

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

May 27, 2015

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Dear Administrator McCarthy:

I write to express concern about the Environmental Protection Agency's (EPA) Clean Power Plan proposal, which would set greenhouse gas emission targets for states to meet by 2030.¹ The proposal raises a number of legal concerns and, if finalized, will likely force energy rates to skyrocket nationwide. In fact, the resulting increase in energy prices would hit Wisconsin families particularly hard. In light of these concerns, I ask for your help in better understanding the rationale behind the EPA's proposed Clean Power Plan.

As you know, citing its authority under the Clean Air Act, the EPA announced its Clean Power Plan on June 18, 2014.² The Clean Power Plan would set state-by-state benchmarks for carbon emission reduction over the next 15 years.³ The proposal sets the emission targets for states and ultimately leaves it up to each state to decide how to meet the EPA's mandates.⁴

According to prominent legal experts, the proposal appears to be unconstitutional. Harvard Law School Professor Laurence Tribe stated that the EPA's Clean Power Plan is an "assert[ion] of executive power far beyond its lawful authority."⁵ In testimony to Congress he argued that by forcing states to meet the EPA's emission mandates, the proposal would "lock states into a framework where the goals are set by EPA, the means to be used to achieve these goals are set by EPA, and even the 13-month timetable for the enactment and implementation of new [state] legislation is set by EPA."⁶ Professor Tribe explained that Supreme Court precedent

¹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60), <https://www.federalregister.gov/articles/2014/06/18/2014-13726/carbon-pollution-emission-guidelines-for-existing-stationary-sources-electric-utility-generating#h-24>.

² *Id.*

³ *Id.* at 34,832.

⁴ *Id.* at 34,833.

⁵ Laurence H. Tribe, *The Clean Power Plan is Unconstitutional*, WALL STREET JOURNAL, Dec. 22, 2014, <http://www.wsj.com/articles/laurence-tribe-the-epas-clean-power-plan-is-unconstitutional-1419293203>.

⁶ *EPA's Proposed 111(d) Rule For Existing Power Plants: Legal and Cost Issues Before Subcomm. on Energy and Power, H. Comm. on Energy and Commerce*, 114th Cong. 16 (Mar. 17, 2015) (statement of Laurence H. Tribe, Professor of Constitutional Law, Harvard Law School), <http://docs.house.gov/meetings/IF/IF03/20150317/103073/HHRG-114-IF03-Wstate-TribeL-20150317-U1.pdf>.

prevents “such federal commandeering of state governments, ... which defeats political accountability and violates principles of federalism.”⁷

The Supreme Court’s commandeering doctrine is applicable to the EPA’s Clean Power Plan because the plan will force states to legislate or regulate in order to achieve the EPA’s carbon reduction benchmarks. If the Clean Power Plan is implemented, voters will electorally hold state officials responsible for increased energy costs caused by the rule “while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”⁸

In addition to the constitutional issues, the Clean Power Plan ignores the plain language of the Clean Air Act. Section 111(d) of the Clean Air Act authorizes the EPA to establish emission standards for air pollutants that are *not* regulated under Section 112 of the statute.⁹ Section 112 of the Clean Air Act authorizes the EPA to regulate “major sources” that emit air pollutants, including power plants.¹⁰ In 2000 and 2012, EPA used its Section 112 authority to implement emission standards for the same power plants that it now seeks to regulate under the Clean Power Plan.¹¹ Because the EPA cites Section 111(d) of the Clean Air Act as its statutory authority for the Clean Power Plan,¹² and power plants are already regulated under Section 112 of the Clean Air Act,¹³ the Clean Power Plan appears to violate the text of the Clean Air Act.

Further, the Clean Power Plan will likely cause significant economic harm to many states, including Wisconsin. According to one study, Wisconsin would lose nearly 21,000 jobs by 2030 if the EPA implements its proposal as written.¹⁴ That same study estimates that the loss of jobs, combined with increased energy costs, will reduce real disposable income in Wisconsin by \$1.82 billion by 2030.¹⁵ Further, the Public Service Commission of Wisconsin estimates the Clean Power Plan will cost the state between \$3.8 and \$13.9 billion from 2017 to 2033.¹⁶

⁷ *Tribe*, *supra* note 5 (citing *New York v. United States*, 505 U.S. 144, 175 (1992)). See also *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982).

⁸ *New York*, 505 U.S. at 169.

⁹ 42 U.S.C. § 7411(d).

¹⁰ 42 U.S.C. § 7412.

¹¹ 56 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000) (EPA categorizing stationary power plants as part of a “source category” under Section 112 of the Clean Air Act); 77 Fed. Reg. 9,304 (Feb. 16, 2012) (setting national emission standards for power plants under Section 112 of the Clean Air Act); see also *Comments of Laurence H. Tribe and Peabody Energy Corporation* at 17, Docket ID No. EPA-HQ-OAR-2013-0602, Dec. 1, 2014 [http://www.masseygail.com/pdf/Tribe-Peabody_111\(d\)_Comments_\(filed\).pdf](http://www.masseygail.com/pdf/Tribe-Peabody_111(d)_Comments_(filed).pdf);

¹² 79 Fed. Reg. 34830.

¹³ See *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct 2527, 2537 n.7 (2011) (noting that “EPA may not employ §7411(d) [Clean Air Act Section 111(d)] if existing stationary sources of the pollutant in question are regulated under the . . . ‘hazardous air pollutants’ program, §7412 [Clean Air Act Section 112]”); see also *Tribe*, *supra* note 5.

¹⁴ *The Economic Effects of the New EPA Rules on the State of Wisconsin*, BEACON HILL INSTITUTE AT SUFFOLK UNIVERSITY AND JOHN MACLVER INSTITUTE, Jan. 2015, <http://static.maciverinstitute.com/EPA%20Rules%20WI%20-%20MacIver%20Beacon%202015%20FINAL.pdf>.

¹⁵ *Id.*

¹⁶ *Wisconsin Congressional Delegation Briefing*, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Apr. 21, 2015.

The Clean Power Plan will also significantly raise energy prices on Wisconsin consumers and businesses. According to a study, the rule would increase residential energy rates in Wisconsin by up to 28 percent, increasing the average annual energy costs for a Wisconsin household by more than \$485 by 2020.¹⁷ Under the Clean Power Plan, industrial power rates in Wisconsin are projected to increase by 41 percent by 2020.¹⁸ All told, the total annual statewide cost of power and gas in Wisconsin will grow to a projected \$14 billion by 2020 if the EPA's proposal is finalized.¹⁹

In order to inform the Committee's oversight of the efficiency of federal programs and regulatory affairs, please provide the following information and material:

1. Does EPA take into account projected increases in energy prices on consumers as a "cost" of its proposed regulations? If not, please explain why not.
2. Wisconsin has reduced its carbon emissions by 20 percent since 2005.²⁰ The Wisconsin Department of Natural Resources estimates that under the rule, Wisconsin will need to reduce its carbon dioxide (CO₂) emission rate by an additional 34 percent from 2012 to 2030.²¹ According to the Public Service Commission of Wisconsin, the Clean Power Plan "fails to recognize the CO₂ reductions that Wisconsin (and other early acting states) has already achieved."²² Is EPA planning to account for states that have already significantly reduced carbon emissions? Please explain.
3. Wisconsin currently receives approximately 60 percent of its electricity from coal.²³ How can EPA ensure that compliance with the rule will not disrupt the reliability of the state's electrical grid? Please explain.
4. The Clean Power Plan requires states to promulgate their own plans to meet EPA's carbon reduction benchmarks and submit them to the EPA for approval by June 2016.²⁴

¹⁷ Energy Ventures Analysis, *Energy Market Impacts of Recent Federal Regulations on the Electric Power Sector – State Impact: Wisconsin*, Sept. 26, 2014, http://evainc.com/wp-content/uploads/2014/11/2014_EVA-State_Facts-Wisconsin.pdf.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Letter from the Hon. Scott Walker, Governor, Wisconsin, to the Hon. Gina McCarthy, Adm'r, U.S. Env'tl. Prot. Agency (Dec. 1, 2014), 1, <http://walker.wi.gov/sites/default/files/documents/12.1.14%20EPA.pdf>.

²¹ Wisconsin Department of Natural Resources, *supra* note 16.

²² Letter from Pub. Serv. Comm'n of Wis. to the Hon. Gina McCarthy, Adm'r, U.S. Env'tl. Prot. Agency, (Nov. 30, 2014), 3, <http://static.maciverinstitute.com/12-1-14%20DNR%20PSC%20EPA%20Letter.pdf>.

²³ *Wisconsin's Comments on Clean Power Plan*, 4, Docket ID No. EPA-HQ-OAR-2013-0602, Nov. 30, 2014, <http://static.maciverinstitute.com/12-1-14%20DNR%20PSC%20EPA%20Letter.pdf>.

²⁴ North American Electric Reliability Corporation, *Potential Reliability Impacts of EPA's Proposed Clean Power Plan* at 5, Nov. 2014, http://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/Potential_Reliability_Impacts_of_EPA_Proposed_CPP_Final.pdf.

- a. What consequences will occur if a state fails to formulate such a plan by the deadline?
 - b. How is the EPA's proposed enforcement mechanism consistent with the U.S. Supreme Court's holding in *New York v. United States*?²⁵
 - c. Please provide the EPA's legal analysis of how the Clean Power Plan is consistent with Supreme Court precedent in *New York v. United States* and other appeals.
5. EPA has acknowledged that the plain text of Section 111(d) of the Clean Air Act expressly forbids the regulation of power plants that are already regulated under Section 112 of the statute.²⁶ The Clean Power Plan seeks to regulate power plants that are already regulated under Section 112 of the Clean Air Act.²⁷ Given this fact, how is the Clean Power Plan authorized under Section 111(d) of the Clean Air Act? Please provide all documents and communications referring or relating to the EPA's evaluation of how the Clean Power Plan is consistent with congressional intent under the Clean Air Act.

Please provide this material as soon as possible but no later than 5:00 p.m. on June 10, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency and economy of operations of all branches of the Government."²⁸ Additionally, S. Res. 73 (114th Congress) authorize the Committee to examine "the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs."²⁹ For purposes of responding to this request, please refer to the definitions and instructions in the enclosure.

²⁵ 505 U.S. 144.

²⁶ See 79 Fed. Reg. 34844 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60) ("When the EPA establishes NSPS for new sources in a particular source category, the EPA is also required, under CAA section 111(d)(1), to prescribe regulations for states to submit plans regulating existing sources in that source category for any air pollutant that, in general, is not regulated under the CAA section 109 requirements for the NAAQS or regulated under the CAA section 112 requirements for hazardous air pollutants (HAP)").

²⁷ See note 11, *supra*.

²⁸ S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

²⁹ S. Res. 73 § 12, 114th Cong. (2015).

The Honorable Gina McCarthy
May 27, 2015
Page 5

If you have any questions about this request, please contact Kyle Brosnan or Scott Wittmann of the Committee staff at (202) 224-4751. Thank you for your attention to this important matter.

Sincerely,



Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

Enclosure