

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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Dec 1, 2014

Ms. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
EPA Docket Center—Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Attn: Docket ID No. EPA-HQ-OAR-2013-0602

Re: Comments on proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; 79 Fed. Reg. 34830 (June 18, 2014)

Dear Administrator McCarthy:

The House Committee on Science, Space and Technology¹ submits the following comments in response to the Environmental Protection Agency's (EPA) proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Stationary Sources: Electric Utility Generating Units (CPP).

This proposal is outrageous. It doesn't take a detailed analysis to understand that this proposal regulates beyond the authorities Congress delegated. The CPP violates the letter and spirit of the Clean Air Act (CAA). No amount of administrative deference can rectify this fundamental flaw.

The extraordinary powers the EPA pretends to wield are invented out of whole cloth. To suggest that the CAA gives the federal government the right to regulate the daily lives of citizens within their homes is preposterous. Either the Agency has not read the CAA or assumes the law does not apply. If on the other hand, the EPA hopes to blackmail states into doing this dirty work for them, it is no better.

Congress has not given the EPA the authority to re-write laws or discover new powers for the sake of expediency. This proposal mocks our constitutional framework and subverts the rule of law. The brazen arrogance with which this Administration is steamrolling through such an arbitrary and capricious regulation is a breathtaking affront to the American people.

¹ The Science Committee has jurisdiction over the core technical and scientific issues underpinning this rulemaking. The Committee's authority includes: all energy research, development and demonstration; environmental research and development; and, the commercial application of energy technology. House Rule X(1)(p).

Beyond the obvious legal deficiencies with this proposal, the crude technical assessments are shockingly amateur. A proposal of this nature and scope cannot afford to rely on anemic analysis, outlandish assumptions and makeshift modeling. It's embarrassing.

EPA's sweeping mandate requires a fundamental restructuring of our nation's energy system; it transforms how electricity is both produced and used. The broad new authority EPA claims raises critical questions about our ability to meet demand for reliable, affordable electricity.

If implemented in the current form, the CPP will impact the reliability and diversity of the nation's electricity supply. This could dramatically destabilize electricity prices and energy security. Perhaps most strikingly, the EPA proposal does next to nothing to impact changes in the global climate.

EPA must abandon this disastrous proposal. It would be a foolish waste of taxpayer resources to press ahead. This proposal will only result in years of costly legal wrangling. We have already spent too much time on a bad idea. Scrap this proposal and come up with something workable.

I. Overview

Consistent with its jurisdictional responsibilities, the Science Committee has conducted hearings to obtain testimony from leading technical, scientific, and policy experts. Further, the Committee monitored interactions between the EPA and the independent Science Advisory Board (SAB) charged with advising the Agency and Congress. Science Committee efforts uncovered serious problems and unanswered questions with the scientific and technical assumptions supporting EPA's CPP.

The goal of these comments is to provide the EPA with critical information obtained by the Committee in exercising its jurisdictional responsibilities. All regulations must have a sound technical and scientific basis. As the Agency has stated on many occasions, "science is, and continues to be the backbone of this agency and the integrity of our science is central to the identity and credibility of our work."² This Committee intends to hold EPA to that standard.

The Science Committee's comments highlight questions related to the technical, scientific and policy underpinnings of the CPP. This includes testimony obtained by the Science Committee and unanswered official Science Committee questions and oversight inquiries. Until these deficiencies are addressed, adequate peer review is undertaken, and the law is honored, the Agency stands in default.

II. Inadequate Peer Review

Under the law, the advice of scientific experts is a pre-requisite, not an afterthought. Specifically, the Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDAA)³ establishes the Science Advisory Board as an independent body charged

² EPA News Release, "EPA Appoints New Scientific Integrity Official," Nov. 25, 2013, *available at* <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceac8525735900400c27/d6741453e168fd4385257c2e00650858!OpenDocument>.

³ Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365.

with providing advice to Congress and the EPA. Under ERDDAA, the “Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the... [CAA]... is provided to any other Federal agency for formal review and comment, shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.”⁴ Significantly, the law explains that this process provides the Board with a critical opportunity to share with the Administrator “its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation.”⁵ When followed, ERDDAA helps ensure that regulations are informed by sound science before they are ever proposed.

Further, EPA senior leadership and the SAB continue to note that waiting until the proposal stage to provide information to the SAB is too late in the process for meaningful input.⁶ For this very reason, EPA created a new process to ensure that the SAB received planned Agency actions at the pre-proposal stage so that EPA could consider the Board’s advice before proposing regulations.⁷ It is clear from the statute and the Agency’s own protocol that the Board should review the scientific underpinnings of draft proposals as part of the interagency process before a rule is ever proposed.

The Committee is concerned that the Agency failed to provide the SAB with an adequate opportunity to review the underlying science and provide independent advice before publishing the proposal. In particular, the only opportunity for review was during the fall of 2013 when considering the EPA’s Spring 2013 Regulatory Agenda. This was before the EPA began its “unprecedented outreach” that shaped the CPP and months before scientific information relied upon in the CPP was published. It appears that the Agency issued the CPP absent the opportunity for meaningful examination required by the language and spirit of ERDDAA.

Given the suspicious timeline, the Committee asked Administrator McCarthy for documentation of communications with the Board. These inquiries were made in official Questions for the Record (QFRs) following a full Committee hearing in November of 2013. The EPA did not respond for over nine months. Not only was Agency’s reply long over-due, but the responses were shamelessly evasive.

Specifically, in the September 2014, response to the Committee’s December 2013, questions Administrator McCarthy wrote that “the appropriate protocol is to make such a request through a separate letter to the agency.” It is hard to understand how it took the EPA nearly a year to formulate this simple response. Furthermore, the need for an additional and separate request letter is perplexing. One can only conclude that this charade was a deliberate attempt to stall Congressional oversight.

⁴ *Id.*

⁵ *Id.*

⁶ See Memorandum from SAB Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to Members of the Chartered SAB and SAB Liaisons, Nov. 12, 2013, *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/\\$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf).

⁷ A November 12, 2013 memo from the Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to the Members of the Chartered SAB provides a detailed explanation of this process, its history, and the underlying legal obligations of ERDDAA.

On November 13, 2014, the Committee again requested records pertaining to the role the SAB played in providing advice on the CPP. Additionally, the Committee requested records of peer review of scientific and technical information the CPP relies on and publication of this information in the official docket.

The EPA has failed to respond to the Committee's requests.

Important documents referenced in this summary of communications are included as **Attachment A** as part of the Committee's comments on this rulemaking. These documents highlight significant procedural deficiencies in this rulemaking process.

III. Evidence Submitted to the Committee

Over the past few months, the Committee has held several hearings focusing on the technical and scientific issues underpinning this proposal. In these hearings, evidence was provided to the Committee through prepared testimony, oral testimony, and witness responses to questions for the record. These materials are included as **Attachment B** as part of the Committee's comments on this rulemaking.

In reference to the evidence provided in **Attachment B**, if the Agency disagrees with any of the testimony provided, please detail any objections. Please also detail the steps the Agency has taken to consider this evidence.

IV. Unanswered Questions for the Record

The Science Committee appreciates testimony provided during hearings. However, to fully understand and meaningfully consider the evidence witnesses convey, Committee members have an opportunity to ask official QFRs. The testimony witnesses provide in response to official questions is ultimately a part of the hearing and the official Congressional Record.

The Committee hearings can only be submitted in final publication format when witnesses respond to official QFRs in a timely manner. Unfortunately, EPA Assistant Administrator for Air and Radiation, Janet McCabe has failed to respond to the Committee's QFRs from her appearance before the Science Committee in September of 2014. Consequently, the Committee was forced to include the evidence obtained in a pre-publication format in **Attachment C** as a part of these Science Committee comments.

Again, in order to properly fulfill oversight responsibilities, the Science Committee needs honest and timely responses. It's a waste of taxpayer resources when several months or more pass between when a question is asked and when the answer is communicated. The hearing materials, transcripts, and unanswered QFRs address issues directly related to this rulemaking. To finalize a rule without fully addressing these issues would be arbitrary, capricious, and an abuse of discretion.

V. Technical Considerations Ignored

Committee investigations have uncovered important technical considerations ignored by the Agency when determining the “best system of emission reduction” (BSER). These unexplained assumptions have direct bearing on the determinations EPA makes in this proposal. We cannot afford to compromise transparency and accountability in the name of expediency. Accordingly, EPA should not move forward with a final rule until these questions are fully answered. The Agency’s thorough responses should be made available for consideration as part of the official rulemaking record and public comment.

Reflecting upon the evidence obtained by the Science Committee and all other relevant information the Agency is aware of or has relied on, please respond to the questions in **Attachment D** and detail how such responses were considered in this rulemaking. To finalize a rule without fully addressing these issues would be arbitrary, capricious, and an abuse of discretion.

VI. Shoddy Compliance Modeling

The American people deserve the facts. This is impossible without a comprehensive, real-world analysis of the EPA’s proposed regulations. Systematic biases and major omissions in EPA’s limited evaluation produced a cost-benefit analysis divorced from reality. Its modeling suffers from a number of deficiencies that mask the rule’s implications and limit its usefulness as a policy tool. Consequently, EPA’s Regulatory Impact Assessment fails to assess whether the proposed rule will achieve meaningful benefits and, more importantly, whether the benefits are worth the heavy cost.

Similar to the unanswered requests for SAB communications, QFRs, and technical assumptions referenced above, the EPA has failed to adequately consider the impacts of the CPP. Consequently, the public has been deprived of adequate notice and an opportunity for meaningful comment.

Reassurances of “flexibility” are inadequate when considering regulations of this magnitude. Americans deserve an opportunity to see the facts. Without public access to all underlying assumptions, modeling mechanisms, and results, it is impossible to know whether the Agency has corrected core deficiencies that have resulted in the gross underestimation of impacts in previous rules.⁸ Americans cannot afford to pay for EPA’s mistakes.

⁸ Flaws in recent EPA analyses amplify concerns about the real impacts of these regulations. The Government Accountability Office released a report highlighting a pattern of shoddy EPA analysis. It was revealed that EPA relied on decades old data and ignored important factors. The independent watchdog warned that “EPA cannot ensure that it’s [analysis] provide the public with a clear understanding of its decision making.” For example, EPA claimed that the Mercury and Air Toxics Standards (MATS) would retire just 4.7 gigawatts of power. Yet, the Energy Information Administration (EIA) now projects that 54 gigawatts of generating capacity, ten times more than EPA’s projections, will close by the MATS compliance deadline. EPA also said that MATS would increase electricity rates by just 1.3% to 6.3%. However, reports indicate that rate-payers are facing a 21% increase in rates this summer due to MATS power plant closures. Further, EPA assured Americans that MATS would not result in reliability concerns, but Midwest grid operators now warn of an impending electricity shortage. EPA’s failure to adequately model MATS impacts is all the more troubling in light of the fact that EPA itself now models up to 49

EPA's incomplete modeling disregards a number of technical, regulatory, and economic realities.⁹ These omissions have the effect of downplaying the possible energy and economic impacts of this proposal while simultaneously ignoring the lack of climate benefits. The costs of any greenhouse gas policies are directly proportional to the price and availability of viable technologies. In the case of base load power, these options include carbon capture and storage (CCS), natural gas, nuclear, and hydro-electric in some locations. In its analysis, the EPA assumes that these technologies are available and relatively affordable throughout the lifetime of the policy and beyond. But the facts paint a different picture.

For example, notwithstanding the Administration's claim that CCS is "adequately demonstrated," serious questions remain about its technological and economic viability beyond unique applications. At the same time, the EPA is poised to choke off the only economically viable CCS option, enhanced oil recovery, by putting in place regulations that would preclude its use as a carbon abatement option.¹⁰ Furthermore, EPA has refused to recognize the use of other carbon utilization technologies for compliance purposes.¹¹ There is no evidence that EPA's modeling has taken these considerations into account.

In addition to issues related to the use of coal, concern about climate change has reinforced opposition in some quarters against other types of energy production. In the case of natural gas, continued access at today's historically low prices is questionable in the face of special-interest opposition to drilling and the specter of additional federal regulations. Further, EPA's sweeping assumption that natural gas plants can increase annual utilization to 70% across the entire fleet, presents huge technological challenges both at the plants and within the supply chain. EPA's proposal admits that 70% utilization rates have been exceptionally rare;¹² consequently, assertions of technical feasibility require detailed modeling, contingency planning, and real-world testing. There is no evidence that EPA's modeling has taken many of these and other confounding factors into account.

Over the past decade, there has been a renewed interest in nuclear power as an alternative to fossil fuels. Yet despite greater acceptance of this emissions-free energy resource, nuclear power faces a host of obstacles and uncertainties that could not only inhibit its expansion, but

gigawatts of plant closures due to the proposed section 111 regulations. If past performance is an indication, could this number double, triple, or worse? GAO, *EPA Should Improve Adherence to Guidance for Selected Elements of Regulatory Impact Analysis*, at 32 July 2014. Available at <http://oversight.house.gov/wp-content/uploads/2014/08/GAOREport.pdf>.

⁹ This proposal will have ripple effects throughout the wider economy as higher electricity and natural gas prices create drag on other sectors. No rule should proceed absent peer-reviewed economy-wide modeling. However, EPA has not attempted to model these impacts but is establishing a "Science Advisory Board panel on economy-wide modeling to consider the technical merits and challenges of using this analytical tool to evaluate costs, benefits, and economic impacts in regulatory development." RIA at 5-2.

¹⁰ See generally Letter from U.S. House of Representatives Committee on Science, Space, and Technology to EPA Administrator Gina McCarthy, Dec. 19, 2013. Available at http://science.house.gov/sites/republicans.science.house.gov/files/documents/Letters/121913_mccarthy.pdf.

¹¹ Amanda Peterka, *Algae Companies Ask EPA to be able to Cash in on Power Plant Emissions*, GREENWIRE. Aug. 6, 2014.

¹² "The corresponding percentages of NGCC units that in 2012 operated at annual utilization rates of at least 65 percent and at least 75 percent were 16 percent and 6 percent, respectively." U.S. EPA, *Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, June 2, 2014, at Fn 127.

will accelerate retirements from the existing fleet. EPA's modeling fails to adequately consider the challenges facing our existing nuclear fleet.

The Agency also fails to consider significant legal problems with assumed compliance options. There is considerable uncertainty as to whether states will embrace EPA's proposal and implement it through a State Implementation Plan (SIP) like process. Consequently, if the Agency forcibly imposes a federal implementation plan on states, EPA's options may be limited to regulating the power plants themselves. Accordingly, an alternative policy analysis should assess the impact of the guidelines under a scenario limited to heat rate improvements and dispatch changes among affected power plants.

These fundamental technical constraints raise serious questions as to how this country could meet growing electricity demand affordably and reliably while complying with EPA's proposed CPP. Local, state, and regional level impacts must also be carefully considered. The effects of EPA's policies will vary dramatically and hinge on a wide variety of issues including everything from existing power resources and access to low cost alternatives to infrastructure constraints and energy demands. Americans deserve the bottom line: what does it cost and what will we get for the money?

Finally, EPA's failure to model impacts between 2030 and 2040 is a serious analytical shortcoming. The Administration has committed to reduce emissions by 83% by 2050. As a result, reductions beyond 2030 must be analyzed to understand the implications of this approach. Given the White House's promises in this regard, the target reduction for the power sector for 2040 should be modeled on a trajectory consistent with the implied 2050 target.

Credible analysis is critical to a well-informed debate concerning climate change and energy policy choices now before American people. As such, in August of 2014, the Science Committee requested that the EPA analyze the proposed guidelines taking these realities into account. Given the urgent nature of this request, the Committee supplied detailed specifications for assessment.

Unfortunately, the EPA responded a month later with little more than excuses. The September 2014, letter from the EPA demonstrated a misunderstanding of the Committee's modeling request. With the close of the comment period rapidly approaching, the Science Committee again reiterated the pressing need for comprehensive analysis in a November 2014, letter to the EPA. The Agency has failed to complete these pivotal assessments.

Important documents referenced in this summary of communications are included as **Attachment E** as part of the Committee's comments on this rulemaking. These documents and EPA's failure to consider real-world impacts, highlight significant procedural deficiencies in this rulemaking process. Accordingly, EPA should not move forward with a final rule until this modeling is undertaken and the results are made available for consideration as part of the official rulemaking record and public comment.

VII. Conclusion

We cannot afford to ignore inconvenient details when the truth hangs in the balance. Mindful of the unique role created for the Science Committee under the law and the Agency's commitment to scientific integrity, before moving ahead with this proposal the EPA must address the unanswered questions and problems highlighted in these comments.

The CPP proposal is premature, arbitrary, and inadequately supported by the record. For the reasons provided in these comments, the EPA must abandon this proposal.

Sincerely,



Rep. Lamar Smith

Chairman
Committee on Science,
Space, and Technology

cc: The Hon. Shaun Donovan, Director, Office of Management and Budget
Rep. Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and
Technology