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May 9, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environment Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Submitted electronically via Regulations.gov

Re: Comments of West Virginia, Nebraska, Alabama, Alaska, Arizona, Georgia, Kansas, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, and Utah on the Proposed *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units* (Docket No. EPA-HQ-OAR-2013-0495)

Dear Administrator McCarthy:

The undersigned States appreciate the opportunity to submit the following comments on the Environmental Protection Agency's ("EPA") proposed *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units*.¹ States have a unique role in facilitating and ensuring affordable and reliable electric service while encouraging robust economic policy and responsible environmental protection. The current proposal upsets this careful balance by preventing the States from utilizing vital resources to supply the future energy needs of their citizens. As the chief legal officers of our States, we believe this unlawful and misguided rulemaking will result in great harm to our citizens.²

¹ 79 Fed. Reg. 1430 (Jan. 8, 2014).

² Kentucky Attorney General Jack Conway joins these comments to the degree that they are not inconsistent with the comments tendered on April 22, 2014, by the Kentucky Energy and Environment Cabinet via Secretary Leonard K. Peters. North Dakota Attorney General Wayne Stenehjem joins these comments to the degree that they are not inconsistent with the comments submitted by the North Dakota Department of Health.

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EPA originally issued new source performance standards (“NSPS”) for emissions of carbon dioxide (“CO₂”) for new fossil fuel-fired electric generating units (“EGUs” or “power plants”) in 2012.³ Following widespread criticism, EPA withdrew the proposal.⁴ Then on September 20, 2013, EPA issued re-proposed standards, which were published in the Federal Register for comment on January 8, 2014.

The current proposal establishes nationwide standards meant to address greenhouse gas (“GHG”) emissions from new EGUs. Promulgated pursuant to EPA’s authority under section 111(b) of the Clean Air Act (“CAA” or “Act”), the proposal creates separate emissions standards for fossil fuel-fired EGUs regulated under subpart Da and natural gas-fired stationary combustion turbines (“CTs”) regulated under subpart KKKK. New utility boilers and Integrated Gasification Combined Cycle (“IGCC”) units may emit no more than 1,100 lbs of CO₂ per MWh, and natural gas-fired CTs may emit no more than 1,000 lb CO₂/MWh for larger units and 1,100 lb CO₂/MWh for smaller units. These emission limitations would apply upon the effective date of the final rule.

According to the proposal, the new CO₂ emissions standards reflect the emission levels EPA has determined to be achievable for different types of power plants. The standard for utility boilers and IGCC units is based on the application of partial carbon capture and storage (“CCS”)—a technology that is neither commercially available nor installed on a commercial scale anywhere in the world—as the best system of emissions reduction (“BSER”). The new emissions standard for natural gas-fired power plants is based on the modern natural gas combined cycle (“NGCC”) technology as the BSER.

But much like the original proposal, the new proposal suffers from numerous fatal flaws and must be withdrawn.

I. THE BSER DETERMINATION IS LEGALLY AND FACTUALLY WRONG

The proposed rule suffers from a core defect: partial carbon capture and storage is not the best system of emission reduction. EPA has proposed two limits for fossil fuel-fired utility boilers and IGCC units, depending on the compliance period that best suits the unit. As noted, these limits require partial carbon capture and storage from a new unit. The proposed limits are 1,100 lb CO₂/MWh gross, or 1,000-1,500 lb CO₂/MWh gross over an 84-operating month period. According to EPA, these standards reflect the level of CO₂ emissions achievable by what

³ 77 Fed. Reg. 22392 (Apr. 13, 2012).

⁴ 79 Fed. Reg. 1352 (Jan. 8, 2014).

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the agency considers to be the “best demonstrated system” of emission reduction (“BSER”): partial CCS technology.

The BSER is the statutory “focal point” of an NSPS determination. *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973). Under section 111, an NSPS must be set at a level that

reflects the degree of emission limitation 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.

42 U.S.C. § 7411(a)(1). Section 111 thus requires that “EPA identify the emission levels that are ‘achievable’ with ‘adequately demonstrated technology.’” *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981).

The decisions of the D.C. Circuit addressing the BSER requirement “have established a *rigorous* standard of review under section 111.” *Nat’l Lime Ass’n v. Env’tl. Prot. Agency*, 627 F.2d 416, 429 (D.C. Cir. 1980) (citing cases) (emphasis added). A court’s review of the BSER determination is no less searching due to the technical complexity of the subject matter. *Nat’l Lime*, 627 F.2d at 430 (“The search for reasoned decisionmaking in a world of technical expertise must continue if judicial review is to have any meaning in the statutory scheme.”). Indeed, judicial review of the agency’s balancing of the relevant factors becomes *more* rigorous if the standard is based on novel technology. As the “imprint of the new technology” on the proposed rule increases, the court’s review becomes “more demanding.” *See Costle*, 657 F.2d at 348 (“the greater the imprint of the new technology on the final rule, the more demanding our review of the evidence about the potential benefits and capabilities of the new technology.”).

The agency’s BSER determination will not survive judicial review, as it is contrary to the statutory text and a wealth of evidence, and is not supported by reasoned decisionmaking. Significantly, section 111 of the Clean Air Act (“CAA”) does not permit EPA to force an experimental technology through an NSPS. But this is precisely what the proposal attempts to do. Accordingly, EPA should reverse its determination that CCS is the BSER for the proposed NSPS.

A. EPA fails to explain how CCS has been “adequately demonstrated.”

An “adequately demonstrated system” is one “which has been shown to be [1] reasonably reliable, [2] reasonably efficient, *and* which can [3] reasonably be expected to serve the interests

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of pollution control without becoming exorbitantly costly in an economic or environmental way.” *Essex Chemical*, 486 F.2d at 433. None of these standards are satisfied.

1. CCS has not been shown to be reasonably reliable and reasonably efficient.

The proposal fails to provide any evidence that CCS “has been shown to be reasonably reliable [and] reasonably efficient.” *Id.* In fact, substantial evidence demonstrates that CCS is neither viable nor cost-effective on the scale the proposal envisions. EPA points to no coal-fired facility that is currently employing CCS as intended by this proposal for a good reason: there is no such facility. At best, CCS is an experimental technology—a conclusion borne out by the very examples that EPA cites in support. These examples include several government-subsidized CCS demonstration projects that are in various stages of planning or development. No project has been completed—let alone been operational on the scale EPA prophesies.

For example, the proposal claims that the construction of the Kemper County, Mississippi, Coal Gasification Plant (“Kemper Plant”) is an example of an adequate demonstration of CCS technology for purposes of section 111. But the story of the Kemper Plant demonstrates otherwise. Kemper is suffering at least \$2 *billion* in cost overruns despite a promise of \$270 million in assistance by the federal government and \$133 million in special tax credits. To help pay for the project, the utility company received approval to recover \$2.8 billion in costs from the ratepayers. Overall, the ratepayers have suffered a 15% rate increase and may have further bond surcharges and rate increases totaling 7%. Moreover, the company responsible for constructing the Kemper Plant explained that the facility should *not* be a technological model for coal-burning power plants using CCS. The company stated, “Because the unique characteristics that make the project the right choice for Mississippi cannot be consistently replicated on a national level, the Kemper County Energy Facility should not serve as a primary basis for new emissions standards impacting all new coal-fired power plants.” Reuters, *Southern cautions on Kemper coal unit as EPA carbon model*, Sept. 20, 2013, <http://www.reuters.com/article/2013/09/20/usa-energy-emissions-kemper-idUSL2N0HG1GB20130920>.

Furthermore, the proposal fails to explore and explain the problems of using CCS technology on a commercial scale, a task the agency must do before finalizing any regulation that establishes CCS as the BSER. *See Costle*, 657 F.2d 298, 341 n.157 (“We see no basis on this record which would justify extrapolating from the pilot scale data to the conclusion that dry scrubbing is adequately demonstrated for full scale plants throughout the industry.”). Although the agency is entitled to make a projection based on existing technology, the projection is “subject to the restraints of reasonableness and cannot be based on ‘crystal ball’ inquiry.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973), *superseded on other*

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grounds, Am. Trucking Ass'n, Inc. v. U.S.E.P.A., 175 F.3d 1027 (D.C. Cir. 1999). EPA must evaluate the “demonstration of commercial-scale systems”—a “crucial” issue that must be considered in the BSER determination. *Costle*, 657 F.2d at 341 n.157.

In fact, several government entities have concluded that CCS technologies are not commercially viable. For example, the Administration’s own interagency taskforce has emphasized that CCS technology is years away from being commercially available due to multiple barriers to commercial development. *See Report of the Interagency Task Force on Carbon Capture and Storage*, Aug. 2010, at 50 (existing CO₂ capture technologies for coal-based power plants “are not ready for widespread implementation primarily because they have not been demonstrated at the scale necessary to establish confidence for power plant application”). More recently, the Department of Energy (“DOE”) has acknowledged the problem of translating successful demonstration projects into commercially viable operations. *See Dep’t of Energy, FY 2014 Budget Request*, Vol. 3 (April 2013) at FE-5 (“[T]hese demonstrations focus on first generation CCS technologies and seek to demonstrate that CCS can be integrated at commercial scale while maintaining reliable, predictable and safe plant operations. However, in the case of electricity generation, first generation CCS technology cost is not expected to be low enough to achieve widespread deployment in the near term.”).

More generally, EPA’s own Science Advisory Board (“SAB”) has raised concerns regarding the adequacy of the science on which EPA relied when determining that CCS is the BSER for new coal-fired power plants. In a November 12, 2013 memorandum—sent *after* the NSPS proposal was publicly posted—the SAB Work Group chairman stated, “the peer review of the scientific and technical information” from the National Energy Technology Laboratory studies relied upon by EPA “appears to be inadequate.” *See* James R. Mihelcic, Memorandum to Members of Chartered SAB and SAB Liaisons, Nov. 13, 2013 (also adding that further review by the full SAB would be appropriate). And though the SAB appears to have reversed itself after conferring with other EPA officials, the basis for this reversal is dubious. EPA represented to the SAB that the proposed rule only requires the *capture* of carbon emissions and does not directly address carbon *storage*. *See* James R. Mihelcic, Memorandum to Members of Chartered SAB and SAB Liaisons, Jan. 7, 2014. But it is clear from the proposal that the rule requires carbon storage to be implemented.

2. The proposal ignores the exorbitant economic costs associated with implementing CCS on a commercial scale.

The proposal fails to address the significant financial barriers that will simply result in higher costs for ratepayers, and ultimately, the taxpayers of the States. *See Lignite Energy Council v. U.S.E.P.A.*, 198 F.3d 930, 933 (D.C. Cir. 1999) (EPA contravenes section 111 if “the environmental or economic costs of using the technology are exorbitant”). The proposal points

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only to heavily subsidized projects that are suffering cost overruns and are not yet operational. *See Essex Chemical*, 486 F.2d at 433; *Lignite Energy*, 198 F.3d at 933. The best evidence EPA provides is the Kemper Plant, which as noted, faces at least \$2 billion in cost *overruns*, despite already heavy federal subsidies, tax credits, and rate increases. Moreover, in recent congressional testimony, Deputy Assistant Secretary of Energy Julio Friedmann also confirmed the exorbitant costs associated with CCS. He testified that the requiring CCS would increase electricity prices by as much as 80%. *See Ashe Schow, Energy official: Electricity prices to soar 80 percent, thanks to EPA coal regulations*, Washington Examiner, Feb. 11, 2014, <http://washingtonexaminer.com/energy-official-electricity-prices-to-soar-80-percent-thanks-to-epa-coal-regulations/article/2543871>.

The proposal mistakenly predicts that CCS technology will become commercially available at a reasonable cost, in part, because the proposed NSPS will create an economic incentive for further development and eventual commercial deployment. In reality, the proposal will have the opposite effect. The proposal hinders CCS development in the United States because the NSPS effectively prohibits new coal-fired power plants from being built. With the CO₂ emission level set as currently proposed, utilities will likely opt for cheaper, more proven technologies like natural gas combined cycle over ones that have not been commercially demonstrated like CCS. It is simply a question of risk: with no market in sight, investment will stop. Indeed, any entity that assumed the expense and risk of developing a coal-fired plant would risk civil penalties of up to \$37,500 per day if CCS proves ineffective to satisfy the emission limits. *See* 42 U.S.C. § 7413(b)(1); 40 C.F.R. § 19.4 (setting civil penalty amounts).

In addition, the proposal attempts to answer cost concerns by asserting that CCS will generate byproducts—here, CO₂—that possess marketable value. However, EPA does not consider the significant environmental, economic, and legal challenges associated with long-term storage of CO₂, which is often hampered by geographical and geological constraints, as well as regulatory uncertainty. CO₂ has only been permanently injected on a small scale. None of the pilot projects described in the proposal actively capture CO₂ from plant exhausts or store CO₂ in the ground. Because CCS is not operational at these pilot projects, there is no data about continuous operations, commercial scalability, or costs. Hence, these experimental projects cannot form the basis for a finding that the technology is available.

3. Rather than follow the statutory text, EPA effectively rewrites the section 111 requirements to justify the proposal's BSER determination.

To justify its BSER determination, EPA crafts from whole cloth a “technical” feasibility benchmark in place of the “adequately demonstrated” standard. *See* 79 Fed. Reg. 1430, 1463. Specifically, rather than assessing whether CCS technology is reasonably reliable, reasonably

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efficient, and capable of controlling pollution without imposing exorbitant costs on the commercial scale, the proposal looks to whether the separate components of CCS are technically feasible. *See* 79 Fed. Reg. at 1472-74.

The proposal fails to explain where this purported “technical” feasibility standard arises from and how evidence of such is sufficient to support an “adequately demonstrated” finding. Any BSER discussion that does not address whether the elements of CCS can be integrated at a commercial scale with the generation of electricity is flawed. In setting emissions standards for new power plants under section 111, the question before EPA is not whether the individual components of CCS has been adequately demonstrated, but whether the technology as whole has been adequately demonstrated for commercial-scale fossil fuel-fired power plants. By couching the BSER determination as a simple question of “technical” feasibility, EPA has significantly relaxed the standard it must satisfy to determine the appropriate BSER. Of course, it is easy to see why the agency needed to lower the standard set by the statutory text and case law: CCS cannot reasonably be considered “adequately demonstrated” because it is not technically or economically viable on a commercial scale. *See Costle*, 657 F.2d at 341 n.157; *Essex Chemical*, 486 F.2d at 433.

B. Even if CCS was an adequately demonstrated system, the proposal establishes an emissions standard that is not achievable.

EPA fails to provide sufficient evidence that the emissions standard is “achievable,” even if CCS was an adequately demonstrated system. An “achievable” standard is one that is “within the realm of the adequately demonstrated system’s efficiency and which, while not at a level that is purely theoretical or experimental, need not necessarily be routinely achieved within the industry prior to its adoption.” *Essex Chemical*, 486 F.2d at 433. *Cf. Costle*, 657 F.2d at 326 (“Control technologies cannot be ‘best’ if they create greater problems than they solve.”). This interpretation reflects congressional intent. *See id.* at 326 n.14 (“The legislative history of § 111 of the Clean Air Act . . . reveals that Congress was most concerned that new plants—new sources of pollution—would have to be controlled to the greatest degree *practicable* if the national goal of a cleaner environment was to be achieved.” (emphasis added)). Critically, the “[p]romulgation of standards based upon *inadequate proof of achievability* would defy the . . . mandate against [agency] action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Nat’l Lime Ass’n v. Env’tl. Prot. Agency*, 627 F.2d 416, 430 (D.C. Cir. 1980) (emphasis added); *see also* 42 U.S.C. § 7607.

To be “achievable,” an “adequately demonstrated technology” must be available in all parts of the country. To fulfill its “statutory duty to promulgate achievable standards,” EPA must “approach that task in a systematic manner that identifies relevant variables and ensures that they are taken account of in analyzing test data.” *See Nat’l Lime*, 627 F.2d at 443. Critical

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among these variables is “the representativeness—along various relevant parameters—of the data relied upon” by the agency’s achievability decision. *Id.* The “representativeness” standard incorporates a geographical component, which requires that the NSPS satisfy the conditions for all variations of operating conditions being considered throughout the Nation. *See id.* at 437 n. 63.

In this proposal, EPA ignores this essential guidance. Nowhere does the proposal even acknowledge EPA’s responsibility to account for the representativeness of the data on which the agency relied to determine achievability. The proposal’s discussion on “achievability” conspicuously fails even to mention *National Lime*, the controlling case with regard to permissible constructions of “achievability” under section 111. *See id.* at 416.

One particular issue is the variation across the country with respect to CO₂ enhanced oil recovery (“EOR”). EPA anticipates that new coal-fired power plants will defray the high costs of CCS by selling the captured CO₂ to oil producers, which use the gas to help extract oil by displacing liquid fuels deep underground using EOR. Its cost estimates are based on coal-fired power plants being within 50 miles of geology suitable for EOR.

But these cost estimates elide the geologic variations across the country. As EPA concedes, “there are places” where access to EOR “may not be presently available.” Indeed, it identifies only 12 States where EOR is practiced. The cost estimates are therefore inadequate and incomplete, as requiring CCS in locations with no access to EOR will be far more costly than in locations within 50 miles of geology suitable for EOR.

II. THE PROPOSED RULE VIOLATES THE ENERGY POLICY ACT OF 2005

As explained in a letter dated November 15, 2013, from the leadership of the U.S. House of Representatives Energy and Commerce Committee to EPA Administrator Gina McCarthy, the Energy Policy Act of 2005 (“EPAct”)⁵ prohibits the agency from considering projects that receive government funding as the basis for a Clean Air Act section 111 rulemaking.⁶ As noted, new source performance standards must reflect the “degree of emission limitation achievable through the application of the best system of emission reduction” that has been “adequately

⁵ 42 U.S.C. §§ 15961-64.

⁶ Letter from Reps. Fred Upton (Chairman), Ed Whitfield (Chairman, Subcommittee on Energy and Power), Joe Barton (Chairman Emeritus), and Steve Scalise (Vice-Chair, Subcommittee on Energy and Power), U.S. House of Representatives, Committee on Energy and Commerce, to Gina McCarthy, Adm’r, EPA (Nov. 15, 2013), *available at* <http://energycommerce.house.gov/press-release/committee-leaders-request-withdrawal-epa-proposed-power-plant-standards>.

demonstrated.”⁷ Thus, no NSPS may be established based on technology that has not been shown “to be reasonably reliable, reasonably efficient, and . . . can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way.”⁸ It stands to reason that technologies that can be built and tested only with government support are therefore not “adequately demonstrated.” In the EAct, Congress simply confirmed as much by *expressly* prohibiting EPA from “considering”—for purposes of section 111—technology used at facilities that are awarded either Clean Coal Power Initiative (“CCPI”) funding or Section 48A tax credits as adequately demonstrated.

EPA violated the EAct because the proposal maintains that CCS technologies have been “adequately demonstrated” based on government-funded projects. In direct contravention of EAct, EPA initiated a proceeding to establish GHG NSPS based on express consideration of four facilities that were awarded CCPI funding, Section 48A tax credits, or both, as evidence that carbon capture and sequestration or storage is “adequately demonstrated.” The only facility that EPA relied on that was not awarded either CCPI funding or a Section 48A tax credit is a Canadian project under development that is owned and heavily subsidized by the Canadian government. To comply with EAct, EPA must withdraw the current section 111 rulemaking proposal and issue a new proposal that is not based on consideration of EAct-prohibited technologies.

Finally, even if this proposal could proceed, the rule would not survive judicial review once the EAct-subsidized facilities are properly discounted. The other facilities that EPA cites briefly in the section 111 rulemaking preamble are either located outside the United States, incorporate only a single component of CCS, or are outside the electric generating sector and thus cannot serve as examples of what is adequately demonstrated technology for new U.S.-based coal-fired EGUs that face geographically-, technically-, and economically-unique constraints. Moreover, most if not all of the international projects relied upon by EPA also are heavily subsidized by their own governments (or even the U.S. government). There simply is no evidence that CCS is commercially viable for power plants.⁹ In fact, even outside the power-plant context, CCS is heavily subsidized, totaling \$600 million to \$1 billion for U.S. projects alone. Technology that has never been demonstrated at a commercial-scale power plant and which continues to require such extensive federal subsidies even outside the power-plant context cannot fairly be mandated for every new coal-fired power plant in the United States.

⁷ CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1).

⁸ *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973).

⁹ *Power Plant Carbon Dioxide Capture and Storage Projects*, Carbon Capture & Sequestration Technologies, Massachusetts Institute of Technology, available at http://sequestration.mit.edu/tools/projects/index_capture.html.

III. THE PROPOSAL IS FUNDAMENTALLY FLAWED BECAUSE EPA'S JUSTIFICATIONS FOR THE RULE ARE CONTRARY TO THE AGENCY'S OWN PREDICTIONS AND PURPOSES IT RELIED UPON IN CRAFTING THE STANDARDS.

The central rationale for promulgating the rule—that the proposal will protect public health and address climate change¹⁰—is undercut by EPA's own admission that the proposed standards “will result in negligible CO₂ emission changes, quantified benefits, and costs, by 2022.”¹¹ The agency predicts no costs and no benefits for natural gas plants because EPA chose a CO₂ limitation that is easily met by new natural gas units. In addition, EPA predicts the same for coal plants because, in the agency's view, no new coal power plants will be built “due to existing or expected market conditions.”¹² Thus, the agency concluded that compliance with the rule will *cost nothing* and *accomplish nothing* because the rule is not predicted to result in any actual CO₂ reductions.¹³

This makes the rule arbitrary and capricious. A reviewing court “must engage in a ‘substantial inquiry’ into the facts, one that is ‘searching and careful.’” *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 25 (D.C. Cir. 1976) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)). “This is particularly true in highly technical cases.” *Id.* But this explanation does not articulate a “‘rational connection between the facts found and the choice made.’” *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994) (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)); *see also A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (“an agency must cogently explain why it has exercised its discretion in a given manner,” and that explanation must be “sufficient to enable us to conclude that the agency's action was the product of reasoned decisionmaking” (quoting *State Farm*, 463 U.S. at 48, 52 (alterations omitted))). To the contrary, the “explanation for its decision ... runs counter to the evidence before the agency.” *Motor Vehicle Mfr's Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Moreover, a rulemaking without purported benefits violates the EPA's rulemaking authority under the Clean Air Act, which limits that authority to “prescrib[ing] such regulations as are necessary to carry out” the Administrator's functions under the Act. 42 U.S.C. §

¹⁰ 79 Fed. Reg. 1430, 1496.

¹¹ *Id.* at 1433.

¹² *Id.* at 1496.

¹³ The actual reasons EPA may have issued the proposal may have little to do with the NSPS, and everything to do with its forthcoming rule for existing power plants under section 111(d) of the Act. As EPA concedes, this new proposal under section 111(b) is “a necessary predicate for regulation of existing sources” under section 111(d). 79 Fed. Reg. 1430, 1496.

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7601(a)(1). These functions include “protect[ing] and enhanc[ing] the quality of the Nation’s air resources,” *id.* § 7401(b)(1), and “encourag[ing] or otherwise promot[ing] reasonable . . . actions . . . for pollution prevention,” *id.* § 7401(c). Because EPA acknowledges that this proposal would have no environmental benefits, the proposal cannot in any way be seen to be “necessary” to accomplish the stated goals of the statute under which it is being proposed.

IV. EPA FAILED TO COMPLY WITH NOTICE AND COMMENT REQUIREMENTS

Section 307(d) of the 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 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.”

EPA did not comply with these requirements until late in the original comment period. This proposal was first published in the Federal Register on January 8, 2014—months after it was first signed by the Administrator—beginning a comment period that would end on March 10, 2014. But EPA failed to docket the Notice of Data Availability (“NODA”) and accompanying Technical Support Document (“TSD”) until February 6, 2014—*more than halfway through* the proposal’s original comment period. Those documents then were not published in the Federal Register until February 26, 2014. Only after at least ten States¹⁴ pointed out this failure to EPA did the agency extend the comment period until May 9, 2014.¹⁵

The new May 9 comment deadline for the complete proposal still provides insufficient time for stakeholders to meaningfully analyze and formulate comments. The NODA and TSD contained *new* technical information and legal interpretations offering EPA’s argument for considering subsidized facilities notwithstanding the prohibitions in the EPAct. 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

¹⁴ By letter dated February 10, 2014, the Commonwealth of Kentucky formally requested that EPA extend the comment period for 90 days. Likewise, on February 21, 2014, the State of West Virginia and eight other States made the same request.

¹⁵ 79 Fed. Reg. 12681 (Mar. 6, 2014).

(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 the rule would have), *vacated on other grounds*, 431 U.S. 99 (1977). All told, the public has had barely two months to review and comment on one of the most wide-ranging and unprecedented rules ever to have been issued by a federal agency, and to fully analyze and provide comments on the 27 additional issues raised by the TSD. *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.").

Unless the proposal is withdrawn and properly reissued, it risks being overturned on these grounds. *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 rule-making 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 public of a meaningful opportunity to submit comments and participate in the administrative process mandated by law").

V. EPA FAILED TO COMPLY WITH SECTION 321 OF THE CLEAN AIR ACT

The proposal does not indicate whether the Administrator complied with section 321 of the CAA, which requires her to conduct continuing evaluations of potential loss or shifts of employment that may result from the administration or enforcement of the Act. *See* 42 U.S.C. § 7621(a). Section 321(a) states as follows:

(a) Continuous evaluation of potential loss or shifts of employment

The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.

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42 U.S.C. § 7621(a). Nothing in the provision places any conditions on EPA's ongoing duty to conduct "continuing evaluations" on job losses resulting from its CAA enforcement activity. The plain text imposes an affirmative duty on EPA to continually evaluate its enforcement of the CAA for potential loss or shifts of employment resulting from its rulemaking actions affecting, among others, the mining industry. The record does not show that EPA has complied with section 321 with respect to the current proposal.

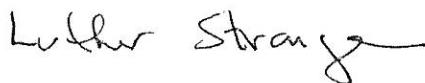
Sincerely,



Patrick Morrisey
West Virginia Attorney General



Jon Bruning
Nebraska Attorney General



Luther Strange
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Michael C. Geraghty
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Tom Horne
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Samuel S. Olens
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Derek Schmidt
Kansas Attorney General



Jack Conway
Kentucky Attorney General



James D. "Buddy" Caldwell
Louisiana Attorney General



Bill Schuette
Michigan Attorney General



Wayne Stenehjem
North Dakota Attorney General



Mike DeWine
Ohio Attorney General

Honorable Gina McCarthy

May 9, 2014

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Handwritten signature of E. Scott Pruitt in black ink.

E. Scott Pruitt
Oklahoma Attorney General

Handwritten signature of Alan Wilson in black ink.

Alan Wilson
South Carolina Attorney General

Handwritten signature of Marty J. Jackley in black ink.

Marty J. Jackley
South Dakota Attorney General

Handwritten signature of Sean Reyes in black ink.

Sean Reyes
Utah Attorney General