

JAMES M. INHOFE  
OKLAHOMA

WASHINGTON OFFICE  
205 RUSSELL SENATE OFFICE BUILDING  
WASHINGTON, DC 20510-3603  
(202) 224-4721

TULSA OFFICE  
1924 SOUTH UTICA, SUITE 530  
TULSA, OK 74104  
(918) 748-5111

OKLAHOMA CITY OFFICE  
1900 N.W. EXPRESSWAY, SUITE 1210  
OKLAHOMA CITY, OK 73118  
(405) 608-4381

COMMITTEES:  
ARMED SERVICES  
INTELLIGENCE *ex officio*  
ENVIRONMENT AND  
PUBLIC WORKS

# United States Senate

WASHINGTON, DC 20510-3603

December 1, 2014

The Honorable Gina McCarthy  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania, Avenue N.W.  
Washington, D.C. 20004

Dear Administrator McCarthy:

I am writing to express my deep concerns with the Clean Power Plan rule<sup>1</sup> being proposed by the Environmental Protection Agency (EPA). This rule, a key component of the President's Climate Action Plan, sets out a regulatory mandate that will completely restructure the nation's electricity market, which is a foundational component of the competitiveness of our economy. The clear prohibition in statute against this rulemaking is cause enough for it to be vitiated. When the cost of the rule, the mandate it will impose on states, and the negative impact it will have on the reliability of our electric grid are also weighed, it becomes clear that the Administration's aim of this rulemaking is less about reducing greenhouse gas emissions and more about taking over another sector of the economy. This is wholly inappropriate, and I urge the withdrawal of this rule.

The clear language of the Clean Air Act (the Act) unambiguously prohibits the promulgation of this proposed rule. When Congress gave EPA the authority to require state-by-state pollution controls on existing sources under section 111(d) of the Act, it was extremely sensitive to the possibility of subjecting sources to double-regulation by both the states and the federal government. As such, Congress expressly prohibited EPA from requiring state-by-state regulations of categories of sources where it had already established a national standard. The Act states that EPA may not mandate standards from "*a source category which is regulated under section 112*"<sup>2</sup> of the Act.

In February 2012, EPA promulgated regulations under the authorities of section 112 for electric generating units with a rule known as the Utility Mercury and Air Toxics Standard rule (Utility MATS).<sup>3</sup> The Utility MATS rule was designed to reduce emissions of pollutants from all power plants across the country at a cost EPA estimated at \$9.6 billion per year.<sup>4</sup> EPA also estimated that the rule would cause the retirement of 4,700 megawatts of coal-fired generating capacity.<sup>5</sup> With these things in mind, no room is left to question why Congress would expressly prohibit EPA from having the authority to establish *double* regulation on the same source category with additional state-by-state regulations.

---

<sup>1</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule; June 18, 2014. 79 Fed. Reg. 34,830.

<sup>2</sup> 42 U.S.C. 7411(d)

<sup>3</sup> National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Final Rule; February 16, 2012. 77 Fed. Reg. 9,304.

<sup>4</sup> Ibid at 77 Fed. Reg. 9,306

<sup>5</sup> Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards. EPA-452/R-11-011, December 2011.

Congress has always been concerned about the cost of imposing pollution control mandates on facilities regulated under the Act; prohibiting double regulation is a simple step Congress took to establish a cost boundary. EPA can either establish a national standard for a source category, or it can allow states to establish their own standards. The Act prohibits EPA from doing both, and for this reason alone, EPA should abandon its rulemaking and permanently withdraw it.

If EPA were to ignore the statute and press ahead with this rulemaking, it would be in direct contradiction to the recent Supreme Court decision in *Utility Air Regulatory Group v. EPA*. In that case, the Court struck the EPA's Tailoring Rule because "*it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.*"<sup>6</sup> The proposed rule is at odds with this precedent because EPA will achieve the stated goals of its regulation by effectively taking over the nation's electricity market and establishing what amounts to a national renewable power standard, which is something Congress has never authorized. EPA envisions states complying with this rule by establishing regulatory plans – that it approves and retains the authority to enforce – that use a combination of four building blocks: (1) improving the efficiency of the coal combustion process; (2) deploying more natural gas power plants; (3) deploying more renewable sources of power; and (4) actually limiting the use of or destroying the demand for electricity.

EPA currently has authority to enforce only the first of these four building blocks. During testimony before the Senate Environment and Public Works Committee earlier this year, you told me that EPA does not currently have the authority to require a state to deploy more natural gas delivered electricity, enforce a state's renewable portfolio standard, or to destroy demand for a state's electricity consumption by 1.5% per year. Regardless, these are all envisioned as being a part of a state's compliance plan. You did say, however, that you would be able to enforce the rule if EPA finalized it;<sup>7</sup> accordingly, this rule is an autonomous expansion of EPA's authorities without clear Congressional direction. There is no rationale for any court to uphold this rule against the Supreme Court's *UARG* decision.

Under the cooperative federalism of the Act, when state governments submit plans that are accepted by the EPA, the agency retains the authority to enforce those plans. State governments are then left with two options: (1) submit no plan; or (2) submit a plan that would surrender sovereign powers of a state over its electricity markets to the bureaucrats of the EPA. What state would voluntarily surrender its power to EPA?

The agency has been clever to disguise the expansion of its authority as being "cooperative" and "flexible," but the agency's real motivation is to advance a political agenda that it does not have the authority to implement on its own. In order to successfully reduce greenhouse gas emissions in line with the President's goal, it must entice states to surrender their existing authorities to EPA. Accordingly, the agency has gone out of its way to avoid disclosing the details of what a federal plan would look like if a state chose not to submit a plan in line with the rule, and I believe this is because the agency does not want to admit that an enforceable federal plan could only include elements of the first building block, the only building block directly related to a physical power plant facility. The remaining three building blocks are "outside the fence," and have nothing to do with the physical plants regulated under section

---

<sup>6</sup> *Utility Air Regulatory Group v. EPA*, 573 U.S. \_\_\_\_ (2014) slip opinion at page 19

<sup>7</sup> Oversight Hearing: EPA's Proposed Carbon Pollution Standards for Existing Power Plants Before the Senate Environment and Public Works Committee, 113<sup>th</sup> Congress, July 23, 2014.

111(d) of the Clean Air Act. Expanding the use of natural gas has no direct impact on reducing greenhouse gas emissions at an existing power plant. Expanding the use of renewable energy does not have a direct impact on reducing greenhouse gas emissions at an existing power plant. Destroying demand by mandating efficiency programs at residential homes, small businesses, and elsewhere does not have a direct impact on reducing greenhouse gas emissions from an existing power plant. These building blocks, when combined together and viewed as a complete system may reduce greenhouse gases, but EPA has never been given the authority by Congress to do that.

The Supreme Court also declared in its recent *UARG* decision that it “*expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’*”<sup>8</sup> This rule clearly has “vast economic and political significance.” From an economic standpoint, the rule is estimated to cost between \$366 billion and \$479 billion to implement nationwide and could push electricity prices up by as much as 17%,<sup>9</sup> all while lowering global temperatures by only 0.018°C over the next 86 years.<sup>10</sup> From a political standpoint, every state government at levels ranging from the legislature, the governor, energy and environmental departments, and utility commissions will be required to roll up their sleeves to determine how to comply with this rule. In many states, new laws will have to be enacted before a plan, as envisioned by EPA, can be submitted.

The rule will also have a dramatic impact on the nation’s electricity reliability, adding to its political and economic significance. The North American Electric Reliability Corporation issued a report warning of the major adverse effects the rule could have on grid reliability, highlighting that EPA’s estimate that as many as 134 gigawatts, or about 10 percent of our nation’s total electric generating capacity, could be forced to retire by 2020. This may be too aggressive for power providers to effectively meet without sacrificing reliability.<sup>11</sup> Further, the Southwest Power Pool, to which Oklahoma is a party, determined that this rule could result in rolling blackouts and leave the region far below needed reserve margins by 2020. By 2024, the rule could reduce generating capacity so much that the region may not have the power needed to meet demand, reserve margins aside.<sup>12</sup>

Further concerns arise when evaluating other, associated rulemakings of the President’s Climate Action Plan, one of which attempts to treat modified and reconstructed power plants as both new and existing sources simultaneously. This is inappropriate and counter to the plain reading of the Clean Air Act. To justify the rule for modified and reconstructed electric generating units,<sup>13</sup> EPA states that any “modified or reconstructed source would be subject to both (1) the CAA section 111(d) requirements that it had previously been subject to” as an existing source “and (2) the modified source or reconstructed source standard being promulgated under CAA section 111(b).”<sup>14</sup> The Act does not allow this, though EPA claims it has the discretion to require this double regulation because section 111 is

<sup>8</sup> *Utility Air Regulatory Group v. EPA*, 573 U.S. \_\_\_\_ (2014) slip opinion at page 19

<sup>9</sup> Potential Energy Impacts of the EPA Proposed Clean Power Plan, NERA Economic Consulting (Oct. 2014).

<sup>10</sup> 0.02°C Temperature Rise Averted: The Vital Number Missing from EPA’s “By the Numbers” Fact Sheet, Paul C. Knappenberger and Patrick J. Michaels, CATO Institute, retrieved December 1, 2014 from <http://www.cato.org/blog/002degc-temperature-rise-averted-vital-number-missing-epas-numbers-fact-sheet>

<sup>11</sup> Potential Reliability Impacts of EPA’s Proposed Clean Power Plan, North American Electric Reliability Corporation (Nov. 2014).

<sup>12</sup> Southwest Power Pool letter to Gina McCarthy regarding the Clean Power Plan (Oct. 2014), retrieved December 1, 2014 from [http://www.spp.org/publications/2014-10-09\\_SPP%20Comments\\_EPA-HQ-OAR-2013-0602.pdf](http://www.spp.org/publications/2014-10-09_SPP%20Comments_EPA-HQ-OAR-2013-0602.pdf)

<sup>13</sup> Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units; Proposed Rules; June 18, 2014; 79 Fed. Reg. 34,960

<sup>14</sup> *Ibid* at 79 Fed. Reg. at 34,975

“silent on whether requirements imposed under a CAA section 111(d) plan continue for a source that ceases to be an existing source because it modifies or reconstructs.”<sup>15</sup> On the contrary, section 111 speaks as clearly as possible by defining a “new source” to include “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 each source.”<sup>16</sup> The Act defines the term “existing source” to be “any stationary source other than a new source.”<sup>17</sup> In plain, clear language, the Act prevents any source from being simultaneously regulated as a new source and as an existing source. They cannot simultaneously be regulated as both; any argument to the contrary simply ignores the clear limitations imposed by Congress on the EPA. Any imposition of additional requirements on a modified source regulated by the Act as a new source is explicitly reserved for the states under section 116 of the Act, and in that case it is voluntary; thus, the double regulation cannot be compelled as EPA is attempting to do.

The agency’s justification for reinterpreting the Clean Air Act to fit the policy goals of the section 111(d) proposal is to avoid disruption “to the operation of the program” caused by “uncertainty about whether units would remain in the program” and to avoid creating “incentives for sources to seek to avoid their obligations under a CAA section 111(d) plan by undertaking modifications.”<sup>18</sup> EPA has no statutory authority to do this, particularly in light of the plain language of the text. In its *UARG* decision, the Supreme Court is again instructive, where it declared that “*An agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.*”<sup>19</sup> Consequently, the EPA must also withdraw its proposed rule for modified and reconstructed units.

EPA has clearly overstepped its authorities with the Clean Power Plan and other associated rulemakings. Congress has simply not given the agency the authority to regulate the national electric grid, but that is what the rulemaking will require. No state should comply with this rule if it will mean surrendering authorities to EPA that have not been granted to it. Accordingly, I urge EPA to withdraw its Clean Power Plan from further consideration.

Sincerely,



James M. Inhofe  
United States Senator

---

<sup>15</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule; June 18, 2014. 79 Fed. Reg. at 34,904.

<sup>16</sup> 42 U.S.C. 7411(a)(2)

<sup>17</sup> 42 U.S.C. 7411(a)(6)

<sup>18</sup> 79 Fed. Reg. at 34,904

<sup>19</sup> *Utility Air Regulatory Group v. EPA*, 573 U.S. \_\_\_\_ (2014) slip opinion at page 21