

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

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

STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *et al.*,
Respondents.

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

**BASIN ELECTRIC POWER COOPERATIVE'S
MOTION TO STAY FINAL RULE**

Christina F. Gomez
Lawrence E. Volmert
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202
Ph. 303-295-8000 / Fx.: 303-295-8261
cgomez@hollandhart.com
lvolmert@hollandhart.com

Patrick R. Day
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
Cheyenne, WY 82001
Ph.: 307-778-4200 / Fx.: 307-778-8175
pday@hollandhart.com

Emily C. Schilling
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Ph. 801-799-5800 / Fx. 801-799-5700
ecschilling@hollandhart.com

*Attorneys for Petitioner Basin Electric Power Cooperative
in Case No. 15-1393 (consolidated with Lead Case No. 15-1363)*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

GLOSSARY..... iv

INTRODUCTION..... 1

BACKGROUND..... 2

 I. Legal Background..... 2

 II. Movant’s Interests..... 4

ARGUMENT 5

 I. Petitioners are Likely to Succeed on the Merits. 5

 II. Basin Electric Will be Irreparably Harmed if a Stay is Not Granted 15

 III. There is Little Risk of Harm in the Absence of a Stay, and the
 Public Interest Will be Served by a Stay..... 19

CONCLUSION 20

ADDENDUM

ATTACHMENTS

 Att. 1 Declaration of David Raatz

 Att. 2 Declaration of Gavin McCollam

 Att. 3 Declaration of Lyle Witham

 Att. 4 EPA Final Rule, Carbon Pollution Emission Guidelines for Existing
 Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg.
 64,662 (Oct. 23, 2015)

TABLE OF AUTHORITIES

Cases

<i>ASARCO Inc. v. EPA</i> , 578 F.2d 319 (D.C. Cir. 1978).....	7, 8
<i>Cal. Pharmacists Ass’n v. Maxwell-Jolly</i> , 563 F.3d 847 (9th Cir. 2009), <i>vacated and remanded on other grounds sub nom., Douglas v. Indep. Living Ctr. of S. Cal., Inc.</i> , 132 S. Ct. 1204 (2012).....	19
<i>Chamber of Commerce v. Edmonson</i> , 594 F.3d 742 (10th Cir. 2010)	19
<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	12
<i>Cuomo v. U.S. Nuclear Regulatory Comm’n</i> , 772 F.2d 972 (D.C. Cir. 1985)	5
<i>In re Prairie State Generating Co.</i> , 13 E.A.D. 1 (EAB 2006).....	14
<i>In re La Paloma Energy Center, LLC</i> , 16 E.A.D. __, PSD Appeal No. 13-10 (EAB Mar. 14, 2014) (EAB 2014)	14
<i>In re Rochester Public Utilities</i> , PSD Appeal No. 03-03 (Aug. 3, 2004)	9
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996).....	12
<i>Michigan v. EPA</i> , 135 S. Ct. 2699 (2015)	11
<i>Nat’l Asphalt Pavement Ass’n v. Train</i> , 539 F.2d 775, 786 (D.C. Cir. 1976)	5
<i>Nat’l Lime Ass’n v. EPA</i> , 627 F.2d 416, 431 (D.C. Cir. 1980).....	14
<i>Thunder Basin Coal Co. v. Reich</i> , 510 U.S. 200 (1994).....	19
<i>Unbelievable, Inc. v. N.L.R.B.</i> , 118 F.3d 795 (D.C. Cir. 1997)	15
* <i>Util. Air Regulatory Group v. EPA</i> , 134 S. Ct. 2427 (2014).....	8, 10, 11

Statutes

42 U.S.C. § 4321	17
------------------------	----

*42 U.S.C. § 7411	2, 5, 6, 7, 8, 9, 11, 12, 13, 15
42 U.S.C. § 7479	15

Regulations

75 Fed. Reg. 82392 (Dec. 30, 2010)	20
80 Fed. Reg. 64510 (Oct. 23, 2015).....	3
80 Fed. Reg. 64662 (Oct. 23, 2015) (Att. 4)	1, 3, 4, 6, 7, 9, 10, 12, 13, 14, 20

Other Authorities

1977 H. Rep. No. 95-294.....	8, 9
EPA, Clean Power Plan State Goal Visualizer, State Generation Mix, www2.epa.gov/cleanpowerplanttoolbox	10
EPA, Clean Power Plan State-Specific Fact Sheets, www2.epa.gov/ cleanpowerplanttoolbox/clean-power-plan-state-specific-fact-sheets.....	9
EPA, <i>Legal Memorandum Accompanying Clean Power Plan for Certain Issues</i> , www3.epa.gov/airquality/cpp/cpp-legal-memo.pdf	10, 12
EPA, Memo to Docket, “Stranded assets analysis,” www.regulations.gov/ #!documentDetail;D=EPA-HQ-OAR-2013-0602-36478	12
EPA Office of Air Quality Planning & Standards, “PSD and Title V Permitting Guidance for Greenhouse Gases,” EPA-457/B-11-001 (Mar. 2011).....	14
<i>Hearing on EPA’s Proposed Clean Power Plan before the Senate Comm. on Env’t. & Public Works</i> , 113 Cong. (2014) (statement of Gina McCarthy, Administrator, EPA)	19
Paul C. “Chip” Knappenberger & Patrick J. Michaels, “0.02°C Temperature Rise Averted: The Vital Number Missing from the EPA’s ‘By the Numbers’ Fact Sheet,” CATO at Liberty, www.cato.org/blog/002degc-temperature- rise-averted-vital-number-missing-epas-numbers-fact-sheet (June 11, 2014).....	20

* *Authorities upon which we chiefly rely are marked with asterisks.*

GLOSSARY

BSER	Best system of emission reduction
CAA	Clean Air Act
CO ₂	Carbon dioxide
EGU	Electric generating unit
EPA	U.S. Environmental Protection Agency
MWh	Megawatt-hour
NGCC	Natural Gas Combined Cycle
Rule	Final Rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

INTRODUCTION

This Court should stay the effective date of EPA's Final Rule ("the Rule")¹ pending judicial review and should extend all compliance dates by the number of days between publication of the Rule and a final decision in this consolidated appeal.²

EPA has dramatically expanded the reach of its authority to an unprecedented extent. Whereas in the past EPA has established standards of performance that apply to individual sources, the Rule regulates the entire electricity generation system, across the nation. Also unlike past regulations, the Rule mandates that sources shut down or reduce operations and that new and different sources of electricity be built to replace them. This is not regulating emissions; it is regulating the production of electricity. There are serious questions about the validity of this unparalleled expansion of EPA's authority and, therefore, there is a strong possibility this Court will vacate the Rule.

Meanwhile, compliance with the Rule will require a huge and costly effort by the regulated community, beginning immediately, to develop a vast amount of new electricity generating facilities. Basin Electric Power Cooperative ("Basin Electric") alone will have to spend hundreds of millions of dollars while this appeal is pending, unless a stay is granted. Collectively, parties regulated under the Rule will spend billions in that time frame. If this Court vacates the Rule, these resources will have

¹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (Att. 4).

² Basin Electric submitted a request to stay to EPA on October 29, 2015, but has received no response. Also, counsel for Basin Electric has attempted to notify lead counsel for Respondents by telephone and left a voice mail regarding the motion.

been wasted. Balanced against this probable waste is the fact that neither other parties nor the public will suffer any meaningful harm if a stay is granted. Therefore, the Court should stay the Rule pending judicial review of this case.

BACKGROUND

I. Legal Background.

Under § 111(b) of the Clean Air Act (“CAA”), EPA sets “standards of performance” for new sources that belong to certain source categories EPA has found to “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A).

A standard of performance “reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA] determines has been adequately demonstrated.” *Id.* § 7411(a)(1). But for existing sources, § 111(d)(1) grants EPA the more limited authority to establish procedures for the States to establish standards of performance for sources “to which a standard of performance ... would apply if such existing source were a new source.” *Id.* § 7411(d)(1).

EPA’s Rule, rather than simply creating guidelines for the States, establishes stringent standards of performance for carbon pollution from existing fossil fuel-fired electric generating units (“EGUs”) premised on a re-structuring of the entire EGU sector. EPA’s standards consist of “emission performance rates” for the two

subcategories of coal-fired and natural-gas-fired plants: 1,305 lbs CO₂/MWh (coal) and 771 lbs CO₂/MWh (gas). 80 Fed. Reg. at 64742. Comparatively, in the final rule for *new sources*, EPA set less stringent rates: 1,400 lbs CO₂/MWh (coal) and 1,000 lbs CO₂/MWh (gas). 80 Fed. Reg. 64510, 64512-13 (Oct. 23, 2015).

To reach the emission performance rates for existing sources, EPA used a two-prong analysis: (1) determining the “best system of emission reduction . . . adequately demonstrated” (“BSER”), 80 Fed. Reg. at 64666; and (2) quantifying the BSER and applying it to the source categories, *id.* at 64811. In the first prong, EPA determined that the BSER consisted of three “building blocks”: (1) improving efficiency at coal-fired plants; (2) shifting electricity generation from coal-fired plants to lower-emitting natural gas-fired plants; and (3) shifting electricity generation from coal- and natural gas-fired plants to zero-emitting renewable energy sources. *Id.* at 64667. Only the first of these building blocks addresses actions that can be taken at the source. The other two must be implemented externally. Yet EPA argues that all three building blocks are available to affected sources through on-site activities (“operational shifts”) or off-site actions (“direct investment” in lower-emitting sources and “emissions trading”). *Id.* To include off-site activities as part of the BSER, EPA interpreted “system of emission reduction” to include not only actions a source can implement at the facility, but any “set of measures that source owners or operators can implement to achieve an emission limitation applicable to their existing source.” *Id.* at 64762.

In the second prong, EPA quantified the emission reductions it believed were achievable through application of the building blocks. Applying those reductions, EPA determined the national performance rates for the two sub-categories. *Id.* at 64811. EPA then translated those rates into a single Statewide rate-based goal and an equivalent mass-based goal. *Id.* at 64821. The final performance rates—or the State equivalents—must be achieved by 2030. *Id.* at 64811. EPA also set “mandatory reduction” requirements for the periods of 2022-24, 2025-27, and 2028-29 as “interim performance rates” to create a “glide path” to meet the final goals. *Id.* at 64827-28. In total, EPA estimates that the Rule will result in a 32% reduction in carbon dioxide (“CO₂”) emissions from 2005 levels. *Id.* at 64665.

II. Movant’s Interests.

Basin Electric is a not-for-profit regional wholesale electric generation and transmission cooperative that provides wholesale power to member rural electric systems in nine States. Basin Electric owns and/or operates electric generation facilities in North Dakota, South Dakota, Wyoming, Montana, and Iowa, serving approximately 2.9 million consumers. Several of these facilities will be required to comply with the Rule’s stringent emission requirements. Based on a preliminary assessment, Basin Electric estimates that it will need to retire about 43% of its existing coal-fired generating capacity and build an unprecedented amount of new natural gas-fired and renewable generation resources at a cost of more than 5 billion dollars, with more than \$300 million of that amount being spent during the course of this appeal.

ARGUMENT

This Court reviews four factors in determining whether to stay agency action pending appeal: (1) the likelihood that the movant will succeed on the merits; (2) the prospect of irreparable harm to the movant absent a stay; (3) the possibility of harm to other parties if a stay is granted; and (4) the public interest. *See* D.C. Cir. R. 18(a); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

All four criteria are satisfied here, and the Court should issue a stay.

I. Petitioners are Likely to Succeed on the Merits.

Petitioners are likely to succeed on the merits because EPA has exceeded its statutory authority under the CAA. EPA has impermissibly expanded the reach of its § 111(d) authority beyond the statutory directive to regulate emissions from individual sources, and seeks instead to control the operation of the entire electricity generation and distribution structure in the country. EPA also exceeded its § 111(d) authority by regulating existing sources more stringently than new sources, attempting to use BSER to reduce output at existing units, and usurping the regulatory powers Congress conferred upon the States. Finally, even if the Rule were within EPA's authority, the Rule still is neither appropriately justified nor the result of reasoned decisionmaking and, therefore, it is arbitrary and capricious. *See Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 786 (D.C. Cir. 1976) (applying arbitrary and capricious review standard).

1. EPA's authority does not extend beyond individual sources. EPA does not have the authority to include within its BSER framework building blocks 2 and 3,

which reach facilities and activities beyond the “fence line” of an existing source.

Under § 111(d), EPA establishes regulations that set forth the procedures for a State to submit a plan that “establishes standards of performance for any *existing source*.”

42 U.S.C. § 7411(d)(1) (emphasis added). “Existing source” means any “stationary source” other than a new source, and “stationary source” means “any building, structure, facility, or installation that emits any air pollutant.” *Id.* § 7411(a)(3), (6).

The CAA thus plainly limits “standards of performance” to the emission of pollutants from the regulated *source*, as performance standards are “emission limitation[s]” that apply to individual buildings, structures, facilities, or installations. *Id.* § 7411(a)(1).

The Rule, however, reaches beyond individual sources to restructure the entire power generating system. EPA recognizes that actions at the facility itself could not achieve significant greenhouse gas emission reductions, particularly where cost would preclude technologies from qualifying as “standards of performance.” *See* 80 Fed. Reg. at 64769 (recognizing that building block 1 “yield[s] only a small amount of emission reductions,” but that other technologies with greater emission reductions “are substantially more expensive than building blocks 2 and 3”). So to achieve greater reductions, EPA argues that the reference to a “system of emission reduction” radically enlarges its authority. EPA uses a dictionary definition of “system” to argue that the word has a “broad meaning” encompassing emission reduction measures taken outside the facility. 80 Fed. Reg. at 64720, 64761-62. But this distorts the plain meaning of the statute, which provides that a § 111(d) standard of performance

applies only to an existing *source*. When the statute says a standard of performance means what is achievable through the “best system of emission reduction” (or BSER), that “system” is referring back to the standard of performance. Thus, just as the standard of performance applies to the *source*, so does BSER also apply to the *source*. BSER has no meaning independent of the standard of performance, and is not a basis for extending EPA’s statutory beyond the individual source.

EPA also argues that the CAA reaches beyond the source to its owners and operators because, “[a]s a practical matter, the ‘source’ includes the ‘owner or operator’ of any building, structure, facility or installation for which a standard of performance is applicable.” *Id.* at 64762. EPA rationalizes that the CAA references “application” of the BSER, thereby limiting the system to “measures that can be implemented – ‘appl[ied]’ – by the sources themselves, that is, as a practical matter, by the actions by the owners or operators of the sources.” *Id.* at 64720. But it defies both the statute and common sense to equate a source with its owner and anything else the owner affects or controls. If that were so, it would follow that, since General Electric manufactures jet engines and washing machines, EPA could treat jet engines and washing machines as the same source. Certainly, that it not the case.

Standards of performance under § 111(d) apply only to sources, not to the country’s entire electricity generating framework. EPA is attempting to “change the basic unit to which the [standard applies] from a single building, structure, facility, or installation”—“the unit prescribed in the statute.” *ASARCO Inc. v. EPA*, 578 F.2d

319, 327 (D.C. Cir. 1978). But EPA “has no authority to rewrite the statute in this fashion.” *Id.* Just as this Court in *ASARCO* rejected EPA’s attempt to define a source under § 111 as an entire plant instead of a single building, structure, facility or installation, so should the Court now reject EPA’s attempt to define a source to include thousands of plants and other facilities spread across the nation. *See also Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (EPA must “operate ‘within the bounds of reasonable interpretation’”) (citation omitted).

2. EPA cannot regulate existing sources more stringently than new sources. EPA’s reliance on a BSER that cannot be implemented by a facility alone results in a standard that is even more stringent than EPA’s aggressive standards for new sources. *See supra* at 3. This is fundamentally at odds with the structure and legislative history of the CAA, and thus is not a reasonable application of the CAA.

The CAA is structured to distinguish between new or modified sources and existing sources, and to “recognize that the easiest and most economical time to impose the requirements on major new sources of pollution [is] when a new facility [is] being proposed for construction.” *In re Rochester Public Utilities*, PSD Appeal No. 03-03 at 11 (Aug. 3, 2004) (citing H. Rep. No. 95-294 at 185 (1977)). In contrast to § 111(b)’s provisions for new sources, § 111(d) involves an express balancing of the costs of controls and remaining useful life of existing sources against the benefits of regulation. 42 U.S.C. § 7411(d)(1) (requiring the “State in applying a standard of performance . . . to take into consideration, among other factors, the remaining useful

life of the existing source”). This discrepant treatment reflects Congress’ judgment that “it was only right that the costs of applying best practicable control technology be considered by the owner of a large new source of pollution as a normal and proper expense of doing business.” 1977 H. Rep. No. 95-294 at 184. By promulgating a § 111(d) standard for existing sources that is more stringent than the corresponding § 111(b) standard, EPA has turned this statutory framework on its head.

EPA concedes that the § 111(d) existing source performance standards “have a lower nominal emission limit than the standards for new and modified sources,” but argues that assessing the relative stringencies of these standards is “an ‘apples-to-oranges’ comparison” due to the “flexibility that this rule offers.” 80 Fed. Reg. at 64785. This is an apples-to-oranges comparison only because EPA properly applied the § 111(b) standard to “sources” as defined in the CAA, but unlawfully applied the 111§ (d) standard to the entire U.S. electricity generation and transmission system.

Even if EPA were authorized to regulate beyond sources, its claim of flexibility is based on oversimplification and conjecture. For example, Basin Electric has fossil-fuel fired generating assets in two States—North Dakota and Wyoming—with the most stringent State “goals” and the fewest opportunities to take advantage of the Rule’s so-called flexibilities.³ Two of Basin Electric’s steam generating units are

³ Wyoming’s goal is 1,299 lbs of CO₂/MWh, a 44.3% reduction from the 2012 baseline, while North Dakota’s goal is 1,305 lbs of CO₂/MWh, a 44.9% reduction from the baseline. *See* EPA, Clean Power Plan State-Specific Fact Sheets, www2.epa.gov/cleanpowerplantoolbox/clean-power-plan-state-specific-fact-sheets.

located in Wyoming, which has only one NGCC plant (currently under construction).⁴ Under this scenario, “phasing in” reductions as EPA proposes, 80 Fed. Reg. at 64676, provides no meaningful relief for existing steam generating EGUs that must comply with a limit that EPA determined is more stringent than the BSER for new sources.

EPA’s interpretation of these provisions therefore fails to “account for both ‘the specific context in which . . . language is used’ and ‘the broader context of the statute as a whole.’” *Util. Air Regulatory Group*, 134 S. Ct. at 2442 (citation omitted).

3. EPA cannot use BSER to reduce generation at existing units. The CAA and source performance standards have never before been used to require facilities to reduce output. EPA concedes as much, noting that “reduced generation by itself does not fit within our historical and current interpretation of the BSER.” 80 Fed. Reg. at 64780. Yet EPA also admits that building blocks 2 and 3 are premised on reducing generation at existing fossil-fuel fired EGUs and replacing it with generation from zero-emitting resources. *Id.* at 64724. *See also id.* at 64725 (“[E]ach individual affected EGU is integrated into a ‘complex machine’ that makes it possible for generation from one generating unit to be replaced with generation from another generating unit *for the purpose of reducing generation from CO₂-emitting generating units.*”) (emphasis added).

EPA asserts that limits on a source’s capacity are regularly used under other CAA programs. *See id.* at 64780-81; EPA, *Legal Memorandum Accompanying Clean Power*

⁴ EPA, Clean Power Plan State Goal Visualizer, State Generation Mix, www2.epa.gov/cleanpowerplanttoolbox.

Plan for Certain Issues, www3.epa.gov/airquality/cpp/cpp-legal-memo.pdf (“Legal Mem.”) at 62-75. But in each of these cases, a source could install control technology to meet the standard and continue operating; and if it decided to shut down instead of installing controls, that was its choice. *Id.* Here, sources have no such choice. The standard itself is premised on shutting down or reducing output at fossil-fuel fired EGUs—which is an improper use of EPA’s § 111 authority. *Cf. Michigan v. EPA*, 135 S. Ct. 2699, 2706-12 (2015); *Util. Air Regulatory Group*, 134 S. Ct. at 2449.

4. EPA impermissibly usurps authority Congress granted to the States.

Section 111 creates a clear delineation of authority between EPA and the States in establishing emission reduction requirements for new and existing sources. For new sources, EPA can establish, implement, and enforce standards of performance. 42 U.S.C. § 7411(b). But for existing sources, the *States* are authorized to establish, implement, and enforce such standards; and EPA’s authority is limited to prescribing regulations pursuant to which the States establish the standards. *Id.* § 7411(d)(1). These procedures must allow States to take “remaining useful life” and “other factors” into account in determining how to apply a performance standard to a particular source, as the CAA expressly permits the States to consider these factors. *Id.* Only in instances where a State fails to submit a satisfactory plan can EPA step in to establish, implement, and enforce its own performance standard. *Id.* § 7411(d)(2).

In the Rule, EPA has—under the guise of identifying emission guidelines for the States—established binding standards of performance for existing EGUs, thereby

usurping the States' authority under § 111(d). And by prohibiting the States from adjusting their goals based on remaining useful life and other facility-specific factors, 80 Fed. Reg. at 64870, the Rule contravenes the express language of § 111(d).

EPA claims it can limit the manner in which States consider remaining useful life in applying the standards of performance. *See* 80 Fed. Reg. at 64873; Legal Mem., p. 37-38. But EPA cannot reasonably interpret the CAA or its implementing regulations to allow such authority, because “Congress has directly spoken to the precise question at issue.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (“Where the language of the statute is clear, resort to the agency’s interpretation is improper.”).

EPA argues that the Rule provides “inherent flexibility” to allow States to consider remaining useful life within the limits set by EPA. 80 Fed. Reg. at 64871. Yet the “inherent flexibility” EPA relies on does not, in fact, exist. *See supra* at 9-10. Although EPA allows States to consider remaining useful life in *implementing* EPA’s standards, it precludes States from considering remaining useful life in *setting* the standards, as provided by the statute.

Further, EPA’s terse analysis of stranded assets—which simply assumes that the performance rates can be met without retiring any EGUs before they or any expensive pollution controls installed on them have fully depreciated—does not reflect reality. *See* Legal Mem., p. 44; EPA, Memo to Docket, “Stranded assets analysis,” www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-

36478. In Wyoming and North Dakota, for instance, most of Basin Electric's coal-based EGUs were constructed between the mid-1970's and mid-1980s and are undergoing significant capital investments for pollution controls to meet various requirements of the CAA. Applying the Rule's new requirements to its operations, Basin Electric has determined that 5 of its 12 coal-fired EGUs, representing about 43% of its current coal-fired generating capacity, may have to be shut down before fully depreciated. Att. 1 (Raatz Decl.), ¶ 12. Forcing the premature retirement of these units by limiting their hours of operation will result in stranded investment and considerable premature and uneconomical investment in new resources.

5. EPA's BSER is neither adequately demonstrated nor reasonable. As EPA admits, the BSER cannot be "purely theoretical or experimental," but must "reasonably be projected to be available to an individual source" and "capable of being met under most adverse conditions which can reasonably be expected to recur and which are not or cannot be taken into account when determining the 'costs' of compliance." 80 Fed. Reg. at 64722 (citations omitted). Additionally, the costs of the BSER cannot be "exorbitant," "excessive," or "unreasonable." *Id.* at 64720 (citations omitted); *see also* 42 U.S.C. § 7411(a)(1) (defining "standard of performance").

EPA claims the BSER includes a "menu of actions" that EGUs "may implement in different amounts and combinations in order to achieve their emission limits at reasonable cost." 80 Fed. Reg. at 64724. But nowhere in the Rule does EPA demonstrate that this "menu of actions" (taken alone or in concert) is technically

feasible, is reasonable from a cost perspective, or actually can be implemented by all or most EGUs. *See Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 431 (D.C. Cir. 1980) (remanding a New Source Performance Standard because “the record does not support the ‘achievability’ of the promulgated standards for the industry as a whole”).

EPA’s regional grid-based approach to determining the BSER—which depends on unsupported assumptions about heat rate improvements, increased utilization at certain NGCC facilities, and vast increases in renewable energy availability—is not reflective of what reasonably can be achieved by any single facility. *See* 80 Fed. Reg. at 64727-30. Imposing broad assumptions of an entire “system” on a single source fundamentally redefines the nature of the source, which runs contrary to EPA’s policy on the scope of technologies considered when permitting new and modified sources. EPA Office of Air Quality Planning & Standards, “PSD and Title V Permitting Guidance for Greenhouse Gases,” EPA-457/B-11-001 at 26 (Mar. 2011), citing *In re Prairie State Generating Co.*, 13 E.A.D. 1, 23 (EAB 2006) (“GHG Permitting Guidance”). According to EPA’s guidance, for example, “the option of using natural gas as a primary fuel would fundamentally redefine a coal-fired [EGU]” in most cases. *Id.* at 27. *See also In re La Paloma Energy Center, LLC*, 16 E.A.D. ___, PSD Appeal No. 13-10, slip op. at 27 (EAB Mar. 14, 2014) (noting the Environmental Appeals Board has upheld determinations “that an all-solar facility would be inconsistent with the applicant’s business purpose of providing baseload supply of electricity”). Yet the Rule requires coal-based power plants to comply with a rule premised on the use of

NGCC, nuclear, or renewable generation in a manner not achievable by the source.⁵ This effectively redefines the source, arbitrarily departing from EPA's own guidance.

Nor is this an issue on which the Court can defer to EPA, as EPA is not an expert on the nation's electricity generating framework. See *Unbelievable, Inc. v. N.L.R.B.*, 118 F.3d 795, 805 (D.C. Cir. 1997) ("court does not defer to agency decision in matter outside of agency's expertise").

For these reasons and those cited in other Petitioners' motions, EPA's Rule is unlawful, arbitrary, and capricious, and Petitioners are likely to succeed on the merits.

II. Basin Electric Will be Irreparably Harmed if a Stay is Not Granted

If the effective date of the Rule is not stayed and the compliance dates are not extended, Basin Electric will be forced to spend more than \$300 million during the course of this appeal to ensure compliance by 2022, notwithstanding that this Court (or the Supreme Court) may well conclude that the Rule is beyond EPA's authority, arbitrary and capricious, or otherwise invalid. Att. 2 (McCollam Decl.), ¶ 22.

Notwithstanding its ongoing efforts to incorporate renewable energy resources into its overall generating portfolio, complying with even the initial interim step requirement under the Rule will require Basin Electric to take immediate, large-scale,

⁵ The § 111(a) performance standards set a regulatory floor for the pre-construction permitting program known as "prevention of significant deterioration." See 42 U.S.C. § 7479(3). Because the case-by-case Best Available Control Technology determination is source-specific and requires that technology be technically feasible, it follows that the regulatory floor for this assessment—the standard of performance—also must be reasonably applied to the source. See GHG Permitting Guidance at 17.

and expensive actions. Att. 1 (Raatz Decl.), ¶ 11; Att. 2 (McCollam Decl.), ¶ 12.

Basin Electric will need to spend more than \$5 billion dollars building new natural gas baseload capacity and wind and back-up gas generating assets, as well as associated transmission lines, that otherwise are not needed to meet its members' electricity demands. Att. 1 (Raatz Decl.), ¶¶ 22-23. Further, Basin Electric will need to retire significant generating capacity that has between 8 and 28 years of remaining useful life. *Id.*, ¶¶ 4, 21. The net result will be a stranding of assets and significant additional costs that must be borne by Basin Electric's members and their customers. *Id.*, ¶ 22.

Building this renewable energy, gas generation, and transmission infrastructure will involve a complex set of tasks undertaken on a scale significantly beyond anything Basin Electric has ever undertaken in its efforts to integrate renewable energy into its generation mix. Att. 2 (McCollam Decl.), ¶ 22. Basin Electric will need to undertake about 15 large scale projects to develop wind farms and natural gas-fired electric generating facilities just to meet the initial interim step requirements scheduled to take effect in 2022. *Id.*, ¶ 9. Tasks like selecting sites, purchasing property and rights-of-way, conducting necessary technical and environmental analyses, obtaining permits, and constructing and commissioning resources will take years to complete and must be initiated now. *Id.*, ¶¶ 11-12. Immediate efforts are required to ensure that Basin Electric has the ability to satisfy its contractual obligations to provide electricity to its various members while complying with the Rule's emission standards. *Id.*, ¶¶ 11-14.

For Basin Electric to develop the massive amount of new generating assets and transmission lines needed to comply with the Rule's emission requirements in the next six years, before the start of the first compliance period in 2022, would be challenging even during normal times. But these are not normal times. If the Rule goes into effect, it will necessitate a radical transformation of the U.S. electric generation sector, consisting of an unprecedented shutdown of existing coal-fired generating units and a build-out of enormous amounts of new renewable and gas-fired generating resources. The increased demand for all the equipment and services necessary to accomplish this transformation over the next six years likely will result in serious supply shortages and necessitate that companies like Basin Electric act quickly to acquire the necessary equipment to ensure they can continue meeting their customers' electricity demand needs while at the same time complying with the stringent CO₂ emission requirements that, absent a stay, will go into effect in 2022. *See* Att. 2 (McCollam Decl.), ¶ 21. The sheer magnitude of the projects Basin Electric must undertake also necessitates additional time to complete the tasks, above and beyond what would be required for individual projects undertaken in the ordinary course of business. *Id.*, ¶ 11.

Compliance for Basin Electric is further complicated by the likelihood that some of the projects it will need to complete prior to the effective date of the Rule will need to undergo review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* Basin Electric's service area, particularly in Wyoming, includes extensive federal lands, and the massive amount of acreage necessary for wind farms

as well as substantial transmission infrastructure means it is reasonably possible, if not probable, that some of these projects will be subject to NEPA review. While there is no set time for the NEPA process, it typically requires 3-5 years for large projects such as those that Basin Electric will need to undertake. Att. 3 (Witham Decl.), ¶ 13. The time needed for the NEPA process increases the time pressure to begin immediately to develop the generation assets necessary to comply with the Rule.

Contrary to EPA's predictions suggesting that companies can readily meet the Rule's required CO₂ emission standards through a combination of proven strategies, Basin Electric's specific analysis of its compliance obligations just to meet the initial interim step standard in 2022 show that it could not possibly comply with that standard if it waits until the Court rules on the pending Petitions for Review to begin to develop more than \$5 billion in new facilities. While EPA may suggest that Basin Electric can wait until this Court rules on the Petitions for Review before undertaking this herculean task, such a delay would be reckless if Basin Electric expects to both meet its customers' needs and comply with the Rule in the event that it is upheld. Accordingly, Basin Electric must undertake substantial efforts costing hundreds of millions of dollars during the next two years in order to ensure that it will be able to comply with the current 2022 effective date.

In the likely event that the Rule is overturned, Basin Electric's significant expenditures during the pendency of the appeal will have been wasted, and Basin Electric will have no recourse against EPA or any other party to recover those costs.

See, e.g., Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) (“complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs”); *Chamber of Commerce v. Edmonson*, 594 F.3d 742, 770-71 (10th Cir. 2010) (“Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.”); *Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 851-52 (9th Cir. 2009) (monetary losses may constitute irreparable harm where sovereign immunity precludes a party from obtaining a remedy in damages against the government defendant), *vacated and remanded on other grounds sub nom., Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012).

Delaying the effectiveness the Rule and extending the compliance dates to account for the time necessary for the appellate process will avoid such waste.

III. There is Little Risk of Harm in the Absence of a Stay, and the Public Interest Will be Served by a Stay.

A stay will not harm other parties and will serve the public interest. EPA has acknowledged that the Rule “is not about pollution control” but, rather, is “about increased efficiency at our plants,” “investments in renewables and clean energy,” and “investments in people’s ability to lower their electricity bills by getting good, clean, efficient appliances, homes, rental units.” *Hearing on EPA’s Proposed Clean Power Plan before the Senate Comm. on Env’t. & Public Works*, 113 Cong. (2014) (statement of Gina McCarthy, Administrator, EPA). EPA does not attempt to show that the Rule will

actually benefit the climate (and thus the public health and welfare) in any meaningful way. And others' calculations suggest that the Rule may avert the rise of only "less than two one-hundredths of a degree Celsius by the year 2100."⁶

Thus, EPA's regulatory goals will not be thwarted by a stay, and time is not of the essence in implementing the Rule. Indeed, EPA missed its agreed-upon deadline to finalize a rule regulating greenhouse gases from existing EGUs by more than three years. *See* 75 Fed. Reg. 82392 (Dec. 30, 2010) (EPA agreeing to act by May 26, 2012). EPA also extended the implementation date of the Rule two years beyond its initial proposal. 80 Fed. Reg. at 64669. And EPA has recognized that electric utilities already have made strides to reduce greenhouse gas emissions and will continue to do so even without the Rule. *See id.* at 64662 ("This final rule will continue progress already underway in the U.S. to reduce CO₂ emissions from the power sector.").

The public interest also will be served by a stay, which will ensure during the pendency of this appeal the continued provision of affordable and reliable electricity. And, as noted above, delaying compliance with the Rule for a short time will not have any significant impact on climate or public health or welfare.

CONCLUSION

For all these reasons, the Court should stay the Rule.

⁶ Paul C. "Chip" Knappenberger & Patrick J. Michaels, "0.02°C Temperature Rise Averted: The Vital Number Missing from the EPA's 'By the Numbers' Fact Sheet," CATO at Liberty, www.cato.org/blog/002degc-temperature-rise-averted-vital-number-missing-epas-numbers-fact-sheet (June 11, 2014).

Dated: November 5, 2015.

Respectfully submitted,

s/ Christina F. Gomez

Christina F. Gomez

Lawrence E. Volmert

HOLLAND & HART LLP

555 Seventeenth Street, Suite 3200

Denver, CO 80202

Ph. 303-295-8000 / Fx.: 303-295-8261

cgomez@hollandhart.com

lvolmert@hollandhart.com

Patrick R. Day

HOLLAND & HART LLP

2515 Warren Avenue, Suite 450

Cheyenne, WY 82001

Ph.: 307-778-4200 / Fx.: 307-778-8175

pday@hollandhart.com

Emily C. Schilling

HOLLAND & HART LLP

222 South Main Street, Suite 2200

Salt Lake City, UT 84101

Ph. 801-799-5800 / Fx. 801-799-5700

ecschilling@hollandhart.com

*Attorneys for Petitioner Basin Electric Power
Cooperative*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO STAY was electronically filed today through the Court's CM/ECF system, which will electronically serve all registered counsel for the parties to this case.

Dated: November 5, 2015

s/ Christina F. Gomez _____

Christina F. Gomez

Counsel for Petitioner Basin

Electric Power Cooperative