¶47, Supp. Util. Mot. Ex.; McLennan Decl. ¶20, Util. Mot. Ex. I (7 years to build new natural gas generation); McCollam Decl. ¶¶8, 10, Bas. Mot. Att. 2; Raatz Decl. ¶¶21-23, Bas. Mot. Att. 1.

because of unit retirements "necessitate[s] transmission upgrades that are costly" and "cannot be completed quickly." 80 FR at 64756. Even the Power Intervenors acknowledge (Br. 3) that natural gas, wind, and solar projects will take more than 4-5 years to complete if any supporting transmission capacity is required. Moreover, neither EPA nor its supporters addressed the additional delays that will be caused by the need to build so much additional infrastructure at once, which will make needed materials scarce and elongate the time needed for the build-out demanded by the Rule. *E.g.*, McCollam Decl. ¶¶12-13, Bas. Mot. Att. 2. As to EPA's broad claim that Movants cannot show the Rule "requires" any particular plant to close, Br. 60, Movants' declarations show otherwise.[14]

As explained in detail in the Stoltz reply declaration, responsible power companies cannot wait until State plan requirement specifics are set in stone; they must make near-term commitments to ensure the needed facilities are operational by

[14] *See, e.g.*, Pemberton Decl. ¶13, Util. Mot. Ex. B ("[u]nder EPA's Compliance solution, Georgia Power must retire ... more than 4,200 MW ... in 2016" and identifying specific plants); Rasmussen Decl. ¶¶7-8, Util. Mot. Ex. J (sole plant serving Reservation would have to cease operations under either a rate-based or mass-based emissions limit); Brummett Decl. ¶¶16-19, Util. Mot. Ex. G (Rule "will force the retirement of [San Miguel]"); Raatz Decl. ¶12, Bas. Mot. Att. 1 (Basin must "shut down or curtail operations at 5 of its existing coal-fired steam generating units, representing approximately 43% of its existing coal-fired capacity"); *see also, e.g.*, McLennan Decl. ¶14, Util. Mot. Ex. I (Minnkota will need "a combined approach of reducing its generation at its three coal generating resources [and] perhaps shuttering the Young Station completely"); Hines & Cashell Decl. ¶44, Supp. Util. Mot. Ex. ("operation of the Colstrip Plant cannot continue as it exists today under" the Rule).

2022.[15] And, as utilities begin to shift generation from coal- to natural gas-fired plants or renewable generation, coal mining companies and companies that provide equipment and supplies to the coal mining industry will also have to make near-term, irrevocable decisions to reduce capacity.[16]

In sum, the claim that the Rule requires "*nothing* of affected sources until 2022 at the earliest," Power Intervenors Br. 7 (emphasis in original), is without merit. Nor can industry responsibly defer making the required commitments to new generation and associated infrastructure until it knows the specific requirements of State plans once EPA approves them by its September 2019 deadline. *Cf.* EPA Br. 60-61. By that time the compliance period will be only 28 months away—far too little time to make the necessary changes. 80 FR at 64669. Echoing the warnings of NERC and the regional grid coordinators, FERC Commissioner Clark cautioned that "if expanded

[15] Stoltz Reply ¶¶9-15, Ex. G (Basin Electric renewable projects will require long lead-time for new transmission); *see also, e.g.*, Heilbron Decl. ¶2, Util. Mot. Ex. M (Alabama Power will incur $72 million for new transmission projects in 2016-17); McCollam Decl. ¶¶22, Bas. Mot. Att. 2 (Basin Electric will incur $330 million in compliance costs in the next 2 years); Galli Decl. ¶18, Peabody Ex. A ("The closure process will need to begin immediately for affected plants .... It takes a decade or more to make major shifts in generation mix and to upgrade the transmission system to support these shifts. … [P]roviders must begin planning now."); Nowak Decl. ¶¶9-12, WV Ex. C-158; McLennan Decl. ¶22, Util. Mot. Ex. I; Heidell & Repsher Decl., PA Report at 8-11, Util. Mot. Ex. C; McInnes Decl. ¶14, Util. Mot. Ex. L.

[16] Forrest Decl. ¶¶5, 8, 10, Coal Mot. Ex. 4 (company to auction its fleet of mining equipment next year, and value received will be much lower than absent Rule); Neumann Decl. ¶¶18, 25, Coal Mot. Ex. 6 ($50 million equipment purchase postponed due to Rule); *see also, e.g.*, Siegel Decl. ¶¶5-7, Coal Mot. Ex. 5; Schwartz Decl. ¶31, Coal Mot. Ex. 1.

infrastructure is not built in time to meet the generation mix changes required by [the Rule]," grid reliability will be imperiled and electricity prices will rise "substantially." *See* Clark Testimony 6-7, Ex. C. The Rule forces utilities to act now to ensure necessary infrastructure is in place by 2022 to preserve reliable electric service.

C. EPA's modeling forecasts further immediate harm. Movants' immediate injury is not limited to the need to act now to ensure new generation is available when coal units are forced to close in 2022. EPA's *own analysis* forecasts further imminent, irreparable harm in the closure of scores of coal plants *in 2016*. Schwartz Decl. ¶4, Coal Mot. Ex. 1. EPA's modeling recognizes the reality that, for many plants, making costly investments necessary to continue operations in the short term when those plants are likely to be shuttered by the Rule in a few years is economically irrational. Schwartz Report 63, Att. to Coal Mot. Ex. 1. Beyond the irreparable harm to those facilities, many plants are tied to a nearby coal mine, so retirement of the plant will cause the mine to close, resulting in lost jobs at the plant and mine and economic devastation to the rural communities in which these facilities are located. *Id.* at 70-72.

EPA denigrates (Br. 64-66) its own model's reliability, but to no avail. *See generally* Schwartz Reply ¶¶20-31, Ex. A. The agency concedes the model's accuracy to "gauge the overall, power-sector-wide impacts of control requirements in terms of costs, emission reductions, and economic impacts." EPA Br. 64. And EPA recently praised its modeling to this Court as able to "forecast how the power sector produces electricity at least cost while meeting energy demand, reliability constraints, and

environmental requirements." EPA *EME Homer* Br. 40. Even if EPA were correct that the model cannot predict precisely which plants will close, the relevant and undisputed point is that EPA's model predicts substantial 2016 plant closures. That is more than sufficient to demonstrate irreparable harm.

Second, EPA must have confidence in its model's accuracy because the agency used that model's results not just to predict the impact of the Rule but also to design the Rule. EPA used the model to determine the requirements of building blocks 2 and 3, to address its obligation under §111(a) to "tak[e] into account" the "cost" and "energy requirements" of its proffered "best system of emission reduction" and to ensure that its proffered emission rates would not impair the reliable operation of the electric grid. Schwartz Reply ¶¶21-22, Ex. A. EPA cannot rely on its modeling to determine whether the emission rates imposed by the Rule are achievable while claiming the very modeling results used to make that determination can be ignored.

Third, EPA is now using the model's predictions regarding particular 2016 unit retirements from this Rule to decide State nitrogen oxide emission budgets for 2017 in its recently proposed Transport Rule. *Id.* ¶¶28-31. Thus, even as EPA disputes the reliability of the 2016 modeling results with regard to specific plant closures, it proposes to use those very same projected closures to determine whether and how much "upwind" States must reduce nitrogen oxide to improve "downwind" air quality. *Id.* ¶¶28-31.

In short, having used the model to formulate the Rule's regulatory

requirements and having relied on the specific 2016 retirements to develop the Transport Rule, EPA cannot maintain that the model's understanding of the power system is so poor that it cannot even predict something as basic as whether the Rule will cause near-term retirements *at all*. If anything, EPA's modeling *underestimates* the Rule's transformational impact because its "base case"—its description of the power sector without the Rule—assumes away massive amounts of existing generation. *See* Schwartz Report 23, Att. to Coal Mot., Ex. 1. EPA projects that 52,000 MW more coal units will retire in 2016 even without the Rule than does EIA. EPA cannot explain these retirements. Schwartz Reply ¶¶15-16, Ex. A.

D. The Rule will cause widespread harm. Finally, the Rule imposes harms throughout the country. Consumers will see their electricity rates rise as affordable power sources close and utilities are forced to build expensive new plants. Harbert Decl. ¶¶18-19, Bus. Mot. 7-A; Hines-Cashell Decl. ¶¶47-48, 50-53, Supp. Util. Mot. Ex. Wide swaths of industry—especially heavy electricity users like large manufacturers—will see their operating expenses climb and may be forced to relocate overseas, including to countries where less rigorous environmental and emission controls permit cheaper electricity. *Id.* ¶62; Harbert Decl. ¶29, Bus. Mot. 7-A. The Rule will hit poor, rural areas especially hard. In many of these areas, power generation and mining jobs are the principal drivers for the local economy, *e.g.*, Witherspoon Decl. ¶¶4-6, Bus. Mot. 7-N, and provide the best blue-collar wages available, Harbert Decl. ¶26, Bus. Mot. 7-A. Many rural towns and counties rely

heavily on taxes from utilities and mines. *E.g.*, Taylor Decl. ¶5, Bus. Mot. 7-F. The closure of plants, mines, and supporting services will devastate these rural communities, resulting in widespread job loss, Harbert Decl. ¶¶20, 22, Bus. Mot. 7-A, cuts to essential services and education, *e.g.*, Hines-Cashell Decl. ¶¶61, 63, Supp. Util. Mot. Ex.; Rinas Decl. ¶¶9-11, Bus. Mot. 7-B, and disintegration of community ties as laid-off employees are forced to relocate to look for work, *id.* ¶¶6-8.

III. The Public Interest Favors A Stay.

As Movants have demonstrated, a stay serves the public interest. EPA maintains the Rule would make important reductions in CO_2 even if "only a part" of broader efforts to address the issue, EPA Br. 67, but the reductions will, in fact, be only an extremely small part of global emissions by 2030 (less than 1%). Thus, EPA cannot show a stay pending judicial review will have any appreciable impact on its goals, despite the immediate harm to industry from not granting a stay. Given that EPA contends the Rule merely reinforces existing trends toward low-carbon resources and that compliance actions are not required until well in the future, it cannot claim that a short stay will have any meaningful effect on achieving the Rule's objectives. EPA's main concern (Br. 68) is that a stay will ultimately delay the 2022 commencement of the interim compliance period. This just emphasizes the desirability of expediting briefing of this case on the merits. If the case is briefed and argued on an expedited basis (as Movants request), and if EPA prevails, the stay will have been short and the brief delay in implementing the Rule will have an

inconsequential effect on national, let alone global, emissions. Further, any States that wish to push development of renewable sources as a matter of State law will be free to continue to do so even if a stay is granted.

EPA's argument (Br. 67-68) regarding a stay's impact on international negotiations suggests that other countries should find out later rather than sooner that the Rule is unlawful. But surprising foreign governments who have relied on U.S. commitments imperils rather than fosters diplomatic endeavors. In any event, EPA cites no case for the proposition that this Court should withhold relief warranted under federal law to strengthen the government's bargaining position abroad. To the contrary, the Executive's interest in "ensuring the reciprocal observance of" treaties, "protecting relations with foreign governments," and "demonstrating commitment to" international norms does not authorize EPA "to set aside first principles." *Medellin v. Texas*, 552 U.S. 491, 524 (2008). Finally, any reduction in greenhouse gases by the United States related to the Paris agreement is not scheduled until 2025, Paris Factsheet, Ex. J—in contrast to the harms the Rule is now causing—and, in any event, the government has emphasized that even those commitments are nonbinding, Paris Agreement Article, Ex. D. Thus, there is ample time to formulate a new—and lawful—emission reduction program to meet any commitments.

CONCLUSION

The Court should grant the requested stay.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December 2015, I will cause to be served electronically the foregoing through the ECF system, which shall cause electronic service to be made upon all registered parties, and will serve by Federal Express any parties not registered with the ECF system.

/s/ C. Frederick Beckner III

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