**Executive Summary of State/Industry Petitioners’ Brief in the Challenge of the CPP**

D.C. Federal Appeals Court Core Issues Brief

The brief addresses the “core” issues associated with the CPP rule under a 22,000 word court-imposed limit. The core issues address the fundamental flaws of the rule and, if the court agrees, make the CPP not correctable on vacation or remand to EPA. Thus, success on any of the core issues would almost certainly doom the CPP. Depending on the core issue going against EPA, the agency may be severely limited in options going forward regarding a Clean Air Act (CAA) Section 111(d) rule, or it may be completely prohibited from promulgating one. The core issues are as follows:

* The CPP transgresses EPA CAA Section 111 authorities and discretions given to it by Congress and unconstitutionally forces states to implement federal energy policy. EPA’s “legislative” rulemaking authorities are only as vast as those given to it by Congress, subject to constitutional limitations. Numerous facts and circumstances operate against the CPP’s broad mandates and requirements. Three of these stand out in particular: (1) in the dozens of prior Section 111 rulemakings, EPA has never imposed mandates beyond those directed at the regulated source; (2) longstanding case law holds that a Section 111 standard must apply to the emissions unit (source) where averaging beyond the source to meet the standard is prohibited; and (3) CPP implementation necessarily tramples on longstanding states’ rights and non-CAA federal jurisdictions.

The CPP impermissibly regulates beyond the source. The CPP regulates beyond the source when it utilizes a best system of emission reduction (BSER) that comprehends many generation sources contributing power to the grid. This portends sweeping changes to the grid that are of great economic significance. In addition to the problems with this approach, as described above, several recent Supreme Court case holdings cast serious doubt that EPA could construe longstanding statutory language in a manner inconsistent with its prior interpretations and that has such broad economic significance without explicit congressional authority to do so.

Section 111(d) prohibits regulation beyond the source, generation shifting, and control of sources not CAA jurisdictional. Besides being inconsistent with prior regulations, EPA equates source owners with sources and argues that owners, not sources, have reduction obligations. In addition to this construct being inconsistent with prior CAA interpretation, it fails for all of the reasons outlined above.

The CPP abrogates CAA authority given to the states. Section 111(d) language and longstanding general implementing regulations make clear that the states have ultimate authority to set source performance standards based on individual source remaining useful life and other relevant factors. The CPP strips that authority by mandating national standards that are not state amendable on a source basis.

The CPP unconstitutionally forces states to implement federal energy policy. To comply with the CPP, states must alter their laws addressing energy policy in a manner that encroaches on states’ constitutional rights, such as states’ exclusive authority to regulate intrastate electric service.

* Existing electric utility regulation under the CAA Section 112 for hazardous air pollutants forecloses any regulation of the electric utility source category under Section 111(d). EPA argues that the Section 111(d) language is unclear or is subject to clerical error when combining the House and Senate versions of the 1990 CAA amendments. But there is really no ambiguity. Section 111(d) can be read without any inconsistency to prohibit any electric utility source category 111(d) regulation, and EPA has no constitutional authority to create legislation, as its “interpretation” would do here.