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March 25, 2015

The Honorable Regina A. McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

Via Certified Mail No. 7010 0290 0000 5952 0310

**Also Submitted to Docket ID No. EPA-HQ-
OAR-2013-0495 via email to
a-and-r-docket@epa.gov**

Re: Proposed Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (Jan. 8, 2014) (Docket No. EPA-HQ-OAR-2013-0495)

Dear Administrator McCarthy:

The Environmental Protection Agency ("EPA") recently announced its *intention* to issue the final rule for *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units* (the "Proposed Rule"),¹ in summer 2015, establishing new source performance standards ("NSPS") for greenhouse gas emissions for new fossil fuel-fired electric generating units ("EGUs").² On May 9, 2014, Louisiana, West Virginia, and Nebraska, along with 13 other States submitted extensive comments on the Proposed Rule, explaining that the Proposed Rule is unlawful. Several of the States also noted EPA's failure to comply with notice and comment requirements by neglecting to docket the Notice of Data Availability and accompanying Technical Support Document until February 6, 2014.³

¹ 79 Fed. Reg. 1430 (Jan. 8, 2014).

² See EPA FACT SHEET: Clean Power Plan and Carbon Pollution Standards, <http://www2.epa.gov/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf> (Site last visited 2/20/15).

³ See 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*

Now, more than a year after publication of the Proposed Rule, EPA's proposal suffers from an additional infirmity further plaguing its rulemaking process. Section 111(b)(1)(B) of the Clean Air Act ("CAA") requires EPA to promulgate final NSPS standards no later than one year following publication of the proposed rule. *See* 42 U.S.C. § 7411(b)(1)(B) (EPA "shall publish proposed regulations, establishing Federal standards of performance for new source . . . [EPA] shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate.") (emphasis added). Here, the Proposed Rule was published on January 8, 2014; therefore, by failing to promulgate the final rule by January 8, 2015, EPA has violated the mandatory duty established by Section 111(b)(1)(B) of the CAA. Considering all of the grounds upon which this rule is likely to be overturned,⁴ and because the rulemaking threatens the citizens of the States, we as the chief legal officers of the States are notifying your agency that this Proposed Rule has expired. It must therefore be withdrawn.

Congress' mandate that EPA promulgate final NSPS rules within one year of publication of the proposed standards was an intentional requirement that recognizes the unusually immediate impact of the rules on finalization. Once an NSPS emissions standard is final, it applies to sources that commenced construction after the date of the proposal in the Federal Register, as opposed to taking effect after the date of the final rule's publication.⁵ Indeed, the Proposed Rule acknowledges this, stating: "once an NSPS is finalized, then the standard applies to any new source or modification that meets the applicability of the NSPS and has not commenced construction as of the date of the proposed NSPS."⁶ By subjecting new sources to the rule at the time of proposal, Section 111(a)(2) creates a unique impact of causing harm to EGUs immediately upon publication of the Proposed Rule.

The one year deadline imposed by the CAA also limits the period during which businesses contemplating construction are left in a state of uncertainty with respect to the final NSPS emission standards. Section 111(b)(1)(B) allows EPA to, in the final rule, make modifications to the proposed standards of performance the Administrator "deems appropriate" after considering the public comments. Because of this uncertainty, once EPA announced its intention (through publication of the Proposed Rule) to create new emissions standards for fossil fuel-fired EGUs and natural gas-fired stationary combustion turbines, some sources may have made the business decision to postpone construction until the final NSPS are issued. Congress specifically limited the time frame during which this uncertainty would be allowed by setting a precise one-year deadline within which EPA *must* act. But rather than comply with the law, EPA has let that one year deadline come and go. Assuming EPA does, in fact, promulgate the final rule this summer, EPA will have missed the mandatory deadline by anywhere from six to eight months, thereby subjecting sources or proposed sources to at least 1.5 times the delay permitted

(Docket No. EPA-HQ-OAR-2013-0495) (May 9, 2014). *See also* Comment letters submitted individually by some States.

⁴ *See id.*

⁵ 42 U.S.C. § 7411(1)(a) (defining "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations (*or, if earlier, proposed regulations*) prescribing a standard of performance under this section which will be applicable to such source.") (emphasis added).

⁶ 79 Fed. Reg. at 1489.

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under the statute. As the United States Supreme Court noted in *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”

Furthermore, because the proposed Section 111(d) rule is *predicated on the publication of a lawful final Section 111(b) rule*, EPA’s failure to finalize the Section 111(b) rule within the statutorily required timeframe has imposed substantial harms upon many States. Specifically, States are currently expending considerable time and resources developing implementation plans required by the proposed Section 111(d) rule. But if EPA had finalized the Section 111(b) rule in January, in anything close to its proposed form, that rule would likely be subject to invalidation in court, for the reasons described in the States’ May 9 letter. Such court invalidation would in turn have further rendered unlawful the entire Section 111(d) rulemaking, permitting the States to stop the ongoing waste of public resources in preparing Section 111(d) implementation plans. EPA’s unlawful delay in finalizing the Section 111(b) rule is thus additionally the cause of substantial harm to States in particular.

Given the unlawful nature of the Section 111(b) rule, for the reasons outlined in the States’ previous May 9, 2014, comments and now due to EPA’s failure to timely issue the final rule, these efforts are pointless. EPA’s failure to promulgate final new source performance standards by January 8, 2014, requires the withdrawal of the Proposed Rule. The withdrawal of the Proposed Rule would also require withdrawal of the proposed Section 111(d) rule.

Sincerely,



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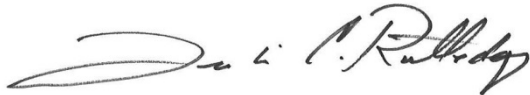
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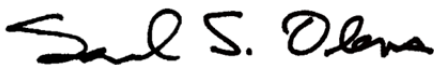
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