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Submitted via www.regulations.gov

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

**Re: Comments on EPA's Proposal to Repeal the Clean Power Plan (CPP)
(Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric
Generating Units (82 Fed. Reg. 48035) (Oct. 16, 2017) Docket ID No. EPA-HQ-OAR-2017-
0355)**

Dear Administrator Pruitt:

On behalf of the Electric Reliability Coordinating Council (ERCC), I am pleased to submit comments on the proposal referenced above. In this action, EPA proposes to repeal the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule (the Clean Power Plan or CPP) in its entirety and also supersede the legal interpretations presented in the CPP and the accompanying Legal Memoranda. For the reasons set forth below, ERCC believes that EPA's proposed interpretation of Section 111(d) of the Clean Air Act is the only permissible interpretation of the statutory language and, for both legal and policy reasons, it strongly supports the proposed repeal of the CPP.

The Electric Reliability Coordinating Council is comprised of power companies that provide power to millions of consumers across the country. ERCC members operate diverse portfolios of generation capacity, from traditional baseload resources like fossil fuels and nuclear, to a range of other resources including wind, solar, and other renewables. ERCC members are dedicated to a balanced energy portfolio that ensures reliable and affordable electric power, an essential prerequisite for the protection of the environment, public health, and the economy. To that end, ERCC members work with businesses and household consumers to improve energy efficiency and otherwise manage energy use. Due principally to a range of market trends, ERCC members and the rest of the electric industry have experienced substantial reductions in the carbon intensity of their power production.

According to EPA, U.S. emissions of criteria pollutants have declined by as much as 85 percent since 1990,¹ and nationwide carbon dioxide emissions are at their lowest levels in 25 years.² Reductions in CO₂ emissions are largely due to market trends such as the sustained low price of natural gas, continued investment in and market demand for renewables and energy efficiency, concerns expressed by the investment community, and best practices developed by the industry itself. While state and federal regulations do play a role in reducing emissions of CO₂ and other greenhouse gases (GHGs), the overly broad, unilateral Clean Power Plan does more harm than good. In fact, ERCC believes that the CPP removes the flexibility and pragmatism that the marketplace can provide in addressing greenhouse gases. The market provides a careful balance between continued forward momentum in reducing emissions and the critical need to address consumer demand, all while preserving electric reliability and resilience at the lowest possible cost.

I. The CPP Went Well Beyond EPA’s Authority Under Section 111(d) of the Clean Air Act

In the CPP, EPA claimed that section 111(d) of the Clean Air Act actually provided the Agency with authority to restructure the entire U.S. power system. Based on this claim, EPA developed a complicated regulatory scheme that effectively required some companies to shut down and curtail the use of coal-fired power plants, shift generation to existing natural gas-fired plants, and plan, permit, and construct other energy generating facilities (mostly wind and solar) favored at that time by EPA.

As the current EPA proposal recognizes, the Agency’s remarkable reading of Section 111(d) under the prior Administration (as set forth in the CPP and an accompanying legal memorandum) is simply wrong. It appears that the Supreme Court recognized this fact too — given that the Court stepped in to stay the rule and stop its implementation until the courts could determine whether it was lawful. Notably, this was the first and only time in history that the Supreme Court has stepped in to stay a rule issued by a federal agency.

Section 111, including Section 111(d), has been in place since 1977, and is actually very straightforward. Before issuing any regulation under Section 111, EPA must first identify specific types of facilities (known as “sources”) that will be regulated. Then, under Section 111(b), EPA establishes a “standard of performance” that applies to any new source of that type. Over the last 40 years, EPA has set more than a hundred of these standards for many types of sources, including power plants. In every case, the standard of performance is a requirement that each “new source” must meet by controlling its emissions. As explained below, all such standards must be based on the “best system of emission reduction” that such a source (*e.g.*, a power plant) can use to ensure a “continuous emission reduction” from the source when it is operating.

¹ U.S. Environmental Protection Agency, *Progress Cleaning the Air and Protection People’s Health*, Feb. 16, 2017, at <https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health> Accessed Jan. 9, 2018.

² Benjamin Hulac, *Progress: U.S. Carbon Emissions Decline*, *Scientific American*, Oct. 13, 2016, at <https://www.scientificamerican.com/article/progress-u-s-carbon-emissions-decline/>

Section 111(d) provides that, under certain circumstances, EPA may require states to set a “standard of performance” for “any existing source . . . to which a section 111(b) standard of performance would apply if such existing source were a new source.” This section also provides that EPA “shall permit the State in applying a standard of performance to any particular source . . . to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” Thus, EPA sets a standard of performance for any “new source” in the country, and individual states set a standard of performance for “any existing source” within their boundaries.

The statute certainly contemplates that a standard of performance is an emission rate that must be met by each and every regulated source. Until the CPP, all section 111 regulations for new and existing sources rely on this same reading—even when it comes to CO₂ emissions from new power plants. In the CPP, however, the prior EPA claimed that a “standard of performance” is something altogether different when it comes to CO₂ emissions from existing power plants. Thus, instead of requiring states to establish a standard that applies to individual power plants, EPA created a complex regulatory scheme that can only be met by shutting down and curtailing many coal-fired power plants and building many new generating facilities favored by the prior EPA (mostly wind and solar plants) to replace them.

The prior EPA justified this approach based on a statutory provision that defines a “standard of performance” as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”

The prior EPA based the CPP on just four words of this definition — “best system of emission reduction”—and ignored the rest of the statutory language, congressional intent, and almost 40 years of regulatory history. In the CPP, EPA took the position that the best system of emission reduction (BSER) involves looking at the electric generating system as a whole and “shifting generation” away from coal-fired plants to existing gas-fired plants and then, over time, toward wind and solar facilities that, under the CPP, would have to be constructed. In essence, the CPP was designed to take business away from coal-fired plants and, by regulatory fiat, award it to other generating facilities favored by the prior EPA.

The proposal to repeal the CPP recognizes that EPA simply does not have authority to mandate such an approach. The statutory language, as EPA correctly interpreted it for almost 40 years before the CPP, requires EPA to identify the “best system of emission reduction” that can be used to control emissions from an individual plant and that will ensure “continuous emission reduction” when that source is in operation.

In the proposed CPP repeal, EPA offers an interpretation of section 111(d) that returns to the clear intent of Congress — that any requirement under this section must be based on “emission

reduction measures that can be applied to or at an individual stationary source.”³ The phrase “system of emission reduction” cannot be read in isolation, as it was in the CPP, and BSER cannot be interpreted, as it was in the CPP, as “something that the source’s owner or operator can implement on behalf of the source at another location.”⁴ The fact that the CAA separately defines “stationary source” as “any building, structure, facility, or installation which emits or may emit any air pollutant”⁵ and “owner or operator” as “any person who owns, leases, operates, controls, or supervises a stationary source”⁶ demonstrates Congress’ intention to keep the two separate and distinct. ERCC agrees with EPA’s proposed interpretation of BSER as limited to what can be accomplished at the source itself, as this is the only legally acceptable interpretation of the statute. Clearly, section 111(d) does not give EPA authority to reorganize the entire U.S. electricity sector in the name of reducing CO₂.

II. The CPP Is Fundamentally Inconsistent with the Cooperative Federalism Principles that Congress Established in the CAA and other Federal Statutes

In the CAA, Congress explicitly provided states a primary role in regulating emissions from existing sources within their borders, as air pollution control at its source is the primary responsibility of states and local governments.⁷ States, not EPA, are the choice leaders for developing meaningful policy while balancing environmental protection with support of economic activity and job growth. States should be allowed the discretion to consider a variety of factors, including costs and the remaining useful life of individual power plants, when they establish standards of performance for the existing plants within their borders.

In our comments on the proposal of the CPP, ERCC cited a brief by 17 state attorneys general (in *State of Oklahoma et al*) regarding the legal infirmity of the CPP based upon accepted federalism doctrine. In their brief, these attorneys general point to the jurisprudence of the Federal Power Act:

The question of what role the federal government and its agencies should play in developing energy policy throughout the country has been considered extensively under the Federal Power Act, Congress's definitive pronouncement on the subject. And while Congress unquestionably did not intend Section 111 as an energy-policy provision at all, assuming *arguendo* that it were capable of being construed to touch on energy policy issues in some meaningful way, such as what type of resources may be used to generate electricity in different states, how state and regional power grids should dispatch power, retail energy-efficiency measures, and the like, then EPA's Section 111(d) proposal directly

³ 82 Fed. Reg. at 48036.

⁴ 82 Fed. Reg. at 48039.

⁵ 42 U.S.C. 7411(a)(3).

⁶ 42 U.S.C. 7411(a)(5).

⁷ 42 U.S.C. 7407(a).

contravenes Congress's careful decision in the Federal Power Act to preempt only certain aspects of power generation.

In short, EPA's interpretation of Section 111 contained within the CPP is arguably illegal as it may supersede the authority of some state legislatures, environmental and energy regulators, and the system that helps to ensure reliable electricity in the United States. The CAA does not provide the Agency such broad authority as it has assumed in the CPP.

III. The Clean Power Plan is Bad Policy

A. The CPP Could Jeopardize the U.S. Electricity Supply System and Harm Consumers and Businesses

There is little doubt that CPP's inherently inflexible structure could directly jeopardize the U.S. electricity supply — a risk that entails serious public policy consequences. The CPP would require a number of different public and private parties to take numerous actions over the next decade to approve, permit, and build hundreds of new generating facilities and thousands of miles of new transmission and pipelines. The accomplishment of these tasks would depend on major and often coordinated actions by the Federal Energy Regulatory Commission (FERC), state legislatures, public utility commissions, state environmental regulators, regional grid and transmission operators, reliability organizations, renewable energy developers, and industrial energy users.

If recent history is a guide, virtually all of these tasks would also be subject to organized opposition from environmental groups and others who often oppose the construction of new generating stations, transmission infrastructure, and pipelines — and on federal and state courts that must rule on objections from these groups. Even with no opposition and a major coordinated effort by all parties seeking to implement the CPP, there still may be substantial technical, geographical, dispatch, and transmission constraints that pose serious risks to electric reliability.

Electric reliability is a matter of substantial national importance. The Institute of Electrical and Electronics Engineers of the U.S. (IEEE-USA) has observed that even minor disruptions in the electric power grid can sometimes lead to catastrophic "cascading" blackouts, and that the loss of a single generator can result in an imbalance between load and generation. The resulting blackouts cause incalculable economic damage. The independent, non-profit Regional Transmission Organization for New England emphasized the point in no uncertain terms:

A reliable supply of electricity is a foundation of our prosperity and quality of life. Without it, our world literally grinds to a halt — businesses cannot plan and operate productively, hospitals and schools cannot provide their essential services, and residents cannot depend on the electricity they need simply to live

their daily lives. Without reliable electricity, the financial and societal costs would be enormous.⁸

Further, there is a risk that the CPP would significantly increase the cost of electricity in many parts of the country, a result that would harm both businesses and consumers – particularly those in low-income communities. From a commercial perspective, higher electricity prices would be largely borne by companies in energy-intensive manufacturing, where higher prices will make it more difficult to expand operations and increase employment. These productive industries result in millions of direct and indirect jobs. Nationwide, higher energy prices would produce a ripple effect throughout the economy that could shutter businesses, deter hiring, cause layoffs, increase the price of essential goods and services, and increase the cost of living for all Americans.

The hardest hit by any rate hikes would be people who live on fixed incomes, including senior citizens and the poor. Rate hikes would also leave these already-vulnerable groups less able to cope with the considerable human costs of lower economic growth. The Pacific Research Institute conducted multiple studies examining the impacts of the proposed CPP and found that “[e]nergy poverty will increase under the Clean Power Plan. Under each of the study’s different scenarios, average annual electricity expenditures will go up for all under the Clean Power Plan, but low-income communities will be impacted the most. The hardest-hit communities will see average annual electricity expenditures rise to 10 percent of their income, or even higher.”⁹

A second study, controlled for income bracket and community, estimates that “in 2030, based on average annual wholesale power price projections, electricity customers will see a 21 percent increase in their power bill compared to what they would have paid without the CPP regulations. This means that consumers nationwide will end up paying approximately \$214 billion more for electricity when compared to the non-CPP base case.”¹⁰

In an amicus brief filed by 18 former state public utility commissioners who represented the interests of consumers in over a dozen states, the Commissioners found a strong incongruity between the CPP and the Federal Power Act:

Lost in the litigation of EPA’s Power Plan is its permanent and irreversible impact on state regulators and state institutions. The Power Plan traduces state utility regulation, the Federal Power Act, current state institutional arrangements, and

⁸ Energy Consumers Relief Act: Legislative Hearing before the Committee on Energy and Commerce, Subcommittee on Energy and Power, U.S. House of Representatives, 113th Cong. at 181 (April 12, 2013) (statement of the Electric Reliability Coordinating Council)(ERCC statement citing ISO-New England and independently concluding, “The downside impacts of reduced electric reliability are substantial and must be taken into account in any responsible analysis” of environmental policy).

⁹ Winegarten, Wayne. “New PRI Study Finds Clean Power Plan Will Raise Electricity Costs, Worsen Problem Of Energy Poverty.” Pacific Research Institute, October 28, 2016. Online at: <https://www.pacificresearch.org/new-pri-study-finds-clean-power-plan-will-raise-electricity-costs-worsen-problem-of-energy-poverty/>

¹⁰ Winegarten, Wayne and Alexander Specht. “The Clean Power Plan’s Economic Impact by Income Group and Local Area.” Pacific Research Institute, October 2016. Online at: https://www.pacificresearch.org/wp-content/uploads/2017/03/CleanPowerPlan_RegressivityReduction_Web.pdf

the regulatory compact. The expansiveness of the “system” EPA deems regulable under the Power Plan eliminates the authority of state institutions. This includes where to regulate utilities, how to regulate utilities, and when to regulate utilities. All of these state institutional prerogatives, and the attendant exercise of states’ historic police powers, become subordinate to the Power Plan’s requirement that state air regulators, with EPA behind them, control the electric generation mix and the dispatch of that generation mix within any given state. EPA’s use of subcategory performance standards does not mitigate these institutional impacts, as the Power Plan’s subcategory performance standards are the product of a nationwide, system-wide resource planning exercise. Rather, EPA’s Power Plan nullifies the regulatory compact, long held as the basis by which utilities and regulators keep faith, and more important, the electricity flowing. The only historic role left to state utility regulators is to present customers with the bill for the Power Plan’s implementation.¹¹

B. The CPP Would Do Essentially Nothing to Reduce the Risk of Global Climate Change

Notwithstanding the potential cost of the CPP, it would do essentially nothing to reduce the projected risks of global climate change. According to a study by the Manhattan Institute:

[I]ndependent analyses using the EPA-sponsored Model for the Assessment of Greenhouse Gas Induced Climate Change (MAGICC) estimate that the CPP will reduce the world’s average temperature between only 0.004° C and 0.013°C by 2100, with an average reduction of 0.008°C. Changes in average global temperature of those magnitudes are far too small to be measured physically. Nor can such small changes be separated from natural climate variation...the CPP will have no physically measurable impact on world climate, estimated to be less than 0.01 degrees Celsius by the year 2100 using an EPA-sponsored climate model.¹²

Data from the U.S. Energy Information Administration (EIA) show why the CPP would not be a meaningful way to address climate change. According to EIA, the average yearly increase in CO₂ emissions from China is greater than the total reduction in CO₂ emissions that the CPP would achieve between now and 2030. This means that just the increase, from one year to the next, in CO₂ emissions from China would completely offset the emission reductions required under the CPP.¹³ Even the prior EPA conceded the negligible effect the CPP would have on climate

¹¹ The amicus brief can be found on the ERCC website at http://www.electricreliability.org/sites/default/files/media_files/Commissioners%20CPP%20Amicus%20Final-c1.pdf

¹² Lesser, Jonathan A. “Missing Benefits, Hidden Costs: The Cloudy Numbers in the EPA’s Proposed Clean Power Plan.” Manhattan Institute, June 2016.

¹³ “China.” U.S. Energy Information Administration. February 4, 2014 .. Further, carbon emissions will jump 34 percent in India by 2020 and double by 2030 under its existing policies, according to the International Energy Agency. Bloomberg report, Nov.

change. When asked by Members of Congress what impact the CPP will have on global temperatures, then-EPA Administrator Gina McCarthy said, "... the impacts of any single action will be small."¹⁴

IV. EPA Should Replace the CPP With Regulations Based on Sound Legal and Economic Principles

ERCC believes that, in the absence of legislation from the U.S. Congress to address climate change, market principles are generally the most sound basis upon which to proceed. That said, we recognize that, in light of *Massachusetts v. EPA*, EPA arguably has a legal obligation to regulate CO₂ emissions from the power sector under section 111 of the CAA. For that reason, ERCC supports EPA's efforts to develop a new rule to regulate CO₂ emissions from new and existing fossil fuel power plants, as long it is based on sound legal and economic principles. Such an effort would provide regulatory certainty, diminish frivolous litigation, and aide the planning efforts of power companies and state utility commissions.

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We know from nearly five decades of experience that the Clean Air Act works best when implemented in the spirit of cooperative federalism. When the Federal Government works with the States and industry as partners, we have shown that we can improve our air quality and protect our economy and the electricity grid simultaneously.

Sincerely,



Scott Segal, Executive Director

30, 2014. See also, Washington Post, Nov. 12, 2014 (expressing view of critics that recent US-China deal imposes few restrictions on China; also noting, "China completes a new coal plant every eight to 10 days, and while its economic growth has slowed, it is still expanding at a brisk rate of over 7 percent.").

¹⁴ Testimony before the House Committee on Science, Space and Technology, September 17, 2014. Also, EPA Air Administrator Janet McCabe testified before the House Energy & Commerce Committee in June 2014 that "you can't predict the impact" the CPP will have on climate change-related outcomes. In 2013, Gina McCarthy testified before the House Energy & Power Subcommittee that "it's unlikely ... any specific one step is going to be seen as having a visible impact on any of those [climate change] impacts."