

The Legal Implications of the Environmental Protection Agency's
Greenhouse Gas Existing Source Performance Standard for Utilities:
Whether, How and When the Courts Will Undo It

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Chairman Capito, Ranking Member Carper, and Members of the Subcommittee:

Thank you for providing me the opportunity and the honor to appear before you today.

The subject of today's hearing addresses the legal implications of what is likely the most important and precedent-setting environmental regulation of a generation. President Obama instructed the Environmental Protection Agency to develop the Greenhouse Gas Existing Source Performance Standard for Electric Generating Units ("ESPS") to address today's pressing environmental challenge: global climate change. In pursuit of a target of reducing greenhouse gases ("GHGs") from power plants by 2030, EPA proposes for the first time in the nearly 45 year history of the Clean Air Act ("CAA") to implement new legal interpretations that would massively expand its authority to set standards for existing sources of air pollutants far beyond what is technically achievable, feasible, or legally permissible at those sources. If implemented as proposed, the ESPS would become the federal government's most comprehensive regulation of energy itself, and forever elevate EPA's role to be the nation's most powerful regulator of energy at both the federal and state levels.

No matter how noble the goal may be set by the President and being implemented by EPA, there can be no debate at the outset that the Executive Branch first must act within the bounds and limits set by Congress. While it is settled now that EPA can regulate GHGs under the CAA, the unprecedented approach it proposes to take in the ESPS squarely conflicts with the CAA, 45 years of legal precedent, and a recent decision by the Supreme Court.

Although EPA has yet to finalize the ESPS, Administrator McCarthy has indicated that the final rule—due this summer—is unlikely to change materially from the proposal. For instance, McCarthy explained in an interview that “we are quite certain

¹ The views expressed here are that of the author are not intended to represent the views of Sidley Austin LLP or its clients.

that [the] obligations [in the proposed rule] will be required.”² Given the certainty of its finalization, and the immediate irreparable harm that will flow from it, the time is thus now ripe for this Subcommittee to consider the legality of the final rule, the impact on states and the regulated community, and the legal precedent for future regulation of other sectors.

In my testimony below, I seek to answer three key questions: (1) *whether* the reviewing courts are likely to undo the ESPS; (2) *how* courts might address the precedent setting legal concerns the rule raises; and (3) *when* courts might take action. In summary, I, like many other legal commenters, conclude that the ESPS ultimately is unlikely to survive judicial review in its full form, but, importantly, in the interim states and the regulated community will confront significant irreparable harm while judicial review proceeds over the next several years. Indeed, as described below, the most important factor regarding the ultimate impact and harms of the ESPS may be the timing of judicial review.

Background

By way of background, I am both a lifelong environmentalist and a career environmental lawyer. I am very proud to have spent the majority of my career in public service, as a trial attorney in the Justice Department's Environment Division, as the General Counsel of the United States Environmental Protection Agency (a position to which I was unanimously confirmed by this Committee and the full Senate), and as a judicial law clerk on the Tenth Circuit Court of Appeals. Last week, Who's Who Legal named me the leading environmental attorney globally based on peer recommendations.

Both in the government and in private practice, I have served as counsel in almost every case addressing climate change and greenhouse gases. Last year, the Supreme Court in *UARG v. EPA* specifically adopted a position advanced by my clients that both affirmed in part and rejected in part the EPA's GHG regulation under the Prevention of Significant Deterioration (“PSD”) permitting program. In my current capacity as a private practitioner, I am privileged to work with a number of stakeholders, including private companies and trade associations, environmental organizations, and the government, to develop regulatory solutions that advance environmental protection and address climate change while also enabling the United States to retain economic competitiveness in a trade sensitive, global environment

² Interview by Kate Sheppard with Gina McCarthy, EPA Administrator, *available at* http://www.huffingtonpost.com/2015/04/21/mccarthy-epa-climate-change_n_7102410.html.

where very few economies provide even the faintest glimmer of our own environmental controls.

Finally, in both my government and private careers, I am very proud of the opportunities I have had to participate in and advance international rule of law initiatives, working to help develop the enactment of environmental and public participation laws in growing economies. Recently, I served as one of two vice-chairs in the United States of the International Bar Association's Climate Change Justice and Human Rights Task Force, which released a landmark report regarding international legal mechanisms to address climate change. I am also honored to serve on the American Bar Association's President's Sustainable Development Task Force, Rule of Law Initiative, and as a delegate to the United Nations at the Rio+20 sustainable development conference in Brazil and the World Justice Forum at the Hague.

Setting the Stage for Judicial Review:
The Importance of Climate Change in the Courts
v.
The Precedent Setting Legal Nature of the ESPS

Before addressing the specific questions surrounding the merits, remedy, and timing of judicial review of the ESPS, it is important first to set the stage by which the D.C. Circuit and the Supreme Court will review the final rule.

First, like most significant policy issues, the courts will not review the legal issues in a jurisprudential vacuum detached and ignorant from the environmental goals being sought. This is a factor that greatly weighs in EPA's and the President's favor. In the eight years since the Supreme Court first held in *Massachusetts v. EPA* that EPA could regulate GHGs under the existing CAA, the question of EPA's general authority to address climate change is settled in the courts. But even more importantly for EPA, during these eight years the courts repeatedly have signaled that they view climate change as an important policy goal and have endorsed many of the efforts by the government to address GHGs.

The most active courts on climate change issues since 2007's *Massachusetts v. EPA* decision have been the United States Supreme Court, the D.C. Circuit Court of Appeals, and the Ninth Circuit Court of Appeals. (And here the Supreme Court and D.C. Circuit will play the key review roles in the ESPS.) Each court has issued decisions largely affirming federal and state authority to address GHGs and, specifically, regulatory agencies' ability to tailor old laws to address the new challenge of climate change. The Supreme Court has addressed EPA's authority now on three occasions, *Massachusetts v. EPA*, *AEP v. Connecticut*, and *UARG v. EPA*, and with the

exception of a partial vacatur in the *UARG* decision, has endorsed EPA's efforts to use the CAA to regulate GHGs. The Ninth Circuit perhaps has been the most explicit in discussing the court's view on providing leeway to regulatory agencies to address climate change. In addressing a Constitutional challenge to a purported California change regulation, the Ninth Circuit declared the Commerce Clause an "archaic formalism" and opined that "California should be encouraged to continue to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise" and held that the court "will not . . . block" California from such initiatives."³ While the D.C. Circuit has not gone so far with explicit language, its decisions to date largely have affirmed EPA's GHG regulations to the extent allowed by the Supreme Court.

Thus, in 2015, it would be naïve for anyone to underestimate the importance on which courts consider climate change to be an important, if not paramount, policy goal for regulators to pursue and the likely discretion and leeway courts will be inclined to give to measures to address GHGs, even if they entail some creative and novel interpretations of legal authority. This factor may become particularly significant for the courts that review the ESPS given the perception of a pressing need by the United States to take action to reduce GHGs, the unlikelihood of Congressional action on the issue, and the uncertainty associated with the unknown policies of the next Administration. For these reasons, EPA unlikely will be defending its rulemaking on a level playing field, but instead before courts that are likely to be pragmatic in understanding what the Agency is trying to do with its handicapped middle aged legal authority in pursuit of the modern goal of addressing climate change.

At the same time, though, however noble the goal is perceived by the courts, they also will have to balance the unprecedented nature of EPA's legal approach, and the extraordinary consequences that endorsing such an approach would have for future regulation under the Clean Air Act generally.

As described below, the ESPS presents numerous significant precedent-setting and legal issues of first impression in the CAA's 45-year history that, if affirmed, will forever shape if not fundamentally reinvent the scope of EPA's regulatory reach moving forward. Indeed, this may be the first rule in EPA's history where the agency's lawyers felt compelled to include a separate legal justification document in the record to provide the opening argument in favor of its various pushing-the-envelope positions. There are far more novel issues of first impression presented in the rulemaking than there are settled ones.

³ *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013).

Most significantly, these issues, described below, will have expansive precedent beyond the specific rulemaking; even more importantly, if affirmed, they will fundamentally redefine and reshape EPA's regulatory reach for the next generation of rulemakings in a way typically reserved for legislative amendments. In essence, the proposed ESPS would be the nation's broadest and most extensive regulation of energy itself and establish EPA's authority effectively to reorganize the entire energy generation sector. By way of analogy, the impact of the ESPS here on the energy industry is akin to the impact of recent healthcare legislation on the medical services industry with one key distinction: unlike with healthcare, Congress has not specifically acted to authorize EPA to engage in the effective restructuring of the impacted sector here.

Along the way, the ESPS also would forever redefine the system of cooperative federalism upon which the nation's environmental laws are built and challenge Constitutional limits on the federal government's ability to commandeer states to pursue federal policies

Given the two important overarching considerations of addressing climate change and the precedent of the ESPS, the litigation of the ESPS is likely to be as extraordinary as the rule itself. Ultimately, despite the prominent significance and importance to the courts of the goal of addressing climate change, for the reasons described below the legal precedent presented by EPA's approach in the ESPS is likely to tip the scales in the favor of the Rule's challengers. Thus, the key questions at this time go beyond merely *whether* the courts will undo the ESPS, but *how* they will do so and *when* such a decision will be realized. I now take each of those questions in turn.

Whether **The Courts Will Undo the ESPS**

Ultimately, I believe there are five key arguments that will be considered by the courts in deciding the legality of the ESPS.

1. The effect of CAA Section 112 on Section 111(d).

The question of whether Section 112 forecloses EPA's regulation of existing power plants under Section 111(d) has received an unprecedented amount of attention for a proposed rule as it already has been presented to the D.C. Circuit in three distinct challenges to the proposed rule. Assuming the D.C. Circuit does not resolve the issue now, it certainly will confront it again when the ESPS is finalized.

In short, the argument goes like this: the plain language of the codified version of Section 111(d) does not apply to air pollutants that are emitted from source categories subject to Section 112 (which governs hazardous air pollutants (“HAPs”)). Fossil fuel-fired power plants, in turn, are subject to the Section 112 hazardous air pollutant standards under EPA’s Mercury and Air Toxics Standards rule. Thus, even EPA has agreed that that “a literal reading” of this provision “would mean that EPA cannot regulate HAP or non-HAP emitted from a source category regulated under Section 112.”⁴ The Supreme Court has similarly found the language of section 111(d) to be clear. After describing generally EPA’s authority to regulate existing sources under Section 111(d), the Court in *AEP* noted that “[t]here is an exception: EPA may not employ Section [111(d)] if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, Subsection [108-110], or the ‘hazardous air pollutants’ program, Section [112]. See Section [111(d)(1)].”⁵

Of course, everyone now knows that this argument is not so straightforward. Specifically, the analysis is complicated here by the peculiar fact that Congress enacted competing revisions to the same provision, one originating in the House of Representatives and one in the Senate. The Senate version reads slightly differently, but different enough, and would preempt from regulation under Section 111(d) only those pollutants that are actually regulated under Section 112.

There is little doubt that decades from now law professors will be teaching how the courts ultimately resolve this unique issue in administrative law classes. But today the challengers have the better of the arguments. Although it may seem instinctual to simply invoke standard *Chevron* deference here, as EPA attempts to do in choosing to give full weight to the Senate version while virtually disregarding the House version, in this instance, however, citing *Chevron* may be too simplistic a solution to save the agency’s interpretation. Foremost, EPA itself has recognized that the Senate version was a “drafting error,”⁶ and it is hard to see why that version should be given any weight at all, let alone greater weight than the House version. In fact, EPA has previously recognized that the House amendment is “the correct amendment,” and

⁴ See Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List, 70 Fed. Reg. 15994, 16032 (Mar. 29, 2005).

⁵ *AEP v. Connecticut*, 131 S. Ct. 2527, 2537 n.7, 41 ELR 20210 (2011).

⁶ See 70 Fed. Reg. at 16031.

that it means just what the States say it does.⁷ Further, when faced with conflicting provisions, EPA is required “to give effect to both if possible.”⁸ Indeed, EPA reached this same conclusion in a 2005 final rule, explaining that it “must attempt to give effect to both the House and the Senate [versions.]”⁹ Here, as stated above, any attempt to give effect to the House version that has been codified in Section 111(d) is fatal to the ESPS because, as EPA has recognized, the literal language of that provision “mean[s] that EPA cannot regulate HAP or non-HAP emitted from a source category regulated under Section 112.”

2. Reconciling EPA’s Section 111(b) and (d) Rules

Although it is well-established doctrine that courts are inclined to defer to regulatory agencies on technical and scientific issues, there also are well-established exceptions to the rule. Courts offer no deference when an agency takes inconsistent positions across related regulations; instead, courts require that “identical words used in different parts of the same act are intended to have the same meaning.”¹⁰

The CAA contains two provisions governing performance standards. Section 111(b) governs new sources, and Section 111(d) governs existing sources. There is no debate that Section 111(b) and (d) are related, if not symbiotic, provisions.

However, EPA’s approaches to setting performance standards based on the Best System of Emission Reduction (“BSER”) adequately demonstrated in the two proposals are entirely independent, distinct, and ignorant of each other, if not flatly inconsistent. For example, in the Section 111(b) proposal, EPA’s BSER analysis focuses specifically on emission reduction opportunities for individual facilities within the fence-line of those facilities, and sets separate standards for coal- and natural gas-fired EGUs. By contrast, in the Section 111(d) proposal, EPA adopts an entirely distinct approach to BSER that looks far beyond the fence-line of any given facility, and merges not only coal and gas together, but also GHG reductions associated with renewable energy, nuclear energy, and demand-side energy efficiency—energy sectors that are not subject to the Section 111(b) proposal in the first place, and arguably not

⁷ EPA, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines*, Pub. No. EPA-453/R-94-021, 1-5 – 1-6 (1995).

⁸ *United States v. Borden Co.*, 308 U.S. 188, 189 (1939).

⁹ 70 FR 15994, 16031.

¹⁰ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

even subject to the CAA.

As a result of these disparate approaches, the Section 111(d) ESPS proposal turns Section 111 on its head by setting standards for existing facilities that are *more stringent* than those for new facilities in 30 states. If the ESPS survives the first argument above, and a court concludes that there is no generic preemption of Section 111(d) for Section 112 sources, this inconsistency between the Section 111(b) and (d) approaches may be grounds for the court to remand EPA’s specific approach back to the drawing board for a rule that draws a stronger nexus between new and existing source regulation.

3. Regulating “Beyond the Fenceline”

The most novel, important and precedent setting legal issue presented in the ESPS is the proposal’s approach to setting performance standards for EGUs based on emission reduction goals that can only be realized beyond the fenceline of those facilities. For the first time in the history of the CAA, EPA is interpreting its authority to set standards for regulated facilities—here, coal and natural gas power plants—based on emissions reductions that can only be achieved outside those facilities and from facilities such as nuclear and renewable facilities that are not even subject to CAA regulation. In so doing, EPA has assumed regulatory authority over energy generation, dispatch, and retail demand that has always been predominantly (if not exclusively) subject to state regulation.

EPA’s policy rationale for adopting this approach is apparent. The agency concludes that, under the best of circumstances, existing coal-fired EGUs can realize at most 6 percent reductions in their GHG emissions by 2030 (a number that most coal-fired EGUs would contest as unrealistic and too aggressive). Thus, to realize the goal of 30 percent reductions by 2030, as outlined in the proposed rule, EPA had to look elsewhere to make up the difference. The core premise of the ESPS, therefore, is that fossil fuel-fired EGUs can be held accountable for the actions of third parties in other sectors that can reduce overall GHG emissions by displacing coal. And the other side of the coin is EPA’s authorization to states to also hold non-EGUs—who are not otherwise subject to CAA regulation—liable under the CAA as a means of enforcing those reductions.

Putting aside the policy goals, the legality of this approach is untested and beyond the bounds of EPA’s past regulation under the CAA. EPA hinges almost the entirety of its position on the fact that the Section 111 standard here—the best *system* of emission reduction—enables EPA to regulate a “system” of reductions. But this is a heavy lift for a single word read out of context. The arguments surrounding the legislative

history, case law, and past practice have been thoroughly fleshed out in the public comments, with challengers pointing to the approach's inconsistencies with everything that has come before it during the generations of CAA implementation to date.

But beyond the pure legality of the issue, the fundamental question for judges will focus on the precedent-setting nature of the decision. Ultimately, putting the specific arguments aside, supporting EPA's interpretation would require a court to endorse an approach that can hold individual facilities responsible and liable for the actions of third parties in entirely distinct sectors that are not regulated by the same rule or perhaps by the CAA at all. EPA's "portfolio" approach of compliance also, in turn, would hold unrelated third parties liable for a rule under a provision of the CAA that was never intended to apply to them. Even a court sympathetic to EPA's policy goals should pause on the precedential nature of such a decision, not only for this and future GHG rulemakings, but also for the potentially dramatic expansion of the CAA in other contexts into the future.

The legal questions here also extend beyond the CAA. When viewing the ESPS's beyond-the-fenceline approach through the lens of being fundamentally a regulation of energy in the states, states have advanced arguments about how the ESPS upsets the delicate balance between state and federal regulation of the energy sector expressed in the Federal Power Act, state regulations, and regional energy agreements. To implement EPA's ESPS, many states would have to enact new laws and regulations to enforce the new policies set by EPA, even though EPA itself would lack the authority to implement them directly under the CAA. All of this raises questions about the ESPS unraveling cooperative federalism, in potential violation of the Tenth Amendment and other laws.

4. The Challenges with EPA's Energy Sector Technical Assumptions

In the ordinary course, EPA should feel most confident and challengers most insecure when the legal debate before a court turns to challenging EPA's technical assumptions. As the D.C. Circuit recently reminded litigators who challenge EPA rules, "[w]e do not determine the convincing force of evidence, nor the conclusion it should support, but only whether the conclusion reached by EPA is supported by substantial evidence when considered on the record as a whole." Thus, seasoned EPA litigators devote precious little real estate in briefs to challenging technical issues and factual conclusions.

The ESPS, however, may present an exception to this general practice rule for challengers. Throughout the rule, EPA relies on several overarching uniform

assumptions regarding heat rate improvements at coal-fired EGUs, the ability to seamlessly switch dispatch from coal to natural gas combined cycle facilities, states' abilities to enact renewable portfolio standards and preserve at-risk nuclear energy, and efforts to improve demand-side energy efficiency on an annual basis.

It would not be surprising to see the courts take a deeper dive than they ordinarily are inclined to with both the lack of a record basis for EPA's assumptions and a litany of examples where the real world in individual states is at sharp and distinct odds with EPA's across-the-board assumptions. Although EPA surely will cite a mountain of case law in support of its position that neither other parties nor the courts should second-guess its judgment on its factual conclusions, the assumptions that will be challenged are not highly technical environmental and scientific issues where deference is most warranted for EPA, but rather involve assumptions about energy issues outside EPA's expertise. Indeed, just a few days ago, in *Delaware Department of Natural Resources and Environmental Control v. EPA*, the D.C. Circuit vacated portions of a rule governing emergency backup generators in part on the ground that EPA is not the federal agency tasked with regulating the power grid. Further, given the black-and-white nature of rebuttal facts that already have been presented by states and industry in the filed comments, courts are likely to be more willing to truly assess whether EPA's conclusions are arbitrary and capricious.

5. In the Shadow of the Supreme Court

Just five days after the proposed rule was published in the *Federal Register*, the Supreme Court issued its decision in *UARG v. EPA*, a challenge to EPA's inclusion of GHGs in the Prevention of Significant Deterioration ("PSD") permitting program. While the Supreme Court upheld aspects of the regulatory regime EPA proposed, it struck down EPA's attempts to extend the regulatory scheme of the CAA in a novel fashion, stating that:

When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U. S., at 159, 120 S. Ct. 1291, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."¹¹

¹¹ *UARG v. EPA*, 134 S. Ct. 2427, 2444.

Beyond that broader direction, however, also came the Court's comment that EPA cannot "regulate millions of small sources" including commercial, residential, and public buildings, a holding that appears to speak directly to EPA's proposal to regulate demand-side energy efficiency.

Although it is too early to know how lower courts, not to mention EPA, will implement this direction across a wide range of rulemaking challenges, *UARG* seems highly relevant here. In the ordinary course, there is probably little doubt that an agency, in the wake of such a relevant Supreme Court decision, would take the time to revisit its regulatory approach to reconcile it with the Court's direction. But very little about the ESPS is ordinary, and the administration has committed to an approach and time line that does not offer the flexibility required to fix the fundamental issues identified by the Court.

Thus, of the various arguments likely to be considered by the courts, the most inescapable one may be the shadow of the Supreme Court's *UARG* decision. While EPA certainly will work to distinguish it in the record, the D.C. Circuit is unlikely to give the Supreme Court's holding short shrift. As for the Supreme Court itself, it is admittedly difficult to fathom how five Justices who were sufficiently concerned about the EPA's assertion of expansive permitting authority would not share as significant a concern with a rule that is exponentially broader in reach.

How **The Courts Will Undo the ESPS**

For many legal observers in this area, the key question is not whether the courts will strike down the ESPS, but instead how they will do so. In essence, there are two potential paths for the courts to rectify legal flaws and concerns with the ESPS: a full relief option and a partial relief option.

Several of the arguments above would likely warrant the court vacating the ESPS. Specifically, this scenario likely would arise if the court found that Section 112 preempts Section 111(d), if the court found the Section 111(b) and 111(d) approaches inconsistent, or if the court found the *UARG* decision as precluding such a sector wide regulation entirely. Under a "full relief scenario," EPA may have limited options left to address existing power plants under Section 111(d) of the Clean Air Act, and would look to other programs such as the PSD permitting program to realize GHG reductions from plant modifications that are triggered by the emissions of conventional air pollutants and, potentially, Section 111(b)'s coverage of modified and reconstructed existing sources. In addition, states would continue to have the ability

to pursue organic authority to address GHG emissions under state programs and legislation such as California’s AB32 and the northeast RGGI coalition.

Other legal arguments might lead to a partial vacatur. For example, successful challenges to EPA’s beyond the fenceline approach and/or its technical assumptions might lead to the court drawing lines in EPA’s Blocks 1-2-3-4 approach. Under such a result, the court might find that EPA has some legal authority to regulate under the ESPS program, but contain it to one or more of the four building blocks. Indeed, anticipating the likelihood of this scenario, EPA is rumored to be inserting a “severability provision” into the final ESPS in an effort to salvage part of the rule making—a signal that the Agency itself is bracing for the possibility of a remand on at least one of the building blocks.

When **The Courts Will Undo the ESPS**

Finally, for states and regulated parties adversely impacted by the ESPS, no question is becoming more important than the timing of judicial review and a final decision by the courts. Although EPA sets what at first blush appears to be a seemingly far off deadline of 2030 for full compliance with the ESPS, given the broad and unprecedented scope of the ESPS, historically there have been few environmental regulations whose extraordinary impacts will irreparably harm states and regulated parties so soon.

At the outset, the harm to the states will be extraordinary and irreparable. The ESPS is unique in that it places the primary implementation burdens on the states themselves. EPA has set aggressive deadlines requiring states to submit plans on how they will comply with the ESPS within one year after the rule is finalized, although EPA may grant limited extensions if States can show sufficient progress toward developing a final plan. As described by Attorney Generals Morrissey and Pruitt, this will put states squarely in the proverbial catch-22 position of expending significant state resources and creating regulatory uncertainty at home to develop plans that many states believe violate not only the Clean Air Act, but the Constitutional division of powers between states and the federal government. In addition, much of what EPA would require will warrant new state legislation. EPA presumes that the politically accountable legislative bodies of various states will comply with EPA’s asserted goals regarding fossil fuels, renewable energy, and energy efficiency in the time established by EPA. If states do not submit adequate plans, EPA has made it clear that it will pursue the reductions in the states itself, which raises significant questions about EPA’s own ability to dispatch energy among sources in a state, run a renewable portfolio standard mandate, maintain nuclear energy set for retirement, and operate an energy efficiency program.

In addition to state environmental agencies, the ESPS will pose significant challenges for public utility commissions and other organizations charged with operating and maintaining the electricity grid. To comply with EPA's aggressive emission reduction goals, PUCs, Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") will be forced to change from least cost dispatching to environmental dispatching. This fundamental transformation could pose significant untested questions for grid reliability and PUCs, RTOs, and ISOs will be required to invest significant resources to ensure the reliable delivery of electricity. Further, because the geographic scope of RTOs and ISOs differ from those of the states, these organizations will have to operate in a manner that ensures compliance with multiple and perhaps conflicting state plans. Recognizing the significant risks that the ESPS poses for these entities and for electricity consumers, FERC has urged EPA to include a reliability mechanism in the final rule to ensure that EPA's environmental regulations do not threaten the reliability of electricity sector. Several other regional bodies including the North American Reliability Corporation, Southwest Power Pool, the Electric Reliability Council of Texas, and the Midcontinent Independent System Operator have all questioned whether electricity can be reliably provided under the emission reduction requirements that EPA would impose.

Finally, the ESPS, once final, will have an immediate impact on the regulated community. In the proposed rule, EPA has set interim compliance deadlines that must be realized as soon as 2020. On average, these interim 2020 compliance deadlines are approximately two thirds as stringent as the final 2030 compliance requirements. This means that the bulk of the reductions must be realized far in advance of 2030, with the most significant and dramatic burden occurring between now and 2020. This so-called "cliff" between now and 2020 may lead to decisions to shut down coal plants in advance of 2020 while leaving inadequate time to develop the generation capacity and infrastructure for new facilities given the timing necessary for planning, permitting, construction, and startup of new facilities and infrastructure. EPA has hinted that it recognizes this concern and plans to soften the interim deadlines in the final rule. However, it is unlikely to change the ultimate targets to an extent that would avoid the immediate impact and harm to the regulated community once it finalizes the rule.

Unfortunately, under the best of circumstances, judicial review in the D.C. Circuit and the United Supreme Court likely will outlive the near term deadlines in the ESPS. On average, the D.C. Circuit issues decisions 19 months after the commencement of an administrative appeal. The Supreme Court issues decisions on average 9 months after the granting of a petition for certiorari. Importantly, these time frames do not include the time for petitions for rehearing and the time for the filing of and review of a

petition for certiorari. Indeed, recent history has shown that it took more than four years from the filing of litigation challenging EPA's recent greenhouse gas standards for the PSD program to a final decision by the Supreme Court—and the case remains active in the D.C. Circuit to this day. In the meantime, both the states and the regulated industry will be irreparably harmed awaiting a court decision as they decide during the pendency of review whether to proceed in reliance of the possibility of the rule being affirmed and implemented or risk the potential for severe sanctions for noncompliance.

The common rebuttal to these concerns is that almost all environmental rules lead to some immediate harm to both industry and state regulators. That may be true as a general point, but the ESPS is unique and distinct in unprecedented ways. For example, under the well established NAAQS state and federal implementation program regimes, Congress first specifically authorized EPA to implement a NAAQS applying to the states and second, in turn, authorized EPA to delegate EPA's authority to states. Here, however, EPA can point to no authorization by Congress enabling EPA to implement blocks 2, 3 and 4 of the ESPS; indeed, several states have commented that the Constitution's Tenth Amendment forbids Congress from doing so. Thus, EPA cannot require the states to do what Congress has not authorized EPA to do in the first place, and what the Constitution arguably forbids. Furthermore, the ESPS reaches not only specific facilities, but virtually the entire energy grid, and would warrant changes to not only energy production but infrastructure and states laws and compacts.

Thus, the timing issues associated with implementation of the ESPS, the requirements of state plans, and judicial review take on an unprecedented importance here. States will be pressed to decide whether to waive their asserted Constitutional rights or risk enforcement by EPA while they engage in judicial review of the ESPS in the courts.

Similarly, the harm to industry during judicial review is distinct from other rulemakings. In conventional environmental rulemakings, the regulated community typically will be required to make economic investments in new technologies at existing facilities between the time of a final rule and the completion of judicial review. While these investments can be significant and costly, these harms are distinct from the decisions the ESPS requires. Because there is no existing add on technology to reduce GHGs of the magnitude required by EPA, complying with the ESPS could force decisions to shut down coal facilities in favor of natural gas, renewable, and nuclear facilities for which any one generator may have no control. Thus, energy providers in many states will need to make irreparable decisions regarding not only power generation, but also transmission and infrastructure, that will entail more than just economic harm due to investments at existing facilities, but also fundamental

decisions about the viability of existing and new facilities and the need for new infrastructure. Such consequences are far beyond the impact of conventional environmental rulemakings.

For these reasons, the actual fate of the impact of the ESPS will be decided as much by the timing of a final decision as it will the ultimate outcome by the courts. Given the unlikelihood that the ESPS will survive judicial review fully in its anticipated final form, the timing of relief obtained by the courts ultimately is likely to be the key factor in assessing the magnitude of harm caused to states and the cost and reliability of electricity not only during the pendency of judicial review, but on a going forward basis after a final court decision.

Thank you for the opportunity to share my views on this important topic. I would be happy to answer any questions.