SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

pkeisler@sidley.com
(202) 736 8027

October 2, 2015

By First-Class Mail and Email
Filed in EPA Docket ID No. EPA-HQ-OAR-2013-0602

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Re: Petition for Administrative Stay Pending Judicial Review of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

Dear Administrator McCarthy:

I write on behalf of a broad coalition of business associations (the "Business Associations"),[1] representing companies spanning both the full scope of electricity generation and every other sector of the U.S. economy, to petition for an immediate administrative stay of the above-captioned rule (the "Rule") pending judicial review. The Rule, issued under § 111(d) of the Clean Air Act ("CAA"), seeks an unprecedented federal transformation of electricity generation in each State, requiring a massive phase-out of electricity generated from existing fossil fuel-fired electric generating units which, in turn, will irreparably harm the Business

[1] The Business Associations include the following: the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the National Federation of Independent Business, the American Chemistry Council, the American Coke and Coal Chemicals Institute, the American Iron and Steel Institute, the American Foundry Society, the American Forest and Paper Association, the American Fuel & Petrochemical Manufacturers, the American Wood Council, the Brick Industry Association, the Electricity Consumers Resource Council, the Lignite Energy Council, the National Oilseed Processors Association, and the Portland Cement Association.

Associations' members in the immediate future. Indeed, the Rule is *already* causing irreparable harm. Legal challenges to the Rule are highly likely to prevail, because the Rule rests on legal underpinnings both Congress and the courts have emphatically rejected. A stay of the Rule pending judicial review is necessary to prevent enormous and irreparable harm to the Business Associations' member companies and to protect the public interest.

EPA may "postpone the effective date of action taken by it[] pending judicial review" when "justice so requires." 5 U.S.C. § 705. This is clearly such a case, for the reasons below.

I. Legal Challenges Are Likely To Prevail On The Merits

The Rule exceeds EPA's legal authority in multiple, independent respects. The Business Associations identified these fundamental legal errors in their comments to the agency, but the final Rule failed to correct those errors. Without waiving review of any of the many legal errors underlying the Rule, two overarching errors in particular merit mention here and independently support a stay.

First, the Clean Air Act expressly forbids EPA from regulating existing fossil fuel-fired generating units under § 111(d). That provision disallows regulation under § 111 of "any air pollutant ... which is ... emitted from a source category which is regulated under section [112]" of the Clean Air Act. CAA § 111(d)(1)(A)(i). The Supreme Court has read § 111(d) as its plain text requires, explaining that "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under" § 112, *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011), and EPA has previously admitted that this is the "literal" meaning of the statute, *see, e.g.*, 70 FR 15,994, 16,031 (Mar. 29, 2005). Existing fossil fuel-fired generating units are regulated by the Mercury and Air Toxics Standards ("MATS") rule, which EPA issued in 2012 under § 112 of the Clean Air Act. *See* 77 FR 9,304 (Feb. 16, 2012).[2] The entire Rule, which purports to base itself solely on § 111(d)'s grant of authority, is therefore invalid.

Second, the Rule also violates the Clean Air Act by purporting to impose "standards of performance" not for individual sources as the Act requires, but for the entire energy sector in each regulated state. *See, e.g.*, *ASARCO, Inc. v. EPA*, 578 F.2d 319, 327 (D.C. Cir. 1978); CAA § 111(a)(3). EPA itself admits that the "best system of emission reduction," which is used to set the "standard of performance" for each source, must be "implementable by the sources

[2] The Supreme Court recently held that EPA's failure to consider costs when adopting the MATS rule was unreasonable and remanded to the D.C. Circuit for further proceedings. *See Michigan v. EPA*, Nos. 14-46, 14-47, and 14-49 (Jun. 29, 2015). The Supreme Court did not vacate the MATS rule, which remains in effect. *See id.*

themselves."[3] But the Rule specifically finds that individual fossil fuel-fired generating units cannot achieve the stringent emission reduction goals the Rule demands by making on-site changes. The only way to satisfy the Rule's demands is for the entire electricity industry to be fundamentally restructured, shifting electricity generation away from existing coal-fired generating units to gas-fired generating units and especially to new renewable sources—in short, through use of measures that cannot be "implement[ed] by the sources themselves," but that require replacement of these sources with other new sources that are not otherwise subject to regulation under the Rule. Preliminarily, such requirements are not a "standard of performance" within the meaning of the CAA. *See* CAA § 302(k) ("emission limitation" and "emission standard," which define "standard of performance" in § 111, must "limit[] ... emissions of air pollutants on a continuous basis"). Independently, the clear text of § 111(d) does not permit EPA to look beyond individual sources and cannot serve as the basis for restructuring the entire electricity sector by dictating the types of sources that must be constructed and the order in which they must be dispatched. Even if the statutory text were ambiguous (and it is not) an entire array of interpretive canons—including the presumption that Congress does not silently delegate the most important and transformative policy decisions to agencies, and the presumption against federal intrusion into domains traditionally reserved to the States[4]—would resolve that ambiguity against the Rule. EPA's claim "to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy"—and in the course of doing so, to annex the regulatory domain belonging to the States—will be "greet[ed] ... with a measure of skepticism" by the courts. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks omitted). Finally, EPA cannot salvage this fundamental flaw by simply claiming that the Rule's "best system of emission reduction" is "implementable by the sources themselves" on the basis that the *owner or operator* of each source may make arrangements with *other* independent sources that can produce electricity with lower emissions. The Clean Air Act provides no loophole to its overarching requirement that standards must be "implementable by the sources themselves," and explicitly regulates owners and operators separately from the sources themselves, preventing EPA from collapsing this distinction.

II. The Business Associations' Members Will Continue To Suffer Irreparable Harm Absent A Stay

The Business Associations represent a vast scope of companies across every sector of the U.S. economy. The member companies include power plants, mining companies, railroads that

---

[3] EPA, Rule 518 (Aug. 3, 2015), *available at* http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf.

[4] *See, e.g., Ark. Elec. Cooperative Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983); *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005).

transport fuel to power plants, companies that service and repair power plants, and countless businesses that depend on a supply of affordable and reliable electricity.

Absent a stay, these companies will be irreparably harmed by the Rule. The Rule will force the closure of vast numbers of existing coal-fired generating units, which constitute the backbone of the American electric grid. EPA predicts closures will begin imminently, as soon as 2016. Ultimately, under the modeling upon which EPA itself relied to issue the Rule, approximately 46-48% of America's coal-fired generating capacity will close by 2030 under the Rule.[5] EPA itself predicts significant closures will begin to occur in 2016. *Compare* Base Case Capacity Retrofits.xls *with* Rate-Based Capacity Retrofits.xls *and* Mass-Based Capacity Retrofits.xls, *available at* http://www.epa.gov/airmarkets/programs/ipm/cleanpowerplan.html. The Rule also will necessitate the construction of new power generation facilities that otherwise would not be economically viable or constructed absent the Rule, which, in turn, will cause economic harm to existing facilities that will be at a severe competitive disadvantage given the artificial regulatory incentives the Rule is conferring on these new facilities. And the Rule will force the closure of the many coal mines that support these coal-fired plants. Indeed, the Rule is already causing significant regulatory uncertainty that is preventing companies from engaging in normal generation planning and from making the most efficient investments in units. Nor are companies willing to make necessary investments in the coal mines that support those units. Regardless of the outcome of judicial review, the companies that own coal-fired generating units or coal mines will be unable to recover the lost revenue from the period of closure and, in many instances, will not be able to bring units or mines back online after the Rule has forced their retirement. Nor will they be able to recover the revenue they would have realized from making investments during the period of uncertainty preceding judicial review. Some companies, faced with the regulatory uncertainty the Rule is inducing, have already begun shifting investments away from coal-fired electricity generation and coal mining; many of these investment decisions will be irreversible, regardless of the outcome of judicial review. Indeed, you recently recognized that steps industry takes to comply with a regulation are often irrevocable even when the Rule is subsequently invalidated on review.[6]

---

[5] EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* 2-3, 3-31 (Aug. 2015), *available at* http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf.

[6] *See* Timothy Cama & Lydia Wheeler, *Supreme Court overturns landmark EPA air pollution rule*, The Hill (Jun. 29, 2015), *available at* http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule (Administrator McCarthy unconcerned whether EPA regulation will be struck down by Supreme Court because the regulation "was [enacted] three years ago," and most plants "are already in compliance" and "investments have been made.").

Beyond power plants themselves, the closure of these units under the Rule will harm the entirety of the American economy. Companies that transport coal to power plants and companies that provide repair and maintenance services to the plants and infrastructure support to the industry will be forced to close or drastically reduce operations as their customer base shrivels. And, because coal-fired plants are among the most affordable and reliable sources of electric power, industries that rely on electricity for their operations—especially electricity-intensive industries such as manufacturing and steelmaking—will see their costs increase. The lost revenues and additional expenses caused throughout the economy while so many coal-fired power plants are closed will not be recoverable. And some companies in trade-exposed industries may be forced by high electricity prices to relocate production overseas before the courts have weighed in on the Rule's legality. Indeed, these harms are already being realized, as companies begin to shift investments away from coal-fired electricity and coal mining.

Communities across America will feel the harm the Rule inflicts. Thousands of employees of power plants, as well as employees of the coal mines and other companies that supply and support the plants, will lose their jobs. These jobs often offer the best salaries in economically-depressed areas; the loss of these jobs will deal a devastating blow to these communities. And, because coal-fired plants and coal mines are often the largest taxpayers in rural areas, the Rule will deprive small towns and counties of critical tax revenues.

At base, the Rule mandates a fundamental restructuring of the electricity industry—a restructuring that has already begun in light of the regulatory uncertainty the Rule creates—but does nothing to account for the loss of businesses, assets, jobs, income, or local taxes that will result from that restructuring. A stay is warranted to prevent the irreparable harm that would befall all sectors of industry related to the electricity generating industry.

III. The Balance Of Equities Demands A Stay

The balance of harms and the public interest decisively favor a stay. In contrast to the immediate irreparable harm that the Rule will cause—and is causing—for all sectors of the electricity generating industry and related industries, a stay will not cause harm to the public interest that the Rule purports to protect. Despite EPA's predictions that the Rule will shut down coal power plants in 2016, the Rule does not count on any immediate reductions of emissions to alleviate any harms during at least the next seven years. Rather, the Rule seeks to reduce emissions by 2030 (with some interim goals to be met starting in 2022), and these efforts, according to the Rule, are focused on addressing harms that might occur decades or centuries from now. The Rule itself states that the relevant timeframe for harms addressed by the Rule is not immediate but the next few decades or "centuries and millennia."[7] Such a timeframe for

[7] Rule at 102.

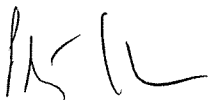
achieving reductions forecloses any claim that immediate implementation of the Rule is required to protect the public interest or that a stay of the Rule pending judicial review will have a material impact on EPA's ability to achieve its ultimate goals, should the Rule survive scrutiny. So, too, does the fact that EPA deferred the Rule for more than three years after the date by which it had previously promised the Rule, but now anticipates that it will shut down facilities within months of the Rule taking effect. *See* 75 FR 82392 (Dec. 30, 2010) (proposing settlement agreement committing EPA to issue final Rule by May 26, 2012); *West Virginia v. EPA*, No. 14-1146, Dkt. No. 1510473 (filed Sept. 3, 2014) (attaching approved settlement agreement).

Given that the Rule will result—and is resulting—in immediate harms but is not intended to achieve benefits within the time period in which judicial review will be completed, the balance of harms and the public interest compel issuance of a stay pending judicial review.

IV. Conclusion

For the foregoing reasons, "justice ... requires" that the Rule be stayed pending judicial review. 5 U.S.C. § 705. The Business Associations petition for a stay of the Rule that tolls each of the compliance dates in the Rule on a day-for-day basis. Thank you for your consideration.

Very truly yours,



Peter D. Keisler
Roger R. Martella
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Counsel for Business Associations

cc: Janet McCabe, Acting Administrator, EPA Office of Air and Radiation