

EPA's New Source Performance Standard for Electric Generating Utilities:
Dissecting the Legal Rationale for a Policy Driving Rule

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Chairman Stewart, Chairman Lummis, and Ranking Members Swalwell and Bonamici, thank you for providing me the opportunity and the honor to appear before you today.

The subject of today's hearing is critically important because it addresses both the technical and legal basis for what I believe is the most important and impactful regulation of the Obama Administration's Environmental Protection Agency: The New Source Performance Standard for Greenhouse Gases from Electric Generating Units (hereinafter, the EGU NSPS). I commend the Subcommittee for addressing this issue at a key time, and look forward to assisting your ongoing efforts.

We should be exceedingly proud that in the more than 40 years since Congress enacted the Clean Air Act, the United States simultaneously has promoted the healthiest skies and the strongest economy in the world. Congress in the Clean Air Act provided EPA specific mechanisms and tools to achieve the policy and science based goals the Agency deems necessary to fulfill its environmental mandate, but within the context of a specific and strict legal framework that the law's provisions delicately articulate. As EPA proceeds to address climate change using a law that was enacted without consideration for the unique and fundamentally distinct circumstances of greenhouse gas (GHG) emissions, these existing legal authorities are being put to new tests. While, as a general proposition, I do not take issue with EPA's authority under the New Source Performance Standard program to address GHG emissions under appropriate circumstances, the Agency's chosen path in the proposed EGU NSPS, by EPA's own admissions, surpasses the bounds of its legal authority into the realm of arbitrariness and capriciousness. Congress, in enacting the Clean Air Act, and Section 111 in particular, strictly limited the Agency's authority to control air emissions from stacks and did not authorize EPA to do what it proposes to do here and phase out an entire source of energy in the United States.

By way of background, I am both a lifelong environmentalist and a career environmental lawyer. I am very proud to have spent the majority of my career in public service, as a trial attorney in the Justice Department's Environment Division, as the General Counsel of the United States Environmental Protection Agency, and

as a judicial law clerk on the Tenth Circuit Court of Appeals. In my current capacity as a private practitioner, I am privileged to work with a plethora of stakeholders including private companies and trade associations, environmental organizations, and the government, to develop creative solutions that advance environmental protection while also enabling the United States to retain economic competitiveness in a trade sensitive, global environment where very few economies provide even the faintest glimmer of our own environmental controls and public process protections.

In both my government and private careers, I am very proud of the opportunities I have had to participate in and advance environmental rule of law initiatives, working to help develop the enactment of environmental and public participation laws in growing economies. In particular, I am proud to serve as the co-chair of the International Bar Association's Climate Change Justice and Human Rights Task Force and vice-chair of the American Bar Association's Sustainable Development Task Force. Last year I was honored to have served as one of five American Bar Association delegates to the United Nations at the Rio+20 sustainable development conference in Brazil, and this year was one of five ABA delegates to the World Justice Forum on environmental and climate change justice issues.

During my tenure as EPA General Counsel, the Supreme Court decided the landmark case *Massachusetts v. EPA*. In brief, the 5-4 decision compelled EPA to consider the regulation of greenhouse gases alongside other "air pollutants" under the Clean Air Act. Shortly after the decision, President Bush and the White House tasked me to oversee the development of legal options and authority for promulgating the first-ever national GHG controls in the United States under the Clean Air Act. Working with the talented group of lawyers in EPA's Office of General Counsel and other federal agencies, I formulated a full range of legal options, along with associated pro and con considerations.

As part of this assessment, I came to appreciate certain advantages of utilizing Section 111 of the Clean Air Act—the New Source Performance Standards provision—over the various options available to address GHGs from stationary sources. When applied appropriately, NSPS can be the most effective tool for driving environmental results and emission reductions while considering the costs and benefits on those subject to such controls, the economy, energy security, and, ultimately, consumers. In fact, I advised that if EPA were compelled to regulate GHGs from utilities, NSPS should be the preferred mechanism to pursue among the existing Clean Air Act options given its flexibility, its history of realizing

environmental results, and the statutory mandate to consider demonstrated technology and weigh costs and benefits of the promulgated standards.

Thus, given my history, experience, and perspective regarding Section 111, it is with regret that I offer my opinion that the NSPS EGU proposal EPA released in September steps beyond the legal bounds of the authority Congress established in the Clean Air Act.

As other witnesses have testified today, the approach EPA proposed in the EGU NSPS raises numerous technical and policy concerns for coal and pet coke fired EGUs. In setting a performance standard of 1,100 pounds of CO₂/MWh, the proposed NSPS relies on two technical assumptions: (1) that the single best-performing Integrated Gasification Combined Cycle (IGCC) facility in the nation is the representative baseline for the coal and pet coke EGU industry as a whole; and (2) that carbon capture and storage is 'adequately demonstrated' technology today. Relying upon these technical assumptions, EPA's proposed NSPS establishes the 1,100 pounds CO₂/MWh performance standard, a standard which no commercial coal or pet coke facility in the United States if not anywhere in the world can come close to meeting. Thus, as a policy ramification, the proposed NSPS has the practical effect of being as much an energy regulation as an environmental regulation given its impact of phasing out any new coal or pet coke facilities from being built in the United States.

I defer to today's witnesses to address the technical and policy ramifications of this proposal, and instead focus on several key legal deficiencies based strictly on the record upon which EPA relies in the Rule. (The EGU NSPS raises numerous legal questions beyond the scope of this testimony, but given the focus of today's hearing I am focusing specifically on the legal ramifications of the technology questions that are at issue today.)

Let's start with the language in the Clean Air Act itself. The opening provision of Section 111 defines a "standard of performance" as

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been **adequately demonstrated**. (emphasis added)

Although the intersection of this text with EPA's proposal raises scores of legal questions and issues, for today's purposes my focus entirely is on two simple words: "adequately demonstrated." Although lawyers frequently deserve a reputation of making simple things more complicated than they need to be, I will resist that temptation today. "Adequately demonstrated" simply means what it says, and there is no need to go further to understand the fundamental and fatal flaw in EPA's proposal.

First, to base an emissions standard for all coal facilities on IGCC technology runs counter to a long standing EPA precedent that EPA cannot require facilities to "redefine the source." In other words, EPA itself long and consistently has recognized that it is not the Agency's role to dictate or switch the type of facility and energy source any given project is to utilize, but instead to identify the best system of emissions reductions for the type of source that is proposed by the project developer. IGCC units, which use combustion turbines, have significantly different designs than coal-fired boilers. Thus, EPA departed at the outset from established past precedent in utilizing a baseline that mandates the type of source facilities are required to build.

Second, and the primary focus of today's hearing, EPA clearly erred in requiring CCS under Section 111 given that, by the Agency's own admissions, the technology is not "adequately demonstrated." To be clear, EPA itself in the proposal concedes that no coal fired boiler has ever been in commercial operation with CCS or achieved the proposed limit. Simply stated, EPA in the record does not point to a single operating facility in the United States—or in the world—that is currently utilizing the technology that it says is "adequately demonstrated." It similarly fails to point to any commercial source that even comes close to meeting the standard that it requires as "adequately demonstrated." Importantly, EPA's prior proposed rule from April 2012 did not project CCS to be adequately demonstrated for another 10 years. This proposed rule claims that CCS is currently demonstrated, but provides no explanation of why EPA changed its outlook so dramatically in less than 18 months. Finally, beyond the record of this specific rulemaking, EPA's proposed standard also is entirely inconsistent with the Agency's last 30 months of issuing GHG permits for new facilities under the Prevention of Significant Deterioration program.

To address these legal inconsistencies, EPA provides an extensive legal justification for utilizing NSPS to develop "evolutionary" new technologies. I do not dispute that one element of many environmental standards is a technology-driving consideration, even if such technology comes with a significant cost for the

regulated community, and that such standards legitimately can serve dual purposes simultaneously of driving emissions reductions while promoting the development of important new technologies. However, even when EPA is allowed to promote technology driving standards to some extent, Section 111 does not delegate carte blanche authority to simply mandate new technologies that do not satisfy the statutory mandate of “adequately demonstrated.” Those two words are explicit, intentional and cannot be disregarded. It is not necessary to look any further than EPA’s record in the proposed NSPS to conclude that the technologies EPA would require are not “adequately demonstrated” today, and thus violate the letter and the law of Section 111. A lengthy and complex legal justification in and of itself cannot compensate for a disregard of the plain language of the text of the statute, and EPA’s legal advocacy cannot fix a conclusion that is arbitrary and capricious under the Act.

Finally, beyond the legal ramifications of this proposal on new EGUs, it is critical to anticipate and appreciate the potential precedent of this Rule on other types of facilities. First, once EPA finalizes this rule, certain groups are likely to argue that this standard “sets the floor” for so-called Best Available Control Technology (BACT) standards for facilities that are required to obtain a pre-construction permit under the Prevention of Significant Deterioration (PSD) program. Thus, this standard has the potential to cascade to other sources not directly regulated by the NSPS and where IGCC and CCS bear even less relevance.

Second, EPA has committed to regulating GHG emissions from existing EGUs no later than June, 2016. If EPA were to apply a similar legal interpretation to existing facilities of requiring retrofits of technology that is not adequately demonstrated, existing EGUs may be required to fuel switch given that Administrator Gina McCarthy has recognized that CCS is not an available retrofit technology for existing sources. Such decisions will be unpractical and uneconomic for many existing facilities, leading to shut downs, reliability concerns, and cost increases. Notably, there is a very strong legal argument that EPA has authority to avoid the regulation of existing sources under the NSPS program in the first instance and thus avoid triggering the ramifications of imposing an energy efficiency standard on the nation’s existing utility fleet. This argument—that EPA is precluded under Section 111(d) from regulating existing sources that are subject to Section 112’s controls for Hazardous Air Pollutants—is the straightforward reading of the text of the Clean Air Act and would enable EPA to address GHG emissions from new sources while regulating other emissions from existing sources pursuant to established programs such as the PSD permitting system and National Emissions Standards for Hazardous Air Pollutants.

Third, it is critically important to consider the impact of the EGU NSPS on other NSPS source categories. EPA has signaled ~~if not committed~~ that it plans to regulate the GHG emissions of other source categories through NSPS. However, such other source categories—which largely represent the nation’s manufacturing sectors—are fundamentally distinct from EGUs. First, EPA must make separate and distinct ‘endangerment’ determinations for each source category and decide, under Section 111, whether the emissions from a specific source category pose a ‘significant’ contribution to endangerment. Second, unlike utilities, the processes employed by most manufacturing source categories are unique and distinct for each facility, prohibiting across the board regulation of energy use or efficiency. Third, most other source categories are trade exposed, meaning that the impact of GHG regulations on a particular source category could merely lead to such industry being located to other areas of the world that are less energy efficiency, resulting in net increases in GHG emissions globally. For these reasons, EPA should clarify that nothing it does regarding utilities shall serve as precedent for other source categories that are fundamentally distinct.

Thank you for the opportunity to share my views on this important topic. I would be happy to answer any questions.