Testimony of the Pennsylvania Coal Alliance before the Pennsylvania House and Senate Coal Caucuses

RE: Assumptions & Illegality of EPA's Clean Power Plan

Tuesday, November 17, 2015
9:00 AM Senate Majority Caucus Room, Capitol Building
Harrisburg, PA

John Pippy
CEO

Good morning chairmen, members of the House and Senate Coal Caucuses, thank you for the opportunity to testify on this very important issue.

My name is John Pippy and I am CEO of the Pennsylvania Coal Alliance (PCA).

PCA is the principal trade organization representing underground and surface bituminous coal operators in Pennsylvania, as well as other associated companies whose businesses rely on coal mining and a strong coal economy. PCA represents the interests of more than 300 member companies statewide which produce almost 90 percent of the bituminous coal mined annually, with over 59 million tons mined in 2014. The Commonwealth ranks fourth nationally in coal production and exports almost 15 million tons annually to 20 states and internationally.

The steam coal market represents the largest market by far for Pennsylvania-mined coal. Accordingly, PCA's members have an immediate and significant interest in how Pennsylvania plans to comply with the Environmental Protection Agency's (EPA) regulation on carbon emissions, commonly referred to as the Clean Power Plan (CPP).

As members of the coal caucus, you are amply aware of the economic impact coal has both directly and indirectly on your district for jobs and economic development. This morning I would like to highlight the legal issues with both the authority to regulate and illegal assumptions within the rule.

DISREGARD FOR STATE PRIMACY

EPA is blatantly circumventing Congress, state's rights and our elected official's ability to represent their constituents fairly by mandating energy policies disguised as environmental regulation. Under the CPP, EPA is exercising primacy over a sector that has historically been regulated by states. In concurrence with the Pennsylvania Public Utility's original comments on this matter, this conflicts with the Federal Energy Regulatory Commission's responsibility under the Federal Power Act to regulate wholesale electricity markets that meet the unique needs and utilizes the unique resources within each state.

The PCA believes that the CPP represents a fundamentally impermissible attempt to legislate the composition and structure of the power grid. At the expense of the hundreds of thousands of employees working in positions associated with the coal industry and the hundreds of millions of consumers who rely on reliable and affordable sources of electricity, EPA has grossly overstepped its regulatory authority under the Clean Air Act (CAA). In particular, the CPP's requirement for state plans to implement "outside the fence" measures, including redispatching energy generation from coal-fired EGUs to natural gas combined cycle (NGCC) units and renewable energy sources demonstrates how this agency is promulgating a regulation that dictates energy winners and losers.

This regulation has brought together bipartisan opposition at every level of government and every sector of industry and economy. With this rule, the EPA is attempting to transform itself from an environmental regulator to a central planning agency for states' energy economies. The EPA's brazen governmental overreach is a prime example of governmental bureaucracy run rampant. This power grab by the EPA has been challenged in the courts and there is a good chance that it will be found wanting.

212 North 3rd Street, Suite 102, Harrisburg, PA 17101 • *p:* 717-233-7900 | *f:* 717-231-7610
WWW.BETTERWITHCOAL.COM

Our Congressional and state representatives are now burdened with spending time and resources reigning in a rogue agency through introducing legislation that inserts them, and the taxpayers they represent, back into the process of policy-making. Within the last 15 years, federal agencies have finalized and proposed just over 30 high impact rules with compliance price tags of more than $1 billion. The EPA alone introduced 19 of these with costs over $90 billion dollars.

The CPP by EPA's own modest estimate will cost $8.4 billion annually by 2030.

As of November 15, 2015, the EPA faces serious legal opposition from 27 states who have filed lawsuits to block implementation of the CPP. These states represent over 60 percent of the nation's energy supply. In addition, 24 national trade associations — including the U.S. Chamber of Commerce, the National Association of Manufacturers and National Federation of Independent Businesses — are suing EPA. The members of these associations represent more than 80% of the U.S. economy. Another 37 rural electric cooperatives, 10 major companies and three labor unions representing over 878,000 members are also suing the EPA.

EPA'S TRACK RECORD

Given the EPA's recent track record on rules it has promulgated, DEP should have serious concerns about aggressively advancing a plan to comply with the CPP. These recent decisions demonstrate that the EPA continues to overreach in its authority and interpretation of Federal environmental laws. These recent legal decisions include:

1) A June 2015 decision by the United States Supreme Court that remanded the EPA's Mercury and Air Toxics Standards (MATS) Rule back to the D.C. Courts citing that the EPA should have taken into account the costs to utilities and others in the power sector before even deciding whether to set limits for the toxic air pollutants it regulated in 2011.
2) An October 2015 decision by the Sixth Circuit of the U.S. Court of Appeals mandating a stay of the EPA's "Clean Water Rule" (WOTUS) pending conclusive determination of the legality of the rule

MATS was the most expensive and stringent EPA regulation on power plants prior to the CPP and was responsible for the closure of more than 400 coal units in 36 states. Unfortunately, in the MATS case, the ruling by the Unites States Supreme Court came too late. Citing the cost of compliance, several of Pennsylvania's power plants were closed and hundreds of jobs shuttered.

The CPP will face similar legal scrutiny, and the cost of developing a compliance plan to meet the carbon emissions standard will be much higher, as this is not just retrofitting existing plants with available technologies, but taking offline existing power-producing plants, replacing them with less reliable and more costly new sources and building out the transmission infrastructure statewide.

HEALTH CLAIMS

In an attempt to justify the cost of compliance, and make the issue relevant and relatable across the country, President Obama and the EPA have spun a public relations campaign linking climate change to an issue that hits many Americans close to home; asthma.

As you are aware, Section 111(d) of the Clean Air Act regulates carbon emissions from existing electric generating units. The problem is that carbon dioxide—which the rule regulates – does not cause asthma.

212 North 3rd Street, Suite 102, Harrisburg, PA 17101 • *p:* 717-233-7900 | *f:* 717-231-7610
WWW.BETTERWITHCOAL.COM

The Institute for Energy Research, which used data from the EPA's National Emissions Inventory, the Center for Disease Control's National Surveillance for Asthma and the National Health Interview Survey, found that the other six "criteria pollutants" that the agency regulates have declined by 62 percent since 1980. Meanwhile, the prevalence of asthma has increased steadily, with child asthma increasing 131 percent in that same time period.

In addition to falsely linking asthma rates to carbon emissions, the EPA has amplified the projected health benefits by double-counting the proposed benefits of these high-impact regulations using benefits already realized by previously implemented regulations such as the National Ambient Air Quality Standards and MATS.

In section 4.3 of EPA's Regulatory Impact Analysis (RIA) which accompanies the CPP it states, "it is possible that some costs and benefits estimated in this RIA may account for the same air quality improvements as estimated in the illustrative [National Ambient Air Quality Standards] RIAs."

The EPA also states in the same section, "Because EPA rarely has the time or resources to perform new research to measure directly, either health outcomes or their values for regulatory analyses, our estimates are based on the best available methods of benefits transfer, which is the science and art of adapting primary research from similar contexts to estimate benefits for the environmental quality change under analysis."

As the study is not performed on the specific regulation or the emission that it regulates, but on the best available methods of benefits, it should not be taken at face value.

ILLEGALITY

Summarized below are the legal arguments facing the CPP under the CAA. Given the significant role that future legal decisions will play in determining the final provisions of the CPP, it is imperative that Pennsylvania submit an initial plan with a request for a two-year compliance extension.

1) The CPP is based upon purported emissions reduction measures that cannot be deemed as a Best System of Emissions Reduction (BSER).
    a) Building Blocks 2 and 3 of the CPP reflect "beyond-the-fenceline" measures as part of the BSER, reflecting steps that cannot be implemented within an individual facility. Such measures cannot properly be deemed as a "system" as the term is used in Clean Air Act (CAA) Section 111(a)(1). The CPP's BSER determination, therefore, exceeds the scope of EPA's authority under the CAA.

2) EPA's interpretation of a BSER is indefensible considering the Supreme Court's holding in *UARG v. EPA*
    a) Under *UARG v. EPA*, Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." Congress has hardly "spoken clearly" to the question of whether "beyond-the-fence line" measures may be part of a BSER. Since the effect of Building Blocks 2 and 3 of the CPP transform the landscape of electricity generation and usurp authority generally reserved to state and regional utility agencies and FERC, and would dramatically affect the affordability of electricity and the viability of a large industrial sector, the CPP reflects the same interpretive fallacy that was involved in *UARG* and that cannot be sustained in considering the more limited scope of authority granted by the CAA.

212 North 3rd Street, Suite 102, Harrisburg, PA 17101 • *p:* 717-233-7900 | *f:* 717-231-7610
WWW.BETTERWITHCOAL.COM

3) The BSER that EPA determined as part of the CPP is not "adequately demonstrated"
    a) Under Section 111(a)(1), valid standards of performance must be based upon a BSER that is "adequately demonstrated." However, the heat rate reductions and generation targets for natural gas combined cycle (NGCC) and renewable sources have yet to be adequately demonstrated at the scale necessary to realistically achieve the state goals within the CPP. In particular, the heat rate assumptions fail to take into account source-specific characteristics that impact whether further heat rate reductions can indeed be achieved. In addition, there has yet to be a demonstration that NGCC generation targets have ever been achieved, especially during times of peak demand. The lack of achievability of these Building Blocks is all the more clear when considering that the final state goals would translate to emissions standards that are more stringent for existing power plants, than for state-of-the-art new coal-fired power plants (e.g., supercritical pulverized coal-fired plants) as regulated under the new source performance standard (NSPS) rule.

4) Sources that are regulated under CAA Section 112 cannot also be regulated under Section 111(d)
    a) Under Section 111(d), EPA clearly and unambiguously cannot regulate "any air pollutant" emitted from a "source category which is regulated under section [112]." However, coal-fired power plants are currently subject to the (MATS) Rule, a regulation which is based upon CAA Section 112. Any interpretation to the contrary is inconsistent with the DC Circuit's prior holding in *New Jersey v. EPA*, where EPA's attempt to regulate power plants under 111(d) was met with disapproval. Therefore, any regulation of coal-fired power plants under the CPP exceeds the scope of EPA's authority under CAA Section 111(d).

GLOBAL COST OF COMPLIANCE

Using the EPA's own modeling, and assuming every state will meet their goal by 2030, this regulation will impact the global temperature by 0.01°F.

The Energy Information Administration (EIA) reports that the U.S. reduced carbon emissions from coal consumption by 23 percent between 2008 and 2012, while China simultaneously increased emissions by 30 percent and India by 29 percent. Emissions from the U.S. and India combined and doubled are less than China's output.

In November 2015, the New York Times brought to light that China had quietly released data that their statistical agency had misreported carbon emissions, adding about 600 million tons to China's coal consumption in 2012 — an amount equivalent to more than 70 percent of the total coal used annually by the U.S., and in addition to the EIA's reported numbers above.

As we pay dearly for the cost of reducing our consumption of fossil fuels, developing countries will be strengthening their economies on the back of coal. Even more disconcerting is that as we are forced to divest from coal and watch electric rates increase, jobs in energy intensive trade-exposed industries such as steel, manufacturing and chemicals that Pennsylvania relies on will go overseas where electricity from coal-fired power plants is cheaper, but the process is far less environmentally friendly than the U.S.

212 North 3rd Street, Suite 102, Harrisburg, PA 17101 • *p:* 717-233-7900 | *f:* 717-231-7610
WWW.BETTERWITHCOAL.COM

We will essentially be moving the emissions globally, losing the economic benefit and adding more carbon emissions to the same air. The U.S. Chamber of Commerce estimates the cost of compliance will be $51 billion in lost gross domestic product annually.

CONCLUSION

PCA opposes any attempt to artificially and prematurely alter the energy market. PCA recommends allowing the market to determine energy supply based solely on price and availability under the current PJM economic dispatch model.

PCA believes that the CPP represents a dramatic overstepping of EPA's legal authority under the CAA and will have detrimental effects on Pennsylvania's economy, price and reliability of electricity and the Commonwealth's ability to maintain its position as an energy leader. PCA does not support compliance with what we believe is illegal overreach into our state energy policy. Given DEP's aggressive timeframe for compliance, PCA believes it is in the best interest of all stakeholders for DEP to apply for and take advantage of the available two-year extension.

212 North 3rd Street, Suite 102, Harrisburg, PA 17101 • *p:* 717-233-7900 | *f:* 717-231-7610

WWW.BETTERWITHCOAL.COM