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February 21, 2014

Via Certified Mail, Email & Regulations.gov (EPA-HQ-2013-0495)

The Honorable Gina McCarthy
Administrator
U.S. Environment Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
McCarthy.Gina@EPA.gov

Re: Request for withdrawal and re-proposal (EPA-HQ-2013-0495)

Dear Administrator McCarthy:

This letter concerns the Environmental Protection Agency's ("EPA") failure to provide meaningful opportunity for public comment on additional documents only recently docketed to the proposed Standards of Performance for Greenhouse Gas Emissions From Stationary Sources: Electric Utility Generating Units ("NSPS"),¹ which was published in the *Federal Register* on January 8, 2014.² In particular, the Notice of Data Availability ("NODA") and accompanying Technical Support Document ("TSD") were only docketed on February 6, *and neither has yet been published in the Federal Register.*³ Despite this late docketing, EPA has not extended the period for public comments on the underlying proposal, which remain due by March 10, 2014. The public has barely a month to review and comment on one of the most wide-ranging and unprecedented rules ever to have been issued by a federal agency.

Section 307(d) of the Clean Air Act ("CAA") requires that upon publication, a proposal like the NSPS include a "statement of basis and purpose . . . [which] shall include a summary . . . [of the] . . . factual data on which the proposed rule is based, . . . the methodology used in obtaining the data and in analyzing the data, . . . [and the] major legal interpretations and policy

¹ 79 Fed. Reg. 1430 (Jan. 8, 2014).

² The Commonwealth of Kentucky has also made the same request in a previous letter to EPA.

³ "Technical Support Document: Effect of EPA Act 05 on BSER for New Fossil Fuel-fired Boilers and IGCCs, January 8, 2014", Docket No. EPA-HQ-2013-0495-1873, Feb. 6, 2014. The TSD is time-stamped January 8, 2014, but was not placed in the docket until February 6. Likewise, a pre-publication version of the NODA was not posted to the docket until February 6.

considerations underlying the proposed rule.” 42 U.S.C. 7607(d). Critically, section 307(d) also requires that “[a]ll data, information, and documents . . . on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.” This was not done here.

Yet, EPA has only now released the NODA and TSD’s full legal justification for the proposed NSPS, *more than halfway through the proposal’s comment period ending on March 10, 2014*. These documents contain *new* technical information and legal interpretations addressing how EPA believes facilities can be considered under the proposed NSPS despite statutory prohibitions in the Energy Policy Act of 2005 to the contrary. The NODA and TSD make clear that the new information includes “major legal interpretations and policy considerations underlying the proposed rule” and addresses new “data, information and documents.” Deprived of these documents, the notice of proposed rulemaking published on January 8 “fail[ed] to provide an accurate picture of the reasoning that has led [EPA] to the proposed rule.” *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530–31 (D.C. Cir. 1982). This is particularly true where, as here, the proposal overhauls the electric generating sector on an unprecedented scale. *See Maryland v. Envtl. Prot. Agency*, 530 F.2d 213, 222 (4th Cir. 1975) (vacating rule due to EPA’s failure to comply with notice and comment requirements, emphasizing the “drastic impact” that compliance with rule would have), *vacated on other grounds*, 431 U.S. 99 (1977).

The simultaneous comment deadline for the NODA and TSD provides insufficient time for stakeholders to meaningfully analyze and formulate comments not only on the proposed NSPS, but now also the NODA and TSD individually and as they relate to the proposal. In short, EPA is leaving the public with *less than a month* to not only complete comments on the proposal, but also fully analyze and provide comments on the 27 additional issues raised by the TSD. Forcing States and stakeholders to draft comments on the proposed NSPS, as well as the NODA and TSD by March 10, 2014, is unreasonable and will burden states. *See Conn. Light & Power Co.*, 673 F.2d at 530–31 (“An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”).

Moreover, this failure to comply with section 307(d) places any final rule in serious legal jeopardy. *See Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 540 (D.C. Cir. 1983) (“late docking [is] highly improper” and “prohibit[ed]. . . in no uncertain terms”); *Sierra Club v. Costle*, 657 F.2d 298, 396–400 (D.C. Cir. 1981) (“If . . . documents . . . upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment . . . , then both the structure and spirit of section 307 would have been violated.”); *see also Conn. Light & Power*, 673 F.2d at 530–31 (“If the notice of proposed rulemaking fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency’s proposals.”); *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982) (EPA improperly placed economic forecast data in the record only one week before issuing its final regulations); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004) (vacating rule because agency “deprived the

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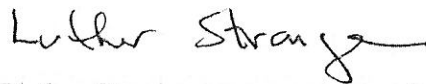
public of a meaningful opportunity to submit comments and participate in the administrative process mandated by law”).

To comply with section 307(d), EPA must withdraw and re-propose the proposed NSPS so that major legal interpretations and policy considerations in the NODA and TSD are “included in the docket on the date of publication of the proposed rule.” 42 U.S.C. § 7607(d). Therefore, the undersigned States request EPA withdraw and re-propose the NSPS to comply with applicable law, and provide interested parties 90 days to review and comment on the re-proposal. If EPA declines to do so, we request that the comment deadline for the proposed NSPS be extended to 90 days after publication of the NODA in the *Federal Register*, to allow for adequate review and comment on the proposed NSPS along with and in light of the new supporting data and major legal interpretations in the NODA and TSD.

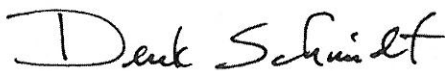
Sincerely,



Patrick Morrisey
West Virginia Attorney General



Luther Strange
Alabama Attorney General



Derek Schmidt
Kansas Attorney General



Jon Bruning
Nebraska Attorney General



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Ohio Attorney General



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