September 28, 2017

STRATEGY TO ADDRESS GHG REGULATION UNDER THE CLEAN AIR ACT IN RELATION TO REFORM OF THE CLEAN POWER PLAN

Introduction and Executive Summary

The new Administration's "Unified Agenda" released recently by Office of Management and Budget (OMB) states that the Clean Power Plan (CPP) exceeds the statutory authority provided under section 111 of the Clean Air Act. As EPA reconsiders the CPP, along with the Section 111(b) Rule, referred to as the Carbon Pollution Standards (CPS), it should take the opportunity to consider the full scope of overarching issues regarding federal regulation of greenhouse gases under the Clean Air Act.

An advanced notice of proposed rulemaking (ANPR), or a preamble to a proposed CPP and CPS revision addressing such issues, as the case may be, should act as a springboard for review of: (1) the scope of the CPP, CPS, and other greenhouse gas regulations, (2) the underlying scientific data supporting them, (3) the legal thresholds for taking regulatory action, (4) the economic impacts, and (5) the public policy considerations. This strategy provides the framework for the Administration to accomplish these goals while restoring the rule of law based on the limits imposed by Congress under the Clean Air Act.

The Foundation recommends that the scope of an ANPR or regulatory preamble should include the following:

- Within the context of finalizing the 111 replacement rules, clarification that an EGU-specific endangerment and contribution assessment must occur before Section 111 rules would apply;
- Initiation of a docket to assess whether the higher "significant contribution" Section 111 standard has been met; and
- Longer-term, concurrent review of the Section 202 Endangerment Finding made in 2009.

An ANPR or regulatory preamble should put these issues on the table for public comment, so that any revisions of current federal greenhouse gas regulations proceed in an open and coordinated manner with full public participation. There are two overarching matters that should be addressed: (1) the failure of the prior Administration to utilize the correct contribution to

endangerment standard in promulgating the CPS and CPP, and (2) the underlying flaws with the 2009 Endangerment Finding.

Analysis

The prior Administration took the position that EPA's CAA § 111(b) Rule for new power plants (also known as the Carbon Pollution Standards)[1] and the 111(d) Rule for existing power plants[2] did not require its own endangerment finding. According to EPA, an endangerment finding was only required to *list* a subcategory, not to impose new standards on an already listed category and that, in any event, the Section 202 endangerment finding was sufficient to support the CPP.[3] EPA's position in these rulemakings is the subject of legal challenge, including arguments that a new endangerment finding should be required for both the 111(b) Rule and 111(d) Rule. These arguments have not been ruled upon because the 111(b) and (d) cases have been stayed pending action on the CPP by the new Administration. The CPP ANPR or preamble to proposed revision must provide for resolution of this disputed issue.

One of the major reasons the prior Administration did not want to concede the applicability of a Section 111-specific endangerment finding is the difference between the Section 111 standard and the lower Section 202(a)(1) threshold that governed the 2009 endangerment finding for mobile sources. In both statutory tests, the agency must find a contribution to a condition of air pollution "which may reasonably be anticipated to endanger public health or welfare…." But, the standard governing the amount of contribution is notably different between the two sections.

CAA §202(a)(1) states:

The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare… (Emphasis added)

On the other hand, CAA §111(b)(1)(A) states:

The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes ***significantly*** *to, air pollution which may reasonably be anticipated to endanger public health or welfare.* (Emphasis added)

This distinction regarding the materiality of the contribution is vitally important. If we are to protect the rule of law, the distinction between the threshold for making an endangerment finding

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[1] *See* U.S. EPA, Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,510, 64,529-64,531 (Oct. 23, 2015).

[2] U.S. EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,709 n. 284 (Oct. 23, 2015).

[3] 80 Fed. Reg. at 64,529-64,530.

for stationary source categories under Section 111 and for mobile sources under Section 202 should be honored and whether the Section 111 standard has been met should be addressed.

There is every reason to believe that the prior Administration did not wish to utilize the Section 111 endangerment standard because there has been extensive analysis regarding the very minor reductions/benefits that would be provided by the Clean Power Plan. Specifically:

- 0.2% reduction in global CO_2 concentration;
- Global temperature increase reduced by 0.01 degree Fahrenheit;
- Sea level rise reduced by less than 1/100th of an inch;
- In 2025, total annual US reductions under the Clean Power Plan would be offset by approximately 3 weeks of Chinese emissions; and
- For every coal plant EPA predicted would be shut down under the CPP, 31 were already planned or being built across the world.[4]

Note that a review of the underlying data reveals that the entire inventory of EGU carbon dioxide emissions is only slightly larger than two times the total tons projected to be reduced by the CPP. Therefore, the minimal impacts noted above will remain minimal even if you are assessing the full inventory of EGU carbon dioxide emissions (the metrics above will only be slightly more than doubled) – leaving a set of impacts that, by any measure, can be fairly characterized by the administration as "non-significant." A call for public comment on these matters would help shed light on the proper standard for making an endangerment finding under Section 111, now and in the future. More broadly, the ANPR or preamble should also ask for public comment to review actions taken by the prior Administration regarding greenhouse gas emissions, including the underlying scientific data supporting those actions, the legal thresholds, the economic impacts, and the public policy considerations.

The trigger for such a call for broader public comment is the recent filing of three administrative petitions seeking reconsideration of the Section 202 endangerment finding. Two of the petitions argue that the underlying science does not support the finding. The third petition argues that the Section 202 endangerment finding is legally deficient because the prior Administration failed to obtain statutorily mandated peer review from the Science Advisory Board before making the finding.

Some have argued that reconsidering the Section 202 endangerment finding could lead to federal common law nuisance claims based on greenhouse gas emissions. For two reasons, those arguments are without merit. First, greenhouse gases are fungible and proving injury from specific sources, categories of sources, or even combined greenhouse gas emissions from all sources nationwide is problematic, as greenhouse gases are emitted worldwide from virtually every nook and cranny of the developed and developing world. Even in the event that a legally

[4] *See "*Climate Effects" of EPA's Final Clean Power Plan, ACCCE, August 2015 (Intergovernmental Panel on Climate Change (IPCC) projected concentrations of CO2 in 2050 from 450 to 600 ppm); Statement of Karen Harbert, U.S. Chamber of Commerce, U.S. House of Representatives Comm. on Science, Space, & Technology, April 15, 2015; National Centers for Environmental Information, NOAA, Global Analysis – Annual 2014; U.S. Chamber of Commerce, Institute for 21st Century Energy, Coal-fired Power Plants Planned and Under Construction; EPA CPP RIA.

defensible scientific case could be made that total global anthropogenic emissions are significantly contributing to climate change, allocating responsibility among emitters everywhere will be an impracticable task for federal courts to undertake. For similar reasons, state nuisance claims for greenhouse gas emissions are unsustainable.

Second, the holding in *American Electric Power v. Connecticut*[5] states that the *existence* of the Clean Air Act displaces federal common law with respect nuisance from air emissions. "If EPA does not set emission limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court."[6] Accordingly, even if the Section 111 or Section 202 endangerment findings are withdrawn, EPA still has the ability under *Massachusetts v. EPA*, to regulate greenhouse gases. It is the ability, provided via Congressional delegation, that is important; not whether there is a specific rule or set of rules governing greenhouse gas emissions.

Conclusion

For these reasons, EPA should ensure the issues set forth above are addressed in requesting public comment on both the Section 111 endangerment finding and the Section 202 endangerment finding in connection within its review of the CPS and CPP.

Respectfully Submitted,

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5 564 U.S. 410 (June 2011).
6 *Id* at 425.