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RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

May 17, 2012

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Jackson:

Pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, the Committee on Energy and Commerce seeks information regarding the Environmental Protection Agency's (EPA) recent proposed rule seeking to regulate carbon dioxide (CO_2) emissions from power plants under the agency's Clean Air Act New Source Performance Standards (NSPS) program. The proposed rule was published in the Federal Register on April 13, 2012 (77 Fed. Reg. 22392), and is referred to by EPA as its "Carbon Pollution Standard for New Power Plants."

We specifically seek information regarding EPA's proposal to combine coal-fired and natural gas-fired power plants into a single newly created source category "for the purpose of greenhouse gas emissions," and then to set a CO_2 emissions standard that currently can only be met by a new efficient combined cycle natural gas-fired plant. We also request information regarding EPA's proposal to effectively require any new coal-fired power plant to install carbon capture and storage (CCS) technology, even though CCS technology necessary to meet the new CO_2 standard has never been demonstrated or deployed on a commercial scale, the geologic sequestration sites that would be needed have not been developed, and the necessary regulatory and legal framework to address liability has not been developed. The practical result is a de facto ban on any new coal-fired power plants. We request information regarding these matters, and also regarding the precedent this proposed rule will set for other sectors regulated under the NSPS program.

Further, we request information regarding EPA's plans to propose CO_2 standards for existing power plants. In December 2010, EPA committed in a settlement to set such standards for new and existing power plants, and the agency's regulatory impact analysis for the proposed

rule states that "Existing sources are not covered in this proposed action, but will be addressed in a subsequent rulemaking by the EPA."

We are very concerned with the implications of these proposed and forthcoming rulemakings because in addition to supporting thousands of jobs, coal generates affordable electricity, leaving consumers more money to spend on other essential goods and services. In addition to providing consumers with an affordable, reliable supply of electricity, coal provides affordable energy for domestic manufacturing and other businesses.

Furthermore, in December 2010 EPA also entered into a separate settlement agreement committing to set CO_2 emissions standards for new and existing refineries. We request information about EPA's plans to regulate CO_2 emissions relating to refineries and other source categories regulated under the NSPS program for which EPA has or may be considering setting CO_2 standards.

Accordingly, please find attached to this letter questions and document requests as well as instructions relating to the requests for documents. Please provide your written responses to the attached requests for information and documents not later than June 1, 2012. Thank you for your attention to this matter. Should you have any questions, please contact Mary Neumayr of the Majority Committee staff at (202) 225-2927.

Sincerely,

Fred Upton
Chairman

Ed Whitfield
Chairman
Subcommittee on Energy and Power

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Bobby L. Rush, Ranking Member
Subcommittee on Energy and Power

Attachments

INFORMATION AND DOCUMENT REQUESTS

Proposed GHG Standards for New Power Plants

1. In EPA's proposed rule to regulate carbon dioxide (CO_2) emissions from new electric generating units (EGUs) under the Clean Air Act New Source Performance Standards (NSPS) program,[1] EPA maintains that it is authorized to regulate greenhouse gas (GHG) emissions from power plants based on previous endangerment findings relating to non-GHG pollutants made for the source categories addressed in this rulemaking.

    a. Does EPA take the position that it has the authority, and that it has already made the prerequisite endangerment findings, to regulate GHG emissions from all sources currently regulated under the NSPS program? Please provide all legal opinions or memoranda relating to this position.

    b. Could EPA be compelled to regulate GHG emissions from all sources currently regulated under the NSPS program as part of its periodic 8-year reviews?

    c. Please provide a list of all source categories currently regulated under the NSPS program.

2. While EPA may take the position that it need not make new GHG endangerment findings for EGUs, the proposed rule discusses an alternative interpretation. As an alternative, EPA is considering whether Clean Air Act section 111 should be interpreted to require new endangerment and significant contribution findings for GHG emissions from EGUs. In connection with this alternative, EPA proposes to find that CO_2 emissions from fossil fuel-fired EGUs cause-or-contribute significantly to GHG pollution.

    a. Please clarify whether this proposed finding applies to existing units, or whether the finding applies to new units, or to both new and existing units.

    b. Please clarify whether all units regulated as a result of the previous non-GHG endangerment findings are covered by this proposed finding. If not, which units are exempted and could they be subject to litigation seeking to compel them to be regulated?

3. EPA proposes to combine coal-fired power plants and natural gas-fired power plants into a newly created subpart TTTT category "...for purposes of GHG emissions." EPA states: "We recognize that today's proposed approach of combining the Da category and a portion of the KKKK category, and applying as the standard of performance the rate that natural gas-fired EGUs can meet, represents a departure from prior agency practice."

[1] All references to the "proposed rule" refer to the proposed rule entitled "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units" published in the Federal Register at 77 Fed. Reg. 22392 (April 13, 2012).

a. What precedent is there for combining NSPS source categories and setting a standard that only a portion of the sources in one of the previous categories can meet?

b. What is the basis for abandoning the longstanding practice, as provided for in section 111(b) of the Clean Air Act, of distinguishing among classes, types, and sizes within categories of new sources, including recognizing fundamental differences among fuels?

4. EPA maintains that "[n]ew coal-fired power plants with CCS are being permitted and built today," and that "new coal-fired power plants can install CCS technology" and thereby meet the emissions limits in the proposed rule. However, the Administration itself issued a report in August 2010 entitled "Report of the Interagency Task Force on Carbon Capture and Storage," that identifies numerous barriers to the deployment of CCS, including the availability of suitably large, secure geologic reservoirs, the cost of CO_2 capture, transport and storage, long-term liability for sequestration sites, the need for a legal/regulatory framework, and public awareness and support. EPA was not only a participant in this Interagency Task Force, but a co-chair, and has since expressly supported the Task Force's conclusion that there is "considerable uncertainty" associated with commercial deployment of CCS.

a. Please outline in detail all the steps that would be required for a new coal-fired power plant to gain approval and install CCS, including site identification, permitting, community education, technology development, design, financing, liability and other risk management, construction, and ongoing monitoring and reporting.

b. For each step, please explain whether existing technologies and Federal, State, local and tribal government programs are sufficient to complete the step in a timely and cost-effective manner, and how much time would be required for each step.

5. The August 2010 report also expressly stated: " . . .early CCS projects face economic challenges related to climate policy uncertainty, first-of-a-kind technology risks, and the current high cost of CCS relative to other technologies. Administration analyses of proposed climate change legislation suggest that CCS technologies will not be widely deployed in the next two decades absent financial incentives that supplement projected carbon prices. In addition to the challenges associated with cost, these projects will need to meet regulatory requirements that are currently under development. Long-standing regulatory programs are being adapted to meet the circumstances of CCS, but limited experience and institutional capacity at the Federal and State level may hinder implementation of CCS-specific requirements. Key legal issues, such as long-term liability and property rights, also need resolution."

a. How has EPA addressed each of the concerns and barriers to deployment of CCS identified in the August 2010 report?

b. Please provide the analyses that demonstrate that EPA has considered and provided a means for overcoming each of these concerns?

6. Section 111 of the Clean Air Act requires that performance standards for new stationary sources listed under the NSPS program be achievable. Prior to the promulgation of the proposed rule, EPA stated in its October 2010 White Paper on "Available and Emerging Technologies for Reducing Greenhouse Gas Emissions for Coal-Fired Electric Generating Units" that "full-scale carbon separation and capture systems have not yet been installed and fully integrated at an EGU."

   a. Did EPA consider setting separate standards for new coal-fired power plants that could be achieved by sources using non-CCS technologies?

      i. If yes, what standards were considered?
      ii. If no, why not?

   b. At this time, are any coal-fired power plants in commercial operation equipped with full-scale CCS systems that would be needed by a new coal-fired power plant to comply with the proposed rule?

      i. If yes, please identify each plant and describe the CCS technology that has been installed that could comply with the proposed rule.

      ii. Please identify suppliers and vendors that design and install commercial scale CCS technology, and provide any available estimates of the cost of such installation and all associated costs.

   c. If there are not coal-fired power plants in commercial operation equipped with full-scale CCS systems that would meet the standards in the proposed rule, what is the basis for EPA's assertion that a new coal-fired power plant can install CCS technology to comply with the proposed rule?

7. Section 111 of the Clean Air Act also provides that "... nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance."

   a. Given that natural gas combined cycle (NGCC) technology is the only demonstrated and viable compliance option for meeting EPA's proposed new plant standards, how is this approach consistent with Congress's specific direction that EPA is not authorized to require a source to install any particular technology system?

8. Section 111 of the Clean Air Act also requires that EPA take into account costs in setting NSPS performance standards.

a. In the development of the proposed rule, did EPA consider less "costly" standards for coal-fired power plants, such as efficiency standards and setting as the performance standard the rate that can be achieved by the best performing existing coal-fired power plants?

   i. If yes, why did EPA decide not to propose the less costly measures?

   ii. If EPA did not consider less costly measures, why not?

b. Has EPA or any other Federal agency estimated the cost of the CCS technology and associated capital and operation costs that a new coal-fired power plant would need to employ to meet the proposed rule's standards?

   i. If yes, what is the estimated cost, or range of costs, for a new coal-fired power plant to comply with the rule? Please provide all cost estimates prepared by EPA or provided to EPA by other Federal agencies or third parties.

   ii. If no, on what basis has EPA determined that the standards are affordable for new coal-fired plants?

9. EPA states that "even though [CCS] is costly, there are some State and Federal programs that can make CCS more affordable." What are "the State and Federal programs that can make CCS more affordable"?

   a. Please list each such program, how much in funding is available, and the eligibility requirements for receipt of such funding.

   b. What is the source of the funding for these programs and is such funding likely to continue to be available in the current fiscal climate?

10. EPA also maintains that even if a new coal-fired power plant cannot presently install CCS technology, there continues to be a "pathway" for use of coal to generate electricity under a 30-year averaging compliance option.

   a. Has EPA considered whether a source would be able to obtain financing giving the uncertainty of being able to comply in the future?

   b. What penalties could be imposed on sources that commit to installing CCS under this 30-year option but cannot meet the more stringent emissions requirements in later years?

   c. Could such a new coal-fired power plant be forced to shut down?

GHG Emissions for Existing Power Plants

11. EPA previously stated in its August 3, 2011, response to the Committee's May 18, 2011, letter that "promulgation of a GHG NSPS for a source category such as EGUs under section 111(b) obligates the EPA to issue a guideline for state regulation of existing sources in the same source category." What is EPA's current timeline for issuance of such standards for existing plants?

12. In the proposed rule, EPA states that it does not have a sufficient base of information to develop a proposal for the affected sources that may be expected to take actions that would constitute "modifications" under EPA's NSPS program. The proposed rule states that EPA may issue proposed standards of performance for modified existing power plants in the future.

    a. What are EPA's plans for developing sufficient information regarding "modifications"?

    b. What is EPA's timeline for the consideration and issuance of such standards?

13. EPA discusses in the proposed rule the exemption for existing EGUs that undertake modifications to comply with other EPA rules. The proposed rule indicates that this exemption for pollution control projects is similar to the exemption in EPA's NSR regulation that was vacated by the DC Circuit Court in 2005.

    a. Has EPA considered whether the exemption in the proposed rule for pollution control projects could be vulnerable to a similar legal challenge?

    b. The proposed rule states that "the Court's vacatur of the NSR regulatory provision may call into question the continued validity of the section 111 regulatory provision." If the exemption were successfully challenged, what are the potential cost implications for existing EGUs?

14. Can EPA confirm that it will not require CCS technology for existing coal-fired power plants?

15. EPA stated in its August 3, 2011, response to the Committee's May 18, 2011, letter that once the agency sets GHG NSPS for new power plants, the agency is obligated to issue guidelines for existing power plants. Before deciding to propose standards for new plants that would trigger the obligation to regulate existing plants, did EPA estimate the range of costs of imposing GHG standards on existing power plants?

    a. If yes, what were those estimated costs? Please provide all draft and final cost estimates, analyses and briefing documents considered by EPA.

b. If not, what is EPA's justification for initiating an action which triggers the obligation to issue standards for existing plants without considering the associated costs?

16. The proposed rule refers specifically to anticipated modifications of existing facilities that would involve equipment changes to improve efficiency to meet the requirements of a future 111(d) rulemaking for existing sources.

    a. To which future 111(d) rulemaking requiring efficiency improvements at existing sources does the preamble refer?

    b. Has EPA considered emissions guidelines under CAA section 111(d) that would include efficiency improvements?

17. EPA stated in its August 3, 2011, response to the Committee's May 18, 2011, letter that "Administrator Jackson and Assistant Administrator Gina McCarthy have stated publicly that the agency has no intention of pursuing a cap-and-trade program for GHGs under the Clean Air Act. The agency reaffirms those statements here." At the same time, on its website that agency in March 2012 updated its "Cap & Trade Simulation" web page which includes a CO_2 program relating to power plants, including with a "Facilitators Guide" dated July 20, 2011.

    a. If EPA has no intention of pursuing a cap-and-trade program, what is the purpose of the CO_2 simulation program?

    b. Please provide an estimate of the staff, materials, and vendor commitment employed to develop the "Cap & Trade Simulation" web page.

    c. Is the agency developing any other cap-and-trade documentation, software or other materials relating to CO_2 and cap-and-trade programs? If yes, what activities are being undertaken? Please describe the activities being undertaken, and the staff and resources being used for these activities.

    d. Does the representation in the August 3, 2011, letter that the agency "has no intention of pursuing a cap-and-trade program for GHGs under the Clean Air Act" remain accurate?

Additional Planned Actions to Address GHGs from Stationary Sources

18. Please list all source categories regulated under Clean Air Act section 111 for which EPA has considered promulgation of GHG standards.

    a. For which of these source categories is EPA currently considering petitions or requests to propose GHG standards?

b. Are there any source categories regulated under the NSPS program for which EPA can confirm it will not propose GHG standards?

c. What is EPA's current estimated schedule for the proposal of standards addressing each source category?

RESPONDING TO COMMITTEE DOCUMENT REQUESTS

In responding to the document request, please apply the instructions and definitions set forth below:

INSTRUCTIONS

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you.

2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.

3. In the event that any entity, organization, or individual named in the request has been, or is currently, known by any other name, the request should be read also to include such other names under that alternative identification.

4. Each document should be produced in a form that may be copied by standard copying machines.

5. When you produce documents, you should identify the paragraph(s) and/or clause(s) in the Committee's request to which the document responds.

6. Documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. Indicate the office or division and person from whose files each document was produced.

7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph(s) and/or clause(s) of the request to which the documents are responsive, should be provided in an accompanying index.

8. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.

9. The Committee requests electronic documents in addition to paper productions. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, back up tape, or removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), you should immediately consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above.

10. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party.

11. If any document responsive to this request was, but no longer is, in your possession, custody or control, state:

a. how the document was disposed of;
b. the name, current address, and telephone number of the person who currently has possession, custody or control over the document;
c. the date of disposition;
d. the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.

12. If any document responsive to this request cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.

13. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

14. The request is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

15. All documents should be bates-stamped sequentially and produced sequentially. In a cover letter to accompany your response, you should include a total page count for the entire production, including both hard copy and electronic documents.

16. Two sets of the documents should be delivered to the Committee, one set to the majority staff in Room 316 of the Ford House Office Building and one set to the minority staff in Room 564 of the Ford House Office Building. You should consult with Committee majority staff regarding the method of delivery prior to sending any materials.

17. In the event that a responsive document is withheld on any basis, including a claim of privilege, you should provide the following information concerning any such document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; (e) the relationship of the author and addressee to each

other; and (f) any other description necessary to identify the document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any statute, rule, or regulation.

18. If the request cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a privilege log provided to the Committee, as described in (17) above, or identified as provided in (10), (11) or (12) above.

DEFINITIONS

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto. The term "document" also means any graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, back up tape, memory sticks, recordings, and removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, electronic format, disk, videotape or otherwise. A document bearing any notation not part of the original text is considered to be a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.

3. The term "communication" means each manner or means of disclosure, transmission, or exchange of information, in the form of facts, ideas, opinions, inquiries, or otherwise, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, instant message, discussion, release, personal delivery, or otherwise.

4. The terms "and" and "or" should be construed broadly and either conjunctively or disjunctively as necessary to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, limited liability corporations and companies, limited liability partnerships, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, other legal, business or government entities, or any other organization or group of persons, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms "referring" or "relating," with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

7. The terms “you” or “your” mean and refers to

For government recipients:

“You” or “your” means and refers to you as a natural person and the United States and any of its agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction; and includes any other person(s) defined in the document request letter.