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U.S Environmental Protection Agency
Docket ID No. EPA–HQ–OAR–2017–0355
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Request for Comment on Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (October 16, 2017), EPA–HQ–OAR–2017–0355

We, Daniel A. Farber and Kirsten Engel, submit the following comments regarding the Request for Comment on Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (October 16, 2017), EPA–HQ–OAR–2017–0355 (the “Request for Comment”). The Request for Comment seeks comment concerning the appropriateness of EPA’s proposal to repeal the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, commonly referred to as the Clean Power Plan (the “Plan”).

Daniel Farber is the Sho Sato Professor of Law and co-director of the Center for Law, Energy, and the Environment at the University of California, Berkeley. He has taught and written about environmental law for forty years, first at the University of Illinois, then the University of Minnesota, and finally at the University of California, Berkeley. Professor Farber is the co-author of a leading environmental law casebook and has published dozens of law review articles about environmental law and policy.

Kirsten Engel is the Charles E. Ares Professor of Law at the James E. Rogers College of Law at the University of Arizona and a member of the Arizona House of Representatives.¹ Engel is the co-author of an environmental law textbook, book chapters and articles. Prior to joining the law faculty at the University of Arizona, she held numerous permanent and temporary appointments within academia and in the public and nonprofit sectors, including the U.S. Environmental Protection Agency, the Massachusetts Attorney General's Office, and Harvard, Vanderbilt, and Tulane Law Schools.

EPA should not repeal the Plan. The Request for Comment is based on the argument that under § 111(d) of the Clean Air Act (the “Act”), a “best system of emission reduction” (“BSER”) must consist of measures that can be “applied to or at” an individual facility, or as is often said, “inside the fence line.” 82 Fed. Reg. 48039. We disagree with this contention. But even if accepted, that argument does not suffice to render the Plan invalid. There is a logical gap between the assertion that the EPA can only directly control actions within a facility and the

¹ Institutional affiliations of Professors Engel and Farber are provided purely for purposes of identification and do not imply any institutional endorsement of the views expressed here. Assistance in drafting this comment letter was provided by Ted Lamm, Research Fellow at the Center for Law, Energy & the Environment at UC Berkeley School of Law

conclusion that the state emissions targets set in the Plan are invalid. It would be arbitrary and capricious to invalidate the Plan because of a weakness in one rationale if a valid alternative rationale exists. See *Safe Air For Everyone v. U.S. E.P.A.*, 488 F.3d 1088, 1101 (9th Cir. 2007) Such a rationale is presented in this comment.

I. Section 111(d) of the Clean Air Act Allows EPA to Go Beyond “Inside the Fenceline” Measures.

In order to reduce carbon dioxide emissions, the Plan would require utilities to improve efficiency at coal-fired power plants and/or scale back electricity generation at those plants in favor of generators using natural gas or renewable sources. See 80 Fed. Reg. 64662 et seq. The theory now articulated in the NOPR is that EPA can only require reductions in carbon dioxide emissions that can be accomplished by utilities “inside the fenceline” of a power plant, *i.e.*, through the direct application of technology or control systems to power plant operations. 82 Fed. Reg. 48039. Under this interpretation, EPA could require a utility to increase the efficiency of a coal-fired plant. But the Request for Comment wrongly assumes that this “inside the fenceline” interpretation would rule out requiring a utility to reduce use of the coal-powered plant (and, as a result, obtain power elsewhere if necessary). In other words, according to EPA’s most recent interpretation of the Act, the Act authorizes the agency to impose efficiency improvements for coal-fired plants but not that the electricity out-put of a coal-fired plant be reduced in favor of other sources of electricity. The latter requirement is prohibited, according to EPA’s current interpretation, because obtaining electricity elsewhere is something that happens outside the fenceline and the Act does not authorize the agency to require such outside-the-fenceline measures. This logic is the basis of EPA’s justification for proposing to completely repeal the Plan. 82 Fed. Reg. 48039-43.

Although many of EPA’s § 111(d) regulations have operated “inside the fenceline” in that – like the addition of a scrubber to a power plant -- they require technological or process changes at a specific polluting facility, nothing in the Act limits the agency to requiring only “inside the fenceline” measures. Indeed, while it may make sense that EPA’s past practice should inform its discretion in developing new rulemakings, it makes little sense to use this history to handcuff the agency in its ability to address new and novel problems. This is particularly true given that generators are operated in such close coordination in the modern grid. Moreover, many undoubtedly valid control measures depend on actions that reside outside of a facility (and even outside of EPA jurisdiction) to implement. There are many examples of such measures. A clear one is the Clean Air Act’s provisions designed to limit emissions causing acid-rain. Such provisions allow for compliance through a utilities’ use of low-sulfur coal, a compliance pathway that entails purchase transactions and transportation taking place wholly outside the confines of a particular coal-fired power plant. 42 U.S.C. § 7651 et seq. But even if it is correct that EPA can only base standards on actions that can be taken within the boundaries of a polluting facility, such interpretation in no way compels the conclusion that the Plan is invalid.

II. EPA’s Clean Power Plan Requires Only Measures that are Implemented Inside the Fenceline.

EPA argues that the agency's Clean Power Plan is invalid because the shifting of generation from coal-fired power plants to natural gas-fired and renewable facilities requires action beyond the fenceline.² But this is a misinterpretation of the agency's own Clean Power Plan. Nowhere in the Plan does EPA require that polluting utilities obtain outside-the-fenceline replacement power, or indeed, any replacement power at all. Instead, all that the agency requires is that states rely less upon coal-fired and certain other generators for electricity production than they did in 2005. In doing so, EPA is not directing states or utilities to obtain replacement power from less-polluting sources, such as renewable generators or even natural gas plants. The decision to obtain such replacement power, if such a decision is indeed made, is would instead be made by the utilities or state regulators, acting under authorities other than the Clean Air Act or EPA's Clean Power Plan, and as needed to satisfy market demand.

The Clean Power Plan is thus fully consistent with the legal interpretation announced by EPA in its NOPR: that its mandates be limited to actions that are carried out "within the fenceline" of a coal plant. The Clean Power Plan's requirement that utilities reduce their reliance upon coal-fired electricity generation unless efficiency offsets are available is obviously something that can be accomplished purely inside the fenceline, by turning parts of the polluting plant off and on as needed. As discussed below, these restrictions on utilization are easily encompassed within EPA's authority under the Act to determine standards of performance based on the best adequately demonstrated "system of emission reduction."

III. Utilization Restrictions are a Valid "System of Emission Reduction"

The Plan's emission limitations originate in § 111(d), which requires "standards of performance for any existing source" of certain air pollutants. Section 111(a) defines this term to mean "the best system of emission reduction . . . the Administrator determines has been adequately demonstrated." One such demonstrated system of emission reduction is simply to reduce use of a polluting facility. While EPA attempts to read into the Act a requirement that this system be technological in nature, 82 Fed. Reg. 48040, the Act does not refer to a "best technological system," but rather the "best system." Nor does the Act say that BSER must require the same degree of emission reduction at all moments, or, like other emission limitation standards such as "best available control technology" and "maximum available control technology," include a reference list of processes, systems or techniques that might be considered. Rather, the Act simply defines BSER broadly in a manner that clearly encompasses more than purely technological changes designed to increase efficiency, and including operational changes, such as turning off generating units within a single facility as needed or reducing the use of the facility to meet an annual emission cap.

² EPA authority to require reductions in output at particular sources to reduce pollution would not intrude on the jurisdiction of the Federal Energy Regulatory Commission. Cf. 82 Fed. Reg. 48042 (2017). On the contrary, FERC has no authority to regulate emissions, and § 201(b)(1) of the Federal Power Act, 16 USC § 824(b)(1), deprives FERC of jurisdiction over generators. Cf. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016)(programs relating to generators do not infringe FERC authority if they are "untethered to a generator's wholesale market participation.") Many undoubtedly valid regulatory measures can impact a generators power output – most obviously a permit denial or an injunction to immediately cease polluting that can only be met through a shutdown.

An analogous issue arose early in the history of the Clean Air Act. Section 111(d) explicitly cross-references another section of the Act dealing with plans to achieve air quality standards. Within a few years after the passage of the statute, some sources claimed it was infeasible for them to achieve requirements using pollution control systems. Instead, they wanted to cut their output on days when air pollution was high. EPA allowed “intermittent use” as a way of cutting pollution when there was no feasible alternative.³ Given that efficiency improvement at power plants can produce such limited reductions in carbon emissions, the Plan well fits the mold of using intermittent controls as an option where other approaches would be ineffective in achieving the statute’s goals.

Challengers of the Clean Power Plan concede that regulations under other parts of the Act can require reductions in the use of a particular facility, reallocation of use among different facilities, or participation in cap-and-trade programs. But they argue that § 111 is narrower, because a system of “performance” cannot include reduced performance or nonperformance. See Linda Tsang and Alexandra M. Wyatt, *Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA* 19 (Congressional Research Service, March 2017). This argument is inconsistent with the plain meaning of the statutory language.

To begin with, the argument is at odds with ordinary English usage. For example, an athlete’s training system might involve workouts every day, but it might be modified to incorporate a day off when necessary to reduce physical stress and improve overall performance. Similarly, a furnace can be modulated or turned off entirely by a thermostat while still being considered a “system for heating.” If a system for training or heating can involve reducing activity when appropriate, there is no reason why a “standard of performance” cannot involve reducing performance when needed. Indeed, such reductions may be implemented through automated systems, thus qualifying as technological systems to the extent that might be relevant.

In addition, “standard of performance” clearly refers to a plant’s emissions performance, not to how the plant is performing in terms of producing output. Implementing the best system of emissions performance means cutting emissions as much as possible. If that were not clear from the context, § 111(a) makes it exceedingly clear by defining a standard of performance as that based on the “best system of emission reduction.”

The best system of emissions reduction at a facility might require shutting some units down from time to time. For instance, imagine that when run at the highest possible level, a particular class of manufacturing facility causes its pollution control devices to overheat. EPA clearly has the power to take this into account.

At the very least, a perfectly reasonable “system of performance” for a utility is that of reducing generation at its coal-fired plant. An equally viable option would be to deploy more wind, solar, or other non-emitting energy resources. The availability of these options helps

³ See *Kennecott Copper v. Train*, 526 F.2d 1149 (9th Cir. 1975) (upholding EPA’s approach, including an added requirement that the firm sponsor research into improved emissions controls). Congress later acted to limit the use of intermittent controls, but EPA regulations allowing intermittent controls continue to this day to grandfather such controls at certain plants.

show that curtailment of coal use is feasible and “adequately demonstrated,” but EPA is in no sense *mandating* the use of these options.

Industry has argued in its challenges to the Plan that the definition of “standard of performance” in § 302(k) precludes requirements that would entail limitations on plant activities. EPA may have accepted this contention, citing § 302 without elaboration as a source of statutory authority, 82 CFR 48049). The § 302(k) definition includes any “requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.” Note that, like § 111(a)(1), this definition is *not* limited to technological measures. It clearly includes a requirement that a power plant use fewer than all of its operating units, operate below some emissions cap for each unit, or offset emissions on a continual basis. Indeed, requiring a plant to permanently reduce output or to cease emissions entirely unless it obtains annual offset credits clearly “assure[s] continuous emission reductions”.

More importantly, § 111(a) explicitly states that definitions found within § 111 apply “for purposes of this section.” As a result, § 302(k) is displaced to the extent that it differs from § 111(a)(1)’s broad definition of a standard of performance. And, as explained above, § 111(a)(1)’s capacious requirement easily encompasses decreased utilization requirements.

IV. EPA Fails to Provide a Reasonable Justification of its Repeal of its own Clean Power Plan.

We appreciate the opportunity to comment on EPA’s notice. While we contend that the “beyond the fenceline” interpretation has no foundation in the Clean Air Act, even if EPA’s authority is considered to be restricted to measures that can be implemented at regulated facilities, the plain language of the Act clearly encompasses reduced utilization of a facility as a means to achieve emission reductions.

Moreover, if there is any tenable legal ground to uphold the agency’s Clean Power Plan - EPA’s most important effort to address the threat of climate change -- it would be unreasonable to undo that effort. In § 335 of the National Defense Authorization Act for Fiscal Year 2018 recently signed by President Trump, Congress declared that climate change is a serious threat to national security. EPA itself has found that greenhouse gases endanger human health and welfare. Eliminating such dangers is the core purpose of the Clean Air Act. To borrow Justice Scalia’s language in *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) – it would not be “even rational, never mind ‘appropriate,’” for EPA to dismantle its response to such a serious threat when there is a clearly reasonable interpretation of the statute authorizing that response.

Sincerely,

/s/

Kirsten Engel

Daniel Farber