

# United States Senate

WASHINGTON, DC 20510

December 18, 2023

The Honorable Michael S. Regan  
Administrator  
US Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

Dear Administrator Regan:

We write in response to the Environmental Protection Agency's (EPA or Agency) latest solicitation of comments regarding the impacts of the proposed "Clean Power Plan 2.0"<sup>1</sup> on small entities and on the reliability of the electric grid.<sup>2</sup> We are deeply concerned that the Agency's proposal is unachievable, uneconomic, and unreasonable for small and large electric generating units (EGUs) alike given that the emissions control technologies mandated are currently inadequately demonstrated. Further, the proposed Clean Power Plan 2.0 fails to sufficiently consider the serious reliability concerns already raised by stakeholders, regulators, and independent experts. Changes by the Agency to the modeling underlying the rule, as well as information and comments furnished by third parties since the initial comment period closed that are discussed further below, clearly demonstrate that the EPA's proposal is unjustifiable.

As proposed, the rule clearly runs afoul of the Supreme Court's ruling in *West Virginia v. EPA*, 597 U.S. \_ (2022). Principal Deputy Assistant Administrator for the Office of Air and Radiation Joe Goffman acknowledged this constraint to Congress during his nomination hearing: "In *West Virginia v. EPA*, the Supreme Court held that the EPA did not have the authority to adopt generation-shifting as the best system of emission reduction (BSER) as part of its emission guidelines for power plant greenhouse gas emissions under Clean Air Act section 111(d). The Inflation Reduction Act did not include provisions addressing EPA authority to adopt generation[-]shifting as the BSER under Clean Air Act section 111."<sup>3</sup> Yet, the EPA has clearly chosen to adopt generation shifting through its co-firing requirements in the proposal.

The flaws we have identified both in the Agency's November request for comments and in the original proposal are so egregious that the EPA must withdraw the Clean Power Plan 2.0 and

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<sup>1</sup> New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33,240 (May 23, 2023) (hereinafter "Clean Power Plan 2.0").

<sup>2</sup> Supplemental Notice of Proposed Rulemaking; New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 80,682 (Nov. 20, 2023).

<sup>3</sup> *Hearing on the Nomination of Joseph Goffman to be Assistant Administrator for Air and Radiation of the Environmental Protection Agency: Hearing Before the S. Comm. on Env't & Pub. Works*, 118 Cong. (Mar. 1, 2023) (responses to questions for the record by Joseph Goffman).

start over. Correction of these serious, foundational deficiencies would require a wholesale rewrite such that any final rule the EPA finalizes would not be a logical outgrowth of the proposal.<sup>4</sup> The only legally permissible course is to develop a new, legally sound proposal and start the rulemaking again.

### **Additional Information on the Lack of Adequate Demonstration of Carbon Capture and Storage as the BSER Since the Close of the Initial Comment Period**

The proposed Clean Power Plan 2.0's compliance mechanisms are infeasible and not adequately demonstrated as applied to covered entities, including small EGUs. For example, the proposal included a list of "successful applications" of carbon capture and storage (CCS) for fossil fuel-fired power plants. However, none of these projects would meet the EPA's proposed requirement that 90 percent of carbon emissions be captured or show that the technology is adequately demonstrated and commercially available. In fact, SaskPower commented on the proposed rule providing a correction to the EPA's claim that the SaskPower Boundary Dam Unit 3 CCS facility had successfully demonstrated the feasibility of 90-percent capture rates at commercial scale.<sup>5</sup> The capital and operating costs associated with CCS, including parasitic load, will be unachievable for all entities, especially small EGUs.

Additionally, several proposed carbon dioxide (CO<sub>2</sub>) pipelines were listed in a supporting document entitled "Carbon Dioxide Transport and Storage References" to support the Agency's claim that CCS is adequately demonstrated.<sup>6</sup> These projects faced major setbacks due to permitting and other challenges. One of the projects listed in this supporting document is Summit Carbon Solutions. Summit Carbon Solutions has planned to build 2,000 miles of new CO<sub>2</sub> pipeline across the Midwest.<sup>7</sup> On August 4, 2023, North Dakota regulators denied the permit application for Summit Carbon Solutions.<sup>8</sup> Since the proposed rule's comment period closed on August 8, 2023, South Dakota regulators have denied siting approval to the Summit Carbon Solutions pipelines in the state.<sup>9</sup>

Another project cited in the proposal is the Navigator CO<sub>2</sub> Ventures' Heartland Greenway project that would have built 1,300 miles of new CO<sub>2</sub> pipeline across several Midwest states.<sup>10</sup>

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<sup>4</sup> See *Small Refiners Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) ("[U]nder the [Administrative Procedure Act] and under Clean Air Act § 307(d), ... the final rule must be a logical outgrowth of the proposed rule.") (internal quotation marks omitted).

<sup>5</sup> Comment Submitted by SaskPower to EPA (Aug. 4, 2023), <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-0687>.

<sup>6</sup> Carbon Dioxide Transport and Storage References from EPA (Jun. 5, 2023), <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0072-0068>.

<sup>7</sup> Congressional Research Service (CRS), *Siting Challenges for Carbon Dioxide (CO<sub>2</sub>) Pipelines* (Nov. 30, 2023), <https://www.crs.gov/Reports/IN12269?source=IAP>.

<sup>8</sup> Press Release, North Dakota Public Service Commission, PSC Denies Siting Permit for Summit Carbon Pipeline Project (Aug. 4, 2023), <https://www.psc.nd.gov/public/newsroom/2023/8-4-23SummitCarbonPipelineOrderNR.pdf>.

<sup>9</sup> South Dakota Public Services Commission, *Order Granting Motion to Deny Application of SCS Carbon Transport LLC* (Sept. 13, 2023), <https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2022/HP22-001/HP22-001OrdertoDeny.pdf>.

<sup>10</sup> Congressional Research Service (CRS), *supra* note 10.

On September 6, 2023, South Dakota regulators denied siting approval for the pipeline.<sup>11</sup> Following this denial, Navigator suspended pipeline permit proceedings in Iowa, and announced cancellation of the entire project on October 20, 2023.<sup>12</sup>

On November 20, 2023, another CO<sub>2</sub> pipeline project, Wolf Carbon Solutions, announced the withdrawal of its permit application in Illinois after the state's Commerce Commission recommended denying the permit.<sup>13</sup> While Wolf Carbon Solutions plans to reapply for the permit in 2024, it is far from certain that it will be approved.

Significant infrastructure – beyond the fence line of an EGU – is required to support deployment of CCS. An October report from the Energy Futures Initiative (EFI) Foundation, founded by former Secretary of Energy under the Obama Administration, Ernest Moniz, determined that 150 large carbon dioxide pipelines transiting 50,000 miles would be needed by 2035 to support the required CCS buildout under the proposed rule.<sup>14</sup> This would be the equivalent of building more than a quarter of the existing petroleum pipelines in a little more than a decade. Given the current permitting environment, it is unreasonable for the EPA to conclude that the necessary infrastructure will be in place within the timelines of the rule to support widespread deployment of CCS at existing or proposed EGUs, including smaller entities.

The infeasibility of constructing carbon pipeline infrastructure is exacerbated by the EPA's failure to approve permanent geologic sequestration wells in a timely manner under its Underground Injection Control Program (Class VI wells) to offtake carbon dioxide from hypothetical, future pipelines. On November 15, 2023, the EPA Office of Inspector General launched an evaluation of the Agency's Class VI wells permit program to determine whether the EPA has appropriately used authorization and funding to improve the permitting of such wells as part of the Infrastructure Investment and Jobs Act (IIJA).

Indeed, there is much ongoing disagreement regarding the adequate demonstration of CCS within the Biden Administration. The Administration's own Climate Czar, John Kerry, recently told a group at COP28 that the fossil fuel industry needs "to show us they can capture all those emissions, to tell us whether it's really going to be part of the future." Kerry was also quoted saying, "No scientist tells me we can capture it all. Can't do it."<sup>15</sup>

This information and recent developments since release of the proposal further proves that CCS technologies cannot qualify as an adequately demonstrated BSER for power plants under the

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<sup>11</sup> South Dakota Public Utilities Commission Meeting, *Minutes of Commission Meeting* (Sept. 6, 2023), <https://puc.sd.gov/minutes/2023/0906.aspx>.

<sup>12</sup> Press Release, Navigator CO<sub>2</sub>, Heartland Greenway Project Update (Oct. 20, 2023), <https://navigatorco2.com/press-releases/heartland-greenway-project-update>.

<sup>13</sup> Press Release, Wolf Carbon Solutions U.S., Wolf Carbon Solutions to Refile Mt. Simon Hub Permit Application in Illinois in Early 2024, [https://wolfcarbonsolutions.com/wp-content/uploads/2023/11/WOLF\\_MediaStatement\\_11\\_20\\_2023.pdf](https://wolfcarbonsolutions.com/wp-content/uploads/2023/11/WOLF_MediaStatement_11_20_2023.pdf).

<sup>14</sup> EFI Foundation, *How Much, How Fast? Infrastructure Requirements of EPA's Proposed Power Plant Rules* (Oct. 2023), <https://efifoundation.org/wp-content/uploads/sites/3/2023/10/EPA-H2-Infrastructure-1.pdf>.

<sup>15</sup> Karl Mathiesen, *John Kerry Warns Against Carbon Capture's "Great Façade" as a Climate Cure All*, PoliticoPro (Dec. 9, 2023), <https://subscriber.politicopro.com/article/2023/12/john-kerry-warns-against-carbon-captures-great-facade-as-a-climate-cure-all-00130943>.

Clean Air Act for any-sized EGU.

### **Electric Grid Reliability Concerns**

In the proposed rule, the EPA says that it has “evaluated the reliability implications of the proposal ... and consulted with the [Department of Energy] and the Federal Energy Regulatory Commission (FERC) in the development of these proposals.”<sup>16</sup> Yet comments filed on the proposed rule and a recent FERC technical conference demonstrate that alleged evaluation is far from adequate.

For instance, the joint comments from the ISOs/RTOs (includes ERCOT, MISO, PJM, and SPP) noted that the proposed Clean Power Plan 2.0 has the potential to “materially and adversely impact electric reliability.”<sup>17</sup> They expressed doubt about the adequate demonstration of the BSER technologies, saying the proposed rule “overstates the commercial viability of CCS and hydrogen co-firing.” Additionally, they cautioned against proceeding with the proposal’s requirements without firm proof of its commercial and operational viability, saying “In short, hope is not an acceptable strategy.”

State regulators have raised similar concerns. On October 4, 2023, the EPA received a letter from the West Virginia and Delaware Public Service Commissions (PSCs) cautioning the Agency that the proposed Clean Power Plan 2.0 and the rest of EPA’s EGU Strategy will force premature retirements and increase the risk of reliability problems.<sup>18</sup> Their letter further states:

We are not advocating against intermittent resources. They can provide valuable energy into the power grid on an intermittent basis when the sun is shining, and the wind is blowing. However, these resources cannot be expected to provide constant and consistent voltage and frequency even when they are generating and online. Batteries or other energy storage devices may be a backup source, frequency provider, or even base-load provider in the future, but that scenario may be very far into the future and is not likely to occur within the short timelines of EPA rules, which will certainly lead to the premature retirement of the resources that can provide backup, frequency control and baseload power when needed.<sup>19</sup>

Federal reliability and bulk power systems regulators have also expressed deep concern with the proposal’s effects on reliability across the entire grid. FERC Commissioner James Danly commented on the proposal, rebuking the EPA’s claim that it had consulted with the FERC to evaluate the reliability implications of the proposed rule.<sup>20</sup> Subsequently, the Commission held

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<sup>16</sup> 88 Fed. Reg. at 33,246-47.

<sup>17</sup> Comment Submitted by Electric Reliability Council of Texas, Inc. *et al* to EPA (Aug. 8, 2023), <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-0673>.

<sup>18</sup> Letter from Chairman Charlotte R. Lane and Chairman Dallas Winslow to Administrator Michael S. Regan (Jun. 8, 2023), <https://www.epw.senate.gov/public/cache/files/b/a/ba9bdb37-1b22-4791-a3fa-78491873dbf8/9F73018AC81181DD102C32034BD9153F.letter-from-wv-and-de-regulatory-commissions-to-epa.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> Comment Submitted by Federal Energy Regulatory Commission (FERC) to EPA (Aug. 8, 2023), <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-0707>.

its Annual Reliability Technical Conference on November 9, 2023.<sup>21</sup>

During the FERC technical conference, witness testimony and questioning from the Commissioners exposed fundamental gaps in the EPA’s analysis of the rule’s impacts, and its reliability consequences. The conference included a 60-minute panel discussion with Mr. Goffman. Commissioner Danly highlighted challenges that the rule will present for electric reliability if it is implemented as proposed. He raised questions about the EPA’s faulty assumptions regarding projections of the retirement of fossil fuel-fired power plants and asserted that the assumption that there would be orderly retirements should be re-examined. Finally, he expressed the hope that EPA would step up its interaction with the Commission on these subjects.<sup>22</sup>

The Commissioners also raised the point that the EPA neglected to examine whether fossil fuel-fired power plants could access financing to comply with the proposed rule if the market concludes the proposed regulation is designed to make some affected EGUs uneconomic. Commissioner Mark Christie expressed the following concern to Mr. Goffman: “If they can’t get financing, it’s not going to be a ‘glide path.’ It’s going to be a nosedive from 50,000 feet. You can have timelines, you can have alternatives, but if the units can’t get financing, they’re going to shut down.” Mr. Goffman responded that “it would be an overstatement if I said ‘we analyzed whether or not they could get financing...’”<sup>23</sup>

On November 2, 2023, we sent a letter to the Commission explaining in detail factors that should be considered at the November 9th technical conference, as well as a list of questions that were requested to be addressed by the Commissioners at the conference. From our review of the responses to these questions, it is clear that the limited discussion between the Commissioners and Mr. Goffman was not nearly enough time to explore or resolve the wide array of impacts from this rule on the power sector. Given Mr. Goffman’s repeated assertion that he is eager for feedback, we suggest the Agency take all of the information from the technical conferences and the feedback provided by the written responses attached hereto and use that information to develop a new proposal.<sup>24</sup>

As recognized by Commissioner Danly, “The bulk electric system is complicated—even the smallest addition or loss of generation or transmission can have a profound impact on the system’s stability.”<sup>25</sup> While EPA finally has recognized that the reliability impacts of the proposal bear more comprehensive analysis and consideration, the only way to address these concerns with the attention they deserve is for the EPA to withdraw the current proposal and consult with state, regional, and federal regulators as well as affected stakeholders before developing and proposing a feasible alternative.

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<sup>21</sup> U.S. Federal Energy Regulatory Commission, *2023 Annual Reliability Technical Conference* (Nov. 9, 2023), <https://www.ferc.gov/news-events/events/2023-annual-reliability-technical-conference-11092023>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See questions in Enclosure 1.

<sup>25</sup> Comment Submitted by Federal Energy Regulatory Commission (FERC) to EPA (Aug. 8, 2023), <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-0707>.

**Conclusion**


We urge the EPA to rescind its Clean Power Plan 2.0 proposal and make affordability, reliability, and the limits of its authorities under the Clean Air Act cornerstones of any future proposal. The more time that has passed since the proposal, the more issues with the Clean Power Plan 2.0 have been uncovered. The proposal is beyond repair and must be withdrawn. Failing to do so and moving ahead with the proposal would significantly threaten the safety and reliability of the electric grid. The impact of these flaws will ultimately be borne by ratepayers through higher energy costs and the effects of reduced reliability on economic opportunity and public health and safety. Low-income and other vulnerable Americans will be disproportionately affected due to the regressive nature of energy cost increases.

We further request that the EPA enter the full docket from the FERC Annual Reliability Technical Conference into the rulemaking record.

Sincerely,



Shelley Moore Capito  
Ranking Member  
Environment & Public Works Committee



John Barrasso, M.D.  
Ranking Member  
Energy & Natural Resources Committee

*Enclosures: 7*