



April 18, 2018

Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Repeal of Clean Power Plan, Docket ID No. EPA-HQ-OAR-2017-0355

Dear Environmental Protection Agency (EPA):

Thank you for this opportunity to comment on the proposed repeal of the Clean Power Plan. The Sabin Center for Climate Change Law opposes EPA's decision to repeal this regulation and takes issue with the legal and policy rationales for doing so. We explain our position in the following comments:

- (1) EPA's Interpretation of the Clean Air Act Is Incorrect:** The Clean Air Act empowers EPA to set emissions limits that require power plants to comply using generation-shifting, and it does not permit EPA to merely seek heat rate improvements that would not materially reduce emissions.
- (2) EPA's Regulatory Impact Assessment of Repeal Ignores Benefits and Inflates Costs:** In order to justify the repeal, EPA has manipulated its cost-benefit analysis in order to downplay the benefits and inflate the costs of the Clean Power Plan.

These points are discussed in greater detail below.

1. EPA's Interpretation of the Clean Air Act Is Incorrect

The Clean Air Act requires EPA to set standards for States' regulation of greenhouse gas emissions from existing power plants. 42 U.S.C. § 7411(a); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (“we think it [] plain that the Act speaks directly to emissions of carbon dioxide from the defendants' plants.”) (internal quotations omitted). The standards EPA sets must reflect the degree of emissions limitations that are achievable through application of the “best system of emissions reduction,” provided that the system has been “adequately demonstrated.” *Id.* § 7411(a), (d). These criteria leave EPA some—but not unlimited—discretion over the approach it takes to regulating greenhouse gas emissions from existing power plants.

In their briefs to the D.C. Circuit in *West Virginia v. EPA*, EPA and intervenors—including a number of states, cities, and electricity sector stakeholders—explained why the Clean Power Plan

was wholly consistent with the Act’s provisions governing existing sources and with its overarching logic of cooperative federalism.¹ Key points from among their arguments include the following:

- EPA was within its authority to include generation-shifting—the ramping up of a less emissions-intensive facility to offset the ramping down of a more emissions-intensive one—in the “system of emissions reduction” it prescribed in the Clean Power Plan;
- A “system” that involves generation-shifting has been “adequately demonstrated,” and indeed is demonstrated constantly by power sector facility owners, who routinely ramp their facilities up and down in response to various prompts;
- That “system” would be the “best” for the purpose of cost-effectively reducing greenhouse gas emissions from power plants, which are the largest stationary sources of such emissions in the U.S.;
- The Clean Power Plan’s long timeframes (stretching to 2030) and options for compliance (“Building Blocks”) would provide states with options and pathways that would be “achievable;” and
- The Plan would not intrude on state authority, either by commandeering or coercion, but would make cooperative federalism a basic touchstone.

In addition to these points, the Local Government Coalition, a group of *amici* representing the National League of Cities, the U.S. Conference of Mayors, and over fifty individual localities, made another: the Clean Power Plan was deserving of *Chevron* deference from the court because it reflected a reasonable interpretation of the ambiguous statutory term “best system of emissions reduction,” and was consistent with Congress’ intent in enacting the Clean Air Act, namely “to speed up, expand, and intensify the war against pollution”—not to slow down, narrow and weaken it. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1165 (D.C. Cir. 1983) (quoting H.R. Rep. No. 91–1146, 91st Cong., 2d Sess. 1, 5 (1970), U.S. Code Cong. & Admin. News 1970, p. 5356 (noting that progress in controlling air pollution “has been regrettably slow.”)).²

Whereas the Clean Power Plan comports well with the language, structure, and purpose of the Clean Air Act, the interpretation offered by petitioners in *West Virginia v. EPA*—and now by EPA in its proposed repeal—does not. There is much to say about its incompatibility with the Act, and the briefs filed by EPA and intervenors in *West Virginia v. EPA* do so, but our key point, here, is simple: reading the statute as authorizing only ineffective and relatively expensive improvements to heat rate efficiency requires reading it to *exclude* the possibility of a manifestly better system of emissions reduction. This interpretation is fundamentally at odds with the statute’s definition of a performance standard. 42 U.S.C. § 4711(a)(1) (“The term ‘standard of performance’ means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable

¹ Case No. 15-1363 (D.C. Cir. Apr. 22, 2016): Respondent EPA’s Final Brief, <https://perma.cc/HTD4-G7S7>; Brief for State and Municipal Intervenors in Support of Respondents, <https://perma.cc/9C4N-MRE5>; Final Brief of Intervenors Calpine Corp. et al., <https://perma.cc/DN8X-LU3P>.

² Brief of Amici Curiae the National League of Cities et al. (the Local Government Coalition), *West Virginia v. EPA*, Case No. 15-1363 (D.C. Cir. Apr. 1, 2016), <https://perma.cc/9HKA-9W7R>.

through the application of the *best* system of emission reduction. . . .”) (emphasis added). That is, it reads “best” out of the provision. It thus also willfully ignores the Act’s purpose of reducing air pollution aggressively.

As the Local Government Coalition pointed out in its amicus brief in the *West Virginia v. EPA* case, courts have encountered and rejected similar gambits offering contorted readings of the Act that would undermine the effective regulation of emissions out of exquisite sensitivity to carefully selected snippets of statutory language. One such case was *Motor Vehicle Manufacturers’ Association of the U.S., Inc. v. Ruckelshaus*, in which industry petitioners sought to displace EPA’s interpretation of Clean Air Act § 207(b) and substitute one less likely to actually limit pollution from motor vehicles. 719 F.2d 1159, 1165 (1983). EPA had read Section 207(b) as allowing it to establish *limited* “short tests” for in-use motor vehicle emissions—the key limitation being that although the tests could be conducted quickly and relatively cheaply they could not detect levels of all three target pollutants. Thus the tests could detect only noncompliance with federal standards but not full compliance. Industry argued that the Act only supported implementation of a more perfect short test that would detect all three target pollutants and that EPA was misapplying the statute by moving forward with a good but imperfect short test. The court disagreed, pointing out that industry’s approach “would make it impossible to establish any [such] tests for the foreseeable future,” and so “would frustrate the intent of Congress,” which meant for the Clean Air Act to actually reduce pollution.

The analogy to the legal issues relating to the proposed interpretation of Section 111 is plain: in the name of fidelity to the language of a law devised to reduce air pollution, EPA here, like industry in *MVMA v. Ruckelshaus*, has put forward an interpretation that would *prevent* the agency from requiring states to employ the best adequately demonstrated system of emissions reduction available. This is contrary to the meaning of Section 111 and to Congress’ intent for the Act more generally. A decision by EPA to repeal an existing regulation based on a mistaken legal interpretation would be arbitrary and capricious and a violation of the Administrative Procedure Act.

2. EPA’s Regulatory Impact Assessment of Repeal Ignores Benefits and Inflates Costs

EPA’s original regulatory impact assessment (RIA) of the Clean Power Plan revealed that the benefits of the plan significantly outweighed its costs. Specifically, EPA projected that the net monetized benefits of the rule could reach approximately \$7 billion per year in 2020, \$28 billion in 2025, and \$46 billion in 2030.³ These net benefits will be lost if the rule is repealed.

To justify the repeal, EPA published a new RIA in which it finds that the compliance costs of the rule are significantly higher than anticipated while the monetized benefits are significantly lower than anticipated. The revised analysis is not based on sound science or economics. To the contrary,

³ EPA. Regulatory Impact Analysis for the Clean Power Plan Final Rule, EPA-452/R-15-003 (2005) at ES-23 (these figures reflect EPA’s upper-bound estimate for net benefits under a mass-based compliance approach, applying a 3% discount rate to climate and air quality health co-benefits). (2011\$ values have been converted to 2016\$ using a factor of 1.079).

it is clear that EPA manipulated the data in order to reach a conclusion which aligned with the administration's deregulatory agenda. There are a number of fatal flaws in EPA's analysis. These include:

a. Inflated Compliance Costs

EPA has significantly inflated compliance costs by changing how it accounts for energy savings. In the original RIA, EPA recognized that states and utilities would comply with the rule, at least in part, through investments in demand-side energy efficiency programs, and that the cost of those programs would be partially offset by the energy savings generated by those programs. The cost-benefit analysis in the new RIA includes the cost of energy efficiency investments but ignores the savings generated by those investments. In other words, EPA's analysis assumes that the power sector will pay for both the energy efficiency programs *and* the electricity that would no longer be produced as a result of those programs. Through this accounting trick, EPA was able to inflate the compliance costs by approximately \$20 - \$25 billion.⁴

In addition, EPA's new RIA ignores ample evidence that compliance costs have actually fallen since the rule was promulgated due primarily to the declining prices of alternate energy sources such as wind, solar, and natural gas.⁵ EPA should have accounted for these changing circumstances in its analysis.

b. Confining the Social Cost of Carbon to a "Domestic" Boundary

EPA's new RIA also includes several accounting tricks aimed at devaluing the benefits of the rule. One such trick is EPA's decision to confine the social cost of carbon to a "domestic" boundary. As a result of this decision, EPA has reduced the projected climate benefits from approximately \$20 billion per year by 2030 to approximately \$3 billion.

One major problem with EPA's approach is that there is no established methodology for calculating a domestic share of global climate damages with any accuracy. Moreover, even if it is possible to isolate those damages, it would be imprudent to use a domestic rather than global estimate. As detailed in a recent report from the Institute for Policy Integrity (IPI), there are many important policy rationales for applying a global estimate of climate change damages when estimating the costs and benefits of regulations aimed at reducing greenhouse gas emissions.⁶

⁴ Richard Revesz & Jack Lienke, *The E.P.A.'s Smoke and Mirrors on Climate Change*, New York Times (Oct. 9, 2017); <https://www.nytimes.com/2017/10/09/opinion/environmental-protection-obama-pruitt.html>; Rama Zakaria, *The Four Accounting Tricks Pruitt Used to Justify EPA's Clean Power Plan Repeal*, Environmental Defense Fund Blog (Oct. 11, 2017), <https://www.edf.org/blog/2017/10/11/4-accounting-tricks-pruitt-used-justify-epas-clean-power-plan-repeal>.

⁵ Denise Grab & Jack Lienke, *The Falling Cost of Clean Power Plan Compliance* (Institute for Policy Integrity, 2017), <http://policyintegrity.org/publications/detail/the-falling-cost-of-clean-power-plan-compliance>; API Energy, *EPA Clean Power Plan Compliance Pathways – Modeled Generation, Capacity and Costs* (2017), http://www.api.org/~media/Files/Policy/Natural-Gas-Solutions/ CPP_National_Results.pdf.

⁶ Howard & Schwartz (2016). *See also* Casey Wichman, *The Strategic Costs of Carbon Emissions: Global versus Domestic Policy Considerations*, Resources for the Future Online Magazine, Issue No. 195 (2017), <http://www.rff.org/research/publications/strategic-costs-carbon-emissions-global-versus-domestic-policy-considerations>.

Using a global estimate can foster international cooperation and reciprocity that benefits the United States, insofar as other countries will also be motivated to consider the global impacts of emissions when making decisions about how to regulate and reduce those emissions.⁷ The potential spillover effects of climate change also present a compelling policy rationale for adopting a global estimate.⁸

Finally, there is no valid legal justification for this change in EPA's accounting methodology. The Clean Air Act contains no provisions which limit EPA's consideration of impacts to domestic impacts—to the contrary, the statute speaks broadly of the need to protect public health and welfare, and both the Supreme Court and the D.C. Circuit Court of Appeals have upheld EPA's authority to regulate on the basis of *global* harms caused by greenhouse gas emissions.⁹

c. Deflating the Public Health Benefits from Reductions in Co-Pollutants

The other key way in which EPA has undervalued benefits in the new RIA is by ignoring the public health benefits associated with reductions in co-pollutants that would occur under the plan. In the original RIA, EPA anticipated that the plan would lead to significant reductions in sulfur dioxide (SO₂) and nitrogen oxide (NO_x), which would in turn reduce ambient concentrations of PM_{2.5} and ozone, resulting in an estimated \$30 billion in monetized public health benefits per year by 2030.

EPA has adopted two different approaches to downplaying these public health benefits. First, EPA has arbitrarily deflated these public health benefits by introducing a new assumption into its analysis: that there are no health benefits associated with reducing PM_{2.5} pollution below certain threshold levels. Applying this assumption, EPA finds that the value of foregone health co-benefits under the repeal would reach a maximum of \$4.8 or \$17.6 billion per year by 2030 (depending on which threshold level is applied). As noted by many commentators, there is no scientific basis for the thresholds used by EPA in the new RIA.¹⁰

Second, EPA has presented tables and summaries of the “net benefits of repeal associated with targeted pollutant” in which it completely ignores the foregone benefits associated with the reduction of co-pollutants.¹¹ These sections of the RIA suggest that the repeal could generate net benefits of as much as \$14 billion by 2030. This approach is inconsistent with EPA's longstanding practice of including co-benefits in regulatory cost-benefit analysis and is also extremely misleading. As a point of comparison: even with all of the other modifications EPA has made to its analysis, it still finds that the costs of the repeal would significantly outweigh the benefits under most scenarios (e.g., by 2030, EPA anticipates that the net monetized impact of the repeal could range from a net cost of \$14.8 billion to a net benefit of \$0.2 billion; in all other years, EPA only projects net costs).

⁷ Howard & Schwartz (2016) at 221-232.

⁸ *Id.* at 238.

⁹ *Id.* at 247-248.

¹⁰ See e.g., Alan J. Krupnick & Amelia Keyes, *Hazy Treatment of Health Benefits: The Case of the Clean Power Plan*, Resources for the Future Blog (Oct. 13, 2017), <http://www.rff.org/blog/2017/hazy-treatment-health-benefits-case-clean-power-plan>.

¹¹ See, e.g., RIA for the Review of the Clean Power Plan: Proposal, p. 12, Table 1-5.

In sum: EPA's new accounting methodology is arbitrary and capricious and clearly aimed at downplaying the benefits and exaggerating the costs of the Clean Power Plan.

3. Conclusion

EPA seeks to justify the repeal of the Clean Power Plan through faulty legal and economic analyses that run directly contrary to its previous analysis of the rule. EPA has not provided adequate rationales for the fundamental shifts in its legal perspective and its approach to cost-benefit analysis. Ultimately, we believe the proposal to repeal the Clean Power Plan is arbitrary and capricious and at odds with EPA's legal obligations.

Sincerely,



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