

February 26, 2018

VIA EMAIL

Administrator E. Scott Pruitt
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460
Attn: Docket ID No. EPA-HQ-OAR-2017-0545

Re: State Environmental and Energy Regulators' Comment on Advance Notice of Proposed Rulemaking, Docket ID No. EPA-HQ-OAR-2017-0545

Dear Administrator Pruitt:

We are environmental and energy regulators from a group of 12 states, and we are providing comment on the Environmental Protection Agency's (EPA) Advance Notice of Proposed Rulemaking on State Guidelines for Greenhouse Gas Emissions from Existing Sources (ANPRM).¹

We represent states that are already suffering the economic and human consequences of climate change, and that are leaders in working to reduce the emissions that cause it. Extreme weather events in recent years have continued to cause record damages that disrupt state economies and require years for recovery. For example, in 2017 California experienced almost twice as many wildfires burning six times as many acres as the average over the last five years,² and these fires were among the deadliest in the state's history, killing a total of 47 people.³ The National Oceanic and Atmospheric Administration (NOAA) estimates that Hurricane Sandy caused damages of over \$70 billion, and projected damages from Hurricane Harvey total \$125 billion.⁴ With over \$300 billion in estimated losses from disaster events in 2017, last year was by far the costliest year for climate and weather related events, and it also tied the record for the number of billion-dollar disaster events in a single year.⁵ Our states are working to reduce harmful climate pollution individually and jointly. Minnesota's GDP grew by 23.1 percent between 2000 and 2014, while its emissions decreased by 3.6 percent.⁶ North Carolina's

¹ 82 Fed. Reg. 61,507 (Dec. 28, 2017).

² "Incident Information," California Department of Forestry and Fire Protection, http://cdfdata.fire.ca.gov/incidents/incidents_stats?year=2017.

³ California Department of Forestry and Fire Protection, *Large Fires 2017: 300 Acres and Greater*, http://cdfdata.fire.ca.gov/pub/cdf/images/incidentstatevents_273.pdf.

⁴ "Billion-Dollar Weather and Climate Disasters," NOAA, <https://www.ncdc.noaa.gov/billions/events/NY/1980-2017>.

⁵ *Id.*, <https://www.ncdc.noaa.gov/billions/overview>.

⁶ Devashree Saha & Mark Muro, The Brookings Institution, *Growth, Carbon, and Trump: State progress and drift on economic growth and emissions 'decoupling'* (December 8, 2016), Fig. 3.

Renewable Energy and Energy Efficiency Portfolio Standard has resulted in investments of over \$10 billion in clean energy technologies,⁷ created 34,000 clean energy jobs,⁸ and reduced CO₂ emissions by 14.6 percent between 2004 and 2014.⁹ Since the launch of the multi-state Regional Greenhouse Gas Initiative, carbon emissions from power plants in the region have decreased by 40 percent.¹⁰ EPA should act urgently to reduce the risk to American citizens from further climate impacts, and should take into account the methods our states have already proven as effective and affordable in reducing carbon pollution.

Our agencies are responsible for creating the state plans to implement a rule under Section 111(d) of the Clean Air Act (CAA),¹¹ which gives us a keen and vested interest in the design of such a rule. As we explain below, EPA has a legal obligation to regulate carbon dioxide from existing power plants under Section 111(d), through binding guidelines that achieve meaningful reductions in emissions. EPA's Clean Power Plan accomplishes that duty in a way that provides states with ample flexibility. If EPA persists in reconsidering that rigorous approach, we provide the following comments on the process identified in the ANPRM.

1. EPA has a legal obligation to regulate carbon emissions from existing fossil fuel power plants.

EPA is legally required to regulate carbon dioxide emissions from existing electric generating units (EGUs). The U.S. Supreme Court held in *Massachusetts v. EPA* that "if EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions" of the pollutant.¹² EPA's 2009 Endangerment Finding concluded that carbon dioxide does cause or contribute to "greenhouse gas pollution that endangers public health and welfare,"¹³ thereby triggering the Agency's obligation under the Clean Air Act to regulate greenhouse gas emissions. EPA has since then relied on that Endangerment Finding to issue multiple regulations of greenhouse gases, including the New Source Performance Standards (NSPS) for new and

⁷ RTI International, *Economic Impact Analysis of Clean Energy Development in North Carolina – 2017 Update* (Oct. 2017), https://energync.org/wp-content/uploads/2017/10/Summary-Findings_Economic-and-Rate-Impact-Analysis-of-Clean-Energy-Development-in-North-Carolina%E2%80%942017-Update-October-Version.pdf

⁸ U.S. Climate Alliance, *2017 Annual Report*, https://static1.squarespace.com/static/5936b0bde4fcb5371d7e4c/t/59bc4959beba2c44067922/1505511771219/USCA_Climate_Report-V2A-Online-RGB.PDF.

⁹ North Carolina Utilities Commission, *Annual Report Regarding Renewable Energy and Energy Efficiency Portfolio Standard in North Carolina Required Pursuant to G.S. 62-133.8(J)* (October 1, 2017), <http://www.ncuc.commerce.state.nc.us/reports/repreport2017.pdf>.

¹⁰ "RGGI Emissions Fell Again in 2016," Acadia Center (March 10, 2017), <http://acadiacenter.org/rggi-emissions-fell-again-in-2016/>.

¹¹ Please note that Vermont does not have sources regulated under the Clean Power Plan.

¹² 549 U.S. 497, 533 (2007).

¹³ *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

modified EGUs and the Clean Car Standards.¹⁴ Section 111(b) establishes a nondiscretionary duty to address carbon pollution from new and modified sources, and Section 111(d) establishes a nondiscretionary duty to address carbon pollution from existing sources.¹⁵

Furthermore, in multiple contexts EPA has induced reliance on the certainty of regulation of carbon emissions from existing power plants. Courts have relied on EPA's assurance of future federal regulation of carbon dioxide from the power sector in resolving litigation with states seeking action to address carbon pollution.¹⁶ For example, in *AEP v. Connecticut*, the U.S. Supreme Court held that the Clean Air Act displaced federal common law nuisance claims against contributors to climate change because the Clean Air Act authorizes EPA to regulate sources of greenhouse gases, noting that EPA was in the process of developing proposed regulations under Section 111.¹⁷ In *New York et al. v. EPA*, parties settled the case on the condition that EPA would take final action to regulate greenhouse gases from EGUs.¹⁸ For years now, many utilities and energy companies have incorporated the CPP's expected reductions in carbon emissions into their long-term planning and investments.¹⁹ Yet in the ANPRM, EPA states that it is merely "consider[ing] the possibility of replacing certain aspects of the CPP."²⁰ As state environmental regulators, we not only object to EPA's delay in addressing the urgent need to reduce greenhouse gas emissions, we are also troubled that the Agency suggests it might not fulfill its legal responsibilities. This would also inject even greater uncertainty into electricity system planning and operations, disadvantaging companies that have acted in good

¹⁴ Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015); 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012).

¹⁵ "The Administrator shall prescribe regulations ... under which each State shall ... establish standards of performance for any existing source ... to which a standard of performance under this section would apply if such existing source were a new source." 42 U.S.C. § 7411(d)(1).

¹⁶ See *American Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011); Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. 82,392 (Dec. 30, 2010).

¹⁷ *American Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 425 (2011).

¹⁸ This settlement resolved threatened litigation over the EPA's failure to respond to United States Court of Appeals for the District of Columbia Circuit's remand in *State of New York, et al. v. EPA*, No. 06-1322. Under the terms of the settlement agreement deadlines were established for EPA to take action. Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. 82,392 (Dec. 30, 2010).

¹⁹ For example, Minnesota law requires the Public Utilities Commission (MPUC) to establish an estimated cost range of future CO₂ regulation on electric generation in the state, which is then to be applied in utility Integrated Resource Plans (IRPs). The MPUC's most recently established cost range and starting date were designed for CPP compliance. Since utilities plan many years in advance, Minnesota utilities have already included this cost estimate in their IRPs. Minn. Stat. § 216H.06.

²⁰ 82 Fed. Reg. 61,509.

faith based on EPA's commitments. Given its statutory obligation to regulate pollutants under the Clean Air Act, EPA cannot repeal the CPP without adopting a replacement rule.²¹

2. EPA must establish binding national emission guidelines that achieve meaningful reductions in carbon emissions from the power sector.

EPA has an obligation to issue binding emission guidelines that states must achieve. In the ANPRM, EPA says that if the Administrator has made an endangerment finding, then the CAA implementing regulations "*authorize* EPA to make its emission guideline binding on the States"²² (emphasis added). But, the regulation EPA cites actually *requires* EPA to issue binding emission guidelines. That regulation states that "where the Administrator has determined that a designated pollutant may cause or contribute to endangerment of public health, emission standards *shall be no less stringent* than the corresponding emission guidelines" (emphasis added), except in the specific circumstances identified in subsection (f) of that section.²³ EPA should apply any exceptions sparingly, as their use will lessen the effectiveness of the rule in achieving the CAA's goals.

Furthermore, non-mandatory emission guidelines would undermine the level playing field for all states and regulated parties that federal environmental regulations provide. By establishing a "regulatory floor," federal environmental rules ensure that dangerous pollution is effectively addressed in all parts of the country. The Clean Air Act was enacted to reduce and prevent pollution endangering the health and welfare of Americans and to eliminate the potential for a regulatory "race to the bottom" where states are encouraged to loosen pollution standards in order to attract industry. For this reason, when a state fails to submit a Section 111(d) implementation plan that meets the emission guidelines, Section 111 requires EPA to prepare a federal plan implementing the emission guidelines directly for covered facilities, ensuring that facilities in all states will meet a minimum emission standard.²⁴ Non-binding emission guidelines would not result in meaningful emission reductions, and therefore would not achieve the goals of the Clean Air Act or protect our citizens from the threat posed by carbon pollution.

The ANPRM contemplates providing states with flexibility to set less stringent standards than the level established by the emission guidelines. The emission guidelines, however, dictate standards that each state must meet. Instead of allowing states to establish weaker standards, EPA should only evaluate flexibilities in how states implement those guidelines or to

²¹ See Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009); Order at 2, *West Virginia et al. v. EPA*, No. 15-1363 (D.C. Cir. August 8, 2017), ECF No. 1687838.

²² 82 Fed. Reg. 61,509, fn. 6 (quoting 40 CFR § 60.24(c)).

²³ 40 CFR § 60.24(c). For example, subsection (f) allows for applying a less stringent standard if a state demonstrates that it would be physically impossible to install control equipment at a particular facility. 40 CFR § 60.24(f).

²⁴ See 42 U.S.C. § 7411(d); 42 U.S.C. § 7410(c).

accommodate state standards that are *more* stringent than the emission guidelines. As EPA acknowledges in a footnote, but not in its discussion of state flexibilities, states have authority to adopt more stringent standards.²⁵ The role of federal regulation under the CAA is to create a minimum level of environmental protection, while allowing states to be more ambitious if they so choose. Many states have developed, or may wish to develop, ambitious greenhouse gas reduction programs regulating emissions from fossil fuel-fired EGUs that would be covered by a rule under Section 111(d). EPA should ensure that any rule under Section 111(d) does not impede the goals or implementation of those programs and that it maintains the cooperative federalist structure of the CAA. However, accommodating stronger state programs is not sufficient to address a problem like carbon pollution, which creates harms across state boundaries and cannot be effectively addressed without strong federal standards.

As states, we are broadly in favor of flexibilities in setting standards under Section 111(d) that allow us to tailor our implementation plans to state-specific circumstances. For example, the availability of both mass- and rate-based emission limits would be one way to ensure that a potential rule can work with, instead of against, existing state programs. But any such flexibilities should not undermine the role of federal emission guidelines as a floor, requiring all states to achieve meaningful emission reductions.

The approach that EPA indicates it may adopt, focused solely on heat-rate improvements, may not even achieve reductions in the target pollutant. On the contrary, such an approach could lead to high-emitting plants running more frequently and continuing operations for longer periods of time. A 2015 study of possible approaches to a rule under Section 111(d) found that a regulation that set unit-specific emissions rate standards based on heat-rate improvements could increase generation from coal-fired power plants, and projected a national decrease in carbon emissions of only 2 percent,²⁶ with carbon emissions *increasing* in some states.²⁷ Clearly, an approach that leads to increasing pollution cannot represent the *best* system of emissions reduction.

In addition, any replacement for the CPP should also include detailed consideration of the potential for emissions leakage between jurisdictions covered by the proposed rule. Allowing states to set standards less stringent than the federal emission guidelines could simply shift emissions to states with weaker standards, negating the benefit of any reductions achieved in states with more stringent standards. Our agencies are responsible for protecting the health of our citizens, but increases in emissions in neighboring states could impede our ability to do so.

²⁵ 82 Fed. Reg. 61,510, fn. 7.

²⁶ Charles T. Driscoll et al., “US Power Plant Carbon Standards and Clean Air and Health Co-benefits,” *Nature Climate Change* (May 4, 2015), DOI: 10.1038.

²⁷ Dallas Burtraw & Kathy Lambert, Slide Deck from Capitol Hill Briefing: The Health Impacts of Repealing and Replacing the Clean Power Plan (February 6, 2018), https://science-policy-exchange.org/sites/default/files/documents/House%20Briefing%20Slides_6%20Feb%202018_0.pdf.

3. Compliance flexibilities in a Section 111(d) rule should be reflected in the BSER and emission guidelines.

In the ANPRM, EPA requests comment on the compliance flexibilities available to states under the statute and EPA's implementing regulations. We support the use of compliance flexibilities to achieve emission reductions because these can allow operators greater ability to pursue familiar least-cost solutions while giving states the option, when appropriate, to leverage existing policies and programs. In this ANPRM, EPA requests comment on whether to allow emissions trading or averaging and on other "available systems of emission reduction" as compliance options in state plans, but warns that those systems "may not meet the criteria for consideration as the BSER," despite their qualification to "be considered as compliance options for individual units."²⁸ It would be unreasonable and arbitrary to evaluate emission reduction systems as compliance options without evaluating those systems in the best system of emission reduction analysis—particularly when such systems have potential to secure emission reductions cost-effectively far beyond that of systems EPA proposes to consider in developing the BSER and emission guidelines. If EPA considers only a small set of measures for the BSER, but recognizes many more for compliance, the standards will be much weaker than the reductions that could be achieved. Consequently, complying entities would be able to meet the standards without even implementing the very techniques EPA identified as the "best system of emission reduction" in setting the guidelines.

4. The BSER analysis should account for all available emission reduction strategies, including those being deployed by states and companies today.

EPA requests comment on how to best define the BSER for existing EGUs within its interpretation of "best system of emission reduction" as "measures that can be applied at or to individual sources."²⁹ The ANPRM states that the agency is "primarily focused on opportunities for heat rate (or efficiency) improvements" at EGUs as constituting the BSER, but also seeks information on any other systems that may be considered part of the BSER under the new interpretation.³⁰ As noted above, EPA cannot reasonably eliminate from consideration systems of emission reduction that are widely and cost-effectively deployed, such as generation shifting and reductions in the utilization of higher-emitting sources.³¹ The Clean Power Plan established emission guidelines that accounted for state experience successfully reducing pollution from power plants and the policy frameworks that have achieved those pollution reductions. These emission reduction strategies have proven cost-effective, flexible, and successful in reducing

²⁸ 82 Fed. Reg. 61,516-17.

²⁹ *Id.* at 61,512.

³⁰ *Id.* at 61,513.

³¹ See the *Implementing EPA's Clean Power Plan: A Menu of Options* (National Association of Clean Air Agencies) for a comprehensive list of strategies, including multiple strategies that can be implemented at regulated EGUs.

emissions, and it would be contrary to EPA's statutory responsibilities for EPA to ignore them in considering the "best system" available.

EPA must conduct this rulemaking as it conducts rulemakings for any other regulation under the CAA: it must use robust technical and economic data to ensure accurate decision-making.³² Given the increasing pace of technological innovation in the electricity sector, this includes updating its assessment of the state of technology and cost of available reduction strategies.

5. EPA should fully consider the public health implications of any rule under Section 111(d).

A rule under Section 111(d) would also affect emissions of pollutants other than carbon dioxide. The health benefits of reducing those pollutants are of vital importance to our citizens, and EPA must consider the potential co-benefits of alternative replacement rules. Any increase in the emissions from generators located in our own states or in neighboring states could hamper our efforts to meet other air quality standards. A rule replacing the CPP with weaker requirements could increase air pollution and put health and lives at risk. A study by researchers at Harvard, Syracuse, University of Colorado, Boston University, and Drexel University, in cooperation with Resources for the Future, found that a rule focused on heat-rate improvements could increase premature deaths, hospitalizations, and illnesses from criteria air pollution compared to repealing the CPP without a replacement.³³ Increases as high as 33 additional premature deaths were projected in some states.³⁴ Such a result would clearly disqualify that system from being the "best system of emission reduction" under the statute and would interfere with state efforts to reduce air pollution and comply with other mandatory federal air quality standards. We strongly urge EPA to consider the effects of any potential rule on air quality and public health and the full social cost of carbon in identifying the BSER and in developing emission guidelines, and to use evidence-based, rigorous methods for calculating those effects.³⁵

³² See 42 U.S.C. § 7607(d)(9); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. ... Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 605-06 (D.C. Circ. 2016).

³³ Charles T. Driscoll et al., "US Power Plant Carbon Standards and Clean Air and Health Co-benefits," *Nature Climate Change* (May 4, 2015), 4.

³⁴ *Id.* at fig. 4.

³⁵ EPA should adhere to the scientific consensus that there is no level of exposure to PM_{2.5} at which further reductions produce no health benefits. U.S. EPA, *Summary of Expert Opinions On the Existence of a Threshold in the Concentration-Response Function for PM_{2.5}-related Mortality* (June 2010), <https://www3.epa.gov/ttn/ecas/regdata/Benefits/thresholdstd.pdf>; World Health Organization, *Health Effects of Particulate Matter* (2013), 6. EPA should also use a global, peer-reviewed value for the social cost of carbon as provided by the Interagency Working Group. Please see forthcoming multi-state comments on the Proposed Repeal of the Clean Power Plan for a deeper discussion of the appropriate methods for calculating health benefits from air pollution reductions.

Conclusion

The urgency of reducing carbon pollution and mitigating climate change grows every day. Our states and citizens are already experiencing harmful climate change impacts. Until we significantly reduce greenhouse gas emissions, those impacts—including droughts, floods, sea level rise, deadly heat waves, and intensifying smog—will continue to intensify. Existing power plants are the largest stationary source of carbon pollution in our country. EPA has a legal responsibility to establish mandatory emission limits that achieve significant reductions in emissions of carbon pollution from the U.S. power sector. After years of engagement with and input from stakeholders, EPA issued a rule that fulfilled that duty while providing ample flexibilities for states to tailor their compliance plans and to rely on proven, cost-effective emission reduction strategies. Despite the voluminous administrative record that establishes the advantages of this approach, EPA has decided to start over again. The ANPRM gives every indication that EPA is considering alternative approaches that would not reflect the best emission reduction strategies available nor the level of reductions achievable and needed. This ANPRM considers non-binding emission guidelines that would produce insufficient emission reductions and potentially worse air quality, while facilitating a regulatory race-to-the-bottom among states that does not protect the progress made by our own states for our residents. This approach would not fulfill EPA’s legal responsibilities and would fail to meet its mission “to protect and enhance the quality of the Nation’s air resources ... [and] to promote the public health and welfare.”³⁶ We urge EPA to reconsider the strategies in the ANPRM and fulfill its statutory obligations to protect the health and welfare of Americans by implementing a meaningful federal program to reduce greenhouse gas emissions.

Sincerely,



Mary Nichols
Chair
California Air Resources Board



Robert Klee
Commissioner
Connecticut Department of Energy and
Environmental Protection

³⁶ Clean Air Act, 42 U.S.C. § 7401(b).



Martin Suuberg
Commissioner
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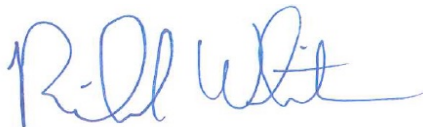
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