May 9, 2014

Environmental Protection Agency

By electronic delivery to a-and-r-Docket@epa.gov

Re: Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units

Contact Information:

Name: Marlo Lewis, Ph.D.
Organization: Competitive Enterprise Institute
Address: 1899 L Street, NW, 12th Floor, Washington, DC 20036
Tel: 202-331-1010
Email: Marlo.Lewis@cei.org

On behalf of the Competitive Enterprise Institute (CEI), a non-profit public policy group specializing in regulatory issues, I respectfully submit this comment letter on the Environmental Protection Agency’s proposed Carbon Rule.¹

EPA should withdraw the proposal for the following reasons:

1. The Carbon Rule would kill the future of the U.S. coal industry. It would establish a new source performance standard (NSPS) for carbon dioxide (CO₂) emissions that no commercially-viable coal power plant can meet. Banning new coal generation is a policy Congress has not approved and would reject if proposed in legislation and put to a vote.

2. The rule defines carbon capture and sequestration (CCS) as the “best demonstrated system of emission reduction” (BSER) for CO₂ from coal power plants. CCS is not “adequately demonstrated” because its cost is exorbitant, making a new coal plant up to five times more expensive than a new natural gas combined cycle (NGCC) plant. Although not as blatant as

---

the original 2012 proposal, which defined NGCC as BSER for coal power plants, the current proposal is still a fuel-switching mandate.

3. Both proposals are products of an underhanded bait-and-fuel-switch political strategy. Had the EPA come clean about anti-coal agenda in 2010 and 2011, Senators Lisa Murkowski (R-Alaska) and James Inhofe (R-Okla.) would likely have garnered more support for their efforts to rein in EPA’s greenhouse gas regulations.

4. Although not as contorted as the agency’s original proposal, the current proposal is still bizarre, classifying NGCC as BSER for . . . itself. Also, like the initial version, the redo avowedly achieves no CO₂ reductions and no climate-related benefits. What’s the point?

5. A leaked OMB document and environmental group analyses indicate what the real purpose is: Establish the legal predicate for suppressing existing coal power plants via carbon cap-and-trade programs.

6. Congress never enacted legislation specifically requiring or authorizing NSPS for CO₂ and never enacted a greenhouse gas cap-and-trade program.

7. Public trust in government is in free fall. EPA cannot continue to steamroll through congressional gridlock and dictate climate policy without de-legitimizing itself.

I. Agenda-Driven Regulation

Whatever its official rationale, EPA’s proposed Carbon Rule advances a top political priority of the environmental movement – prevent new coal-fired power plants from being built.²

President Barack Obama came to the White House already invested in that agenda. During his first presidential campaign, candidate Obama told the San Francisco Chronicle that his plan for a cap-and-trade program would “bankrupt”³ anyone who builds a coal power plant. Cap-and-trade died when it was exposed as cap-n-tax — a stealth energy tax that would cause electricity rates to “necessarily skyrocket,” as Sen. Obama put it in the same interview.⁴ Following the November 2010 defeat of 29 House Democrats⁵ who supported H.R. 2454, the American Clean Energy and Security Act, popularly known as the Waxman-Markey cap-and-trade bill, President Obama vowed to find “other ways of skinning the cat.”⁶

² The Sierra Club, for example, boasts that it has “defeated” plans for 140 new coal-fired power plants. Sierra Club, Proposed Coal Plant Tracker, accessed May 9, 2014, http://content.sierraclub.org/coal/environmentallaw/plant-tracker.
⁴ Ibid., https://www.youtube.com/watch?v=HiTxGhn4sH4
EPA’s original Carbon Rule,\textsuperscript{7} proposed in April 2012, was clearly what the President had in mind. It was a \textit{de facto} ban on the construction of new coal generation.

In the original rule, EPA set the new source performance standards (NSPS) for both new coal and new natural gas combined cycle (NGCC) power plants at 1,000 pounds of carbon dioxide per megawatt hour (1,000 lbs. CO$_2$/MWh). EPA estimated that 95\% of all NGCC power plants already met the standard,\textsuperscript{8} whereas no existing coal power plants came close; even the most efficient, on average, emitted 1,800 lbs. CO$_2$/MWh.\textsuperscript{9}

This meant the original Carbon Rule was a “fuel-switching” mandate. Utilities planning to build new coal power plants could comply only by building NGCC plants instead.

As should go without saying, the lawmakers who enacted and amended the Clean Air Act (CAA) never understood themselves to be authorizing EPA to block investment in new coal generation. Even in 2012, after more than 20 years of global warming advocacy, any bill containing the proposed NSPS would have been dead on arrival.

\textbf{II. Bait-and-Fuel-Switch}

What makes the agenda-driven character of the Carbon Rule even more evident is the underhanded manner in which it was sprung on Congress and the regulated public. The relevant history is not well-known and bears repeating.

 Traditionally, EPA regulated coal power plants and NGCC plants as separate source categories subject to different NSPS for conventional air pollutants. When EPA began developing its greenhouse gas Endangerment Rule, however, coal interests worried the agency would redefine source categories so that coal power plants and NGCC plants would be held to identical NSPS for CO$_2$.

In April 2010, at an event hosted by the Johns Hopkins School of Advanced International Studies, Gina McCarthy, then head of EPA’s air office, stated that best available control technology (BACT) standards for major greenhouse gas emitters would require only efficiency upgrades, not fuel switching from coal to gas. “We haven’t done it [fuel switching] in the past, and there’s been good reason why we haven’t done it in the past,” she explained.\textsuperscript{10}

\textsuperscript{8} 77 FR 22414.
\textsuperscript{9} 77 FR 22417.
The Air Office’s permitting guidance for greenhouse gases, both as proposed in November 2010\(^\text{11}\) and as adopted in March 2011, similarly states that the “initial list of control options for a BACT analysis does not need to include ‘clean fuel’ options that would fundamentally redefine the source.” In other words, coal power plants would not be lumped together with NGCC power plants in the same industrial source category subject to the same emission standards. Accordingly, an applicant would not be required to “switch to a primary fuel type other than the type of fuel that an applicant proposes to use for its primary combustion process.”\(^\text{12}\)

Lest there be any confusion on this point, a Q&A document published along with the March 2011 final guidance asks whether “fuel switching (coal to natural gas) should be selected as BACT for a power plant?” The document answers: “No.” It states that BACT for CO\(_2\) should “consider the most energy efficient design,” but “does not necessarily require a different type of fuel from the one proposed.”\(^\text{13}\)

The April 2012 Carbon Rule did exactly what McCarthy and the air office said EPA would not do. It redefined coal and NGCC power plants as “fossil fuel power plants” – a new source category to be labeled TTTT in the federal code. Both types of power plants would then be held to a common CO\(_2\) performance standard that no commercial coal power plant could meet and nearly all NGCC plants already meet.

What made this reversal all the more unexpected is that BACT standards, which apply to individual facilities on a case-by-case basis, are generally more stringent than NSPS, which set minimum emission control standards for categories of industrial sources. In regulatory parlance, NSPS provide the “floor” for BACT determinations.\(^\text{14}\) If EPA would not use BACT to require fuel-switching, then it would seem unreasonable – even paranoid – to suspect EPA of planning to use NSPS for that purpose. Nonetheless, that is exactly what the agency did.

The timeline of those actions is critical. In June 2010, the Senate voted on Sen. Lisa Murkowski’s resolution\(^\text{15}\) to overturn the EPA’s Endangerment Rule, the prerequisite for all EPA global

---


warming regulations. The resolution fell short by four votes (47-53). In April 2011, the Senate voted on Sen. James Inhofe’s legislation\(^\text{16}\) to overturn all EPA global warming regulations except those auto companies had already made investments to comply with. The bill failed on a 50-50 tie vote.

Had EPA been candid about its anti-coal agenda in 2010 and 2011, more Senators might have voted for those measures. In any case, agencies are not supposed to provide false or misleading information to influence how Members of Congress vote.

In May 2013, Sen. David Vitter (R-La.), ranking member of the Senate Environment and Public Works Committee, released a 123-page document containing Gina McCarthy’s answers to scores of questions raised in connection with her confirmation hearing.\(^\text{17}\) Fuel switching and the Carbon Rule were among the topics covered.

Noting that BACT standards are generally more stringent than NSPS, and by law may not be less stringent, Vitter asked:

> If BACT does not require fuel-switching, we should have no reason to expect that NSPS would require fuel switching or “redefine the source” to impose identical CO\(_2\) control requirements on coal boilers and on gas turbines. Is that correct?

McCarthy replied:

> EPA’s GHG Permitting Guidance (March 2011) says: “… a permitting authority retains the discretion to conduct a broader BACT analysis and to consider changes in the primary fuel in Step 1 of the analysis.” Thus, EPA never ruled out the possibility that a permitting agency could require that an applicant consider natural gas, or other cleaner fuels, when proposing a coal-fired EGU.\(^\text{18}\)

McCarthy omitted the first word of the sentence she quoted: “Ultimately.” The unexpurgated sentence reads: “Ultimately, a permitting authority retains the discretion to conduct a broader BACT analysis and to consider changes in the primary fuel in Step 1 of the analysis.”\(^\text{19}\) “Ultimately” suggests something that might happen several years down the road, not the agency’s next move, and then only as a matter of “discretion” in individual cases, not as the


industry-wide floor. The guidance document’s weasel words, which occur in only one sentence out of a 96-page text, do not obviate the fact that EPA misled Congress and industry about the scope of the agency’s regulatory ambition.

Indeed, McCarthy practically acknowledged as much in her response to a follow-up question. Referring to the November 2010 draft greenhouse gas permitting guidance, the March 2011 final guidance, and the associated Q&A document, Vitter asked:

These documents suggest that the EPA will not require fuel switching in BACT determinations. Was that a reasonable conclusion for Congress and electric utilities to draw at the time?

McCarthy replied:

That is a reasonable interpretation, and EPA continues to believe that its BACT guidance is reasonable for the specific purposes for which the guidance is intended.\(^{20}\)

The admittedly “reasonable interpretation” of the EPA documents undercut congressional and other critics who warned that EPA could not be trusted with the power to regulate CO\(_2\), which, like the power to tax, is also the power to destroy.

### III. Regulatory Contortions

Another telltale sign of the rule’s agenda-driven character was its downright weirdness. Three anomalies are noteworthy.

1. Under CAA §111(a), NSPS are to reflect the degree of emission limitation achievable under the “best system of emission reduction” that has been “adequately demonstrated.” To pick a standard of 1,000 lbs. CO\(_2\)/MWh, EPA had to pretend that NGCC is an “adequately demonstrated” “control option” and “system of emission reduction” for . . . coal-power plants!\(^{21}\) NGCC, of course, is not an emission reduction system but a type of power plant. In effect, EPA argued that a new coal plant could meet the standard by being something other than what it is.

2. To subject coal power plants to the same CO\(_2\) performance standard as NGCC plants, EPA proposed to create, within the federal code, a new industrial source category, “fossil-fuel electric generating units,” labeled TTTT — but only for CO\(_2\). For all other pollutants, EPA would

---


\(^{21}\) 77 FR 22394-22395.
continue to prescribe separate standards for coal boilers under subpart Da and for gas turbines under subpart KKK.\(^{22}\)

Why not hold coal boilers and gas turbines to same standards for all pollutants? EPA’s answer:

This is because although coal-fired EGUs have an array of control options for criteria and air toxic air pollutants to choose from, those controls generally do not reduce their criteria and air toxic emissions to the level of conventional emissions from natural gas-fired EGUs.\(^{23}\)

The same logic argued even more strongly against imposing a single CO\(_2\) standard on coal boilers and gas turbines. According to EPA’s view at the time, coal plants had no “adequately demonstrated” options for reducing CO\(_2\) emissions to the level of new NGCC plants – except by being NGCC plants instead!

(3) Perhaps to deflect criticism that the administration was waging a war on coal, EPA said the rule would not actually reduce power-sector CO\(_2\) emissions and would have no climate change benefits! Natural gas had become so cheap, EPA argued, that few if any new coal plants would be built anyway. The rule would not “add costs” because it would simply ratify where the market was already going.\(^{24}\)

So what was the point? A recently leaked OMB document\(^{25}\) about the 2014 version of the rule lets the cat out of the bag. EPA offered this rationale: “By statute, in order to issue emission standards for existing sources, the Agency must first propose standards of performance for new sources.” The rule’s value is instrumental. The point of the Carbon Rule is to position EPA to ‘add costs’ to existing coal power plants.

More precisely, as explained below, the Carbon Rule appears to be the setup for regulating existing coal plants through cap-and-trade.

### IV. Carbon Rule 2.0

The recycled Carbon Rule is still a fuel-switching mandate, although not as overtly so. This time EPA proposes two separate CO\(_2\) standards. For NGCC plants, the standard remains 1,000 lbs.

\(^{22}\) 77 FR 22406.

\(^{23}\) 77 FR 22411.

\(^{24}\) 77 FR 22399-22340.

CO\(_2\)/MWh; for coal power plants, the standard is 1,100 lbs. CO\(_2\)/MWh.\(^{26}\) That is a distinction without a difference, because commercially-viable coal power plants, which emit 1,800 lbs. CO\(_2\)/MWh, are still not within hailing distance of the standard.

In the first go-round, EPA decided that carbon capture and sequestration (CCS) was not an “adequately demonstrated” system of emission reduction. The levelized cost of new coal power plants already exceeded that of new NGCC plants, and according to EPA’s 2012 proposal, “today’s CCS technologies would add around 80% to the cost of electricity for a new pulverized coal (PC) plant, and around 35% to the cost of electricity for a new advanced gasification-based (IGCC) plant.”\(^{27}\)

EPA has since changed its tune, arguing that during the period between the original and revised proposals, several utility-scale CCS projects have made significant progress towards completion, so the technology now qualifies as “adequately demonstrated.”\(^{28}\)

However, cost is a statutory factor in determining what is “adequately demonstrated,” and none of the utility-scale CCS projects EPA cites are being built without taxpayer subsidies. The Kemper County IGCC/CCS plant,\(^{29}\) arguably the pride of the fleet, received a $270 million grant from the Department of Energy and $133 million in tax credits from the IRS (although construction delays caused Mississippi Power to forfeit the IRS credits in October 2013).\(^{30}\)

More importantly, the Kemper plant’s cost has increased from an initial estimate of $2.4 billion\(^{31}\) to $5.5 billion\(^{32}\) – roughly 71%-89% more costly than an advanced pulverized coal power plant without CCS and 438% more costly than an advanced NGCC power plant.\(^{33}\) So unless a utility intending to build a new coal power plant wants to go bankrupt, it’s only real ‘choice’ is to fuel-switch and build an NGCC plant instead.

Because EPA is now proposing two (slightly) different CO\(_2\) performance standards for coal power plants and NGCC plants, the updated rule would codify the standards separately under

---

\(^{26}\) 79 FR 1433.
\(^{27}\) 77 FR 22415.
\(^{28}\) 79 FR 1434.
\(^{29}\) Kemper County IGCC Fact Sheet: Carbon Dioxide Capture and Storage Project, [http://sequestration.mit.edu/tools/projects/kemper.html](http://sequestration.mit.edu/tools/projects/kemper.html).
\(^{31}\) Kemper County IGCC Fact Sheet.
subpart Da for coal power plants and subpart KKK for NGCC plants, following EPA’s practice in codifying performance standards for conventional air pollutants. However, the rule requests comment on the pros and cons of including both standards in a newly created subpart TTTT, as in the original proposal.  

This arcane detail may seem of interest only to regulatory nerds. But according to Nathan Richardson of Resources for the Future, the TTTT option would allow states to implement CAA §111(d) existing-source performance standard guidelines by establishing carbon cap-and-trade programs. Such programs would accelerate fuel-switching from existing coal to new or increased gas generation.

V. Backdoor Cap-and-Trade

Richardson is a politic writer, discussing cap-and-trade in terms of regulatory “flexibility.” Reading a bit between the lines, I would restate his thesis as follows.

1. Because EPA is no longer proposing a single CO₂ NSPS for both coal plants and NGCC plants, it does not need to codify the requirements in a newly-created single source category.
2. However, as long as existing coal plants and NGCC plants are in separate source categories, a “best system of emission reduction” for coal plants essentially means efficiency enhancements, which can reduce CO₂ emissions by only a few percentage points.
3. To get big CO₂ emission reductions from existing coal power plants, regulators must curb coal generation. The only way to achieve that is the Waxman-Markey way – place existing coal plants and NGCC plants under a declining carbon cap and authorize them to trade emission allowances.
4. Since CAA § 111 performance standards apply to specific source categories, emissions trading between coal and NGCC power plants is legal only if both are classified as part of the same source category.
5. Since courts might find category TTTT to be arbitrary and capricious if it applies only to existing sources and not also to new sources, EPA’s Carbon Rule for new sources should administer CO₂ standards under new source category TTTT, as originally planned.

34 79 FR 1346-1347.
36 79 FR 1435.
The Natural Resources Defense Council also argues that the TTTT option would facilitate states’ use of cap-and-trade programs to meet their § 111(d) responsibilities.\(^\text{37}\)

All this must be music to EPA’s ears!

Given that the Waxman-Markey bill aimed to de-carbonize electric generation through two devices – cap-and-trade and NSPS for new coal power plants (section 116 of the bill) – I should revise my initial characterization of the Carbon Rule. The rule is not another way to skin the cat – it is the Waxman-Markey way, albeit implemented in phases and state-by-state rather than the entire country at one stroke.

VI. Will EPA De-Legitimize Itself?

Is law such a creature of administrative convenience that EPA can put cap-and-trade back on the political map just by revising terminology in the federal code?

In EPA’s first official assertion of authority to regulate greenhouse gases, Clinton administration EPA General Counsel Jonathan Z. Cannon argued that §111 does not allow compliance through inter-source emissions trading:

Technology-based standards under the Act directed to stationary sources have been interpreted by EPA not to allow compliance through intersource cap-and-trade approaches. The Clean Air Act provisions for national technology-based standards under sections 111 and 112 require EPA to promulgate regulations to control emissions of air pollutants from stationary sources. To maximize the opportunity for trading of emissions within a source, EPA has defined the term “stationary source” expansively, such that a large facility can be considered a “source.” Yet EPA has never gone so far as to define as a source a group of facilities that are not geographically connected, and EPA has long held the view that trading across plant boundaries is impermissible under sections 111 and 112.\(^\text{38}\)

Regardless of how courts may ultimately decide the issue, the TTTT option aims to advance a policy administration officials dare not espouse openly. Such stratagems are clever only when

---


your opponents are asleep at the switch. That’s not the case here! When people wise up to power grabs, they do things like join the Tea Party.

Constitutional scholar Angelo Codevilla\(^{39}\) notes that public trust in government is in free fall:

> This year, Rasmussen’s April 15 survey of sentiments about government found that only 22 percent of respondents considered government as protective of their persons and rights, while 54 percent see it as a threat to liberty and 37 percent fear it outright.\(^{40}\)

Fear and distrust run high, Codevilla argues, because America is governed by an increasingly unaccountable administrative state:

> Today’s America, ruled over by an administrative state, is ever less different from the rest of the world. Virtually all of the rules by which we live are made, executed, and enforced by administrative agencies—from the IRS to the EPA and countless others—that are responsible only to themselves, to those who appoint them, and to the interest groups with which they are affiliated. Ordinary people have virtually no recourse against them.

Agencies are fooling themselves if they think Americans’ respect for law will forever ensure respect for regulatory and enforcement actions: “Expecting ordinary people to support governmental actions as if they were their own is reasonable only when these actions proceed perceptibly from elections.”

The 2010 midterm elections were in no small part a repudiation of cap-and-trade. Public sentiment has not changed since then – otherwise President Obama and Democratic leaders would have introduced new cap-and-trade legislation in the 113\(^{th}\) Congress and made GOP opposition to cap-and-trade an election-year issue.

From a citizen’s perspective, the bottom line is this: Congress never enacted a law specifically requiring or authorizing NSPS for CO\(_2\) and never enacted a greenhouse cap-and-trade program.

EPA already acts as if it is authorized to steamroll through congressional gridlock and legislate climate policy.\(^{41}\) The more EPA attempts to implement policies that do not “proceed

---


perceptibly from elections,” the more it risks de-legitimating itself and being perceived as threat rather than as protector.