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# United States Senate

WASHINGTON, DC 20510-3603

April 28, 2014

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

Dear Administrator McCarthy,

The President has made explicitly clear that one of the most important components of his Climate Action Plan (CAP) is to reduce greenhouse gas (GHG) emissions from both new and existing power plants. He referenced this desire in his speech announcing the CAP on June 25, 2013, and made it one of the headline items in the associated documents. Accordingly, it is important for Congress to be fully engaged in evaluating the impact CAP could have on the American people and our nation's economy.

On June 25, 2013, the President issued a Presidential Memorandum directing the Environmental Protection Agency (EPA), to "issue a new proposal" that would regulate GHG emissions for newly constructed power plants, "by no later than September 20, 2013."<sup>1</sup> EPA complied - and announced the proposal of its GHG New Source Performance Standards (NSPS) for power plants by posting the rule on EPA's website on September 20, 2013.<sup>2</sup> However, as prescribed by the Administrative Procedures Act, a rule is not officially noticed until it is published in the Federal Register, where it can be reviewed and commented on by the public.<sup>3</sup>

Generally once agencies complete the administrative process of crafting a proposal, the text is submitted to the Office of the Federal Register for publication in the Federal Register. Under the regular filing schedule, rules are published about two weeks after being received from an agency. Alternatively, agencies could choose to specify the date of publication.<sup>4</sup>

Timing of the publication of the GHG NSPS proposal for new power plants triggers a unique requirement applicable to rules written under the authority of Section 111 of the Clean Air Act. According to the statute, EPA must finalize the NSPS "within one year after such

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<sup>1</sup> Barack H. Obama, "Memorandum on Power Sector Carbon Pollution Standards, June 25, 2013," *available at* [www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards](http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards) (last accessed Apr 28, 2014).

<sup>2</sup> Env't Prot. Agency, 2013 Proposed Carbon Pollution Standard for New Power Plants (last updated Feb. 5, 2014), *available at* <http://www2.epa.gov/carbon-pollution-standards/2013-proposed-carbon-pollution-standard-new-power-plants> (last accessed Apr 28, 2014).

<sup>3</sup> *See* 5 U.S.C. § 553.

<sup>4</sup> *See* 1 CFR § 17.1.

[regulatory proposal's] publication."<sup>5</sup> As such, if a Section 111 rule is not finalized within a year of proposal's publication, then EPA must start the entire process over again.

As you know, the NSPS rule was officially published in the Federal Register on January 8, 2014, about three and a half months after the Agency first announced it was being proposed.<sup>6</sup> If EPA published the rule in the Federal Register on September 20, 2013, as outlined by the President, EPA's obligation to publish the final rule would have been on September 20, 2014. However, given EPA waited until January 8, 2014, to publish the rule, the Agency's legal obligation to finalize the rule shifted to January 8, 2015.

Based on this sequence of events, it appears that the delay in the proposal's publication may have been motivated by a desire to lessen the impact of the President's harmful environmental policies on this year's mid-term elections. If EPA had kept the timetable mandated by the President, it would have been obligated to finalize the new rule about six weeks before the 2014 elections. Now, because of EPA's delay, the proposal will not need to be finalized until well after this election cycle.

The costs of the President's GHG regulations are going to be enormous with far-reaching and irreparable impacts on our electricity generation capacity, affordability and reliability. With this in mind, it makes sense that the American public would react negatively to the finalization of this first round of GHG regulations for power plants. This makes the timing of your proposal very important. If the rule was finalized by September 20, 2014, the American people would have about six weeks to consider the negative impact of the rule on the economy prior to going to the polls. In addition to this, my colleagues and I would have been able to force a vote on a resolution of disapproval against the final rule under the Congressional Review Act. This possibility of electioneering is deeply troubling

During the EPW Committee hearing on January 16, 2014, you said, "I will assure you that as soon as that [NSPS] proposal was released, we had submitted it to the Federal Register office. The delay was solely the backup in the Federal Register office."

After the hearing, I wrote to the Federal Register and asked them when they received the rule from EPA. They responded that they did not receive the rule until November 25, a full 66 days after you said it had been transmitted.

In light of these concerns and the information described herein, transparency and accountability is needed on this matter.

Consequently, I am launching an oversight investigation to determine whether the timing of the proposed NSPS rule's publication on the EPA's website verses the Federal Register was in

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<sup>5</sup> See 42 U.S.C. 7411(b)(1)(B).

<sup>6</sup> "Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units; Proposed Rule," 79 Fed. Reg. 5 (Jan. 8, 2014), pp 1430-1519.

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any way motivated by electoral politics. I respectfully request that you fully respond to the following questions in writing with any supporting documentation or evidence by May 13, 2014:

1. How did EPA make the decision of when to submit the NSPS rule to the Federal Register? Please provide any and all documents referring or relating to the EPA's decision making process on the submission date.
2. At what point did the EPA decide to not submit the NSPS rule to the Federal Register on the same day as the rule was published on the website? Please provide any and all documents and communications records referring or relating to the decision to delay the submission.
3. What involvement or role did the White House Office of Management and Budget (OMB) play in deciding when to submit the rule to the Federal Register? Please provide any and all documents and communications records between OMB and EPA concerning the NSPS rule, its contents, and its official proposal date.

For the above questions, "any and all documents and communications records" should include: including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meeting and/or discussions, and transcripts and notes of any such meetings and/or discussions.

Thank you for your swift attention to this request.

Sincerely,



James M. Inhofe  
United States Senator