ACCCE
AMERICAN COALITION FOR CLEAN COAL ELECTRICITY

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American Coalition for Clean Coal Electricity Comments on EPA's Proposed Federal Plan, Model Trading Rules, and Amendments to Framework Regulations

The American Coalition for Clean Coal Electricity (ACCCE) submits these comments in response to the proposed rule entitled "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" (proposed Federal Plan).

ACCCE is a national trade organization comprised of industries — including electricity generators, coal producers and railroads — involved in generating electricity from coal. A list of our members is attached. Coal-fueled power plants produce carbon dioxide (CO_2) emissions that the U.S. Environmental Protection Agency (EPA) is proposing to regulate under the proposed Federal Plan, as part of EPA's unprecedented, unlawful, and symbolic effort to reduce CO_2 emissions from coal-fueled plants under the Clean Power Plan (Power Plan), even though these emission reductions will have no meaningful effect on climate change and will needlessly raise electricity prices. For these reasons, ACCCE and its members will be significantly impacted by the proposed Federal Plan and, therefore, have a substantial interest in the outcome of this rulemaking. In addition to our comments, ACCCE is a member of the Utility Air Regulatory Group (UARG) and incorporates the UARG comments on the proposed Federal Plan by reference.

ACCCE is adamantly opposed to the regulation of CO_2 and other greenhouse gases under the Clean Air Act (CAA). We submitted comments on the proposed Power Plan explaining why that proposal was illegal and should therefore be withdrawn. The changes EPA incorporated into the final Power Plan did not remedy the fundamental legal flaws in the proposed Power Plan. As a result, we have filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging the legality of the Power Plan, and joined 27 States, as well as 158 industry and other groups, who have filed a total of 42 petitions for review challenging the legality of the Power Plan.

Because the proposed Federal Plan would implement EPA's unlawful Power Plan that clearly violates the CAA, other federal laws, and the U.S. Constitution, the proposed Federal Plan suffers from the same insurmountable legal flaws as the Power Plan itself. For that reason, ACCCE incorporates by reference our comments on the proposed Power Plan and, in the discussion below, further explains why the proposed Federal Plan to implement the Power Plan is also illegal.

The proposed Federal Plan is illegal because EPA lacks the authority to regulate coal-fired power plants under section 111(d) of the CAA. The CAA imposes an absolute prohibition against section 111(d) regulation of "any air pollutant" — in this instance, CO_2 — emitted from a "source category which is regulated under section 112."[1] This prohibition against regulating CO_2 applies to existing coal-fueled power plants because certain emissions from coal-fueled plants are regulated by EPA under section 112. In particular, EPA adopted in 2012 the final Mercury and Air Toxics Standards (MATS) rule, which established standards for mercury and other hazardous air pollutants emitted from coal-fueled power plants pursuant to section 112(d).[2] EPA's adoption of the MATS rule precludes EPA from regulating CO_2 emissions from coal-fueled power plants through the Power Plan and, by extension, the proposed Federal Plan.

In the Power Plan, EPA attempted to evade this clear statutory prohibition by arguing that the CAA only excludes the regulation of specific air pollutants under section 111(d) that are regulated under section 112 and only when the source category at issue is also regulated under section 112.[3] As ACCCE explained in its comments on the proposed Power Plan,[4] EPA's interpretation of the CAA is fundamentally wrong. Unfortunately, EPA is attempting to

rewrite the plain terms of the statutory prohibition against section 111(d) regulation of "any source category which is regulated under section 112" into a much narrower prohibition. The narrower prohibition EPA has concocted would bar EPA from establishing section 111(d) performance standards for any source category that is regulated under section 112, but only in the case of those hazardous air pollutants that are actually regulated under section 112. As the U.S Supreme Court clearly stated in *Utility Air Regulatory Group v. EPA*, EPA has no authority to "rewrite clear statutory terms to suit its own sense of how the statute should operate."[5]

Because EPA has no authority to regulate coal-fueled power plants under the Power Plan, EPA also has no authority to implement performance standards established under the Power Plan using EPA's proposed Federal Plan for states that fail to submit approvable implementation plans.

The performance standards to be implemented by the proposed Federal Plan are illegal because the standards were set in violation of the CAA. Another major flaw of the proposed Federal Plan is EPA's intention to implement and enforce the unlawful performance standards in the Power Plan. These performance standards are unlawful because the CAA does not authorize EPA to set standards based on measures that take place "outside the fence" of affected power plants and thus are outside the control of plant operators.

Any performance standard set under section 111 must meet several important statutory requirements. One is that EPA must set performance standards based on the emission reductions that can be achieved by control measures implemented at the sites of affected power plants. The statute authorizes EPA to set performance standards for existing sources that are "achievable through the application of the best system of emission reduction" that is "adequately demonstrated" for that source.[6] Section 111(d)(1)(A) also limits EPA's authority to requiring states to establish "standards of performance for any existing source" that reflect emissions reductions achieved through improvements to a source's performance. A "standard of performance" must be "appl[icable] … to any particular source."[7] This statutory language clearly indicates that the regulatory focus of section 111 is on the reduction of emissions achieved by improving a source's performance through emission control measures that can be applied to the source.

The Power Plan violates this statutory requirement. EPA has established performance standards based on actions that clearly take place outside the fence line of affected power plants and that are outside the control of plant operators. This approach enables EPA to fundamentally restructure the way the nation's electricity is generated by setting a standard that requires the shifting of electricity production from existing coal-fueled power plants to natural gas and renewable energy resources.

To justify its approach, EPA argues in the Power Plan that section 111(d) authorizes the Agency to treat the electric grid as a "complex machine" for supplying electricity[8] and thereby to set performance standards based on those measures that "shift[] generation from dirtier to cleaner sources" within the electric grid.[9] However, as noted above and discussed in our prior comments,[10] EPA's argument in the Power Plan that would sweep the entire electric grid within its regulatory purview cannot be squared with the plain language of section 111(d) and overall statutory scheme of the CAA. Nor can EPA's argument be squared with past Supreme Court precedent that rejected EPA's interpretations of another CAA provision because that "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[11]

The performance standards also are illegal because EPA has failed to meet the statutory requirement that the standards must be "achievable" through application of any control technology or operating process that is "adequately demonstrated" for use at any individual power plant. In the case of existing coal-fueled plants, for example, EPA set an emission limit of 1,305 lbs CO_2/MWh under the Power Plan, which is more stringent than the 1,400 lbs CO_2/MWh standard for new, state-of-the-art coal-fueled plants.[12] The Power Plan emission limit is not achievable by any existing affected coal-fired power plant in the United States.[13]

Because the proposed Federal Plan would implement unachievable outside-the-fence performance standards which EPA has no authority to establish, the proposed Federal Plan is profoundly flawed.

The proposed Federal Plan would usurp the traditional powers of states to regulate electricity. The proposed Federal Plan violates the U.S. Constitution, the principles of cooperative federalism embodied in the CAA,

and other Federal statutes by infringing on the traditional sovereign authority of states to regulate electricity. This intrusion on states' inherent sovereign authority is another reason why the proposed Federal Plan is illegal.

Section 111 of the CAA grants EPA authority only to regulate emissions of air pollutants from stationary sources within an affected source category. These statutory powers do not extend to regulating the generation, transmission, distribution, and consumption of electricity within any state. Despite the lack of any authorization in the CAA to regulate electricity, the Power Plan and the proposed Federal Plan both seek to extend dramatically EPA's authority over such traditional state regulatory functions, in violation of long-standing presumptions *against* construing statutes to allow broad expansions of federal regulatory authority.

Long-standing Supreme Court precedent makes it absolutely clear that neither EPA nor any other federal agency may regulate the electricity sector without express statutory authority to do so. Under well-established principles of federalism, courts and agencies may rely on the Supremacy Clause to override state prerogatives *only if* Congress has been "unmistakably clear" in its grant of authority.[14] Moreover, decisions regarding electricity generation, distribution, and consumption are traditionally within the sovereign authority of states, and EPA has no jurisdiction over these areas.[15] As the Supreme Court stated in *Pacific Gas & Electric Co.*, the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."[16] The Court further noted that "[w]ith the exception of the broad authority of … the Federal Energy Regulatory Commission, over the need for and pricing of electrical power transmitted in interstate commerce, these economic aspects of electrical generation have been regulated for many years and in great detail by the states."[17]

Neither section 111 nor any other provision of the CAA contains any explicit, much less "unmistakably clear," authorization for EPA to regulate matters pertaining to the use of coal and other fossil fuels to generate electricity. Section 111 deliberately confines EPA's authority to the areas in which it has expertise, such as the evaluation of emissions control technologies. This lack of express authority further confirms the intent of Congress to respect and preserve the states' historic role to regulate electricity and not authorize EPA

to adopt a performance standard that dictates how electric utilities generate, transmit and distribute electricity.

In addition, both the Power Plan and the proposed Federal Plan are fundamentally inconsistent with cooperative federalism framework established under the CAA. Section 111(d) gives states the primary responsibility to establish plans for the implementation and enforcement of performance standards for existing sources and limits EPA's role to establishing "a procedure" for the development and submission of those state plans. Instead of respecting this cooperative federalism framework, EPA has usurped states' regulatory role under section 111(d) by establishing binding performance standards under the proposed Federal Plan and imposing those binding standards through federal plans. This usurpation of state authority is another fundamental legal flaw in the proposed Federal Plan.

EPA's proposal to impose a Federal Plan on states without first providing an opportunity for notice and public comment violates the CAA and other federal laws. Under the CAA and Administrative Procedure Act (APA), EPA is required to open a rulemaking docket and provide for notice and comment on any federal plan the Agency seeks to impose on a state under the CAA.[18] However, EPA has ignored this statutory requirement by suggesting in the preamble to the proposed Federal Plan that EPA does not need to provide notice or take comment before imposing a federal plan in those cases where a state fails to submit an initial submittal to EPA by September 6, 2016.

Specifically, EPA states that "[w]hen submittals do not contain the necessary minimum elements, then the EPA may, without further action, find that a state has failed to submit a plan."[19] EPA considers this determination to be "ministerial in nature."[20] EPA's proposed regulatory text further confirms that the Agency will *promulgate* (not *propose*) a federal plan for any state within 12 months of making this finding,[21] and EPA clarifies that "[i]t is the agency's intention to promulgate federal plans promptly for states who do not submit plans or initial submittals by September 6, 2016."[22]

These preamble statements, along with regulatory text changes, clearly indicate that EPA is proposing to impose state-specific federal plans without first proposing the precise provisions of the federal plan that would apply to the particular state and taking public comment on that proposal. EPA's proposed

approach runs contrary to the procedural requirements of both the CAA and the APA. As even EPA acknowledges in the preamble to the proposed Federal Plan, the Agency must propose the rule or regulation it intends to finalize, not just a description of that rule or regulation. EPA has conceded that it has not proposed any regulatory text or any other state-specific provisions that would, if finalized, be included in the promulgation of a federal plan.

Furthermore, EPA's claim is wrong that the issuance of a federal plan to individual states would be a "ministerial" Agency action that does not require a notice-and-comment rulemaking. The imposition of a federal plan would be a highly intrusive federal regulatory action to restructure the way a state generates and uses electricity. This type of regulatory action demands public notice and opportunity for comment on the specifics of the proposed federal plan for each state. EPA cannot and should not avoid these notice-and-comment procedures through only the partial proposal of generic provisions contained in the proposed Federal Plan. EPA cannot issue a final federal plan for any individual state without first issuing a proposed federal plan (with draft regulatory text applicable to the state) and providing the state and other interested parties with the opportunity to comment on the proposed federal plan, as required under the CAA and the APA.

Conclusion. Due to EPA's lack of authority to regulate coal-fired power plants under section 111(d) of the CAA and the other insurmountable legal flaws in the Power Plan, EPA cannot impose CO_2 performance standards on states that fail to submit approvable implementation plans. EPA should withdraw the unlawful proposed Federal Plan, but we are not under any illusion EPA will do that. Fortunately, the courts are likely to strike down the Power Plan and, with it, eliminate EPA's threat to impose Federal Plans on the states.

Sincerely,

/s/

Paul Bailey
Senior Vice President, Federal Affairs and Policy

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[1] Section 111(d)(1)(A)(i) of the CAA.
[2] *See* 77 Fed. Reg. 9304 (February 16, 2012).

[3] *See* 80 Fed. Reg. at 64,714 (stating that "it is reasonable to interpret the House amendment of the Section 112 Exclusion as only excluding the regulation of HAP emissions under CAA section 111(d) and only when that source category is regulated under CAA section 112").
[4] ACCCE Comments on the Proposed CPP Rule at pages 6-14.
[5] 134 S. Ct. 2427, 2446 (2014).
[6] Section 111(a)(1) of the CAA.
[7] Section 111(d)(1)(B) of the CAA.
[8] 80 Fed. Reg. at 64,767-88.
[9] 80 Fed. Reg. at 64,726.
[10] ACCCE Comments on the Proposed CPP Rule at pages 14-32.
[11] 134 S. Ct. at 2444. Furthermore, the Supreme Court warned: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" the Agency must provide an especially convincing explanation of its legal authority. *Id.* (quoting *Brown & Williamson Tobacco*, 529 U.S. at 159).
[12] *Compare* 80 Fed. Reg. at 64,707 (1,305 lbs CO_2/MWh) *with* 80 Fed. Reg. at 64,513 (1,400 lbs CO2/MWh).
[13] In addition to the legal flaws in the methodology for setting the performance standards, EPA has made incorrect and arbitrary assumptions concerning in all three Building Blocks used in setting overly stringent and unachievable emission limits for coal-fueled power plants. As discussed in our comments on the proposed rule, these errors provide further compelling grounds for EPA's withdrawal of the proposed rule.
[14] *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (it is an "ordinary rule of statutory construction that if Congress intents to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"); *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) ("Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the States."). *See also Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992).
[15] Interstate transmission of electricity and wholesale sales of electricity are federally regulated by the Federal Energy Regulatory Commission, not EPA.
[16] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). The *limited* grant of authority to FERC supports the notion that, should Congress intend to displace traditional state authority over the electricity sector, it would only convey that power clearly. In contrast, Section 201 of the Federal Power Act limits FERC's jurisdiction to transmission and wholesale energy sales; FERC cannot directly regulate power generation. Similarly, Section 202 of the FPA references "voluntary interconnection and coordination" of electric facilities across regions; FERC cannot compel any particular sort of coordination. *Atlantic City*, 295 F.3d 1. If Congress wished to extend federal authority over the broader electricity system, it could have done so at the time of promulgation of Part II the FPA in 1935, or during any of that Act's subsequent revisions. Instead, the primary Federal statute governing electricity clearly *limits* the scope of FERC's authority over the electric sector, and EPA's effort to assert authority through a statute that does *not* directly address these issues is inconsistent with Congress' actions over nearly eighty years.
[17] *Pac. Gas & Elec.*, 461 U.S. at 205-06.
[18] Under section 307(d) of the CAA, EPA is required to provide for notice and comment for, *inter alia*, the promulgation or revision of federal implementation plans issued pursuant to section 110 of the Act, as well as standards of performance issued under section 111. Federal Plans to implement the CPP qualify as either of these covered actions, because they are required to be issued under "the same authority" that EPA has under section 110(c) and because the issuance of a Federal Plan represents the establishment of a standard of performance for existing sources subject to the Federal Plan. Moreover, even if these

provisions did not govern EPA's issuance of state-specific Federal Plans to implement a state's CPP requirements, EPA would be required to provide for notice and comment for these two EPA rulemaking actions under section 553 of the APA, 5 U.S.C. § 553.

[19] Proposed Rule, 80 Fed. Reg. at 65,036.

[20] Proposed Rule, 80 Fed. Reg. at 65,036.

[21] Proposed Rule, 80 Fed. Reg. at 65,059.

[22] Proposed Rule, 80 Fed. Reg. at 64,975.

Attachment

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AMERICAN COALITION FOR CLEAN COAL ELECTRICITY

Alliance Coal, LLC

Alpha Natural Resources

American Electric Power

Arch Coal, Incorporated

Associated Electric Cooperative

Basin Electric Power Cooperative

Berwind Natural Resource Corporation

BNSF Railway Company

Buckeye Power, Incorporated

Caterpillar Incorporated

Crounse Corporation

CSX Corporation

Drummond Company, Incorporated

Joy Global Incorporated

Murray Energy Corporation

Natural Resource Partners, L.P.

Norfolk Southern Corporation

Oglethorpe Power Corporation

Peabody Energy Corporation

PowerSouth Energy Cooperative

Prairie State Generating Company, LLC

Southern Company

Sunflower Electric Power Corporation

Tri-State Generation & Transmission Assn.

Union Pacific Railroad

Western Fuels Association

Western Fuels Colorado

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