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August 25, 2014

Via Certified Mail and Regulations.gov

The Honorable Gina McCarthy
Administrator
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 Both the Existing Source Rule and the Modified Sources Rule must thus be withdrawn.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.

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).

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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 Morrissey, 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,



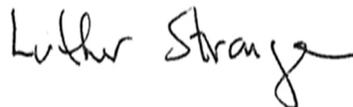
Patrick Morrissey
West Virginia Attorney General



Jon Bruning
Nebraska Attorney General



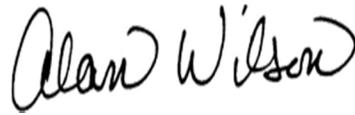
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