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VIA ELECTRONIC SUBMISSION

EPA Docket Center
U.S. Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Attn: Docket ID No. EPA-HQ-OAR-2017-0355

Re: Proposed Rule: Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Clean Power Plan); Docket ID No. EPA-HQ-OAR-2017-0355

Dear Administrator Pruitt:

We are pleased to submit these comments on behalf of the Southeastern Legal Foundation ("SLF") in support of the proposed rule by the U.S. Environmental Protection Agency ("EPA") to repeal the Clean Power Plan.

SLF is a national public interest law firm advocating individual freedom, limited government, and respect for the free enterprise system. SLF's clients include individuals, companies, trade associations, and elected representatives. SLF has represented such clients in numerous environmental cases, including a successful challenge to the EPA's greenhouse gas regulations before the United States Supreme Court, a challenge to the EPA's Cross-State Air Pollution Rule, and a successful challenge before the Supreme Court to a common-law claim filed by the State of Massachusetts against American Electric Power and others.

On behalf of SLF and its clients who are engaged in the production, consumption, and distribution of energy produced by coal, we hereby timely submit comments on the EPA's Proposed Rule, "Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Clean Power Plan)"; (Docket ID No. EPA-HW-OAR-2017-0355), 82 Fed. Reg. 48,035 (October 16, 2017) (the "Proposed Repeal").

The EPA does not have the vast authority the Clean Power Plan ("CPP") purports to give it. The CPP creates significant federalism issues by requiring broad changes to the energy industry

at the state level, coercing states to comply with the EPA's guidelines by creating implementation plans that will cripple state energy programs if left unchecked. The CPP also violates separation of powers principles by encroaching on powers delegated to the legislative branch. The EPA needs clear authorization from Congress before it may impose such economically and politically significant regulations on the energy industry. For these reasons—discussed further below—the CPP should be repealed as an improper exercise of regulatory power unauthorized by statute.

I. The EPA's Clean Power Plan Violates Principles of Federalism Codified in the Clean Air Act

The authority to regulate power traditionally has been reserved to the States.[1] Although the federal government typically has controlled interstate rates and transmissions, issues such as the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."[2]

Section 111 of the Clean Air Act recognizes the States' traditional role in this area by striking a balance between federal and state regulation. Although Section 111 contemplates "standards of performance" for both new and existing sources of power, it divides responsibility for this standards-setting between the States and the federal government. The federal government takes a primary role in regulating *new sources* under Section 111(b), which requires the EPA to establish nationally applicable "standards of performance" for new sources.[3] For *existing sources*, on the other hand, the States take the lead. Section 111(d) allows the EPA to issue only regulations that "establish a procedure … under which each State shall submit … a plan which [] establishes standards of performance for any existing source."[4] Only in those "cases where the State fails to submit a satisfactory plan" may the EPA "prescribe a plan for a State."[5] In other words, Section 111(d) allows States substantial flexibility in achieving CO_2 emissions reductions and addressing the economic interests of their utilities in the most cost-effective, investment-promoting manner.

The CPP upends this careful division of authority that Congress delineated in Section 111. Under Section 111(b), the CPP set aggressive performance standards for new coal-fired facilities, modified and reconstructed coal-fired facilities, and new gas-fired facilities.[6] Under

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[1] *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-06 (1983) (explaining the States' traditional role in regulating energy).

[2] *Id.*

[3] 42 U.S.C. § 7411(b)(1)(B) ("[T]he Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources … [and] shall promulgate … such standards . . . as he deems appropriate.").

[4] 42 U.S.C. § 7411(d)(1).

[5] 42 U.S.C. § 7411(d)(2)(A).

[6] *See* Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,512-13 (Oct. 23, 2015)

Section 111(d), instead of "establish[ing] a procedure" for States to submit their own plans "establish[ing] standards of performance for any existing source," the CPP went ahead and set a uniform standard for every State. Although the CPP says that its uniform performance standards for States are mere "guidelines," the CPP in effect bars States from imposing emissions standards that are less stringent than the CPP's specified national performance rates.[7] In other words, the States have no role in setting their own "standards of performance"; they are instead left to implement the "standards of performance" that the EPA mandates.

This elimination of the States' role is particularly troubling because it marked a departure from the EPA's longstanding views to the contrary. In 1975, the EPA issued regulations establishing the procedure by which States submit their own standards of performance under Section 111(d). Those regulations provided that the EPA would issue an "emission guideline" that "reflects the application of the best system of emission reduction."[8] But that "guideline" was just that. States could issue less stringent standards by demonstrating impossibility, unreasonable cost, or "other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable."[9] The "emission guideline," as the EPA explained, was not "a legally enforceable national emission standard."[10] The EPA reversed course, however, with the CPP by issuing just such a national standard.

In sum, the Clean Air Act balanced federal and State sovereignty interests by giving States the opportunity to self-regulate in accordance with federal goals—using direct federal regulation only as a "Plan B" if the States fail to act. The CPP abandons that congressionally mandated balance by setting targets for individual States that force them to overhaul their energy markets and regulatory structures to reach the EPA's air quality targets. Repeal of the CPP would return the regulatory landscape to the correct balance struck by Congress.

II. The EPA's Clean Power Plan Violates Separation of Powers Principles

a. The Clean Power Plan required a clear authorization from Congress to be valid

The Framers of the Constitution were well aware of the dangers of consolidating too much power in one branch of government, so they created a tripartite system with distinct powers in order to defend against "the very definition of tyranny."[11] The resulting separation of

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(setting a standard of 1,400 lbs CO_2/MWh-g for new coal-fired facilities, 1,800 to 2,000 lbs CO_2/MWh-g for modified and reconstructed coal-fired facilities, and 1,000 lbs CO_2/MWh-g for gas-fired facilities).

[7] 80 Fed. Reg. at 64,870 ("Consideration of facility-specific factors and in particular, remaining useful life, does not justify a state making further adjustments to the performance rates … that the guidelines define for affected [units] in a state and that must be achieved by the state plan.").

[8] *See* 40 C.F.R. § 60.22(a), (b)(5).

[9] *Id.* § 60.24(f).

[10] Standards of Performance for New Stationary Sources, 40 Fed. Reg. 53,340, 53,341 (Nov. 17, 1975).

[11] The Federalist No. 47 (James Madison).

powers serves as "the absolutely central guarantee of a just Government."[12] To accomplish that goal, the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[13] This fundamental feature of the federal government particularly declines to grant the President authority to exercise legislative powers. And the Supreme Court has "completely refute[d] the claim that the President may act as a lawmaker in the absence of a delegation of authority or mandate from Congress."[14]

Courts have indicated that they will be especially vigilant in guarding that line in "extraordinary cases" where "there may be reason to hesitate before concluding that Congress has intended … an implicit delegation."[15] Congress "does not … hide elephants in mouseholes."[16] As a result, if the issue affects "a significant portion of the American economy,"[17] involves "billions of dollars in spending each year," or affects "millions of people,"[18] then there must be a clear statement from Congress that an agency has the authority to regulate it.[19] This is true "regardless of how serious the problem an administrative agency seeks to address."[20] Agencies may not exercise their authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law."[21]

In the CPP, however, the EPA attempted to reduce carbon dioxide emissions by "shifting" electric generation from fossil-fuel power plants to alternative sources.[22] It sought to do this primarily by regulating coal-fired facilities out of existence. To that end, despite the fact that existing facilities cannot retrofit to achieve the same efficiency as new ones, the CPP set *more* aggressive performance rates for existing coal-fired and gas-fired facilities than it set for new facilities.[23] In other words, the EPA based the performance standard for new facilities on the

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[12] *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting).

[13] U.S. Const. art. 1, § 1.

[14] *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235 (8th Cir. 1975) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952)).

[15] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

[16] *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (citing *Brown & Williamson*, 529 U.S. at 159-60).

[17] *Brown & Williamson*, 529 U.S. at 159.

[18] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

[19] *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (citing *Brown & Williamson*, 529 U.S. at 159).

[20] *Brown & Williamson*, 529 U.S. at 125 (internal quotation omitted).

[21] *Id.*

[22] 80 Fed. Reg. at 64,726.

[23] *Compare* 40 C.F.R. pt. 60, subpt. UUUU, tbl 1 (setting rates of 1,305 lbs CO_2/MWh for existing coal-fired facilities and 771lbs CO_2/MWh for existing gas-fired facilities), *with* 40 C.F.R. pt. 60, subpt. TTTT, tbl 1 (setting a rate of 1,400 lb CO_2/MWh for newly constructed steam generating unites and integrated gasification combined cycles).

best available technology, which is unattainable for existing facilities, and then set the standard for existing facilities *even higher*. By definition, then, existing facilities cannot comply with the CPP's standard. States must therefore shift to other types of power to comply with CPP and to keep up with preexisting demand levels.

This shift was intentional. As the previous Administration admitted, the CPP was meant to "aggressive[ly] transform[]…the domestic energy industry."[24] And it would accomplish that goal by decimating the coal industry. Coal is the most affordable source of power and provides about one third of the country's electricity.[25] If the CPP remains in place, the EPA's own analysis shows that coal-fired generating capacity will be halved by 2030.[26] This would significantly raise residential electricity rates and reduce domestic coal production by 32% by 2025,[27] costing over $8 billion a year.[28] The EPA can effect a change of this magnitude only with a clear statement of authorization by Congress.

b. Congress did not grant the EPA authority to enact the Clean Power Plan

The CPP's extraordinary transformation of a massive and vital industry has no clear authorization from Congress. To start, the CPP contravenes Congress's attempts to ensure that the coal industry remains viable. For example, Congress has provided funding and regulatory relief for "clean coal technology,"[29] which is incompatible with the CPP's goal of eliminating coal plants altogether. Also, elimination of coal plants contravenes the goal of the Energy Policy Act of 2005 to keep coal competitive with other forms of energy to maintain a diversity of fuel choices and meet electricity generation requirements.[30] The CPP's ultimate aim similarly conflicts with preexisting tax incentives for coal exploration and development.[31]

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[24] Joby Warrick, White House set to adopt sweeping curbs on carbon pollution, Wash. Post (Aug. 1, 2015), https://www.washingtonpost.com/national/health-science/white-house-set-to-adopt-sweeping-curbs-on-carbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html?utm_term=.3215794f5039.

[25] *See generally* Rocky Mountain Coal Institute, "Fast Facts About Coal," http://www.rmcmi.org/education#.Wht3aLT83eQ.

[26] *See* Clean Power Plan, Regulatory Impact Analysis, at 2-3, 3-24, 3-31 (noting a reduction from 336,000 MW in 2012 to 183,000 in 2030); *see also* Sam Batkins, *EPA's Greenhouse Gas Regulation Expects Coal Generation to Decline 48 Percent*, American Action Forum (Aug. 4, 2015), https://www.americanactionforum.org/research/epas-greenhouse-gas-regulation-expects-coal-generation-to-decline-48-percen/.

[27] *See* U.S. Energy Information Administration, Analysis of the Impacts of the Clean Power Plan, at 18, 41-42 (May 2015), https://www.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerplant.pdf.

[28] *See* Batkins, *supra*, n.26.

[29] *See generally* 42 U.S.C. § 7651n.

[30] *See* 42 U.S.C. § 15961, *et seq.*

[31] *See* Proposed Rule, Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1,430, 1,478 (Jan. 8, 2014) (noting the tax benefits for coal exploration and development).

Moreover, the EPA promulgated the CPP in the face of specific refusal by Congress to enact legislation for CO_2 reduction programs. Because an existing coal-fired facility cannot comply with the CPP's performance standards, it has only the option to "shut[] down, in which case it would achieve a zero emission rate."[32] Save that result, the CPP sets up a type of cap-and-trade program that would allow only some coal-fired facilities to remain operational. The EPA has explained, for example, that "one of the things an affected [facility] can do to achieve its emission limit" under the CPP "is to buy a credit or an allowance from another affected [facility] that has over-complied."[33] An affected facility acquires such an allowance by "invest[ing] in actions at facilities owned by others[] in exchange for rate-based emission credits" that offset the original facility's own higher emission rates.[34]

But Congress has declined to take up consideration of similar programs. In fact, only after Congress failed to act on a similar cap-and-trade program did the EPA move forward with the CPP.[35] It strains credulity for an agency to take legislative inaction and claim the unenacted policy embodied Congress's intent all along. Moreover, the Supreme Court has rejected similar legal strategy in the past.[36]

The CPP further contravenes congressional statutes in another way. The EPA has now recognized that "regulation of the nation's generation mix itself is not within the Agency's authority."[37] This is because Congress provided that "[r]egulation of the energy sector qua energy sector is generally undertaken by the Federal Energy Regulatory Commission (FERC)" in conjunction with the States to regulate energy markets—not the EPA.[38] The EPA now correctly recognizes that "the Federal Power Act ... establishe[d] long-recognized regulatory authority for the FERC over electric utilities engaged in interstate commerce."[39] But in its original efforts to promulgate the CPP, EPA had in contrast relied on the incorrect claim that its jurisdiction overlapped with FERC.

These concerns ultimately raise separation-of-powers problems because, outside of any congressional authorization, the EPA gave to itself the authority to write and enforce extraordinarily broad rules—conflating the domains of the executive and legislative branches. If, as EPA claims, the statutory phrase "standard of performance" can mean instituting a system to

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[32] 80 Fed. Reg. at 64,780 n.590.

[33] 80 Fed. Reg. at 64,733.

[34] 80 Fed. Reg. at 64,733; *id.* ("Trading provides an affected EGU other options besides direct implementation of emission reduction measures in its own facility or an affiliated facility when lower-cost emission reduction opportunities exist elsewhere."); *see also* 40 C.F.R. § 60.5790(c)(1).

[35] *See, e.g.*, Clean Energy Jobs & American Power Act, S. 1733, 111th Cong. (2009) (rejecting cap-and-trade); S. Cong. Res. 8, S. Amend. 646, 113th Cong. (2013) (rejecting carbon tax).

[36] *See Brown & Williamson*, 529 U.S. at 147-155 (outlining why Congress rejecting similar proposals establishes the agency does not have authority to implement its own).

[37] Proposed Repeal, 82 Fed. Reg. at 48,042.

[38] *See, e.g.*, 16 U.S.C. § 824.

[39] *See* Proposed Repeal, 82 Fed. Reg. at 48,042.

trade "rate-based emission credits" or requiring States and facilities to substitute one mode of energy for another, then the Clean Air Act's provisions essentially are boundless. EPA's attempt to remake the Clean Air Act through the CPP is inappropriate within the constitutional order. Attempts to address national problems through solutions that necessitate large tradeoffs must be effectuated through legislation, the constitutionally appointed mechanism for accountability in policymaking.

There can be no doubt then, as Members of Congress have explained, that the CPP "usurps th[e] essential policy-setting role of Congress by determining … to impose significant economic burdens on States and the nation to address climate change in EPA's prescribed way without achieving measurably significant climate benefits. This is not a policy choice that EPA is allowed to make."[40] Because the CPP brings "about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization," it has violated the "clear statement" rule.[41] The EPA's proposed repeal, on the other hand, "has the advantage of not implicating this doctrine."[42]

For these reasons, SLF supports the EPA's proposed rule to repeal the CPP.

Sincerely,

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[40] Brief for Members of Congress as Amicus Curiae, at 23, *State of West Virginia v. EPA*, 15-1363 (U.S. 2016).

[41] *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159).

[42] 82 Fed. Reg. at 48,042.