Exhibit A1

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

A Communication from the Chief Legal Officers of the States of Alabama, Arizona, Arkansas, Georgia, Kansas, Kentucky, Michigan, Nebraska, North Dakota, Oklahoma, South Dakota and Utah

June 25, 2012

Hon. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
EPA Headquarters - Ariel Ross Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington D.C. 20460

Submitted Electronically via: regulations.gov

RE: Proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Generating Units: Docket ID No. EPA–HQ–OAR–2011–0660.

Dear Ms. Jackson:

As State Attorneys General, we appreciate the opportunity to submit the following comments on the Environmental Protection Agency's ("EPA") proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Generating Units ("Greenhouse Gas NSPS").[1] The EPA should rescind this ill-advised proposal, and re-issue it only after the Agency devises an approach that accommodates all modes of energy generation.

The proposed Greenhouse Gas NSPS mandates stringent carbon caps on all new power plants. The only way new coal-fired power plants might achieve these caps is by employing Carbon Capture and Storage. Yet, even the Administration admits the earliest this technology might be commercially available is 2020.[2] Thus, EPA's proposed Greenhouse Gas NSPS effectively forbids the construction of new coal-fired power plants for the foreseeable future.

[1] 77 Fed. Reg. 22392 (Apr. 13, 2012).

[2] *Report of the Interagency Task Force on Carbon Capture and Storage* (Aug. 2010).

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EPA projects, even absent the proposed rule's *de facto* ban on new coal-fired generation, no new coal-fired power plants will be built in the United States through 2030. Thus, EPA concludes the Greenhouse Gas NSPS will neither harm energy resources nor help the environment. As EPA succinctly explains in the proposed Greenhouse gas NSPS Regulatory Impact Analysis, the proposed rule "is highly likely to have no costs or benefits."[3] However minimal EPA may assess the benefit of its own regulations, outside analysts see significant impact resulting from the proposed Greenhouse Gas NSPS. Shortly after the proposed rule's publication, Moody's Investor Service, citing this and other EPA regulations against coal, downgraded the outlook of the U.S. coal industry to "negative."[4]

EPA's projections notwithstanding, the proposed rule will, in fact, significantly challenge small business owners, farmers, manufacturers, and other constituents in our States. The proposed Greenhouse Gas NSPS comes at a time when the Administration wants the country to pursue an "all of the above" energy strategy. Yet, the proposed rule takes coal off the table for new power plants, locking states out of future use of the country's most abundant domestic energy source. When the economy improves and energy demand increases, no new plants will be able to take advantage of this abundant and affordable fuel.

Sound energy policy calls for states to develop a diverse portfolio of coal, nuclear, natural gas, renewable, and other sources to guard against market and supply volatility. Many of the signatory states are leaders in the development of renewable energy and demand side management programs. Even so, these States believe that coal fired generation has to remain on the table as part of the "all of the above" strategy to meet the country's energy demands in a reliable and cost effective way. Instead, the proposed Greenhouse Gas NSPS forces states away from coal, increasing dependence on energy supplies that may not be technologically and economically feasible or would require extensive and vulnerable infrastructure. Such supplies could easily be disrupted, causing serious reliability concerns to the electrical grid.

We are further concerned the proposed Greenhouse Gas NSPS will not only undermine coal-fired power plants, but may also inadvertently challenge natural gas-fired electricity generation. EPA assumes market economics will make natural gas combined cycle power plants the predominant technology for new electric generation and claims 95% of such units built between 2006 and 2010 comply with the proposed rule.[5] However, a recent study by the University of California's Center for Energy and Environmental Economics found nearly 30% of natural gas combined cycle power plants planned for construction through 2017 will be unable to

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[3] ENV'T. PROT. AGENCY, *Regulatory Impact Analysis for the Proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units* 1-2 (March, 2012).

[4] MOODY'S INVESTORS SERVICE, *Announcement: Moody's: US coal industry outlook turns negative on weak power demand* (May 8, 2012).

[5] 77 Fed. Reg. at 22414.

meet Greenhouse Gas NSPS requirements due to a trend towards smaller capacity.[6] The proposed Greenhouse Gas NSPS effectively forbids new coal use while imposing limits on the construction and operation of new natural gas combined cycle power plants. Such policy constrains our citizens' options to power their homes, businesses, and lifestyles.

Finally, we are concerned the Greenhouse Gas NSPS is a pretext for harmful carbon caps on existing power plants. Numerous existing power plants will need to undertake projects to comply with other new EPA regulations including the Cross State Air Pollution Rule and Utility MACT. EPA claims these projects will not trigger the Greenhouse Gas NSPS. Regardless whether that position ultimately proves correct, EPA has described the Greenhouse Gas NSPS as the first step towards creating greenhouse gas caps for existing power plants. Indeed, EPA has asserted that promulgating the Greenhouse Gas NSPS legally mandates the Agency to create new regulations capping carbon emissions from existing sources. Such regulations further undermine economic and energy security as the country struggles to rebound from recession.

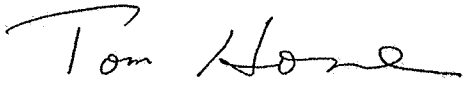
States have a unique role in ensuring affordable, universal electric service and reliability while encouraging robust economic policy and responsible environmental protection. EPA's proposed Greenhouse Gas NSPS upsets this careful balance by preventing states from utilizing vital resources to supply the future energy its citizens will need to grow and prosper. As the chief legal officers of our States, we believe this unlawful and misguided rule will result in great harm to our citizens. Therefore, we ask EPA to withdraw the Greenhouse Gas NSPS until such time the Agency develops a proposal that properly accommodates all forms of fossil energy production.

Sincerely,

E. Scott Pruitt
Oklahoma Attorney General

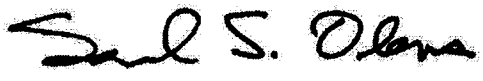
[6] MATTHEW J. KOTCHEN AND ERIN T. MANSUR, *How Stringent is the EPA's Proposed Carbon Pollution Standard for New Power Plants?* 7 (Apr. 25, 2012) (University of California's Center for Energy and Environmental Economics is a joint venture of the UC Berkley Energy Institute and UC Santa Barbara Bren School of Environmental Science and Management.).

Luther Strange
Alabama Attorney General



Tom Horne
Arizona Attorney General

Dustin McDaniel
Arkansas Attorney General



Sam Olens
Georgia Attorney General

Derek Schmidt
Kansas Attorney General

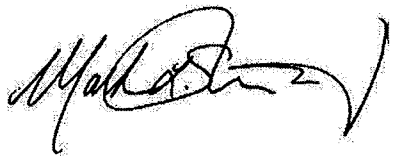
Jack Conway
Kentucky Attorney General

Bill Schuette
Michigan Attorney General

Jon Bruning
Nebraska Attorney General

Wayne Stenehjem
North Dakota Attorney General

Marty Jackley
South Dakota Attorney General



Mark Shurtleff
Utah Attorney General

Exhibit A2

Scott Pruitt

December 19, 2012 ·

Good evening to you all. I'd encourage you to start following me on Twitter @ScottPruittOK... Just another way to keep track in 2013.

Like Comment

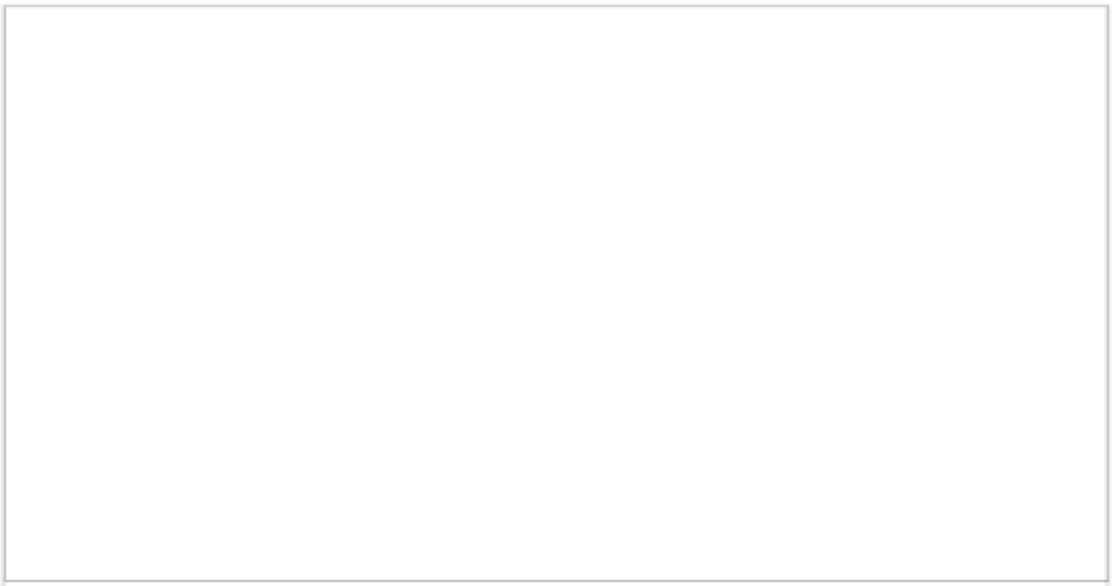
Exhibit A3

Scott Pruitt

April 2, 2013 ·

Friends: our new website is live today. Scott Pruitt for Attorney General 2014. Please visit often, share with your friends, sign up to volunteer, read my blog, and donate. It's your support that makes all the difference.

http://scottpruitt.com/



Scott Pruitt | Scott Pruitt for Attorney General

Friends -- welcome to the website and thank you for taking the time to stop by. Protecting you, the citizens of Oklahoma, is the cornerstone to everything I do as your Attorney General. As I enter my third year in this position, I am so thankful to...

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Exhibit A4

Scott Pruitt

September 30, 2013 ·

Will you help?

When I ran for Attorney General, I promised to defend the rights of Oklahomans against an overreaching federal government. During the first three years of my administration we've had our share of victories … but the fight is not over.

The Obama administration continues to aggressively pursue its big-government agenda. As Attorney General, I've fought against the unconstitutional actions of this administration and its army of bureaucrats. We've challenged the EPA's intrusion into state sovereignty and filed suit against the IRS when the agency attempted to improperly implement the Affordable Care Act in Oklahoma.

You can help me in the fight to protect the rights of Oklahomans. Today marks the end of fiscal Quarter 3, and I am humbly asking for you to consider a donation of $10, $15, or $20 today by clicking here: https://scottpruitt.com/donations/

Your support is much appreciated and invaluable. Thank you.

Donations | Scott Pruitt

"Washington, DC continues to pass legislation that puts unfair demands on taxpayers, handcuffs state government and saddles generations with massive debt. Oklahoma needs an Attorney General who is willing to stand up and fight – and Scott Pruitt is that

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Exhibit A5

Scott Pruitt

November 13, 2013 ·

En route to Washington, D.C. for a hearing at 9:30am tomorrow before the U.S. House Committee on Energy and Commerce's Subcommittee on Energy and Power.

"The Subcommittee on Energy and Power, chaired by Rep. Ed Whitfield (R-KY), has scheduled a hearing for Thursday, November 14, 2013, at 9:30 a.m. in room 2123 of the Rayburn House Office Building. The hearing is entitled "EPA's Proposed GHG Standards for New Power Plants and H.R. __, Whitfield-Manchin Legislation." Witnesses to be announced.

The subcommittee will continue its oversight of the Environmental Protection Agency's proposed greenhouse gas New Source Performance Standards for new power plants. The subcommittee previously examined the president's broader Climate Action Plan in September, which includes imposing new greenhouse gas regulations on both new and existing power plants.

Members will also discuss draft legislation authored by Chairman Whitfield and Sen. Joe Manchin (D-WV) to address EPA's pending greenhouse gas rules affecting electricity generation. The bipartisan legislation will ensure America can maintain a diverse and affordable electricity portfolio, which includes the use of coal, natural gas, nuclear power, and renewables. "

Exhibit A6

Committee on Energy and Commerce
U.S. House of Representatives
Witness Disclosure Requirement - "Truth in Testimony"
Required by House Rule XI, Clause 2(g)

1. **Your Name:** E Scott Pruitt - Oklahoma Attorney General			
2. **Are you testifying on behalf of the Federal, or a State or local government entity?**		**Yes** ✓	**No**
3. **Are you testifying on behalf of an entity that is not a government entity?**		**Yes**	**No** ✓
4. **Other than yourself, please list which entity or entities you are representing:** STATE OF OKLAHOMA			
5. **Please list any Federal grants or contracts (including subgrants or subcontracts) that <u>you or the entity you represent have received</u> on or after October 1, 2011:** Violence Against Women Act, Statewide Automated Victim Information Notification Program, VINE Enhancement, Family Violence Prevention & Services, Medicaid Fraud Control Unit.			
6. **If your answer to the question in item 3 in this form is "yes," please describe your position or representational capacity with the entity or entities you are representing:** N/A			
7. **If your answer to the question in item 3 is "yes," do any of the entities disclosed in item 4 have parent organizations, subsidiaries, or partnerships that you are not representing in your testimony?** N/A		**Yes**	**No**
8. **If the answer to the question in item 3 is "yes," please list any Federal grants or contracts (including subgrants or subcontracts) that were received by the entities listed under the question in item 4 on or after October 1, 2011, that exceed 10 percent of the revenue of the entities in the year received, including the source and amount of each grant or contract to be listed:** N/A			
9. **Please attach your curriculum vitae to your completed disclosure form.**			

Signature: [redacted] **Date:** 11/12/2013

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

Attorney General E. Scott Pruitt was elected as the 17th Attorney General of the State of Oklahoma on November 2, 2010. He is the second Republican in the history of the state to hold the office, which oversees 80 attorneys. He is dedicated to fighting corruption, protecting Oklahoma's vulnerable citizens, championing public safety measures to reduce violent crime and advocating excellence in the administration of the law, justice and protecting the interests of the Great State of Oklahoma and its citizens.

Attorney General Pruitt has quickly risen as a national leader in the cause of restoring limited government and the proper balance of power between the states and the federal government. As a first priority in office, Attorney General Pruitt established Oklahoma's first Federalism Unit in the Office of Solicitor General to more effectively combat unwarranted regulation and systematic overreach by federal agencies, boards and offices.

Pruitt currently serves as chairman of the Republican Attorneys General Association (RAGA) and chairman of the Midwest Region of the National Association of Attorneys General (NAAG). Under his leadership, attorneys general have come together to advance policies and legal strategies that protect the interests of their states from an overly intrusive federal government, with a particular focus on domestic energy security and production. Attorney General Pruitt has led the charge with repeated notices and subsequent lawsuits against the U.S. Environmental Protection Agency for their leadership's activist agenda and refusal to follow the law.

Attorney General Pruitt is an ardent defender of Oklahoma consumers, families and children in his capacity as Oklahoma's top law officer. During his first months in office, he transformed the AG's consumer protection efforts into the Public Protection Unit with a broader focus on keeping citizens safe. He established the Internet Crimes Against Children Unit to provide specific training for investigators and expanded resources for tracking criminals who intend to exploit children through technology.

In response to a personal call to defend the needs of children who are less fortunate, Attorney General Pruitt worked to negotiate a state settlement through the Department of Human Services that will dramatically improve foster care in Oklahoma. He was awarded the "Hero Award" by the Marland Children's Home for his efforts to prevent closure of the home and eviction of children who are emotionally disabled. In 2011, Attorney General Pruitt received the Humanitarian Award by Oklahoma CARE, a coalition of ministries and providers who deliver care for troubled children and their families.

Establishing and respecting the Rule of Law is a hallmark of Attorney General Pruitt's administration. In late 2011, Attorney General Pruitt made national headlines when he took the

bold step of negotiating an Oklahoma settlement with mortgage servicers instead of joining a 49-state mortgage settlement that exceeded the proper legal role and scope of authority vested in state attorneys general. The Oklahoma agreement with several of the nation's largest mortgage service providers included $18.6 million in compensatory damages for Oklahomans who were harmed by unfair practices during the foreclosure process.

Before being elected Attorney General, Pruitt served Broken Arrow, Coweta and Tulsa in the Oklahoma State Senate where he served for eight years, four of those as Assistant Republican Floor Leader. In the Senate, he was the leading spokesman for workers' compensation reform, lawsuit reform and greater accountability for government spending. He championed traditional, faith-based legislation that included allowing faith-based organizations to partner with the state in helping prisoners successfully re-integrate into society after their sentences were fulfilled.

Attorney General Pruitt used his experience in the Legislature to transform the AG's Workers' Compensation and Insurance Fraud Unit and the Medicaid Fraud Control Unit. Under his leadership, the fraud units increased prosecutions, hired 12 investigators, secured more than $20 million in Medicaid fraud restitution and worked directly with Oklahoma businesses to educate workers on fraud recognition and reporting.

Attorney General Pruitt's record of defending religious freedoms began during his time in the state Legislature with his efforts to author and successfully pass the Religious Freedoms Act, making Oklahoma one of the first states to pass an act that makes it more difficult for a government to burden an individual's right to practice their faith, especially in public. His efforts continue as Attorney General, joining six states to fight the federal health care mandate that will require religious groups to violate their beliefs. In 2012, Pruitt was selected to serve as a trustee for The Southern Baptist Theological Seminary.

From 2003 to 2010, Attorney General Pruitt was co-owner and managing general partner of the Oklahoma City Redhawks, the Triple-A baseball team in Oklahoma City. The team, under his leadership, regularly rated among the league's leaders in attendance and merchandise sales.

Pruitt grew up in Lexington, Kentucky, where he graduated high school and earned a scholarship to play baseball as a second baseman at the University of Kentucky. He earned a bachelor's degree in communications and political science at Georgetown College before being accepted to the University of Tulsa College of Law. After working his way through law school and earning a Juris Doctorate, Pruitt ventured into private practice, specializing in constitutional and employment law.

The Attorney General and his wife of 22 years, Marlyn, are raising two children, McKenna and Cade, in Tulsa. The Pruitts are members of the First Baptist Church of Broken Arrow, where Pruitt serves as deacon.

Testimony before the Subcommittee on Energy and Power of the House

Committee on Energy and Commerce

"EPA's Proposed GHG Standards for New Power Plants and H.R. __, Whitfield-Manchin Legislation"

November 14, 2013

E. Scott Pruitt

Attorney General

State of Oklahoma

Dear Chairman Whitefield, Ranking Member Rush, and Members of the Subcommittee,

Good morning and thank you for the invitation to join you today to discuss concerns – from a state perspective – of the EPA's proposed standards for greenhouse gas emissions of new power plants. This is an issue of great concern for Oklahoma and other states who were given the authority by Congress under the Clean Air Act to develop and implement emission standards for existing power plants.

In recent years, the EPA has expressed an unwillingness to appropriately defer to state authority under the Clean Air Act. The prospect of aggressive performance standards for new coal-based power plants is cause for serious concern among the states.

The EPA has indicated a similarly aggressive approach to existing coal-based power plants, for which the President has directed the EPA to propose standards by June 1, 2014, and to finalize the rules by June 1, 2015.

While the Clean Air Act gives the EPA the authority to develop the framework for states to establish emissions standards for existing power plants, the EPA may not dictate to the states what those standards should be.

The states, in making these important decisions, are allowed to engage in a cost-benefit analysis and consider a wide range of factors in setting standards. This is important to note, as the EPA's new emission standard, under the guise of "flexible approaches," mandates new coal-based power plants use costly carbon capture storage technology, which likely remains commercially unviable for at least a decade.

The elimination of coal-based electric generation – which according to the U.S. Energy Information Administration is projected to provide 40 percent of U.S. electricity in 2014 – would result in higher electricity prices for ratepayers, and would be detrimental to the national and

state economies, as well as job-creation in general. No doubt, increased electricity prices will hurt the competitiveness of American manufacturing.

I and the attorneys general of 16 other states – and the senior environmental regulator of an 18th state – recently submitted to EPA Administrator Gina McCarthy a white paper outlining these concerns and our position on both the EPA and the states' role under Section 111(d) of the Clean Air Act.

Unfortunately, this is not the only issue at which the states and EPA are at odds over the scope of their respective responsibilities. Many states, including Oklahoma, are actively engaged in legal challenges to thwart the EPA's attempt to expand its authority under the Regional Haze Rule.

Under the Clean Air Act's Regional Haze rules, a target date of 2064 was set to achieve "natural visibility" in federally designated lands across the United States. Since Regional Haze deals with issues of aesthetics and visibility – and not safety or public health – the Clean Air Act gives states the primary role in establishing regulations.

In Oklahoma, stakeholders worked with utilities to construct a plan for regional haze that allows for fuel flexibility and balances environmental protection with the need for affordable energy. Our state plan accomplished the objectives of the regional haze rule and exceeded the target date by nearly four decades (38 years). However, the EPA rejected Oklahoma's state implementation plan in favor of a federal implementation plan, which could cost state utilities $2 billion, leaving Oklahoma consumer to foot the bill.

What's more, the federal plan would provide less environmental benefits than the state plan and is estimated to increase costs for Oklahoma ratepayers as much as 20 percent annually.

Our state made the decision to sue the EPA over its decision. This is a case of first impression that likely could wind up at the Supreme Court level. Many states are monitoring the case closely, as the decision will impact their ability to set policy within their jurisdictions.

There is a great deal of frustration among the states with the EPA's attitude that ignores the proper role of the states as the agency attempts to expand its authority. The EPA seems to view the states as merely a vessel to implement whatever policies and regulations the Administration sees fit, regardless of the wisdom, cost, or efficiency of such measures.

Fortunately for the states, that is not what the law allows. Congress clearly intended for the states to have primacy in the areas of environmental regulation and for the EPA to work closely with the states to regulate these issues. However, the EPA is attempting to usurp the role of the states in the name of imposing the administration's anti-fossil fuel agenda.

The extent and form of greenhouse gas regulation is important to the states. The states have the experience, expertise, and ability to regulate these issues and must be allowed to play their proper roles in making the significant policy judgments that are required in adopting any such regulation.

We hope that by making our concerns known, the EPA will respect the principles of cooperative federalism that are set forth in the Clean Air Act and take a more commonsense approach to any new regulations and include the States in the process. If not, we will attempt to obtain relief from the Courts, and we also certainly welcome Congressional oversight being brought to bear on federal agencies.

Thank you for affording me the opportunity to present these concerns. Please see attached for your review the white paper titled, Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act."

Sincerely,

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act.

Introduction

As State Attorneys General, we believe it is critical to bring public awareness to another example of what has unfortunately become routine: the United States Environmental Protection Agency ("EPA" or "Agency") is poised to yet again propose new regulations that venture well beyond the limits of the agency's authority. The President has called upon EPA to propose greenhouse gas (GHG) emission standards, regulations, or guidelines for *existing* power plants by June 1, 2014, and to finalize those rules by June 1, 2015. As this paper will show, EPA's authority under the Clean Air Act is limited to developing a procedure for *states* to establish emissions standards for existing sources. EPA, if unchecked, will continue to implement regulations which far exceed its statutory authority to the detriment of the States, in whom Congress has vested authority under the Clean Air Act, and whose citizenry and industries will ultimately pay the price of these costly and ineffective regulations.

Last year, EPA published a proposed rule regulating carbon dioxide ("CO_2") emissions from new electric utility generating units ("EGUs"). 77 Fed. Reg. 22,392 (April 13, 2012) ("EGU NSPS"). In light of recent comments from industry, EPA is considering the need to re-propose this standard due to its failure to finalize the action within the CAA's 1-year timeframe. In addition, on April 15 and 17, 2013, some states and environmental groups filed 60- and 180-day Notices of Intent to sue EPA under section 304(a) of the Clean Air Act ("CAA") for failure to perform the allegedly non-discretionary duty of and/or unreasonably delaying finalizing the

EGU NSPS and proposing standards for existing EGUs.[1] In response to these Notices, a coalition of Attorneys General has requested to be involved in any settlement discussions with advocates of broad federal GHG regulations.

EPA states that once it has issued regulations for an air pollutant from *new* sources in a particular source category under the CAA § 111(b), it has legal authority to regulate emissions from *existing* sources of that air pollutant within the same source category.[2] The final version of the new source performance standards for new EGUs will likely face legal challenge. However, the following analysis assumes the final EGU NSPS for GHG emissions is upheld and EPA moves forward with rulemaking for existing sources.

The purpose of this paper is to identify a timely example of a serious, ongoing problem in environmental regulation: the tendency of EPA to seek to expand the scope of its jurisdiction at the cost of relegating the role of the States to merely implementing whatever Washington prescribes, regardless of its wisdom, cost, or efficiency in light of local circumstances. The issue is not new. The States and EPA have been at odds over the scope of their respective responsibilities under the federal environmental statutes since the statutes' inception. The recent increase in the level of federal regulatory activity under the Clean Air Act has generated a

[1] A settlement agreement entered into by a number of states and environmental groups in December 2010 set forth deadlines for EPA to issue regulations with respect to GHG emissions from existing EGUs. See, 75 Fed. Reg. 82,392 (Dec. 20, 2010). The deadlines have passed.

[2] The authority of EPA to promulgate GHG NSPS for existing EGUs, even if it finalizes its proposed GHG NSPS rule for new EGUs, has been questioned. *See* William J. Hann, The Clean Air Act as an Obstacle to the Environmental Protection Agency's Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants, THE FEDERALIST SOCIETY (Mar. 2013), available at http://www.fed-soc.org/publications/detail/the-clean-air-act-as-an-obstacle-to-the-environmental-protection-agencys-anticipated-attempt-to-regulate-greenhouse-gas-emissions-from-existing-power-plants. Without conceding that EPA does have authority to promulgate a GHG NSPS for existing EGUs, we assume for purposes of discussion here that EPA does have that authority and will exercise it.

corresponding increase in concerns among the States regarding the preservation of their role in environmental protection.

The way in which EPA has "pushed the envelope" in interpreting its legal authority under the CAA to promulgate a New Source Performance Standard for new EGUs portends a similarly aggressive and unlawful approach to the regulation of existing EGUs. EPA's clear policy goal in establishing its new source standards is to prevent the construction of new coal plants. EPA's proposed EGU NSPS would foreclose the construction of new coal-based electric generation absent carbon capture and storage ("CCS"), yet CCS is likely to remain commercially infeasible for a decade or more. The elimination of coal as a fuel for new electric generation would have highly concerning implications for electricity prices and for the economy and job-creation in general, as well as the competitiveness of American manufacturing.

In order to justify its proposed standard that would not allow new coal-based EGUs absent CCS, EPA has taken unprecedented steps. The Agency proposed to combine coal and combined-cycle natural-gas units into a single regulatory category, something it has never done before for coal and gas EGUs. Indeed, it did not even go so far as recently as last year when it proposed NSPS for traditional pollutants emitted by EGUs. EPA's aggressive posture in its proposed new-source NSPS, both as to foreclosing new coal plants and in pushing the scope of its claimed legal authority, raises serious questions as to the approach EPA will eventually take when it promulgates existing-source NSPS.

If EPA proceeds against existing coal plants with the same hostility, it is likely to be reversed in court. As this paper shows, EPA does not have authority to promulgate prescriptive limitations for existing coal-fueled EGUs. Under section 111(d) of the CAA, EPA must recognize that States have broad discretion to determine the nature of NSPS requirements for

existing EGUs. EPA may require States to adopt standards, and EPA may guide how States do so procedurally, but the States are vested with the legal authority to decide the ultimate standards.

The Statutory and Regulatory Framework For Developing Performance Standards For Existing Sources

The focus of the following analysis is the limitations Congress placed on EPA's authority under Section 111(d) of the CAA. Section 111(d) provides EPA with the authority to develop standards of performance for existing sources and directs the Agency to:

> prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which establishes 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.

Section 111(d) requires the existence of a performance standard for new sources as a condition precedent to the development of such standards for existing sources. Thus, the legality of the final version of EPA's EGU NSPS rule has significant implications for EPA's ability to require regulation of existing EGUs.

Most importantly, section 111(d) invokes the principle of cooperative federalism – with roles clearly delineated for both EPA and the States. The reference to § 110 refers to the general process by which States submit their State Implementation Plans ("SIPs") for EPA review. Accordingly, EPA's authority under § 111(d) is limited to establishing, in the statute's term, a "*procedure*" by which the States submit plans for regulating existing sources. EPA cannot promulgate rules establishing the substantive standards to be imposed on existing sources.

The cooperative federalism is illustrated by EPA's general procedural regulations relating to the States' adoption and submittal of plans establishing standards of performance for existing

sources. Those regulations require EPA to issue a "guideline document" concurrently with, or after, the "proposal of standards of performance for the control of a designated pollutant from affected facilities." 40 C.F.R. § 60.22(a). The content of the guideline document is of great importance to the preservation of the States' role in the development of performance standards for existing sources.

Under EPA's regulations, the guideline document is to "provide information for the development of State plans" including a "description of systems of emissions reduction which, in the judgment of the Administrator, have been adequately demonstrated." *Id* at (b)(2). The guideline document also shall contain an "emission guideline" providing "criteria for judging the adequacy" of § 111(d) plans. 40 C.F.R. § 60.22(b)(5); *see,* 40 Fed. Reg. 53,341 (Nov. 17, 1975). The emission guideline "reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated." 40 C.F.R. § 60.22(b)(5). The emission guideline must also allow sub-categorization "when costs of control, physical limitations, geographical location, or similar factors make [it] appropriate." *Id*.

Also under EPA's regulations, the States have nine months to submit a "plan for the control of the designated pollutant to which the guideline document applies." 40 C.F.R. § 60.23(a)(1). The plan "shall include emission standards" that "shall prescribe allowable rates of emissions except when it is clearly impracticable." 40 C.F.R. § 60.24(a), (b)(1). The States have significant discretion in formulating these plans. Although the "emission standards" are to be "no less stringent than the corresponding emission guideline(s), the States may make a case-by-case determination that a specific facility or class of facilities should be subject to a less-stringent standard or longer compliance schedule due to 1) cost of control; 2) physical limitation of installing necessary control equipment; and 3) other factors making the less-stringent standard

more reasonable. *See*, 40 C.F.R. § 60.24(c), (f). EPA then has four months to determine whether the plan meets the requirements discussed above. If EPA disapproves the plan, the State may correct the deficiencies or, under EPA's construction, the Agency may issue its own plan within 6 months of the original submission deadline. *See*, 40 C.F.R. § 60.27(c), (d).

Although these regulations have never been tested in court, EPA undoubtedly has power to adopt procedural regulations governing State adoption of plans setting forth performance standards. But, importantly, and consistent with the statute, the determination of the actual substantive standards is left to the states.

Existing Source Performance Standards for CO_2 Emissions from EGUs

In contemplating regulation of existing EGUs, however, EPA appears poised to go beyond the establishment of procedures and usurp the states' authority by setting minimum *substantive* requirements for state performance standards. Having reviewed the statutory and regulatory requirements for developing standards of performance for existing sources in a general sense, we now apply that legal framework to CO_2 emissions from EGUs. Although EPA has not yet issued a proposed guideline document for CO_2 emissions from existing EGUs, we offer general observations about potential issues that have already presented themselves.

Fundamentally, § 111(d), as well as EPA's own regulations, require that emission reductions be made through adequately demonstrated systems of emission reduction technology. Under § 111(d), EPA establishes procedures for States to submit plans containing "performance standards." "Performance standards" is defined in § 111(a): "The term 'standard of performance' means 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 nonair quality health and

environmental impact and energy requirements) the Administrator determines *has been adequately demonstrated*." (Emphasis supplied). And EPA's guideline document and the emission guideline contained therein are to "reflect[] the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated." 40 C.F.R. § 60.22(b)(5); *see also*, 42 U.S.C. § 7411(1) (definition of "standard of performance"). The crux of this requirement thus is that the system be, in fact, adequately demonstrated.

It seems incontrovertible that no post-combustion reduction system has been "adequately demonstrated" for CO_2 emissions from EGUs on a broad, commercial scale. A system of carbon capture and storage is perhaps a decade away from being technologically and economically feasible. A permitting system for storing CO_2 emissions underground and a set of legal rules governing liability for CO_2 storage has not been put in place in most states. Without an adequately demonstrated post-combustion control technology, EPA must look to standards based on cost-effective efficiency improvements at electric generating units, because more efficient units will produce lower CO_2 emissions per unit of heat input or electricity output.

EPA and others may believe that efficiency measures will not ensure the amount of CO_2 emission reductions they desire. As a result, some groups have proposed EPA be given flexibility to develop emission guidelines based on trading programs with statewide emissions caps, increased reliance on lower CO_2 emitting facilities, or demand-side and non-regulated source reductions. In short, EPA may attempt to force coal-fueled EGUs to decrease operation time or retire early, or force utilities to rely more heavily on natural gas and other resources in an effort to ensure greater CO_2 emission reductions. Such proposals, often offered as ways of providing "flexibility," do not conform to the limitations Congress has placed on EPA in the

Clean Air Act, nor do they properly preserve the primary role of States in the development of standards of performance for existing sources. Under § 111(d), it is the States, not EPA, that are authorized to adopt performance standards; therefore it is the States, not EPA, that weigh the § 111(a)(1) factors to determine what technology is adequately demonstrated. Simply put, EPA lacks statutory authority (and is limited by its own regulations) to issue emission guidelines seeking reductions of CO_2 emissions from coal-based EGUs in a manner based on something other than an adequately demonstrated reduction system for such EGUs.

To the extent § 111(d) provides authority for flexible approaches to establishing performance standards to seek reductions in CO_2 emissions, that authority is vested in States, not EPA. And of course, under § 116, States retain authority to adopt more stringent CO_2 controls than EPA has the authority to mandate.

As noted, § 111(d) specifies that EPA's regulatory authority is limited to developing a *procedure* for the submission of state plans. EPA's general regulations authorizing the issuance of emission guidelines that establish minimum requirements, depending on how EPA implements this guideline authority in a particular case, bear on substantive standard-setting. But EPA does not have the authority to establish minimum substantive requirements.

EPA cannot dictate substantive outcomes. The agency can require that States actually adopt performance standards based on application of the § 111(a)(1) factors.

States are additionally afforded the discretion to consider "among other factors, the remaining useful life of the existing source to which such standard applies" when developing performance standards for existing units. Beyond this, § 111(d) does not provide authority for EPA to reject a State plan if it does not contain a standard of performance as that term is defined, and based on the factors set forth, in § 111(a)(1).

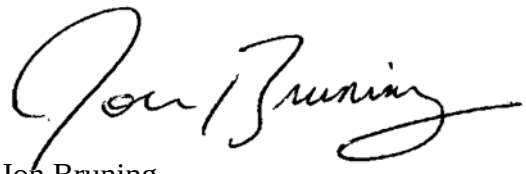
In sum, the CAA imposes responsibility for air pollution control at the State and local levels because of the proximity to existing sources and familiarity with local operating conditions. State implementation plans are thus the primary architecture of emission controls. *See* §§ 107(a); 110(a); 111(d). The "structure of the CAA militates against reading an extra-statutory requirement into the Act's limitations on state discretion. Because the states enjoy 'wide discretion' in implementing the Act, the imposition of newfound restrictions upsets the Act's careful balance between state and federal authority. *Union Elec. Co.*, 427 U.S. at 250; *see also Fla. Power & Light Co*., 650 F.2d at 587 ('The great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by EPA.')." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 929 (5th Cir. 2012). EPA's role for existing sources is therefore "confine[d]…to the ministerial function of reviewing SIPs for consistency with the Act's requirements." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012).

Conclusion

The prospect for EPA adoption of GHG performance standards for new or existing coal-based EGUs raises serious concerns. EPA's aggressive standards for new coal-based EGUs indicate a similarly aggressive approach to existing coal-based EGUs. While EPA is authorized to require States to submit plans containing performance standards, EPA may not dictate what those performance standards shall be. Nor may EPA require States to adopt GHG performance standards that are not based on adequately demonstrated technology or that mandate, in the guise of "flexible approaches," the retirement or reduced operation of still-viable coal-based EGUs.

These concerns are serious. EPA regulations may harm the nascent economic recovery. Moreover, our federalist system of government, as implicated in the CAA, requires that EPA

recognize the rights and prerogatives of States. The extent and form of greenhouse gas regulation is important to the States; it is critical that States be allowed to play their proper roles in making the significant policy judgments that are required in adopting any such regulation.



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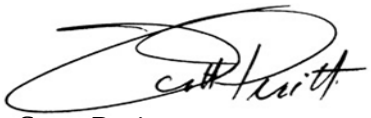
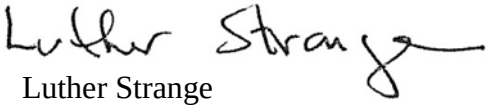
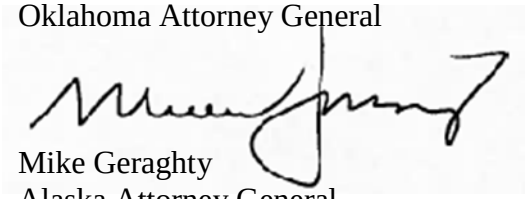
Bill Schuette
Michigan Attorney General



Scott Pruitt
Oklahoma Attorney General



Luther Strange
Alabama Attorney General



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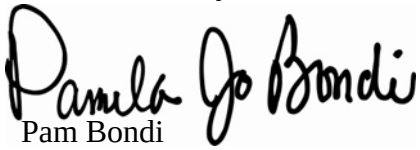

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Derek Schmidt
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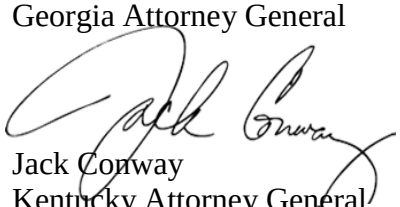

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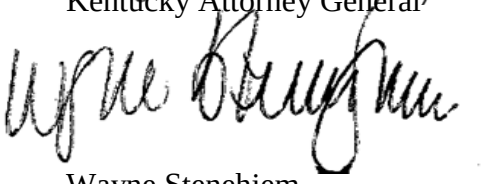
Kentucky Attorney General

Tim Fox
Montana Attorney General



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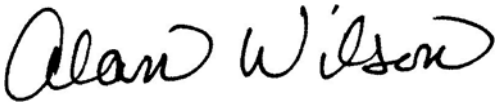

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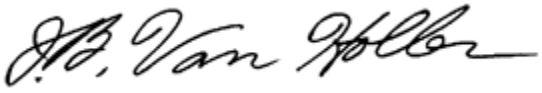

J.B. Van Hollen
Wisconsin Attorney General

Tom Easterly
Commissioner, Indiana Department
of Environmental Management

Exhibit A7

Scott Pruitt shared a link.

November 15, 2013 ·

Oklahoma Attorney General Scott Pruitt criticizes EPA at congressional hearing

Pruitt, who is suing the Environmental Protection Agency, tells a House panel that state authority is…

NEWSOK.COM

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Exhibit A8

Scott Pruitt

December 4, 2013 ·

"Given the EPA's history in such areas, states like Oklahoma remain skeptical of any assurances from the EPA that states will be given flexibility in meeting new emission standards for power plants," Oklahoma Attorney General Scott Pruitt told The Daily Caller in a statement.

States wary of EPA's promise of 'flexibility' on carbon dioxide limits

Environmental Protection Agency administrator Gina McCarthy promised to give states flexibility when reducing carbon dioxide emissions from existing power…

DAILYCALLER.COM

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Exhibit A9

Print Article

Press Release

Tuesday, May 20, 2014

"Oklahoma Attorney General's Plan" Offers State-Focused Framework for Power Plant Emissions Standard

Plan Allows States, Rather than EPA to Take Lead in Setting CO_2 Standards

WASHINGTON D.C. –Oklahoma Attorney General Scott Pruitt on Tuesday unveiled his proposal to give states flexibility to address carbon dioxide emissions standards from existing power plants. The plan titled, "The Oklahoma Attorney General's Plan: The Clean Air Act Section 111 (d) Framework that Preserves States' Rights," was the focus of Tuesday's event in Washington, D.C., hosted by the Federalist Society.

"The Environmental Protection Agency has played an important role historically in protecting the environment. But the Clean Air Act and other environmental laws envision a cooperative federalism where the states and federal government work together to protect our air and water," Attorney General Pruitt said. "Unfortunately, the EPA has grown increasingly unwilling to properly defer to state authority and instead is attempting to usurp the role of the states through initiatives like proposing new regulations on emissions from existing power plants."

The President's Climate Action Plan directs the EPA to regulate carbon dioxide emissions from new and existing fossil-fuel fired power plants. The plan has no legal basis, nor the force of law, and in fact goes against the spirit of cooperative federalism that underscores most environmental laws. The Clean Air Act gives states the authority to design and implement regulations to address emissions standards. By directing the EPA to set emissions standards, the Administration is using a federal agency to impose its anti-fossil fuel agenda while undermining state authority.

Attorney General Pruitt said the Oklahoma Attorney General's Plan is a better approach to addressing emissions standards. The plan allows each state to set emissions standards for existing units by evaluating each unit's ability to improve efficiency and reduce carbon dioxide emissions in a cost effective way. The Oklahoma Attorney General's Plan institutes a unit-by-unit, "inside the fence" approach to determining state emissions standards. It accounts for the practical reality that air quality impacts differ from state to state, as do costs and opportunities for carbon dioxide emission reductions.

"States have a vested interest in protecting the air and water, and they have the experience, expertise, and ability to regulate these issues," Attorney General Pruitt said. "Cooperative federalism empowers states by letting them lead the way in addressing these issues. The Oklahoma Attorney General's Plan provides the states the ability to make necessary policy judgments in order to address carbon dioxide emissions standards. This approach preserves state primacy and does not turn over management of local power generation fleets to the EPA. The Oklahoma Attorney General's Plan keeps resource planning in the hands of state regulators with specialized expertise and a focus on ratepayer impacts and protection of the public interest."

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The Federalist Society hosted Oklahoma Attorney General Scott Pruitt and a panel of experts Tuesday at the National Press Club in Washington D.C. for a discussion on state-based solutions to the Obama Administration's Climate Action Plan to address greenhouse gas emissions.

Exhibit A10

THE OKLAHOMA ATTORNEY GENERAL'S PLAN

The Clean Air Act Section 111(d) Framework that Preserves States' Rights

E. Scott Pruitt
Attorney General
State of Oklahoma
April 2014

I. Executive Summary

President Obama's Climate Action Plan (CAP) directed the Environmental Protection Agency ("EPA" or the "Agency") to regulate carbon dioxide (CO_2) emissions from new and existing fossil-fuel fired generation units. The CAP has no legal basis or force of law, and EPA in regulating these units remains subject to the Clean Air Act (CAA) – a law passed by Congress and signed by the President consistent with principles of democratic governance. EPA is unlawfully regulating through and to the principles outlined in the CAP, and in doing so is engaging in energy rationing that will first eliminate coal-fired generation from each State's fuel mix, then target and eradicate natural gas-fired generation.

EPA has proposed a New Source Performance Standard (NSPS) for new power plants, which includes performance standards that are not achievable in the real world. Even more problematic, pursuant to Section 111(d) of the CAA, EPA will issue standards for existing power plants mid-year 2014 that will create immediate problems and higher electricity costs for consumers nationwide, including in Oklahoma. Because the existing generation fleet was neither built nor designed to control CO_2 emissions, the EPA approach will seek to set a State by State budget using a baseline for allowed emissions resulting from electricity generation in each state. However, EPA's ambition is restrained by Section 111(d), which gives the States the authority to determine achievable emission standards for its fossil-fuel fired units. Despite President Obama's directives to EPA in the Climate Action Plan, EPA cannot exceed its legal authority under Section 111(d). The CAA governs EPA's actions – not the CAP. Furthermore, the legality of EPA's purported authority to regulate CO_2 emissions for existing power plants under Section 111(d) has been questioned, and the Agency's very ability to promulgate regulations is only assumed to be legal here for purposes of this discussion.

The Oklahoma Attorney General's Plan ("OKAG Plan") counters the recently released white paper entitled *Greenhouse Gas Implications for Kentucky under Section 111(d) of the Clean Air Act* (Kentucky Plan)[1], which promotes a "mass-emissions" approach – conceptually indistinguishable from cap-and-trade. This approach removes the significant authority and discretion left to the States under Section 111(d); instead, it embraces CAP-driven energy rationing, despite the fact that there is no legal basis for the CAP. The Kentucky Plan's proposed framework erroneously gives EPA maximum flexibility with its Section 111(d) authority and minimum flexibility to the States in crafting emission standards. This is the antitheses of the Section 111(d) regulatory scheme.

The Kentucky Plan borrows from environmental and academic literature that argues for the wholesale shift of Section 111(d) into a national cap-and-trade regime. A Natural Resources Defense Council (NRDC) white paper argues for constraints on emissions of carbon under Section 111(d) as part of an "optimization process," which will be specified on the basis of "cap-

[1] Commonwealth of Kentucky Energy and Environment Cabinet, *Greenhouse Gas Policy Implications for Kentucky under Section 111(d) of the Clean Air Act* (Oct. 2013), *available at* http://eec.ky.gov/Documents/GHG%20Policy%20Report%20with%20Gina%20McCarthy%20letter.pdf.

and-trade policies" and applied to individual generating units or groups of units.[2] Academic papers argue for using Section 111 to implement a cap-and-trade program to drive Greenhouse Gas (GHG) emission reductions, even if that means "jamming a square peg through a round hole."[3]

The OKAG Plan properly construes Section 111(d): EPA designs a procedure and emission guidelines, and States determine the legally enforceable emission standard that is as stringent as the applicable guideline – *unless* the State determines that circumstances justify imposition of a less stringent emission standard. The OKAG Plan institutes a unit-by-unit, "inside the fence" approach to determining State emission standards, and accounts for the practical reality that air quality impacts differ from State to State, as do costs and opportunities for CO_2 emission reductions. With the OKAG Plan, the resource planning function is *not* usurped by an allocation system or CO_2 budget and instead remains where it belongs – "inside the fence" in the hands of state regulators with specialized expertise and a focus on ratepayer impacts and protection of the public interest. Furthermore, the "inside the fence" model ensures that emissions reductions are limited to the engineering limits of each facility. The OKAG Plan preserves State primacy and does not turn over management of local generation fleets to EPA under the guise of "flexibility."

II. Background and Regulatory Concerns

The EPA is poised to again propose new regulations that venture well beyond the limits of the law. Through the recent CAP, which has no force of law or legal basis, President Obama has called upon EPA to propose CO_2 emission guidelines for existing power plants by June 1, 2014, and to finalize those rules by June 1, 2015 under Section 111(d).[4] Accordingly, individual States[5], such as the State of Kentucky, have begun offering proposed "frameworks" to provide "input" to EPA in developing guidelines under Section 111(d). The OKAG Plan serves as a counterproposal that is more faithful to the law as written; gives States the significant discretion and authority reserved to them under Section 111(d); and keeps the EPA from dictating standards it has no authority to impose. It properly leaves the appropriate amount of emissions reductions to the State on an "inside the fence" basis.

Simply put, EPA does not have the authority to impose a state-by-state "cap and trade" CO_2 emissions policy.. This "outside the fence" approach ignores the States' primary authority to devise Section 111(d) State Implementation Plans (SIPs) that are: flexible; cognizant of the

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[2] *See, e.g.*, Daniel A. Lashof, Starla Yeh, David Doniger, Sheryl Carter & Laurie Johnson, *Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America's Biggest Climate Polluters*, Natural Res. Def. Council (Dec. 2012), *available at* http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf.

[3] James Salzman & Barton H. Thompson, Jr., Environmental Law and Policy 87-88 (3d ed. 2010); *see also*, M. Rhead Enion, *Using Section 111 of the Clean Air Act for Cap-and-Trade of Greenhouse Gas Emissions: Obstacles and Solutions*, 30 UCLA J. Envtl. L. & Pol'y 1, 34-45 (2012).

[4] 42 U.S.C. § 7411(d).

[5] On December 16, 2013, officials from 15 states submitted a paper entitled *States' §111(d) Implementation Group Input to EPA on Carbon Pollution Standards for Existing Power Plants* to EPA. *See* Mary D. Nichols, et al., *States' §111(d) Implementation Group Input to EPA on Carbon Pollution Standards for Existing Power Plants*, (Dec. 16, 2013) *available at* http://www.georgetownclimate.org/sites/default/files/EPA_Submission_from_States-FinalCompl.pdf.

particular circumstances of the given state; and will not imperil the families and businesses of the state with ruinous electricity rate increases.

i. EPA has, at best, circumscribed authority under Section 111(d).

EPA's authority to promulgate a CO_2 emission guideline for *existing* electric generating units (EGUs) has been questioned.[6] CO_2 is not among the types of pollutants that can be regulated explicitly under Section 111(d). Therefore, EPA has no authority *at all* to require States to adopt CO_2 performance standards for existing EGU CO_2 emissions.[7] Despite our belief that EPA has no authority to promulgate a CO_2 emission guideline for existing EGUs, it is clear that EPA believes that it has that authority and will attempt to exercise it.[8] In line with EPA's anticipated action claiming CO_2 emission authority, the OAG Plan at least strikes the appropriate balance on the "cooperative federalism" scale, emphasizing State primacy under Section 111(d) of the Clean Air Act.

Unchecked, EPA will continue to implement regulations that exceed its statutory authority to the detriment of the States. Under the CAA, Congress has vested authority to the States, whose citizenry and businesses ultimately pay the price of costly and ineffective regulations. EPA's authority under the Section 111(d), at best, is limited to developing a procedure for States to establish emissions standards for existing sources.

Indeed, Section 111(d) materially differs from Section 111(b), the NSPS provision, and it is well-established that **"Section 111(d) grants a more significant role to the states in development and implementation of standards of performance than does [Section] 111(b)."**[9] The Supreme Court itself recognizes the extensive State authority under Section

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[6] *See* William J. Haun, The Clean Air Act as an Obstacle to the Environmental Protection Agency's Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants, THE FEDERALIST SOCIETY (Mar. 2013), *available at* http://www.fed-soc.org/publications/detail/the- clean-air-act-as-an-obstacle-to-the-environmental-protection-agencys-anticipated-attempt-to-regulate-greenhouse- gas-emissions-from-existing-power-plants.

[7] EPA's proposed CO_2 NSPS rule for new EGUs pursuant to Clean Air Act (CAA) Section 111(b) is a separate matter, under a separate section of the Clean Air Act.

[8] Section 111(d) does not authorize EPA to adopt regulations for a particular category of facilities where that source category "is regulated under section [112] of this title." *See* 42 U.S.C. § 111(d)(1)(A)(i). Indisputably, coal plants are regulated under Section 112. EPA listed coal plants for regulation under Section 112 in 2000 and recently established Section 112 pollution standards in its 2012 Mercury and Air Toxics Standards (MATS) rule. *See* 77 Fed. Reg. 9304 (Feb. 16, 2012); 65 Fed. Reg. 79,825 (Dec. 20, 2000). Thus, having regulated coal plants under Section 112, EPA has no power under Section 111(d) to adopt regulations governing coal-plant CO_2 emissions. Because EPA has not yet proposed Section 111(d) CO_2 performance standards for existing coal plants, EPA's exact rationale for its authority to do so is not known with certainty. Nevertheless, based on past EPA statements, EPA is expected to claim that Section 111(d) is ambiguous on this point and that its interpretation of the provision as allowing for CO_2 regulation is entitled to deference. The claimed ambiguity stems from language in the House and Senate versions of the 1990 Clean Air Act Amendments. But as has recently been explored at length, EPA's interpretation depends on not giving effect to all of the language Congress adopted. *See* Haun, *supra* note 2. Including all of Congress' language inevitably leads to the conclusion that CO_2 emissions from coal-fueled EGUs cannot be regulated under Section 111(d). *See, e.g.*, Brian H. Potts, *The President's Climate Plan for Power Plants Won't Significantly Lower Emissions*, 31 YALE J. ON REG. 1A, 9A (2013)(concluding in part that "it is highly questionable whether EPA can even regulate existing power plants at all using Section 111(d).")

[9] Jonas Monast, Tim Profeta, Brooks Rainey Pearson, and John Doyle, *Regulating Greenhouse Gas Emissions From Existing Sources: Section 111(d) and State Equivalency*, 42 ENVTL. L. 10206, 10206 (2012).

111(d); Section 111(d) allows "each State to take the first cut at determining how best to achieve EPA emissions standards within its domain."[10]

The cornerstone of the OKAG Plan is State primacy under the CAA. The way in which EPA has overreached in interpreting its legal authority under the CAA to promulgate a NSPS for *new* EGUs portends a similarly aggressive and unlawful approach to the Section 111(d) regulation of *existing* EGUs. EPA's unambiguous policy goal in establishing its new source standards is to prevent the construction of new fossil-fuel fired plants. For example, EPA's proposed EGU NSPS would foreclose the construction of new coal-based electric generation absent carbon capture and storage (CCS), yet CCS is likely to remain commercially infeasible for a decade or more. The elimination of coal as a fuel for new electric generation would have severe implications for electricity prices; the economy and job-creation in general; and the competitiveness of American manufacturing. Importantly, States that have already eliminated or reduced coal-fired generation or have planned or carried out turnover of their generation fleet to natural gas are not immune from Section 111(d). Under these circumstances, gas plant emissions will be the first target for emission reduction – and the result is the same: elimination of gas as a generating resource. The eradication of all fossil-fueled generation, *including natural gas*, is the inevitable result of EPA's current course of action over time and will only be counteracted when States assert their statutory authority through proper balance and implementation of a Section 111(d) SIP.

ii. The Kentucky Plan.

Even though it says all the right things, the Kentucky Plan does not strike the proper balance in its proposed framework. It references the "flexibility" provided to the States under Section 111(d); recognizes the fact that States "submit a plan to establish standards of performance"; argues that CCS "is not yet commercially proven in the primary large-scale for which it is envisioned"; and argues that "the transition to lower emission sources should not be a sole trade-off between one type of carbon fuel (coal) for another (natural gas)." Unfortunately, by advocating for a "mass-emissions approach," the Kentucky Plan in practice does not support these statements.

The Kentucky Plan provides a framework centered on mass emissions, or an emission cap, which would result in standards "expressed as a percent reduction of the mass (tons) of pollutant (CO_2)." The framework is not tied to an emission standard based upon adequately demonstrated and achievable systems of emission reductions; rather, the Kentucky Plan predefines its goal and regulates to the lawless CAP by setting an emission baseline and mandating CO_2 reduction levels for 2020 (17 percent), 2025 (28 percent), 2030 (38 percent), and 2050 (80 percent). This involves no unit-by-unit analysis of achievable reductions or consideration of whether emission reduction technologies are adequately demonstrated. It simply sets a cap then forces compliance, divesting the States of their significant discretion and authority under Section 111(d).

[10] *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011). The Court further recognized that EPA merely promulgates guidelines, while States determine performance standards: "For existing sources, EPA issues emissions guidelines; in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, § 7411(d)(1)." *Id.* at 2537-38.

The "mass-emissions approach" is legally tenuous and *will* result in wholesale turnover of the generation fleet at ratepayer expense through the mandated CO_2 reductions. Indeed, the threat posed by the significant reductions contemplated by the Kentucky Plan is not limited to coal and equally portends drastic reductions in natural gas-fired generation. The Kentucky Plan threatens all fossil-fuel fired generation and in turn the economic recovery and ratepayers because diverse resource portfolios keep risk low and reliability high.

iii. States are the driver of Section 111(d) regulation, and the OKAG Plan recognizes this authority.

States, and not EPA, have primary authority over Section 111(d) planning. Resource planning will have to comply with state-created and -implemented plans for CO_2 reductions. Properly construed Section 111(d) SIPs will require achievable reductions, not wholesale turnover of the generation fleet. In fact, Section 111(d) explicitly recognizes cost, and States have flexibility to keep low cost generation running.[11]

The OKAG Plan offers an alternative framework that is consistent with the State primacy entrenched in Section 111(d). As contemplated by Section 111(d), States possess the authority and discretion to define emission reduction requirements through unit-specific analyses. The OKAG Plan eschews the mass-emissions model because this approach subsumes resource planning processes traditionally left to the States into mandatory CO_2 budgets. Instead, the OKAG Plan allows for a unit-by-unit analysis and considers affordable electricity.. In addition, the framework holds EPA to its recent public pronouncements regarding regulation of existing EGUs. In a December 2, 2013 speech before the Center for American Progress, EPA Administrator Gina McCarthy pledged that EPA would be "really flexible" with States regarding Section 111(d).[12] The OKAG Plan embraces the "significant flexibility" left to the States under Section 111(d).

III. The Statutory and Regulatory Framework For Developing Performance Standards For Existing Sources

i. Emission guidelines versus emission standards and EPA's confined authority to promulgate a "guideline document."

The difference between EPA and State authority in the Section 111(d) regulatory framework is illustrated by the difference between an "emission guideline" and an "emission standard." An emission guideline must reflect emissions reduction achievable by "the best system of emission reduction (taking into account the cost of such reduction) … [that] has been adequately demonstrated for designated facilities."[13] Promulgation of a "guideline" is consistent with EPA's statutory duty to "establish a procedure" for State submission of Section 111(d)

[11] *See, e.g.* 40 C.F.R. § 60.24(f)(1) (providing that States may provide for less stringent emissions standards based on "[u]nreasonable cost of control resulting from plant age, location or basic process design ….")
[12] *See* Laura Barron-Lopez, EPA to be 'flexible' on carbon standards, The Hill (Dec. 2, 2013), *available at* http://thehill.com/blogs/e2-wire/e2-wire/191743-epa-to-be-flexible-with-states-on-carbon-standards.
[13] 40 C.F.R. § 60.21(e).

SIPs.[14] Guidelines may be established for different types, sizes and classes of facilities if costs of control, physical limitations, geographic locations or similar factors render sub-categorization appropriate.[15] Under Section 111(d) regulations, EPA's guideline document is meant to "provide information for the development of State plans."[16]

The definition of an "emission standard" is indicative of the States' more substantive role. An emission standard is a "*legally enforceable regulation* setting forth an allowable rate of emissions into the atmosphere, establishing an allowance system, or prescribing equipment specifications for control of air pollution emissions."[17] Each SIP must include emission standards, and "emission standards shall be no less stringent than the corresponding emission guideline(s)."[18] However, States retain the discretion to prescribe *less stringent* emissions standards under certain circumstances, including if the cost of control is "unreasonable … resulting from plant age, location, or basic process design."[19]

In sum, a guideline is general and suggestive, while a standard is specific and prescriptive – and the Section 111(d) implementing regulations reflect this difference. EPA designs a procedure and emission guidelines, and States determine the legally enforceable emission standard that is as stringent as the applicable guideline – *unless* the State determines that circumstances justify imposition of a less stringent emission standard after evaluating the factors set forth at 40 C.F.R. § 60.24(f). More simply, the standard must satisfy the guideline unless enumerated circumstances, *in the States' estimation*, exist. This invokes the principle of cooperative federalism, with roles clearly delineated for both EPA and the States. The cooperative federalism principle is illustrated by EPA's general procedural regulations relating to the States' adoption and submittal of SIPs, while the State-driven SIPs establish the legally enforceable emission standards for existing sources. EPA may only promulgate legally enforceable emission standards if (1) a State fails to submit a SIP, or (2) a State submits a SIP that does not comply with Section 111(d) regulations.

ii. States have primacy and discretion in formulating Section 111(d) plans.

As discussed above, States have significant discretion in formulating Section 111(d) SIPs. Although the "emission standards" are to be "no less stringent than the corresponding emission guideline(s)," the States may make a case-by-case determination that a specific facility or class of facilities are subject to a less-stringent standard or longer compliance schedule due to: (1) cost of control; (2) a physical limitation of installing necessary control equipment; and (3) other factors making the less-stringent standard more reasonable.[20] Moreover, States may

[14] 42 U.S.C. § 7411(d)(1).
[15] 40 C.F.R. § 60.22(b)(5).
[16] 40 C.F.R. § 60.22(b). Section 111(d) requires the existence of a performance standard for new sources as a condition precedent to the development of such standards for existing sources. Thus, the legality of the final version of EPA's EGU NSPS rule has significant implications for EPA's ability to require regulation of existing EGUs.
[17] 40 C.F.R. § 60.21(f) (emphasis added).
[18] 40 C.F.R. § 60.24(c).
[19] 40 C.F.R. § 60.24(f).
[20] 40 C.F.R. § 60.24(f).

establish equipment specifications rather than emissions rates where allowable emission rates are "clearly impracticable."[21]

EPA's authority, on the other hand, is limited to evaluating compliance with the guideline document and not promulgating and implementing substantive performance standards. After submittal of a SIP, EPA has four months to determine whether the plan meets the requirements discussed above. If EPA disapproves the plan, the State may correct the deficiencies or, under EPA's construction, the Agency may issue its own plan within six months of the original submission deadline.[22]

iii. Systems of emissions reduction must be adequately demonstrated.

Fundamentally, Section 111(d) requires that emission reductions be achievable through adequately demonstrated systems of emission reduction technology. Under Section 111(d), EPA establishes procedures for States to submit plans containing "performance standards." The term "standard of performance" is defined in Section 111(a):

> The term "standard of performance" means 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 nonair quality health environmental impact and energy requirements) the Administrator determines *has been adequately demonstrated*.[23]

EPA's guideline document must "reflect[] the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated."[24] The crux of this requirement thus is that the emission reduction system be, in fact, adequately demonstrated.

Specifically with regard to coal plants, States and EPA have limited options in determining systems of CO_2 emission reduction that have been adequately demonstrated as achievable. EPA itself has acknowledged on several occasions that CCS would not qualify as a performance standard for existing coal plants. The only way to achieve cost-effective emission reductions for a coal generator would be to improve the efficiency of the unit, since increased efficiency translates into reduced CO_2 emissions per unit of electric output. Existing coal plants differ widely in terms of the combustion technologies they use, their ages, maintenance histories,

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[21] 40 C.F.R. § 60.24(b)(1).

[22] 40 C.F.R. § 60.27(c)-(d). The State of North Carolina, through the North Carolina Department of Environment and Natural Resources, recently submitted a policy paper entitled "North Carolina §111(d) Principles" to EPA. Given the certain litigation regarding Section 111(d), coupled with recent vacations by the D.C. Circuit and other courts of key EPA rules, North Carolina believes that "EPA should require each State to submit a §111(d) plan within three years following the expiration of the legal litigation process – a 'legal trigger approach.'" The Oklahoma Attorney General's Plan also advocates for this approach because it will protect States from allocating limited resources to comply with another rule that is ultimately vacated by the courts. *See* North Carolina Department of Environment and Natural Resources, *North Carolina §111(d) Principles*, at 14. (Jan. 27, 2014), *available at* http://www.ncair.org/rules/EGUs/NC_111d_Principles.pdf.

[23] 42 U.S.C. § 7411(a) (emphasis added).

[24] 40 C.F.R. § 60.22(b)(5).

and how they operate. There is no "one-size-fits-all" method of improving unit efficiency that would apply to all units in the coal fleet. As a result, CO_2 performance standards must be based on unit-by-unit evaluations of available cost-effective efficiency. This approach, which is grounded squarely in the language and history of the Section 111 program, would not require coal plants to retire or curtail operation; they would only require more efficient operation, to the extent it is cost-effective to do so.

EPA's current approach regarding CCS is cause for grave concern. In the recently proposed CO_2 NSPS for new sources, EPA contends that CCS technologies have been adequately demonstrated; however, this conclusion conflicts with existing law, specifically the Energy Policy Act of 2005 (EPAct). EPA maintains that CCS technologies for coal-fired power plants have been "adequately demonstrated" based on three government-funded projects receiving assistance under the Department of Energy's Clean Coal Power Initiative (CCPI) and a fourth project funded by the Canadian government. EPA Acting Assistant Administrator Janet McCabe confirmed the Agency's use of these projects as the basis for its determination at a November 14, 2013 hearing. The EPAct prohibits EPA from considering technology used at CCPI projects as being "adequately demonstrated" for purposes of Section 111(d). This legal issue was raised with EPA in a November 15, 2013 letter to Administrator McCarthy from Congressman Fred Upton (R-MI), the chairman of the House of Representatives Committee on Energy and Commerce, and other legislators; the committee leaders ultimately concluded that "[u]nder these provisions of the Energy Policy Act of 2005, EPA's consideration of CCPI projects to determine that CCS for coal-fired power plants is 'adequately demonstrated' is prohibited." The Office of Management and Budget within the Obama Administration raised similar concerns: "EPA's assertion of the technical feasibility of carbon capture relies heavily on literature reviews, pilot projects, and commercial facilities yet to operate. We believe this cannot form the basis of a finding that CCS on commercial-scale power plants is 'adequately demonstrated.'"[25]

A working group within EPA's Science Advisory Board (SAB) also raised concerns with EPA's conclusion that CCS has been adequately demonstrated.[26] The working group concluded "that the scientific and technical basis for carbon storage provisions is new science and the rulemaking would benefit from additional review"[27]; it necessarily follows that new science is

[25] EPA, *Summary of Interagency Working Comments on Draft Language under EO12866 Interagency Review*, at 9 (Aug. 19, 2013), *available at* http://www.eenews.net/assets/2014/02/04/document_daily_02.pdf. The Center for Regulatory Effectiveness has also raised concerns about compliance with the Data Quality Act. *See* Letter from Jim J. Tozzi, Center for Regulatory Effectiveness, to Administrator Gina McCarthy, EPA (Feb. 3, 2014), *available at* http://www.eenews.net/assets/2014/02/04/document_daily_01.pdf.

[26] Memorandum from SAB Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to Members of the Chartered SAB and SAB Liaisons, Nov. 12, 2013, *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf. The memorandum's findings regarding the existing basis for the conclusion that CCS has been adequately demonstrated as achievable is equally troubling: "The EPA has stated that U.S. Department of Energy National Energy Technology Laboratory (NETL) studies as well as existing EGUs under construction and in advanced stages of development were used as the basis for the BSER assumptions for new natural gas and coal fuel sources for new EGUs. EPA staff explained that the NETL studies were all peer reviewed and EPA did not conduct additional peer review(s). *However, based on additional information provided to the Work Group from NETL, the peer review appears to be inadequate*." *Id.* (emphasis added).

[27] *Id.*

not established science. In a recent meeting, however, an EPA official argued that CCS does not require SAB peer review because the proposed new NSPS rule *does not cover how CO2 emissions are stored* and instead the rule only covers the control technology. In other words, the CCS conclusion does not include the "storage" component of CCS. The notion that storage is not legally relevant to the NSPS is illogical.[28]

Natural gas is similarly threatened by EPA overreach regarding "adequately demonstrated" emission control technologies. If the EPA determines CCS is "adequately demonstrated" as achievable and the practical effect is the mass closure of coal plants, only natural gas emissions remain to achieve reductions to comply with Section 111(d). The unachievable technologies will influence the emission baseline that is set, and natural gas will be eliminated from the resource mix through the incremental reductions.

These significant concerns compel the proposal of the OKAG Plan framework. The proposed framework contemplates States and the EPA working together, but it also requires good faith and legal action on the part of the Agency. The issues discussed above, particularly the CCS adequate demonstration conclusion, merits further involvement of and discussion with the States and other stakeholders.

IV. The Kentucky Plan – State Cap and Trade

The Kentucky Plan is tethered to three improper premises, specifically that: (1) EPA effectively dictates performance standards; (2) allowance systems are permissible as an "emission standard"; and (3) fossil-fuel fired EGUs should account for the bulk of CO_2 emissions reduction. It amounts to express or de facto cap and trade. These deficiencies underscore the need for a unit-by-unit, State-driven plan like the OKAG Plan.

First, Section 111(d) implementing regulations provide that each State compliance plan shall include emission standards and compliance timelines, *as determined by each State*.[29] This is consistent with the text of Section 111(d) itself, which provides that States shall establish "standards of performance for any existing source …."[30] The Kentucky Plan misappropriates authority under Section 111(d) and precludes the extensive role and authority given to the States under Section 111(d).

Second, the Kentucky Plan makes clear that the "proposed framework sets a statewide mass-emission limit that could be the foundation for an allocation program." In other words, the mass-emissions model appears solely based on the use of an "allowance system" under the regulations. The regulatory definition of "emission standard" appears at 40 C.F.R. § 60.21(f) and includes the term "allowance system," and this term appears later in the implementing regulations at 40 C.F.R. § 60.24(b)(1). Notably, the term "allowance system" did not appear in these regulations when promulgated by EPA in 1975; rather, it was added 30 years later in 2005

[28] North Carolina raises similar concerns and "does not believe that CCS is 'adequately demonstrated' for purposes of 111(d)." It further states that "sound science, rather than speculation, should be relied upon to develop §111(d) emission guidelines and plans." *See* North Carolina Department of Environment and Natural Resources, *North Carolina §111(d) Principles*, at 12-13.
[29] 40 C.F.R. § 60.24(a)-(b)
[30] 42 U.S.C. § 7411(d)(1).

when EPA promulgated the Clean Air Mercury Rule (CAMR) because the CAMR featured a mercury allowance trading program.[31] The CAMR changes to these regulations included a new subparagraph (k) at 40 C.F.R. § 60.21, this established a new definition for the term "allowance system." However, the D.C. Circuit Court of Appeals vacated the CAMR regulations in 2008.[32] Despite the ruling, no change was made to the regulations until 2012 when EPA promulgated the MATS rule and removed the "allowance system" definition at 40 C.F.R. § 60.21(k).[33] While EPA purported to also be "revising" 40 C.F.R. § 60.21(f) and 40 C.F.R. § 60.24(b)(1) in the MATS rule, it did not remove the reference to "allowance systems" notwithstanding that the term's definition was removed from the regulations. Accordingly, reliance on an "allowance system" as a valid "emission standard" in a SIP is precarious at best and likely illegal, given the term was added through a rule vacated by the D.C. Circuit.

Commentators continue to promote "credit systems" and other regulatory models premised on the legality of allowance systems as Section 111(d) compliance mechanisms.[34] Absent from these proposals, with purpose as it nullifies the entire regulatory model, is the legislative history outlined above. Assuming for the sake of argument that allowance systems are permissible, there is reason to question the entire "market basis" of allowance system proposals in the first place – these are not markets in a traditional sense, but regulatory constructs without the Pareto outcomes of real markets. Furthermore, market-based systems cannot justify imposition of emission reduction requirements that are not "achievable" through "adequately demonstrated" systems of emission reduction. Any such emission guideline runs facially afoul of 40 C.F.R. § 60.22(5).

A recent NRDC proposal provides a relevant example of the impacts of such an "outside the fence" regulatory framework. NRDC's proposal is a CO_2 emissions cap for each state reflecting the level of total CO_2 emissions from all generation resources that would occur if EPA imposed an emission limit of 1,500 lb CO_2/MWh on all generators. Since that level of emissions is unachievable at an individual coal plant, for example (most existing units emit greater than 2,000 lb/MWh), the only means through which a state could demonstrate compliance with the cap would be to decrease the use of coal plants and increase the use of other resources. As the emissions caps ratchet downwards, *all generation resources with targetable emissions* are at risk, including natural gas. This proposal contradicts the language and history of Section 111(d). A further perversion of this model would be the ultimate squeeze put on states that are natural gas-fired centric in generation. If coal is eliminated, a given state's CO_2 "budget" can only be met by the retirement or carbon capture of natural gas-fired assets.

Third, the Kentucky Plan provides that "[e]ach major GHG emissions sector will contribute proportionately to any overall emissions reduction strategy." This notion is neither developed nor supported; rather, the plan states that CO_2 from the transportation sector will be handled through Corporate Average Fuel Economy Standards and "[p]roportionate GHG emissions from other non-electric generating unit (EGU) emitting sources will be handled under

[31] 70 Fed. Reg. 28,606, 28,649 (May 18, 2005).
[32] *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008).
[33] 77 Fed. Reg. 9304, 9447 (Feb. 16, 2012).
[34] *See, e.g.*, Steven Michel, *A State Model CO2 Emissions Standard for Power Plants*, THE ELECTRICITY JOURNAL (2013).

other EPA-proposed regulations." These latter regulations are not specified. Kentucky uses this unsupported conclusion to justify placing the entire burden of CO_2 emission reduction on EGUs, specifically coal-fired and natural gas-fired generation. Because this means, in practice, that the *entire* CO_2 reduction from a given state must come from only a portion of its CO_2 emitters, namely, power plants, it follows that the cost and regulatory burden of Section 111(d) disproportionately affects the electric sector and rates. As discussed, no fossil fuel is safe under the Kentucky Plan because the reduction targets increase over time – 17% in 2020, 28% in 2025, and 38% in 2030. Once coal-fired generation is taken off-line, the natural gas plants will be targeted next to achieve these reductions.

V. The OKAG Plan

The OKAG Plan avoids the pitfalls outlined above and instead tracks Section 111(d) and its implementing regulations. It keeps the EPA function ministerial in reviewing submitted SIPs and tied to procedure, *i.e.* promulgating emission guidelines, unless and until a State fails to submit an adequate SIP.[35]

Beyond its basis in law, the OKAG Plan recognizes and accounts for the practical reality that air quality impacts differ from State to State, as do costs and opportunities for CO_2 emission reductions. With the OKAG Plan, the resource planning function is *not* usurped by an allocation system or CO_2 budget and instead remains where it belongs – "inside the fence" in the hands of state regulators with specialized expertise and a focus on ratepayer impacts and protection of the public interest. Furthermore, the "inside the fence" model ensures that emissions reductions are limited to the engineering limits of each facility. The OKAG Plan preserves State primacy and does not turn over management of local generation fleets to EPA under the guise of "flexibility."

The OKAG Plan is simple and contemplates the following approach:

- ***State involvement throughout the Section 111(d) process.*** States have a role and input in EPA's promulgation of emission guidelines *before and after* the draft guidelines are published. State officials have detailed knowledge about their respective generation fleets and EPA benefits from taking this into account in the guideline drafting process. This contemplates incorporating the input of *all interested States* – not just States whose leadership shares the same vision of EPA and the Obama Administration.

- ***Unit-by-unit analyses***. Each State will undertake a unit-by-unit analysis to determine achievable and legally enforceable emission standards and compliance schedules that do not require New Source Review. States will not, as in the Kentucky Plan, set an arbitrary emission baseline and haphazard reduction percentages that dictate all subsequent resource planning decisions. The analysis will instead relate directly to the nature and characteristics of the generation fleet.

- ***Promulgation of appropriate "inside the fence" measures.*** Each State will determine appropriate "inside the fence" measures, and ensure that the practical effect of any

[35] *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012).

emission guideline is not mandating a best system of emission reduction that completely transforms a generating unit into a different source category.

- ***Consideration of the remaining useful life of existing sources***. Each State may consider the remaining useful life of an existing source and other factors in determining and implementing a performance standard. EPA is required by statute to allow for this consideration. The remaining useful life may, under certain circumstances, justify a regulatory exclusion or application of a less stringent standard of performance.

- ***Consideration of each State's unique economic and environmental attributes.*** This model and its individualized, deferential approach allows States to plan and compensate for varying circumstances and factors that face the generation sector and ratepayers in each State.

- ***Consistency with Section 111(d) and the contemplated regulatory scheme.*** The OKAG Plan, is consistent with Section 111(d) and its implementing regulations. States are left to make, without limitation, the following decisions based on a detailed and exhaustive "inside the fence" analysis:

    - States may prescribe, on a case-by-case basis for particular designated facilities or classes of facilities, less stringent emission standards based upon (1) unreasonable cost of control; (2) physical impossibility; and (3) other factors specific to the facility.[36]
    - States, where appropriate, may defer select decision-making to local jurisdictions provided the emission standards are enforceable by the State.[37]
    - States may extend any individual unit's compliance schedule more than 12 months after SIP submittal so long as the SIP included legally-enforceable increments of progress.[38]
    - States may formulate compliance schedules after plan submittal for individual sources or categories of sources.[39]
    - States may adopt more stringent emission standards or require final compliance at earlier times.[40]

In sum, the State discretion inherent in the Section 111(d) regulatory scheme and State primacy principle demand a unit-by-unit, "inside the fence" analysis to make all of the determinations and exercise the authority conferred by Section 111(d). The OKAG Plan reflects the plain fact that States, not EPA or the Obama Administration, are in the best position to exercise Section 111(d) authority in the best interest of citizens and to balance relevant factors including costs, which will ultimately be paid by local citizens and businesses. If EPA, in recognition of its narrow Section 111(d) authority, were to embrace the OKAG Plan, the Agency may be surprised by the aptitude of the States. The OKAG Plan's "inside the fence" model

[36] 40 C.F.R. § 60.24(f).
[37] 40 C.F.R. §§ 60.24(b)(3), 60.26(e).
[38] 40 C.F.R. § 60.24(e)(1).
[39] 40 C.F.R. § 60.24(e)(2).
[40] 40 C.F.R. § 60.24(g).

would result in States serving as incubators for diverse, *achievable* CO_2 reduction strategies that can be implemented on a unit-by-unit basis in a cost-effective manner without ruinous economic consequences. Further, the OKAG Plan does not take a major policy and political issue, the imperative and timing of reductions in CO_2 emissions, and delegate it to the arcane and obscure workings of a regulatory process into which the public has little input. An anti-carbon agenda should not be forced upon the public through executive or administrative fiat.[41]

VI. Conclusion

EPA's approach to Section 111(d) regulation raises serious concerns. EPA's aggressive course of action with regard to new sources indicates a similarly aggressive approach to existing sources. While EPA is authorized to require States to submit SIPs containing performance standards, EPA may not dictate those performance standards. Nor may EPA attempt to force States to adopt performance standards that are not based on adequately demonstrated technology or that mandate, in the guise of "flexible approaches," the retirement or reduced operation of still-viable coal-based EGUs and subsequent curtailment and elimination of natural gas-fired generation as well.

These concerns are serious as EPA overreach under Section 111(d) may harm the developing economic recovery. Moreover, the federalist system of government, as set forth in the CAA, requires that EPA recognize the rights and prerogatives of States. The OKAG Plan, led by States "inside the fence" rather than EPA in the form of an artificially created CO_2 budget, recognizes those State rights.. It does not rely on a dubious allowance system or pin its legitimacy and achievability on EPA's disputed, even by its own SAB, determination that CCS is adequately demonstrated as achievable at this time. The CCS determination is technically and legally specious.

The fundamental principle underlying the OKAG Plan does not implicate complicated CO_2 trading systems – it simply complies with Section 111(d) and gives States the authority and discretion they are entitled to under the CAA. States serve in the primary role under the proposed framework and devise and control the destiny of their own generating systems, as well as the associated impacts on ratepayers and citizens.

[41] The emissions reductions achievable through an "inside the fence" approach, even if *numerically* less than an "outside the fence" approach, are sound from a policy perspective. Due to other EPA regulations, there are numerous EGUs, primarily older and less efficient, that are already either retired or committed to be retired. If further emission reductions are mandated, then emission reductions would be achieved from newer and more efficient units. These latter forced retirements are inequitable and compromise system reliability.

Exhibit A11

Oklahoma Attorney General E. Scott Pruitt

May 21, 2014 ·

States have a vested interest in protecting the air and water, and they have the experience, expertise, and ability to regulate these issues. Cooperative federalism empowers states by letting them lead the way in addressing these issues. The Oklahoma Attorney General's Plan provides the states the ability to make necessary policy judgments in order to address carbon dioxide emissions standards.

This approach preserves state primacy and does not turn over management of local power generation fleets to the EPA. The Oklahoma Attorney General's Plan keeps resource planning in the hands of state regulators with specialized expertise and a focus on ratepayer impacts and protection of the public interest.

"Oklahoma Attorney General's Plan" Offers State-Focused Framework for Power Plant Emissions Standard

WASHINGTON D.C. –Oklahoma Attorney General...

OK.GOV

Exhibit A12

Scott Pruitt

May 22, 2014 ·

From a recent Washington Post article on why I am fighting the EPA.

...Other states are resisting the EPA plan. Oklahoma Attorney General E. Scott Pruitt, for example, argued at the National Press Club on Tuesday that the Clean Air Act gives states the power to determine what pollution standards should be and how to achieve them. Only later, he said, can the EPA reject a state's plan and impose its own, so the EPA's task now is to design a procedure and general emissions guidelines.

"I find it offensive that the EPA feels regulators in states are not interested in air quality or pollution," he said. And he said that the EPA has a "dictatorial attitude that as long as you agree with us, everything is kosher."

EPA readies climate rule for existing power plants

New policy would allow states and companies flexibility in how they will meet emissions standards.

WASHINGTONPOST.COM

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Exhibit A13

Scott Pruitt
@ScottPruittOK

Follow

#EPAATITAGAIN Why I am fighting the EPA, again. Let's stick to the Clean Air Act.

EPA readies climate rule for existing power plants

New policy would allow states and companies flexibility in how they will meet emissions standards.

washingtonpost.com

5:03 PM - 22 May 2014

Exhibit A14

Scott Pruitt

May 29, 2014 ·

http://dailycaller.com/…/ag-epas-cap-and-trade-scheme-woul…/

AG: EPA's 'Cap-And-Trade Scheme' Would Violate The Clean Air Act

The Environmental Protection Agency's upcoming climate rule that would push policies like cap and trade violates the Clean Air Act and will be challenged in…

DAILYCALLER.COM

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Exhibit A15

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA,
STATE OF ALABAMA,
STATE OF INDIANA, STATE OF KANSAS,
COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA,
STATE OF NEBRASKA,
STATE OF OHIO, STATE OF
OKLAHOMA, STATE OF
SOUTH CAROLINA, STATE OF
SOUTH DAKOTA, and
STATE OF WYOMING

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

PETITION FOR REVIEW

Case No. ~~14-1146~~

The States of West Virginia, Alabama, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, South Carolina, and Wyoming, and the Commonwealth of Kentucky, respectfully petition this Court, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and the Clean Air Act, 42 U.S.C. § 7401 *et seq.* ("CAA"), for review of a final settlement agreement pursuant to which United States Environmental Protection Agency ("EPA") committed to proposing and then finalizing a rule requiring States to regulate existing coal-fired

power plants under Section 111(d) of the CAA, *see* 42 U.S.C. § 7411(d). The settlement agreement is between EPA and various non-party States, governmental entities and private organizations who had threatened litigation against the agency. EPA published a notice of the proposed settlement agreement on December 30, 2010. *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010). Following a notice and comment period, the settlement agreement was approved as final by EPA on March 2, 2011. *See* Memorandum from Scott Jordan, Air and Radiation Law Office, to Scott C. Fulton, General Counsel (March 2, 2011). On June 13, 2011, EPA modified the settlement agreement to change certain suggested dates for EPA's actions, without otherwise altering EPA's commitment to propose and then to finalize a Section 111(d) existing coal-fired power plants rule. This Court has jurisdiction over final actions of EPA pursuant to the CAA, § 307(b)(1), 42 U.S.C § 7607(b)(1).

The present petition is, at a minimum, timely under the Clean Air Act's statutory after-arising-ripeness exception. The CAA requires a petition for review to be brought "within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." 42 U.S.C. § 7607(b)(1). The CAA specifically recognizes an exception to the 60-day requirement for claims that are "based solely" on grounds that occur after the 60-day period. *Id.* This Court has held that under this statutory exception, a party may bring a challenge to a final agency action within 60 days of an "occurrence of an event that ripens a

claim." *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 129 (D.C. Cir. 2012), *aff'd in part and vacated in part on other grounds by Utility Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

Petitioners' claim challenging the legality of the settlement agreement ripened, for purposes of the exception, when EPA declared its final position that it has legal authority to propose and adopt a rule under Section 111(d) regarding coal-fired power plants notwithstanding intervening events that have rendered such a rule clearly unlawful. On June 11, 2011, the Supreme Court explained that "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, § 7411(d) [Section 112]." *Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). Then, on February 16, 2012, EPA finalized Section 112 regulations on "stationary sources" that included coal-fired power plants. *See* 77 Fed. Reg. 9,304 (Feb. 16, 2012). Notwithstanding the fact that these developments had rendered any Section 111(d) coal-fired power plants rule plainly unlawful, on June 2, 2014, EPA issued a legal memorandum explaining that EPA had determined that it retains the legal authority to issue just such a Section 111(d) rule.[1] Consistent with

[1] EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* ("Legal Memorandum" or "Mem."), *available at* http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf.

this legal memorandum and the settlement, on June 18, 2014, EPA announced in the Federal Register a proposed rule regarding coal-fired power plants under Section 111(d).[2]

In light of these developments, both elements of ripeness are now satisfied. It was not until EPA's announcement of its flawed view of its Section 111(d) authority that the "fitness of the issues" that Petitioners seek to raise against the legality of the settlement became ripe "for judicial resolution." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). In addition, the "hardship to the parties of withholding court consideration" now would be substantial because without this Court's prompt intervention, Petitioners will be forced to undertake burdensome measures in the coming months to meet the demands of the unlawful rule that EPA committed to proposing and then finalizing under the settlement agreement. *Id.*

Petitioners ask this Court: (1) to hold the settlement agreement unlawful to the extent that the settlement commits EPA to proposing a coal-fired power plant rule under Section 111(d); (2) to hold the settlement agreement unlawful to the extent that the settlement commits EPA to finalizing a coal-fired power plant rule under Section 111(d); (3) to enjoin EPA from complying with the settlement agreement by continuing the present ongoing comment period regarding EPA's

[2] 79 Fed. Reg. 34,830 (June 18, 2014).

proposed coal-fired power plants rule under Section 111(d); (4) to enjoin EPA from complying with the settlement agreement by finalizing a coal-fired power plants rule under Section 111(d); (5) to vacate the settlement agreement in relevant part; and (6) to grant such other relief as this Court deems appropriate.

Dated: July 31, 2014

Respectfully submitted,

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Exhibit A16

Scott Pruitt

August 7, 2014 ·

Our lawsuit is about holding the EPA accountable to following the environmental statutes as passed by congress.

Oklahoma will continue to challenge the EPA - or any other federal agency - when it takes actions that undermine our system and the rule of law.

http://dailycaller.com/…/twelve-states-sue-obama-administr…/

Twelve States Sue Obama Administration Over Carbon Dioxide Regulations

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Exhibit A17

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August 25, 2014

Via Certified Mail and Regulations.gov
The Honorable Gina McCarthy
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U.S. Environment Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: Request for Withdrawal (EPA-HQ-OAR-2013-0602 and EPA-HQ-OAR-2013-0603)

Dear Administrator McCarthy:

This letter concerns the failure of the Environmental Protection Agency ("EPA") to include required and critical information in the regulatory dockets of two recent proposed rules: the *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units* ("Existing Source Rule")[1] and the *Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units* ("Modified Sources Rule")[2] (together, "Proposed Rules"). By failing to include in the dockets key materials on which the agency relies as support for the Proposed Rules, EPA has violated Section 307(d) of the Clean Air Act ("CAA") (codified at 42 U.S.C. § 7607(d)). Both the Existing Source Rule and the Modified Sources Rule must thus be withdrawn.

Section 307(d) of the CAA imposes certain mandatory requirements for all proposed rules, which reflect Congress's judgment that information on which a proposed rule is based must be made available to the public at the time of proposal to ensure meaningful comment and sound rulemaking. Upon publication, a proposal must include a "statement of basis and purpose . . . [which] shall include a summary of . . . the factual data on which the proposed rule is based[,] . . . the methodology used in obtaining the data and in analyzing the data[,] and . . . the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d). Section 307(d) further requires that "*[a]ll data, information, and documents* . . . on

[1] 79 Fed. Reg. 34,830 (June 18, 2014).
[2] 79 Fed. Reg. 34,960 (June 18, 2014).

which the proposed rule relies shall be included in the docket *on the date of publication* of the proposed rule." *Id.* (emphases added). These docketing requirements are nondiscretionary. *See Union Oil Co. v. EPA*, 821 F.2d 678, 681-82 (D.C. Cir. 1987). Finalizing a rule without providing parties with the technical information necessary for meaningful comment renders the final rule unlawful. *See Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). Nor can the problem be cured by late docketing of the required data, as such late docketing does not permit the public with sufficient time for meaningful review and comment. *See Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 540 (D.C. Cir. 1983); *Sierra Club v. Costle*, 657 F.2d 298, 398 (D.C. Cir. 1981).

In the Existing Source Rule and the Modified Sources Rule, EPA has repeatedly violated Section 307's unambiguous requirements:

In the Existing Source Rule, EPA omitted from the docket 84% of the modeling runs on which it relied in crafting the proposed Rule, without which the States and the public cannot comment meaningfully on the proposal. Specifically, the docket does not include 21 out of 25 of the Integrated Planning Model modeling runs that the agency used to justify the standards imposed by the Rule. The missing modeling runs cover projections for 2016, 2018, 2020, 2025 and 2030. This information is critical to assessing EPA's claims that States and industry will be able to comply with the four "building blocks" in the proposed Existing Source Rule. The States need the modeling run data for sufficient analysis of what that data shows on a unit by unit and state by state basis.

Similarly, EPA failed to include in the Existing Source Rule's docket vital net heat rate and emissions data, which are central to EPA's assertion that existing power plants are able to achieve a four to six percent heat rate improvement under EPA's first "building block." For example, EPA claims in the proposed Existing Source Rule to have reviewed its database of existing coal-fired units and found 16 facilities that have achieved heat rate improvements of three to eight percent "year-to-year,"[3] but it does not include any supporting data. Without the "year-to-year" data showing that facilities can comply with the four to six percent heat rate improvement, the States and the public cannot meaningfully comment on the achievability of EPA's heat rate projections.

In the Modified Sources Rule, EPA has completely failed to include *any technical information to support its proposed standard* for modified Subpart Da units or for the proposed standards for either modified or reconstructed Subpart KKKK units. For instance, the preamble to the Modified Source Rule references a technical support document, "Standard of Performance of Natural Gas-Fired Combustion Turbines," which it says is available in the docket. *See* 79 Fed. Reg. at 34,990 n.94. But that document is not available on the docket. Without such missing data and related materials, States and the public cannot properly determine the basis on which EPA claims that these emission standards are achievable and reasonable.

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[3] EPA, GHG Abatement Measures, Technical Support Document ("TSD") for *Carbon Pollution Guidelines for Existing Power Plants: Emission Guidelines for Greenhouse Gas Emissions from Existing Stationary Sources: Electric Generating Units*, at 2-32 (EPA-HQ-2013-0602) (June 10, 2014).

All told, the missing information unquestionably constitutes "data, information and documents," and likely contains "policy considerations underlying the proposed rule" that should have been in the rulemaking dockets from the beginning, according to Section 307(d). Deprived of this missing information, the notices of proposed rulemaking published on June 18 "fail[ed] to provide an accurate picture of the reasoning that has led [EPA] to the proposed rule." *Conn. Light*, 673 F.2d at 530. This is particularly problematic where, as here, the proposals seek to overhaul the existing electric generating sector on an unprecedented scale. *See Maryland v. E.P.A.*, 530 F.2d 215, 222 (4th Cir. 1975) (vacating rule due to EPA's failure to comply with notice and comment requirements, emphasizing the "drastic impact" that compliance with rule would have), *vacated on other grounds*, 431 U.S. 99 (1977).

In light of these clear violations of Section 307, EPA should withdraw the Existing Source Rule and the Modified Sources Rule immediately. With regard to the proposed Existing Source Rule, that Rule is wholly unlawful on other grounds and therefore may not be re-proposed at all, even if EPA were to compile the data and documents required by Section 307. *See* Letter from Patrick Morrisey, Attorney General of West Virginia, to Gina McCarthy, Administrator, EPA (June 6, 2014); *State of West Virginia, et al. v. EPA*, No. 14-1146 (D.C. Cir.); *In re Murray Energy Corporation*, No. 14-1112 (D.C. Cir.). As to the proposed Modified Sources Rule, the comment deadline on that rule is October 16, 2014 and is thus fast approaching. The undersigned States therefore request that if EPA wishes to press forward with the Modified Sources Rule, EPA should withdraw that Rule and re-propose it with all the supporting documents and data required by Section 307. EPA should then provide 120 days from the re-proposal date to provide sufficient time for States and the public to review and comment. Alternatively, EPA should—at a minimum—publish the missing data immediately and then extend the comment period 120 days from the date of such publication.

Sincerely,

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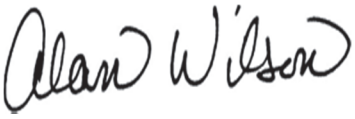

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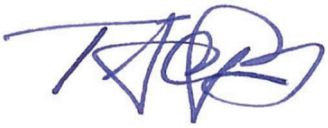

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