

STATES NEED TO COMMENT ON EPA'S PROPOSED CO₂ RULE LIMITING STATE FLEXIBILITY AND FORCING UNREASONABLE REQUIREMENTS

EPA's proposed guidelines for CO₂ emissions from existing power plants undermine State flexibility to craft energy and environment policy. State Attorneys General and relevant agencies should prepare comments highlighting the proposal's legal and policy flaws. Comments are due on **October 16, 2014**. In the interim, States should **use all available forums** to address impacts from the proposed guidelines' unreasonable requirements.

BACKGROUND

On June 2, 2014, EPA released its proposed CO₂ guidelines for existing power plants. The proposal requires States to reduce CO₂ emissions through "building blocks" of control technologies, most of which are "outside the fence-line" of a power plant. This, despite a September 2013 analysis from 17 bipartisan State Attorneys General noting the Clean Air Act requires controls be "inside the fence-line" of a power plant. In this way, the proposed guidelines set standards that power plants inherently cannot achieve. Thus, to comply with the proposed guidelines states must either shut down coal-fired capacity, or cede vast jurisdiction over a State's electricity grid to EPA – allowing the Agency to regulate, in its words, "from plant to plug."

STATE CONCERNS

- **Cap-and-Trade Without the Vote:** "Cap and trade" legislation failed to pass the Senate. At its core, the proposed guidelines are essentially a "cap and trade" program for power plants, mandated via executive fiat rather than Congressional authorization.
- **Requires Unprecedented "Outside the Fence-Line" Control Technology:** The proposed guidelines' use of "outside the fence-line" control technology contradict the Clean Air Act's plain language, the September 2013 Attorneys' General analysis, and EPA's own past regulations. Indeed, the Supreme Court's June 23rd *UARG v. EPA* decision cites EPA regulations to note that control technology "cannot be used to order a fundamental redesign of the facility," is "required only for pollutants that the source itself emits," and "may not be used to require reductions in a facility's demand for energy from the electric grid." Yet, the proposed guidelines seek to redesign the electric grid by effectively requiring control technologies well "outside the fence-line" of a power plant and often where no greenhouse gases are actually emitted.
- **The Supreme Court is Weary of EPA Power Grabs:** EPA is seeking to overhaul the country's entire electric grid by claiming new powers under a law that has been on the books for over 40 years. The Supreme Court's recent *UARG* decision sends a clear warning to EPA that such expansive use of authority faces substantial legal hurdles, "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"
- **Usurps Traditional State Powers Over Energy Policy:** States have long enjoyed flexibility under the Federal Power Act to regulate electricity within their borders.

Indeed, the D.C. Circuit's May 23rd *EPSA v. FERC* decision threw out federal regulations because they intruded on State retail electricity matters. The proposed guidelines' "outside the fence-line" approach short-circuits this State primacy. One State official recently testified to Congress that under EPA's proposed 111(d) guidelines, State Public Service Commissions would be able to take actions to protect rate-payers and ensure reliability "only in so much as they comport with EPA's greenhouse gas agenda."

- **Undermines State Flexibility on Environmental Policy:** Under the Clean Air Act, States are the driving force in crafting standards, like those in the proposed guidelines, according to guidelines from EPA. States are also empowered to base such standards on a number of factors including, in this case, the "remaining useful life" of a power plant. Yet the proposed guidelines ignore this statutory role of States, stating that "once the final goals [under the proposed guidelines] have been promulgated, a state would no longer have an opportunity to request that the EPA adjust its CO₂ goal."
- **Establishes Unreasonable State Requirements:** The proposed guidelines' "outside the fence-line" analysis uses flawed assumptions in each "building block" of control technologies that lead to unreasonable State requirements. EPA blithely dismisses concern over its assumptions, suggesting in the proposed guidelines that States rob Peter to pay Paul, "even if a state demonstrates during the comment period that application of a building block to that state would not result in the level of emission reductions reflected in the EPA's quantification for that state, then the state should also explain why the application of the other building blocks would not result in greater emission reductions than are reflected in the EPA's quantification for that state."
- **Threatens the Economy:** EPA claims that its proposal won't harm the economy fall flat. EPA projected its Mercury and Air Toxics Standards (MATS) would close just 5,000 M.W. of power plants; the U.S. Energy Information Administration now projects over 50,000 M.W. of power plants will close due to MATS. EPA said MATS would raise electricity prices an average of just 3%; Illinois rate-payers now face a 21% increase in their summer electricity bills due to MATS. Given EPA's past failed projections, the proposal's impact will likely be closure to estimates from the U.S. Chamber of Commerce: 114,000 MW of power plant closures, \$290 billion in electricity price increases, reduced annual GDP by \$52 billion, and 442,000 fewer jobs.

STATES NEED TO MAKE THEIR VOICES HEARD NOW

State economic development, energy use, and commerce agencies should review the proposal and file comments explaining how EPA's assumptions for each building block of control technologies are implausible and result in unreasonable State requirements. State Attorneys General should highlight legal problems with "outside the fence-line" controls in light of the Supreme Court's decision in *UARG*, as well as the risk of EPA imposing a Federal Implementation Plan. Comments on the proposal are due on **October 16, 2014**.¹ States should also use all public and intergovernmental forums to point out how the proposal's requirements cannot be met by States without threatening reliable and affordable electricity.

¹ Comments can be submitted at <http://www.regulations.gov>. Enter the docket number "EPA-HQ-OAR-2013-0602." From the docket folder, click the "Comment Now!" button and follow instructions to submit.