MIDWEST OZONE GROUP COMMENTS IN SUPPORT OF

EPA'S PROPOSED REPEAL OF THE CLEAN POWER PLAN[1]
November 28, 2017

My name is David Flannery. I am a member of the law firm Steptoe & Johnson PLLC in Charleston West Virginia. I have the privilege of serving as legal counsel for the Midwest Ozone Group. I am pleased to appear today in support of EPA's proposed repeal of the Clean Power Plan.

The Midwest Ozone Group is an affiliation of companies and organizations[2] which works with policy-makers to develop environmental programs that reflect sound science and the rule of law. MOG members and participants operate 75,000 MW of coal-fired and coal-refuse fired generation in more than ten states.

There are numerous legal defects in the Clean Power Plan. While time does not permit me to mention all of them, I will bring three to your attention at this time.

a. *Absence of clear congressional intent.*

Our first concern is that there is a lack of clear congressional intent in the underlying statutory law to support the Clean Power Plan. While Section 111(d) of the Clean Air Act, authorizes the establishment of standards of performance for certain existing sources, the Clean Power Plan does not so much seek to establish performance standards for existing fossil-fueled

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[2] The members of and participants in the Midwest Ozone Group include: American Coalition for Clean Coal Electricity, American Electric Power, American Forest & Paper Association, Ameren, Alcoa, ARIPPA, Associated Electric Cooperative, Big Rivers Electric Corp., Citizens Energy Group, City Water, Light and Power (Springfield IL), Council of Industrial Boiler Owners, Duke Energy, East Kentucky Power Cooperative, FirstEnergy, Indiana Energy Association, Indiana Utility Group, LGE / KU, Ohio Utility Group, and Olympus Power.

power plants as it does to impose broad-based energy policy measures aimed at reducing the demand for fossil-fueled power generation as a whole.

The Clean Power Plan raises significant policy questions that have not yet been addressed by Congress. As the U.S. Supreme Court stated in 2014 in *UARG v. EPA*[3]:

> "When 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 skepticism. We expect Congress to speak clearly if it wishes to assign an agency a decision of vast economic and political significance."

Nothing in Section 111(d) can be argued to support the Clean Power Plan effort to set national energy policy. EPA is therefore correct in proposing its repeal.

b. *Section 112 Exclusion*

Our second legal concern with the Clean Power Plan is EPA's impermissible and duplicative regulation of power plants under both Section 111(d) and Section 112 of the Clean Air Act.

One of the limitations imposed by Section 111(d) is that EPA is prohibited from requiring States to develop an existing source performance standard for any air pollutant emitted from a source category that is regulated under Section 112. The intent of Congress was to avoid duplicative regulation by not allowing EPA to require regulation of an existing source category under Section 111(d), when that category already had to comply with the national emission standards of Section 112.

[3] *UARG v. EPA*, 134 S. Ct. 2427 (2014).

Because EPA has already regulated fossil-fueled power plants under Section 112, it may not do so again under Section 111(d). The failure of the Clean Power Plan to recognize this limitation constitutes a fatal flaw in the rule which justifies the proposed repeal being advanced at this time.

c. *Standards of performance*

The third concern with the legal basis of the Clean Power Plan is the manner in which it seeks to establish standards of performance mandated by Section 111(d) which reflects the degree of emission limitation achievable through the application of the best system of emission reduction ["BSER"]." EPA, however, lacks the authority to define the BSER in a manner that goes beyond improvements available at an individual source.

Under the Clean Power Plan, power plant's must resort to using "outside the fence line" measures, such as switching to alternative fuels or generation technologies, and/or requiring dramatic reductions in electricity usage to achieve BSER for CO_2. In other words, the Clean Power Plan's objectives are not achievable through the imposition of "standards of performance" at the individual sources involved but instead require redesigning the manner in which the nation's electric grid is fueled and operated. This is an egregious expansion of EPA's authority into areas where the agency lacks expertise, authority or jurisdiction.

Conclusion

Given the significance of these and other legal defects in the Clean Power Plan, the Midwest Ozone Group urges its repeal.