COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

ENVIRONMENTAL PROTECTION AGENCY

Concerning

CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING STATIONARY SOURCES: ELECTRIC UTILITY GENERATING SOURCES

(Docket ID No. EPA-HQ-OAR-2013-0602)

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Environmental Protection Agency
EPA Docket Center, Mail Code 28221T
Attention: Docket ID No. EPA-HQ-OAR-2013-0602
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Comments Concerning the Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Docket ID No. EPA-HQ-OAR-2013-0602)

Dear Sir/Madam:

Pursuant to the public notice published at 79 Fed. Reg. 1430 (January 8, 2014), the Washington Legal Foundation (WLF) appreciates this opportunity to offer comments to the Environmental Protection Agency (EPA) on the agency's proposed rule under the Clean Air Act (CAA) for establishing carbon emission standards for electric utility generating units ("the proposed rule").

I. Interests of WLF

Founded in 1977, the Washington Legal Foundation is a public-interest law firm and policy center based in Washington, D.C. with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly engages in original and *amicus* litigation in a wide variety of environmental matters, including cases concerning the proper scope of the EPA's authority under the Clean Air Act (CAA). *See, e.g., Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently produces and distributes articles on a wide array of legal issues related to EPA regulation under the CAA. *See, e.g.,* Donald W. Fowler & Richard O. Faulk, *Federal Clean Air Act Preemption of Public Nuisance Claims: The Case for Supreme Court Resolution*, WLF CONTEMPORARY LEGAL NOTES (November 2014); Mark Latham,

Victor E. Schwartz, & Christopher E. Appel, *Is EPA Ignoring Clean Air Act Mandate to Analyze Impact of Regulations on Jobs?*, WLF LEGAL BACKGROUNDER (June 6, 2014); F. William Brownell, Allison Wood, & Jim Rubin, *CO_2 Control Under Clean Air Act: Headed For A Glorious Mess?*, WLF LEGAL OPINION LETTER (October 23, 2009).

WLF fears that the EPA, by effectively requiring States to completely reengineer their electric utility grids to meet EPA's "goals," is exceeding the scope of its statutory authority under the CAA. At the same time, the proposed rule would undermine the States' primary authority under Section 111(d) to devise flexible implementation plans that will not unduly burden the States' citizens and businesses.

In addition, WLF is very concerned about the devastating economic impact that higher energy costs triggered by the proposed rule will have on the American economy. Reducing the diversity of our nation's electricity supply and raising its costs will create a structural barrier for the nation's economic recovery and future growth. Families will have less disposable income as they spend more to light and heat their homes, with middle-income and lower-income Americans being hit the hardest.

I. The Proposed Rule

Issued pursuant to Section 111(d) of the Clean Air Act, the EPA's proposed rule seeks to cut carbon dioxide emissions from existing power plants nationwide by 30%, as measured against 2005 levels, by imposing State-specific goals premised on the EPA's assessment of potential "strategies" for reducing carbon pollution and each State's "unique energy mix."

Under the proposed rule, each State must develop a plan that includes emission performance levels for its fossil fuel-fired electric generating units (EGUs) that meet the State-specific CO_2 goal in the EPA's emission guidelines, as well as the measures needed to achieve those levels and the overall goal. The State must decide whether it will adopt the rate-based form of the goal established by the EPA or translate the rate-based goal to a mass-based goal. The State must then establish a standard, or set of standards, of performance, as well as implementing and enforcing measures, to achieve the emission-performance level specified in the State's plan.

The EPA contends that a combination of the following four "building blocks" represents the "best system of emission reduction . . . adequately demonstrated" for EGUs:

(1) Reducing the carbon intensity of generation at individual affected EGUs through heat rate improvements;

(2) Reducing emissions from the most carbon-intensive affected EGUs in the amount that results from substituting generation at those EGUs with generation from less carbon-intensive affected EGUs;

(3) Reducing emissions from affected EGUs in the amount that results from substituting generation at those EGUs with expanded or low- or zero-carbon generation;

(4) Reducing emissions from affected EGUs in the amount that results from the use of demand-side energy efficiency that reduces the amount of generation required.

The proposed rule also establishes guidelines for States to follow in developing their plans. These guidelines include approvability criteria, requirements for State plan components, the process and timing for State plan submittal, and the process and timing for demonstrating achievement of the CO_2 emission performance level in the State plan.

II. EPA Lacks the Authority to Require States to Fundamentally Reengineer Their Electric Grids

The proposed rule is premised entirely on EPA's remarkable claim that it has determined, for each of the 50 States, the "best" mix of electricity generation and energy efficiency resources consistent with the agency's predetermined goals for reducing CO_2. Although EPA insists that States would be free to formulate their own plans to meet EPA's goals—by varying the mix of natural gas, renewable, and energy efficiency resources—what EPA euphemistically calls "goals" are effectively EPA-established State-by-State emissions caps. EPA developed these "goals" based on an aggressively unrealistic set of assumptions as to how each State should reengineer its electric grid to reduce the use of coal-fired electricity.

According to the EPA, the "best" mix of resources is for States to mandate that (1) coal generators improve efficiency by 6%, (2) natural gas generators operate their units 70% of the time (a run-rate that that EPA concedes only 10% of gas generators meet now); (3) utilities significantly expand their use of renewable resources by EPA-determined amounts; and (4) customers cut electricity usage by EPA-determined amounts. Any State's compliance with the proposed rule would require wholesale

changes to how that State's utilities provide electricity to its citizens. That mandate is far beyond the scope of the EPA's authority.

Simply put, Congress never authorized EPA to dictate to States how to configure their electric grids. Under Section 111(d), the maximum extent of EPA's power is to call on States to submit plans that set feasible, cost-effective performance standards that coal generators can achieve. It cannot directly or even indirectly require, in the guise of setting performance standards for coal generators, significant increases in the use of natural gas, renewable, and energy-efficient resources. Such an approach ignores the States' primary authority under Section 111(d) to devise implementation plans that are flexible, cognizant of the particular circumstances of the given State, and that will not unduly burden the citizens and businesses of the State with exorbitant electricity rate increases. *See, e.g.* 40 C.F.R. § 60.24(f)(1) (providing that States may provide for less stringent emissions standards based on "[u]nreasonable cost of control resulting from plant age, location, or basic process design"). As pointed out in comments that EPA has already received from various state officials, the proposed rule ignores the role that generation diversity plays to help stabilize power supplies and prices. What states need most is the flexibility to maintain a diverse and reliable generation mix for their citizens' economic and energy security.

Indeed, EPA's proposal directly injects the agency into policy matters that are reserved for State regulators. States, through their public service commissions, have exclusive authority over electric resource planning. No federal law, much less the CAA, grants the EPA the authority to dictate disastrous electric resource choices to States. Any suggestion that Congress authorized EPA, through Section 111(d), to mandate that States completely restructure their electric utility grids is not only implausible, it is preposterous.

III. The Proposed Rule Will Drastically Increase Energy Costs and Exact an Enormous Toll on the American Economy

WLF is deeply troubled by the devastating impact the proposed rule will have on the American economy. Reducing the diversity of our nation's electricity supply will result in higher energy costs, which will greatly impede the nation's economic recovery and stifle future growth. Families will have less disposable income as they spend more to light and heat their homes, with middle-income and lower-income Americans being hit the hardest. EPA itself estimates that the rule will increase electricity prices between 6% and 7% nationally by 2020, and up to 12% in some areas. *See* EPA, *Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and*

Emission Standards for Modified and Reconstructed Power Plants, June 2014. EPA also concedes annual compliance costs between $5.4 and $7.4 billion in 2020, hitting $8.8 billion in 2030. *Id.* But these numbers include only future power sector compliance costs, failing to capture the residual impacts of higher electricity rates on overall economic activity.[1]

As *The Wall Street Journal* observed in a recent editorial, "it is impossible to raise the price of carbon energy without also raising costs across the economy. The costs will ultimately flow to consumers and businesses." Editorial, *Carbon-Income Inequality*, The Wall Street Journal, June 3, 2014. Notwithstanding EPA's myopic projections, the proposed rule will impose an immense burden on the American economy. According to a study conducted by the respected global energy and economics firm IHS, Americans will pay significantly more for electricity, experience slower economic growth, lose jobs, and have less disposable income if the proposed rule is implemented as drafted. *See* Institute for 21st Century Energy, *Assessing the Impact of Potential New Carbon Regulations in the United States*, May 2014. IHS estimates that the proposed rule will result in an additional $289 billion in cumulative electricity payments by consumers from 2014 through 2030. *Id*. That study also estimates a steady job loss of 224,000 jobs on average through 2030. *Id.* IHS forecasts more than $50 billion in average annual GDP loss through 2030, with a peak GDP loss of nearly $104 billion in 2025. *Id.* From 2014 through 2030, IHS projects a cumulative reduction of $586 billion in disposable income. *Id.*

A separate report by Energy Ventures Analysis (EVA) concludes that EPA has underestimated not only how much the proposed rule will raise electricity prices, but natural gas prices as well. *See* EVA, *Energy Market Impacts of Recent Federal Regulations on the Electric Power Sector*, November 2014. According to EVA, both "the cost of electricity and natural gas will be impacted in large part due to an almost 135% increase in the wholesale price of natural gas (100% in real dollars), from $2.82/mmbtu in 2012 to approximately $6.60/mmbtu ($5.63) in 2020." *Id.* These increases are due to baseline market and policy impacts between 2012 and 2020 as well as significantly increased pressure on gas prices resulting from recent EPA regulations on the power sector as well as the proposed rule. *Id.* America's industrial sector would be hit the hardest, seeing their electricity and gas costs soar 64% by 2020 over 2012 costs. *Id.* The study notes that skyrocketing "operational costs in the industrial sector are of

[1] The EPA continues to avoid undertaking an employment analysis under Section 321(1) of the CAA, which requires the continuous review of potential job losses and shifts in employment due to the implementation of the CAA. *See* 42 U.S.C. § 7621(a).

particular concern for energy intensive industries in the U.S. such as aluminum, steel and chemicals manufacturing, which require low energy prices to compete." *Id.*

Higher energy prices caused by EPA policies will also adversely impact U.S. families, especially lower-income, middle-income, and fixed-income families. For many, such increases will make a bad situation worse. Since 2001, real energy costs for middle-income and lower-income families have increased by 27 percent. *See* Eugene M. Trisko, *Energy Cost Impacts on American Families, 2001 – 2014*, February 2014. Over the same period, real after-tax income for these families has declined by 22 percent. *Id.* Energy expenditures are consuming an increasingly large portion of household budgets. In 2001, lower-income households spent 16 percent of their after-tax income on energy. In 2014, these households will spend 26 percent of their budgets on energy (before taking into account any energy assistance programs). *Id*. Lower-income families are especially vulnerable because energy costs represent a larger portion of their budgets and reduce the amount of income they can spend on food, housing, health care, and other necessities. *Id.*

IV. Conclusion

WLF respectfully urges the EPA not to adopt the proposed rule for establishing carbon emission standards for electric utility generating units. At most, the EPA should encourage further voluntary reduction of carbon emissions.

Respectfully submitted,

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