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January 12, 2018

The Honorable E. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments relating to “Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” (82 FR 48035; Docket ID: EPA-HQ-OAR-2015-0355)

Dear Administrator Pruitt,

On behalf of the Commonwealth of Kentucky, the Energy and Environment Cabinet (Cabinet) submits the following comments relating to EPA's proposed repeal of carbon pollution emission guidelines for existing electric utility generating units referenced above. In addition to this cover letter, the Cabinet is providing comments in the enclosure specific to the proposed rulemaking.

The Cabinet supports EPA's proposal to repeal the Clean Power Plan (CPP). Specifically, the Cabinet agrees with EPA's change to the legal interpretation for the basis of the Clean Power Plan as applied to Section 111(d) of the Clean Air Act (CAA) to an interpretation that "...is consistent with the CAA's text, context, structure, purpose, and legislative history."¹ Previous comments provided by the Cabinet expressed concerns with EPA's former approach to require emissions reductions "beyond the fence" and questioned whether such a novel approach to the CAA is appropriate. The Cabinet's aforementioned comments are consistent with EPA's proposed repeal of the CPP and the current legal rationale of Section 111(d) included in the Federal Register notice.

Legally, the Cabinet agrees it is reasonable for EPA to repeal this regulation. Numerous stakeholders, including the Cabinet, articulated concerns regarding the legality of the rule during notice-and-comment rulemaking. Further, the U.S. Supreme Court took the historic step of staying the effectiveness of the rule pending litigation – litigation in which this legal argument is under active consideration. Consistently voiced and well-reasoned legal arguments showing the illegality of a rule provide a sufficient basis for its repeal.

¹ 82 FR 48036

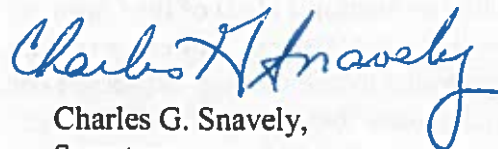
Without question, an agency has the authority to repeal its own regulations.² However, “[a]n agency's power to revoke its regulations is not unlimited - such action must be neither arbitrary nor unreasonable.”³ Considering that EPA concurred in this analysis required by Executive Order 13783⁴ prior to the culmination of the litigation speaks to the validity of those legal arguments.

The Cabinet also notes that the final CPP rule bears no resemblance to the proposed rule, is not a logical outgrowth of the proposed rule, and violates rulemaking procedures. While the Obama Administration's proposed rule was based on implementing emission reductions within each state, the final rule was premised on nationally uniform emission rates for coal- and natural gas-fired plants.⁵ Specifically for Kentucky, EPA's proposed rule set a goal of 1,763 lbs CO₂ per Megawatt (lb CO₂/MWhr) or a total mass rate of 77 million tons of CO₂; whereas, EPA's final rule set a CPP emission limits of 1,286 lbs CO₂/MWhr or a total mass rate of 63 million tons of CO₂. The Cabinet found EPA's methodology and process for setting the final goals of the CPP to be arbitrary and capricious.

In reality, emissions of CO₂ from Kentucky electric generating units are steeply declining and on the path to meet the goals set by the CPP.⁶ As explained by the Congressional Research Service, “This observed decline in annual CO₂ emissions from the electric power sector is 77% of the reductions that EPA projected would occur as a result of the CPP.”⁷ Market forces are responsible for the decline and the potential unintended consequences to the CAA resulting from the CPP are unnecessary and should be avoided.

In conclusion, the Cabinet supports the proposed repeal of carbon pollution emission guidelines for electric utility generating units. Your consideration of this letter and comments is greatly appreciated. If you have any questions relating to the enclosed comments, please contact me at your earliest convenience.

Sincerely,



Charles G. Snaveley,
Secretary

Enclosure:

² *U.S. Lines, Inc. v. Federal Maritime Commission*, 584 F.2d. 519, 526 n. 20 (D.C. Circ. 1978)

³ *Nader v. Bork*, 366 F.Supp. 104, 108 (D.D.C. 1973)

⁴ 82 FR 48038

⁵ 82 FR 48037

⁶ Kentucky CO₂ emissions from electric generating units declined by 21% in 2016 compared to 2005 emission rates

⁷ Congressional Research Service, 7-5700, www.crs.gov, R44992

Kentucky Energy and Environment Cabinet Comments Regarding EPA's Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Docket ID No. EPA-HQ-OAR-2017-0355)

Executive Summary

On behalf of the Commonwealth of Kentucky, the Energy and Environment Cabinet (Cabinet) offers comments of support for the U.S. Environmental Protection Agency to finalize the proposed "*Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units*."¹ Throughout the promulgation process of the Clean Power Plan, the Cabinet expressed concerns regarding the legality of the rule and whether EPA exceeded its statutory authority. The Cabinet also questioned the technical feasibility of existing sources' ability to achieve standards established by the Clean Power Plan.

The Cabinet agrees with EPA's current legal interpretation in the proposal that the Clean Power Plan exceeds its statutory authority established under Section 111(d) of the Clean Air Act. Additionally, the Cabinet supports EPA's proposed change in the legal interpretation of the application of Section 111(d) of the Clean Air Act to be consistent with the statutory "...text, context, structure, purpose, and legislative history, as well as with the Agency's historical understanding and exercise of its statutory authority."

Previous comments submitted by the Cabinet detailed concerns with EPA's approach to regulate emissions "beyond the fence" and questioned whether such a novel approach is appropriate.² The Clean Power Plan's radical departure from historic application of the "best system of emission reduction" sets a dangerous precedent. The Cabinet supports EPA's proposal to interpret the "best system of emission reduction" consistently by considering only measures that can be applied to or at the source.

Without question, an agency has the authority to repeal its own regulations. However, "[a]n agency's power to revoke its regulations is not unlimited - such an action must be neither arbitrary nor unreasonable."³ Considering the fact that 27 states challenged the legality of the Clean Power Plan, it is not arbitrary nor unreasonable for EPA to repeal the rule. In fact, the Supreme Court's unprecedented stay⁴ of the Clean Power Plan prior to the culmination of litigation merely speaks to the correctness of those legal arguments.

It should also be noted that EPA's final Clean Power Plan rule changed dramatically from the proposed rulemaking. The significant revisions directly affected the Clean Power Plan emission standards and were of central relevance to the outcome of the rule. Due to the unanticipated deviations from its proposal, EPA made it "impracticable," if not impossible, for the Cabinet to raise objections during the public comment period. The Cabinet concludes the final Clean Power

¹ 82 FR 48035

² [November 26, 2014 letter to Administrator McCarthy](#)

³ Nader v. Bork, 366 F.Supp. 104, 108 (D.D.C. 1973)

⁴ West Virginia v. EPA, No. 15A773 (U.S. February 9, 2016)

Plan rule bears no resemblance to the proposed rule, is not a logical outgrowth of the public comment process, and violates rulemaking procedures.

For these reasons, the Cabinet requests EPA to finalize its proposal to repeal the Clean Power Plan.

I. Introduction

In the Federal Register published October 16, 2017, the United States Environmental Protection Agency (EPA) proposes to repeal the Clean Power Plan (CPP) issued under the Clean Air Act (CAA) and proposes a change to the legal interpretation for which the CPP was based upon.⁵ The Federal Register notice explains that EPA proposes an interpretation that "...is consistent with the CAA's text, context, structure, purpose, and legislative history, as well as with the Agency's historical understanding and exercise its statutory authority."⁶ EPA's rationale for the proposed repeal centers on the statutory authority established under Section 111(d) of the CAA and whether the CPP exceeds the statutory authority. The Cabinet concurs with EPA's rationale and requests EPA to finalize its proposal to repeal the Clean Power Plan.

Additionally, EPA requests comments on whether it should repeal the legal memoranda issued during the promulgation of the CPP. EPA under the previous administration issued the two documents, "Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units" (in the docket for the proposed rule) and "Legal Memorandum Accompanying Clean Power Plan for Certain Issues" (a supplementary document in the docket for the final rule), to address legal vulnerabilities with the CPP and to prepare for anticipated litigation. The Cabinet concurs with EPA's assessment that the legal underpinnings of the memoranda serving as the foundation of the CPP improperly expand the statutory authority under Section 111(d) of the CAA.

Detailed reasons why EPA must rescind the CPP and legal memoranda are provided in **Section V. Legal and Technical Reasons for Repeal.**

II. Authority to Repeal

As explained in the Federal Register notice, an agency has the authority to reconsider⁷ and the courts have affirmed an agency's authority repeal its own regulations.⁸ However, "[a]n agency's power to revoke its regulations is not unlimited - such action must be neither arbitrary nor unreasonable."⁹

It is reasonable for the EPA to repeal this regulation, the CPP. Numerous stakeholders, including the Cabinet, articulated concerns regarding the legality of the rule during notice-and-comment rulemaking. Further, the U.S. Supreme Court took the historic step of staying the

⁵ 82 FR 48035

⁶ 82 FR 48036

⁷ 82 FR 48039

⁸ U.S. Lines, Inc. v. Federal Maritime Commission, 584 F.2d. 519, 526 n. 20 (D.C. Circ. 1978)

⁹ Nader v. Bork, 366 F.Supp. 104, 108 (D.D.C. 1973)

effectiveness of the rule pending litigation¹⁰ – litigation in which this legal argument is under active consideration. Consistently voiced and well-reasoned legal arguments supporting the illegality of a rule provide a sufficient basis for its repeal. That fact that the Executive Branch concurred in this analysis¹¹ prior to the culmination of the litigation merely speaks to the validity of those legal arguments.

Once EPA finalized the rule, legal challenges were immediately filed. On January 21, 2016, the Cabinet petitioned EPA to reconsider the rule.¹² The Cabinet's request expressed concerns with the legality of the rule and whether the rulemaking process followed the American Procedures Act. In addition to the Cabinet, 26 other states along with a number of other parties petitioned the United States Court of Appeals for the District of Columbia.¹³ In an unprecedented move, the Supreme Court stayed implementation of the CPP pending disposition of the challenge by the courts.¹⁴ The Supreme Court's stay of the effectiveness of the rule evinces an acknowledgment of the legal deficiencies of the CPP and its inability to withstand legal challenge.

III. Proposed Rescission of the Previous Legal Memoranda

When proposing the CPP, EPA included a “Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units” in the docket to justify the appropriateness of issuing the rule under Section 111(d) of the CAA. However, EPA issued a revision titled “Legal Memorandum Accompanying Clean Power Plan for Certain Issues” to address specific issues raised during public comment process and included the revised legal memorandum in the docket of the final rule. Detailed comments related to the reasons EPA must rescind the legal memoranda are provided in **Section V. Legal and Technical Reasons for Repeal**. Due to the inconsistent statutory interpretations established by the two legal memoranda, the Cabinet requests that EPA rescind both documents.

IV. Background of the Clean Power Plan under Section 111(d)

By virtue of its title and content, Section 111(d) of the Clean Air Act establishes "Standards of performance for existing sources" and considers the "remaining useful life of source."¹⁵ Section 111(d) requires the EPA administrator to prescribe regulations and create a procedure for each state to submit a plan that establishes standards of performance for any "existing" source emitting an air pollutant not subject to a national ambient air quality standard. The regulatory requirements pursuant to Section 111(d) should be similar to State Implementation Plan requirements

Initially, EPA proposed new source performance standards for greenhouse gas emissions from electric utility generating units on April 13, 2012.¹⁶ In response, the Cabinet provided EPA

¹⁰ West Virginia v. EPA, No. 15A773 (U.S. February 9, 2016)

¹¹ Executive Order 13783

¹² December 21, 2015 letter to Administrator McCarthy

¹³ 82 FR 48037

¹⁴ West Virginia v. EPA, No. 15A773 (U.S. February 9, 2016)

¹⁵ 42 U.S.C. 7411

¹⁶ 77 FR 22392

with comments focused on the lack of statutory authority and inappropriate emission standards through a letter dated June 25, 2012.¹⁷

Due to receiving more than 2.5 million comments and new information specific to the best system of emission reduction, EPA announced a notice of withdrawal of the proposed rule on September 20, 2013. At the same time, EPA also proposed emission limits for new large natural gas-fired turbines, small natural gas-fired turbines, and coal-fired units.¹⁸

On January 8, 2014, the proposed new source performance standards to limit CO₂ emissions from electric generating units were published in the Federal Register.¹⁹ The Cabinet provided extensive adverse comments on the proposed rule on April 22, 2014.²⁰ In its comments, the Cabinet detailed the fact that EPA set unachievable standards for new coal-fired electric generating units and established relaxed standards for new natural gas-fired electric generating units that would not meet the definition of the "best available control technology." EPA did not finalize the Section 111(b) standards for new sources until October 23, 2015,²¹ and at the same time that the emission standards for existing sources were finalized.²²

A standard of performance for existing sources is predicated on EPA establishing a standard of performance for "new" sources under Section 111(b) of the CAA.²³ After proposing the standards for "new" sources on January 8, 2014, EPA published CO₂ emission standards for existing sources on June 18, 2014.²⁴ The proposed rule, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, provided EPA's framework for regulating greenhouse gases from existing electric generating units under Section 111(d) of the CAA. On November 26, 2014, the Cabinet once again submitted thorough technical comments, expressing concerns with EPA's regulatory approach to establishing emission targets.²⁵

A state plan should provide for the implementation and enforcement of standards established for the existing sources subject to the plan. Generally, implementation and enforcement of the standards is carried out through regulation. In Kentucky, state plan requirements under the CPP are governed by state statutes, specifically KRS 224.20-140 through 146.

As a state develops a Section 111(d) plan, EPA must allow a state to consider the "remaining useful life" of a source when applying a standard of performance to a particular source.

¹⁷ [June 25, 2012 letter to Administrator Jackson](#)

¹⁸ September 20, 2013, Press Release: "EPA Proposes Carbon Pollution Standards for New Power Plants/Agency takes important step to reduce carbon pollution from power plants as part of President Obama's Climate Action Plan"

¹⁹ 79 FR 1430

²⁰ [Docket ID No. EPA-HQ-OAR-2013-0495](#)

²¹ 80 FR 64510

²² 80 FR 64662

²³ 79 FR 1496

²⁴ 79 FR 34830

²⁵ [November 26, 2014 letter to Administrator McCarthy](#)

EPA shall also permit a state to consider "other factors" in setting the standards of performance for existing sources. EPA's final CPP rule failed to allow states to consider the "remaining useful life" in setting the final state plan emission standards.

Over the years, EPA has issued hundreds of performance standards for new sources in a particular source category under Section 111(b) of the CAA. However prior to the CPP, EPA only issued a handful of emission guidelines for the corresponding "existing" sources in the same source category.²⁶ For those sources subject to a Section 111(d) standard, the emission limitations and standards have been applied directly to the emissions units, or "inside the fence."

If a state fails to submit a satisfactory plan, the Administrator shall prescribe a state plan and take into account the useful remaining lives, among other factors, of the applicable existing sources. On October 23, 2015, EPA also issued the proposed "Federal Plan Requirements for Greenhouse Gas Emissions from Electric Generating Units"²⁷ as a federal backstop to state plans found to be inadequate.

To comply with the emission guidelines of the Clean Power Plan, EPA proposed the emission rates for each state based on its capacity to achieve reductions using the four "building blocks." EPA's building blocks are summarized as follows:

1. Improving the efficiency of coal-fired plants;
2. Substituting generation from coal-fired and oil/gas-fired plants with generation from existing natural gas combined-cycle (NGCC) units;
3. Increasing generation from renewable and nuclear energy sources; and
4. Reducing electricity demand

The agency's decision to include renewables and demand-side energy efficiency - building blocks 3 and 4 - in its state targets were particularly controversial. In its November 26, 2014 comment letter to the Administrator on the proposed regulation of existing sources, the Cabinet indicated that it was concerned with whether the approach of emission reductions beyond the fence-line could withstand legal scrutiny. "[T]he issue of EPA's approach of emission reductions beyond the fence line of existing power plants will be a central theme in challenges to the final rule."²⁸

In the final rule, EPA agreed with the Cabinet's assessment of "Building Block 4" and eliminated demand-side energy efficiency measures from consideration of BSER. EPA narrowed the BSER for CO₂ emissions from existing fossil fuel-fired electric generating units to a combination of three sets of measures:

1. Improving heat rate at affected coal-fired steam generating units;

²⁶ 40 CFR Subpart Cb, Cc, Cd, Ce, Cf

²⁷ 80 FR 64966

²⁸ [November 26, 2014 letter to Administrator McCarthy](#)

2. Substituting increased generation from lower-emitting existing natural gas combined cycle units for decreased generation from higher-emitting affected steam generating units; and
3. Substituting increased generation from new zero-emitting renewable energy generating capacity for decreased generation from affected fossil fuel-fired generating units.²⁹

V. Legal and Technical Reasons for Repeal

As noted in previous Cabinet comments, statutory definitions speak for themselves and interpretations should not be manipulated for the sole purpose of implementation of one particular rulemaking. Any deviation from the application of plain statutory language will create unnecessary regulatory uncertainty. Without question, the CPP's novel approach to compliance clearly redefines statutory terms and reinterprets EPA's historical application of the authorizing statutes. Therefore, the Cabinet requests EPA to repeal the CPP for the reasons explained below.

A. Expansion of Statutory Authority

The Cabinet agrees that the CPP final rule is novel, expansive and inconsistent with the CAA. Section 111(d) of the CAA contemplates emission limits on individual power plants; however, EPA's final CPP rule established limits based on the level of emission reduction each state was capable of achieving across its entire power sector. Specifically, 111(d) of the Clean Air Act provides that states, "establish[] standards of performance for any existing source," and does not authorize regulating beyond the individual source.³⁰ In the final rule "anything that reduces the emissions of affected sources may be considered a 'system of emission reduction'" for purposes of regulating GHGs from coal-fired EGUs.³¹ However, EPA's interpretation under the final rule is contrary to the plain language of the statute.

In the legal memorandum issued with the final rule, EPA acknowledges the concerns of the expansion of federal authority. EPA explains, "Thus, this rule does not have the effect of expanding CAA jurisdiction in a way that Congress would not recognize."³² In previous Cabinet comments, the Cabinet explained that EPA's regulatory approach promulgates "cap and trade" mechanisms to regulate greenhouse gases from electric generating units. The Cabinet vehemently voiced opposition to such a regulatory strategy that lacks congressional statutory authority.

In essence, the final CPP clearly constitutes a CO₂ cap-and-trade program that Congress failed to provide statutory authority. EPA acknowledges that individual units are unable to achieve the emission standards under the CPP without trading:

*In these final guidelines for state plans to limit CO₂ from affected EGUs, however, the agency does not specify presumptive performance rates that each individual EGU is to achieve in the absence of trading.*³³

²⁹ 80 FR 64707

³⁰ 42 U.S.C. §7411(d)(1)(A)

³¹ 79 FR 34886.

³² "Legal Memorandum Accompanying Clean Power Plan for Certain Issues"(Page 135)

³³ 80 FR 64870

President Obama undoubtedly recognized Congress role in properly establishing specific statutory authority to regulate CO₂ from fossil-fuel power plants. In his 2013 State of the Union Address, President Obama urged "... Congress to get together, pursue a bipartisan, market-based solution to climate change, like the one John McCain and Joe Lieberman worked on together a few years ago." However, Congress did not pass legislation to provide statutory authority for such a regulatory approach.

On June 2, 2014, President Obama followed through on his threat and issued an Executive Order to "...direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy." Absent the statutory authority granted by Congress, the actions of the executive branch clearly exceed its powers and duties. Due to the CPP exceeding its statutory authority, the Cabinet requests EPA to finalize its proposal to repeal of the CPP.

To address several comments regarding the expansion of statutory authority, EPA felt compelled to explain, "The EPA is not asserting 'new authority to regulate the economy' - the EPA has authority to regulate CO₂ emissions from the power sector, and the EPA is not regulating anything else."³⁴ By including "Building Block 3," EPA indeed asserted new authority to regulate sources that would not have been previously subject to a Section 111(d) state plan.

As explained in the **Section IV. Background of the Clean Power Plan under Section 111(d)** of this document, EPA included "[s]ubstituting increased generation from new zero-emitting renewable energy generating capacity for decreased generation from affected fossil fuel-fired generating units" in its methodology in setting the BSER. By including the substitution of increased generation from renewable energy sources, the Cabinet remains concerned that EPA is subjecting entities that do not emit the regulated pollutant (CO₂) to the Clean Air Act requirements.

Although EPA recognizes that these measures cannot be federally-enforceable,³⁵ EPA intends to subject the entities to CAA requirements through the enforceability of a state plan required by the CPP. Based upon the decision of *UARG v. EPA*, this expansion of jurisdiction through the CAA is not authorized.³⁶ To prevent the expansion of statutory authority under Section 111(d) of the CAA, the Cabinet requests EPA to repeal the CPP and rescind the legal memoranda as proposed in the October 16, 2017 Federal Register notice.

B. Redefined Statutory Terms - "New source" and "existing source"

Section 111 of the Clean Air Act plainly defines "new source" and "existing source" and establishes separate subsections to provide statutory authorization in determining distinct standards of performance for new and existing sources. Under Section 111(a)(2), a "new source"

³⁴ Legal memo on certain issues page 136

³⁵ "Unlike the Court's concern in *UARG*, this rule does not impose federally enforceable regulatory requirements on any entity other than affected EGUs, which are generally already regulated under the Clean Air Act." Legal Memorandum Accompanying Clean Power Plan for Certain Issues, Page 135

³⁶ *Utility Air Reg. Group v. EPA*, 134 S.Ct. 2427(2014)

is defined as any stationary source, the construction modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations). Section 111(a)(6) defines the term of “existing source” as any stationary source other than a new source. Section 111(d) only applies to existing sources. Thus, modified and reconstructed sources are considered new and not subject to the requirements of a Section 111(d) plan after becoming a modified source.

To justify the CPP, EPA states, “Because CAA section 111(d) does not address whether an existing source that is subject to a CAA section 111(d) program remains subject to that program even after it modifies or reconstructs, the EPA has authority to provide a reasonable interpretation, under the Supreme Court’s decision in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-844 (1984). The EPA’s interpretation is that under these circumstances, the source remains subject to the CAA section 111(d) plan, ...”³⁷ EPA’s interpretation to subject a modified or reconstructed unit to the requirements of a Section 111(d) plan clearly ignores that statutory definitions.

Further, in an attempt to rationalize the stringency of the existing source standards, EPA blurred the lines between the definitions of “existing” and “new, modified, and reconstructed” sources. In its proposal, EPA requested comments “...on whether incremental emission reductions from new NGCC units that outperform the performance standards for such units under CAA section 111(b) based on the use of CCS should be allowed as a compliance option to help meet the emission performance level required under a CAA section 111(d) state plan.”³⁸

C. Unreasonable Standards of Performance

In the proposed rule, EPA set a Kentucky-specific emission rate of 1,763 lbs CO₂/MWhr. However, the final rule took a drastically different approach and abandoned state-specific determinations in setting the standards. The regional approach adopted in the final rule ignores characteristics specific to Kentucky. EPA established a final emission rate of 1,286 lbs CO₂/MWhr for Kentucky, which is more stringent than the emission standard for “new” units.

The emission standards established under the CPP is obviously inconsistent with the historical application of Section 111(d) of the CAA. As noted in the October 27, 2017 Federal Register notice, “...Agency’s emission guidelines will ordinarily be less stringent than those required by standards of performance for new sources because the costs of controlling existing facilities will ordinarily be greater than those for control of new sources.”³⁹

As noted, the final targets for existing sources in Kentucky are now more stringent than the 111(b) standards for new sources. The table below illustrates two specific technical points of emphasis: (1) The proposed emission standards failed to recognize standards of performance that “...reflects the degree of emission limitation achievable through the application of the best system of emission reduction” and (2) the final emission standards did not take “...into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.”

³⁷ 43 See 79 Fed. Reg. at 34904.

³⁸ See 79 Fed. Reg. at 34924

³⁹ 40 FR 53340, 53341 (November 17, 1975)

	CO ₂ Rate (lbs/MWh)	CO ₂ Mass (tons)
2012 Historic Generation	2,166	91,372,076
Proposed CPP	1,763	77,385,560
Final CPP	Rate-based target	Mass-based target
Final 2030 and beyond	1,286	63,126,121

Relative to EPA’s attempt to merge “new” and “existing” source emission standards, EPA previously addressed a situation where a facility contains both new and existing units. When EPA promulgated emission guidelines for primary aluminum plants, EPA found that “w[here] a facility contains both old and new [reduction] cells, it may be reasonable to apply somewhat less stringent standards to the old.”⁴⁰ By applying more stringent standards to existing units, the CPP is unreasonable and inconsistent with historical application of Section 111(d).

Rather than determining “adequately demonstrated” best systems of emission reductions, the CPP is an evident outgrowth of a report issued in March 2013 by the Natural Resources Defense Council (NRDC), which recommended that EPA’s regulations incorporate energy efficiency and renewable energy to offset higher carbon emitting generation from fossil fuels. Without question, the NRDC document served as the blueprint for the CPP and recommended several ways for each source to comply:

- *A source may comply by meeting the emission rate standard on its own.*
- *A set of sources may comply by averaging their emission rates. For example, a coal plant may average with a gas plant, such that their total emissions divided by their combined electricity output meets the applicable state standard.*
- *A source may comply by acquiring qualifying credits derived from low- or zero-emitting electricity generation. For example, an NGCC plant would earn credits reflecting the difference between the required state fleet average standard and its emissions per megawatt-hour. A wind plant would earn larger per-MWh credits, reflecting the difference between the state standard and its zero-emission rate.*
- *Finally, a source may comply by acquiring qualifying energy efficiency credits, reflecting incremental reductions in power demand (sometimes called “negawatt-hours”), which earn credits at the same rate as other zero-emission sources listed above.⁴¹*

⁴⁰ 45 FR 26295

⁴¹ Page 11, “Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America’s Biggest Climate Polluters”, Daniel A. Lashof, Starla Yeh, David Doniger, Sheryl Carter, Laurie Johnson Natural Resources Defense Council, March 2013 R: 12-11-A

Eerily enough, EPA's proposed CPP included all of the same elements of the NRDC report. An analysis of the NRDC's March 2013, *Closing the Power Plant Carbon Pollution Loophole*,⁴² revealed that all coal-fired generation in Kentucky would have to shut down by 2025 to meet the NRDC goals. Congress never intended for EPA to establish unreasonable standards of performance for the purpose of shutting down particular sources or industries. Due to the unreasonable standards of performance, EPA should finalize the repeal of the CPP.

D. Severability of “Building Blocks”

As noted numerous times, the final CPP is not a logical outgrowth of the proposed rule. **Section IV. Background of the Clean Power Plan under Section 111(d)** explained that EPA removed the proposed “Building Block 4” from the final CPP. Logically, a reasonable approach would to lessen the stringency of the emission limitation as a result. However, EPA set an even more unreasonable standard for Kentucky's existing power plants as detailed above.

Not only did the final CPP defy logic, EPA contradicted itself. In the proposed CPP, EPA states:

We consider our proposed findings of the BSER with respect to the various building blocks to be severable, such that in the event a court were to invalidate our finding with respect to any particular building block, we would find that the BSER consists of the remaining building blocks. The state goals that would result from any combination of the building blocks can be computed from data included in the Goal Computation TSD and its appendices using the methodology described in the preamble and that TSD.⁴³

Again, a reasonable assessment to removing a building block would be to adjust a state's target commensurate with the elimination of the percentage contribution to the target. In its comments on the proposed CPP, the Cabinet predicted a court may invalidate Building Block 4 and explained:

For example: If Building Block 4, Energy Efficiency, is vacated, Kentucky's target of 1,763 lbs CO₂/MWh should increase to reflect only the effect of Building Blocks 1, 2 and 3. Assuming that the loss of one or more of the building blocks can be made up by the remaining building blocks is not appropriate and should not be employed by EPA as a backstop. There are real technological limitations to each of the building blocks, and these limitations cannot be dismissed.⁴⁴

⁴² “Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America's Biggest Climate Polluters”, Daniel A. Lashof, Starla Yeh, David Doniger, Sheryl Carter, Laurie Johnson Natural Resources Defense Council, March 2013 R: 12-11-A

⁴³ See 79 Fed. Reg. at 34892

⁴⁴ [November 26, 2014 letter to Administrator McCarthy](#)

Considering that the CPP is not a logical outgrowth of the proposed rule and EPA's contradiction on the severability of building blocks, the Cabinet requests EPA to repeal the CPP as proposed.

VI. Comments relating to the Regulatory Impact Analysis

The Cabinet supports the approach taken in the accompanying *Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal*, which focuses on the domestic social costs of carbon. The global social cost of carbon approach used to justify the benefits of the Clean Power Plan was unprecedented and inappropriate. Not only did EPA inflate the benefit equation in its Clean Power Plan analysis, it did not appropriately weigh the costs-benefits for each state.

For states like Kentucky, the Clean Power Plan would have significantly impacted our ratepayers and the overall economy. As a manufacturing state, Kentucky's low-cost, reliable electricity is vital to our state's economic well-being. Manufacturing accounts for almost 20 percent of the state's GDP, and the average salary for employees in the manufacturing sector is \$57,000 per year. One in six private sector jobs is in manufacturing, in such industries as aeronautics, automobile production, chemicals, paper, oil refining, and aluminum and steel production. Most of these industrial operations are energy-intensive and require twenty-four hour a day provision of stable electricity. They are very sensitive to even small increases in electricity rates.

In previous comments, the Cabinet expressed serious concerns regarding the potential of stranded coal unit assets. Kentucky's utilities have invested more than \$4 billion in the recent years to comply with other federal environmental regulations. These investments are ratepayer funded, and units that have been retrofitted to comply with the Mercury and Air Toxics Standards have an assumed "remaining useful life" of 20-30 years.

Kentucky has an 18% poverty rate overall and 24% poverty rate for children under 18—ranking the commonwealth 47th in the nation. Electric rate increases harm the most vulnerable in our population, and the state needs the flexibility to determine its own energy future given changing market conditions and without the overlay of the CPP, which did not address state-level impacts. Thus, the Cabinet appreciates EPA's call for comments in the RIA about more robust cost-benefit analysis.

As the energy landscape continues to undergo significant shifts, the interplay of various forces such as declining load growth, advances in technologies that make renewable generation and battery storage more cost-competitive, distortions in wholesale markets, etc., makes forecasting costs and benefits more complex and less certain. Kentucky's emissions are expected to continue to decline and are currently projected to meet the targets established in the CPP. However, the flexibility afforded the state through a CPP repeal is significant in that states can determine the energy landscape that suits their resource mix and economic growth profile. Importantly, this flexibility allows Kentucky to focus on industrial recruitment to grow our manufacturing base to improve our overall economy.

The Regulatory Impact Analysis refers to the Energy Information Administration's Energy Outlook, which forecasts that coal generation would continue to decline under the Clean Power

Plan, but could stay steady for the 10 years if the rule were to be repealed. As a coal state that has been devastated by the decline in coal production, further dramatic decreases that would have resulted from the CPP would have been untenable.

Due to the unattainable emission standards established for new coal-fired electric generating units, there is not an expectation that the U.S. will have any new coal capacity; however, it is important that currently operating units, especially those in states like that Kentucky that have been funded through ratepayers to comply with other rules are allowed to stay in the system and operate as baseload as they were designed.

The Cabinet applauds EPA's plans to conduct updated modeling and make the results of these models publicly available for comment. Not only should the results be made available, EPA should also provide the modeling platform and data inputs available for public review and comment. The Cabinet requests EPA to conduct state-specific modeling. The Cabinet is willing to partner in such efforts as appropriate, for Kentucky.

One of the Cabinet's more serious objections to the CPP centered on how the previous administration conducted its assessments on the availability of cost-effective renewable energy resources. Rather than conduct an analysis of each state's economic and technological renewable energy potential, EPA assessed and applied regional potential, which allowed EPA to justify a more stringent emissions target for Kentucky compared to the proposed rulemaking. The RIA states, "We consider that how changing market conditions and technologies may have affected future actions that may have been undertaken by states to comply with the CPP and how these changes may affect the potential benefits and costs of the CPP repeal." The Cabinet supports further analysis on this aspect.

The Cabinet also encourages more analysis on the benefits of demand-side energy efficiency. Again, dramatic technological shifts are occurring in the efficiency landscape, including growing adoption of LED lighting and the adoption of digital technologies providing greater control of building operations. For example, the U.S. Department of Energy says widespread use of LED lighting has the greatest potential impact on energy savings, "potentially cutting demand by the equivalent of 44 large power plants by 2027."

EPA, in proposing the CPP, argued that trends toward "cleaner" sources for electricity generation were already occurring. The goal then was to lock in these changes and prevent a reversal if market conditions were to change. In other words, the trend toward increasing natural gas would have been cemented in such a way that consumers would have had to pay more as natural gas prices increased. The Cabinet recognizes that numerous, rapid and, in some cases, unprecedented changes, are occurring in the electricity sector. This transformation will continue to occur regardless of whether the CPP is in place. However, absent a repeal of the CPP, Kentucky and many other states would be precluded from being able to make prudent decisions about electricity generation and energy policy in a manner that ensures affordability, price stability and reliability.

VII. Conclusion

In conclusion, the Cabinet requests EPA to finalize the proposed "*Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units*."⁴⁵ Throughout the promulgation process of the Clean Power Plan, the Cabinet expressed serious concerns regarding the legality of the rule and whether EPA exceeded its statutory authority. Previous comments submitted by the Cabinet detailed concerns with EPA's approach to require emissions "beyond the fence" and questioned whether such a novel approach is appropriate.⁴⁶

Additionally, the Cabinet requests that EPA rescind both the "Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units" and the "Legal Memorandum Accompanying Clean Power Plan for Certain Issues." The Cabinet concurs with EPA's assessment that the legal underpinnings of the memoranda serving as the foundation of the CPP improperly expand the statutory authority under Section 111(d) of the CAA.

Finally, the Cabinet supports EPA's proposed change in the legal interpretation of the application of Section 111(d) of the Clean Air Act to be consistent with the statutory "...text, context, structure, purpose, and legislative history, as well as with the Agency's historical understanding and exercise of its statutory authority." The Clean Power Plan's radical departure from historic application of the "best system of emission reduction" sets a dangerous precedent. The Cabinet appreciates and supports EPA's proposal to interpret the "best system of emission reduction" consistently and by considering only measures that can be applied to or at the source.

Therefore, the Cabinet requests EPA to finalize its proposal to repeal the Clean Power Plan.

⁴⁵ 82 FR 48035

⁴⁶ [November 26, 2014 letter to Administrator McCarthy](#)