

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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August 2, 2012

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: EPA's Proposed Electric Utility Greenhouse Gas New Source Performance Standard Rule

Dear Administrator Jackson:

I ask that you immediately withdraw the proposed rule, "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units" (77 *Fed Reg.* 22392, referred herein to as "Proposed Rule"). This rule relies on a number of unprecedented and flawed interpretations of Section 111 of the Clean Air Act (CAA), which was never intended to regulate greenhouse gases (GHGs) or force the elimination of coal as a fuel.

If finalized, this rule will transform the American economy. It would set precedents affecting industries far beyond electric generating units (EGUs) and extend EPA's regulatory reach into manufacturing and other regulated entities. This type of regulatory action – with its consequences, opaque and hidden from the vast majority of our citizens – only reinforces the public perception that EPA uses clandestine means to achieve its political objectives while ignoring the effects on consumers, particularly the poor and the elderly.

EPA has stated that the Proposed Rule allows a continued role for all fuels in electric power generation. This is a misrepresentation at best. In fact, the proposal thrusts on new EGUs the first ever GHG New Source Performance Standards (NSPS), which are neither commercially viable nor achievable in practice. At the same time, the proposal also places *existing* units at risk of closure if new source requirements are triggered as a result of installing pollution control equipment to meet other EPA regulations. It is widely acknowledged that the proposed standards would eliminate the use of coal as a fuel source in generating electricity. Certainly, eliminating coal – our most abundant energy resource – is not a small step or one that should be made by Agency fiat. Indeed, the vast majority of our citizens believe that coal should remain in our country's energy mix because it ensures affordable, reliable electricity and provides hundreds of thousands of jobs.

The impact of the Proposed Rule on natural gas plants is also troubling. If EIA and EPA's models are correct, natural gas fired power plants will likely dominate new generation in

The Honorable Lisa P. Jackson

Page 2

August 2, 2012

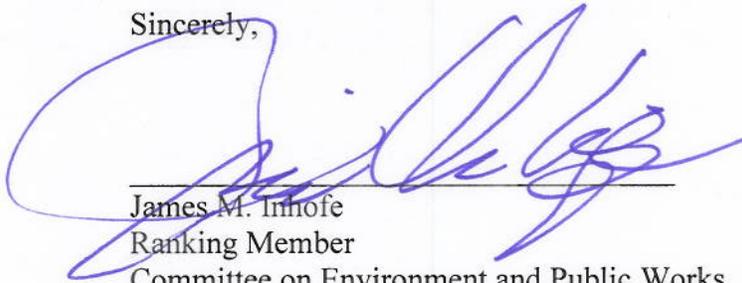
the years ahead. Yet, the proposal creates uncertainty for natural gas because, as the Agency admits, standards as low as 950 lbs CO₂ per MWh would eliminate designs currently used in electric-only generation. As a result, this could limit options for natural gas generation below 40 MW. Given the proposal's legal vulnerabilities and the uncertainties it creates for simple cycle and other gas fired generation, one must question whether it rewards natural gas or threatens all fossil fuels. The answer is more likely the later.

Finally, the Proposed Rule embraces a reckless energy and economic agenda that is threatening a weak economy. As you are aware, under CAA Section 111(a)(2), the proposed standards are immediately applicable to EGUs that commence construction after the date of publication. The Proposed Rule, therefore, has the force of law, but simultaneously yields only limited legal recourse to sources affected by its requirements

For these reasons, the Proposed Rule should be immediately withdrawn. If reissued, the standards should first be issued as an advanced notice of proposed rulemaking. Such steps are essential to allow the public and their elected representatives, sufficient time to understand and respond to the proposal, its legal implications, and the economic consequences of its implementation—without the threat of immediate applicability and enforcement.

I have attached to this letter a number of comments and questions on the many important issues raised by this Proposed Rule and request that you respond by August 31, 2012.

Sincerely,



James M. Inhofe
Ranking Member
Committee on Environment and Public Works
U.S. Senate

Enclosure

ATTACHMENT

I. Threats to New Power

EPA's proposal to require new coal plants to meet a natural gas limit contravenes statutory requirements. CAA Section 111 defines standard of performance to mean a standard which reflects the degree of emission limitation "achievable" through the application of the best system of emission reduction (BSER) that the Administrator determines "has been adequately demonstrated." No one has asserted that an EGU with carbon capture and storage (CCS) meets this definition. Not only is CCS economically unachievable, it is also not technically achievable for many new coal units located in areas of the country that lack geologic sequestration sites or pipeline access to transport captured CO₂. Although the technology may have promise in limited applications, it has not been adequately demonstrated for large base load commercial applications. EPA's failure to analyze and determine BSER for coal plants is a serious legal problem and by itself justifies withdrawing the proposal.

Similarly, in an attempt to accommodate new plants that have already been permitted under the PSD program and projected to commence construction within the next twelve months, the Proposed Rule introduces the relatively novel category of "transitional sources." Yet EPA's treatment of these sources does not comport with statutory requirements. Section 111 defines new sources as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations)." However, EPA now proposes to treat these transitional sources as existing units, not subject to the rule. While I agree these sources should not be required to meet standards that are unachievable, the Agency should not set up false hopes or rely on questionable legal rationales that counter the plain meaning of the statute. Should the "transitional source" class be overturned in court, these sources would be subject to the NSPS and face catastrophic consequences.

In defining new units, the Proposed Rule also attempts to limit adverse impacts by proposing to exempt simple cycle natural gas plants. The proposed exemption reflects the fact that these plants are generally used to meet peak demand rather than base or intermediate load requirements. This is an important exemption given the operational role simple cycle gas plants play at EGUs as backup for fossil fuel-fired base load and renewable. But note the details. The Proposed Rule also seeks comment on whether the exemption is appropriate. Specifically, EPA requests comment on whether the exemption for simple cycle turbines would result in the greater use of these turbines instead of more efficient combined cycle facilities. Depending on the comments received, EPA may very well include new simple cycle units in the standard if they otherwise meet the definition of an EGU.

In light of the Proposed Rule's treatment of new EGUs, please respond to the following questions:

- Did the Department of Energy agree with EPA's assessment of CCS implicit in this proposal? According to the Department of Energy's web page on Post-Combustion Capture Research, coal-fired electric generating plants are the "cornerstone of America's

central power system.” Yet when discussing the feasibility and economics of CSS, DOE states the following:

DOE/NETL analyses suggest that today’s commercially available post-combustion capture technologies may increase the cost of electricity for a new pulverized coal plant by up to 80 percent and result in a 20 to 30 percent decrease in efficiency due to parasitic energy requirements. Additionally, many of today’s commercially available post-combustion capture technologies have not been demonstrated at scales large enough for power plant applications. (http://fossil.energy.gov/programs/powersystems/pollutioncontrols/Retrofitting_Existing_Plants.html)

- Did the DOE endorse the effective ban on coal in this proposal? Please provide us with a copy of all interagency communication on this issue between officials at the Department with EPA and the White House on this Proposed Rule and related technical documents.
 - Does EPA agree or disagree with the DOE’s assertion that today’s commercially available post-combustion capture technologies have not been demonstrated at scales large enough for power plant applications?
 - Does EPA agree or disagree with DOE’s conclusion that CCS may increase the cost of electricity by up to 80 percent?
 - Does EPA agree or disagree with DOE’s assertion that CCS results in a 20 to 30 percent decrease in efficiency due to parasitic energy requirements?
 - Does EPA believe that a standard of 1,000 lbs of CO₂/MWh is BSER for simple cycle gas plants?
- Section 111(a) of the CAA requires EPA to establish standards of performance that are “achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”
 - Does EPA believe that CCS is “achievable” and “adequately demonstrated” as those terms are defined under the CAA? Please explain.
 - Does EPA believe the CAA allows the Agency to select which fuels to rely on in setting standards?
 - Does EPA believe that the CAA allows the Agency to set standards that would be economically unachievable for coal-fired units or based on technologies that are not adequately demonstrated? Please explain
 - On what basis does EPA conclude that transitional sources that commence construction after the date of proposal do not have to comply with the limits proposed for new EGUs given the definition of new units in Section 111 of the CAA?
 - Has the Agency excluded so called transitional units that commence construction after the date of proposal from other NSPS regulations for new units?

- Were these provisions challenged? Please provide examples.
- Given that the NSPS becomes effective for new sources on the date of proposal, did you consider issuing it as an Advanced Notice of Proposed Rulemaking (ANPR) instead of a proposed rule?
 - Given the legal jeopardy you are placing so called transitional units in – why did you not consider the wiser, more prudent course of first issuing an ANPR to allow these units greater time without the threat of lawsuits.
 - Given the apparent legal risks from treating transitional units as existing units for purposes of this proposal, how many of these transitional units could be subject to law suits for violating an applicable requirement in their Title V permits?
- Has EPA ever established NSPS program limits that would in practice preclude the use of a major fuel source such as coal? Please provide examples.
 - Has EPA ever relied on model projections over ten and twenty years to preclude setting standards for specific fuels? Please provide examples.
- Has EPA evaluated the impact to electric generation of including simple cycle natural gas units in the definition of covered sources?
 - Approximately, how many units would be regulated, and what impact would their regulation have on their use as peak load generators?
 - What impact would the regulation of simple cycle units have on the overall operational flexibility of electric power generation?
 - What impact would their regulation have on their use as backup for renewable power generation?
 - How would EPA’s proposed treatment of these units compare to California’s proposed regulation of these units?

II. Threats to Existing Power

In the Proposed Rule, EPA proposes to exclude modified sources from the requirements of the new standard because it lacks sufficient information on which to make a decision. However, EPA also states that it may issue a standard for modified sources in the future. The CAA, however, may not provide EPA with the flexibility to exclude modified sources. As noted above, CAA Section 111(a)(2) defines new sources as “any stationary source, the construction *or modification* of which is commenced after the publication of regulations (or, if earlier, proposed regulations)” (emphasis added). The plain meaning of this definition suggests that modified units would indeed be considered new units subject to the standard.

If EPA is overturned on this one point, all existing sources that undertake significant changes that trigger NSPS modification will have to meet a natural gas limit. This not only jeopardizes existing coal but also existing gas plants that may not be able to meet the more stringent efficiency standard of a new natural gas combined cycle gas plant.

Although historically few EGUs have triggered NSPS modification, EPA confirms in the Proposed Rule that this will change. According to the proposal, installing pollution control equipment may trigger NSPS modification for some units. Similarly, EPA states that expected GHG control requirements for existing EGUs under Section 111(d) could also trigger NSPS modification. Although the current NSPS regulations exempt pollution control projects, EPA seeks comments on whether such exemption should remain in the program given the loss of the pollution control exclusion in the PSD program. Thus, while existing sources may have avoided triggering NSPS modification in the past, EPA believes they could be regulated in the future. This puts significant pressure on EPA's novel and risky legal rationale for excluding modified units despite the statutory definition. Instead of putting existing sources at risk, EPA should comply with the requirements of Section 111(b) and set a standard that reflects what is achievable and adequately demonstrated for new and modified sources. This is what the law requires and what EPA has traditionally accomplished in issuing NSPS rules.

In light of this legal vulnerability, please respond to the following questions:

- As noted above, Section 111(a) defines new units to include “any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations),” and yet in the Proposed Rule, you are proposing not to treat them as new units but rather to treat them as existing units.
 - Has EPA ever treated modified units under NSPS as existing units in the past?
 - Has EPA ever successfully defended a challenge to a provision in an NSPS rule that sets a different standard for modified units than the standard for new units?
 - What does EPA believe is the reason Congress included modification in the definition of new units if EPA believes the statute allows those units to be treated as existing?
 - What would happen to existing units undergoing modification if EPA is legally forced to treat modified units as new? Would existing coal plants that trigger modification be forced to close?
- You request comment on eliminating the exclusion for pollution control projects from the types of projects that could trigger modification. You also note that some of the measures being considered for reducing GHG emissions from existing sources under Section 111(d) could in fact lead to emission increases that could trigger modification.
 - What types of pollution control requirements for existing sources is EPA considering that could trigger modification?
 - How many existing sources could be impacted and at risk if EPA eliminates the pollution control exemption?
- EPA intends to maintain sub-categorization for EGUs for traditional pollutants because there is no clear technology for achieving the same level of reductions. Please explain why EPA believes that CCS is demonstrated for GHGs but not for traditional pollutants?
 - If this proposal is finalized, could it be used as a basis for challenging NSPS rules that do not require CCS for non-GHGs?

- On December 21, 2010 EPA signed a settlement agreement committing to promulgate emission guidelines under Section 111 for existing EGUs. Section 111(d), however, requires EPA to establish standards of performance for existing sources “for which air quality criteria have not been issued or which is not included on a list published under section 7408 (a) of this title or emitted from a source category which is regulated under section 7412 of this title.” Given that EPA has recently promulgated the MATS rule please explain why EPA believes it has the authority to regulate existing sources under Section 111(d)?

III. New Threats to Small GHG Sources under PSD and Title V

When the final rule to regulate GHG emissions from motor vehicles was issued, EPA triggered PSD and Title V controls and permitting requirements on stationary sources as small as 100 to 250 tons per year under the Agency’s interpretation of the CAA. To prevent up to six million sources, including schools, apartment buildings and hospitals, from being subject to new requirements, EPA issued a rule on June 3, 2010, “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule”, known as the “Tailoring Rule”. This rule phases in the stationary source requirements by establishing higher emissions thresholds.

In proposing to regulate GHGs under the NSPS program, EPA is seeking to regulate GHGs for a second time under the CAA. Legal experts who have reviewed the Proposed Rule and the final Tailoring Rule are concerned that EPA’s new proposal will once again trigger PSD and Title V for sources that meet or exceed the statutory emission thresholds of 100 and 250 tons. In fact, in an April 20, 2012 letter to EPA, the Colorado Department of Public Health and the Environment, requested “that the finalization of the Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units (“Carbon Pollution Rule”) be delayed until both federal and state rules can be revised to prevent the regulation of GHG at 100/250 tpy on a mass basis.”

In light of these significant concerns, please respond to the following questions:

- What is EPA’s response to the concerns raised by the Colorado Department of Public Health and the Environment and its request for a delay?
- Who outside the EPA reviewed EPA’s legal interpretation of the statutory provision? Did anyone from DOJ, White House Counsel’s office or the Office of Management and Budget’s Office of General Counsel review the Proposed Rule prior to your signature? If no outside legal review was conducted, please explain the reason why this did not occur.
 - Given the significant adverse outcome of being forced to regulate and permit up to six million sources, why has the Agency voluntarily issued rules that would put so many public and private sources at risk of being in violation of the CAA?
- In issuing this proposal, did EPA and other reviewing agencies fully consider the risks to smaller sources that may trigger PSD only for GHGs at the 100/250 ton threshold?

- Isn't it true that when small "GHG-only sources" trigger PSD and are forced into major PSD source category for GHGs, they become major source for conventional pollutants as well under this program and subject to potential controls?
- Isn't it also true that this could trigger controls on other non-GHG pollutants emitted by the source?
- Why did EPA believe it was acceptable to issue this proposal given the potential risk to smaller sources?

IV. Legal Precedents

Our review of the Proposed Rule suggests that those who see this proposal as only affecting EGUs should look again. By attempting to wedge GHGs into a program that was designed for traditional pollutants and by seeking to end the use of coal in generating new electric power, EPA has stretched the meaning of several CAA provisions. EPA's interpretations, if upheld in court, will set precedents for future regulations for both GHGs and traditional pollutants. These precedents may allow EPA new authority to regulate pollutants and source categories without making the required endangerment finding. And, as noted above, they may also allow EPA to control what fuels and inputs industry should use in manufacturing based on the Agency's model projections, and not what industry believes is necessary to compete in a global market.

The full implications of these precedents may not become clear until EPA turns to the next GHG regulation on its list – reducing GHG emissions from refineries. EPA committed in a settlement agreement to propose a GHG NSPS rule for refineries by December 10, 2011. Although senior White House officials are reported in the press as saying that there will be no proposal this year – an obvious response to election year politics – this proposal will certainly be at the top of EPA's regulatory agenda after the election. Key potential precedents of concern for this rule and all future NSPS rules include the following:

A. No Endangerment Finding

Section 111 (b)(1) of the CAA, establishing the NSPS program, requires the Administrator to list a source category for regulation if in his judgment, the source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." The Proposed GHG NSPS Rule fails to include either the required endangerment finding or the significant contribution finding. Instead, EPA argues that a new finding is not necessary because the new category of sources being regulated under this proposal, the TTTT category, is composed of sources that have been previously regulated under the NSPS source categories (the Da and KKKK source categories) for which an endangerment and contribution finding have already been made for a non-GHG pollutant.

On the face of it, it is difficult to believe that the required endangerment and contribution findings for a traditional air pollutant could suffice for GHGs given how different the emissions

and their potential effects are. While EPA seeks comments on alternative interpretations, EPA's failure to propose a new endangerment finding based on the newly created source category creates significant uncertainty and establishes a worrisome legal precedent allowing the Agency to short circuit required regulatory findings when attempting significant new regulations under this provision. This is not what Congress intended.

- Once a source category has been listed under Section 111, under what circumstances does EPA believe a new endangerment finding would be required?
- Does EPA believe that the endangerment finding for a non-GHG pollutant should suffice for a GHG?

B. Redefining Source

In 2010, EPA issued Best Available Control Technology (BACT) Guidance for PSD that stated that it would not force permitting authorities to require new coal plant applicants to switch to natural gas because it would have the effect of redefining the source.

Now, just two years later, the EPA is reversing this position under the NSPS program. Under this Proposed Rule, limits for new EGUs would force all new coal plant applicants to redefine their source and burn natural gas unless they commit to CCS. This suggests that what EPA had clearly and carefully avoided in the PSD program could become mandatory in the NSPS program. The implications of this decision are significant for all regulated industries. If EPA sees no difference between a coal-fired power plant and natural gas-fired power plant, what other sources will EPA attempt to redefine?

- Does EPA believe it can set limits under the NSPS program that will require new sources to use different fuels than originally intended? On what basis?
- Does EPA believe its interpretation of Section 111 would also allow it to require sources under the NSPS program to use different feeds stocks in producing products? Please explain.
- What restrictions does EPA agree are present in Section 111 of the CAA that limit what the Agency can require new sources to do under this program?