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## United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, STAFF DIRECTOR  
ANDREW WHEELER, MINORITY STAFF DIRECTOR

October 24, 2008

Hon. Stephen Johnson  
Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Dear Administrator Johnson:

We are writing to express our grave concern that the EPA could be putting our nation's air quality at risk if the agency promulgates its currently pending New Source Review proposals incorporating "the EGU Hourly Test." Air pollution and poor air quality continue to threaten the health and quality of life of millions of Americans, especially those of children and older citizens. If the EPA moves forward with the New Source Review proposals, our nation's air and citizens will further suffer. That is why we request that you withdraw this dangerous proposal.

The flawed proposals in question are the: "Prevention of Significant Deterioration, Nonattainment New Source Review (NSR), and New Source Performance Standards: Emissions Test for Electric Generating Units," 70 *Federal Register* 61081 *et seq.* (October 20, 2005) and "Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units," 72 *Federal Register* 26,202 *et seq.* (May 8, 2007) (collectively "the EGU Hourly Test" proposal).

If adopted as a final rule, the EGU Hourly Test proposal would result in substantially higher emissions of dangerous air pollutants, undermining the Clean Air Act's public health and environmental protections. The proposal would permit electric generating units (EGUs) to increase their operating capacity and annual emissions without prior review, without installation of air pollution controls, and without modeling of impacts on ambient air. This, in turn, would significantly increase the likelihood that i) National Ambient Air Quality Standards that protect public health will be violated, threatening the health of children and families across the nation; ii) limits that preserve air quality in clean air areas would be breached; and iii) Class I pristine air areas such as National Parks will be degraded.

In addition, a critical component of the EPA's justification for the EGU Hourly Test proposal has been negated by a recent decision of the United States Court of Appeals for the D.C. Circuit, which vacated the Clean Air Interstate Rule (CAIR). Under the proposed EGU Hourly Test rule, air pollution sources would be permitted to increase

their annual emissions without triggering the protections required under the New Source Review (NSR) rules. The agency argued in its proposal, however, that any potential emission increases from the EGU Hourly Test rule would be mitigated or offset by emissions reductions mandated by CAIR. (*See* 72 Federal Register 26,208.) This purported reassurance is no longer available as a result of this summer's decision by the D.C. Circuit Court of Appeals vacating CAIR.

Because the CAIR rule was crucial to the agency's initial justification of the proposal, the vacatur of the CAIR rule throws into serious doubt the already questionable wisdom and legality of the promulgation of the EGU Hourly Test proposal. At a minimum, the agency must re-propose the EGU Hourly Test rule, offering explicit analysis and justification of the proposal in the absence of CAIR, and then must invite and respond to public comment on the re-proposal. Promulgating the rule as proposed without following these steps would raise serious legal questions under the Clean Air Act and the Administrative Procedure Act. As noted, since the agency viewed the emissions reductions resulting from the CAIR rule as "greatly reduc[ing] the significance of hours of operations on actual emissions from the sector nationally", the vacatur of CAIR makes it imperative for the EPA to address the significance of increased hours of operation and increased annual emissions from the sector.

At the same time, the agency's reliance on the CAIR rule as justification for the Hourly Test is itself wholly unpersuasive, for the simple reason that this approach unacceptably forfeits prior review of potentially air quality-degrading emissions increases. The vacatur of the CAIR rule only compounds the underlying threat to air quality posed by the EGU Hourly Test proposal. Seventy-one percent of the nation's coal-fired capacity is between 27 and 57 years old. As EPA's proposal recognized, electric power companies are almost certain to extend the life of these plants through renovations. Once renovated, these plants can be expected to operate for longer periods of time without installing additional controls, which will result in their annual, actual emissions increasing significantly, degrading air quality to the detriment of human health and the environment.

In addition, these emissions increases will occur without the prior knowledge and analysis of state air quality officials, and without the installation of air quality controls needed to ensure that those emissions do not impede the attainment or maintenance of annual National Ambient Air Quality Standards. Planning and implementing control strategies to attain the more stringent particulate matter and 8-hour ozone standards will be significantly more difficult. In fact, the effect of the rule's *de facto* exemption of large utility sources from NSR will compel air quality officials to impose more stringent control requirements on a greater number of smaller sources of emissions, many of which are less well-positioned to bear the additional costs. Even then, there is reason to fear that additional requirements for small sources will fail to offset the emissions, since power plants generate thousands of tons per year of uncontrolled nitrogen oxides, sulfur oxides, and volatile organic compounds.

In sum, both the dangerous effect of the proposed rule and the vacatur of CAIR put EPA in an untenable position if it goes forward with promulgating the rule as initially

proposed without further procedural and analytical steps required by the Clean Air Act and the Administrative Procedure Act. Given the weight of evidence against the rule, if the EPA does promulgate the rule, this Committee may be compelled to undertake extensive investigation and oversight of the agency's and its officials' conduct and actions in connection with the promulgation of the rule.

For these reasons, we urge the EPA to abandon the EGU Hourly Test proposal. If you have any questions or desire further information, do not hesitate to contact Joseph Goffman of the of the Environment and Public Works committee at 202 224 8832 or Laura Haynes of Senator Carper's staff at 202-224-2441. Thank you for your consideration in this matter.

Sincerely,



Barbara Boxer  
Chairman  
Committee on Environment  
and Public Works



Tom Carper  
Chairman  
Subcommittee on Clean Air  
and Nuclear Safety