ARIZONA DEPARTMENT
OF
ENVIRONMENTAL QUALITY

1110 West Washington Street • Phoenix, Arizona 85007
(602) 771-2300 • www.azdeq.gov

Janice K. Brewer
Governor

Henry R. Darwin
Director

BY EMAIL AND WEB SUBMISSION

December 1, 2014

To: Docket ID No. EPA–HQ–OAR–2013–0602

Re: Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule; 79 Fed. Reg. 34830 (June 18, 2014)

To Whom It May Concern:

Attached are the comments of the Arizona Department of Environmental Quality on EPA's legal authority to adopt the above-referenced proposed guidelines for CO2 emissions from fossil fuel-fired electric generating units.

Sincerely,

Henry R. Darwin, Director
Arizona Department of Environmental Quality

Southern Regional Office
400 West Congress Street • Suite 433 • Tucson, AZ 85701
(520) 628-6733

Legal Discussion

Arizona believes that the proposed rule exceeds EPA's authority under Section 111(d). By its terms, Section 111(d) prohibits EPA from promulgating regulations for pollutants that are emitted "from a source category which is regulated under" Section 112. Electric Generating Units (EGUs) obviously are a source category that EPA has regulated under Section 112 through its recent Mercury and Air Toxics Standards. EPA therefore may not adopt Section 111(d) regulations for EGUs.

Arizona DEQ is aware of EPA's position that Section 111(d) is ambiguous owing to what EPA believes are conflicts in the House and Senate versions of the 1990 Clean Air Act Amendments as to Section 111(d). *See* EPA "Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units," at 12. Arizona DEQ, however, endorses the view that there is no conflict because the Senate language, adopted in a "Conforming Amendment," was a drafting mistake that, as a matter of statutory interpretation, must be ignored. *See Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013). In any event, EPA's attempt to harmonize the Senate and House language fails because it essentially renders the House language a nullity. The only way to reconcile the substantive House language with the non-substantive and erroneous Senate language is to give the House language full effect. Under that language, EPA cannot regulate source categories under Section 111(d) that it is regulating under Section 112. As a result, given the MATS rule, EPA cannot regulate EGUs under Section 111(d).

Even if EPA could regulate EGUs under Section 111(d), the manner in which EPA has proposed to regulate CO_2 emissions from EGUs improperly limits State discretion under that provision. Section 111(d) contemplates shared authority between EPA and the States. EPA may adopt regulations setting forth a "procedure" that is "similar" to the Section 110 procedure for States to develop plans and submit them to EPA for approval. On the other hand, Section 111(d) gives States the authority to "establish" the performance standards that go into the State plan.

EPA's proposal, however, would effectively preempt States' authority to establish performance standards in their plans. Under the proposal, EPA establishes State-specific emissions standards that each State must meet. Although EPA terms these standards "goals," they are no different than performance standards—the "goals" are maximum emission limits to which sources in the regulated source category are subject. EPA has never before established State "goals" in the Section 111(d) program, and for good reason. It is the States' role to establish performance standards, not EPA's.

EPA's Section 111(d) authority to judge whether a State plan is "satisfactory" does not empower it to dictate State emission limits. As in other cases where the CAA delegates authority to States to determine emission standards in the first instance, EPA may disapprove a State determination only where it can show that the State acted "unreasonably." *See, e.g., Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 484-89 (2004). Thus, although EPA ultimately could disapprove a State Section 111(d) plan if it is unreasonable and therefore not "satisfactory," EPA would bear the burden of showing that the State acted unreasonably. As a result, it cannot dictate substantive outcomes, as it has proposed to do here.

EPA's proposal also trespasses on State authority by failing to allow the States to take into consideration "the remaining useful life' of sources to which the State-established performance standards apply. *See* Section 111(d)(1)(B). As Arizona sets forth in its comments, EPA's own building block analysis shows that all coal generation in Arizona would be forced to close, including recently constructed generation and generation that has recently installed hundreds of millions of dollars of pollution-control equipment. Arizona DEQ welcomes EPA's willingness in the Notice of Data Availability to further consider the stranded investment issue. 79 Fed. Reg. 64543, 64548-49 (Oct. 30, 2014). Unless EPA modifies Arizona's goal to allow these coal units to operate for their remaining useful lives, EPA will run afoul of Section 111(d)(1)(B).

EPA's proposal also exceeds the Agency's Section 111(d) authority by using a "best system of emission reduction" (BSER) analysis that extends to facilities that are not within the regulated source category. EPA's "outside-the-fence" approach is a departure from EPA's consistent past practice for the more than 40-year history of the Section 111 program. Without exception, EPA has always determined BSER by examining emission reductions that can be achieved through the installation of emissions-control equipment or by making emissions-reducing operational changes at the regulated facility. EPA maintains that its "outside-the-fence" analysis is a valid Section 111(d) system for reducing emissions from regulated facilities because it forces those facilities to operate (and therefore emit) less. But, in contrast to other sections of the Clean Air Act which provide for emissions caps (such as Title IV), Section 111 does not authorize emissions caps and certainly not based on an EPA analysis that a regulated facility should operate less because EPA believes that product substitutes are available. If EPA's position were correct, it would have authority to, for instance, determine that petroleum refineries should produce less gasoline because EPA thinks that electric vehicles are a good substitute for gasoline-powered automobiles. Clearly, Section 111 does not delegate such broad authority to EPA.

EPA's outside-the-fence approach is also beyond the Agency's authority because outside-the-fence measures are unenforceable. The Arizona DEQ has no authority to order natural gas or renewable energy generators to operate more, or to order the public to consume less electricity, in order to offset reduced coal generation. Nor does Arizona DEQ have authority to take enforcement action against entities that voluntarily undertake these types of "portfolio approach" measures, if they fail to implement those commitments. Neither does EPA.

The fact that EPA's proposal is in excess of its statutory authority is shown most clearly by the extent EPA's authority intrudes into Arizona's traditional police power, preserved by the Federal Power Act, 16 U.S.C. § 824(a), over electric utility generation resource planning. EPA's BSER analysis is based on the premise that the "best system" for Arizona to reduce CO_2 emissions is to completely reorder its electric generation and demand-side resources according to EPA-determined "building blocks." Even with whatever limited flexibility the proposal provides for States to depart from these building blocks in developing an implementation plan, EPA's proposal will force Arizona to undertake a major reengineering of its electric utility system. Section 111(d), a little-used and limited provision, cannot possibly be construed as having such an extended reach. As the Supreme Court recently stated, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a 'significant portion of the American economy … we typically greet the announcement with a measure of skepticism." *Utility Air*

Regulatory Group v. EPA, 134 S.Ct. 2427, 2444 (2014). As the Court stated, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* at 19.