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OHIO ATTORNEY GENERAL

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EPA Docket Center
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
via www.regulations.gov

Attn: Docket ID No. EPA-HQ-OAR-2015-0199

RE: Comments by the Attorney General of the State of Ohio on the U.S. Environmental Protection Agency's Proposed *Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations*

Thank you for the opportunity to comment on the proposed Federal Plan that might be invoked pursuant to the recently issued "Clean Power Plan." *Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations*, 80 Fed. Reg. 64965 (Oct. 23, 2015). These comments are submitted separately from but in complement to comments submitted by the Ohio Environmental Protection Agency (Ohio EPA) and the Public Utilities Commission of Ohio (PUCO). I also join with other Attorneys General in a multistate letter providing further comments on this subject.

My earlier comments on the United States Environmental Protection Agency's Power Plan when proposed addressed numerous legal flaws of that Power Plan as now challenged in Court. *See* EPA-HQ-OAR-2013-0602-23640 & EPA-HQ-OAR-2013-0602-25443. In addition, the PUCO and Ohio EPA also submitted comments addressing many of the legal and technical concerns with the Power Plan. *See* EPA-HQ-OAR-2013-0602-22762 & EPA-HQ-OAR-2013-0602-22760. While U.S. EPA has stated that it is not here accepting comments on its underlying Power Plan, I reference these previous comments and incorporate them, as if fully rewritten here, because most of the initial concerns raised there remain, and several of the underlying legal infirmities of the Power Plan have been carried over to the proposed Federal Plan on which you now request comment. Specifically, I reiterate that U.S. EPA does not have authority to impose its Power Plan because Clean Air Act §111(d)(1)(a) expressly prohibits regulation of EGUs under Section 111(d) when U.S. EPA also is regulating under Section 112, and because the Clean Air Act does not provide such sweeping authority to reorder our nation's economy and power generation system in any event.

U.S. EPA Does Not Have the Authority to Promulgate or Enforce the Proposed Federal Plan

One of the proposed Federal Plan's most rudimentary flaws is its violation of the constitutional allocation of powers among the three branches of the federal government. *Cf. e.g., Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2446 (2015) (U.S. EPA's expansive exercise of regulatory authority "would deal a severe blow to the Constitution's separation of powers"); *Consumer Energy Council of Am. v. F.E.R.C.*, 673 F.2d 425, 471 (D.C. Cir. 1982), citing *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). The Executive Branch—including agencies such as U.S. EPA—is limited to the powers conferred upon it by the Constitution or by Congress through the relevant enabling statute. *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (citations omitted).

Like the Power Plan itself, U.S. EPA's proposed Federal Plan misuses §111(d) of the Clean Air Act (CAA) to exceed the powers conferred on U.S. EPA by Congress. Clean Air Act §111(d)(1)(A) allows standards of performance to be set for any "existing source." Pursuant to the definitions in CAA §111(a)(2)(3) & (5) and as applied to the Power Plan, an existing source is a "building, structure, facility, or installation" that was constructed prior to January 8, 2014. This is a clear congressional mandate that U.S. EPA exceeds. It does so through emission guidelines establishing the Best System of Emissions Reduction (BSER) that when defined in the Power Plan and proposed Federal Plan go well beyond the boundaries of "existing sources" and hence Congress's CAA §111(d) statutory limitations.

Under the Power Plan and proposed Federal Plan, BSER consists of three individual building blocks: Building Block 1 – heat-rate improvements at the EGUs; Building Block 2 – substitution of generation from Natural Gas Combined Cycle Units to replace generation from coal-fired EGUs; and Building Block 3 – increased electricity generation from renewable energy sources. *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg 64661, at 64667 (Oct. 23, 2015). Building Blocks 2 and 3 generate emission requirements that are "beyond-the-fenceline" of the power plants themselves and hence outside the confines of standards of performance for any "existing source" under CAA §111(d)(1)(A). U.S. EPA's "beyond-the-fenceline" requirements amount to an unreasonable "expansion in EPA's regulatory authority without clear congressional authorization." *Utility Air Regulatory Group*, 134 S.Ct. at 2444 (rejection of U.S. EPA's greenhouse gas thresholds for the PSD and Title V programs).

In its proposed Federal Plan, U.S. EPA references comments it received on the proposed Power Plan regarding the agency's lack of authority to require the "beyond-the-fenceline" building blocks it proposed as the BSER. 80 Fed. Reg. at 64987. U.S. EPA states that it is "not requiring the implementation of the BSER or the building blocks" in the Power Plan, and that it will not "attempt to order sources to implement the measures that comprise the BSER." 80 Fed. Reg. at 64987. These statements reveal some understanding that U.S. EPA does not have the

constitutional or statutory authority to order compliance with the "beyond-the-fenceline" building blocks. However, despite claims that it is not mandating the "beyond-the-fenceline" building blocks, U.S. EPA proclaims "[i]n providing for the implementation of the federal plan proposed in this action, the agency is *ensuring those things will happen*." *Id.* (Emphasis added.) That statement again reflects that U.S. EPA "insist[s] on seizing expansive power that it [all but] admits the statute is not designed to grant." *Utility Air Regulatory Group v. EPA*, 134 S.Ct. at 2444.

U.S. EPA's emission guidelines under the Power Plan seek to ensure that the "beyond-the-fenceline" building blocks will be implemented. Thus, while U.S. EPA has determined a range of 2.1 to 4.3% for the average EGU heat-rate improvement (Building Block 1), its overall national goal of reduced carbon dioxide (CO_2) emission levels from EGUs by 32% demonstrates the bulk of CO_2 emission reductions must come elsewhere. *See* 80 Fed. Reg. at 64665 & 64744. On average, emissions reductions from heat-rate improvements represent approximately one-tenth of the total emissions reductions mandated by U.S. EPA. By default, the additional reductions are to come from some combination of the remaining building blocks.

U.S. EPA attempts to highlight the perceived difference between "requiring" the "beyond-the-fenceline" building blocks and "ensuring" their implementation. 80 Fed. Reg. at 64987. This is a distinction without a difference. Whether the building blocks are mandated or established by coercion, their use as the basis for the compelled standards is illegal. U.S. EPA seeks to exceed the authority it has been delegated by Congress in the Clean Air Act, and the proposed Federal Plan—in addition to presenting the technical problems noted in the separate comments from Ohio EPA and the PUCO—therefore violates the Constitution's separation of powers.

U.S. EPA cannot constitutionally use the Federal Plan as a club to coerce Ohio to regulate according to federal instructions.

U.S. EPA has announced that a state-specific version of the Federal Plan will be implemented for states that do not submit a state plan. 80 Fed. Reg. at 64968. Thus, Ohio understands that it has a "choice" as to whether to accept the onerous federal plan or draft and submit a coerced state implementation plan. That is a "Hobson's Choice" dictated by U.S. EPA. But "'The Constitution simply does not give [the federal government] the authority to require the States to regulate.' … That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566, 2602 (2012), quoting *New York v. U.S.*, 505 U.S. 144, 178 (1992). "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system." *Id.* (also noting at 2602 that under such a scheme, "the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer"). *See also, e.g., Printz v. U.S.*, 521 U.S. 898, 928 (1997) (States' role is undermined by federal policy "'reduc[ing them] to puppets of a [federal] ventriloquist.'"

(Citation omitted)). Implementation of the Federal Plan would impose dire consequences on the State and potentially lead to the closing of many coal-fired power plants. But Ohio currently gets approximately 58% of its electricity from coal. http://www.puco.ohio.gov/puco/index.cfm/be-informed/consumer-topics/how-does-ohio-generate-electricity/#sthash.jtzMrMGk.dpbs. (last visited January 19, 2016). Further still, U.S. EPA could not implement its Federal Plan without requiring action by Ohio to reorganize its energy system – action that the federal government cannot require for the same constitutional reasons that it cannot coerce Ohio to adopt a "State" plan in its own name. And as noted above, Ohio would be forced to include some combination of the "beyond-the-fenceline" Building Block reductions just to submit what U.S. EPA would deem an *approvable* State Implementation Plan.

The proposed Federal Plan is unconstitutional as it exceeds U.S. EPA's delegated authority under the Clean Air Act, compels State participation in federal regulation, and serves as a bludgeon with which to induce State regulatory action; the Power Plan's alternative—forcing Ohio to submit and operate an onerous State plan on penalty of falling under the proposed Federal Plan—further violates constitutional structures. Here, as in *Sebelius*, "when the State has no choice," the scheme must be set aside. *Sebelius*, 132 S.Ct. at 2603.

Because coal-fired EGUs can achieve only slight reductions in CO_2 emissions through heat-rate improvements, the vast majority of the reductions will be realized through decreased production of electricity from coal plants. And if Ohio's coal plants are forced to reduce their emissions by the national goal of 32% as the Power Plan envisions, then approximately 18.5% of Ohio's electricity generation will be taken off-line—nearly one-fifth of its electricity production. To offset this power loss, Ohio would be forced to enact other standards or incentives to shift production sources. Otherwise, there simply would not be enough electricity to meet the needs of Ohio's citizens and businesses. This compelled State action is obviously U.S. EPA's intended result.

Courts will "strike down federal [action] that commandeers a State's legislative or administrative apparatus for federal purposes." *Sebelius*, 132 S.Ct. at 2602 (citations omitted). U.S. EPA should be especially mindful of such concerns in this area, since utility regulation is a vitally important function associated with the traditional police powers of the States. And "[b]ecause the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more accountable than a distant federal bureaucracy." *Sebelius*, 132 S.Ct. at 2578, quoting The Federalist No. 45, at 293 (J. Madison), and citing also *Bond v. U.S.*, 131 S.Ct. 2355, 2364 (2011).

Conclusion

Section 111(d) of the Clean Air Act simply does not provide authority for U.S. EPA to propose the emission guidelines it seeks in the Power Plan. By attempting to force the regulations on Ohio, U.S. EPA violates the Constitution's separation of powers both horizontally and vertically by exceeding the powers conferred upon it by the Clean Air Act and by coercing States to implement laws and rules that U.S. EPA dictates. It would be illegal for U.S. EPA to impose the proposed Federal Plan, and the Plan should be withdrawn.

Very respectfully yours,

Mike DeWine
Ohio Attorney General