Testimony of Melissa A. Hoffer, Assistant Attorney General
Chief, Energy and Environment Bureau, Massachusetts Attorney General's Office
Before the U.S. House of Representatives
Committee on Energy and Commerce – Subcommittee on Energy and Power
Hearing to Examine EPA's Proposed 111(d) Rule for Existing Power Plants
and the Proposed Ratepayer Protection Act
April 14, 2015

SUMMARY OF TESTIMONY

My testimony will summarize (1) the legal basis for the Environmental Protection Agency's (EPA) authority under Clean Air Act Section 111(d) to regulate power plant carbon dioxide emissions; (2) why the Discussion Draft's compliance extension provision is not necessary and why its opt out provision would set a precedent that could substantially weaken implementation of the Clean Air Act; and (3) how the Clean Power Plan's flexible approach leverages states' innovation and expertise to achieve cost-effective reductions of dangerous global warming pollution.

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Good morning, Chairman Whitfield, Ranking Member Rush, and Members of the Committee. The Massachusetts Attorney General's Office appreciates this opportunity to provide testimony on EPA's Clean Power Plan and the Proposed Ratepayer Protection Act.

The Environmental Protection Agency (EPA) Has Authority Under Clean Air Act Section 111(d) To Regulate Power Plant Carbon Dioxide Emissions

Section 111(d) plays a critical role in the Clean Air Act's comprehensive scheme for regulating stationary sources by allowing EPA and states to reduce harmful air pollution from existing stationary sources that is not regulated under the National Ambient Air Quality Standards (NAAQS) program (Sections 108-110), or the hazardous air pollutant (HAP) program (Section 112). The NAAQS and HAP programs address emissions of certain listed pollutants, respectively, criteria pollutants and hazardous pollutants. By contrast, with Section 111(d), Congress more broadly authorized EPA to establish standards for *any* emissions from existing sources that endanger public health or welfare but are not regulated under the NAAQS or HAP programs.

Congress drafted the Clean Air Act with the intent that these three programs would ensure "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91-1196, at 20 (1970). These provisions, therefore, collectively "establish[ ] a comprehensive program for controlling and improving the nation's air quality." *Luminant Generation Co. v. EPA*, 675 F. 3d 917, 921 (5th Cir. 2012) internal quotation omitted).

Let's be clear: Those who challenge EPA's authority are taking the position that, simply because EPA is regulating emissions of *hazardous* pollutants from power plants, it may not also regulate emissions of carbon dioxide—a pollutant *not* regulated under the hazardous air pollutant program. The Clean Power Plan imposes no double regulation of the same pollutant; rather, it proposes to do exactly what Congress intended—implement regulation of a pollutant, carbon dioxide, that is not regulated under either the NAAQS or HAP programs. It makes no sense—and neither the language of the Act, nor its legislative history provide any basis to conclude—that Congress wanted to force EPA to choose between regulating *either* hazardous air pollution from power plants *or* dangerous carbon dioxide pollution from power plants, but not both. EPA's opponents would exclude the largest sources of carbon dioxide—power plants—from regulation under Section 111(d) simply because they also happen to be huge sources of completely different, toxic air pollutants. That interpretation is not supported by the text of the statute or the legislative history of the 1990 amendments, and in light of the Act's Congressionally stated purpose "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," 42 U.S.C. § 7401(b)(1), the more reasonable interpretation is that Congress intended for EPA to do both. Congress recognized that different air pollutants cause different harms to public health and the environment, and frequently require different control strategies.

In 1990, the Clean Air Act's HAP program was amended extensively after EPA's delays in listing and regulating hazardous pollutants "proved to be disappointing." *Sierra Club v. EPA*, 353 F. 3d 976, 979-80 (D.C. Cir. 2004). The pre-1990 approach had required EPA to identify and list certain air pollutants that "cause or contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible, illness" and put in place emissions standards that

would "provide[ ] an ample margin of safety to protect the public health." Pub. L. No. 91-604, § 112(a)(1), (b)(1)(B), 84 Stat. 1676, 1685 (1970). Congress was well aware of the public health risks posed by hazardous air pollution, and recognized that the law had "worked poorly," since "[i]n 18 years, EPA has regulated only some sources of only seven chemicals." S. Rep. No. 101-228, at 128, 1990 U.S.C.C.A.N. at 3513 (internal quotations omitted). Congress's focus in 1990, with respect to regulation of hazardous air pollutants, was to remedy the regulatory paralysis that had prevented EPA from putting into place urgently needed hazardous air pollution emissions controls. *See New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008).

Before the 1990 amendments, Section 111(d) required that state plans address "any air pollutant which is not included on a list published under Section 7408(a)" (a reference to the NAAQS program), or "7412(b)(1)(A) of this title," a reference to the then-existing HAP program. *See* 42 U.S.C. § 7411(d) (West 1977). When Congress amended Section 112 in 1990, instead of relying on EPA's listing of hazardous air pollutants to trigger Section 112 regulation, Congress itself listed 189 hazardous air pollutants and directed EPA to list categories of major and area sources for each of those pollutants, and establish emission standards for each source category. *See* 42 U.S.C. § 7412(b)(1), (c)(1), (d)(1).

Congress also made conforming amendments to Section 111(d)—different conforming language from the House and Senate bills was, however, included in different sections of the final legislation without being reconciled in conference. The Senate amendment replaced the existing cross-reference to Section 112(b)(1)(A) (which section was eliminated by the 1990 amendments) with a cross reference to the new Section 112(b). As a result, the Senate amendment requires that Section 111(d) standards be developed for "any pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or section

112(b)." Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). The House amendment also replaced the existing cross-reference to Section 112(b)(1)(A); its language requires Section 111(d) standards be developed for "any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or emitted from a source category which is regulated under section 112." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990).

Both amendments were signed into law by then-President Bush, and both appear in the Statutes at Large, but only the House amendment appears in the U.S. Code. The text of the Statutes at Large governs when it is inconsistent with the U.S. Code. *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of America*, 508 U.S. 439, 448 (1993).

There is no evidence that Congress intended with these amendments to make a sweeping, substantive change to Section 111(d)'s unique role in the Act's comprehensive regulatory scheme. Indeed, to the contrary, in Section 112(d)(7), Congress specifically provided that EPA's regulation of emissions under Section 112 must not impair Section 111 requirements for different emissions from the same sources. *See* 42 U.S.C. § 7412(d).

Moreover, the legislative history indicates that Congress intended the Senate's amendment to Section 111(d) to be in the final bill. After the House amended the Senate's bill and deleted the Senate's seven "Conforming Amendments," (including the revision to section 111(d)), the Conference Committee *added the Senate's conforming amendments back into the final bill. Compare* S. 1630, 101st Cong. (as passed by House, May 23, 1990) *with* Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). As well, when the Congressional Research Service complied the legislative history of the 1990 amendments shortly after their enactment, it

transcribed the amended Act by including both the House and Senate amendments to Section 111(d), noting that the amendments were "duplicative" and simply used "different language [to] change the reference to section 112." A Legislative History of the Clean Air Act Amendments of 1990, Vol. 1, at 46 & n.1 (1993).

Interpreting Section 111(d) to bar regulation of any non-criteria, non-HAP pollutant emitted by a source that also happens to emit hazardous air pollutants would effectively gut Section 111(d), nullifying its role as a backstop to ensure comprehensive protection of public health from harmful air pollution. EPA has long regulated source categories under both Section 111(d) and Section 112. *See Attachment A* at p. 12 & n. 8. Such an interpretation would undermine Section 111(d)'s function, as recognized by the Supreme Court in *AEP v. Connecticut*, to "provide[ ] a means to seek limits on emissions of carbon dioxide from domestic power plants." 131 S. Ct. 2527, 2537-38 (2011).

Opponents' interpretation ignores the Senate amendment, and fails to address the fact that the House amendment itself is subject to multiple readings. For example, it could reasonably read as preserving, as did the Senate amendment, Section 111(d)'s role to regulate emissions not regulated under the NAAQS or HAP programs. The phrase "which is regulated under Section 7412" could be read as modifying both the phrase "any air pollutant" and the phrase "source category," referencing those air pollutant emissions that are actually subject to Section 112 regulation because both the air pollutant is listed as a pollutant subject to regulation under Section 112 *and* the source category is listed as a source category subject to Section 112 regulation. Read this way, Section 111(d) would preclude regulation only of pollutants—like power plant mercury emissions—that are actually regulated under Section 112.

EPA has correctly attempted to harmonize the House and Senate amendments, to the extent they appear inconsistent. The D.C. Circuit has previously held that where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course . . . to give maximum possible effect to both." *Citizens to Save Spencer Co. v. EPA*, 600 F. 2d 844, 872 (D. C. Cir. 1979).

The Discussion Draft's Compliance Extension Provisions Are Not Necessary and Its Opt Out Provisions Would Set a Dangerous Precedent

The Discussion Draft's compliance extension provisions are not necessary. There already are well established legal procedures in place by which agency action may be stayed pending judicial review. *See* FRAP 18; D. C. Cir. R. 18. The D. C. Circuit has "customary power to stay [agency action] under review," *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 11, (1942), and properly may stay any final rule EPA may issue if it finds the party seeking a stay has demonstrated that (1) it is likely to prevail on the merits of the appeal; (2) without relief , it will be irreparably harmed; (3) the issuance of the stay would not substantially harm other parties interested in the proceedings; and (4) on balance, the stay would favor the public interest. *See Virginia Petroleum Jobbers Assoc. v. Federal Power Commission*, 259 F. 2d. 921 (1958). This standard—in place in the courts for over fifty years—has withstood the test of time, and ensures that courts will undertake a careful balancing of interests before granting a stay of agency action. The Discussion Draft would jettison this careful balancing in favor of what is effectively an automatic rule that would halt Clean Power Plan implementation

for years during the pendency of any litigation, without regard to the merits of the claims, the impacts to other interested parties, or the consequences for the public interest.

Further, the extension provisions, by requiring implementation of the Plan to be delayed until all judgments are final in any qualifying challenge brought to the Rule, would create powerful incentives for frivolous litigation in an effort to stall and avoid compliance with the Clean Power Plan.

The Discussion Draft would also create an unprecedented escape hatch for states wholly to opt out of urgently needed carbon dioxide pollution control requirements solely on the basis of unverified claims regarding costs or purported reliability concerns. It begs the question of what comes next—could states also then opt out of their Clean Air Act obligations to plan for control of soot, which harms millions of Americans every year?

With the passage of the 1970 Clean Air Act, Congress established national air pollution control requirements, and it employed a cooperative federalism model to implement those requirements. For example, under the NAAQS program, EPA sets the ambient air quality standards, and states develop and submit plans setting forth their own paths for achieving compliance. If a state fails to submit a plan, Congress created a health-protective backstop—EPA steps in to write a plan for the state. Congress understood that, without national standards, Americans' health and well-being would suffer, since air pollution travels across state borders—an upwind state willing to allow its facilities to emit more pollution would place at risk those living in a downwind state, no matter how stringent that downwind state's own pollution controls might be.

The Discussion Draft's opt out provision would break the promise, backed by the federal government, of the Clean Air Act—that air pollution will be controlled to protect public health.

The Clean Power Plan's Flexible Approach Leverages States' Innovation and Expertise to Achieve Cost-Effective Reductions of Dangerous Global Warming Pollution

The Clean Power Plan's cooperative federalism approach ensures that states will have maximum flexibility to design compliance plans that work best for states. Massachusetts is a part of the multi-state Regional Greenhouse Gas Initiative (RGGI), which instituted a mandatory power sector cap and trade program. Since 2009 when RGGI went into effect, the RGGI states have reduced regional carbon dioxide emissions 40 percent below 2005 levels by encouraging shifts to less carbon intensive fossil fuel generation, increasing reliance on renewables, and reducing energy demand through efficiency. Since RGGI was implemented, the Massachusetts economy has largely outperformed the Nation's, and Massachusetts employers have added more than 200,000 jobs. Regionally, one independent study concluded that, in the first three years of the RGGI program, RGGI added $1.6 billion to the regional economy[1] and created thousands of new jobs in the process.[2] As a result of RGGI, electricity consumers, including households and businesses, enjoy a gain of over a billion dollars as their overall electricity bills drop over time.[3] The Clean Power Plan would allow Massachusetts to rely on what we know works, including RGGI, to achieve the required carbon dioxide emissions reduction. And that is good for our economy—due in large part to our innovative energy and environmental policy, clean energy is now a multi-billion dollar sector in Massachusetts supporting double-digit job growth between 2013 and 2014. Our experience shows that we need not choose between environmental and economic sustainability—we can make clean power investments while growing the economy.

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[1] *See* Analysis Group, *The Economic Impacts of the Regional Greenhouse Gas Initiative on Ten Northeast and Mid-Atlantic States at 2* (2011), *available at* http://www.analysisgroup.com/uploadedfiles/publishing/articles/economic_impact_rggi_report.pdf

[2] *Id.* at 7.

[3] *Id.* at 4.