OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA

PATRICK MORRISEY
ATTORNEY GENERAL

January 21, 2016

The Honorable Regina A. McCarthy
Administrator
U.S. Environment Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Submitted electronically via Regulations.gov

Re: Comments of the States of West Virginia, Alabama, Arizona, Arkansas, Florida, Georgia, Kansas, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Wisconsin, Wyoming, and the Arizona Corporation Commission, the Mississippi Department of Environmental Quality, the Mississippi Public Service Commission, the New Jersey Department of Environmental Protection, and the North Carolina Department of Environmental Quality on the 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* (Docket No. EPA-HQ-OAR-2015-0199)

Dear Administrator McCarthy:

The undersigned States and state agencies submit the following comments on the Environmental Protection Agency's ("EPA") 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*, 80 Fed. Reg. 64,966 (Oct. 23, 2015) (the "Proposal"). The States have a significant interest in the Proposal because the States have been long-recognized as the leaders in ensuring our citizens have access to affordable and reliable electricity. *See Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983); 16 U.S.C. § 824(a). Unfortunately, the Proposal attempts to upend state authority and, as even EPA recognizes, will likely increase consumers' electricity prices, *see* 80 Fed. Reg. at 65,018. We believe the Proposal is contrary to law in numerous respects and thus must be withdrawn immediately.

BACKGROUND

As you know, the Administration in 2009 sought congressional approval for a cap-and-trade program for carbon dioxide ("CO_2") emissions from fossil fuel-fired power plants. Congress soundly rejected it. But now, the Administration through the EPA is attempting to achieve the same goal using its claimed authority in Section 111(d) of the Clean Air Act ("CAA") to force upon States a Federal Implementation Plan ("FIP") that effectively imposes a carbon trading regime. Of course, if such legal authority actually existed in the CAA, the Administration's attempt to persuade Congress to enact nearly the same policy by legislative enactment would have been entirely unnecessary.

The Proposal establishes the requirements that EPA will impose on any State that "fails to submit a satisfactory [state] plan," 42 U.S.C. § 7411(d), implementing the final Section 111(d) Rule, a separate rulemaking that established emission standards for existing fossil fuel-fired power plants.[1] EPA calls this Section 111(d) rule the "Clean Power Plan" ("Power Plan"). The Power Plan sets carbon dioxide emission limits that are based on three buildings blocks that EPA considers the "best system of emission reduction," a statutory requirement. Those blocks are: (1) requiring coal-fired power plants to improve their efficiency; (2) replacing coal-fired generation with natural gas generation; and (3) replacing fossil-fuel-fired generation with renewable-energy generation. 80 Fed. Reg. at 64,667. If a State does not submit an EPA-approved plan for meeting EPA-set CO_2 emission limits, the agency will impose upon the State the carbon trading program outlined in the Proposal.

The Proposal presents two different approaches for a trading program—a rate- or mass-based trading program—but the final FIP will adopt only one of these approaches. Both approaches utilize the Power Plan's three building blocks. The rate-based trading program would set emission rates for each power plant, expressed as emissions of CO_2 per unit of energy; the power plant must emit below the applicable rate or apply emission rate credits ("ERCs"). 80 Fed. Reg. 64,989-90. EPA would allocate ERCs to power plants that (1) produce emissions less than the CO_2 rate cap; (2) shift to natural gas generation; (3) shift to renewable energy; or (4) construct new nuclear units. *Id*. at 64,990. ERCs may be bought, sold, transferred, or banked for future use.

Under the mass-based approach, each State would be able to distribute emissions allowances to individual power plants up to the mass-based goal established for the State in the Power Plan. 80 Fed. Reg. at 65,011. Each allowance would authorize the emission of one short ton of CO_2 during the compliance year. *Id*. at 65,012. If the State declines to distribute the allowances, EPA would distribute the allowances in its place. *Id.* Again, power plants may transfer, buy, sell, or bank the allowances. *Id.* Though the mass-based approach allows States to

[1] *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

allocate the allowances, States must shift their energy production to natural gas and renewable energy in order to achieve the goal. *Id.* at 64,667, 64,727, 65,011. In addition, the proposal includes rate- and mass-based model trading rules for potential use by States in developing their own plans, which would be considered "presumptively approvable" by EPA. *Id*. 64,969.

DISCUSSION

The Proposal is unlawful and should be immediately withdrawn for at least three reasons. *First*, the proposal is predicated on an illegal CAA Section 111(d) rule—the Power Plan. *Second*, EPA lacks authority under 111(d) of the CAA to impose a carbon credit trading program on the States, even if the Power Plan stands. *Third*, the Proposal is arbitrary and capricious and otherwise contrary to law under the Administrative Procedure Act.

I. THE PROPOSAL IS PREDICATED ON AN ENTIRELY ILLEGAL SECTION 111(d) RULE

EPA lacks statutory authority to impose a federal implementation plan under CAA Section 111(d)(2), 42 U.S.C. § 7411(d)(2), because the underlying Section 111(d) rule purporting to establish emission guidelines for existing power plants under CAA Section 111(d)(1), *id*. § 7411(d)(1)—the Power Plan—is unlawful.

A. The text and structure of Section 111(d) demonstrate that EPA's authority to impose a federal implantation plan on non-compliant States is contingent on the promulgation of *lawful* "regulations" requiring the States to establish standards of performance for existing sources. Because EPA has failed to finalize a lawful Section 111(d) rule for existing fossil fuel-fired power plants, the proposed FIP cannot stand.

Section 111(d)(1) addresses when state plans must be created and what they must contain. Under subsection (d)(1)(A), the EPA Administrator is authorized to "prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan" establishing "standards of performance for any existing source" for "any air pollutant . . . to which a standard of performance under this section would apply if such existing source were a new source," subject to certain exclusions. *Id*. § 7411(d)(1)(A). And under subsection (d)(1)(B), state plans must "provide[] for the implementation and enforcement of such standards of performance." *Id*. § 7411(d)(1)(B). Properly read, section 111(d)(1) conditions a State's obligation to "submit to the Administrator a [state] plan" on the Administrator's lawful "regulations . . . establish[ing] a procedure" for submitting state plans setting standards of performance for an existing source. *Id*. § 7411(d)(1).

Although Section 111(d)(2) grants to the EPA Administrator "the same authority . . . to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan . . . in the case of failure to submit an implementation plan," *id*. § 7411(d)(2)(A), this authority evaporates where the State's primary obligation under Section 111(d)(1) itself is created by unlawful

"regulations. . . establish[ing] a procedure" to submit a state plan. *Id*. § 7411(d)(1). Put another way, if a State has no duty to submit a state plan because the Administrator's "regulations" requiring it to do so are unlawful, EPA's authority to impose a federal plan is simply never triggered. Accordingly, EPA's attempt here to propose federal implementation plan requirements conditioned on a wholly unlawful Section 111(d) "regulation[]" must likewise fail.

The Proposal is also contingent on the Power Plan because the proposed mass-based approach utilizes the emission standards EPA established for each State in the Power Plan. Because EPA lacks authority to impose these emission standards on the States and force States to reorganize their energy economy, it also lacks authority to use these emission targets to impose on States a carbon trading program.

B. EPA's final Section 111(d) Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015), is completely illegal for numerous reasons.[2] We highlight just a few here. *First*, EPA is prohibited from regulating power plants under Section 111(d) when it has already regulated power plants under Section 112. Section 111(d) expressly prohibits EPA from using Section 111(d) where the "source category . . . is regulated under section [112], . . ." 42 U.S.C. § 7411(d)(1)(A)(i).[3] *Second*, Section 111(d) does not authorize EPA to force the States to restructure the electric grid by forcing States to shift generation to other sources. Doc. 1579999, at 6-11, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.). Section 111(d) limits EPA to requiring States to establish "standards of performance for any existing source" rather than attempting, as the Rule does, to regulate the State's energy generation mix, which is an area of exclusive State control. *Id.* at 7.[4]

II. EPA LACKS AUTHORITY TO IMPOSE A CARBON CREDIT TRADING PROGRAM ON STATES

Even aside from the illegal Section 111(d) rule, EPA lacks the authority to impose a carbon credit trading program on States under the CAA, the Federal Power Act, and the U.S. Constitution.

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[2] *See generally*, Letter from the Attorneys General of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah, and Wyoming, to U.S. Envt'l Prot. Agency, EPA-HQ-OAR-2013-0602-25433 (posted Dec. 15, 2014); Doc. 1579999, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.); Doc. 1524569, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir.)

[3] Doc. 1579999, at 11-15, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.).

[4] Although the Proposal states that "[c]omments on the underlying [Section 111(d) Rule] will be considered outside the scope for this proposed rule," 80 Fed. Reg. 64,972 (Oct. 23, 2015), the comments here addressing the legality of Power Plan are necessary because any federal implementation plan under this Proposal cannot stand if the "underlying" Section 111(d) rulemaking is unlawful.

A. The Statutory Text And Structure Of CAA Section 111 Does Not Authorize EPA, Under Section 111(D)(2), To Force A CO_2 Emission Trading Program On States That Do Not Submit An EPA-Approved State Plan.

The plain language of Section 111(d) does not authorize EPA to force a CO_2 emission trading program on those States that do not submit an EPA-approved state plan. Section 111(d)(1) provides that "[t]he Administrator shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which . . . establishes standards of performance for any existing source for any air pollutant . . ." 42 U.S.C. § 7411(d)(1). And "[t]he Administrator shall have the same authority . . . to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan. . . ." 42 U.S.C. § 7411(d)(2). "Standard of performance" is defined 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 . . . has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). The statute's plain language makes clear that in the event that a State does not submit an approved plan, EPA's authority is limited to establishing "standards of performance" for individual "building[s], structure[s], facility[ies], or installation[s]" reflecting the level of emissions achievable through the "application" of the "best system of emission reduction." EPA has no authority under the plain text of Section 111 to impose on States a CO_2 emission trading regime that shifts energy generation away from coal-fired power plants. That is because "standards of performance" must be "*appl[icable] . . . to* a[] particular source" within a regulated source category. 42 U.S.C. § 7411(d)(1)(B) (emphasis added); *accord id.* § 7411(a)(2) (discussing standards of performance "which will be applicable to" individual new sources (emphasis added)). EPA's standard requires the displacement of coal and in some cases natural gas-fired power plants, and is therefore, not an applicable standard of performance but a standard of non-performance. This understanding is supported by D.C. Circuit precedent. *See ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978).

EPA's Proposal also is fundamentally inconsistent with the agency's requirements for new power plants under the final Section 111(b) rule, which is the legal prerequisite for both the Power Plan and the Proposal. *See* 80 Fed. Reg. 64,510 (Oct. 23, 2015). The Section 111(b) rule requires new stationary sources to satisfy strict emission limits based on applying pollution control technology applied to each source. In contrast, the Proposal's mass-based trading scheme does not set standards of performance for sources at all and sets, instead, state-wide emissions caps. The Proposal also requires emissions credits and allowances based on the Power Plan's Buildings Blocks two and three, which are not measures of a source's "performance," but substitutes for fossil-fuel fired energy. In these two ways the Proposal goes well-beyond regulating the efficiency of individual power plants and is fundamentally inconsistent with the Section 111(b) rule's new source performance standards. There is no statutory basis for these two vastly different approaches. Both Section 111(d) and Section 111(b) require that "standards of performance" be "appl[icable] . . . to a[] particular source" within a regulated source category. 42 U.S.C. § 7411(d)(1)(B); *accord id.* § 7411(a)(2).

This disconnect is illustrated by the fact that the emissions limits for existing sources (under the proposed FIP) are much more stringent than the limits for new sources (under the Section 111(b) rule). *Compare* 80 Fed. Reg. at 64,707 (1,305 lb. CO_2/MWh), *with* 80 Fed. Reg. 64,510, 64,513 (Oct. 23, 2015) (1,400 lb. CO_2/MWh); 80 Fed. Reg. at 64,707 (771 lb. CO_2/MWh), *with* 80 Fed. Reg. at 64,513 (1,000 lb. CO_2/MWh); 80 Fed. Reg. at 65,012. EPA itself recognized this disconnect, stating that there is "a larger incentive for affected EGUs to shift generation to new fossil fuel-fired EGUs relative to what would occur when the implementation of the BSER took the form of standards of performance incorporating the subcategory-specific emission performance rates representing the BSER." 80 Fed. Reg. 64,977-78. This disconnect exists precisely because the Section 111(b) rule applies subcategory-specific emission performance rates consistent with the text of the CAA. And the Proposal applies stringent controls that cannot be achieved with source-specific performance measures. EPA's extensive efforts in the Proposal to mitigate "leakage" from existing sources to new sources, 80 Fed. Reg. 65,019-65,025, would be entirely unnecessary if EPA's approach complied with the text of the CAA.

B. The Proposal Is Contrary To The Structure Of The Clean Air Act.

Congress' decision to expressly authorize EPA to adopt trading programs under other provisions of the CAA demonstrates EPA lacks authority to impose one here. For example, Congress expressly provided for an extensive emission allocation and transfer system under the acid rain program. 42 U.S.C. §§ 7651-7765. Congress also expressly enacted a more limited trading program for modifications of certain major stationary sources in ozone nonattainment areas. *Id.* at § 7511a(c)(7)-(8); *see also Michigan v. EPA*, 213 F.3d 663, 685-88 (D.C. Cir. 2000). The absence of such trading authorization is significant, confirming what the language and structure of Section 111 make clear: Section 111 standards are technology-forcing and meant to apply uniformly directly to affected sources. *See Ethyl Corp.*, 51 F.3d at 1061-63 (declining to "imply authority" for agency action under one statutory provision when a nearby statutory provision expressly grants that authority in a different context); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion." (citation omitted)).

Moreover, and as noted, Congress rejected the current Administration's attempt to enact a statute granting EPA authority to establish a cap-and-trade program for carbon dioxide emissions from fossil fuel-fired power plants. *See* Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009). If the CAA permitted the emission trading regime that EPA now proposes to adopt, the Administration's efforts to obtain congressional authorization were unnecessary.

C. The Proposal Is Contrary To The States' Sovereign Authority.

The Federal Power Act ("FPA") recognizes the traditional division of authority over electricity markets between the federal government and the States. 16 U.S.C. § 791 *et seq.* The FPA grants the Federal Energy Regulatory Commission ("FERC") authority over "the

transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(a). The FPA at the same time expressly preserves the States' jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce. . . ." *Id.* § 824(b)(1). In other words, the FPA recognizes and preserves the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). In fact, the States' authority over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

The proposed carbon trading program invades this traditional State responsibility. The Proposal seeks to transform the States' energy economies and prevent States from independently assessing the State's "[n]eed for new power facilities, their economic feasibility, and rates and services." *Pac. Gas*, 461 U.S. at 205. The Proposal does so by requiring States to shift energy generation from fossil-fuel-fired generation to natural gas, nuclear, and renewable generation. 80 Fed. Reg. 64,990. These decisions as to the proper mix of energy generation are well-within the States' exclusive authority.

In particular, EPA lacks the authority to make electricity dispatching decisions that are properly within the authority of the States. Some State public utilities dispatch energy from individual power plants to meet demand. In other States, a Regional Transmission Organization ("RTO") or Independent System Operator ("ISO") is charged with this task. In both scenarios, the order of dispatch from particular power plants depends in large part upon which plants have the lowest variable costs. EPA has no authority to make decisions about the dispatch of electricity or to dictate to States or RTOs/ISOs how those decisions should be made. Yet, the Proposal does precisely that by mandating that States or RTOs/ISOs dispatch electricity from "cleaner" sources first rather than from sources with the lowest variable costs.

D. The Proposal Constitutes A Decision Of Vast Economic And Political Significance Without Clear Congressional Authorization.

The U.S. Supreme Court has explained that when an agency seeks to regulate an area of vast political and economic significance, the Court looks for a clear statement from Congress that it intended to grant the agency such authority. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"). In *UARG*, the Supreme Court rejected EPA's expansive regulation of carbon dioxide emissions, explaining "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Id.* at 2444 (citation omitted). If Congress intends to authorize an agency to undertake decisions of vast political and economic significance, it is expected to do so clearly. *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

The *UARG* clear statement rule supports what is apparent from the plain text of Section 111(d)—Congress did not authorize EPA to impose upon States a carbon trading program. The Proposal represents a program of vast economic and political significance because it reorders the States' energy economies to favor certain types of energy generation. For example, the Proposal assigns emission rate credits or allowances to power plants that shift to natural gas and renewable energy generation. *See* 80 Fed. Reg. at 64,990. While the credits or allowances will be traded to the entity with the greatest willingness to pay, EPA concedes that the initial allocation will have distributional effects. *Id*. at 65,015. This is undoubtedly a change of significant economic and political significance. And, under the mass-based program, the cap on the State's total emissions is only achievable if the State overhauls its energy sector by shifting fossil-fuel fired generation to natural gas and renewable energy generation. *See id*. at 64,667, 64,727, 65,011. This will result in the retirement of coal and in some cases natural gas-fired power plants, blackouts during periods of increased demand, lost jobs, and as even EPA concedes, *id*. at 65,018, potentially higher energy prices.[5] *UARG* requires that Congress authorize decisions of such economic and political significance clearly before EPA can undertake such rulemaking. And Section 111(d)'s requirement that States apply "standards of performance" that are "appl[icable] . . . to a[] particular source" within a regulated source category, 42 U.S.C. § 7411(d)(1)(B), does not clearly authorize the authority to overhaul States' energy economies.

E. EPA's Proposed Imposition Of Cap-And-Trade On Non-Consenting States Raises Serious Constitutional Problems.

The Tenth Amendment prohibits EPA from commandeering States to carry out federal programs. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. It is a violation of the Tenth Amendment for the federal government to commandeer the States to carry out federal law—that is, to "use the States as implements of regulation." *New York v. United States*, 505 U.S. 144, 161 (1992). The federal government may offer States the choice of regulating according to federal standards or having state law preempted, but it may not require the State to carry out federal policy. *Id.* at 167, 176-77. The Supreme Court has also extended this principle to prohibit the federal government from commandeering State officers to carry out federal commands. *Printz v. United States*, 521 U.S. 898, 928 (1997).

EPA's Proposal unlawfully commandeers States to implement a federal program. Even if EPA implemented the proposed federal plan on its own without any assistance from the States, it would be unlawful because EPA has no authority to regulate the mix of energy generation facilities. But the Proposal also recognizes that state "planning authorities," "public utility commissions," and other agencies *must assist in implementing the federal plan*. *See* 80 Fed.

[5] Doc. 1579999, at 19-20, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.).

Reg. at 64,981-2. Moreover, the Proposal effectively mandates the retirement of fossil fuel-fired power plants, if not significant reductions in their use, by requiring the purchase of expensive emission allowances (or credits). State utility regulators and their respective RTOs/ISOs will be required to respond to these retirements and ensure an adequate and reliable supply of electricity for the citizens of their State.

Moreover, the Proposal unconstitutionally attempts to offer the States a choice of regulation or preemption in areas where EPA has no authority to preempt State actions. EPA could only conceivably preempt State action with respect to building block one, efficiency improvements at individual power plants. The other two building blocks—shifting to natural gas generation and shifting to renewable energy generation—are beyond EPA's preemption authority. Federal law recognizes the States' exclusive jurisdiction "over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). And because EPA has conceded that States cannot achieve the emission reduction targets through building block one alone, *see* 80 Fed. Reg. at 64,727, States must take regulatory action precisely in these areas where the federal government has no preemption authority in order to comply with the Proposal.

Similarly, the federal government cannot coerce States into implementing federal policy by leveraging a substantial existing entitlement of the State or its citizens. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2603 (2012). The Proposal offers States an option between allowing EPA to restructure their energy economy and implementing federal policy. Thus, EPA has unlawfully leveraged the States' existing entitlement—their constitutionally reserved and statutorily protected authority over electricity generation—in order to coerce the States into directly implementing a federal program.

The Proposal could also result in uncompensated takings that are unlawful under the Fifth Amendment. The Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. Amend. V. As EPA has acknowledged, compliance with the CO_2 emission target goals is impossible unless the State shifts energy generation from fossil fuel-fired power plants and uses measures outside the regulated source, primarily using new natural gas, new renewable energy, and new energy efficiency measures. *See* 80 Fed. Reg. at 64,667, 64,727, 65,011. These target goals will effectively force a significant number of existing coal and gas-fired power plants toward retirement.[6] By mandating that these power plants close, the Proposal could deprive the owners of all economically beneficial use of their property without providing just compensation.

Given the serious constitutional concerns associated with the Proposal, the text of Section 111 must be read to preclude EPA's Proposal. "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid

[6] *See* Energy Ventures Analysis, "Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry," at 16, 66-68 (Sept. 2015), http:/ /www.nma.org/pdf/EVA-Report-Final.pdf; Doc. 1579999, at 19-20, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.).

such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Because EPA's interpretation of the text of Section 111(d) raises serious concerns about unconstitutional commandeering, coercion, and uncompensated takings, EPA's reading must be rejected.

III. THE PROPOSAL IS ARBITRARY AND CAPRICIOUS

A reviewing court must "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The reviewing court "must engage in a 'substantial inquiry' into the facts, one that is 'searching and careful.'" *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 25 (D.C. Cir. 1976) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)). And the agency must demonstrate to the court that its action "was the product of reasoned decisionmaking" by explaining the "rational connection between the facts found and the choice made." *Motor Vehicle Mfr's Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (internal citation omitted).

Moreover, a rulemaking that does not achieve the purported benefits violates the EPA's rulemaking authority under the CAA. EPA's rulemaking authority under the CAA is limited to "prescrib[ing] such regulations as are necessary to carry out" the Administrator's functions under the Act. 42 U.S.C. § 7601(a)(1). These functions are "protect[ing] and enhanc[ing] the quality of the Nation's air resources," *id.* § 7401(b)(1), and "encourag[ing] or otherwise promot[ing] reasonable . . . actions . . . for pollution prevention," *id.* § 7401(c).

The Proposal is arbitrary and capricious and inconsistent with the CAA because it does not address the problem it purports to solve—global climate change. If finalized, the Proposal will not accomplish any meaningful reduction in global temperatures. The emissions reductions resulting from the Proposal are minor compared to overall global greenhouse gas emissions under business as usual. Therefore, the Proposal will provide little or no benefit in terms of reducing global temperatures. And the costs of the Proposal are significant—power plant retirements, increased energy prices, lost jobs, and threats to the reliability to the energy grid. A proposal that provides no benefit at the expense of significant economic cost is arbitrary and capricious and inconsistent with the CAA. Accordingly, the Proposal should be withdrawn.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Tim Fox
Montana Attorney General

Luther Strange
Alabama Attorney General

Doug Peterson
Nebraska Attorney General

Mark Brnovich
Arizona Attorney General

Mike DeWine
Ohio Attorney General

Leslie Rutledge
Arkansas Attorney General

E. Scott Pruitt
Oklahoma Attorney General

Pam Bondi
Florida Attorney General

Alan Wilson
South Carolina Attorney General

Sam Olens
Georgia Attorney General

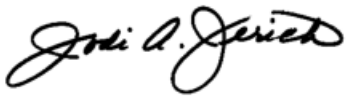
Marty Jackley
South Dakota Attorney General

Derek Schmidt
Kansas Attorney General

Ken Paxton
Texas Attorney General

Brad D. Schimel
Wisconsin Attorney General

Peter Michael
Wyoming Attorney General



Jodi Jerich
Executive Director
Arizona Corporation Commission

Gary Rikard
Executive Director
Mississippi Department of
Environmental Quality

Bob Martin
Commissioner
New Jersey Department of
Environmental Protection

Donald R. van der Vaart
Secretary
North Carolina Department of
Environmental Quality

Todd E. Palmer
Michael, Best & Friedrich LLP
601 Pennsylvania Ave. NW, Suite 700
Washington, DC 20004-2601
(202) 747-9560 (telephone)
(202) 347-1819 (facsimile)
tepalmer@michaelbest.com
Attorneys for Mississippi Public Service
Commission