

Testimony of Richard Revesz
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Hearing on “*Implications of the Supreme Court Stay of the Clean Power Plan*”
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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—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.bracewelllaw.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/PPP_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).