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November 26, 2014

Via U.S. Mail
The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, D.C. 20460

Via U.S. Mail & Electronic Submission at:
http://www.regulations.gov
U.S. Environmental Protection Agency
EPA Docket Center
Attention Docket ID No. EPA-HQ-OAR-2013-0602
Air and Radiation Docket, Mail Code 28221T
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Comments of the Midwest Ozone Group (MOG)
to the Notice of Proposed Rulemaking (NPRM)
Carbon Pollution Emission Guidelines
for Existing Stationary Sources:
Electric Utility Generating Units (EGUs)
(Docket ID: EPA-HQ-OAR-2013-0602).

Dear Administrator McCarthy:

The Midwest Ozone Group (MOG) takes this opportunity to comment on the Notice of Proposed Rulemaking (NPRM) of the U.S. Environmental Protection Agency (EPA) entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (EGUs) (Docket ID: EPA-HQ-OAR-2013-0602). 79 Fed. Reg. 34830 (June 18, 2014).

MOG is an ad hoc affiliation of companies and organizations, which have drawn upon their collective resources to advance the development of programs to implement the federal Clean Air Act that are both legally and technically sound. It is the primary goal of MOG to work with policy makers in evaluating policies by encouraging the use of sound science and law. MOG has a keen interest in assuring that policy makers are appropriately assessing the data and information required to accurately evaluate control strategies established to implement the Clean Air Act. MOG Members own or operate numerous fossil-fired steam electric generating units

throughout the Midwest and Southeast that are capable of generating in excess of 90,000 MW of electricity.

While MOG is providing these comments on the proposed rule, MOG is troubled by the fact that the proposed rule is based upon significant technical and legal flaws that render it fatally defective. Our comments are offered, along with the comments of many others to point out these defects and to urge that the proposed rule not be finalized, or in the alternative, that these defects be corrected before any rule is finalized.

MOG shares the concerns being offered by others that the proposed rule suffers from a complete lack of legal authority and commits the nation to a radical reform of its energy policies in a manner never contemplated by Congress. These comments will highlight some of the more significant legal defects and provide data to illustrate that the agency's conclusions about the health benefits of this rule are unfounded. Finally, our comments will note the impossible task that this rule, if finalized, would impose on states to develop implementation plans even as the agency's authority to promulgate the rule is being tested in the Courts.

## I. The Proposed Rule Lacks Legal Authority.

While these comments will not seek to identify all possible legal defects related to the proposed rule, we will offer what we consider to be some of the more serious concerns. At the outset, it is significant to note that EPA's stated legal basis for the proposed rule must be evaluated in the full light of the admonition by the U.S. Supreme Court stated in its June 23, 2014 decision in the case of UARG et.al. v. EPA et. al. In that opinion the Court addressed the question of whether EPA's issuance of motor vehicle greenhouse gas regulations necessarily and automatically triggered permitting requirements under other titles of the CAA for stationary sources that emit greenhouse gases. The opinion not only addresses the merit of the greenhouse rule it had before it, but also offered a clear warning to EPA about its future regulatory actions relative to greenhouse gases.

In its opinion the Court stated in part as follows:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. 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

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

Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2444, 189 L. Ed. 2d 372 (2014) (citations omitted).

The Court went on to state:

> Moreover, in EPA's assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute "unrecognizable to the Congress that designed" it.

Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2444, 189 L. Ed. 2d 372 (2014) (citations omitted).

In addition, the Court stated:

> We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."

Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2446, 189 L. Ed. 2d 372 (2014).

With these words by the U.S. Supreme Court clearly in mind, we offer the following comments about gaps in the agency legal authority to promulgate the rule as proposed.

**A. EPA is prohibited from imposing this rule on EGUs because EGUs are already regulated under Section 112 of the Clean Air Act.**

The threshold legal issue that must be confronted on this proposal is the specific prohibition against the adoption of this rule that is set forth on the face of Section 111(d) of the Clean Air Act (CAA). That section authorizes EPA to require states to regulate existing sources, but specifically prohibits the regulation of air pollutants emitted from sources already regulated by EPA under Section 112 of the Clean Air Act. CAA § 111(d)(1)(A).

> CAA § 111(d)(1)(A) as it appears in the U.S. Code provides as follows:
>
> "111(d)(1) ... State shall submit ... a plan which (A) establishes standards of performance for any existing source for any air

> pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under [section 108(a)] of this title or emitted from a source category which is regulated under [section 112] but (ii) to which a standard of performance under this section would apply if such existing source were a new source … "

CAA § 111(d)(1)(A); 42 U.S.C. §7411(d)(1)(A).

In the agency's legal memorandum in support of the rule, EPA concedes that a literal reading of that language means that the agency cannot regulate any air pollutant from a source category regulated under Section 112. Legal Memorandum, p. 26. The agency's arguments that the literal language set forth in Section 111(d) in the U.S. Code is the result of a "drafting error" and therefore subject to the agency's own interpretation (Legal Memorandum, 8, 26) is baseless. The U.S. Code establishes prima facie the laws of the United States. 1 U.S.C. § 204(a). Only in those instances in which the Statutes at Large are inconsistent with the U.S. Code can the U.S. Code be displaced. EPA has failed to establish any such inconsistency, and therefore its claim of legal authority must fail.

**B. EPA's BSER determination is inconsistent with the CAA**

The CAA requires EPA to develop "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." CAA § 111(a)(1). The D.C. Circuit held that "(a)n adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way. An achievable standard is one which is within the realm of an adequately demonstrated system's efficiency and which, while not at a level that is purely theoretical or experimental, need not necessarily be routinely achieved within the industry prior to its adoption." Essex Chem. V. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973) (emphasis added).

In determining BSER, "EPA considered the reductions achievable through measures that reduce $CO_2$ emissions from existing fossil fuel-fired EGUs either by (1) reducing the $CO_2$ emission rate at those units or (2) reducing the units' $CO_2$ emission total to the extent that

generation can be shifted from higher-emitting fossil fuel-fired EGUs to lower- or zero-emitting options." 79 Fed. Reg. 34830, at 34835 (June 18, 2014). This application of a "system-based" approach to set BSER is outside the scope of EPA's authority under the CAA to regulate the units themselves. Accordingly, the proposed rule is based upon legal authority that contains a fatal defect. EPA's unprecedented interpretation of the word "system" in the "standard of performance" definition is disassociated from, and in conflict with, the interlinked CAA definitions of "stationary source," "existing source," "emission limitation," and "performance standard," and with the legislative history of Section 111. It is also in conflict with EPA regulations that implement Section 111, and at odds with EPA's historical interpretation and application of Section 111.

Another fatal defect in EPA's proposal is the dubious way it attempts to ignore the phrase "standards of performance for any existing source" in Section 111(d), by reinterpreting the word "for." Specifically, EPA concludes that a performance standard "for" an existing source may apply to "other entities whose actions would reduce generation, and thus emissions" from the existing source. "For any existing source" is not the same thing as "for other entities." If it were, the resulting authority to mandate reduced production from existing sources and replace that production with actions by "other entities," heretofore hidden in Section 111(d) would greatly expand EPA's powers over the American economy.

EPA's flawed, out-of-context interpretations of "system" and "for" lead to proposed "emission guidelines" and "state goals" that necessitate command and control of the performance of "entities" that are outside the affected EGU source category, contrary to the plain language of the statute. EPA's proposed emission guidelines rely on restrictions that would affect the behavior and obligations of electricity consumers, balancing authorities, electricity distribution companies with no generating capacity, natural gas pipeline suppliers, and the states themselves. Rather than reflecting the degree of emission limitation achievable by applying a demonstrated technology-based (or work practice) system of emission reduction to the affected EGU, as the statute plainly directs, the proposal requires a reduction in the hours of operation and/or rate of production (or complete shutdown) of affected EGUs, a result contrary to the text and structure of the statute, and that could not have been imaginable by Congress in enacting these provisions.

## II. EPA inappropriately relies on the benefits of reductions in criteria pollutant levels for economic justification of the Proposed Rule

In evaluating the economic benefits of the proposed rule, EPA not only quantified the climate benefits from reduced emissions of $CO_2$ but also added in the health co-benefits from reduced exposure to fine particulate matter ($PM_{2.5}$) and ozone. Therefore, the between 45% and 69% of all of the benefits said to be related to this proposal are in the form of co-benefits related to health based standards. See: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 FR 34830-01 (June 18, 2014). In asserting that approximately half or more of the benefits of the proposal are related co-benefits associated with reductions in criteria pollutant levels, EPA fails to acknowledge that virtually all of the nation will meet the nation's existing health-based ambient air quality standards with emission controls that are already on-the-books, without considering any additional potential reductions that might occur through adoption of this proposal.

At the request of MOG, Alpine Geophysics, LLC and ENVIRON International Corporation were tasked with preparing an analysis of ambient air quality data on regional and State geographic scales. These consultants prepared a series of presentations and fact sheets documenting these trends[1] in ozone and particulate matter precursor emissions and developed methods and output to present State-wide maximum and average design value (dv) data for 8-hr ozone and annual and 24-hr $PM_{2.5}$ concentrations. The reports confirm at the State level what EPA's data indicate on a national level; that emissions have significantly decreased and air quality is significantly improved as a result of recently adopted regulations, and is expected to continue to improve as existing regulations are fully implemented in the upcoming years.

These findings are consistent with EPA's trends publication citing a national decrease in national, aggregate emissions of fifty-nine percent (59%) since 1990[2]. Emissions of $NO_x$ and $SO_2$ show the largest decline during the study timeframe, largely as a result of the implementation of national and regional regulation of these pollutants from electric generating units (EGUs). Title IV, the $NO_x$ State Implementation Plan (SIP) Call, and the Clean Air

1 http://www.midwestozonegroup.com/AirTrendsJuly2013Public.html

2 http://www.epa.gov/airtrends/2011/index.html

Interstate Rule (CAIR), all require emission reductions from EGUs on the order of up to seventy percent (70%) from baseline conditions in selected States across the eastern U.S.

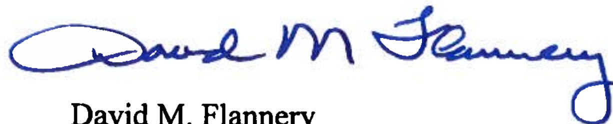
Full implementation of existing regulations governing on-road mobile source vehicle fleets and fuels are anticipated to generate additional reductions of criteria pollutants, including the Tier 3/Tier 2/Gasoline Sulfur rule and Heavy Duty Engine/Vehicle and Highway Diesel Fuel rules. Secondary reductions of PM and other combustion by-products are also achieved via these promulgated regulations.

Further reductions can be expected from the implementation of existing requirements, including regulation of locomotives, marine vessels, and others. Air quality will continue to improve as emissions are reduced in line with the requirements of these environmental rules. Reductions in ozone and particulate precursor emissions and improvements in air quality are observed and recorded in all areas of the United States. Existing federal, State, and local air pollutant emission control programs are working and the benefits of these regulations are being realized today. Continued implementation of these exiting rules will continue to improve air quality, absent the requirements of this proposal.

EPA has failed to demonstrate that its proposal is necessary to achieve any health-based standard. Therefore, EPA's reliance on co-benefits of the proposed rule is inappropriate.

In conclusion, MOG urges EPA to withdraw this proposed rule as being fatally flawed or, in the alternative, that these cited defects be corrected before any rule is finalized.

Very truly yours,



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