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September 11, 2013

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Re: EPA Performance Standards for Greenhouse Gas Emissions for Existing Electric Generating Units

Dear Administrator McCarthy:

The Attorneys General of seventeen states and the senior environmental regulator of an eighteenth have followed with interest EPA's statements regarding its intention to promulgate guidelines for performance standards for greenhouse gas (GHG) emissions from existing electric generating units (EGUs).

We recognize EPA's obligation to promulgate these guidelines through an open and transparent process, which would include input from all stakeholders. As the statutory responsibility and authority under Section 111(d) for developing and implementing performance standards is vested at the state level, we intend to participate fully in this process as representatives for our States.

Enclosed with this letter is a white paper setting forth our position on both EPA and the states' authority under Section 111(d). The white paper responds to EPA's aggressive proposal for GHG performance standards for new EGUs and indications of a similarly aggressive stance on existing EGUs. Our concerns are justified given EPA's unwillingness to appropriately defer to State authority under the Clean Air Act in recent years.

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As the white paper describes, Section 111(d) is unambiguous in granting to states the sole authority to determine actual substantive standards as applied to individual sources. EPA's role is limited to establishing procedures whereby states develop and implement performance standards for existing EGUs. We trust EPA will to adhere to the limitations of its authority under the Clean Air Act when adopting guidelines for the states' development of plans for GHG performance standards for existing EGUs.

We appreciate your consideration of our position and restate our commitment to cooperative federalism as required under the CAA.

Sincerely,

Jon Bruning
Attorney General

Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act.

Introduction

As State Attorneys General, we believe it is critical to bring public awareness to another example of what has unfortunately become routine: the United States Environmental Protection Agency ("EPA" or "Agency") is poised to yet again propose new regulations that venture well beyond the limits of the agency's authority. The President has called upon EPA to propose greenhouse gas (GHG) emission standards, regulations, or guidelines for *existing* power plants by June 1, 2014, and to finalize those rules by June 1, 2015. As this paper will show, EPA's authority under the Clean Air Act is limited to developing a procedure for *states* to establish emissions standards for existing sources. EPA, if unchecked, will continue to implement regulations which far exceed its statutory authority to the detriment of the States, in whom Congress has vested authority under the Clean Air Act, and whose citizenry and industries will ultimately pay the price of these costly and ineffective regulations.

Last year, EPA published a proposed rule regulating carbon dioxide ("CO_2") emissions from new electric utility generating units ("EGUs"). 77 Fed. Reg. 22,392 (April 13, 2012) ("EGU NSPS"). In light of recent comments from industry, EPA is considering the need to re-propose this standard due to its failure to finalize the action within the CAA's 1-year timeframe. In addition, on April 15 and 17, 2013, some states and environmental groups filed 60- and 180-day Notices of Intent to sue EPA under section 304(a) of the Clean Air Act ("CAA") for failure to perform the allegedly non-discretionary duty of and/or unreasonably delaying finalizing the

EGU NSPS and proposing standards for existing EGUs.[1] In response to these Notices, a coalition of Attorneys General has requested to be involved in any settlement discussions with advocates of broad federal GHG regulations.

EPA states that once it has issued regulations for an air pollutant from *new* sources in a particular source category under the CAA § 111(b), it has legal authority to regulate emissions from *existing* sources of that air pollutant within the same source category.[2] The final version of the new source performance standards for new EGUs will likely face legal challenge. However, the following analysis assumes the final EGU NSPS for GHG emissions is upheld and EPA moves forward with rulemaking for existing sources.

The purpose of this paper is to identify a timely example of a serious, ongoing problem in environmental regulation: the tendency of EPA to seek to expand the scope of its jurisdiction at the cost of relegating the role of the States to merely implementing whatever Washington prescribes, regardless of its wisdom, cost, or efficiency in light of local circumstances. The issue is not new. The States and EPA have been at odds over the scope of their respective responsibilities under the federal environmental statutes since the statutes' inception. The recent increase in the level of federal regulatory activity under the Clean Air Act has generated a

[1] A settlement agreement entered into by a number of states and environmental groups in December 2010 set forth deadlines for EPA to issue regulations with respect to GHG emissions from existing EGUs. See, 75 Fed. Reg. 82,392 (Dec. 20, 2010). The deadlines have passed.

[2] The authority of EPA to promulgate GHG NSPS for existing EGUs, even if it finalizes its proposed GHG NSPS rule for new EGUs, has been questioned. *See* William J. Hann, The Clean Air Act as an Obstacle to the Environmental Protection Agency's Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants, THE FEDERALIST SOCIETY (Mar. 2013), available at http://www.fed-soc.org/publications/detail/the-clean-air-act-as-an-obstacle-to-the-environmental-protection-agencys-anticipated-attempt-to-regulate-greenhouse-gas-emissions-from-existing-power-plants. Without conceding that EPA does have authority to promulgate a GHG NSPS for existing EGUs, we assume for purposes of discussion here that EPA does have that authority and will exercise it.

corresponding increase in concerns among the States regarding the preservation of their role in environmental protection.

The way in which EPA has "pushed the envelope" in interpreting its legal authority under the CAA to promulgate a New Source Performance Standard for new EGUs portends a similarly aggressive and unlawful approach to the regulation of existing EGUs. EPA's clear policy goal in establishing its new source standards is to prevent the construction of new coal plants. EPA's proposed EGU NSPS would foreclose the construction of new coal-based electric generation absent carbon capture and storage ("CCS"), yet CCS is likely to remain commercially infeasible for a decade or more. The elimination of coal as a fuel for new electric generation would have highly concerning implications for electricity prices and for the economy and job-creation in general, as well as the competitiveness of American manufacturing.

In order to justify its proposed standard that would not allow new coal-based EGUs absent CCS, EPA has taken unprecedented steps. The Agency proposed to combine coal and combined-cycle natural-gas units into a single regulatory category, something it has never done before for coal and gas EGUs. Indeed, it did not even go so far as recently as last year when it proposed NSPS for traditional pollutants emitted by EGUs. EPA's aggressive posture in its proposed new-source NSPS, both as to foreclosing new coal plants and in pushing the scope of its claimed legal authority, raises serious questions as to the approach EPA will eventually take when it promulgates existing-source NSPS.

If EPA proceeds against existing coal plants with the same hostility, it is likely to be reversed in court. As this paper shows, EPA does not have authority to promulgate prescriptive limitations for existing coal-fueled EGUs. Under section 111(d) of the CAA, EPA must recognize that States have broad discretion to determine the nature of NSPS requirements for

existing EGUs. EPA may require States to adopt standards, and EPA may guide how States do so procedurally, but the States are vested with the legal authority to decide the ultimate standards.

The Statutory and Regulatory Framework For Developing Performance Standards For Existing Sources

The focus of the following analysis is the limitations Congress placed on EPA's authority under Section 111(d) of the CAA. Section 111(d) provides EPA with the authority to develop standards of performance for existing sources and directs the Agency to:

> prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source for any air pollutant…to which a standard of performance under this section would apply if such existing source were a new source.

Section 111(d) requires the existence of a performance standard for new sources as a condition precedent to the development of such standards for existing sources. Thus, the legality of the final version of EPA's EGU NSPS rule has significant implications for EPA's ability to require regulation of existing EGUs.

Most importantly, section 111(d) invokes the principle of cooperative federalism – with roles clearly delineated for both EPA and the States. The reference to § 110 refers to the general process by which States submit their State Implementation Plans ("SIPs") for EPA review. Accordingly, EPA's authority under § 111(d) is limited to establishing, in the statute's term, a "*procedure*" by which the States submit plans for regulating existing sources. EPA cannot promulgate rules establishing the substantive standards to be imposed on existing sources.

The cooperative federalism is illustrated by EPA's general procedural regulations relating to the States' adoption and submittal of plans establishing standards of performance for existing

sources. Those regulations require EPA to issue a "guideline document" concurrently with, or after, the "proposal of standards of performance for the control of a designated pollutant from affected facilities." 40 C.F.R. § 60.22(a). The content of the guideline document is of great importance to the preservation of the States' role in the development of performance standards for existing sources.

Under EPA's regulations, the guideline document is to "provide information for the development of State plans" including a "description of systems of emissions reduction which, in the judgment of the Administrator, have been adequately demonstrated." *Id* at (b)(2). The guideline document also shall contain an "emission guideline" providing "criteria for judging the adequacy" of § 111(d) plans. 40 C.F.R. § 60.22(b)(5); *see*, 40 Fed. Reg. 53,341 (Nov. 17, 1975). The emission guideline "reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated." 40 C.F.R. § 60.22(b)(5). The emission guideline must also allow sub-categorization "when costs of control, physical limitations, geographical location, or similar factors make [it] appropriate." *Id*.

Also under EPA's regulations, the States have nine months to submit a "plan for the control of the designated pollutant to which the guideline document applies." 40 C.F.R. § 60.23(a)(1). The plan "shall include emission standards" that "shall prescribe allowable rates of emissions except when it is clearly impracticable." 40 C.F.R. § 60.24(a), (b)(1). The States have significant discretion in formulating these plans. Although the "emission standards" are to be "no less stringent than the corresponding emission guideline(s), the States may make a case-by-case determination that a specific facility or class of facilities should be subject to a less-stringent standard or longer compliance schedule due to 1) cost of control; 2) physical limitation of installing necessary control equipment; and 3) other factors making the less-stringent standard

more reasonable. *See*, 40 C.F.R. § 60.24(c), (f). EPA then has four months to determine whether the plan meets the requirements discussed above. If EPA disapproves the plan, the State may correct the deficiencies or, under EPA's construction, the Agency may issue its own plan within 6 months of the original submission deadline. *See*, 40 C.F.R. § 60.27(c), (d).

Although these regulations have never been tested in court, EPA undoubtedly has power to adopt procedural regulations governing State adoption of plans setting forth performance standards. But, importantly, and consistent with the statute, the determination of the actual substantive standards is left to the states.

Existing Source Performance Standards for CO_2 Emissions from EGUs

In contemplating regulation of existing EGUs, however, EPA appears poised to go beyond the establishment of procedures and usurp the states' authority by setting minimum *substantive* requirements for state performance standards. Having reviewed the statutory and regulatory requirements for developing standards of performance for existing sources in a general sense, we now apply that legal framework to CO_2 emissions from EGUs. Although EPA has not yet issued a proposed guideline document for CO_2 emissions from existing EGUs, we offer general observations about potential issues that have already presented themselves.

Fundamentally, § 111(d), as well as EPA's own regulations, require that emission reductions be made through adequately demonstrated systems of emission reduction technology. Under § 111(d), EPA establishes procedures for States to submit plans containing "performance standards." "Performance standards" is defined in § 111(a): "The term 'standard of performance' means a standard for emissions of air pollutants which 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*." (Emphasis supplied). And EPA's guideline document and the emission guideline contained therein are to "reflect[] the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated." 40 C.F.R. § 60.22(b)(5); *see also*, 42 U.S.C. § 7411(1) (definition of "standard of performance"). The crux of this requirement thus is that the system be, in fact, adequately demonstrated.

It seems incontrovertible that no post-combustion reduction system has been "adequately demonstrated" for CO_2 emissions from EGUs on a broad, commercial scale. A system of carbon capture and storage is perhaps a decade away from being technologically and economically feasible. A permitting system for storing CO_2 emissions underground and a set of legal rules governing liability for CO_2 storage has not been put in place in most states. Without an adequately demonstrated post-combustion control technology, EPA must look to standards based on cost-effective efficiency improvements at electric generating units, because more efficient units will produce lower CO_2 emissions per unit of heat input or electricity output.

EPA and others may believe that efficiency measures will not ensure the amount of CO_2 emission reductions they desire. As a result, some groups have proposed EPA be given flexibility to develop emission guidelines based on trading programs with statewide emissions caps, increased reliance on lower CO_2 emitting facilities, or demand-side and non-regulated source reductions. In short, EPA may attempt to force coal-fueled EGUs to decrease operation time or retire early, or force utilities to rely more heavily on natural gas and other resources in an effort to ensure greater CO_2 emission reductions. Such proposals, often offered as ways of providing "flexibility," do not conform to the limitations Congress has placed on EPA in the

Clean Air Act, nor do they properly preserve the primary role of States in the development of standards of performance for existing sources. Under § 111(d), it is the States, not EPA, that are authorized to adopt performance standards; therefore it is the States, not EPA, that weigh the § 111(a)(1) factors to determine what technology is adequately demonstrated. Simply put, EPA lacks statutory authority (and is limited by its own regulations) to issue emission guidelines seeking reductions of CO_2 emissions from coal-based EGUs in a manner based on something other than an adequately demonstrated reduction system for such EGUs.

To the extent § 111(d) provides authority for flexible approaches to establishing performance standards to seek reductions in CO_2 emissions, that authority is vested in States, not EPA. And of course, under § 116, States retain authority to adopt more stringent CO_2 controls than EPA has the authority to mandate.

As noted, § 111(d) specifies that EPA's regulatory authority is limited to developing a *procedure* for the submission of state plans. EPA's general regulations authorizing the issuance of emission guidelines that establish minimum requirements, depending on how EPA implements this guideline authority in a particular case, bear on substantive standard-setting. But EPA does not have the authority to establish minimum substantive requirements.

EPA cannot dictate substantive outcomes. The agency can require that States actually adopt performance standards based on application of the § 111(a)(1) factors.

States are additionally afforded the discretion to consider "among other factors, the remaining useful life of the existing source to which such standard applies" when developing performance standards for existing units. Beyond this, § 111(d) does not provide authority for EPA to reject a State plan if it does not contain a standard of performance as that term is defined, and based on the factors set forth, in § 111(a)(1).

In sum, the CAA imposes responsibility for air pollution control at the State and local levels because of the proximity to existing sources and familiarity with local operating conditions. State implementation plans are thus the primary architecture of emission controls. *See* §§ 107(a); 110(a); 111(d). The "structure of the CAA militates against reading an extra-statutory requirement into the Act's limitations on state discretion. Because the states enjoy 'wide discretion' in implementing the Act, the imposition of newfound restrictions upsets the Act's careful balance between state and federal authority. *Union Elec. Co.*, 427 U.S. at 250; *see also Fla. Power & Light Co.*, 650 F.2d at 587 ('The great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by EPA.')." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 929 (5th Cir. 2012). EPA's role for existing sources is therefore "confine[d]…to the ministerial function of reviewing SIPs for consistency with the Act's requirements." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012).

Conclusion

The prospect for EPA adoption of GHG performance standards for new or existing coal-based EGUs raises serious concerns. EPA's aggressive standards for new coal-based EGUs indicate a similarly aggressive approach to existing coal-based EGUs. While EPA is authorized to require States to submit plans containing performance standards, EPA may not dictate what those performance standards shall be. Nor may EPA require States to adopt GHG performance standards that are not based on adequately demonstrated technology or that mandate, in the guise of "flexible approaches," the retirement or reduced operation of still-viable coal-based EGUs.

These concerns are serious. EPA regulations may harm the nascent economic recovery. Moreover, our federalist system of government, as implicated in the CAA, requires that EPA

recognize the rights and prerogatives of States. The extent and form of greenhouse gas regulation is important to the States; it is critical that States be allowed to play their proper roles in making the significant policy judgments that are required in adopting any such regulation.

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