



September 9, 2014

Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Obama:

As governors of affected states, we write to express our concerns about the Environmental Protection Agency’s (EPA or Agency) recent proposal for reducing carbon dioxide emissions at existing power plants. Our country needs a coherent, consistent energy policy that promotes reliable and affordable energy in addition to a healthy environment. However, we cannot achieve this end without a sincere partnership between the states and the federal government, whereby EPA appropriately recognizes the limits of federal authority. EPA’s proposed rule for reducing carbon emissions, pursuant to Section 111(d) of the Clean Air Act (CAA or Act), fails to strike this necessary balance.

The unambiguous language of the CAA expressly prohibits EPA from using Section 111(d) to regulate power plants because EPA already regulates these sources under another section of the Act.¹ Moreover, even if the Agency did have legal authority to regulate power plants under 111(d), it overstepped this hypothetical authority when it acted to coerce states to adopt compliance measures that *do not reduce emissions at the entities EPA has set out to regulate*. Under federal law, EPA has the authority to regulate emissions from specific sources, but that authority does not extend outside the physical boundaries of such sources (*i.e.*, “outside the fence”).² In attempting to regulate outside the fence, the Agency’s proposal not only exceeds the scope of federal law, but also, in some cases, directly conflicts with established state law.³

In addition to these legal prohibitions, the rule poses numerous practical problems for state compliance. These problems reflect your Administration’s decision to move forward with the proposed regulation without considering or understanding—among other crucial matters—our state energy markets and infrastructure needs.

¹ As state petitioners argued in a 2007 lawsuit concerning the Clean Air Mercury Rule (“CAMR”): “Subsection (d) of Section 111 provides authority for regulation of existing sources, but is explicitly limited to those air pollutants that are not ‘emitted from a source category which is regulated under section 7412 of this title.’” *See* 2007 Opening Brief of CAMR State Petitioners (New Jersey, California, Connecticut, Delaware, Illinois, Maine, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Rhode Island, Vermont, and Wisconsin).

² The proposal also fails to appreciate that state agencies enforcing air quality standards have no authority to enforce reductions outside the fence.

³ Under existing law, Kansas, Kentucky, Louisiana, Missouri, and West Virginia cannot regulate emissions from power plants by shifting pollution-control costs to other parts of the economy. Emissions reductions must occur at the power plant source.

Below, we highlight some of the more urgent and vexing compliance issues inherent in the proposal, while cautioning that this list is by no means exhaustive. We request that your Administration provides informed plans to address these significant obstacles to state compliance and that it does so well in advance of the proposal's comment deadline of October 16. If you cannot fulfill this obligation in time for states to incorporate the new information into their comments, your Administration should withdraw the proposal until it gives due consideration to these critical concerns.

1. Enforcement of State Plans

At a recent Senate hearing on the proposal, EPA Administrator McCarthy failed to answer questions pertaining to EPA's intentions to enforce provisions in State Plans that currently fall outside EPA's authority. For example, while the Administrator acknowledged that EPA lacks the authority to require a state to adopt a renewable portfolio standard (RPS), she repeatedly dodged the question of whether EPA believes it has the authority to enforce an RPS once a state submits it as part of a State Plan. Without clarification, we are left to assume that EPA is entertaining the possibility of overreaching its authority in this area.

- a. Under your proposal, if a state adopts a renewable portfolio standard (RPS) and/or an Energy Efficiency Resource Standard (EERS) as part of its compliance strategy and later softens or repeals the RPS and/or EERS, does EPA claim to have the authority to enforce the original RPS and/or EERS irrespective of subsequent legislation? If so, what is the source of EPA's legal authority to take such action?
- b. If EPA rejects a State Plan (or if a state fails to submit one), will EPA then attempt to force an RPS and/or EERS on a state via a Federal Plan, despite EPA's admission that it lacks the authority to do so? If so, how does EPA reconcile this action with having conceded to an absence of such authority?

2. Availability and Impacts of Renewable Energy

Your proposal makes broad assumptions about access to renewables. For example, EPA identifies potential renewable energy targets for individual states by looking at the scope of renewable energy mandates in an arbitrarily-defined *region* without any regard for the actual availability of renewable resources or saturation points in the *individual* states. EPA also fails to consider how increased renewable penetration will impact grid reliability and existing baseload capacity.

- a. Has the federal government conducted an analysis to determine the environmental impact of building renewable energy systems at the scale envisioned in the proposal? For example, one nuclear plant producing 1,800 MWs of electricity occupies about 1,100 acres, while wind turbines producing the same amount of electricity would require hundreds of thousands of acres. If such an analysis exists, please provide detailed information related to that analysis. If such an analysis does not exist, please explain why the analysis was not performed.
- b. Given the amount of land required by renewable energy systems, has your Administration considered that federal land permitting requirements may preclude or stall the development of renewable projects? Also, expanding the deployment of wind and solar farms could readily conflict with the Endangered Species Act (ESA). Indeed, one can easily envision the plausible scenario whereby the ESA, operating as federal law separate from the CAA, could prevent state compliance with EPA's emissions targets. How does your Administration propose to avoid these conflicts?
- c. Has the Administration mapped out a transition pathway for renewables from an artificial to a competitive market? Specifically, what is the federal plan to commercialize storage technology, which is necessary for that transition?

3. Construction and Funding for Natural Gas Infrastructure

Your proposal entails significant fuel switching from coal to natural gas, but most retiring coal plants cannot simply be replaced by natural gas plants. Before this switch can occur, gas infrastructure, including storage facilities, must

be built. The necessary pipelines require permits, and in many cases, federal approval. Before your proposal, studies indicated the need for more than \$300 billion in gas infrastructure investment between now and 2035. Currently, EPA projects that its proposal will result in nearly 50 gigawatts of retirements of baseload coal generation between 2016 and 2020, creating an even greater demand for infrastructure investment.

- a. What steps will your Administration take to ensure the necessary construction of interstate natural gas infrastructure, including pipelines? Will you consider expediting the environmental impact study (EIS) process so that gas transmission can be built to serve constrained regions?
- b. What is the estimated cost of the gas infrastructure required to meet compliance targets under your proposal, and who does the federal government foresee paying for it?

4. Disposal of Civil Nuclear Waste

Your proposal also supports nuclear power as a key part of your carbon dioxide emissions reduction strategy. Since renewables cannot replace the baseload generation attributes of retiring coal plants, maintaining existing reactors and building new units is essential for many states to reach their assigned reduction targets. However, at least nine states have bans on new nuclear builds, which will remain in effect until the federal government, at least to some degree, resolves the waste disposal issue.⁴

- a. Given your Administration's opposition to make use of the Yucca Mountain repository, will you bring forward a viable, long-term solution for disposal that would win public support and the necessary votes in Congress? And if so, when?
- b. If not, does your Administration expect the states with bans on new nuclear facilities to revise their laws, despite the federal government's failure to adequately address the waste issue?

5. Importing and Exporting Electricity

A number of states cannot meet their electricity demands without substantial imports of power. Indeed, many states host electric utilities that have existing contracts with distribution companies outside their borders. Accordingly, the shutdown of coal plants in an exporting state could also constrain power supply in an importing state. It is evident that EPA failed to consider this "offshoring" of power requirements, and the corresponding carbon footprint, when it assigned reduction targets to the states.

- a. Why would EPA unfairly penalize those states that have made adequate power generation investments, which allow them to help other states achieve secure electricity supply?
- b. Under the proposal, when exporting states must shut down coal plants, they could face serious constraints on generation resources, particularly during extreme weather. These constraints could create a difficult choice for states: allow their utilities to fulfill existing contracts with entities outside the state or service the citizens of the home state first. Has your Administration considered the potential negative impact this proposal could have on commerce within the United States? If so, please explain how you propose to address this issue.
- c. Has EPA adequately consulted with the entities charged with developing and enforcing reliability standards and with monitoring the bulk power system (*e.g.*, Federal Energy Regulatory Commission (FERC) and the North American Electric Reliability Corporation (NERC)) on the proposal? If so, what did FERC, NERC, and/or other such agencies and departments have to say about how the rule will impact (i) variable energy resource integration; (ii) baseload generation; and (iii) grid reliability?

The economic health of our nation depends on accomplishing a balanced energy and environment policy. The United States should be pursuing a strategy that achieves its objectives without severely harming our economies and pitting states against one another. To help facilitate a successful energy policy, we bring these important state concerns to your attention and request thoughtful answers to our questions. Thank you in advance for your cooperation, and we look forward to your response.

⁴ California, Connecticut, Illinois, Kentucky, Maine, New Jersey, Oregon, West Virginia, and Wisconsin.

Sincerely,



Governor Robert J. Bentley
Alabama



Governor Sean Parnell
Alaska



Governor Janice K. Brewer
Arizona



Governor C.L. "Butch" Otter
Idaho



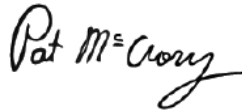
Governor Mike Pence
Indiana



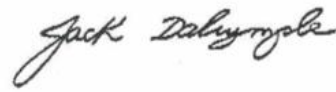
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