

Written Comments Submitted On Behalf of Seventeen Organizations

to the U.S. Environmental Protection Agency

January 20, 2016

on the

Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating

Units Constructed on or Before January 8, 2014;

Model Trading Rules;

Amendments to Framework Regulations

80 Fed. Reg. 205 (October 23, 2015)

Submitted Electronically to:

The Environmental Protection Agency

Docket ID No. EPA-HQ-OAR-2015-0199

By

The Texas Public Policy Foundation
Austin, Texas

Mississippi Center for Public Policy
Jackson, Mississippi

The Pelican Institute
New Orleans, Louisiana

Rio Grande Foundation
Albuquerque, New Mexico

The Platte Institute for Economic Research
Omaha, Nebraska

The John Locke Foundation
Raleigh, North Carolina

The Buckeye Institute for Public Policy Solutions
Columbus, Ohio

Federalism In Action
Charleston, South Carolina

Great Plains Public Policy Institute

Sioux Falls, South Dakota

Oklahoma Council of Public Affairs
Oklahoma City, Oklahoma

The John K. MacIver Institute for Public Policy
Madison, Wisconsin

Freedom Foundation of Minnesota
Minneapolis, Minnesota

Montana Policy Institute
Bozeman, Montana

Competitive Enterprise Institute
Washington, DC

Kansas Policy Institute
Wichita, Kansas

Idaho Freedom Foundation
Idaho Falls, Idaho

James Madison Institute
Tallahassee, Florida

INTRODUCTION

There are significant legal, technical, and policy deficiencies of the so-called “Clean Power Plan” (CPP) as finalized by the U.S. Environmental Protection Agency on August 3, 2015 and published Friday, October 23, 2015. The CPP rule, this proposed federal implementation plan, model trading rules, and amendments to framework regulations, will have momentous impacts on the economies of the states.

The Clean Power Plan is illegal. States are being immediately and irreparably harmed by EPA’s illegal effort to force States to reorder their electrical generation systems. Twenty-seven (27) of the 47 states subject to the Clean Power Plan are challenging it in court. These states represent more than 60% of the electricity supply of the U.S. The Clean Power Plan will impose immense sovereign and financial harms upon the states on a scale exceeding any environmental

regulations the states ever faced. Many legal experts and scholars expect the Clean Power Plan to be overturned by the courts.

A paper in the Federalist Society, “Does EPA’s Clean Power Plan Proposal Violate the States’ Sovereign Rights?” (Engage Volume 16, Issue 1, By David B. Rivkin, Jr., Mark DeLaquil, Andrew Grossman) explains how the rule illegally “commandeers the states in violation of the Tenth Amendment” of the Constitution. Ohio EPA chief Craig Butler has testified that the rule is “encumbered with significant legal problems and should not go forward.” Even Harvard Law Professor Laurence Tribe has testified that the regulation amounts to “burning the Constitution.”

The Clean Power Plan will hurt business and electricity production. Over 120 organizations have sued against the Clean Power Plan including large utilities, electric coops, industry trade associations, labor unions, coal mining companies, non-profits, and others.

The Clean Power Plan will raise electricity prices. According to NERA Economic Consulting the Clean Power Plan will increase average nationwide average electricity prices by 11%/year to 14%/year and cost a total of \$220 billion to \$292 billion, or \$29 billion to \$39 billion per year. Electricity prices are projected to increase for every state that is subject to the Clean Power Plan. Forty-one (41) of these states face peak year retail electricity price increases of 10% or more. As many as 47,000 megawatts of coal-fired electric generating capacity are projected to retire because of the Clean Power Plan.

For example, in Texas, the Electric Reliability Council of Texas (ERCOT) estimates the Clean Power Plan could result in the retirement of at least 4,000 MW of coal-fired generation capacity with significant impacts on the ERCOT regional grid. They further estimate that the Plan could increase retail power drives by up to 16 percent by 2030, not including the impacts of new transmission projects or other investments that could be needed to support compliance. Each of the states submitting these comments estimate a double digit increase in consumer electric rates as a result of the proposed rule.

Higher electricity prices will hurt low-income and middle-income families. Nearly half of American families – 59 million households -- have after-tax incomes of less than \$1,900 per month. These families spend an average of 17% of their take-home pay on energy. These low- and middle-income families will be hit the hardest by the electricity price increases caused by the Clean Power Plan. The Heritage Foundation has predicted as much as 1 million lost jobs from the rule.

The Clean Power Plan will not prevent climate change. Despite its enormous cost, the Clean Power Plan will have no practical effect on climate change. The projected reduced temperature rise of 0.018 degrees Celsius by 2100 is immeasurable, and the projected reduction in sea level rise, the thickness of two sheets of paper, is insignificant.

COMMENTS ON THE PROPOSED FEDERAL PLAN

The Environmental Protection Agency (EPA) is proposing a federal plan to implement the greenhouse gas (GHG) emission guidelines for existing fossil fuel-fired electric generating units (EGUs) under the Clean Air Act (CAA).

The emission guidelines were proposed in June 2014 and finalized on August 3, 2015 as the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (also known as the Clean Power Plan).

This proposal presents two approaches to a federal plan for states and other jurisdictions that do not submit an approvable plan to the EPA: a rate-based emission trading program and a mass-based emission trading program. These proposals also constitute proposed model trading rules that states can adopt or tailor for implementation of the final emission guidelines.

The proposed Federal Plan is an enormous burden to states. States are faced with an enormous burden and difficult decisions in implementing the proposed Federal Plan. These include (but are not limited to) choosing intra-state versus inter-state trading, selecting partner states for trading, setting up allowance trading infrastructure, deciding whether to auction or allocate

allowances and what to do with auction proceeds, and deciding whether to establish implementation plans that are not based on cap-and-trade. This economic burden amounts to an unfunded mandate on the states both in developing and implementing state and federal plans.

The legal underpinnings of the Clean Power Plan weaken the applicability of the proposed federal plan. The compliance pathways offered by EPA are saddled with the same core legal concerns and policy objections, and are indistinguishable in their ultimate harm to consumers and the economy.

The proposed Federal Plan would impose a one-size-fits-all approach to the states. While the EPA purports to offer states flexibility with the Plan, in reality the proposed Federal Plan would impose a one-size-fits-all, command and control approach to environmental and energy regulation, overstepping the legitimate scope of federal authority to have the EPA control the generation, distribution, and use of energy in states. The effects of this overreach violate states' constitutional protections against federal commandeering. The end result would set a precedent for the federal government to fully set and implement state energy policy. This rule imposes sweeping economic changes, while also imperiling the flexibility necessary for states to more effectively address environmental and economic concerns.

The Proposed Federal Plan violates the principles of Cooperative Federalism. The EPA threatens to impose on a state a "Federal" plan designed by EPA bureaucrats in Washington, DC. This is a clear violation of the principles of cooperative Federalism in which the state governments, local governments, and the federal government share responsibility in the governance of the people. They cooperate in working out details concerning which level of government takes responsibility for particular areas and creating policy in that area. Cooperative federalism puts forward the view that the national and state governments are partners in the exercise of governmental authority. Instead, the proposed Federal Plan imposes a plan on the states.

In practice, this means that the federal agency sets minimum standards, which states are left to meet however they best see fit, subject to EPA approval. The proposed Federal Plan is the latest

example of the transition from cooperative federalism to combative federalism where the EPA shreds its traditional role in favor of an authoritarian, top-down imposition of specific rules.

The Proposed model interstate trading program is a cap and trade scheme and cannot be created without the consent of Congress. The proposed model interstate trading program amounts to a cap and trade system already rejected by the Congress several times. EPA proposes to implement this scheme through a system of interstate compacts. Article 1, Section 10, Clause 3 of the U.S. Constitution says, “No State shall, without the Consent of Congress, ...enter into any Agreement or Compact with another State...” Interstate trading systems require approval by Congress and cannot be implemented otherwise.

EPA leaves little time for states to decide. EPA has said it will release the final Federal “Cap and Trade” Plan in the summer of 2016, likely weeks before state plans are due on September 6th. Without knowledge of what alternative to state-based compliance EPA will present in a final Federal Plan—especially given EPA’s willingness to dramatically alter CPP provisions between proposed and final forms—states are forced to make blind decisions ahead of their deadlines. This is unfair and inappropriate.

The proposed Federal “Cap-and-Trade” Plan fails to address reliability or cost. The proposed Federal Plan fails to address the concerns expressed by state public utility councils and others associated with electric reliability, rising electricity prices and employment impacts. According to NERC, and other equally credible studies, reliable baseload power is critical. The effects of the plan will be borne disproportionately by the nation’s most vulnerable and marginalized populations.

The rule has a total price tag of \$292 billion, according to a new study by NERA, and 41 states will see double-digit percentage rate hikes. A separate study by Energy Ventures Analysis (EVA) found that 16 states will see 25 percent or higher increase in wholesale electricity prices.

According to a study by the National Black Chamber of Commerce on the proposed rule, Black and Hispanic poverty will rise by 23 and 26 percent, respectively. EPA Administrator McCarthy has even admitted, “Low-income minority communities would be hardest hit.” These

populations are most harmed because they spend a higher share of their income on energy than high-income households.

Free markets should set electricity rates, not manipulated markets. Low cost electricity powers the economy of every state. The federal government should not impose market constraints that favor one fuel over another. The Clean Power Plan, and especially the proposed Federal Plan, does just that.

The EPA Should Change Shall to Should. In Paris at COP-21, according to press reports, the Administration compelled the 195 gathered member states to change the ultimate agreement from "shall" set economy-wide targets for carbon reductions, to the voluntary "should" without reopening negotiations. The EPA should take the same tack and make emission reductions completely voluntary for the states.

CONCLUSION

The Clean Power Plan and the proposed federal plan raise a host of important legal, economic and environmental questions. The federal plan's efforts to commandeer state-based environmental regulation and the corresponding unintended consequences necessitate greater scrutiny, and should only be advanced on a timetable that first allows full and adequate review and consideration of a final federal plan before state implementation plans are due.

EPA should not impose federal plans on the states until the courts have decided whether the Clean Power Plan is legal. Many legal experts and scholars believe the courts will ultimately overturn the Clean Power Plan. According to the stay motion filed by the states, "EPA set a timeline intended to force the States and other entities to make irreversible decisions before judicial review concludes." EPA should make it easy for states to obtain a two-year extension in order to submit a final implementation plan by September 2018. Granting extensions will allow the courts to rule on the Clean Power Plan before states waste more time and resources on a rule that is likely to be overturned.

