

IMPLICATIONS OF THE SUPREME COURT STAY OF THE CLEAN POWER PLAN

HEARING BEFORE THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE ONE HUNDRED FOURTEENTH CONGRESS SECOND SESSION

JUNE 9, 2016

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IMPLICATIONS OF THE SUPREME COURT STAY OF THE CLEAN POWER PLAN

THURSDAY, JUNE 9, 2016

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 406, Dirksen Senate Office Building, Hon. James M. Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Barrasso, Capito, Crapo, Boozman, Wicker, Fischer, Rounds, Sullivan, Carper, Cardin, Whitehouse, Gillibrand, and Markey.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. The hearing will come to order.

We are going to do something a little bit differently. I just talked to Senator Boxer. She is stuck in traffic and said to go ahead and start without her, so we will do that.

I will do my opening statement, and what we will do is I will introduce all of our witnesses. Thank you very much, all of you, for being here today. This will be a well attended hearing. I am going to be asking something very special of you guys, and that is do as I do, and that is stay within your 5-minute limit because we will have a full panel here, and we have a vote at 11:15, so we want to accommodate both of those if that is all right.

So we are here today to talk about the status of the Clean Power Plan in the wake of a historic decision by the U.S. Supreme Court to stay the rule.

The stakes are high when it comes to the Power Plan. An agency charged with protecting human health and environment is attempting to restructure the entire energy system on imagined legal authority in a manner that will cost billions of dollars, is based on unreasonable assumptions, will increase energy bills, puts grid reliability at risk, and has no impact on the environment.

If the EPA can convince the courts to uphold their approach to regulating the utility industry through the means Congress never authorized, then they will take these same arguments and use them to restructure every industrial sector in this country in a manner that appeases the political obligations of the President.

Neither the Clean Air Act nor the regulatory system was meant to operate this way, and the President knows that. That is why he first attempted to progress his climate agenda—as was tried before he was President, going back as far as 2002—to do this through

legislation, and what the President is very famous for is doing things that he can't do through legislation through regulation. That is what this is all about.

So without the requisite support of Congress, the President has tasked unelected bureaucrats who are insulated from the consequences. So that is where we are today.

Republicans are not the only ones who rightfully question the agency's persistent attempts to blur legal lines. Democrats, leading environmentalists, Governors, well respected economists, attorneys general, State air officials, economic directors, utilities, manufacturers, American businesses, unions, labor unions, and many more have joined the charge. Some have testified before this committee, including the former chief counsel of the Sierra Club, that the Clean Power Plan is legally unsound. President Obama's own law professor testified before the House that what the President and his EPA are doing is akin to "burning the Constitution."

And the latest institution to join the charge is the Supreme Court of the United States. On February the 9th, 2016, the Supreme Court issued a historic stay, which puts the Clean Power Plan on hold until the completion of judicial review and accordingly extends all related deadlines. This is the relief that was requested and the relief that was granted, which even the EPA acknowledged when the Agency thought a stay would never happen.

Yet EPA is attempting to downplay the significance of the stay and argue against the clean legal precedence as a last-ditch effort to scare States into spending scarce resources complying with a rule that could very well be overturned. It is important to note that a key consideration of the Court when assessing a stay is whether the parties requesting the relief will prevail on the merits. While a stay is not a final decision, it makes clear that the highest court in the country has serious reservations on the legal soundness of the rule.

Like much of the Clean Power Plan, how the stay actually plays out is up to the States. We have a chart here. If you look at the States in red are the ones that have stopped their work altogether, the yellow is the ones who have slowed down their work, and then the green are those States, only 11 States, that have continued their work.

So, my message to the States and stakeholders and impacted entities is simple and clear: the highest court in the country, the Supreme Court of the United States, put a hold on the Clean Power Plan and all associated deadlines because it has serious concerns over the legal legality of this rule. As such, no State should fear any penalty for heeding the Court's decision.

So, I thank the witnesses for being here. We are going to start, and we are going to try to adhere to our deadlines. But as soon as Senator Boxer gets here I will interrupt this proceeding and recognize her for her opening statement.

We have witnesses today: Ms. Katie Dykes, Deputy Commissioner for Energy, Connecticut Department of Energy and Environmental Protection. Nice to have you here, Katie.

Professor Richard Revesz, Lawrence King Professor of Law and Dean Emeritus, Director, Institute for Policy Integrity, New York University School of Law; Mrs. Allison Wood, Partner, Hunton &

Williams; Mr. Michael McInnes, CEO of Tri-State Generation and Transmission Association, Incorporated, on behalf of the National Rural Electric Cooperative Association; and Representative Jack Bondon from the State of Missouri, around the Kansas City area, I believe.

It is nice to have all of you here.

We will start on this side with you, Ms. Dykes. And do try. I will be rude if you don't adhere to your 5 minutes. Thank you.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA

We are here today to talk about the status of the Clean Power Plan in the wake of a historic decision from the Supreme Court of the United States to stay the rule.

The stakes are high when it comes to the Power Plan. An agency charged with protecting human health and the environment is attempting to restructure the entire energy system on imagined legal authority in a manner that will cost billions of dollars, is based on unreasonable assumptions, will increase energy bills, puts grid reliability at risk, and have no impact on the environment.

If EPA can convince the Courts to uphold their approach to regulating the utility industry through means Congress never authorized, then they will take these same arguments and use them to restructure every industrial sector in this country in a manner that appeases the political obligations of a President.

Neither the Clean Air Act nor the regulatory system was meant to operate this way, and the President knows it. That is why he first attempted to progress his climate agenda and the predecessor of his Clean Power Plan through Congress in the form of cap-and-trade legislation. The problem the President ran into is that cap-and-trade is a bad deal for this country, and elected officials who are accountable to their constituencies will not support it.

Without the requisite support of Congress, the President and his EPA have tasked unelected bureaucrats who are insulated from the consequences of progressing on all pain, no gain regulation and their legal allies to craft creative arguments to support it. The result of this is an oft repeated mantra from the EPA that the Clean Power Plan is built on a "solid legal foundation." While the agency often makes eloquent, compelling legal arguments, they tend to be wrong.

Republicans are not the only ones who rightfully question the agency's persistent attempts to blur legal lines. Democrats, leading environmentalists, Governors, well respected economists, attorneys general, State air officials, economic directors, utilities, manufacturers, American businesses, unions, and many, many more have all joined the charge. Some have testified before this committee, including the former chief counsel of the Sierra Club, that the Clean Power Plan is legally unsound. President Obama's own law professor testified before the House that what the President and his EPA are doing is akin to "burning the Constitution."

And the latest institution to join the charge: the Supreme Court of the United States.

On February 9, 2016, the Supreme Court issued a historic stay, which puts the Clean Power Plan on hold until completion of judicial review and accordingly extends all related deadlines. This is the relief that was requested, and the relief was granted, which even the EPA acknowledged when the agency thought a stay would never happen.

Yet EPA is attempting to downplay the significance of the stay and argue against clear legal precedence as a last-ditch effort to scare States into spending scarce resources complying with a rule that could very well be overturned. It is important to note that a key consideration of the Court when assessing a stay is whether the parties requesting the relief will prevail on the merits. While a stay is not the final decision, it makes clear that the highest court in this country has serious reservations on the legal soundness of the rule.

Like much of the Clean Power Plan, how the stay actually plays out is up to the States. Over half of the States—29 to be exact—have completely stopped work associated with the Power Plan, and 7 have slowed work. For the 11 States that continue to work on the CPP, a closer look reveals that their decision is more a matter of politics than prudent reason.

My message to States, stakeholders and impacted entities is simple and clear: the highest court in this country, the Supreme Court of the United States, put a hold on the Clean Power Plan and all associated deadlines because it has serious con-

cerns over the legality of this rule. As such, no State should fear any penalty for heeding the Court's direction.

I thank the witnesses for their time and look forward to their statements.

**STATEMENT OF KATIE DYKES, DEPUTY COMMISSIONER FOR
ENERGY, CONNECTICUT DEPARTMENT OF ENERGY AND EN-
VIRONMENTAL PROTECTION**

Ms. DYKES. Thank you.

Good morning, Chairman Inhofe and members of the committee. I appreciate the opportunity to be able to be with you and speak here today. My name is Katie Dykes. I serve as the Deputy Commissioner for Energy at the Connecticut Department of Energy and Environmental Protection. This year I also have the privilege of serving as the Chair of the Board of Directors of the Regional Greenhouse Gas Initiative, or RGGI for short.

The EPA has recognized multi-State, mass-based trading programs like RGGI as a compliance option for the Clean Power Plan, so I think it is relevant to share a little bit of the successes we have been having from implementing this program over the past several years.

The RGGI program caps covered emissions from new and existing power plants by determining a regional budget of carbon allowances. The nine States participating in RGGI distribute a majority of our carbon allowances through quarterly auctions, and we reinvest the proceeds. Collectively the nine RGGI participating States represent 16 percent of the U.S. economy and generate a total GDP of \$2.4 trillion.

Connecticut is proud to be a charter member of RGGI, and we are pleased that EPA has recognized our approach as an option for Clean Power Plan compliance. Participation in RGGI has enabled our State to make significant reductions in carbon pollution already. Since 2005 the RGGI States collectively have reduced carbon emissions by 45 percent from the electric sector, and we are on track to meet a 50 percent reduction by 2050. We have done all this while growing our GDP by 8 percent and while maintaining system reliability of the electric system.

In Connecticut we have embarked on a clean energy transition in our State and our region because we are experiencing the threats of climate change. I will be delighted to share some of the examples that we see already, the hundreds of millions of dollars that we have been asking ratepayers to invest to address hardening our electric system, restoring power as a result of massive storms that rolled through our State and our region in 2011 and 2012. We have coastal substations that are facing the possibility of inundation by flood waters now that they are within the 100-year flood zone, and that is not because we moved those substations. So this is a real reliability threat for us.

But we are also pursuing this because it provides tremendous benefits to our electric grid and our economy. Investments in energy efficiency save customers money. Renewables enhance reliability by diversifying our generation fuel mix and help to moderate electricity market prices. Independent reports by the Analysis Group have found that the RGGI program produced \$1.4 billion in net benefits to the RGGI region between 2012 and 2014, creating

14,000 job-years and \$460 million in consumer energy bill savings. That is net economic benefits from reducing carbon emissions.

In spite of litigation uncertainty around the Clean Power Plan, Connecticut is one of several States that believe that having more information from EPA about how we might comply with the Clean Power Plan if it is upheld will better inform our decisionmaking. In April we were proud to join 13 other States in a letter to EPA requesting additional information and assistance related to the final CPP. Specifically we asked EPA to provide a final model rule or rules. We asked EPA to provide additional information about the Clean Energy Incentive Program, tracking systems for allowances or credits, and so on.

We asked for this information to assist not only with our continued preparation for CPP compliance, but also to assist us with near-term immediate decisions that we need to make and that we are making about grid planning, about our own State obligations related to our State statutory mandate to reduce carbon emissions by 80 percent by 2050, how to comply with the revised ozone standards, and many other regulatory requirements that we have within our State.

We are making decisions today using the best information that we have available. As energy planners we engage in modeling, we consult forecasts, and we make assumptions around the possibilities related to environmental compliance obligations, even when they may be uncertain due to litigation. And that extends not just to the Clean Power Plan, but also deciding decisions, nuclear relicensing, a whole host of administrative decisions that need to be factored into planning.

Finalization of a model rule and other information that we have requested from EPA would not impose any new requirements on States or other parties, but it will provide us critical information about what kind of State plans will be approvable should the CPP be upheld. Given the interconnected nature of the electric grid, it is important for us in Connecticut to have information about how we might comply, how our sister States in RGGI might comply, as well as States outside of RGGI, so that we can continue with our planning.

Connecticut and the other RGGI States have some of the most aggressive Clean Power Plan targets in the country, but we are well placed to meet them because we have taken proactive action, and we encourage others to do the same.

Thank you so much.

[The prepared statement of Ms. Dykes follows:]

Testimony of

Katie Dykes
Deputy Commissioner for Energy,
Connecticut Department for Energy and Environmental Protection
Chair, Regional Greenhouse Gas Initiative, Inc. Board of Directors

June 9, 2016

Before the Senate Committee on Environment and Public Works

Thank you Chairman Inhofe, Ranking Member Boxer, and other members of the committee for inviting me to testify this morning. As Deputy Commissioner for Energy at the Connecticut Department of Energy and Environmental Protection, and as the Chair of the Regional Greenhouse Gas Initiative (RGGI), Inc. Board of Directors, I appreciate the opportunity to share Connecticut's experiences in addressing climate change and strengthening our energy system.

While the Clean Power Plan (CPP) is under litigation, Connecticut continues to move forward in building a reliable low-carbon electric system. Climate change remains a serious issue facing my State. To safeguard the economy, the environment, and the reliability of our grid, Connecticut has been a leader in implementing programs that reduce harmful greenhouse gas pollution while encouraging innovation, boosting clean energy, and generating savings for local families and businesses.

Connecticut is proud to be a charter member of the Regional Greenhouse Gas Initiative, the nation's first market-based, multi-state regulatory program to reduce carbon pollution from the power sector. Connecticut is one of nine states participating in RGGI, along with Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. The RGGI program caps emissions by determining a regional budget of CO₂ allowances, and then distributes a majority of the CO₂ allowances through regional auctions so that the states may reinvest the value of the allowances into strategic programs. Collectively, the nine RGGI participating states represent 16 percent of the U.S. economy and generate a total gross domestic product of 2.4 trillion U.S. dollars.ⁱ

Through our participation in RGGI and other climate change mitigation programs, Connecticut's experience has shown that significant reductions in carbon pollution (such as those that the CPP will require) can be achieved affordably and reliably. Collectively, the RGGI states have already reduced power sector carbon pollution by over 45 percent since 2005, while at the same time transitioning to a cleaner energy system. The RGGI states' use of non-hydro renewables has increased by 74 percent, and in 2014 the RGGI states produced about half of their power from clean or renewable sources.ⁱⁱ As a group, the RGGI states are on track to reduce our power sector

carbon pollution to 50 percent below 2005 levels by 2020. This reduction in emissions goes well beyond the projected national reductions under the CPP, and does so within a shorter timeframe.

Our experiences with RGGI and with other climate change mitigation programs in Connecticut have been accompanied by consumer savings, economic growth, and reliable power. In Connecticut, as of 2013 we have achieved a ten percent reduction in emissions from 1990 levels economy-wide, while our population has grown nine percent, and our GDP increased by 44 percent. We see similar progress in all RGGI states. While power sector carbon pollution declined by 45 percent in the RGGI states since 2005, the region's GDP has grown by 8 percent [see Appendix, Graph 1]. Independent reports by the Analysis Group have found that the RGGI program produced net economic benefits in each and every RGGI state. A 2015 Analysis Group report concluded that RGGI's second three-year period (2012-2014) is adding \$1.3 billion in net economic benefit to the region, creating 14,200 job-years, and generating \$460 million in consumer energy bill savings.ⁱⁱⁱ These benefits come in addition to findings from the program's first three-year period (2009-2011), which is adding \$1.6 billion net economic benefit, 16,000 job-years, and \$1.3 billion in consumer energy bill savings.^{iv}

This track record demonstrates that climate action and economic progress are not just compatible, but complementary. And, real benefits to residents in Connecticut and the RGGI region go beyond the factors just described. The economic findings by the Analysis Group do not include the benefits of avoided climate change, or improvements to public health. If these factors were taken into account, the reported economic benefits would be far higher. Cleaner air is critical to safeguard the health of our families. One study by the Clean Air Task Force found that the RGGI region's transition to a clean energy economy is saving hundreds of lives, preventing thousands of asthma attacks, and reducing medical impacts and expenses by billions of dollars.^v

A 2015 peer-reviewed study also concluded that RGGI is playing a significant role in the region's reduction in carbon pollution.^{vi} The RGGI program works in tandem with complementary policies and market trends to reduce pollution and establish long-term solutions for a reliable energy system. These complementary policies include utility-administered energy efficiency programs and renewable portfolio standards, which are common across the country. Market forces are driving further reductions, by encouraging fuel-switching to less carbon-intensive fuels.

Across the region, RGGI's 32 auctions have generated over \$2.5 billion in proceeds. The reinvestment of RGGI auction proceeds in clean energy and consumer benefit programs is driving a virtuous cycle, further reducing carbon emissions and reinforcing these benefits. Through 2013, the RGGI states reinvested over \$1 billion in auction proceeds in energy efficiency, clean and renewable energy, and other strategic energy programs. More than 3.7 million households and 17,800 businesses participated in programs funded through these investments.^{vii} Connecticut accounted for more than \$84 million of this regional investment, with a significant percentage of

the State's auction proceeds directed toward energy efficiency projects and clean and renewable energy.

In Connecticut, the reinvestment of auction proceeds has helped fund innovative programs that are harnessing market forces and competition to scale clean energy deployment at the lowest cost. Under the leadership of Governor Malloy, our State established the nation's first Green Bank, a quasi-public organization that leverages limited public dollars to attract private investment in clean energy in the State. The Connecticut Green Bank has used RGGI proceeds to help fund projects such as the development of solar photovoltaic (PV) and fuel cell installations in commercial, municipal, non-profit, and educational settings, and the installation of residential solar PV systems. The Green Bank has also partnered with the Connecticut Energy Efficiency Fund and incorporated RGGI proceeds in the Clean Energy Communities Program, encouraging Connecticut cities and towns to reduce their municipal building energy consumption. Funded through RGGI proceeds and ratepayer contributions, the Connecticut Energy Efficiency Fund's investments in energy efficiency and peak demand reduction in 2014 resulted in annual energy savings of 387.8 million kilowatt hours, and will avoid 3.2 million tons of carbon pollution over the lifetime of the efficiency improvements.^{viii} Connecticut's energy efficiency investments planned for the next three years will reduce carbon emissions by 459,174 tons per year, and save enough energy to power a 262 megawatt power plant. These investments are lowering customers' bills, and securing our state's long-term energy future.

Climate change and aging infrastructure pose threats to our economy and to the electric grid. The 2014 National Climate Assessment projected global sea levels to rise between one and four feet by 2100. It found that even without any increase in storm strength, two feet of sea level rise would more than triple the frequency of dangerous coastal flooding throughout most of the Northeast.^{ix} Extreme precipitation is also on the rise in the Northeast: we've seen an increase of over 70 percent in the amount of precipitation falling in very heavy events, a trend which is projected to continue. My State's Climate Preparedness Plan has warned of negative climate change impacts to Connecticut's agriculture, infrastructure (especially coastal infrastructure), natural resources, and public health.^x This is why our State has set a long-term target to reduce greenhouse gases across all sectors to 80 percent below 2001 levels by 2050, and why Governor Malloy has made a commitment to limit global temperature increases to two degrees Celsius by signing on to the Under 2 MOU.

The 2015 Quadrennial Energy Review found that severe weather is the leading cause of power disruptions, costing the U.S. economy from \$18 billion to \$33 billion a year.^{xi} A new report on the health impacts of climate change by the US Global Change Research Program (USGCRP) underscores that these power disruptions can have cascading effects on the economy and human health. The report projects an increase in disruptions to the food supply chain. In particular, it cites

a statistically significant increase in human illness relating to food spoilage following the NY blackout of 2003.^{xii}

We have experienced these adverse climate impacts in Connecticut, resulting in direct costs to our citizens and businesses. According to our Department of Insurance, properties along the Connecticut coastline are collectively valued at over \$570 billion; insurance companies paid nearly \$1 billion for 200,000 covered claims as a result of five major storms in 2011 and 2012, including an unusual Halloween nor'easter, Tropical Storm Irene, and Superstorm Sandy. The cost of restoring power and rebuilding electric distribution lines damaged in those storms has reached to the hundreds of millions of dollars.^{xiii}

As Deputy Commissioner for Energy, I believe that reliability and affordability of energy are of utmost importance in implementing any carbon reduction program. RGGI helps manage these threats by reducing harmful emissions, and supporting reliability through energy efficiency, peak demand reduction, and other strategic investments. Investments funded through RGGI have advanced reliability goals in the region, even as our generation mix has changed and become cleaner.

Connecticut's experience with the feasibility of significant power sector pollution reduction is affirmed by analysis from experts. For example, MJ Bradley, a consulting firm whose client base includes electric and natural gas utilities, major transportation fleet operators, and government agencies, recently conducted a modeling report on the CPP. They concluded that the CPP's targets are "very achievable" across a wide range of scenarios and assumptions.^{xiv} Industry voices have also affirmed that continued reductions in power sector carbon pollution are achievable and affordable. Power generators Calpine, PG&E, and National Grid were joined by Austin Energy and Seattle City Light in filing a motion to intervene in support of the CPP. Their filing states, "The Power Companies support the Clean Power Plan because it will harness market forces to hasten trends that are already occurring in the electricity sector... the Power Companies have reduced CO₂ emissions within their respective generation fleets and portfolios. Their collective experience achieving those reductions demonstrates the achievability and reasonableness of the CPP."^{xv}

Many experts have further said that the CPP simply reinforces economic trends which are already underway. The North American Electric Reliability Corporation (NERC)'s Phase II report on reliability and the CPP found that integration of a large amount of renewables is likely to occur with or without the CPP, and major new transmission and infrastructure investments are also likely to be needed in either case. NERC found that with or without the CPP, the needed investments are significant enough that planning should begin without delay. In line with this reasoning, many states, utilities, and businesses are continuing to plan for a low-carbon energy system irrespective of the Supreme Court stay on the CPP.

Both expert analysis and common sense indicate that planning ahead is the most cost-effective path forward, and EPA can provide tools to help states do so. In April, Connecticut joined with environmental officials from thirteen other states in sending a letter to EPA requesting that the agency provide additional information and technical assistance related to the final Clean Power Plan in a manner that is respectful of the Supreme Court's stay of the regulations until the conclusion of pending litigation.^{xvi} In the letter, we requested a final model rule or rules, as well as additional information on the Clean Energy Incentive Program; tracking systems for allowances or credits; and energy efficiency evaluation, measurement, and verification, along with appropriate technical assistance related to this additional information.

Two especially important tools are the CPP's Federal Plan (FP) and Model Rule (MR). The RGGI states have submitted joint comments highlighting key opportunities for EPA in the FP and MR.^{xvii} When final, the FP and MR will provide important guidance to states planning for compliance with the CPP, or for a low-carbon energy future in general. Among other suggestions, the RGGI states have recommended to EPA that the FP should consist of a mass-based program, and should encourage the auctioning of allowances and the reinvestment of auction proceeds. RGGI's success story, along with a wide range of independent expert research, support the fact that this is the most cost-effective, transparent, and reliable way to achieve emissions reductions.

Of course, the relevance of a model rule and this other information will ultimately depend on the outcome of litigation. As we joined other states in expressing in the April letter, however, Connecticut would find the information helpful and important in the near term to help us prudently carry out a variety of planning and regulatory activities to meet our own state obligations and policy goals. A model rule and the other information that we requested would not impose any new requirements on states or other parties, but would rather provide more information about what kind of state plans would be approvable should the Clean Power Plan be upheld.

This information would also inform our decision making in a number of other contexts where we are taking action now to meet our own state goals and obligations, and where we have other deadlines that do not allow us to wait until Clean Power Plan litigation is resolved. For example, in Connecticut, we are working through the Governor's Council on Climate Change to explore mid-term targets for reduction of GHG emissions as required under the state's Global Warming Solutions Act. Through that effort, we are evaluating emission reduction strategies and recommending policies to meet those goals, as directed by Governor Malloy's Executive Order No. 46. Just this month, we initiated the process for our State's Comprehensive Energy Strategy, in which we will be evaluating the performance of the electricity generation sector and making resource planning recommendations to ensure cleaner, cheaper, more reliable electricity opportunities. We are engaging in dialogues with market participants, other state regulators, and our regional system operator (ISO-New England) to assess potential changes to market rules to

better accommodate state public policies in the design of our competitive wholesale electricity markets. We are also planning for how to meet both the current and new ozone standards. The entire State of Connecticut fails to meet the 2008 ozone standard – in fact, last month EPA “bumped up” Connecticut to next worse designation. We are in the process of determining our obligation under the new more stringent ozone standard. To make progress towards meeting both standards, we will need additional reductions from power plants, both in state and out of state.

In all of these contexts, having better information about how Connecticut and other states could comply with the Clean Power Plan will help our State make prudent decisions. We believe that EPA can provide such information in a way consistent with the stay, similar to the changes that it made to the Cross State Air Pollution Rule when it was subject to a stay.^{xviii} In particular, a final model rule or rules will provide states like Connecticut with a clear model or models of an approvable plan. It would also help us understand how other states might comply with the Clean Power Plan if it is upheld, which is important given the interconnected nature of the electricity system and electricity markets. This information will help our State evaluate the potential impacts to our residents, power companies, and others under different Clean Power Plan scenarios. Connecticut has joined other states in asking EPA for additional information so that we can make the best-informed decisions today in a way that will reduce carbon emissions in Connecticut, improve public health, maintain a reliable and low-cost electricity -system.

Together with the other RGGI states, we are continuing to plan ahead by moving forward with our comprehensive 2016 RGGI Program Review. The RGGI program review process began in November 2015 and will continue through this year, culminating in an update of our RGGI Model Rule. The program review process offers an opportunity to consider program design elements and successes, stakeholder and expert input, as well as considerations for CPP compliance. The RGGI states’ CPP targets are among the most ambitious in the country, and our states are well-placed to achieve them thanks to our existing market-based program and complementary policies. Our states’ commitment towards reducing harmful greenhouse gases remains unchanged.

Multi-state approaches like RGGI have been repeatedly found to be the most cost-effective pathway to reduce harmful carbon pollution. Within the RGGI states, pollution reductions can be achieved where costs are lowest. Furthermore, the iterative process afforded by regular program review allows implementation to move forward in the near term, while still allowing the program to be continually improved in response to new information. Stakeholders and experts have valuable feedback to offer, and updated modeling can provide helpful context for discussion of program improvements. This flexibility increases the effectiveness of the program.

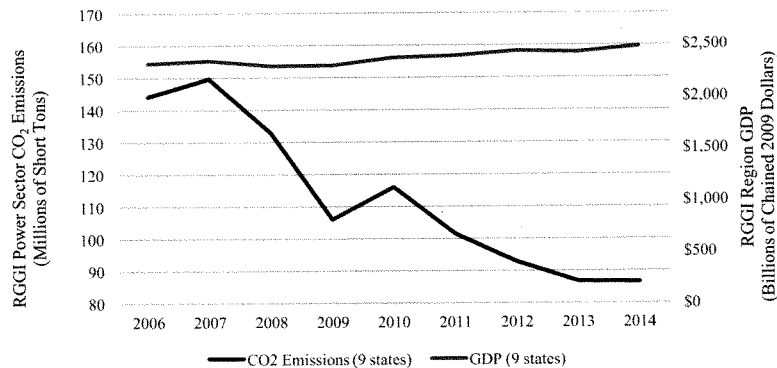
The Clean Power Plan supports multi-state cooperation to reduce power sector carbon pollution, offering many pathways by which groups of states can work together. Based on

Connecticut's experience participating in RGGI, I believe that it is important for states to begin and continue planning for the most cost-effective path to a low-carbon energy system, to ensure the best outcome in terms of cost and reliability. We look forward to sharing our success story to assist any other stakeholders, states, or regions who are interested in learning more. I again thank the Committee for the opportunity to testify.

Appendix

Graph 1:

RGGI Power Sector Pollution Reductions



ⁱ BEA, Real GDP by State.

ⁱⁱ EIA, Detailed State Electricity Data

ⁱⁱⁱ “The Economic Impacts of the Regional Greenhouse Gas Initiative on Nine Northeast and Mid-Atlantic States: Review of RGGI’s Second Three-Year Compliance Period.” The Analysis Group, 2015.

^{iv} “The Economic Impacts of the Regional Greenhouse Gas Initiative on Ten Northeast and Mid-Atlantic States: Review of the Use of RGGI Auction Proceeds from the First Three-Year Compliance Period.” The Analysis Group, 2011.

^v Banks, Jonathan and David Marshall. “How science, advocacy and good regulations combined to reduce power plant pollution and public health impacts; with a focus on states in the Regional Greenhouse Gas Initiative.” Clean Air Task Force, 2015.

^{vi} Murray, Brian and Peter T. Maniloff. “Why have greenhouse emissions in RGGI states declined? An econometric attribution to economic, energy market, and policy factors.” *Energy Economics*. 2015.

^{vii} “Investment of RGGI Proceeds Through 2013.” RGGI, Inc., 2015.

^{viii} “Connecticut Energy Efficiency Board 2014 Programs and Operations Report.” Connecticut Energy Efficiency Fund, 2015.

^{ix} “Climate Change Impacts in the United States: The Third National Climate Assessment: Northeast.” USGCRP. 2014.

^x Connecticut Climate Change Preparedness Plan, 2011.

^{xi} Quadrennial Energy Review, US Department of Energy, 2015.

^{xii} “Impact of Climate Change on Human Health in the United States: Food Safety, Nutrition, and Distribution,” USGCRP, April 2016.

^{xiii} Insurance Information Institute, <http://www.iii.org/article/connecticut-hurricane-insurance-fact-file>.

^{xiv} “EPA’s Clean Power Plan: Summary of IPM Modeling Results With ITC PTC Extension,” MJ Bradley, June 2016.

^{xv} “Unopposed Motion of Calpine Corporation, the City of Austin D B A Austin Energy, the City of Seattle, by and Through Its City Light Department, National Grid Generation, LLC, and Pacific Gas and Electric Company for Leave to Intervene in Support of Respondents,” 2015.

^{xvi} California, Colorado, Delaware, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Oregon, Rhode Island, Vermont, Virginia, Washington. Letter from 14 State Environmental Officials to EPA Acting Assistant Administrator Janet McCabe Requesting Additional Information on the Clean Power Plan, Apr. 28, 2016, <http://www.georgetownclimate.org/states-ask-epa-to-provide-model-rule-other-information-on-clean-power-plan>.

^{xvii} “RGGI States’ Comments on Proposed Federal Plan and Model Trading Rules for the Clean Power Plan,” RGGI, Inc. January 2016.

^{xviii} EPA’s February 21, 2012, final revision rule made changes to the Cross State Air Pollution rule and federal plan while the rule was stayed by order of the D.C. Circuit Court of Appeals. In that action, EPA revised budgets for specific states based on updated modelling assumptions and made other changes. EPA noted that the action was “consistent with” and “unaffected by” the stay order and that it did not impose any requirements in and of itself on regulated units or states. Cross State Air Pollution Rule Final Revisions Rule, 77 Fed. Reg. 10,324, 10,326 (Feb. 21, 2012). EPA also proposed and finalized other changes to the rule during the stay, *see* Cross State Air Pollution Rule June Revisions Rule, 77 Fed. Reg. 34,830 (June 12, 2012).

Senator INHOFE. Right on target. Thank you very much. I appreciate you.

Professor Revesz.

STATEMENT OF RICHARD REVESZ, LAWRENCE KING PROFESSOR OF LAW AND DEAN EMERITUS, DIRECTOR, INSTITUTE FOR POLICY INTEGRITY, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. REVESZ. Mr. Chairman and members of the committee, I am very grateful to have been invited to testify and will address three issues today.

First, the State does not prevent EPA from continuing work related to the implementation of the Clean Power Plan. Before the Supreme Court's stay, EPA had issued a proposed rule outlining Model Trading Rules, which will provide a framework for States that want to use emissions trading programs to achieve the Plan's emissions limits.

EPA has said that it plans to finalize the Model Trading Rules this summer. EPA is also at work on other implementation related matters, including a proposal for a Clean Energy Incentive Program, which will provide States with an optional framework for rewarding early investments in renewable energy and demand-side energy efficiency.

Even though these implementation related activities do not create enforceable obligations for States or sources opponents of the Clean Power Plan claim that EPA is required to cease work on them. But there is ample precedent for EPA continuing to work on implementation related matters during a stay of a regulation. Indeed EPA has done so under the last three Presidential administrations, both Republican and Democratic. In arguing that EPA must put its pencil down, opponents confuse the effects of a stay with those of an injunction, which the Supreme Court did not issue.

In addition to being legal EPA's continued work on implementation related matters will have a number of salutary effects. For one it will aid the many States that during the pendency of the stay are voluntarily preparing to comply with the Clean Power Plan. EPA's guidance will also inform the plans of electric utilities and provide more energy predictability to the industry. Finally, if the plan is ultimately upheld the finalization of the Model Trading Rules will make the development and submission of implementation plans easier for all States.

Second, a decision on the proper timeline for compliance will be made when the stay is lifted and should then take into account the public's interest in timely emissions reductions and developments in the electric power sector.

Opponents of the Clean Power Plan have also argued that the stay has resulted in automatic tolling of all deadlines in the Clean Power Plan, not just the September 2016 and September 2018 deadlines for the submission of plans but also the deadlines for sources to reduce their emissions, which begin 2022 and end in 2030. The litigation will undoubtedly be resolved long before these performance deadlines, and the Supreme Court stay does not say anything about how they should be treated.

Nonetheless earlier this year the U.S. Chamber of Commerce released a white paper arguing if the Clean Power Plan is upheld by the courts, EPA is required to move all of its deadlines into the future by at least the amount of time between the stay's issuance and its expiration. The Supreme Court stay does not mention any such tolling, and by its terms is explicitly limited to the duration of judicial review and is silent on what will happen after that.

Here too there is history under administrations of both parties that makes clear that tolling decisions are made when a stay is lifted, not when it is put in place. And the tolling period is not necessarily equal to the period during which the stay was in effect.

If the Clean Power Plan is upheld any court considering a request to toll deadlines would surely give substantial weight to the public benefit of adhering as closely as possible to the original timetable that EPA developed to best serve the rule's objectives. The court would also likely take into account developments in the electric power sector, such as faster-than-expected growth in renewable generation, which may make it possible for States and sources to comply with the plan more quickly than foreseen when the Clean Power Plan was promulgated and therefore make tolling not necessary.

Third, the Clean Power Plan is a reasonable exercise of EPA's rulemaking authority and is consistent with both the Clean Air Act and the Constitution.

None of the three main arguments made by opponents of the Plan are persuasive. Opponents argue the Clean Power Plan represents an enormous and transformative expansion of EPA's regulatory authority because the rule's guidelines are not based on technological changes that each regulated source can implement independently and assume generation shifting from high emitting to low emitting electricity generators. But here too there is precedent for each of these aspects under other regulations conducted by EPA under administrations of both parties.

And the other two arguments that EPA is precluded from regulating the greenhouse gas emissions of power plants because it regulates the mercury emissions of power plants and the constitutional argument about commandeering are similarly erroneous, and in my written testimony I explore these issues in detail.

Thank you very much.

[The prepared statement of Mr. Revesz follows:]

Testimony of Richard Revesz
Lawrence King Professor of Law and Dean Emeritus
New York University School of Law
Before the Senate Environment and Public Works Committee
Hearing on “*Implications of the Supreme Court Stay of the Clean Power Plan*”
June 9, 2016

Introduction

Thank you for inviting me to testify before this committee. I am Richard Revesz, the Lawrence King Professor of Law and Dean Emeritus at New York University School of Law. At NYU Law School, I also serve as the Director of the Institute for Policy Integrity, a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. In addition, I am the Director of the American Law Institute, the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The views I will express today are my own and do not represent the views, if any, of New York University or the American Law Institute.

I have written nine books and more than 70 articles and book chapters on environmental law, administrative law, and regulatory policy, and have twice won the American Bar Association’s yearly award for the best article or book in the areas of administrative law and regulatory practice. In particular, my recent work has focused on the Clean Air Act and on the regulation of greenhouse gases. My latest book, *Struggling for Air: Power Plants and the “War on Coal”* (co-authored with Jack Lienke) describes how the Clean Power Plan is the natural extension of decades of Clean Air Act policies under administrations of both parties to correct for the broad grandfathering of existing sources, including existing power plants, from the regulatory requirements of the Clean Air Act of 1970. It is not an unprecedented power grab by

the current administration, as opponents argue. My recent articles include “Rethinking Health-Based Environmental Standards” in the *New York University Law Review* (co-authored with Michael Livermore), which focuses on the setting of National Ambient Air Quality Standards under the Clean Air Act, a piece in *Nature* co-authored with Nobel Prize winner Kenneth Arrow and leading economists, climate scientists and legal scholars, which analyzes the models used to evaluate the damages from greenhouse gas emissions, and “Toward a More Rational Environmental Policy,” in the *Harvard Environmental Law Review*, which focuses on two major Clean Air Act decisions from the Supreme Court of the United States.

I am also a public member of the Administrative Conference of the United States and have served on the Science Advisory Board of the U.S. Environmental Protection Agency (EPA) and on committees of the National Academy of Sciences and of the National Research Council.

In conjunction with my colleagues at the Institute for Policy Integrity, I have also filed *amicus curiae* briefs in significant Clean Air Act litigation, including a brief supporting EPA in the ongoing D.C. Circuit challenge to the Clean Power Plan.

My testimony before this subcommittee explains that, despite the Supreme Court’s stay of the Clean Power Plan, it remains both legal and appropriate for EPA to proceed with implementation-related matters like the finalization of model trading rules rules—actions that do not impose any legal obligations on any entities, that have been specifically requested by many states, and that parallel actions taken by EPA when past Clean Air Act rulemakings have been stayed. Furthermore, the stay does not change the fact that Clean Power Plan is on strong legal footing and is therefore likely to be upheld.

Summary

In this testimony, I make the following arguments:

- (1) First, although the Clean Power Plan's requirements are not enforceable while the stay is in place, EPA is free to continue work on implementation guidance and other matters that do not create enforceable obligations during the pendency of the stay, such as the Model Trading Rules it proposed last October.
- (2) Second, while the Supreme Court's stay obviously suspends the states' September 2016 interim planning deadline and will affect the September 2018 deadline for final plans, it says nothing about delaying or "tolling" any of the Clean Power Plan's subsequent deadlines for power plants to meet emission limits, and it is premature for the Plan's opponents to claim that those deadlines will have to be tolled by the amount of time that the stay is in effect.
- (3) Third, notwithstanding the stay, the Clean Power Plan is a reasonable exercise of EPA's rulemaking authority and should ultimately be upheld as consistent with both the Clean Air Act and the Constitution.

I. **The Stay Does Not Prevent EPA from Continuing Work Related to Implementation of the Clean Power Plan¹**

On February 9, 2016, the Supreme Court issued a stay of EPA's Clean Power Plan for the duration of the period during which the D.C. Circuit and the Supreme Court review the Plan's legality.² Before the Supreme Court's decision, EPA had issued a proposed rule outlining Model

¹ Sections I and II draw heavily on a report I co-authored with Alexander Walker, UNDERSTANDING THE STAY: IMPLICATIONS OF THE SUPREME COURT'S STAY OF THE CLEAN POWER PLAN (Institute for Policy Integrity 2016), http://policyintegrity.org/files/publications/CPP_Stay_PolicyBrief.pdf.

² *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.).

Trading Rules for the Clean Power Plan,³ which will provide a ready-made framework for states that want to use emissions trading programs to achieve the Plan's emissions limits. EPA has said it plans to finalize the Model Trading Rules, as guidance for states that choose to continue their implementation planning, this summer.⁴ EPA is also at work on other implementation-related matters, including a proposal for a Clean Energy Incentive Program, which will provide states with an optional framework for rewarding early investments in renewable energy and demand-side energy efficiency, and guidance for states on the evaluation, measurement, and verification of demand-side energy-efficiency projects.⁵

Even though these implementation-related activities do not create enforceable obligations for states or sources, opponents of the Clean Power Plan claim that EPA is required to cease work on them. In a letter sent to the National Association of Regulatory Utility Commissioners, the attorneys general of Texas and West Virginia (two of the states leading the court challenge to the Clean Power Plan) argued that "the States, their agencies, and EPA should put their pencils down."⁶ Jeff Holmstead, a former EPA official representing opponents

³ See generally Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations, 80 Fed. Reg. 64,966 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60, 62, 78).

⁴ Debra Kahn, *EPA 'moving forward' with model rules this summer*, CLIMATEWIRE (May 6, 2016), <http://www.eenews.net/climatewire/stories/1060036822/>.

⁵ *Id.* (describing Clean Energy Incentive Program); EPA, Draft Evaluation, Measurement, and Verification Guidance for Demand-Side Energy Efficiency, <https://www.epa.gov/cleanpowerplanttoolbox/draft-evaluation-measurement-and-verification-guidance-demand-side-energy> (last updated Jan. 28, 2016).

⁶ Letter from Patrick Morrissey, Attorney Gen., State of W. Va., & Ken Paxton, Attorney Gen., State of Tex., to Travis Kavulla, President, Nat'l Ass'n of Regulatory Util. Comm'rs, & Ursula Nelson & Stuart Clark, Co-Presidents, Nat'l Ass'n of Clean Air Agencies 2 (Feb. 12, 2016), available at [http://www.ago.wv.gov/pressroom/2016/Documents/2016-02-12%20Letter%20to%20NARUC%20%20%20NACAA%20\(M0118772xCECC6\).pdf](http://www.ago.wv.gov/pressroom/2016/Documents/2016-02-12%20Letter%20to%20NARUC%20%20%20NACAA%20(M0118772xCECC6).pdf).

of the Clean Power Plan, said that further work by EPA would be the equivalent of “thumbing your nose at the Supreme Court.”⁷ Marlo Lewis, a fellow at the Competitive Enterprise Institute, fretted that even voluntary offers of assistance from EPA to states would be coercive, because states would feel compelled to accept in order to stay on good terms with EPA and ensure they were up to speed on the technical details of the rule.⁸ These moves by EPA towards implementation would be “[e]xactly what the stay prohibits,” Lewis argued.⁹

There is no merit to these overbroad claims. Instead, there is ample precedent for EPA continuing to work on the Model Trading Rules and other implementation-related matters during the stay. Indeed, EPA has taken actions to carry forward with steps to implement stayed rules under both the Republican and Democratic administrations, including when Mr. Holmstead was the EPA Assistant Administrator for Air and Radiation during the George W. Bush administration.¹⁰ In arguing that EPA must “put its pencil down,” opponents seem to conflate the effects of a stay with those of an injunction, which the Supreme Court did not issue.

In addition to being legal, EPA’s continued work on implementation-related matters will have a number of salutary effects. For one, it will aid the many states that, during the pendency of the stay, are voluntarily preparing to comply with the Clean Power Plan. Indeed, on April 28, 2016, fourteen such states specifically requested that EPA proceed with finalization of the

⁷ Amanda Reilly, *Rule Freezes ‘Part of the Landscape’ at EPA*, GREENWIRE (Feb. 18, 2016), <http://www.eenews.net/greenwire/2016/02/18/stories/1060032564>.

⁸ Marlo Lewis, *Will EPA Abide by the Stay?*, GlobalWarming.org (Feb. 16, 2016), <http://www.globalwarming.org/2016/02/16/will-epa-abide-by-the-stay/>.

⁹ *Id.*

¹⁰ See Jeffrey R. Holmstead, BRACEWELL LLP, <http://www.bracewellllaw.com/people/jeffrey-r-holmstead> (last visited April 23, 2016) (noting that “Mr. Holmstead headed the EPA’s Office of Air and Radiation from 2001 – 2005” as an assistant administrator).

Model Trading Rules.¹¹ EPA's guidance will also inform the long-term resource plans of electric utilities and provide more regulatory predictability to the energy industry. Finally, even for states that are not currently working to implement the Clean Power Plan, the finalization of Model Trading Rules will make the development and submission of implementation plans easier if the Plan is ultimately upheld. Thus, rather than coercing states into compliance, EPA's continued implementation work will simply provide them with useful resources.

A. *EPA's Decision to Continue Work on Clean Power Plan Implementation Is Consistent with Prior Practice Under Administrations of Both Parties*

Under the last three presidential administrations, EPA continued to work on facilitating the implementation of Clean Air Act rules that had been stayed by the courts. For example, on December 30, 2011, during the first term of the Obama Administration, the D.C. Circuit issued an order staying EPA's Cross State Air Pollution Rule, commonly known as the "Transport Rule."¹² Though it did not enforce any obligations during the stay, EPA did issue additional regulations related to implementation of the Transport Rule while the stay was in effect. For example, EPA resolved modeling issues and recalculated emission budgets for some states.¹³

¹¹ Letter from State Environmental Officials to Janet McCabe, Acting Assistant Administrator for the Office of Air and Radiation, EPA (Apr. 28, 2016), http://www.eenews.net/assets/2016/04/29/document_cw_04.pdf.

¹² Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone: Effect of Stay of Transport Rule, 77 Fed. Reg. 5,710 (Feb. 6, 2012).

¹³ Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 77 Fed. Reg. 10,324, 10,324 (Feb. 21, 2012) (to be codified at 40 C.F.R. pt. 52, 97); Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 77 Fed. Reg. 10,342, 10,342 (Feb. 21, 2012) (to be codified at 40 C.F.R. pt. 97); Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 77 Fed. Reg. 28,785, 28,785 (May 16, 2012) (to be codified at 40 C.F.R. pt. 97); Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine

EPA argued that its action was “consistent with and . . . unaffected by the Court’s Order staying the underlying final Transport Rule.”¹⁴ To support its position, EPA noted that the additional regulations would not have any legal weight on their own: “Finalizing this action in and of itself does not impose any requirements on regulated units or states.”¹⁵

Under the George W. Bush Administration, EPA also declined to “put its pencil down” when faced with a stay of its rule adding an Equipment Replacement Provision to the Routine Maintenance, Repair, and Replacement exclusion from New Source Review. The D.C. Circuit issued a stay for that rule on December 24, 2003.¹⁶ While EPA amended its regulations to reflect their suspension due to the stay,¹⁷ EPA also proceeded to grant reconsideration of the Equipment Replacement Provision, and solicited comments on several related issues.¹⁸ After considering the issues raised by the comments, EPA ultimately declined

Particulate Matter and Ozone, 77 Fed. Reg. 34,830, 34,831 (June 12, 2012) (to be codified at 40 C.F.R. pt. 97).

¹⁴ 77 Fed. Reg. at 10,326.

¹⁵ *Id.*

¹⁶ *New York v. EPA*, No. 02-1387, 2003 WL 25706732, at *1 (D.C. Cir. Dec. 24, 2003).

¹⁷ Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion; Stay, 69 Fed. Reg. 40,274, 40,274 (July 1, 2004) (to be codified at 40 C.F.R. pt. 51, 52).

¹⁸ Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion; Reconsideration, 69 Fed. Reg. 40,278, 40,281 (July 1, 2004) (granting reconsideration and soliciting comment on “the contentions that our legal basis is flawed, that our selection of 20 percent for the cost limit is arbitrary and capricious and lacks sufficient record, and that we should provide an opportunity for comment on the revised format for incorporating the PSD FIP into state plans”).

to make further changes to the rule.¹⁹ At that time, EPA noted that the judicial stay of the Equipment Replacement Provision was still in effect.²⁰

Likewise, under the Clinton Administration, EPA continued to work on a rule that had been stayed, and also offered opportunities for voluntary compliance with stayed rule. On May 25, 1999, the D.C. Circuit granted a stay of EPA's deadlines for submitting State Implementation Plans (SIPs) under the NO_x SIP Call.²¹ While the stay was in effect, EPA issued an additional regulation noting that certain states could still choose to voluntarily comply with the NO_x SIP Call as an alternative to direct federal regulation of their sources' NO_x emissions under a different section of the Clean Air Act.²² Some commenters complained that EPA was "coercing these States into complying with the NO_x SIP [C]all" and "thereby circumventing the court's stay of the compliance deadline."²³ Rather than coercing states, EPA argued, it was merely providing them another option for complying with a rule that was unaffected by the court's stay.²⁴ The D.C. Circuit later affirmed EPA's position.²⁵

B. A Stay Gives EPA More Flexibility than an Injunction

By arguing that EPA must stop all work on the Clean Power Plan, opponents of the Clean Power Plan speak as if the Supreme Court had granted an injunction rather than a stay. In doing so, they overlook the important differences between a stay and an injunction. A stay

¹⁹ Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion: Reconsideration, 70 Fed. Reg. 33,838, 33,838 (June 10, 2005).

²⁰ *Id.* at 33,839.

²¹ Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 65 Fed. Reg. 2,674, 2,676 (Jan. 18, 2000) (codified at 40 C.F.R. pt. 52, 97).

²² *Id.* at 2,682–83.

²³ *Id.* at 2,682.

²⁴ *Id.* at 2,684.

²⁵ *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1044-48 (D.C. Cir. 2001).

temporarily suspends a court order, an agency order, or an agency rulemaking while the order or rulemaking is reviewed by a court or reconsidered by the agency.²⁶ In contrast, an injunction is an affirmative court order requiring an entity to take some action or refrain from taking some action.²⁷

In the words of Chief Justice Roberts, in a majority opinion for the Supreme Court, a stay “prevent[s] some action before the legality of that action has been conclusively determined . . . by temporarily suspending the source of authority to act” such as a regulation or court order. In contrast, an injunction “directs the conduct of a party, and does so with the backing of [a court’s] full coercive powers.”²⁸ Because of the important distinction between stays and injunctions, the Supreme Court found that an immigration statute that limited the ability of courts to issue injunctions did not limit authority to issue a stay, despite ambiguous language.²⁹

Also, if a court issues an injunction instead of a stay, the court is required to include supporting reasons for the injunction and specify its scope, which is not required for a stay.³⁰ In the case of the Clean Power Plan, the Supreme Court’s terse order lacks the specificity that would be required of an injunction. The order does not direct EPA to cease all work related to the Plan.

²⁶ See *Stay*, BLACK’S LAW DICTIONARY (10th ed. 2014); 5 U.S.C. § 705 (allowing courts and agencies to stay agency actions during judicial review); 42 U.S.C. § 7607(d)(7)(B) (allowing EPA to stay its own rules under the Clean Air Act while reconsidering them).

²⁷ See *Injunction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁸ *Nken v. Holder*, 556 U.S. 418, 428–29 (2009).

²⁹ *Id.* at 426.

³⁰ DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 21:6 (6th ed. 2013, updated May 2015) (citing *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62 (9th Cir. 1951); *Mayflower Indus. v. Thor Corp.*, 182 F.2d 800 (3d Cir. 1950); *FED. R. CIV. P.* 65(d)).

The fact that EPA may stay its own rules while reconsidering them,³¹ and that courts may stay the effects of their own judgments while entertaining certain motions,³² demonstrates that stays allow work to continue even though the underlying rules or judgments are not enforceable. After all, if a stay required EPA to “put its pencil down,” it would be absurd for Congress to grant EPA the ability to stay its own rulemakings while reconsidering them. Reconsideration is an active process, requiring the agency to solicit comment and respond to those comments in the same way as EPA does for comments on a proposed rule.³³ Similarly, if imposing a stay on a court order required a court to “put its pencil down” and stop all work on the case, it would be impossible for the court to stay its own orders while it considered a new motion or conducted a rehearing.

In this case, EPA’s authority to enforce the Clean Power Plan has been temporarily suspended during the period of the Supreme Court’s stay, but EPA has not been directed to stop working on the Clean Power Plan through an injunction.³⁴ As a result, while EPA cannot enforce the Clean Power Plan’s deadlines against any state that does not voluntarily comply with them during the time the stay is in effect, there is nothing barring EPA from continuing to

³¹ See 42 U.S.C. § 7607(d)(7)(B).

³² See, e.g., Fed. R. Civ. P. 62(b) (allowing U.S. district courts to stay a judgment while certain motions are pending); Fed. R. App. P. 41(d) (allowing U.S. circuit courts of appeals to stay a judgment for rehearing, or while the case is appealed to the Supreme Court).

³³ 42 U.S.C. § 7607(d)(7)(B).

³⁴ In fact, the stay order only mentions the final version of the Clean Power Plan, referring to its location in the Federal Register. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.). The Federal Plan and Model Trading Rules were published under a separate notice in the Federal Register, and the Supreme Court’s order does not refer to that notice. *Id.*; Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations, 80 Fed. Reg. 64,966 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60, 62, 78).

develop the Clean Power Plan through finalizing the Model Trading Rules, working on the Clean Energy Incentive Program, or engaging in other related actions.

II. A Decision on the Proper Timeline for Compliance Will Be Made When the Stay Is Lifted and Should Take into Account the Public's Interest in Timely Emissions Reductions and Recent Trends in the Electric Power Sector

Opponents of the Clean Power Plan have also argued that the stay has resulted in an automatic tolling of all deadlines in the Clean Power Plan. When EPA promulgated the final version of the Clean Power Plan in October 2015, it required initial submissions from states by September 6, 2016, either proposing that state's implementation plan or explaining why more time was needed to develop a plan.³⁵ Final state implementation plans are due no later than September 6, 2018.³⁶ The Clean Power Plan has three interim performance goals in the periods 2022–2024, 2025–2027, and 2028–2029, with full compliance beginning in 2030.³⁷ The litigation will undoubtedly continue beyond the initial September 6, 2016, deadline, which EPA will not be able to enforce as a result of the stay. But the case is highly likely to be resolved long before the Plan's deadlines for sources to reduce their emissions. Thus, the fate of the Plan's performance deadlines is uncertain.

Earlier this year, the U.S. Chamber of Commerce released a white paper arguing that, if the Clean Power Plan is upheld by the courts, "EPA is required to move all [of its] deadlines into the future by at least the amount of time between the [s]tay's issuance and its expiration."³⁸

³⁵ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,669 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

³⁶ *Id.*

³⁷ *Id.* at 64,667.

³⁸ SIDLEY AUSTIN LLP, EFFECT OF SUPREME COURT STAY ON CLEAN POWER PLAN DEADLINES 1, <http://www.chamberlitigation.com/sites/default/files/scotus/files/2016/White%20Paper%20on%20Impact%20of%20Stay%20on%20CPP%20Deadlines.pdf>.

According to the white paper, the stay requires tolling because some petitioners to the Supreme Court specifically requested such tolling. The white paper claims that tolling is also required by relevant case law.³⁹ Accordingly, the Chamber has called on EPA to “tell states, utilities, and electricity users that it will honor the tolling requirements inherent in the stay decision.”⁴⁰

But it is simply not true that the Clean Power Plan’s deadlines have all been automatically tolled by the Supreme Court’s stay or that they will necessarily be tolled in the future by the period of time for which the stay is in effect. The petitioners to the Supreme Court *requested* that the deadlines be tolled, but the Supreme Court’s stay order does not address that request. It does not mention any such tolling and, by its terms, is explicitly limited to the duration of judicial review and is silent on what will happen after that.⁴¹

Certainly, EPA cannot enforce Clean Power Plan deadlines while the stay is in effect. But if the Plan is ultimately upheld by the courts, the determination of appropriate revised compliance deadlines will have to be made when the stay is lifted. Neither general remedial principles nor judicial precedent supports the proposition that, if a court has granted interim equitable relief (whether a temporary restraining order, stay, or preliminary injunction) blocking enforcement of a statute or regulation during litigation, the court must delay future implementation dates even after upholding the statute or regulation on the merits and dissolving the interim remedy. Such temporary remedies do not create vested rights that

³⁹ *See generally id.*

⁴⁰ Dan Byers, *EPA Can’t Rely on a ‘Catch Me If You Can’ Strategy for the Clean Power Plan*, U.S. CHAMBER OF COMMERCE: ABOVE THE FOLD (Mar. 3, 2016), <https://www.uschamber.com/above-the-fold/epa-cant-rely-catch-me-if-you-can-strategy-the-clean-power-plan>.

⁴¹ *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.).

survive even after a merits judgment determining that the underlying legal challenges are not meritorious.

If the courts uphold the Clean Power Plan on the merits, they may confront requests from challengers to toll the regulations' future compliance deadlines. Any court considering these requests would surely consider the equities as they appeared at that time, and would give substantial weight to the public benefits of hewing as closely as possible to the original timetable that EPA developed to best serve the rule's objectives. The court would surely also consider whether tolling could have the effect of delaying or preventing the reductions in emissions of dangerous pollutants that are the Clean Air Act's (and the Clean Power Plan's) core purpose. Finally, the court would quite likely take into account changes in the electric power sector's patterns of generation and emissions that may make it possible for states and sources to comply with the Plan more easily and quickly than foreseen when the Clean Power Plan was promulgated.

A. *A Decision on the Proper Timeline for Compliance Will Be Made When the Stay Is Lifted*

The Chamber of Commerce's attorneys argue that precedent requires the Clean Power Plan's deadlines to be tolled during the stay, but they mistake instances of the exercise of judicial discretion, at the time when the stay is lifted, for hard-and-fast rules that apply automatically at the time a stay is granted. None of the legal authorities cited in the Chamber of Commerce's white paper supports the conclusion that the Supreme Court's stay tolled the Clean Power Plan's deadlines.

For example, the Chamber of Commerce's white paper cites an order from the D.C. Circuit that extended the deadlines for submitting SIPs for interstate NO_x pollution in response

to the EPA's NO_x SIP Call (discussed above).⁴² In that order, the court noted that there were 128 days remaining for compliance when the stay was issued, and therefore granted 128 days from the issuance of the order for compliance, rather than EPA's proposed schedule of 71 days after the order.⁴³ The court justified this as merely "restor[ing] the status quo preserved by the stay."⁴⁴ Later, the court amended the order to specify that "the deadline for full implementation of SIP revisions" was extended "from May 1, 2003, to May 31, 2004."⁴⁵ The court justified this extension on the same basis as the previous order, asserting that it gave states 1,309 days for full compliance, as had the original rule.⁴⁶

Most importantly, this decision was made when the stay was lifted, and not when the stay was put in place. In addition, this case is easily distinguishable from the Clean Power Plan litigation, because the timeline for compliance for the NO_x SIPs was much shorter than the Clean Power Plan's performance deadlines. When the Plan was stayed on February 9, 2016, there were 5,075 days until the full compliance date of January 1, 2030,⁴⁷ far longer than the 128-day timeline for submitting NO_x SIPs under the order cited by the white paper, and also far longer than the 1,309 days given for final compliance with the SIP revisions under the NO_x SIP Call. In recognition of the long timeframe for compliance, the general counsel for the National

⁴² SIDLEY AUSTIN LLP, *supra* note 38, at 3 (citing *Michigan v. EPA*, No. 98-1497 (D.C. Cir. June 22, 2000) (order lifting stay)).

⁴³ *Michigan*, No. 98-1497 (D.C. Cir. June 22, 2000) (order lifting stay) (noting that EPA's schedule called for SIPs to be submitted by Sept. 1, 2000, but granting 128 days to submit SIPs instead); see also *Calculate Duration Between Two Dates*, TIMEANDDATE.COM, <http://www.timeanddate.com/date/duration.html> (showing there are 71 days between June 22, 2000 and Sept. 1, 2000).

⁴⁴ *Id.*

⁴⁵ *Michigan*, No. 98-1497, 2000 WL 1341477, at *1 (D.C. Cir. Aug. 30, 2000).

⁴⁶ *Id.*

⁴⁷ See TIMEANDDATE.COM, *supra* note 43 (showing there are 5,075 days between February 9, 2016, and January 1, 2030).

Association of Regulatory Utility Commissioners has suggested that “[t]he deadlines that are further out — the 2030 and 2022 deadlines — may change less than the nearer-term ones” after the stay is lifted.⁴⁸ The Texas Public Policy Foundation has also expressed less certainty that the later deadlines would be tolled for the full duration of the stay.⁴⁹ Because these deadlines are so much farther in the future, the impact of shortening the Clean Power Plan’s implementation schedule would be very different than doing so for the NO_x SIPs.

In addition to the NO_x SIP order, the white paper cites an order from the D.C. Circuit granting EPA’s motion to lift the stay and toll compliance deadlines for the Transport Rule.⁵⁰ In that case, the court agreed with EPA’s proposed compliance deadlines, tolling the deadlines by three years.⁵¹ Like the NO_x SIP order, this decision was made when the stay was lifted, not at the time when it was entered. Furthermore, this order shows the importance of considering the particular circumstances of the case, as opposed to applying an absolute rule. EPA noted in its motion that the stay was issued only two days before the Transport Rule was scheduled to take effect, and therefore tolling the deadlines for the duration of the litigation would give states only two days to comply, an impossible task.⁵² Instead, EPA successfully

⁴⁸ Gavin Bade, *NARUC 2016: What the SCOTUS Stay and Scalia’s Death Mean for the Clean Power Plan*, UTILITYDIVE (Feb. 18, 2016), <http://www.utilitydive.com/news/naruc-2016-what-the-scotus-stay-and-scalias-death-mean-for-the-clean-powe/414109/>.

⁴⁹ MICHAEL NASI, WHY SUSPENDING STATE PLANNING MAKES SENSE IN LIGHT OF THE STAY OF THE 111(D) RULE 5 (2016), <http://www.texaspolicy.com/library/doclib/PP-Why-Suspending-State-Planning-Makes-Sense-in-Light-of-the-Stay-of-the-111-d-Rule-1.pdf>.

⁵⁰ SIDLEY AUSTIN LLP, *supra* note 38, at 4 (citing *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Oct. 23, 2014) (order granting motion to lift the stay)).

⁵¹ See Respondents’ Motion to Lift the Stay Entered on December 30, 2011 at 14, *EME Homer City*, No. 11-1302 (D.C. Cir. June 26, 2014); see also *EME Homer City*, No. 11-1302 (D.C. Cir. Oct. 23, 2014) (order granting EPA’s motion to lift the stay).

⁵² Respondents’ Motion to Lift the Stay at 16, *EME Homer City*, No. 11-1302 (D.C. Cir. June 26, 2014).

argued that the court should toll the deadlines for exactly three years, which gave states 70 days for compliance after the court lifted the stay.⁵³

EPA argued that it would be administratively simpler to delay all deadlines by exactly three years, and the timeline would give states a reasonable amount of time to comply.⁵⁴ Thus, the court chose not to toll the deadlines for the exact period of the litigation, but to take a flexible approach that accounted for the circumstances of the case.

Moreover, in *EME Homer*, unlike in the case of the CPP, there were already regulations in place (the Clean Air Interstate Rule) that controlled the pollutants in question. Indeed, the D.C. Circuit, in issuing the stay in *EME Homer*, had cited the Clean Air Interstate Rule's continued operation and required that the agency leave it in place.⁵⁵ Here, by contrast, there is no other rule in place to protect the public from carbon dioxide emissions from existing power plants. A delay of implementation deadlines would result in failure to control pollution that is contributing to dangerous climate change—a factor that a court would surely take into account in considering requests to toll future implementation dates.

The Chamber of Commerce's attorneys cite *NRDC v. EPA* for the proposition that accelerating the Clean Power Plan's deadlines would "unfair[ly] . . . penalize states that reasonably relied on" the Supreme Court's stay of the Plan.⁵⁶ But the *NRDC* case has little to nothing to do with the current litigation. Instead of requiring EPA to extend compliance

⁵³ *Id.* at 14–16; see TIMEANDDATE.COM, *supra* note 43 (showing there are 70 days between the order on Oct. 23, 2014, and January 1, 2015, the first compliance date).

⁵⁴ Respondents' Motion to Lift the Stay at 15–16, *EME Homer City*, No. 11–1302 (D.C. Cir. June 26, 2014).

⁵⁵ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 38 (D.C. Cir. 2012), rev'd and remanded, 134 S. Ct. 1584 (2014).

⁵⁶ SIDLEY AUSTIN LLP, *supra* note 38, at 3 (citing *NRDC v. EPA*, 22 F.3d 1125, 1137 (D.C. Cir. 1994)).

deadlines after a judicial stay, the D.C. Circuit in *NRDC* reluctantly ratified EPA's extension of a compliance deadline beyond the limits of a statute.⁵⁷ The court found that it would be unfair to subject states to statutory penalties caused by EPA's own delay in promulgating a guidance document long past a statutory deadline.⁵⁸ In this case, by contrast, EPA has not promulgated any document granting a filing extension to states, and there are no statutory deadlines at issue. Furthermore, if the Clean Power Plan is upheld by the courts, it will not be the fault of EPA that the rule has been delayed. The case is therefore not apposite.

B. Current Trends in the Electric Power Sector Indicate that Compliance Might Be Feasible with Little or No Tolling

If the stay is lifted, EPA and the courts may well find that states can meet many of the Clean Power Plan's deadlines with little or no tolling, thanks to faster-than-expected growth of clean energy in the electric power sector. For example, even without the Clean Power Plan, recently renewed renewable energy tax credits are projected to create 92 gigawatts of renewable energy capacity by 2025.⁵⁹ In 2016, the majority of new electric generation capacity is projected to come from solar and wind.⁶⁰

⁵⁷ *NRDC*, 22 F.3d at 1136–37.

⁵⁸ *Id.* at 1137.

⁵⁹ John Larsen, Whitney Herndon, and Kate Larsen, *What Happens to Renewable Energy Without the Clean Power Plan?*, RHODIUM GROUP (Feb. 25, 2016), <http://rhg.com/notes/renewable-energy-without-the-clean-power-plan>.

⁶⁰ Tim Shear & Sara Hoff, *Solar, Natural Gas, Wind Make up Most 2016 Generation Additions*, U.S. ENERGY INFORMATION ADMINISTRATION (Mar. 1, 2016), <https://www.eia.gov/todayinenergy/detail.cfm?id=25172>.

In addition, the outlook for coal-fired generation continues to be bleak, and the nation's largest coal producer recently filed for bankruptcy.⁶¹ Natural gas generation of electricity is anticipated to surpass generation from coal-fired power plants for the first time ever in 2016,⁶² and a recent analysis by PJM found that continuing low natural gas prices could ease compliance with the Clean Power Plan.⁶³ As a result of these trends, carbon emissions from the power sector in the U.S. have been dropping steadily, reaching almost 22% below 2005 levels in 2015.⁶⁴ This represents more than two-thirds of the Clean Power Plan's target of a 32% reduction below 2005 levels by 2030.⁶⁵

Assuming that these trends continue, they would weaken any post-stay request for tolling of the Clean Power Plan's performance deadlines.

⁶¹ Chris Mooney & Steven Mufson, *How Coal Titan Peabody, the World's Largest, Fell into Bankruptcy*, WASHINGTON POST (Apr. 13, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/04/13/coal-titan-peabody-energy-files-for-bankruptcy/>.

⁶² Tyler Hodge, *Natural Gas Expected to Surpass Coal in Mix of Fuel Used for U.S. Power Generation in 2016*, U.S. ENERGY INFORMATION ADMINISTRATION (Mar. 16, 2016), <http://www.eia.gov/todayinenergy/detail.cfm?id=25392>.

⁶³ Emily Holden, *PJM Finds Low Gas Prices Could Ease Climate Rule Compliance*, ENERGYWIRE (Apr. 11, 2016), <http://www.eenews.net/energywire/stories/1060035343>.

⁶⁴ U.S. ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 2016 EARLY RELEASE: ANNOTATED SUMMARY OF TWO CASES 6 (May 17, 2016), [http://www.eia.gov/forecasts/aeo/er/pdf/0383er\(2016\).pdf](http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2016).pdf).

⁶⁵ See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,665 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

III. The Clean Power Plan Is a Reasonable Exercise of EPA's Rulemaking Authority and Is Consistent with Both the Clean Air Act and the Constitution.⁶⁶

Though EPA may not enforce it during the pendency of the stay, the Clean Power Plan has a solid legal foundation and should ultimately be upheld as consistent with both the Clean Air Act and the Constitution. In this section of my testimony, I briefly detail and rebut three of the primary legal critiques raised by opponents of the plan.

A. The Regulatory Design of the Clean Power Plan Is Not Unprecedented

Opponents argue that the Clean Power Plan represents an “enormous and transformative expansion” of EPA’s regulatory authority, because the rule’s emission guidelines are (1) not based solely on technological changes that each regulated source can implement independently, (2) assume “generation shifting” from high-emitting to low- and non-emitting electricity generators, and (3) assume that owners and operators can undertake or invest in off-site actions to reduce pollution from regulated sources.⁶⁷ But there are, in fact, regulatory precedents for each of these aspects of the Clean Power Plan.

⁶⁶ Section III draws on an amicus brief that I filed with my colleagues at the Institute for Policy Integrity in connection with the ongoing D.C. Circuit litigation over the Clean Power Plan. Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae in Support of Respondents, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 1, 2016) [hereinafter “Policy Integrity Brief”], available at http://policyintegrity.org/documents/CPP_Amicus_April2016.pdf. It also features material from testimony I gave at a hearing before the House Subcommittee on Energy and Power on October 22, 2015. *Regulations for New and Existing Power Plants: Legal Perspectives, Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 114th Cong. (Oct. 22, 2015) (testimony of Richard Revesz), available at <http://docs.house.gov/meetings/IF/IF03/20151022/104065/HHRG-114-IF03-Wstate-ReveszR-20151022.pdf>.

⁶⁷ Opening Brief of Petitioners on Core Legal Issues at 34, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb 19, 2016) [hereinafter “Petitioners’ Core Issues Brief”] (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2444 (2014)).

First, several previous EPA regulations incorporated emission trading and/or averaging. In some rules, the use of trading and/or averaging enabled EPA to set tighter limits than it otherwise would have. In other words, trading and averaging were not merely offered as compliance mechanisms, but affected the rules' stringency, as they do in the Clean Power Plan.

Precedents for the EPA's use of trading and averaging include the George W. Bush administration's Clean Air Mercury Rule; the Obama administration's Cross-State Air Pollution Rule (which was upheld by the Supreme Court); the Clinton administration's emissions guidelines for municipal waste combustors; and the Reagan administration's rules limiting the lead content of gasoline and nitrogen oxides emissions from motor vehicles.⁶⁸ Furthermore, two of these rules—the Clean Air Mercury Rule and the municipal waste combustor guidelines—were issued under the very same Clean Air Act provision used for the Clean Power Plan, section 111(d).⁶⁹

Nor is it unprecedented for an EPA regulation to rely on “generation shifting” as a means of pollution reduction. In two previous power sector regulations—the Clean Air Mercury Rule and the Cross-State Air Pollution Rule—the EPA explicitly took into account the possibility of increased dispatch of less-polluting generators when setting emissions limits.⁷⁰ And many other regulations—like the National Ambient Air Quality Standards, which are the centerpiece of the Clean Air Act—have been expected to result in generation shifting, even if their emissions limits were not explicitly based on that expectation.⁷¹

⁶⁸ See Policy Integrity Brief at 6-13.

⁶⁹ *Id.* at 6-8.

⁷⁰ *Id.* at 13-14.

⁷¹ *Id.* at 14-16.

It is also far from novel for a regulation to assume that that owners and operators can undertake or invest in off-site actions to reduce pollution from regulated source. Indeed, the very first set of power-plant emission standards that EPA ever issued, under the Nixon Administration in 1971, assumed that the “best system of emission reduction” for sulfur dioxide from new electric generating units included precombustion cleaning of coal to reduce its sulfur content, an action that source owners and operators typically paid third parties to perform off-site.⁷²

The Clean Air Mercury rule's trading program also required off-site actions. To buy or sell emissions allowances from or to other sources, owners and operators would have to take actions and make investments outside of their own facilities, which would serve to reduce pollution from the source category as a whole.⁷³

Like these earlier rules, the Clean Power Plan simply recognizes that, as a practical matter, emission limits apply to owners and operators of sources and can reasonably encompass off-site pollution-reducing actions undertaken or funded by those owners and operators.

B. EPA Has Legal Authority to Regulate Power Plants' Greenhouse Gas Emissions Under the Clean Air Act

Opponents also argue that EPA's “longstanding reading” of the Clean Air Act precludes regulating power plants' greenhouse gas emissions under section 111(d) of the Clean Air Act, as the Clean Power Plan does, because power plants are regulated for hazardous pollutants under

⁷² *Id.* at 16-17.

⁷³ *Id.* at 17-18.

section 112 of the Act.⁷⁴ In fact, during the twenty-five years since the 1990 Clean Air Act Amendments enacted section 111(d)'s current language, Republican and Democratic administrations have consistently interpreted the section's scope to depend on whether particular pollutants, rather than entire source categories, are already regulated under other sections of the Act.⁷⁵ This consistent interpretation supports the Clean Power Plan's regulation of greenhouse gases from existing power plants.

Furthermore, in contrast to opponents' desired reading, EPA's interpretation is consistent with the structure of section 111(d). Statutory interpretation must consider not just the text, but also the structure of the statute.⁷⁶ With respect to how section 111(d) fits into the structure of the Clean Air Act, criteria pollutants are regulated under section 109, while hazardous pollutants are regulated under section 112. Section 111(d) serves as a "gap-filling" section for pollutants that do not fall into either category. If EPA were to adopt opponents' interpretation of section 111, it would be forced to choose between regulating dangerous carbon dioxide emissions from power plants and dangerous mercury emissions from power plants, a result clearly at odds with the Clean Air Act's mission of addressing all air pollution that poses a threat to public health.

Also, it is clear that even under the opponents' reading, EPA could regulate pollutants under both section 111(d) and section 112 as long as the section 111(d) regulation came first.

⁷⁴ Petitioners' Core Issues Brief at 61.

⁷⁵ Policy Integrity Brief at 20-31.

⁷⁶ *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (quoted by *Fed. Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 132-33 (2000)) ("Ambiguity is a creature not of definitional possibilities but of statutory context."); see also *Loving v. I.R.S.*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (instructing that a court "must employ all the tools of statutory interpretation, including . . . structure, purpose, and legislative history") (internal quotation omitted).

There is no plausible reason why Congress would have intended to allow this situation but prohibit regulating under both sections if the section 112 regulation precedes the section 111(d) regulation.

The opponents of the Clean Power Plan mistakenly rely on the D.C. Circuit's decision to vacate the Clean Air Mercury Rule in 2008.⁷⁷ In that proceeding, EPA sought to use section 111(d) to regulate a pollutant that remained listed (because it had been inappropriately delisted) and therefore remained subject to regulation under section 112. Here, instead, greenhouse gases are not regulated under section 112 and therefore can be regulated under section 111(d).

C. The Clean Power Plan Does Not Unconstitutionally Commandeer State Institutions

Finally, opponents of the Clean Power Plan argue that it runs afoul of the Tenth Amendment's prohibition against the commandeering of state institutions by the federal government. This argument is misguided and, if sustained, would invalidate many of the core provisions of the Clean Air Act, not only section 111(d) on which the Clean Power Plan rests. The standard approach of the Clean Air Act is for the federal government to establish statewide pollution reduction requirements and for the states to then choose how to allocate the burden of this reduction among sources in their jurisdiction. And if a state declines to take action, the federal government imposes requirements directly on polluters within the state. As a result, no state institution is commandeered. The states are merely given the option of allocating the pollution burden among polluters. If they choose not to do so, EPA promulgates a federal plan,

⁷⁷ *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008); see Petitioners' Core Issues Brief at 68 n.33.

which it clearly has the constitutional power to do, and which does not raise any Tenth Amendment problem because it does not impose any requirements on state institutions. That, for example, is the approach under the National Ambient Air Quality Standards, which are the Clean Air Act's centerpiece.

The relationship between states and EPA under section 111(d) is structured similarly to this approach for National Ambient Air Quality Standards laid out in section 110. In fact, section 111(d) instructs that “[t]he Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section [110]” for implementing regulations under section 111(d).

And, indeed, this cooperative federalism approach used for decades under the National Ambient Air Quality Standards program is the approach that the Clean Power Plan takes. States have a choice as to whether or not to submit a state plan, as well as which portions of the state plan to submit.⁷⁸ If a state fails to submit an adequate state plan, EPA will apply a federal plan to the sources in the state. If a state submits a partial state plan, the federal plan will apply to those portions of the plan that are inadequate.⁷⁹ EPA's recently proposed rule on federal plan requirements makes clear that the federal plan will be equivalently stringent to the state

⁷⁸ Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations at 14-29 (Aug. 3, 2015) (to be published in *Federal Register*), available at <http://www3.epa.gov/airquality/cpp/cpp-proposed-federal-plan.pdf> [hereinafter “Proposed Federal Plan”].

⁷⁹ *Id.* at 18-19.

plans,⁸⁰ and that states will be able to take over control of the plan from the federal government once they institute an adequate state plan.⁸¹

The Clean Power Plan is not like the requirement invalidated in *New York v. United States*,⁸² under which states either had to take title to nuclear waste or had to enact particular regulations. Nothing is required of the states under the Clean Power Plan; they are just given an option to act. Neither does the Clean Power Plan give rise to a situation like that in *National Federation of Independent Business v. Sebelius*, the first Supreme Court review of the Affordable Care Act.⁸³ There, the Court deemed the federal requirement “so coercive as to pass the point at which ‘pressure turns into compulsion.’”⁸⁴ One of the factors that the Court considered was that the program at issue threatened to withhold existing Medicaid funding from states if they failed to comply, potentially amounting to over 10 percent of a State’s overall budget.⁸⁵ Here, the Clean Power Plan explicitly provides that federal funding will not be withheld from states that decline to comply. Moreover, the proposed federal plan makes it clear that states will not be penalized in any fashion for failing to submit a state plan.

The targets in the proposed federal plan are the same targets that states will have to meet under state plans.⁸⁶ The proposed federal plan provides for flexible trading options for states that become subject to a federal plan; the proposed federal plan is even designed to

⁸⁰ *Id.* at 27-28.

⁸¹ *Id.* at 33.

⁸² 505 U.S. 144 (1992).

⁸³ 132 S. Ct. 2566 (2012).

⁸⁴ *Id.* at 2604.

⁸⁵ *Id.* at 2604-05.

⁸⁶ Proposed Federal Plan at 15-16.

alternatively serve as an optional model trading rule for states that would like to adopt such flexible options under their state plans.⁸⁷

Even before the final Clean Power Plan rule was released, a number of states indicated that they were considering not preparing state implementation plans in response to the Clean Power Plan, thereby acknowledging that they have a choice about whether to develop a state plan or instead be subject to a federal implementation plan.⁸⁸ Whatever else might be at issue here, it is definitely not the “compulsion” that was found problematic in *NFIB v. Sebelius*.

Moreover, the fact that state regulators might be asked to take routine actions, such as granting or modifying permits, is not constitutionally troubling. That happens routinely under other Clean Air Act programs and the courts have never suggested that plausible Tenth Amendment arguments are implicated by such practices.

In summary, the Clean Power Plan is a run-of-the-mill example of cooperative federalism that is common under the Clean Air Act and that is unproblematic from a constitutional perspective.

Conclusion

I am very grateful to have been invited to testify today and will be delighted to answer any questions you might have.

⁸⁷ *Id.* at 16-20.

⁸⁸ See, e.g., Emily Holden, *What Consequences Await States That “Just Say No” to EPA Carbon Rule?*, ENERGYWIRE (July 30, 2015).

Senator INHOFE. Thank you, Professor Revesz.
Ms. Wood.

**STATEMENT OF ALLISON WOOD, PARTNER,
HUNTON & WILLIAMS LLP**

Ms. WOOD. Good morning. It is an honor to appear before this committee to offer testimony on the implications of the Supreme Court stay of EPA's Clean Power Plan. My name is Allison Wood, and I am a partner in the law firm of Hunton & Williams. I have practiced environmental law for almost 18 years, and for over the past decade my practice has focused almost exclusively on climate change.

I represent several electric utility clients in the litigation involving the Power Plan, including in connection with the electric utility industry's application to the Supreme Court for a stay. I am not representing anyone with regard to this testimony, however; I am testifying in my own personal capacity.

A stay of an administrative action such as the Power Plan maintains the status quo during the time that the court considers the legality of the action. During the stay, the Power Plan has no legal effect. Any and all obligations are effectively void, and neither States nor regulated entities can be penalized for refusing to comply with any requirement or deadline in the Power Plan.

Stays are very rarely granted by any court. The Supreme Court only grants a stay where, one, there is a reasonable probability that four justices would consider the issue one on which they would grant review; two, there is a fair prospect that a majority of the Court would vote to strike down the rule at issue; and three, there is a likelihood that irreparable harm will result without a stay. To grant the stay of the Power Plan, five justices had to find that all of these things were present.

If the Power Plan is ultimately found to be unlawful, which a majority of the Supreme Court has indicated is a fair prospect, then the Power Plan would cease to exist and would have no legal effect whatsoever. Questions have arisen, however, regarding what happens with the deadlines and obligations in the Power Plan if it is found to be lawful. Typically all of the deadlines are tolled and are then extended by the period of time of the stay.

So for example if the stay were in effect for 500 days, you would then extend all of the deadlines in the Power Plan by at least 500 days. This is exactly what has happened with other EPA rules that were the subject of a judicial stay.

Tolling all of the deadlines in the Power Plan was explicitly sought in some of the applications before the Supreme Court. Even for those stay applications that were not explicit, however, the solicitor general of the United States noted to the Supreme Court on behalf of EPA that the request to toll all of the deadlines was inherent. The Supreme Court granted every stay application without any qualification, meaning that the Court gave the applicants—including those who were explicit in their request—the relief that they sought.

Statements that insinuate that not all of the deadlines will be tolled have a deleterious effect on States and regulated entities who become fearful that if they do not continue to plan and work

toward compliance with the Power Plan that they will not have enough time to do so if the rule is ultimately upheld by the courts. This fear effectively negates the relief provided by the stay.

States and regulated entities should be able to rest secure in the knowledge that if the Power Plan is ultimately upheld that all of the deadlines will reset and that they will not have any less time to prepare than they would have had in the absence of the stay. That is what status quo means.

Some States have decided to continue to work on the Power Plan for a variety of reasons, which they are free to do. States that do not want to work on the Power Plan, however, should not be forced to do so, something that EPA has acknowledged.

The problem is that in trying to provide additional tools to the States that want to continue to work EPA ends up forcing States and regulated entities that do not want to work during the stay to do so. For example if EPA issues a proposed rule, which it is planning to do with the Clean Energy Incentive Program, States and regulated entities need to comment on the proposal or risk not having any say in the design or implementation of aspects of the Power Plan. In addition with any final rule EPA may issue, such as the Model Trading Rules, the States and regulated entities have to decide whether to litigate those rules or waive their right to judicial review.

The providing of tools to States that want to continue to work cannot force action by those States and regulated entities that do not want to act during the stay.

Thank you again for the opportunity to testify today.

[The prepared statement of Ms. Wood follows:]

**Hearing on the Implications of the Supreme Court Stay
on the Clean Power Plan**

Testimony of Allison Wood, Partner, Hunton & Williams LLP

**United States Senate
Committee on Environment and Public Works**

June 9, 2016

Summary

On February 9, 2016, the Supreme Court granted without any qualification five applications to stay EPA's Clean Power Plan. The stay remains in effect until the legality of the rule is finally determined, including through any Supreme Court review. As of now, the Power Plan has no legal effect, and its deadlines have no consequence.

Questions have arisen, however, about what will happen to the deadlines in the Power Plan in the event it is ultimately upheld. Should that occur, *all* of the deadlines must be reset by extending every deadline in the rule by at least the same amount of time that the stay remained in place. This is how deadlines in other EPA rules have been adjusted following a stay. The stay applicants specifically sought such relief here, as the Solicitor General of the United States expressly acknowledged in EPA's opposition to the stay motion. Regardless, EPA now claims the stay applicants had differing views on the tolling of the deadlines. This is untrue.

Failing to toll all of the rule's deadlines would deprive the States and regulated parties of the time EPA itself decided they needed to prepare and to comply in a manner that ensures electric reliability. When EPA continues to work to implement the rule—as it has admitted it is doing—its actions disregard the Supreme Court's order and force States and regulated parties to expend resources to consider or respond to EPA's implementation actions or suffer the consequences of failing to do so. By continuing to work on a rule that the Supreme Court has indicated is likely to be overturned, EPA's actions flagrantly disrespect the Supreme Court's order, defeat the entire purpose of the stay, and waste the agency's limited resources.

**Hearing on the Implications of the Supreme Court Stay
on the Clean Power Plan**

Testimony of Allison Wood, Partner, Hunton & Williams LLP

**United States Senate
Committee on Environment and Public Works**

June 9, 2016

I. Introduction

It is an honor to appear before this Committee to offer testimony on the Supreme Court's stay of the EPA rule regulating existing electric generating units under section 111(d) of the Clean Air Act, which it calls the "Clean Power Plan." My name is Allison Wood, and I am a partner in the law firm of Hunton & Williams LLP. I have practiced environmental law for almost 18 years, and for over the past decade my practice has focused almost exclusively on climate change. I have represented clients in every major rulemaking and case involving the regulation of greenhouse gases under the Clean Air Act. I represent several electric utility clients in the pending litigation before the U.S. Court of Appeals for the District of Columbia Circuit involving the Power Plan. I also represented these clients before the Supreme Court in connection with the electric utility industry's application for a stay of the Power Plan, which the Supreme Court granted, along with four other applications, and that is the subject of this hearing. I am not representing anyone with regard to this testimony, however. I am testifying in my own personal capacity.

I. Background

A. The D.C. Circuit Litigation and the Denial of the Initial Stay Motions

The Power Plan was published in the Federal Register on October 23, 2015, and 19 petitions for review were filed that day in the D.C. Circuit challenging the rule. Ultimately, 42

petitions were filed in the D.C. Circuit by 159 different petitioners.¹ More than half of the States oppose the rule. On the day that the Power Plan was published in the Federal Register, four stay motions, each joined by multiple parties, were filed with the court. It is exceptionally unusual for stay motions to be filed on the day a rule appears in the Federal Register, and the rapid filing of the stay motions emphasizes the importance to the parties of obtaining relief from the onerous burdens of the Power Plan.

The court established a deadline of November 5, 2015, for any additional stay motions to be filed,² and ultimately a total of 9 stay motions and 2 supporting statements were filed with the D.C. Circuit by a total of 109 parties. A total of 84 declarations were filed in support of the stay—33 from States, 22 from electric utilities, 15 from coal producers, and 12 from other business interests—discussing in detail how the Power Plan would cause imminent harm if a stay was not granted. Briefing on the stay motions was completed on December 23, 2015,³ which was only one day after the period for filing for judicial review expired.⁴

On January 21, 2016, the D.C. Circuit denied the stay motions in an order that provided no explanation beyond boilerplate language that noted “Petitioners have not satisfied the stringent requirements for a stay pending court review.”⁵ The court did grant expedited briefing in the case and set the case for oral argument before a three-judge panel on June 2, 2016, with

¹ *State of West Virginia, et al. v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.).

² Order, *West Virginia v. EPA*, No. 15-1363, ECF No. 1580781 (D.C. Cir. Oct. 29, 2015).

³ *Id.*

⁴ See 42 U.S.C. § 7607(b)(1).

⁵ Order, *West Virginia v. EPA*, No. 15-1363, ECF No. 1594951 (D.C. Cir. Jan. 21, 2016).

the possibility for argument to continue on June 3, 2016.⁶ The D.C. Circuit has since rescheduled oral argument on its own motion for September 27, 2016, before the en banc court.⁷

B. The Supreme Court Stay Applications and the Grant of the Stay

On January 26, 2016, three business days after the D.C. Circuit denied the stay motions, 29 States and State agencies filed an application with Supreme Court Chief Justice John Roberts seeking an immediate stay of the Power Plan under the Administrative Procedure Act and the All Writs Act.⁸ Four additional stay applications were filed with the Chief Justice shortly thereafter by (1) electric utilities and unions; (2) coal producers; (3) business interest groups; and (4) the State of North Dakota.⁹ The stay applicants were clear that they sought to toll all of the deadlines in the Power Plan. The utility applicants stated that they were “request[ing] an immediate stay of EPA’s rule, extending all compliance dates by the number of days between publication of the rule and a final decision by the courts. . . .”¹⁰ and the coal applicants stated that

⁶ *Id.*

⁷ Order, *West Virginia v. EPA*, No. 13-1363, ECF No. 1613489 (D.C. Cir. May 16, 2016).

⁸ Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, *State of West Virginia, et al. v. EPA*, No. 15A773 (S. Ct. Jan. 26, 2016) (“State Stay Application”).

⁹ Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review, *Basin Electric Power Cooperative, et al. v. EPA*, No. 15A776 (S. Ct. Jan. 27, 2016) (“Utility Stay Application”); Coal Industry Application for Immediate Stay of Final Agency Action Pending Judicial Review, *Murray Energy Corporation, et al. v. EPA*, No. 15A778 (S. Ct. Jan. 27, 2016) (“Coal Stay Application”); Application of Business Associations for Immediate Stay of Final Agency Action Pending Appellate Review, *Chamber of Commerce of the United States of America, et al. v. EPA*, No. 15A787 (S. Ct. Jan. 27, 2016); Application by the State of North Dakota for Immediate Stay of Final Agency Action Pending Appellate Review, *State of North Dakota v. EPA*, No. 15A793 (Jan. 29, 2016).

¹⁰ Utility Stay Application at 22.

the Power Plan “should be stayed, and all deadlines in it suspended, pending the completion of all judicial review.”¹¹

Chief Justice Roberts referred the stay applications to the full Court, which granted all five stay applications, without any qualification, on February 9, 2016.¹² The Court’s orders explicitly provide that the stay remains in effect until the earliest of the following events occurs: (1) the D.C. Circuit issues its opinion and no party files a petition for a writ of certiorari by the deadline seeking Supreme Court review; (2) the Supreme Court denies any petitions for writs of certiorari that are filed; or (3) the Supreme Court grants a petition for certiorari and issues its opinion on the merits.¹³

II. Legal Effect and Implications of the Stay

A stay of an administrative action such as the Power Plan “suspend[s] administrative alteration of the status quo.”¹⁴ The Administrative Procedure Act, which was the basis for the stay applications, grants the Supreme Court authority to “issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.”¹⁵ The Power Plan has no legal effect during the period of the stay; the status quo is preserved for that period of time. Any and all obligations of the Power Plan are effectively void during the stay, and neither States nor regulated entities can be penalized for refusing to comply with any requirement or deadline in the Power Plan.

¹¹ Coal Stay Application at 36.

¹² *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

¹³ *Id.*

¹⁴ *Nken v. Holder*, 556 U.S. 418, 428 n.1 (2009); *see also Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (The purpose of a stay is “to maintain the status quo pending a final determination of the merits of the suit.”).

¹⁵ 5 U.S.C. § 705.

The Supreme Court rarely grants a stay, and it does so only when there is:

(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse [a] judgment below [upholding the Power Plan]; and (3) a likelihood that irreparable harm will result from the denial of a stay.¹⁶

Therefore, to grant the stay, five Justices found that all three of these elements were satisfied, including finding “a fair prospect” that the Power Plan’s legality is in doubt.

If the Power Plan is ultimately found to be unlawful—which a majority of the Supreme Court has indicated it believes is likely—then the rule ceases to exist and has no legal effect whatsoever. Questions have arisen, however, regarding what happens with the deadlines and obligations in the Power Plan if it is found to be lawful. In that event, all of the deadlines in the Power Plan should be reset by extending every deadline in the rule by at least the same amount of time that the stay remained in place. So, for example, if the stay was in place for 500 days, then each deadline in the rule should be adjusted by adding at least 500 days. This preserves the status quo as required.

Indeed, this is exactly how the deadlines in other EPA rules have been adjusted following a judicial stay. EPA’s Cross-State Air Pollution Rule was stayed for almost three years. When the stay was lifted, three years were added on to all of the rule’s deadlines *at the request of EPA*.¹⁷ EPA recognized in the Cross-State Air Pollution Rule that tolling a rule’s deadlines for at least as long as a stay is in place “is equitable and consistent with this Court’s precedent” and “restore[s] the status quo preserved by the stay.”¹⁸ Similarly, when the stay of EPA’s NOx SIP

¹⁶ *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

¹⁷ See Order, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, ECF No. 1518738 (D.C. Cir. Oct. 23, 2014).

¹⁸ Respondents’ Motion to Lift the Stay Entered on December 30, 2011, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, ECF No. 1499505 at 15; see also Rulemaking To Amend Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and

Call rule was lifted, all of the deadlines in that rule were extended by the number of days the stay had been in place to ensure that the status quo was maintained.¹⁹

Tolling of all of the deadlines in the Power Plan was explicitly sought in the stay applications here. The utility applicants asked the Supreme Court to “extend[] all compliance dates by the number of days between the publication of the rule and a final decision by the courts,”²⁰ and the coal applicants asked that the Power Plan “be stayed, and all deadlines in it suspended.”²¹ The States and State Agency applicants also clearly noted that “tolling [of the deadlines] would be appropriate as a matter of basic fairness.”²² The Supreme Court granted these applications without any qualification, meaning that the Court gave these applicants the relief that they sought.

It is clear that EPA understood that the applicants were seeking a day-to-day tolling of all of the deadlines in the Power Plan. In his opposition to the stay applications, the Solicitor General of the United States, on behalf of EPA, noted that the stay applicants:

explicitly or implicitly ask this Court to toll *all* of the relevant deadlines set forth in the Rule, even those that would come due many years *after* the resolution of their challenge, for the period between the Rule’s publication and the final disposition of their lawsuits. . . . Entry of such a ‘stay’ would mean that, even if the government ultimately prevails on the merits and the Rule is sustained, implementation of each sequential step mandated by the Rule would be substantially delayed. A request for such tolling is inherent even in the

Fine Particulate Matter, 79 Fed. Reg. 71,663, 71,666 (“tolling these deadlines by three years returns the rule and parties to the status quo that would have existed but for the stay”) (Dec. 3, 2014).

¹⁹ Orders, *Michigan v. EPA*, No. 98-1497, ECF Nos. 524995, 540209 (D.C. Cir. June 22, 2000).

²⁰ Utility Stay Application at 22.

²¹ Coal Stay Application at 36.

²² Reply of 29 States and State Agencies in Support of Application for Immediate Stay, *State of West Virginia, et al. v. EPA*, No. 15A773 at 30 (Feb. 5, 2016) (“States Reply”).

applications that do not explicitly address that subject, as all of them rest on the premise that a stay would forestall harms alleged to arise from future deadlines.²³

Therefore, EPA clearly understood that the relief being sought was the tolling of all of the deadlines in the Power Plan, including ones that would occur after the stay was lifted, and it opposed the stay applications before the Supreme Court on this basis. EPA cannot now change its position.

In response to a letter from Senator Inhofe,²⁴ however, Janet McCabe, EPA's Acting Administrator for Air and Radiation, attempts to characterize the effect of the stay as "ambiguous" by claiming that the States "clarified" in their reply in support of their stay application that they were seeking a stay only of the "deadlines during the litigation and that the stay would not necessarily provide for day-for-day tolling of the deadlines."²⁵ To the contrary, the States' reply specifically stated that "[i]n the unlikely event the Plan survives judicial review . . . tolling would be appropriate as a matter of basic fairness."²⁶ The States then specifically cited *Michigan v. EPA*, which, as discussed above, is a case where all of the deadlines in an EPA rule were tolled on a day-for-day basis after a stay was lifted.²⁷

Administrator McCabe claims that the stay applicants had differing views on whether all of the deadlines should be tolled. This is untrue. While some stay applicants explicitly asked for

²³ Memorandum for the Federal Respondents in Opposition, *West Virginia, et al. v. EPA*, Nos. 15A773, 15A776, 15A778, 15A787, 15A793, at 2-3 (Feb. 4, 2016) (emphasis in original); see also *id.* at 5, 6, 71, 72, 73 (statements acknowledging that applicants sought tolling of all deadlines in the Power Plan).

²⁴ Letter from Senator Jim Inhofe, Chairman, U.S. Senate Committee on Environment and Public Works, to the Honorable Gina McCarthy, Administrator, EPA (March 10, 2016) ("Senator Inhofe Letter").

²⁵ Letter from Janet G. McCabe, Acting Assistant Administrator, EPA, to the Honorable Jim Inhofe, U.S. Senate at 1 (Apr. 18, 2016) ("McCabe Letter").

²⁶ States Reply at 30.

²⁷ *Id.*

the tolling of all of the deadlines, as the Solicitor General recognized, it was “inherent even in the applications that [did] not explicitly address that subject” that this was the relief requested. The States’ reply brief is the only example cited by Administrator McCabe for a supposedly differing view. But as discussed above, the States were clear in their reply that “tolling would be appropriate.” Moreover, the States recently confirmed their position in a letter to Administrator McCabe, stating that “[y]our recent assertion in a letter to Senator Jim Inhofe that the States who sought the stay conceded that the stay would not toll all deadlines . . . is incorrect.”²⁸ Tellingly, Administrator McCabe says nothing about the fact that the utility and coal stay applications were abundantly clear about the relief being requested and that the Supreme Court granted those applications. Indeed, it was the utility stay application—not the States’ reply—on which Senator Inhofe specifically asked EPA to comment.²⁹

Tolling only some of the deadlines in the Power Plan would deprive the States and the regulated parties of the time needed to prepare and comply with the rule. When EPA issued the Power Plan, it specifically extended some of the deadlines in the rule from what had been proposed in response to comments that it received that the proposed rule did not provide sufficient time. For example, the first year in which electric generating units would need to begin reducing emissions was moved from 2020 in the proposed rule to 2022 in the final rule because of a “compelling” record that providing less time to prepare for the rule would “compromis[e] electric system reliability, impos[e] unnecessary costs on ratepayers, and requir[e] investments in more carbon-intensive generation, while diverting investment in cleaner

²⁸ Letter from Patrick Morrissey, West Virginia Attorney General, and Ken Paxton, Texas Attorney General, to Janet McCabe, Acting Assistant Administrator, EPA at 2, n.2 (May 16, 2016).

²⁹ Senator Inhofe Letter at 3.

technologies.”³⁰ EPA also noted that this postponement was necessary to give States enough time to develop their plans.³¹

EPA noted “the paramount importance of ensuring electric system reliability” and

address[ed] these concerns in large part by moving the beginning of the period for mandatory reductions under the program from 2020 to 2022 and significantly adjusting the interim goals so that they provide a less abrupt initial reduction expectation . . . [with] more time for planning, consultation and decision making in the formulation of state plans and in [electric generating units’] choice of compliance strategies. . . .³²

Tolling only some of the deadlines—and not all of them as EPA seems to suggest it would like to do—would contradict what EPA earlier said was necessary to ensure electric reliability and for proper planning.

Statements like EPA’s that insinuate that not all of the deadlines will be tolled have a deleterious effect on States and regulated entities who become fearful that if they do not continue to plan and work toward compliance with the Power Plan that they will not have enough time to do so if the Plan is ultimately upheld by the courts. This fear effectively negates the relief provided by the stay. States and regulated entities should be able to rest secure in the knowledge that if the Power Plan is ultimately upheld that *all* of the deadlines will reset and that they will not have any less time to prepare than they would have had in the absence of the stay. That is what “status quo” means.³³ EPA’s creation of public confusion on this point is harmful.

Some States have decided to continue to work on the Power Plan for a variety of reasons. While this work may likely prove to be for naught when the Plan is found to be unlawful (as is “a fair prospect” based on the issuance of the stay), the States are free to continue to do this if they

³⁰ 80 Fed. Reg. 64,662, 64,669 (Oct. 23, 2015).

³¹ *Id.*

³² *Id.* at 64,671.

³³ *See Nken v. Holder*, 556 U.S. at 428 n.1; *Holiday Tours*, 559 F.2d at 844.

choose. States that do not want to work on the Power Plan should not be forced to do so, however. A problem has arisen where some States have asked for EPA's guidance on certain aspects of the program, including the Clean Energy Incentive Program, the proposed model rules, and the proposed evaluation, measurement, and verification guidance for the rule.³⁴ In fact, a proposed rule for the design and implementation of the Clean Energy Incentive Program is currently undergoing final review at the Office of Management and Budget.³⁵

Although EPA may characterize this rulemaking as "consistent with the stay" and merely "providing states the tools they have asked for,"³⁶ it violates the stay in that it presents States and regulated entities with a Hobson's choice: either (1) work on the Power Plan by reviewing the proposed rule and preparing comments on it despite the fact that the stay is in place and that this may ultimately wind up being a waste of the State's resources if the rule is found unlawful; or (2) forgo reviewing and commenting on an important aspect of the Power Plan and run the risk that if the rule is ultimately upheld that you will have not had any say in the design and implementation of the Clean Energy Incentive Program.

The Clean Energy Incentive Program would not exist but for the Power Plan. If the Power Plan is found unlawful, the Clean Energy Incentive Program has no purpose. As a public policy matter, expending funds on the creation of a program to support a rule that the Supreme Court has found has "a fair prospect" of being overturned is a poor use of limited resources. And forcing States and regulated entities to expend their limited resources on the creation of tools that may end up being for nothing—or run the risk of having no input into those tools—when the

³⁴ See McCabe Letter at 1.

³⁵ See <http://www.reginfo.gov/public/> (regulations under EO 12866 review).

³⁶ McCabe Letter at 1.

Supreme Court has given them relief in the form of a stay at a minimum violates the spirit of the stay if not the stay itself.

In addition, once EPA finalizes the rule, States and regulated entities will have yet another occasion in which they will be required to act despite the stay as this will trigger the Clean Air Act's judicial review provisions. If the States and regulated entities decide to challenge the Clean Energy Incentive Program (or another final agency action on one of EPA's Power Plan "tools"), they must do so within 60 days or waive their right to judicial review. Thus, States and other interested parties that should be protected by the stay could find themselves needing to file petitions for review in the D.C. Circuit and expending additional resources in litigation.

III. Conclusion

The stay applications that were filed with the Supreme Court asked that all of the deadlines in the Power Plan be tolled, and the Court granted those applications without any qualification. As a result, all of the deadlines in the rule have been tolled and have no legal effect. This is consistent with Supreme Court and D.C. Circuit case law and with how EPA has handled stays in the past. EPA's attempts to obfuscate the meaning of the Supreme Court's stay should be resisted. The agency's continued work on the Power Plan violates the stay and is a waste of public resources.

Thank you again for the opportunity to testify today.

Senator INHOFE. Thank you very much, Ms. Wood.
Representative Bondon.

**STATEMENT OF JACK BONDON, REPRESENTATIVE,
56TH DISTRICT, MISSOURI HOUSE OF REPRESENTATIVES**

Mr. BONDON. Good morning, Mr. Chairman, esteemed members and Senators of the committee. My name is Jack Bondon, and I serve the people of Missouri's 56th Legislative District, including my home town of Belton and parts of southern Kansas City, in the Missouri State House of Representatives.

Thank you for inviting me today to share my perspective as a State legislator on the implication of the Supreme Court's stay on the Clean Power Plan.

My State of Missouri benefits in many ways by having affordable electricity prices. In fact our electricity prices are more than 10 percent below the national average. Currently Missouri relies on coal for nearly 80 percent of its electricity. But at the same time Missourians recognize the need for an affordable, sustainable, and reliable mix of energy sources. To achieve the right mix for our State Missouri released our own State comprehensive energy plan last fall, in October 2015, that includes a renewable efficiency provision and a renewable portfolio standard.

In addition in 2014 the Missouri legislature passed a bill, signed by our Governor Nixon, which establishes how Missouri should set its own CO₂ standard for power plants. In short Missouri has taken the lead in deciding its own energy future.

Unfortunately, the Clean Power Plan would substitute the EPA's energy preferences for the well thought out choices made by Missourians. Not only will the Plan override Missourians' choices about their electricity mix, it will almost certainly increase our electricity prices. A quick, rough calculation using the EPA's own \$37-per-ton estimate equates to a cost of over \$6 billion by 2020, which could increase electricity prices in Missouri by double digits.

Now, I am a legislator, too. I understand there are many interested parties to this discussion—the energy sector, economists, ecologists, scientists, State agencies, and more. But I don't work for them. I work for the people that I serve, and I look at the Clean Power Plan from their perspective—the perspective of the ratepayer, the consumer, the single parent, the retiree on a fixed income, the small business owner struggling to make payroll for their employees. I am their voice in Jefferson City, and I am their voice here today.

Missouri is home to more than 1.2 million low-income and middle-income families, about half of our State's households, that already spend 18 cents of every dollar they take home on energy, and my constituents tell me they cannot afford to pay higher utility prices.

In Missouri opposition to the Clean Power Plan has been a bipartisan effort. Attorney General Chris Koster, a Democrat, joined 26 other States in challenging the Clean Power Plan, and legislatively I introduced a bill that would suspend all State activity on the Clean Power Plan until the issue has been resolved by the courts. To further demonstrate our legislature's opposition to the Clean Power Plan, Missouri's fiscal year 2017 budget strictly prohibits

the use of any funds to implement the Plan. The final vote approving that piece of the budget was bipartisan in the House and unanimous in the Senate.

In addition to introducing legislation, I authored a letter which was cosigned by 16 of my fellow House colleagues, inquiring Governor Nixon as to whether the Missouri Department of Natural Resources intends to continue to take steps to implement the Clean Power Plan while the stay is in effect, and I have not yet received a response.

In summation I believe that the Clean Power Plan is bad for the people that I represent, and, in Missouri many of my colleagues on both sides of the aisle agree. So I am pleased that the Clean Power Plan has been stayed by the Supreme Court, and it is my hope that the Plan will be withdrawn or overturned.

With that, Mr. Chairman, esteemed Senators, thank you for the opportunity to testify before you today, and I look forward to your committee's discussion.

[The prepared statement of Mr. Bondon follows:]

**Testimony of
Missouri State Representative Jack Bondon
Before
Senate Committee on Environment and Public Works
“Implications of the Supreme Court Stay
of the Clean Power Plan”**

June 9, 2016

Good Morning, Chairman Inhofe, Ranking Member Boxer, and esteemed Senators of the committee. My name is Jack Bondon and I serve the people of Missouri’s 56th District, including my hometown of Belton and areas in southern Kansas City, in the Missouri House of Representatives.

Thank you for inviting me today to share my perspective, as a state legislator, about the implications of the Supreme Court’s stay of the Clean Power Plan.

Missouri benefits in many ways by having very affordable electricity prices. In fact, our electricity prices are more than 10 percent below the national average. Currently, Missouri relies on coal for nearly 80% of its electricity. At the same time, Missourians recognize the need for an abundant, affordable, sustainable, and reliable mix of energy sources. To achieve the right mix for our state, Missouri released a comprehensive energy plan in October 2015 that includes energy efficiency provisions and a renewable portfolio standard (RPS.)

In addition, in 2014, the Missouri legislature passed a bill, signed by Governor Jay Nixon, which establishes how Missouri should set CO₂

standards for its power plants. This law makes it clear that any Missouri plan must be based on emission reduction measures that are achievable at each individual electric generating unit.

In short, Missouri has taken the lead in deciding its own energy future.

Unfortunately, the Clean Power Plan would substitute EPA's energy *preferences* for Missourians' energy *choices*. Not only will the Clean Power Plan override Missourians' choices about our electricity mix, it will increase electricity prices. A quick calculation using the EPA's own \$37per/ton estimate equates to a cost of over \$6 Billion by 2030, which could increase electricity prices in Missouri by double digits

There are many interested parties to this discussion, the energy sector, economists, ecologists and scientists, state agencies, and more. But I don't work for them. I work for the people I represent, and so I look at The Clean Power Plan from that perspective: The perspective of the rate-payer, the consumer, the single parent, the retiree on a fixed income, and the business owner struggling to make payroll for their employees. I am their voice in Jefferson City and I am their voice here today.

In Missouri, we have 1.2 million low-income and middle-income families – about half the state's households – that already spend 18 cents of every dollar they take home on energy. And, my constituents tell me that they cannot afford to pay higher electricity prices caused by the Clean Power Plan.

Missouri Attorney General, Chris Koster — a Democrat — joined 26 other states in challenging the Clean Power Plan. I am concerned about wasting the state's resources implementing a regulation that could be ruled

unlawful or even withdrawn by the next President. Therefore, I have introduced legislation that would suspend all state activity on the Clean Power Plan until the issue has been fully resolved by the courts. To further demonstrate the legislature's opposition to compliance with the Clean Power Plan, Missouri's FY2017 budget explicitly prohibits the use of any funds to implement the Clean Power Plan.

In addition to introducing legislation, I authored a letter, co-signed by 16 of my colleagues, inquiring of Governor Nixon as to whether the Missouri Department of Natural Resources intends to take any steps to implement the Clean Power Plan while the stay is in effect; I have not yet received a response. I also wrote an editorial in the *Missouri Times* expressing my concerns about the state moving forward to implement the Clean Power Plan.

In summation, I believe the Clean Power Plan is a bad idea for the people I represent. And, many of my colleagues, on both sides of the aisle, in Missouri agree. That is why I am pleased the Clean Power Plan has been stayed by the Supreme Court, and it is my hope that The Plan will eventually be withdrawn or overturned.

With that, Mr. Chariman, and esteemed Senators, I thank you for the opportunity to testify before you today and I look forward to your committee's discussion.

9-17-15

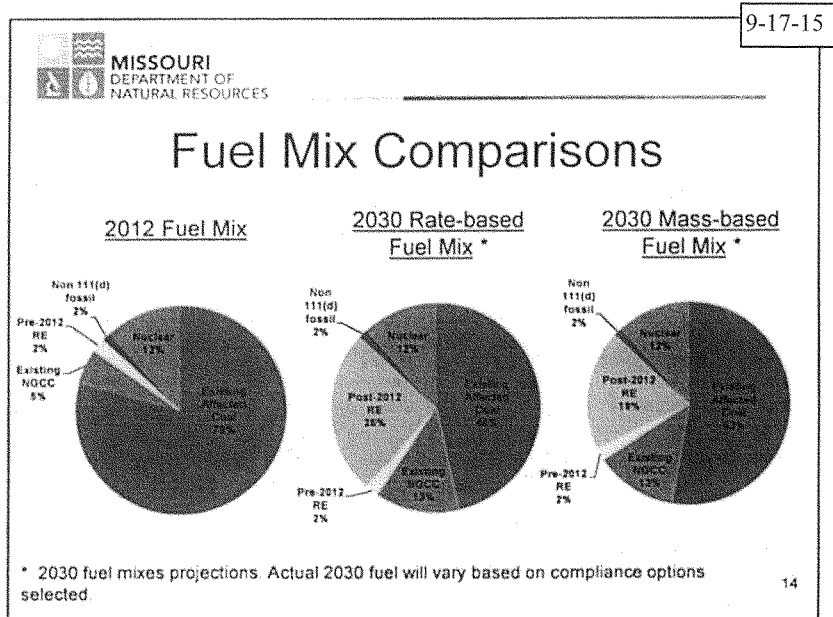


MISSOURI
 DEPARTMENT OF
 NATURAL RESOURCES

Missouri's Final Clean Power Plan Goals

Timeframe	Rate Based Goals	Mass-Based Goals (without new units)	Mass-Based Goals (with new units)
	CO ₂ Rate (lbs/Net MWh)	CO ₂ Emissions (Short Tons)	CO ₂ Emissions (Short Tons)
2012 Actuals	2,008	78,039,449	
Interim Step 1 2022-2024	1,621	67,312,915	67,587,294
Interim Step 2 2025-2027	1,457	61,158,279	62,083,903
Interim Step 3 2028-2029	1,342	57,570,942	58,445,482
Interim Average (2022 – 2029)	↓ 26% 1,490	↓ 19% 62,569,433	63,238,070
Final Goals (2030 and beyond)	↓ 37% 1,272	↓ 28% 55,462,884	56,052,813

10



9-17-15



MISSOURI
DEPARTMENT OF
NATURAL RESOURCES

21 Affected Missouri Sources – Clean Power Plan

Plants highlighted in red have a planned retirement and/or switch to natural gas

Plant Name	Owner/Operator
Labadie Meramec Rush Island Sloux	Ameren (Union Electric Company)
New Madrid St Francis Energy Facility Thomas Hill	Associated Electric Cooperative, Inc.
Chamois	Central Electric Power Cooperative and Associated Electric Cooperative, Inc.
Sikeston Power Station	City of Carthage, Sikeston Bd. of Municipal Utilities, City of Fulton, and City of Columbia
Columbia	City of Columbia
James River Power Station John Twitty Energy Center	City of Springfield, MO
Dogwood Energy Facility	Dogwood Energy, LLC and North American Energy Services
Asbury State Line Combined Cycle	Empire District Electric Company
Iatan	Empire District Electric Company, KCP&L, KCP&L GMO, and Missouri Joint Municipal Electric Utility Commission
Blue Valley	Independence Power and Light
Hawthorn Montrose	KCP&L
Lake Road Sibley	KCP&L GMO

9

SECOND REGULAR SESSION

HOUSE BILL NO. 2543**98TH GENERAL ASSEMBLY**

INTRODUCED BY REPRESENTATIVE BONDON.

6477H.011

D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To amend chapter 643, RSMo, by adding thereto one new section relating to the clean power plan, with an emergency clause.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Chapter 643, RSMo, is amended by adding thereto one new section, to be known as section 643.221, to read as follows:

643.221. 1. The department of natural resources, the commission, and any other agency or department of the state shall immediately suspend all activity related to the Clean Power Plan, a regulation regarding carbon dioxide emissions from power plants that was promulgated by the Environmental Protection Agency under the authority of section 111(d) of the Clean Air Act.

2. No activity by the state or any agency or department of the state related to the Clean Power Plan shall resume until litigation regarding the implementation of the Clean Power Plan has been fully adjudicated and the general assembly has approved resumption of such activity by concurrent resolution adopted by majority vote of both the senate and the house of representatives.

Section B. Because immediate action is necessary to preserve the state's ability to regulate electricity within its borders in order to ensure a reliable and affordable supply of electricity for the citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace, and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

✓

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

SECOND REGULAR SESSION
 [TRULY AGREED TO AND FINALLY PASSED]
 CONFERENCE COMMITTEE SUBSTITUTE FOR
 SENATE COMMITTEE SUBSTITUTE FOR
 HOUSE COMMITTEE SUBSTITUTE FOR

HOUSE BILL NO. 2006

98TH GENERAL ASSEMBLY

2006H.05T

2016

AN ACT

To appropriate money for the expenses, grants, refunds, and distributions of the Department of Agriculture, Department of Natural Resources, Department of Conservation, and the several divisions and programs thereof and for the expenses, grants, refunds, distributions, and capital improvements projects involving the repair, replacement, and maintenance of state buildings and facilities of the Department of Natural Resources and the several divisions and programs thereof to be expended only as provided in Article IV, Section 28 of the Constitution of Missouri, and to transfer money among certain funds, for the period beginning July 1, 2016 and ending June 30, 2017; provided that no funds from these sections shall be expended for the purpose of costs associated with the travel or staffing of the offices of the Governor, Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, or Attorney General, and further provided the Department of Natural Resources notify members of the General Assembly about pending land purchases sixty (60) days prior to the close of sale, and further provided that the Department of Natural Resources not implement or enforce any portion of a federal proposed rule finalized after January 1, 2015, to revise or provide guidance on the regulatory definition of "waters of the United States" or "navigable waters" under the federal Clean Water Act, as amended, 33 U.S.C. Section 1251 et seq., without the approval of the General Assembly, and further provided the Department of Natural Resources not implement or enforce any portion of the federal Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015).

Be it enacted by the General Assembly of the state of Missouri, as follows:

- There is appropriated out of the State Treasury, to be expended only as provided in
- 2 Article IV, Section 28 of the Constitution of Missouri, for the purpose of funding each
 - 3 department, division, agency, and program enumerated in each section for the item or items
 - 4 stated, and for no other purpose whatsoever chargeable to the fund designated for the period
 - 5 beginning July 1, 2016 and ending June 30, 2017 as follows:



April 18, 2016

Governor Jay Nixon
Office of Governor Jay Nixon
P.O. Box 720
Jefferson City, MO 65102

Dear Governor Nixon,

As you know, this spring the United States Supreme Court took the step of granting a request to stay EPA's Clean Power Plan. The stay indicates that the Supreme Court has serious reservations about the legality of the Clean Power Plan.

The stay halts the EPA's implementation of the Clean Power Plan and provides the relief that states seek in order to avoid irreparable harm while the Clean Power Plan is being reviewed. The stay will remain in effect while the courts determine whether the Clean Power Plan is unlawful. In the meantime, states are no longer required to take any steps to implement the Clean Power Plan. Regardless of the outcome, the State of Missouri should not proceed until this case is settled.

In light of the Supreme Court stay, we would like to know whether the Missouri Department of Natural Resources intends to take any steps related to implementing the Clean Power Plan while the stay is in effect. If the Department of Natural Resources intends to take any such steps, please provide a brief description of those steps and the level of resources (both staff time and budget expenditures) that will be necessary. As you are aware, this year's FY2017 budget will contain no appropriated monies for the implementation of this plan and we foresee these to remain halted for any such expenditure to until this case is resolved.

Missouri is under no obligation to take steps to implement a rule that many legal experts believe will be struck down by the courts. In fact, Attorney General Koster is joining other states in the national suit. Furthermore, even if the Clean Power Plan is eventually upheld, the implementation deadlines will almost certainly be extended — perhaps by two years or more — giving states ample time to develop implementation plans. Therefore, I can think of no convincing reason for the Missouri Department of Natural Resources to spend taxpayer dollars by devoting any more of our state's limited resources to the Clean Power Plan for the time being.

I would appreciate your timely response to this inquiry.

Sincerely,

Jack Bondon

CC: Sara Parker Pauley, Director – Missouri Department of Natural Resources
Lt. Governor Peter Kinder
Speaker of the House Todd Richardson
Senate President Pro Tem Ron Richard



Charles R. Borge 47 (Dist.)	Dan Mc 113 (Dist.)
Tom Felt 49 (Dist.)	Greg Berman 4 (Dist.)
Christina 71 (Dist.)	Richard F. Smith 5 (Dist.)
John D. Wernam 103 (Dist.)	Shel 108 (Dist.)
Paul Moe 89 (Dist.)	Shel Dyer 98 (Dist.)
Tom Bosh 132 (Dist.)	Bill E. Kidd 20 (Dist.)
Jeff 105 (Dist.)	Kevin R. Lockwood 14 (Dist.)
Tom Bosh 6 (Dist.)	Gomk 124 (Dist.)

Senator INHOFE. Thank you, Representative Bondon.
Mr. McInnes.

STATEMENT OF MICHAEL MCINNES, CEO, TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., ON BEHALF OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Mr. MCINNES. Mr. Chairman, members of the committee, I am Mike McInnes. I am the CEO at Tri-State Generation and Transmission Association. Thanks for the opportunity to come and discuss the effects of the Clean Power Plan on my organization, on our consumers, and the implications of the Supreme Court stay.

Tri-State is a wholly member-owned generation and transmission cooperative serving in Colorado, Nebraska, Wyoming, and New Mexico. We are owned and governed by our members and operate on a not-for-profit basis. To serve our members we have more than 5,300 miles of high voltage transmission system and generation sources that include coal, natural gas, hydroelectric, wind, and solar power.

Despite significant investments in renewables, energy efficiency, and distributed generation projects, which is projected to make up about 25 percent of energy that we will distribute to our members in 2016, Tri-State relies heavily on coal and natural gas generation to maintain reliability and to control costs. Our reliance on coal and our business model force us to be active in the regulatory and legal arenas, which is what I am here to discuss.

As a cooperative Tri-State operates differently and has different risks compared to investor owned and municipal utilities, a fact that EPA ignored in the proposed Clean Power Plan and why Tri-State and other cooperatives were active in the rulemaking process and challenged the rule in court.

Let me just give you a couple of examples. Cooperatives have different financial goals. Our primary goal and contractual obligation is to provide reliable, affordable, and responsible power to our members. This is different than investor owned utilities whose rate of return is tied to equity, which gives them an incentive to build new infrastructure. The more new infrastructure they build, the more returns they receive. These incentives do not exist for Tri-State and other cooperatives.

Our costs are spread over fewer customers. Tri-State and its members have fewer consumers per mile than other types of utilities, which means we have fewer consumers over which to spread those costs. Typically, cooperatives have 1 to 11 customers per mile of infrastructure, as compared to investor owned and municipals, which have over 35.

When Tri-State needed generation, coal was our only option. In the late 1970s and early 1980s, when the cooperatives were growing, in that same period the Power Plant and Industrial Fuel Act was passed by Congress, and construction of natural gas and oil plants wasn't allowed. We had to choose between nuclear and coal. We chose coal because it was proven, and it was affordable. On the positive side our fleet is relatively new compared to other utilities.

Cooperative plants have longer remaining useful life. Tri-State has invested hundreds of millions of dollars in our plants to im-

prove efficiency and add-on pollution control upgrades. Because of these investments and the fact that our plants are a little newer they still have significant remaining life, and we face large stranded costs if we are forced to shut them prematurely.

Since the EPA failed to address these issues and other legal issues we raised during the rulemaking process our board of directors felt it necessary to challenge the rule in court that resulted in the current stay. While the rule is stayed Tri-State has continued discussions with State regulators to ensure that our concerns are heard. The five States we operate in have taken different approaches to the stay—two States are continuing to develop the Plan a little bit slower; three of them have taken the approach to “put the pencils down.”

Several State regulators justify moving forward based on EPA’s gentle threat that deadlines may remain the same if the rule is ultimately upheld. We feel it is wasteful to spend taxpayer and ratepayer money developing a plan for an unknown target. There are so many variables that could change: a new rule, a modified rule, a new President withdraws the rule or proposes a new one; markets could change, new technology could be developed. So any plan developed today will likely have to be redone. And as we realized with the Clean Power Plan early investments don’t always receive credit in the future.

I am often asked, if you don’t support the Clean Power Plan, what would you suggest? We are already achieving reductions in carbon emissions as a result of maintaining highly efficient power plants and investing in renewable projects, and we continue to support research and development.

In the end although Tri-State and other cooperatives are different, we do have a desire to protect the environment while continuing to provide affordable and reliable energy to our members. We simply believe a different approach is needed to mitigate CO₂ emissions.

Thank you.

[The prepared statement of Mr. McInnes follows:]

"Implications of the Supreme Court Stay on the Clean Power Plan"
U.S. Senate Committee on Environment and Public Works
Thursday, June 9, 2016

Testimony by
Micheal McInnes,
Chief Executive Officer,
Tri-State Generation and Transmission Association, Inc.
Westminster, Colorado

Introduction

- Mr. Chairman, Ranking Member Boxer and Members of the Committee, my name is Mike McInnes and I am CEO of Tri-State Generation and Transmission Association.
- Thank you for the opportunity to discuss the Clean Power Plan, its impact to my organization and the implications of the Supreme Court Stay.
- Tri-State is a wholly member-owned generation and transmission cooperative serving in Colorado, Nebraska, New Mexico and Wyoming. The association generates and transmits wholesale electricity to its 44 member cooperatives and public power districts, which supply retail electricity directly to consumers in a service area that covers approximately 200,000 square miles with a population of about 1.5 million.
- Tri-State is owned and governed by its members, and operates on a not-for-profit basis. Our board of directors, which consists of a representative from each of the 44 members, makes decisions based on sound financial principles, industry best practices and, most importantly, the needs of their members.
- To serve our members, we use more than 5,300 miles of transmission line and a diverse mix of generation sources including coal, natural gas, hydroelectric, wind and solar power.
- Tri-State relies heavily on coal and natural gas-fired generation to maintain reliability and control costs. However, over the last decade we have made significant investments in renewables, energy efficiency and distributed generation projects. Since 2008, Tri-State has added nearly 250 MW of renewable energy and is under contract to add an additional 281 MW by 2017. In 2016, we project 25 percent of energy delivered by Tri-State and its member systems to cooperative consumers will be generated from non-carbon dioxide emitting sources.
- We also invest heavily in research through organizations like the Electric Power Research Institute, where we are participating in research on battery and energy storage technologies. We are also funding a new test center in Wyoming that will conduct cutting-edge research on finding a commercial use for CO₂ and ways to capture it. The XPRIZE Foundation, which encourages advancement of technology through incentivized competition, has agreed to be one of the first tenants in the center.

- Our reliance on coal and our business model force us to be active in the regulatory and legal arenas, which is what I am here to discuss.

The Cooperative Difference

- As a cooperative, Tri-State operates differently and has different risks compared to investor-owned and municipal utilities, a fact EPA ignored in the Clean Power Plan and why Tri-State and other cooperatives were active in the rulemaking process and challenged the rule in court. Let me provide a few examples of how we are different:

- **Cooperatives have different financial goals** – Unlike investor-owned utilities, our interests are not driven by shareholder returns, but by those we serve. Our primary goal – and contractual obligation – is to provide reliable, affordable and responsible power to our members.

This goal is different than investor-owned utilities whose rate of return is commonly tied to equity, which gives them an incentive to build new infrastructure -- the more new infrastructure they build, the more returns they receive. These incentives do not exist for Tri-State and other cooperatives.

- **Our costs are spread over fewer customers** – Tri-State and its members have fewer consumers per mile of line than other types of utilities, which means we have fewer consumers among whom to spread our costs. Typically, cooperatives have 1-11 consumers per mile while investor-owned and municipal utilities average more than thirty-five.
- **When Tri-State needed generation, coal was our only option** – In the late '70s and early '80s, Tri-State's member systems were growing rapidly. During the same time period, the Power Plant and Industrial Fuel Use Act (FUA) was passed by Congress and construction of natural gas and oil plants was not allowed. We had to choose between coal and nuclear plants -- we chose coal because it was proven and affordable. On the positive side, our coal fleet is relatively new compared to other utilities.
- **Cooperatives plants have longer remaining useful life** – Tri-State has invested hundreds of millions of dollars to improve efficiency and on pollution control upgrades. Because of these investments and the fact our plants are newer; they still have significant remaining useful life and we face large stranded costs if we are forced to shut them prematurely.
- **Tri-State does not need new generation** – While some of our members are experiencing growth, it has been offset by losses by other members. Tri-State does not project the need to build new generation until 2024-2026, so to comply with the requirements of the Clean Power Plan we would likely have to shut down existing plants.

- Since the EPA failed to address these issues and other legal issues we raised during the rulemaking process, our board of directors felt it necessary to challenge the rule in court, resulting in the current stay.

Tri-State continues to work with states:

- While the rule is stayed, Tri-State has continued discussions with state regulators to ensure our concerns are heard.
- The five states we operate in have taken different approaches to the stay. Two states are continuing to develop plans – albeit at a slower pace-- and three states have “put the pencils down.”
- Several state regulators justify moving forward based on EPA’s gentle threat that deadlines may remain the same if the rule is ultimately upheld, but we have argued there is strong legal precedent supporting deadlines being tolled.
- We feel it is wasteful to spend taxpayer and rate-payer money developing a plan for an unknown target. There are so many variables that could change – a new rule, a modified rule, a new president withdraws the rule or proposes a new one, markets could change, new technology could be developed – so any plan developed today will likely have to be redone and as we realized with the Clean Power Plan, early investments do not always receive credit in the future.
- Tri-State is also concerned that if states unilaterally move forward developing a plan, it will preclude many options allowed under the Clean Power Plan to develop regional compliance options. For example:
 - A regional trading program will only be possible if states develop one together.
 - If a state plan requires retirement or curtailment of generation sources, it will impact consumers and operations in other states.
 - State plans can either be “mass” or “rate” based, and making a unilateral decision may cause issues if surrounding states decide on a different option.
 - Transmission planning is done on the regional level and states need to work together to identify regional constraints and requirements for new lines.
 - Compliance for multi-state utilities like Tri-State becomes complicated and increases compliance costs if efforts among states are not coordinated.

Conclusion

- I am often asked, if you don’t support the Clean Power Plan to reduce carbon emissions, then what do you suggest?
- Tri-State is already achieving reductions in carbon emissions as a result of maintaining highly efficient power plants and investing in renewable energy projects, and we continue to support research and development of new carbon management technologies.
- Tri-State believes that carbon dioxide regulations need to ensure the viability of all fuel sources and any emission standards need to be attainable in a reasonable timeline.
- In the end, although Tri-State and other cooperatives are different, we do have a desire to protect the environment while continuing to provide affordable and reliable energy to our members. We simply believe a different approach is needed to mitigate CO₂ emissions.

**Tri-State Generation and Transmission Association, Inc.
Member Territory Map**



Senator INHOFE. Well, thank you very much, Mr. McInnes.

Let me compliment all five of you; you stayed within your 5 minutes. Maybe we can do the same thing up here.

I was just notified that Senator Boxer is not going to be able to be here. At this time I will go ahead and submit her statement, without objection, for the record.

[The prepared statement of Senator Boxer follows:]

STATEMENT OF HON. BARBARA BOXER,
U.S. SENATOR FROM THE STATE OF CALIFORNIA

This committee is once again holding a hearing on the Clean Power Plan—the rule that targets carbon pollution from the Nation’s biggest source of climate pollution—power plants. The Clean Power Plan, which was finalized in August 2015, is an historic step forward in the effort to address climate change.

Unchecked climate change poses a threat to the health and safety of children and families. That is why it is urgent that we take action to reduce dangerous carbon pollution from all sources, including power plants.

Climate change is happening all around us. The predictions scientists made about climate change—higher temperatures, more extreme weather events, severe droughts, increased wildfires, decreasing polar ice, and rising sea levels—have become our reality. Here are just a few examples.

- 2015 was the hottest year on record, and 15 of the 16 warmest years on record have occurred in the 21st century.

- Earlier this year, scientists reported that sea levels are rising many times faster than they have in the last 2800 years.

- The 2015 wildfire season was the costliest on record, with \$1.71 billion spent.

The American public understands the need to act. A League of Conservation Voters poll found that 70 percent of voters want their State to cooperate and develop a plan to implement these new standards. And a Yale University poll found 70 percent of voters support setting strict carbon dioxide emission limits on existing coal-fired power plants to address climate change and improve public health.

And we know that the Clean Power Plan will have significant public health benefits. By fully implementing the Clean Power Plan, we can avoid:

- 3,600 premature deaths;
- 1,700 heart attacks;
- 90,000 asthma attacks; and
- 300,000 missed work days and school days by 2030.

We know that the EPA has the authority to regulate carbon pollution. In its 2007 landmark decision, *Massachusetts v. EPA*, the U.S. Supreme Court found very clearly that carbon pollution is covered under the Clean Air Act—and it has upheld this authority in two subsequent opinions.

It is disappointing that the Supreme Court, in a narrow 5 to 4 decision, decided to stay implementation of the Clean Power Plan. But it is important to remember that the Clean Power Plan has not been overruled and will be reviewed on the merits.

Despite this delay, many States are moving toward clean energy because the American people want it. On April 28th, 14 States, including my State of California, sent a letter asking EPA to continue working with them to provide information and technical assistance related to the Clean Power Plan. EPA says it will respond to and meet the needs of States that ask for help in a manner that is consistent with the stay. EPA will continue to provide information, tools, and support States but will not enforce requirements associated with the Clean Power Plan. This is the right approach and is consistent with the long standing practice in both Republican and Democratic administrations.

The Clean Power Plan will have its day in court. Until then, States that understand the threat posed by climate change, see the opportunities for clean energy, and want to protect the health of their citizens should have the right to do so—and receive EPA’s help.

Those people who want to stop all progress on reducing dangerous carbon pollution are ignoring the will of the American public. The American people want action because they know that moving to clean energy will be beneficial for the health of our families and our economy.

Senator INHOFE. Representative Bondon, I am going to read a quote, and I want to make sure that Senator Capito hears this

quote, too. EPA Administrator McCarthy recently stated, "I can't find one single bit of evidence that we have destroyed an industry or significantly impacted jobs other than in a positive way."

Is that true in your district?

Mr. BONDON. Well, I would take exception to that, Senator. Missouri is home to two large coal companies, Peabody Coal and Arch Coal, both out of St. Louis, Missouri, who have recently filed for bankruptcy. Now, there certainly are a number of reasons why a company does that, but the uncertainty created by the Clean Power Plan and the future of moving away from coal has real impact to their employees.

Senator INHOFE. They filed bankruptcy, and this happened after they were aware of the rule?

Mr. BONDON. That is correct.

Senator INHOFE. What is going to happen to those jobs, then, if they go under?

Mr. BONDON. Well, they are trying to figure out how to reorganize right now. But almost certainly some people will lose their job.

Senator INHOFE. Mr. McInnes, along the same line, yesterday, an environmental organization released a report concluding the judicial stay is economically unjustified because the coal industry will not experience any irreparable harm.

What is your response to that?

Mr. MCINNES. Mr. Chairman, I am not sure how a statement like that could be made. As you have just asked about, the coal industry has almost collapsed; there is no ability to make future plans based on that. And I would say that whether or not the industry has been, or a specific instance, certainly the continued onslaught of regulations against generation resources has increased costs to the point that plants are uncompetitive.

Senator INHOFE. Very good.

Now, Ms. Wood, you spent a long time during your opening statement talking about the most controversial parts of this whole thing, and that is tolling. Is there anything you want to add to that?

Ms. WOOD. Senator, I guess the one thing I would add is, when you look at any instance of where an environmental rule has been stayed, the timelines have always been tolled. To the extent they were not done on a day-for-day basis with the period of the stay it is not that they were shorter than the stay; they would be longer.

So, for example with the cross-State air pollution rule, that was stayed for a little more than 2 and a half years. But then all of the deadlines were extended by 3 years. And the reason for that was because a lot of those deadlines started on, say, January 1st, so just adding the days on would have pulled it off the calendar. But you didn't shorten them; you lengthened it. And saying that this rule won't be tolled or couldn't be tolled at the end of the day I think is just a scare tactic to make people work.

Senator INHOFE. Thank you for that clarification.

Mr. McInnes, Tri-State has made a significant investment in pollution control technology due to other EPA air rules. Now, what is the purpose of these investments if the Clean Power Plan forces the premature closure of these plants, and how would your members recover their costs?

Mr. MCINNES. In this instance, there are no investors to share the costs; the owners of these generation facilities will pay that entire cost. And on that point we have some of the most controlled resources in the country because of these upgrades that we have made, and now to have to walk away from those before they have lived their useful lives will be a significant burden on our customers.

Senator INHOFE. Thank you.

Representative Bondon, you and I talked about this. Although the rule is now stayed, how has the Clean Power Plan already impacted coal plants and utilities in your State? In other words, is the damage already done?

Mr. BONDON. Well, I believe that the coal industry sees the writing on the wall, and to that extent I do believe that there is some damage already done. But more than that, Senator, the State of Missouri took this into its own hands; we created our own State comprehensive energy plan to try to create that energy mix in the future. And to the extent that the Clean Power Plan has interfered with our State plans, it has thrown a lot of uncertainty into the mix.

Senator INHOFE. All right, I appreciate that. I have another question, but I am going to stay within my 5 minutes and give it to one of the other members up here to respond to.

Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman, and thank you for this hearing.

First, let me make an observation. I listened to the Chairman's opening statement, and to say the least, we have some different views as to the impact here. It seems to me that when we complain about regulations, a lot of times it would be better if Congress did its responsibility and did its work. This is going to be the first Congress which will not have a legacy of passing legislation to help protect our environment. Instead, what we seem to do is always have bills that prevent the Administration from moving forward rather than looking at ways that we can help build upon the environmental legacy of this country.

Senator INHOFE. I don't very often do this. Let me interrupt. We'll extend your time.

Senator CARDIN. Thank you.

Senator INHOFE. We passed the most significant environmental bill in 25 years just 2 days ago.

Senator CARDIN. I will be glad to yield to the Chairman.

Senator INHOFE. No. The TSCA bill.

Senator CARDIN. Oh, well, Mr. Chairman, some of us have different views on that. And I applaud you for that. It is always good when we move together. That deals with chemicals. And I think it is important that we have laws that work. I regret, though, that we did prevent the States from fully being able to fill the void until the Federal Government actually has an effective regulation. That was part of the problem, I think, on that issue. But that is the system working.

We have not done that with the Clean Water and defining the Waters of the U.S. Instead, we have seen the Supreme Court deci-

sions many years ago, and we have been blocked from trying to get constructive legislation to deal with clean water.

In the clean air issues we have not been able to pass additional legislation. The President's regulation, the Administration's regulation on clean air really yields to the States to figure out how it is best for them to comply with the national standard, and States are able to do that.

Before the President's or before the Administration's Power Plan Rule, Maryland, along with other States, entered into RGGI. They were moving forward in trying to deal with the issues.

I guess my point is this—that rather than looking at ways to stop the Administration from moving forward with regulations, it would be good if Congress just passed laws as to how we can meet our obligations for clean air. Maryland has done its job; it did its job without the Federal Government telling us what we had to do.

But the problem is we are downwind, so we can only do certain things. We need an effective national strategy on this, and that is what the Administration's regulations are attempting to do.

And I would welcome my colleagues working with me, as we did in TSCA, in figuring out how we can provide a greater legacy on the clean air and clean water, but we haven't done that. And the Administration is carrying out its responsibilities. The Supreme Court decision is a stay. We will see where the courts end up, and we will see how the Supreme Court rules on the merits of the regulation. But a stay is a stay, and States are still moving forward.

I guess my question is to either Ms. Dykes or Professor Revesz. If Maryland needs advice from the EPA as to how to move forward on its efforts to deal with clean air, as I understand it, the Supreme Court decision does not prevent a State from continuing to move forward in its efforts, and the Administration can provide that guidance so that they can do what they think is right for the health of their citizens, and under federalism, provide some help for our Nation in developing the right policies for clean air.

Mr. REVESZ. That is correct, Senator.

Ms. DYKES. And while I am not here to speak for my sister RGGI State of Maryland, we were pleased to be signing on to the letter to EPA in April along with our counterparts in the State of Maryland requesting that assistance.

Senator CARDIN. So my concern, Mr. Chairman, is that if you are saying that if you interpret a stay to say that we can't move forward, first of all, that is not what a stay does. But second, that is preventing us from doing what we think is right. Maryland was able to move forward in reducing its carbon footprint on its generation of electricity. We were able to do that in a way that benefited the people of Maryland, benefited our economy, and I think provides a model for what can be done in a sensible way to deal with clean air.

The good news about the Administration's regulation, as I understand it, is that our regional effort is taken into consideration in meeting our goals and that Maryland has the flexibility to determine how it meets its goals; it is not mandated under regulation. Am I correct on that?

Ms. DYKES. That is the hallmark of the Clean Power Plan and of the RGGI program, that mass-based, multi-State programs pro-

vide tremendous flexibility to States to determine exactly how they will meet their goals, and a number of the measures that we have used to achieve the success in RGGI has depended on not only our RGGI program, but also renewable portfolio standards, energy efficiency programs, which I think some of the witnesses here have mentioned that although their States may not be working on Clean Power Plan, they are working on advancing those types of measures, which will only contribute to their ability to comply.

Senator CARDIN. Thank you.

Mr. Chairman, I will yield back the last 18 seconds.

Senator INHOFE. Thank you, Senator Cardin.

Senator Capito.

Senator CAPITO. Thank you, Mr. Chairman. I want to thank our witnesses today for their great testimony.

I just want to make a few comments before I ask my question specific to my State of West Virginia. First of all, when I hear that no irreparable harm has been done because of some of the regulatory measures that have been taken, come and visit the State of West Virginia. No joblessness? We have lost over 20,000 jobs in the coal mining industry. We have suffered irreparable harm, and I keep repeating it in this committee meeting, but I am going to keep repeating it because the folks of West Virginia are seriously hurting.

We have also—I just asked my staff to find out, from 2006 to 2014, our per-kilowatt hour cost of electricity in a cheap State much like Missouri in terms of cheap energy has already gone up 47 percent. This is without the Clean Power Plan. But we are one of the 29 States that has chosen not to move forward for obvious reasons, but an official from the Department of Environmental Protection has stated that based on his experience, “I have determined that implementing this will be extremely complicated and time consuming.” I think everybody on the panel would admit that it is complicated and time consuming.

Since 2014 the State has devoted five employees with 27 hours or more of implementing and trying to understand this section 11(d) rule, and they estimate that to move forward would be another 9 senior staff employees with another 7,100 hours of effort.

This is in the middle of a budget crisis in our State, due in large part to the impact of the coal industry. We are over \$360 million in the hole. What is going to happen is we are losing our teachers, but we are also losing our DEP employees. Our State can no longer afford the measures that are going to be required. So we have stopped, to wait and see what happens.

So, Representative Bondon, you talked about the impact monetarily in a large way of what you think this would be, \$6 billion by 2030, and then we talk about cost-benefit analysis. You know, we hear that if the Clean Power Plan goes forward there will be a minuscule result in terms of what effect it would have on the global environment in terms of temperature change. So we have to look at that as a cost-benefit analysis.

And I would like to say one thing in response that I forgot to say in the beginning, whether Congress has acted or not. Congress did act. I led the way with a Congressional Review Act that basically said the majority of the Senate and the majority of the House do

not agree with the Clean Power Plan. Went to the President's desk, which he promptly vetoed, to nobody's surprise.

So would you have a comment on the cost-benefit, where you see this for your State and maybe the Nation?

Mr. BONDON. Yes, Senator, and thank you for the question. As I mentioned in my testimony, a rough estimate, but the best that we could come up with using the EPA's own \$37 per ton estimate, with the mass-based reduction goals that would have to happen in Missouri, it would cost, on the low end, \$6 billion.

Now, it is very, very hard to figure out how that would be distributed across the State because some of the IOUs, some of the munis, some of the co-ops have different mixes and they would have to change at different rates. So to put it toward an individual customer is hard to do. But some of the best estimates that I have is that it would be a double-digit increase in utility prices.

Senator CAPITO. Right.

Mr. BONDON. And I think, Senator, to your larger point, we have to ask ourselves where is the balance.

Senator CAPITO. Right.

Mr. BONDON. How do we strike the balance between moving into cleaner energy and more reliable energy versus the cost that it is going to take to do that, and when our consumers and our constituents are able to afford that.

Senator CAPITO. Right. Thank you.

Ms. Wood, in a recent letter from EPA Acting Administration McCabe, she stated that, "During the pendency of the stay, States are not required to submit anything to EPA, and EPA will not take any action to impose or enforce obligations." I know there is a bit of a disagreement on what this really means. Is this the case as the EPA continues its work, in your opinion, on the Clean Energy Incentive Program and Model Trading Rules?

Ms. WOOD. Thank you, Senator. Before I answer your question, I wanted to just commend your State for its leadership in the litigation challenging this rule. Your citizens are very lucky to have Attorney General Patrick Morrisey and Solicitor General Elbert Lin leading the State effort. I think in large part due to them is why we have the stay that we have.

In terms of is what EPA is doing, does it impact those States that don't want to act? Yes, it does. And it will impact those man-hours that you were talking about in your State because when EPA publishes its proposed rule on the Clean Energy Incentive Program, West Virginia is going to have a choice to make, which is either comment on that part of that rule or forego that opportunity.

And if at the end of the day the rule is ultimately upheld, and West Virginia decided not to comment on it, then they have lost a valuable right. Yet by forcing them to read and digest and comment on a rule would be more man-hours devoted to a plan that the Supreme Court thinks has a fair prospect of being struck down.

Senator CAPITO. Thank you.

Senator INHOFE. Thank you, Senator Capito.

Senator Whitehouse.

Senator WHITEHOUSE. Senator Carper is not before me? OK, very well, then. Thank you.

Mr. Chairman, this hearing marks an anniversary. Exactly 30 years ago this week, in June 1986, Senator John Chafee, Republican of Rhode Island, then Chairman of the EPW Subcommittee on Environmental Pollution, convened a 2-day, five-panel hearing on ozone depletion, the greenhouse effect, and climate change. His opening remarks warned of, and I will quote him here, “the build up of greenhouse gases which threaten to warm the Earth to unprecedented levels. Such a warming could, within the next 50 to 75 years, produce enormous changes in a climate that has remained fairly stable for thousands of years.” He went on to say, “There is a very real possibility that man, through ignorance or indifference, or both, is irreversibly altering the ability of our atmosphere to perform basic life support functions for the planet.”

The contrast is stark between what Senate Republicans and their witnesses were saying 30 years ago and what the GOP is saying today. Thirty years ago Senator Chafee declared, “This is not a matter of Chicken Little telling us the sky is falling. The scientific evidence is telling us we have a problem, a serious problem.”

Thirty years ago Senator Chafee said, “By not making policy choices today, by sticking to a wait and see approach, by allowing these gases to continue to build in the atmosphere, this generation may be committing all of us to severe economic and environmental disruption, without ever having decided that the value of business as usual is worth the risks. Those who believe that these are problems to be dealt with by future generations are misleading themselves,” he said. “Man’s activities to date may have already committed us to some level of temperature change.”

Thirty years ago Senator Chafee knew there was much yet to learn about climate change. Scientists will agree that there still is. He said then that we have to face up to it anyway. He said, “We don’t have all the perfect scientific evidence. There may be gaps here and there. Nonetheless, I think we have got to face up to it. We can’t wait for every shred of evidence to come in and be absolutely perfect. I think we ought to start to try and do something about greenhouse gases, and certainly to increase the public’s awareness of the problem and the feeling that it is not hopeless. We can do something.”

Senator Chafee was an optimist. He used to say, “Given half a chance, nature will rebound and overcome tremendous setbacks. But we must, at the very least, give it that half a chance.” But he also knew, Mr. Chairman, that nature’s tolerance is not unlimited. At those hearings 30 years ago, Senator Chafee warned, “It seems that the problems man creates for our planet are never-ending. But we have found solutions for prior difficulties, and we will for these as well. That is required is for all of us to do a better job of anticipating and responding to today’s new environmental warnings before they become tomorrow’s environmental tragedies.”

That was 30 years ago. Of course, all of this predated the Supreme Court’s *Citizens United* decision, which has allowed the fossil fuel industry to effect a virtual hostile takeover of the Republican party, rendering that party today the de facto political wing of the fossil fuel industry and producing hearings like today’s, after 30 years.

Senator INHOFE. Thank you, Senator Whitehouse.

Senator Fischer.

Senator FISCHER. Thank you, Mr. Chairman.

Mr. Chairman, I believe my job as a United States Senator is to look at policies that are before us, look at the issues that are before us, and try to determine what that best policy would be. And I think good policy requires balance. Good policy has to look at the issue, but it also has to look at the impacts of what is being presented to us.

Under the Clean Power Plan, the State of Nebraska is facing a 40 percent reduction in its carbon emissions rate, and that makes the State of Nebraska rank as one of the 10 biggest losers. I was on that list as well. Nebraska is a public power State, 100 percent public power. So our ratepayers, which means our families in the State of Nebraska, are going to be harmed by this policy.

Iowa is a leader in wind energy, a leader in this country. Yet under the Clean Power Plan, you know what? They don't get any credit for having that wind power. You tell me how that makes good policy. It does not.

Nebraska's families are going to face affordability and reliability uncertainties. In fact, our DEQ in Nebraska, the employees there have already expended 2,000 hours on interpreting and preparing for the implementation of this Plan. That consumes vital State resources that I believe should be devoted to addressing pressing issues in our State that are affecting the citizens of our State.

Mr. McInnes, in your testimony you discuss the location and population density challenges that Tri-State must overcome in order to supply members with that reliable and affordable energy, and you certainly, as a cooperative, understand public power; you understand the cost to families. And you serve in the panhandle of Nebraska, which is extremely rural. In some counties there is less than 1 person per square mile. My county is one of those.

Mr. McInnes, can you tell me, on average, how many consumers per mile your member systems in Nebraska serve?

Mr. MCINNES. Thank you, Senator. I will follow the lead of Ms. Wood and congratulate you and your State for being public power. I believe electricity is important to modern society, should be supplied to everyone at cost base. Those members that we serve in the panhandle of Nebraska average 1 to 2 consumers per mile of infrastructure.

Senator FISCHER. And how does that compare nationwide to the average density?

Mr. MCINNES. If you look at the nationwide, it is somewhere more in the high 20s. But as you get in the urban areas, that can exceed 35 or 40.

Senator FISCHER. Right. So as I believe public power, whether it is cooperatives or the public power MPPD, OPPD, LES in the State of Nebraska, and many of our rural electric cooperatives, in my opinion, you are providing a public service because it gets more expensive when you have to provide to rural areas, correct?

Mr. MCINNES. It certainly does. And we only have to look at history. When the IOUs were unwilling to go out into the rural areas, and that was what formed the public power districts and cooperative.

Senator FISCHER. Right. And under this Clean Power Plan, if you have to shut down one of your plants that you built because of policies at the Federal level when you built those plants and built those coal-fired plants, it was a decision that impacted your choice, if you have to shut them down or curtail any of them, how is that going to affect the cost to Nebraska families?

Mr. MCINNES. Interestingly enough, Senator, because we serve in multiple States, if one of the States—and it has been mentioned here several times today that each State can go whichever way they want to—if the State of New Mexico makes us shut down one of our resources, it is going to affect the consumers in Nebraska because we serve on a postage stamp rate across our four States.

Senator FISCHER. And the power plants in general, they run most efficiently and with the highest environmental controls at peak operation, and it is my understanding that curtailing production is going to decrease that efficiency, it is going to increase emissions. Is it true that Tri-State you won't be able just to ramp down your coal plants; you are going to have to shut them down in order to comply with the Clean Power Plan? And since you still need to supply your customers, won't you need to ensure that you have another baseload resource in order to maintain that? And I think it is educational to people to explain what a baseload resource is.

Mr. MCINNES. Thank you, Senator. What you have said is certainly true. Baseload facilities are designed for that very thing, to operate all the time, and those are the backup. As you get into what we call peak loads, when people come home at night, turn on their TVs, coffee pots, that sort of thing, we can use other resources. And there are certainly limits to which you can take them as you back them down, and they will have to be shut down at some point.

Senator FISCHER. Thank you very much, sir.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Fischer.

Senator Wicker, Senator Carper has graciously said that you can go ahead and go first.

Senator WICKER. Well, Senator Carper is a gracious colleague, and I appreciate that.

Let me say this about the process, Mr. Chairman, and I want to measure my words. Senator Whitehouse is a friend of mine; we work together on the Ocean Caucus. We work together on treaties and have gotten them ratified together.

It is insulting for a member of this Senate to come in here and to suggest that this hearing, the very holding of this hearing somehow demonstrates that Members of the Congress are wholly owned by the fossil fuel industry. And I resent that, and I think it is beneath my friend from Rhode Island to have done so. He has left the room, but I am going to say it anyway, because I know that he will be able to hear this.

Presumably it is improper for Senator Capito, for example, to raise the question in light of the 40 percent increase in power rates for her constituents, what difference is this going to make if it is implemented anywhere? What difference does it make on world temperatures? Supposedly, it is improper for us to even have a hearing and ask those questions.

This hearing today complies with the procedures that we have always had. There are two minority witnesses; there are three majority witnesses; questions being asked on both sides. So I resent the implication that somehow this hearing shouldn't be held at all and that it indicates we are wholly owned.

Now, let me ask you this, Ms. Wood. If the State of Maryland needs advice about implementing a voluntary plan that they have, they can go to the EPA for advice without the necessity of the Clean Energy Incentive Program, or CEIP, is that correct?

Ms. WOOD. Yes, that is correct.

Senator WICKER. Now, Ms. Wood, is CEIP a separate regulation, or was it part of the Clean Power Plan rule as it was finally submitted to the Congress and to the public for implementation?

Ms. WOOD. It was part of the final rule. I believe, without having seen it, that the proposed rule might be flushing it out, but it is part of the final rule.

Senator WICKER. OK. And if EPA wants to go back, now that there is a stay, and implement a separate Clean Energy Incentive Program, then they can do so by implementing a new rule and sending it through all the process, is that correct?

Ms. WOOD. Absolutely, as long as it wasn't connected to the Clean Power Plan. In other words, if they wanted to have a separate program that achieved what the Clean Energy Incentive Program does, they could.

Senator WICKER. But for now it has been stayed.

Ms. WOOD. Yes.

Senator WICKER. Now, let me also ask you, Ms. Wood, with regard to the effect of the stay application on the deadlines throughout, it is a fact that EPA actually conceded your point in their pleadings, is that not correct?

Ms. WOOD. Yes, the Solicitor General of the United States conceded that point.

Senator WICKER. In his opposition to the stay, and this is on page 6 of your testimony, the Solicitor General of the United States noted that the stay applicants explicitly or implicitly asked this court to toll all relevant deadlines set forth in the rule. That is the statement of the Administration's principal lawyer with regard to the effect of the stay.

Ms. WOOD. Yes, it is.

Senator WICKER. And he went on to say a request for such tolling is inherent in the applications that do not explicitly address this subject, is that correct?

Ms. WOOD. Yes, that is correct.

Senator WICKER. So it is not only your position, it is the position of the chief lawyer of the Administration that all of the deadlines are tolled.

Ms. WOOD. Yes.

Senator WICKER. And there is precedent to back you and the solicitor general up in this regard, is that correct?

Ms. WOOD. Yes.

Senator WICKER. Thank you very much.

Let me just ask, in the few seconds I have remaining, Mr. McInnes and Representative Bondon, the President went before the voters in 2008 and said we can have clean coal. He said that, didn't

he? I think you nodded, Representative Bondon, but you gave an affirmative answer.

As a matter of fact, the plan that Missouri has put forward, as a matter of fact, attempts to make that promise come true by using coal, by eliminating particulate emissions into the environment, and actually fulfilling the promise that the President has now gone back on, to have clean coal as a reliable source of power, is that correct?

Mr. BONDON. That is correct, and that is our hope as a State.

Senator WICKER. Thank you very much.

Mr. BONDON. Thank you, Senator.

Senator INHOFE. Thank you, Senator Wicker.

Again, Senator Carper has agreed to let Senator Barrasso go ahead of him.

Senator Barrasso.

Senator BARRASSO. Thanks, Senator Carper. Thanks, Mr. Chairman.

Ms. Wood, there is a belief by some environmental advocates in the EPA that this Supreme Court stay on the Clean Power Plan doesn't include all the aspects of the so-called Clean Power Plan. The advocates in the EPA seem to believe that the Court somehow meant to allow the EPA to continue working on aspects of the rule despite the Court's ordering that the rule itself be stayed at the request of the States and the utilities, and it seems to me that these advocates and the EPA want to debate what the meaning of the word "is" is.

As you say in your written testimony, the stay preserves the status quo. New work on aspects of the so-called Clean Power Plan is not preserving the status quo to me it means except in the minds of this out of control EPA. The idea that the Supreme Court would issue a stay in this case really is extraordinary, and the justices wouldn't take such an action if there weren't really serious concerns.

David Doniger, Senior Natural Resources Defense Council attorney, a liberal group, said in January of this year that if the Supreme Court issued a stay on the Clean Power Plan, he said it would be an extraordinary step. In fact, in an Energy and Environmental Daily article in January, he said it is extraordinary to get a stay from the D.C. Circuit; it is extra, extra, extraordinary to get one from the Supreme Court.

So we all know the Supreme Court made that extra, extra, extraordinary step, and they did it for a good reason. So could you share with us why you think the Supreme Court took this extraordinary step to block the EPA's Clean Power Plan rule with a stay to preserve the status quo? And how do you believe the Michigan v. EPA case may have played a role in this?

Ms. WOOD. Thank you, Senator. You are correct that this was an extraordinary step. To my knowledge, the Supreme Court has never stepped in before and stayed an EPA rule before the lower court had ruled on the merits of it. So it was an extraordinary step.

I think there were really two primary reasons why the Supreme Court took the step. The first is that there are many legal infirmities with the rule, and those were laid out for the justices to see. And the other is accompanying the stay applications were 84 dec-

larations from a wide number of sectors, from States, from electric utilities, from coal producers, from business interests, talking about how they were going to suffer irreparable harm in the absence of a stay.

So when you talk about the Michigan v. EPA case and how that may have played in, that was a rule, the mercury and air toxic standards NAAQS rule, where power plants were required to put on very, very costly control equipment. That rule had not been stayed. It eventually worked its way up to the Supreme Court. The Supreme Court struck the rule down, but by that point almost all of the plants had already spent the money and put the controls on. And indeed, EPA Administrator McCarthy then made the statement that, you know, this really wasn't a loss for EPA.

Senator BARRASSO. I appreciate your comments.

Mr. McInnes, in your testimony you mention the integrated test center in Wyoming. Could you spend a little time describing the center, how the center is going to help develop technologies that can make burning coal cleaner for everyone; it can protect coal jobs not just in Wyoming, but in other States, and make sure that coal is not a stranded asset for our Nation?

Mr. McINNES. Thank you, Senator. Tri-State has been involved with the concept of this center for a number of years. In fact, our board had indicated a desire to significantly invest in that prospect for that very reason. This test center will find a home at the Basin Electric Cooperative Dry Fork Station near Gillette, Wyoming. The purpose of this test center is to try and find ways that carbon can be utilized. If it is an issue, then let's see if we can find some way to use it productively and still allow the all-of-the-above fuel selection that I think we need in this country.

The purpose of the test center will be to provide a place for those entrepreneurs who want to come test these technologies, see if they can improve better ways of capturing and ways of commercialization of these carbon emissions. In fact, it is going to be the home of the XPRIZE carbon prize, so we are very excited to be a participant in that. We look forward to being able to continue utilizing coal as a resource.

Senator BARRASSO. Well, thank you very much for that and for your commitment.

I would mention, Mr. Chairman, that at the opening ceremonies for that Dry Fork Station in Wyoming there was bipartisan joining in the celebration and participation. Both Senator Heitkamp from North Dakota and I were there, along with Senator Enzi.

Thank you very much, Mr. Chairman.

Senator INHOFE. Thank you, Senator Barrasso.

Senator Carper, you have been patient, and you have been very generous. I have counted the time that we have gone over, and it is about 3 minutes, so feel free to take what time you need.

Senator CARPER. Thanks so much, Mr. Chairman.

I just want to start off today welcoming all of our witnesses. It is good of you to come.

I want to take a minute and just commend Senator Inhofe for his leadership. When a major environmental laws signed 40 years ago by then President Gerald Ford, something called the Tax Exemptions Control Act, which he held as maybe one of the foremost envi-

ronmental pieces of legislation of a generation. I think he was proud to sign it into law.

It turned out not to be that good. And instead of actually regulating toxic substances in our environment, out of the hundreds of toxic chemicals, potentially harmful chemicals could have been regulated by EPA, I think over 46 were regulated; in the last 20 years maybe none. And under this man's leadership—

Senator INHOFE. Would you yield just for a moment? When Senator Cardin made the statement that nothing is coming out for a period of 2 years out of this committee that would be environmental progress, you and I shared the podium at a news conference yesterday where several declared that the action that we took in passing the TSCA bill on chemicals could go down as the most significant environmental improvement in 25 years. So that is the reason I was making that correction.

And I appreciate very much working so closely with you and with many of the more progressive members of your party in making that become a reality. We did a good job in this committee.

Senator CARPER. We did a great job, and thank you for your leadership.

Senator Markey stood up at the press conference. An interesting array of Democrats and Republicans from fairly well to the left and fairly far out there to the right who had banded together and worked with Environmental Defense Fund, National Wildlife Federation, and chemicals groups and business groups to come up with that. That was very, very good, and compromise is going to actually be good for our environment and be good for the health of our citizens.

I said at the close of the press conference maybe if we could take on an issue as complex and as difficult as toxic substances control, maybe we could actually make progress in some other areas, and one of the areas that we need to make progress is the area that we have been talking about here today.

I have been working on Senator Inhofe on this committee for about 15 years. We worked very closely together on something called Diesel Emissions Reduction Act, which I think is another good piece of environmental legislation that George Voinovich and I, former Governor and former Senator from Ohio, worked on before he retired. So my hope is that those two good examples of areas where we could work together.

The issue of multi-pollutants, something that is near and dear to our hearts in Delaware, we are the lowest lying State in America, lowest lying State in America. I was a Naval flight officer in the Vietnam war and moved to Delaware, got an MBA and ended up getting elected as the State treasurer, Congressman, Governor, and now Senator, so I have been around the State for a while and love the place, and the people have been great to let me serve them.

We have a bunch of beaches. I am told we have more five-star beaches in little Delaware, 26 miles of coastline with the Atlantic. I am told we have more five-star beaches than any State in America. Tourism is really important for us. Agriculture is really important for us. Chemical industry is important for us. Financial services is important for us.

But if you drive south in Delaware on State Route 1 past Dover and head on down almost to the town of Milford and make a left turn, head east, you drive out toward Prime Hook Beach. It used to be you would drive east toward Prime Hook Beach, and you go through Prime Hook National Wildlife Refuge, and then you get to the Delaware Bay. And there is a place to park cars or your boat, trailers or whatever, and people put their boats in the water.

And they don't do that anymore. And the reason why they don't do that anymore is because where they get to where the boat ramp and everything and the parking lot used to be, it is water; and somewhere under that water is what used to be a parking lot. And you can stand there by the edge of the water and look off an area about 1 o'clock looking east toward New Jersey, and you see what looks like part of a concrete bunker sticking up out of the water.

I was born in 1947. I have a photograph from 1947 that shows that concrete bunker not almost submerged in water, but 500 feet west of the waterline. West, toward Maryland.

Now, for a State that really depends a lot on tourism and our beaches, Maryland is a similar situation, Virginia and others, this really gets our attention. Something is happening here. With apologies to Stephen Stills, something is happening here, and what it is is pretty clear to me, pretty clear to us in Delaware.

When I was Governor, I used to say that I could literally shut down my State's economy and we would still be out of compliance with respect to clean air standards, and it was because all the bad stuff was being put up from States like my native West Virginia, Ohio, Indiana, Illinois, Tennessee, and so forth. Bad stuff they put up in the air creates cheap energy for themselves. They use these smokestacks that go up 500 feet in the air. The currents just bring the stuff to the East Coast and those of us—Ben Cardin here in Maryland and others—we are at the end of America's tailpipe because the bad stuff would just come to us.

And it wasn't really fair because we would have to clean up our emissions more and more and more all the time, and at the same time the States we competed with for jobs would end up with cheap energy, and we would have expensive energy. They would have cleaner air, better health, and we would have dirtier air, and it just wasn't fair. It just wasn't right.

I remember getting involved in a discussion with a bunch of utility CEOs maybe 10 years ago. I worked for years on Clear Skies legislation. Remember George W. Bush had a proposal they called Clear Skies, and Lamar Alexander and I worked on legislation. We called it Really Clear Skies. It involved sulfur dioxide, nitrogen oxide, mercury, and CO₂, multi-pollutant legislation. And we worked on it for years, worked on it with George Voinovich for years.

I remember meeting with a bunch of utility CEOs—gosh, it might have been 10 years ago, 8 years ago. They came from all over the country to my office to talk with me about Really Clear Skies, and they said, here is what we need, Senator, here is what we need you to do.

A guy from a utility down south, he was kind of a curmudgeon guy, pretty plain spoken. He said, here is what you need to do, Senator. You need to tell us what the rules are going to be, you

need to give us a reasonable amount of time and some flexibility, and get out of the way. That is what he said. You need to tell us what the rules are going to be, give us some flexibility, a reasonable amount of time, and get out of the way.

I have known Gina McCarthy for a good while. She is not a hair-on-fire kind of person. Before she came here, she worked, I think, not for one Republican Governor, I think for two. And one of the reasons why the Administration asked her to do this job—it is a tough job at EPA, as you know—is because she is able to work with people of both parties, with the business community, try to find the reasonable middle. And I honestly believe she has worked hard to do this.

And I think in crafting the Clean Power Plan, I think what they actually tried to do at EPA is take the advice of that curmudgeon, the old utility CEO from 10 years ago, and put into a proposal something that meets those four criteria.

I would just ask Katie, if you would, just react to all that. It is a lot to throw at you, but sort of react to what I have just said.

And I appreciate the chance to go on for a little bit here, Mr. Chairman.

Katie, please.

Ms. DYKES. Well, I can say that we are really proud in Connecticut to be part of RGGI, including with Delaware, and the experience that we have shown in that program really demonstrates that States can comply with the Clean Power Plan without challenging the cost and the reliability of their grid.

All of the things that have been said about the Clean Power Plan are things that were said about RGGI when we were standing up that program many years ago. People said that it would drive up rates, and yet in Connecticut we have seen some of the lowest rates ever in the last decade, just announced coming into play this summer.

And part of that is because of RGGI and the cap that we placed on carbon, but also it is because we have seen the writing on the wall and harnessed these economic trends that are already driving lower carbon reductions. We are retiring the last coal plant in Connecticut. It just announced its retirement a couple months ago, and that is because the economics of natural gas, the incredible efficiency of new combined cycle gas power plants and the low cost of domestically produced natural gas make that generation a source of carbon reduction and lower costs, lower electric rates for our citizens.

So we see the benefits of compliance. We have seen \$1.3 billion in net benefits from implementing this program, and we are excited to share the lessons that we have learned in our States with others.

Senator CARPER. Thanks so much.

Mr. Revesz, would you just react briefly to what I have said? Just very briefly.

Mr. REVESZ. Excuse me, Senator?

Senator CARPER. Would you just react briefly to what I have just said?

Mr. REVESZ. Yes, Senator. I completely agree and was very moved by what you said concerning Delaware's inability to meet

the national ambient air quality standards were it not for reductions that have to take place in upwind States. There is nothing Delaware can do. There is nothing that any of the northeastern States can do unless States that are upwind from them take measures.

Actually, administrations of both parties over a long period of time have been working on this. Finally, the Supreme Court upheld the Transport Rule after prior rules had been struck down by the D.C. Circuit. And now the efforts to bring those emissions under control are under strong legal footing.

And it is important to emphasize that administrations of both parties have been working on this. The Clinton administration had a NAAQS rule, the administration of President George W. Bush had the Clean Air Care program, and then the Obama administration had CSAPR, the Transport Rule. And finally those rules are under strong legal footing.

These rules are enormously important for the health of Americans, and EPA has done these rules paying attention to both the costs and the benefits. Each rule has a regulatory impact analysis that shows that the benefits of these rules significantly exceed the costs. I don't mean to de-emphasize the costs. There are costs, but the benefits are much greater than those costs.

Senator CARPER. Thanks so much.

Mr. Chairman, could I just—

Senator INHOFE. Can I come back to you?

Senator CARPER. That would be great. Thanks so much.

Senator INHOFE. Let's do it that way.

Senator CARPER. Thanks so much for all this time.

Senator INHOFE. And we will hear from Senator Sullivan now.

Senator Sullivan.

Senator SULLIVAN. Thank you, Mr. Chairman. Thank you for calling this hearing. I think it is a really important hearing.

Thanks for the witnesses. I know it is a very distinguished panel.

You know, one of the things that comes up very frequently in this committee is the commitment that we all have to clean air, clean water. My State of Alaska has a lot of water and a lot of air and a very pristine environment, so we are certainly a State that is very committed to that. Matter of fact, we have some of the cleanest water and cleanest air in the country, in the world.

But one of the things that I have always been concerned about is that we also need to abide by the law or the Constitution, especially Federal agencies. And in my view the EPA is creating a record on their major rules that they have been promulgating as not abiding by the law, and a number of us have been concerned about it. We raise it. I think everybody should be raising it on both sides of the aisle; not just Republicans, Republicans and Democrats, because part of our oversight jurisdiction here is making sure that agencies do what is required by the law.

And as all of you know, being legal professionals and experts in your field, Federal agencies cannot just undertake actions because they feel like it; they have to have a statutory or constitutional authority to act. Would everybody on the panel agree with that very basic premise of administrative law?

[Affirmative nods.]

Senator SULLIVAN. Is that a nod from everybody? I am showing that everybody is nodding.

I want the EPA officials to make sure they see this because it is a pretty uncontroversial statement but sometimes doesn't always seem to make it over to the agency.

So it is not just me or others saying that. If you look at the history in the last couple years, *Utility Air Regulators v. EPA*, they lost that Supreme Court case; *EPA v. Michigan*, they lost that Supreme Court case; the WOTUS rule right now has been stayed; and pretty incredibly, the Clean Power Rule has been stayed.

My team did a little bit of research, and we asked CRS. They said looking at a review of treaties on the Supreme Court practice and Supreme Court previous decisions, this is the first time of any Supreme Court case that they have ever found where the Supreme Court of the United States placed a stay or injunction of a Federal regulation before a lower court had ruled on the merits where the lower court had not granted a stay previously. First time in the Supreme Court's history.

So my question to you is, why do you think they did that? Very, very dramatic. And I am going to give you a little hint of why I think they may have done that. It is not just the track record where they lose in every case, but not too long before that case was announced Gina McCarthy was asked on TV show if she thought she was going to win the *EPA v. Michigan* case. And that was a Supreme Court case.

Of course, it is normal for an Administrator to say, of course we are going to win, we did a good job. But then she went on, and she should have just stopped, because then she went on to say publicly, which is a statement I still find stunning from a Federal official, to say, "But even if we don't win, the rule was promulgated 3 years ago. Most of them are already in compliance," meaning the American people and private sector companies. "Investments," hundreds of millions, "have been made, so we'll catch up. We're still going to get to the toxic pollution of these facilities."

So she is saying even if we don't win, we win. Even if we lose in court, we win anyways because we promulgated this, and the poor sucker companies have had to abide by it even if they are going to get the rule overturned.

So I would like your views. Ms. Wood, I will start with you. Why do you think the Supreme Court took really historic action to stop the Supreme Court? And, again it is not just Republicans talking about this. Lawrence Tribe, when he was asked and was arguing against this rule, was very critical, saying it was unconstitutional and was quoted as saying burning the Constitution should not be part of our national energy policy.

Do you think the EPA has been burning the Constitution?

Ms. WOOD. I think that the historic nature of the stay—and you are correct that it is historic—does definitely stem from all of the things that you have noted, which is the fact that the *Michigan v. EPA* case, billions had been spent to put on control equipment for a rule that was then found unlawful.

Senator SULLIVAN. And the Administrator seems to view that as part of her strategy. Even if we lose later, it took 5 years to get

to the Supreme Court, everybody had to comply anyway, so who cares about the rule of law.

Ms. WOOD. Right. And at least in that rule, if that was her strategy, it worked, and the Supreme Court may have been very dismayed by that. And the statements that she made were part of the stay briefing. And also as you note, and as Professor Tribe had noted, there are a lot of legal infirmities with this rule that I am sure got the attention of the Supreme Court.

Senator SULLIVAN. Any other members just want to comment on why they think the Supreme Court took this historic action?

Mr. REVESZ. Senator, I think EPA's record before the Supreme Court is not nearly the one that you characterized.

Senator SULLIVAN. They are zero for three in the last Supreme Court.

Mr. REVESZ. No. They won *EME Homer City Generation v. EPA*, the Cross-State Air Pollution Rule.

Senator SULLIVAN. What year was that?

Mr. REVESZ. That was in 2014.

Senator SULLIVAN. OK.

Mr. REVESZ. The UR case, they lost one issue; they won one issue. The one issue they won on affected the vast bulk of the emissions.

Senator SULLIVAN. Utility Air Regulators, they lost that big time.

Mr. REVESZ. No, the Utility Air Regulators case, the UR case, Utility Air Regulator case, there were two issues in that case.

Senator SULLIVAN. Justice Scalia said they were violating the separation of powers.

Mr. REVESZ. On one issue. And that issue affected 50 percent of the emissions.

Senator SULLIVAN. Well, a pretty big deal.

Mr. REVESZ. And they won on 87 percent of the emissions, or some number in the high eighties.

Senator SULLIVAN. The WOTUS rule, they are losing that.

Professor, why do you think the Supreme Court took this historic action against the EPA? They have never done this before. It is a big, big deal. Why do you think they did it? Do you think it had anything to do with Gina McCarthy's outrageous statement?

Mr. REVESZ. I don't know why they did it, Senator. It is an important rule. But I wanted to address the issue of the track record. The WOTUS rule, the recent decision last week was a procedural decision; it did not affect the merits of the case at all.

Senator SULLIVAN. They stayed the entire rule. Why do you think 31 States in the United States are suing the EPA?

Mr. REVESZ. Well, some States are hurt by the rule; other States are supporting the rule. There are States on both sides.

Senator SULLIVAN. Thirty-one States. That is a lot of States.

Mr. REVESZ. Senator, the numbers are somewhat in flux. It is 27, it is 29. There are quite a number of States on the other side as well.

Senator SULLIVAN. Not 31.

Mr. REVESZ. That is true. As I said, some States would like to see this issue not addressed at all; others would like to see it addressed—

Senator SULLIVAN. But don't you think it has to be legal? Everything the EPA has to do has to be based in statute or the Constitution.

Ms. Woods, do you think what the EPA is doing is based in statute or the Constitution?

Mr. REVESZ. I do, Senator.

Senator SULLIVAN. No, I asked Ms. Woods. Sorry.

Ms. WOODS. No, I don't think it is, and five justices on the Supreme Court appear to agree with me. Also, just to follow back, I represented the Utility Air Regulatory Group in that case, Utility Air Regulatory Group v. EPA, and I absolutely count it as a victory for my client.

Senator SULLIVAN. Absolutely.

Ms. WOODS. And in the EME Homer case, that was a split victory between EPA and the people challenging that rule, and I would like to note that it went back down to the D.C. Circuit to look at the "as applied" challenges to those States, and it was thrown out in 13 States by the D.C. Circuit.

Senator SULLIVAN. Thank you.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Sullivan.

What I would like to do is go back for a short time for Senator Carper and then get to Senator Markey, if that is acceptable.

Senator CARPER. I will be Senator Markey's warm-up act here.

I would say to Senator Sullivan it is always good to have you here in these deliberations.

Sometimes EPA can't win for losing. When it comes to enforcement of the Clean Air Act, they get sued because they are not doing enough. When it comes to enforcement of the Clean Air Act, they get sued because they are not doing enough. When it comes to updating ambient air quality standards, they get sued because they are not going far enough fast enough. They get it coming and going. They get it coming and going. They have a hard job to do because they are going to get sued either way.

I think they are trying to do their job, and I am just reminded that we need to do our job. It shouldn't be left up to the agencies to try to find a way through regulations to a policy that protects our health, protects our environment, but also provides certainty and predictability that businesses need.

One of the things I know we all agree on is the major job that we have here is to provide certainty and predictability for businesses so that they can go forward, be successful, not at our harm, but in order to have a strong economy. And the question always before this committee has been can we have cleaner air, cleaner water, and also have a strong economy. I think we can have both.

The other thing it would be nice to do is actually—if the Supreme Court had a full complement of justices, and my hope is that somehow before the end of this year they can have a starting lineup. It is like trying to have a baseball team and not have a shortstop, or have a baseball team and not have a right fielder. So I think they need the full team on the field.

Thank you very much.

Senator INHOFE. Thank you, Senator Carper.

Senator Markey, before you ask your questions, we have been talking about the great environmental success that you and I, Senator Carper, and others on this committee had 2 days ago, so this is very significant, I think, that we recognize that we have made some great progress.

Senator Markey.

Senator MARKEY. Thank you, Mr. Chairman, very much.

And TSCA is an historic achievement. We all came together. We all stood together to produce that historic environmental bill. And I look forward to the day where we all stand together on climate science and stand together on the new energy policy for the future and hope that that day may be arriving in the near future, perhaps after a Supreme Court decision on the Clean Power Plan. But my ability to prognosticate the future is more limited than my ability to talk about the past and the proud past that we just had yesterday.

Senator INHOFE. Well, yes. Let me just interrupt for a moment here and say that Senator Whitehouse, in his time this afternoon, was talking about one of our colleagues said 30 years ago, and I was thinking to myself it was 7 years ago that Al Gore said there would be no more ice on the North Cap in 5 years. I can remember in my other committee that I had, the Armed Services Committee, it was 20 years ago because I was sitting there when they said in 10 years we would no longer need ground troops. So I think it is better to kind of look into the future and evaluate the present.

Senator MARKEY. I agree with you. Predicting the future is a very perilous terrain for politicians. We work toward creating the future without knowing exactly how it is going to play out. And how the Supreme Court acts is obviously something in the future.

In 2007 in the most important environmental decision that has ever been decided, *Massachusetts v. EPA*, it was a 5 to 4 decision, which, by the way, makes the case for not having a 4 to 5 Supreme Court; otherwise perhaps we might not have had a 5 to 4 decision. But Justice Kennedy voted in the majority, 5. So that is where we are going to be today, predicting the future, where these justices are going to be and even who will be on the Supreme Court. We don't even quite know that when that case might be argued. So as Yogi Berra used to say, making predictions is a very hard thing to do, especially about the future.

So my view is that we should just look at the case as it sits before us and just look back a little bit in time because many of the complaints that come from members about the impact on the coal industry, well, in the Waxman-Markey bill, we built in \$200 billion for carbon capture and sequestration. We built in billions of dollars for coal miners if they needed it; that is, if carbon capture and sequestration was not possible. We built all that money in, \$200 billion.

You know what Peabody Coal said? You know what Alpha Coal said? Do you know what Arch Coal said? They said no, we don't want it. That was the money that could have been there for carbon capture and sequestration. They said no. The Edison Electric Institute endorsed Waxman-Markey, but the coal industry exercised their veto power in the Senate, rejecting \$200 billion for carbon capture and sequestration, rejecting the money for the coal miners.

So as we hear today the concern about the coal miners, just remember that. It was Peabody Coal that made that decision. All of their stocks, of course, now are down in single digits or lower, in the negative.

But that is a little bit of history. I just want to say that it was an attempt to solve this issue, work together on that issue in a way that dealt with all of the interests, all of the parties. It wasn't going to be all or nothing, 100 percent versus zero; it was going to be something that tried to deal with the legitimate need to create a bridge for each and every technology to make it to this cleaner energy future.

But it was Peabody Coal that said no. And it is Peabody Coal that is funding the brief at the Supreme Court. Peabody Coal funding the brief in the Supreme Court. Just remember that. Same company. Same interest. Same money. Same short-term perspective. So that is what we are talking about.

And nothing, to use one of my father's terms, nothing frosts me more than having these very same people still arguing that it can't be done and we can't make the transition, even as we are going to have 16,000 new megawatts of solar and 9,000 new megawatts of wind installed in the United States this year. It is going to be the vast majority of all new electricity in the country.

But we weren't leaving coal behind, I just want to say that. Carbon capture and sequestration is a technology that could have been invested in by public monies that Peabody Coal said they did not want. So I just don't want to hear the crocodile tears from Peabody Coal and Arch Coal and Alpha Coal.

So, Professor Revesz, the stay issued by the Supreme Court does not prohibit the EPA from working on activities related to the Clean Power Plan; it only prohibits it from enforcing the requirements; is that correct?

Mr. REVESZ. That is correct, Senator.

Senator MARKEY. Thank you. Now, during the stay, the EPA is allowed to issue guidance and tools to help States that have decided to continue their plans; is that correct?

Mr. REVESZ. That is also correct. And it has also been the practice of administrations of both parties in the three last Presidential administrations when stays like this were issued.

Senator MARKEY. And critics have accused the EPA that by not announcing the effects the stay will have on all of the complying States forces States to continue work toward the Clean Power Plan using time and resources toward a rule that may be overturned. However, whether or not to change the compliance deadlines, and by how much has traditionally been decided on a case-by-case basis and not issued until the ruling; is that correct?

Mr. REVESZ. That is correct. It has always been issued when the stay was lifted at the end of the litigation.

Senator MARKEY. So from my perspective, the EPA has been very flexible in its dealings with the States. I know that there are some States that perhaps don't like this idea. I am sure there were many, many States that weren't happy with *Brown v. Board of Education*. Might have even been 31 States that were unhappy with *Brown v. Board of Education*; and they would have sued to overturn if they could get away with it. And I am sure there are

many other decisions in history that 31 States might have sued to say we don't want to move to the future; we don't want to change the way in which we do business.

But it doesn't mean that that case is going to get overturned in the Supreme Court. It doesn't mean that enough justices aren't going to come together to look at the accuracy of the argument being made by the Administration that they are upholding existing law and acting under existing law. That is what the Supreme Court did in 1954. That is what this Court also will have to decide.

And I just think it is premature and not a good use of our time to be projecting what the Supreme Court is actually going to decide. This is just a discussion of the law. And I think that the law, as it is being interpreted by the Administration, is right on the money.

So, Professor, I am just going to give you a final minute. Just tell us how we should be viewing this issue now, going forward over the next year. What is the perspective that we should have, in your opinion, in viewing this historic case as it moves to the Supreme Court?

Mr. REVESZ. Thank you, Senator. I think we should understand that there is a lot of strength in the Administration's position that the arguments that EPA is using unprecedented regulatory techniques, so, for example, that the rule is assuming there will be some fuel shifting going on or that the rule is imposing certain obligations that a plant cannot meet within the four walls of its plant, that all of those techniques have been used in the past not only by Democratic administrations but also by Republican administrations. They are part and parcel of all of these efforts that Senator Carper referenced concerning the effort to control interstate emissions. Those are all the standard toolkit of EPA.

There is another big argument about why EPA shouldn't be able to regulate the greenhouse gas emissions of power plants under section 111(d) because it is regulating the hazardous emissions of power plants under section 112. What EPA is doing in this case is essentially consistent with the approaches of administrations of both parties going back to 1990, going back to 25 years.

And on the constitutional side, Professor Tribe was mentioned several times. He made three arguments very forcefully at a House hearing. I was a Democratic witness at that hearing. Two of those arguments aren't even being made anymore by the opponents of the Clean Power Plan.

Senator INHOFE. OK, we are going to have to cut this off.

I would like say, Senator Markey, they will all be glad to know that we have just been saved by the bell.

[Laughter.]

Senator INHOFE. There is a vote that is underway and——

Senator MARKEY. Thirty seconds, if I may?

Senator INHOFE. Thirty seconds, and that is it, and then I have an idea. Go ahead.

Senator MARKEY. And I look forward to that.

Senator INHOFE. See, if you guys don't know, we really like each other.

Senator MARKEY. We do. We are good friends. We are good friends.

Senator INHOFE. Really. And he has every right to be wrong.

[Laughter.]

Senator MARKEY. You know what my father used to say? If two people agree upon absolutely everything, then you don't need one of those people. So we need each other on climate science. We need each other to have this debate.

So, again, Waxman-Markey, EEI endorsed, General Electric, DuPont, Applied Materials, Timberland, Dow Corning, Alcoa, Johnson & Johnson. We had this broad base of support. General Motors, Chrysler, all the auto industry, they all endorsed Waxman-Markey. The outlier was the coal industry, the people paying for this brief before the Supreme Court, Peabody Coal. It is the same culprit. It is the same rear view look at history, and we were trying to give them a bridge to the future so they did not have to go into bankruptcy.

Do you think they wish they could go back to 2009 again and grab that money? You know they would. OK? They made a big historic mistake. The Supreme Court will not make a historic mistake.

Senator INHOFE. Thank you, Senator Markey.

Now I am going to take the Chair's prerogative and ask Ms. Wood. You have heard this back and forth. Do you have any comments to make about the legal characterization of what we are in the middle of right now? One minute, and then we are out of here.

Ms. WOOD. One thing I would note is that Peabody Energy is only one of 149 different entities that are challenging the Power Plan. And I think the thing that we need to remember is going back to the administrative law principle that we all agreed to, which is that EPA can only act within the bounds of the statute. And five justices on the Supreme Court have indicated in a historic stay that they think that EPA is not acting within the bounds that you all, Congress, have set for them to operate.

Senator INHOFE. That is good.

We are adjourned.

Again, thank you, all the witnesses, for enduring this.

[Whereupon, at 11:18 a.m. the committee was adjourned.]