Attorneys General of California, Illinois, Iowa, Maine, Maryland, Commonwealth of Massachusetts, New Mexico, New York, Oregon, Commonwealth of Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia, and the Corporation Counsel of the City of Chicago

December 8, 2017

Via electronic transmission
EPA Docket Center (EPA/DC)
U.S. Environmental Protection Agency
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RE: Comments on Environmental Protection Agency's Notices of Data Availability Regarding Proposed Delays of Oil and Natural Gas Sector Emission Standards

Attention: Docket ID No. EPA-HQ-OAR-2017-0346
Docket ID No. EPA-HQ-OAR-2010-0505

The Attorneys General of California, Illinois, Iowa, Maine, Maryland, the Commonwealth of Massachusetts, New Mexico, New York, Oregon, the Commonwealth of Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia, and the Corporation Counsel of the City of Chicago ("States") respectfully submit these comments on the Environmental Protection Agency's ("EPA") two notices of data availability published on November 8, 2017[1] (the "NODAs") in support of the two proposed rules titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements"[2] and "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements"[3] (collectively, the "Proposed Stay Rules").

The Proposed Stay Rules mark EPA's second attempt to exempt the oil and natural gas sector from the final rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," published in the Federal Register on June 3, 2016 (the "2016 Rule"), which has been in effect for over one year. EPA's first attempt failed when the D.C. Circuit Court struck down the agency's administrative stay of key elements of the 2016 Rule, holding that EPA's action was arbitrary and capricious because the underlying reconsideration grant cited by EPA as the basis for the stay failed to satisfy the requirements of the Clean Air Act. *Clean Air Council v. Pruitt*, 2017 WL 2838112 (D.C. Cir. July 3, 2017).

In June 2017, EPA issued the Proposed Stay Rules, which would collectively stay, for a period of twenty-seven months, those same core compliance requirements contained in the 2016 Rule. But EPA failed to set forth the legal justification for the stays. On August 9, 2017, the

[1] 82 Fed. Reg. 51,788 (Nov. 8, 2017); 82 Fed. Reg. 51,794 (Nov. 8, 2017)
[2] 82 Fed. Reg. 27,645 (June 16, 2017
[3] 82 Fed. Reg. 27,641 (June 16, 2017)

States submitted a comment letter, which is incorporated by reference herein (see Docket ID Nos. EPA-HQ-OAR-2010-0505-11820; EPA-HQ-OAR-2017-0346-0281), opposing the Proposed Stay Rules. Our comment letter details how the Proposed Stay Rules are unlawful because (1) EPA lacks the statutory authority to stay compliance requirements in the 2016 Rule and (2) EPA fails to justify its reversal of its prior position regarding the importance of reducing methane emissions from the oil and natural gas sector and to reconcile the stay with its own rulemaking record. Our comment letter further identified how the Proposed Stay Rules would significantly harm the States by delaying reductions in emissions of methane, volatile organic compounds ("VOCs"), and hazardous air pollutants, thereby adversely impacting public health and the environment.

In the NODAs, EPA proposes to adopt the legal justification prepared by the American Petroleum Institute (API) and seeks comments on "the legal authority to issue a stay and the technological, resource, and economic challenges with implementing the fugitive emissions requirements, well site pneumatic pump standards, and the requirements for certification of closed vent systems by a professional engineer." 82 Fed. Reg. 51,788. EPA also solicits comments on the recommendation that, as an alternative to the proposed stay, EPA should amend the 2016 Rule by extending the "phase-in" periods provided in the 2016 Rule. *Id.* at 51,791. The NODAs also present a reworked economic analysis that newly incorporates forgone climate benefits expected from the Proposed Stay Rules and applies EPA's new "interim" domestic social cost of methane.

For the reasons stated herein, EPA's Proposed Stay Rules, including EPA's proposed alternative of extending compliance "phase-in" periods in the 2016 Rule, are unlawful. Indeed, we find that the NODAs merely compound the legal flaws with the Proposed Stay Rules by seeking to bolster EPA's inadequate record in attempt to develop a post-hoc justification for rolling back the public health and environmental safeguards of the 2016 Rule. Therefore, we renew our request that EPA withdraw the Proposed Stay Rules and continue to implement and enforce the 2016 Rule.

I. EPA MUST PUBLISH THE ANNUAL REPORTS SUBMITTED TO EPA IN ORDER FOR THE PUBLIC TO MEANINGFULLY COMMENT ON THE NODAS

EPA vaguely asserts in the NODAs, without providing supporting data, that affected facilities are unable to implement certain requirements in the 2016 Rule and therefore a stay or "extended phase-in" of compliance requirements is necessary. The 2016 Rule has been in effect for over one year and affected facilities have already had to comply with the requirements that EPA now seeks to delay. Under the 2016 Rule, affected facilities were required to submit to EPA annual reports documenting compliance with its requirements by October 31, 2017. *See* 40 C.F.R. Part 60, Subpart OOOOa. If stakeholders are actually complying with the requirements, that would undermine the presumption behind the NODAs. If industry is failing to comply, that information should be disclosed so that appropriate enforcement action can be taken. Either way, that information needs to see the light of day.

For this reason, on November 21, 2017, many of the States formally submitted a Freedom of Information Act request that EPA make public the annual reports submitted to EPA pursuant to 40 C.F.R. Part 60, Subpart OOOOa, and any related records that have been created by EPA. In addition, those States requested that EPA extend the comment deadline for the NODAs to ninety days after the reports are made available to allow adequate time for review and comment. EPA has not responded to that request for an extension of the comment deadline, but instead has requested an extension until January 19, 2018 to respond to the FOIA. *See* Attachment A. EPA's failure to make the annual reports publicly available before the comment deadline for the NODAs constitutes a procedural error, rendering any final decision arbitrary and capricious. *See* 42 U.S.C. § 7607(d)(9). EPA's failure deprives the States and the public of the opportunity to usefully respond to EPA concerning any purported implementation challenges.

"The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process." *Connecticut Light & Power Co. v. Nuclear Regulatory Com*., 673 F.2d 525, 530-531 (D.C. Cir. 1982). "In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules." *Id*. For a decision to be sustained, "the agency must consider all of the relevant factors and demonstrate a reasonable connection between the facts on the record and the resulting policy choice." *Sierra Club v. Costle*, 657 F.2d 298, 323 (D.C. Cir. 1981).

In general, an agency's failure to make data underlying a proposed rule publicly available precludes an agency from considering all relevant factors in making a decision. *See National Black Media Coalition v. Federal Communications Commission*, 791 F.2d 1016 (2d Cir. 1986) (holding FCC's use of critical, unpublished data to reach rulemaking decision precluded the agency from considering all relevant factors in making a decision and rendered it arbitrary and capricious); *United States v. Nova Scotia Food Prod. Corp*., 586 F.2d 240, 251-52 (2d Cir. 1977) (holding FDA's failure to disclose the scientific data upon which the FDA relied prevented the agency from considering all relevant factors and was procedurally erroneous.) "To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether." *Id*. at 252.

Under the Clean Air Act, EPA is subject to an even more extensive notice requirement than under the Administrative Procedure Act cases discussed above. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 550 (D.C. Cir. 1983) ("[T]he additional notice requirements in § 307(d)(3) suggest that Congress intended agency notice under the Clean Air Act to be more, not less, extensive than under the APA.") Section 307(d)(3) states that a notice of proposed rulemaking "shall be accompanied by a statement of its basis and purpose" including "the factual data on which the proposed rule is based; the methodology used in obtaining and in analyzing the data; and the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3). Courts interpreting this section have found that EPA's failure to make data relating to the basis for its regulations publicly available made "meaningful comment on the merits of EPA's assertions impossible" and constituted reversible error.

Kennecott Corp. v. EPA, 684 F.2d 1007 (D.C. Cir. 1982) (holding EPA's failure to include data in the docket "constitutes reversible error, for the uncertainty that might be clarified by those documents . . . indicates a substantial likelihood that the regulations would have been significantly changed.") "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, (in) critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-95 (D.C. Cir. 1973).

For these reasons, we reiterate our request that EPA promptly make public the annual reports submitted to EPA pursuant to 40 C.F.R. Part 60, Subpart OOOOa, and extend the comment deadline for the NODAs to ninety days after the reports are made available to allow adequate time for the public to meaningfully comment. EPA has, in the past, granted an extension of the comment period when a NODA presents new technical information and legal justification for a proposed rule.[4] We ask that EPA follow its past precedent here and extend the comment period to ensure that the public has sufficient time to review and comment on all the information available supporting its proposed rules.

II. THE PROPOSED STAY RULES ARE NOT AUTHORIZED UNDER THE CLEAN AIR ACT OR THE ADMINISTRATIVE PROCEDURE ACT

In the NODAs, EPA solicits comments on the legal theories discussed in the comment letter submitted by API on July 27, 2017, Docket ID No. EPA-HQ-OAR-2010-0505-10577. Specifically, EPA requests comments on API's assertion that Clean Air Act section 111 authorizes EPA to revise the 2016 Rule by extending compliance deadlines or establishing future compliance dates. EPA further requests comments on API's assertion that the Proposed Stay Rules are authorized under EPA's general rulemaking authority of Clean Air Action section 301. Finally, EPA solicits comments on API's argument that Administrative Procedure Act section 705 authorizes the Proposed Stay Rules because the term "postpone" in that section includes "delay, defer, adjourn, shelve, table, and put on hold." Docket ID No. EPA-HQ-OAR-2010-0505-10577 at 7.

Although EPA may revise the 2016 Rule, it must follow the procedures mandated by Clean Air Act section 111 and must therefore demonstrate that the revisions are consistent with section 111 principles and requirements. As discussed in our August 9, 2017 comment letter and as further detailed below, no provision in the Clean Air Act provides EPA with the authority to stay a duly promulgated regulation for twenty-seven months. EPA only has authority, under section 307(d)(7)(b), to stay a rule for no more than three months. Unless EPA completes a rulemaking that substantively amends the 2016 Rule's standards consistent with this statutory

[4] See *Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 12,681 (Mar. 6, 2014); Letter from Attorneys General for the States of West Virginia, Oklahoma, Alabama, South Carolina, Kansas, Texas, Nebraska, Wyoming, and Ohio to Gina McCarthy, EPA Administrator (Feb. 21, 2014).

mandate and pursuant to a reasoned justification with support in the administrative record, EPA cannot alter the compliance requirements in the 2016 Rule. Nor can EPA rely on Administrative Procedure Act section 705 to "put on hold" the 2016 Rule because section 705 only permits an agency to postpone the effective date of a rule *that is not yet effective*. Given that the 2016 Rule has been in effect for over one year, APA section 705 provides no authority for the Proposed Stay Rules.

A. EPA's Proposed Stay and Extended "Phase-in" of Compliance Requirements Do Not Meet the Reasoned Decision-making and Rulemaking Requirements under Section 111 of the Clean Air Act to Revise the 2016 Rule

The Proposed Stay Rules and EPA's proposed alternative of an extended "phase-in" of compliance requirements constitute a substantive revision to the 2016 Rule, which may only be accomplished if it is permissible under the statute, and there are good reasons for it supported by the agency's record. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). API's comment letter, in contrast, incorrectly argues that EPA has authority under Clean Air Act section 111 to "extend compliance deadlines or establish future compliance dates" divorced from any consideration of the principles of section 111. 82 Fed. Reg. at 51789. EPA therefore cannot rely on API's incorrect contention to support its proposed stay and extended "phase-in."

For EPA's proposed revisions to the 2016 Rule to be permissible under the Clean Air Act, EPA must comply with the procedures and substantive requirements of section 111. *See* 42 U.S.C. § 7411(b)(1)(B) (requiring EPA to "revise such standards following the procedures required by this subsection for promulgation of such standards.") EPA must demonstrate that the standard or revision "reflects the degree of emission limitation achievable through the application of the best system of emission reduction ("BSER") which (taking into account the costs of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a).[5] EPA must also "consider the emission limitations and percent reductions achieved in practice." 42 U.S.C. § 7411(b)(1)(B).

EPA fails to meet any of these requirements here. EPA does not explain how the Proposed Stay Rules or an extended "phase-in" reflects the BSER. EPA also fails to explain how the

[5] EPA seeks to revise standards of performance in the 2016 Rule promulgated under section 111(b), as well as "work practice" standards promulgated under section 111(h). "Work practice" standards must reflect "the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(h). Given that both types of standards are "treated as a standard of performance for purposes of the provisions of this chapter" (see 42 U.S.C. § 7411(h)(5)), both are referred to as BSER standards.

current compliance timeline presents implementation challenges. In developing the 2016 Rule, EPA compiled a robust administrative record supporting why the compliance deadlines were achievable by the affected facilities. But now EPA does not point to any factual support that an extended "phase-in" is necessary, and instead seeks to bolster its inadequate record by "soliciting comments, data, and any other information that would help the EPA determine whether a phase-in period . . . is needed and, if so, the length of such period." 82 Fed. Reg. at 51789. EPA's proposed revision also entirely ignores section 111's technology-forcing mandate to consider the emission limitations and percent reductions achieved in practice." 42 U.S.C. § 7411(b)(1)(B); see also *Portland Cement Ass'n v. Ruckelshaus,* 486 F.2d 375, 391 (D.C.Cir.1973) (recognizing that section 111 "looks toward what may fairly be projected for the regulated future, rather than the state of the art at present.")[6]

EPA further fails to find support in the administrative record for its purported reasons behind its Proposed Stay Rules and extended "phase-in" of compliance requirements. In the NODAs, EPA asserts that the stay of the 2016 Rule and extended "phase in" are "lawful exercises of the EPA's statutory authority and discretion under the CAA" in order to: (1) prevent disruption to existing state programs and company specific programs; (2) provide clarity on what is a "greenfield site"; and (3) consider the costs associated with closed vent certification by professional engineers. 82 Fed. Reg. at 51791. With respect to the first reason, EPA claims that the alternative methods of emissions limitation ("AMEL") process requires clarification before sources can apply and obtain approval to implement their current state program in lieu of the 2016 Rule. *Id*. But, EPA does not provide any evidence or data supporting its assertion that actual affected facilities have applied for, and failed to receive, approval for AMEL. Nor has the agency explained why it cannot issue guidance to resolve any alleged lack of clarity in the AMEL application process or the "greenfield" definition. Without this factual support or explanation, EPA cannot now contend that clarifying the AMEL and "greenfield" provisions provide good reasons for revising the 2016 Rule. EPA also points to the costs associated with certification by professional engineers as justification for the proposed stay and revision, but it fails to reconcile those purported costs with the other substantive factors mandated by section 111 (e.g., nonair quality health and environmental impacts, amount of air pollution reduced, and technological innovation.)

For these reasons, EPA's proposed stay and extended "phase-in" fail to meet the substantive and procedural requirements to revise an emission standard promulgated under section 111 of the Clean Air Act. EPA's proposed action also lacks a "good reason" for the change in course and "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc*., 556

[6] API points to *Portland Cement* for the proposition that "EPA has authority to set future effective BSER." Docket ID No. EPA-HQ-OAR-2010-0505-10577 at 4. However, nothing in that case, or in *Lignite Energy Council v. EPA*, 198 F.3d 930 (D.C. Cir. 1999), also cited by API, has any bearing on whether EPA may extend an *existing* deadline under Section 111 without completing a new rulemaking in accordance with the requirements of that Section.

U.S. 502, 515 (2009). Indeed, EPA has not provided any factual basis for rejecting or revising the conclusions set forth in the rulemaking record for the 2016 Rule. Accordingly, EPA's proposed revision to the 2016 Rule does not meet the reasoned decision-making and rulemaking requirements of the Clean Air Act and is arbitrary and capricious. *See* 42 U.S.C. § 7607(d)(9)(A).

B. EPA's General Rulemaking Authority Under Clean Air Act Section 301 Does Not Authorize the Proposed Stay Rules

Section 301 authorizes the EPA Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. § 7601(a)(1). But, it "does not provide the Administrator with carte blanche authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the Administrator wishes." *Citizens to Save Spencer City v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979). Further, the general power of section 301 does not trump the specific statutory provisions of the Clean Air Act. *See Natural Res. Def. Council v. Reilly*, 976 F.2d 36, 40-41 (D.C. Cir. 1992) ("*Reilly*"); *see also Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."). Therefore, EPA's general rulemaking authority under section 301(a) of the Clean Air Act does not authorize the Proposed Stay Rules or the alternative extended phase-in of compliance requirements.

Reilly is directly on point here. In that case, petitioners challenged one of a series of EPA actions staying duly promulgated section 112 standards for radionuclide emissions from sources other than nuclear power plants for over a year following a notice and comment rulemaking. EPA had imposed the stay while it actively reconsidered the standards in language almost identical to what EPA uses in the Proposed Stay Rules and the NODAs, reasoning that "'it would be inappropriate to compel [certain] facilities … to make all of the initial expenditures of time and resources' to comply with the emission standards 'when it is possible that EPA will conclude that EPA regulation of some or all of these facilities is duplicative and unnecessary.'" *Id.* at 39 (citing 56 Fed. Reg. 18,735, 18,736 (1991)). The court found that "both the language and the purpose of the Act and the 1990 Amendments preclude the authority claimed by the EPA to stay the effectiveness of the standards." *Id*. at 40. Instead, the court held that "EPA ha[s] no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by section 307(d)(7)(B)." *Id.* at 40-41. Thus, EPA's reliance on section 301 here is unsupportable.

EPA incorrectly attempts to distinguish *Reilly* by asserting that unlike section 112, EPA has the "discretion under CAA section 111(B)(1)(B) to add new standards of performance." Whether EPA promulgated the 2016 Rule under EPA's discretionary duty is beside the point. The question is not whether EPA must regulate as a threshold matter – it already decided to do so

in promulgating the 2016 Rule. The question here is whether EPA has the authority under the Clean Air Act to stay the 2016 Rule for twenty-seven months. As discussed above, it does not.[7]

C. EPA Cannot Rely on Administrative Procedure Act Section 705 for the Proposed Stay Rules

Given that the 2016 Rule has been in effect for over one year, EPA cannot rely on section 705 for the Proposed Stay Rules. Under section 705 of the Administrative Procedure Act, an agency "may postpone the effective date of action taken by it, pending judicial review" when it "finds that justice so requires." 5 U.S.C. § 705. As the D.C. Circuit has found, section 705 only "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review." *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324, at *2-3 (D.C. Cir. Jan. 19, 1996) (per curiam); *see also Becerra v. United States Department of Interior,* No. 17-CV-02376-EDL, 2017 WL 3891678, at *9 (N.D. Cal. Aug. 30, 2017) (agreeing with *Safety-Kleen Corp.* and holding that the plain language of Section 705 authorizes postponement of only the effective date, not subsequent dates characterized by the agency as "compliance dates"); *California v. United States Bureau of Land Mgmt.*, No. 17-CV-03804-EDL, 2017 WL 4416409, at *8 (N.D. Cal. Oct. 4, 2017) (holding that agency's attempt to delay compliance with rules on methane releases from oil and gas industry that were already in effect was "contrary to the plain language of" section 705). API's interpretation of section 705 as authorizing the postponement of the effectiveness of a rule after it has gone into effect contradicts the plain language of the statute and has since been squarely rejected by the courts. Therefore, EPA cannot rely on API's legal argument as a basis for the Proposed Stay Rules.

[7] To the extent EPA is relying on section 301 to revise the phase-in periods provided in the 2016 Rule, EPA's reliance is misplaced as section 111 governs the revision of an emission standard. See *infra* Section II. A

III. CONCLUSION

For these reasons, the States remain strongly opposed to the Proposed Stay Rules, including EPA's proposed alternative of extending compliance "phase-in" periods in the 2016 Rule. We therefore respectfully request that EPA not finalize the Proposed Stay Rules.

Sincerely,

FOR THE STATE OF CALIFORNIA

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By: _____

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ATTACHMENT A

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December 8, 2017

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RE: Freedom of Information Act Request for Records Related to Reporting Required by 40 C.F.R. Part 60 Subpart OOOOa (EPA-HQ-2018-001886)

Dear Ms. Mia:

This letter memorializes our telephone conversation of December 6, 2017, whereby we discussed the FOIA request submitted by the Attorney Generals of California, Iowa, the Commonwealth of Massachusetts, Oregon, Vermont, and the District of Columbia, the State of Colorado, and the Corporation Counsel of the City of Chicago ("States") to the U.S. Environmental Protection Agency (EPA) on November 21, 2017. *See* Attachment 1.

As we discussed, of central concern to the States is the fact that EPA's failure to make public the annual reports submitted to EPA pursuant to 40 C.F.R. Part 60, Subpart OOOOa has deprived California, along with the other states and cities working together on joint comments, of the ability to comment meaningfully on the two "notices of data availability" published in the Federal Register on November 8, 2017 (the "NODAs"). For this reason, the States renew their request that EPA agree to extend the comment deadline for the NODAs until ninety days after January 19, 2018 so that we have sufficient time to review the responsive records and meaningfully comment on the NODAs. *See* Attachment 2. Without such an extension of time to comment on the NODAs, the States cannot agree to EPA's request for an extension until January 19, 2108 to produce records responsive to our request.

With respect to the other matters we discussed on our call, the States agree to the following:

General issues

1. We understand that our request may involve voluminous material and searches in multiple locations within EPA. Therefore, we are requesting that EPA provide interim responses and release the records on a "rolling basis." *See, e.g.*,

https://www.justice.gov/oip/template-agency-foia-regulations. As we discussed, this means that EPA will provide responsive documents as soon as those documents are available. For example, there are currently (at least) 43 annual reports in the CEDRI database. Copies of those documents currently in CEDRI should be provided to us as soon as possible.

2. We agree to limit the geographic scope of our request to EPA's Headquarters and EPA Regions 3, 4, 5, 6, 7, 8, 9, and 10.

3. In response to your request for a start date for EPA's records search, please provide all records responsive to our request between August 2, 2016 and November 21, 2017.

Item 1

We do not agree to limit the scope of Item 1 (a)-(e) in our request to those reports in CEDRI. As we discussed, affected facilities are not required to submit annual reports electronically until 90 days after the final template is posted in CEDRI. Given that only 43 reports have been submitted on CEDRI to date, you agreed with us that most affected facilities likely submitted hard copies of their annual reports to EPA. Therefore, we must insist that EPA produce all records responsive to Item 1 (a)-(e), regardless of whether they were received electronically, on paper, or via any media.

Items 2 and 3

1. We agree to limit the scope of "EPA," as that term is used in Items 2 and 3, to include only the Office of Enforcement and Compliance Assurance, the Office of the Administrator, and the Office of Air and Radiation (excluding the sub-offices of the Office of Radiation and Indoor Air, and the Office of Transportation and Air Quality).

2. We do not agree to limit the scope of records requested in Items 2 and 3 to email correspondence. Therefore, please provide all responsive records.

Sincerely,

DANIEL M. LUCAS
Deputy Attorney General

For XAVIER BECERRA
Attorney General

Encl.

cc: William Wehrum, Assistant Administrator, Office of Air and Radiation
Peter Tsirigotis, Office of Air Quality Planning and Standards

ATTACHMENT 1

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November 21, 2017

SUBMITTED ELECTRONICALLY

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RE: Freedom of Information Act Request for Records Related to Reporting Required by 40 C.F.R. Part 60 Subpart OOOOa

Dear National Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552, as amended, and its implementing regulations, the Attorney Generals of California, Iowa, the Commonwealth of Massachusetts, Oregon, Vermont, and the District of Columbia, the State of Colorado, and the Corporation Counsel of the City of Chicago ("States") hereby make this request for records. This request describes: (1) the records sought; and (2) our request for a fee waiver for production of these records.

Request for Materials

The States believe that EPA is in possession of records, as that term is described at 5 U.S.C. § 552(f)(2), related to reporting made pursuant to 40 C.F.R. Part 60 Subpart OOOOa ("Subpart OOOOa"). These records include, but are not limited to, communications, documents, letters, information, notes, memoranda, electronic mail transmissions or other electronic forms of information, telephone logs and records, meeting records, reports, analyses, assessments, data, and modeling, including all drafts and preliminary forms of any such records.

Specifically, the States request the following records:

1. Reports submitted to EPA pursuant to Subpart OOOOa's reporting requirements including, but not limited to, the following reports:

(a) Results of the Performance Test, as required by 40 C.F.R. § 60.5420a(b)(9)(i);

(b) Initial Semiannual Reports, as required by 40 C.F.R. § 60.5422a(b);

(c) Semiannual Reports, as required by 40 C.F.R. § 60.5422a(a);

(d) Annual Reports, as required by 40 C.F.R. § 60.5420a(b); and

(e) Annual Reports of Excess Emissions for Sweetening Units, as required by 40 C.F.R. § 60.5423a(b).

2. Copies of all correspondence between EPA and outside parties containing:

(a) reference to the new source performance standards for the oil and gas sector, Subpart OOOOa, or any of the specific reports or regulatory provisions listed above in paragraph (1) of this request; and

(b) one or more of the following terms:

(i) "comply," including any inflection thereof (e.g., "complies," "complying," "compliant," or "compliance");

(ii) "deadline" or "deadlines";

(iii) "delay," including any inflection thereof (e.g., "delays," "delayed," or "delaying");

(iv) "due";

(v) "enforce," including any inflection thereof (e.g., "enforces," "enforcing," or "enforcement");

(vi) "extend," including any inflection thereof (e.g., "extends," "extending," "extension," or "extensions");

(vii) "postpone," including any inflection thereof (e.g., "postpones," "postponed," "postponing," or "postponement"); or

(viii) "variance" or "variances."

3. Copies of all internal correspondence within EPA containing:

(a) reference to the new source performance standards for the oil and gas sector, Subpart OOOOa, or any of the specific reports or regulatory provisions listed above in paragraph (1) of this request; and

(b) one or more of the following terms:

(i) "comply," including any inflection thereof (e.g., "complies," "complying," "compliant," or "compliance");

(ii) "deadline" or "deadlines";

(iii) "delay," including any inflection thereof (e.g., "delays," "delayed," or "delaying");

(iv) "due";

(v) "enforce," including any inflection thereof (e.g., "enforces," "enforcing," or "enforcement");

(vi) "extend," including any inflection thereof (e.g., "extends," "extending," "extension," or "extensions");

(vii) "postpone," including any inflection thereof (e.g., "postpones," "postponed," "postponing," or "postponement"); or

(viii) "variance" or "variances."

Please provide all of the requested records on a rolling basis. If any of the information sought in this request is deemed by EPA to be exempt from production pursuant to one or more exemptions set forth at 5 U.S.C. § 552(b), then please provide an explanation, for each such record or portion thereof, sufficient to identify the record and the particular exemption(s) claimed.

Request for Fee Waiver

The States are, of course, noncommercial organizations not subject to review fees. In addition, the States respectfully request a waiver of search and copying fees. Under FOIA, agencies must waive such fees where disclosure is likely to contribute to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requester. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). EPA has incorporated this requirement in its regulations for responding to FOIA requests. 40 C.F.R. section § 2.107.

As discussed below, each of the four factors that EPA uses to assess whether the requested information in fact is in the public interest and likely to contribute significantly to public understanding of the operations or activities of the government demonstrates that a waiver is proper here. And because the States are governmental, and not a commercial, entities, the second fee waiver requirement—that the request "is not primarily in the commercial interest of the requester"—is not applicable. 40 C.F.R. § 2.107(l)(1).

The Subject of the Request Concerns the Operations or Activities of the Government.

The requested records, which relate to oil and gas industry reporting pursuant to 40 C.F.R. Part 60 Subpart OOOOa, directly concern the "operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i).

Under Clean Air Act § 111(b), when the EPA administrator determines that a category of sources "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," the Administrator "shall" include that category on a list of stationary sources. 42 U.S.C. § 7411(b)(1)(A). Pursuant to § 111(b), EPA listed crude oil and natural gas production as a source category that contributes significantly to air pollution that may reasonably be anticipated to endanger public health and welfare. *See* Priority List and Additions to the List of Categories of Stationary Sources, 44 Fed. Reg. 49,222 (Aug. 21, 1979).

Methane is a particularly powerful agent of climate change; pound-for-pound, methane warms the climate about thirty-four times more than carbon dioxide over a 100-year period, according to the Intergovernmental Panel on Climate Change, and on a twenty-year timeframe, has about eighty-six times the global warming potential of carbon dioxide. According to EPA, the oil and gas sector is the largest industrial emitter of methane in the U.S., accounting for a third of total U.S. methane emissions.[1] Oil and gas production, transmission, and distribution results in massive leakage of methane to the atmosphere.

Numerous scientific assessments, including, but not limited to, EPA's 2009 greenhouse gas endangerment determination, the assessments of the International Panel on Climate Change, the U.S. Global Change Research Program and the National Academy of Sciences, and scientific studies undertaken by states across the nation, establish that anthropogenic greenhouse gas emissions, including methane, may reasonably be anticipated to endanger public health or welfare. The oil and natural gas source category causes or contributes significantly to such greenhouse gas air pollution. As well, available technology can effectively and efficiently reduce methane emissions from the oil and natural gas industry. As a result, in 2015, EPA promulgated a final New Source Performance Standard under Clean Air Act § 111(b) for methane emissions from new and modified oil and natural gas sources. *Oil and Natural Gas Sector Emission Standards for New, Reconstructed and Modified Sources*, 81 Fed. Reg. 35, 824 (June 3, 2016).

Nevertheless, on June 16, 2017, EPA proposed two rules that would collectively stay, for a period of two years and three months, the compliance requirements contained in the final rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified

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[1] EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2015 (2017) ("2017 GHGI"), at ES-16, Table ES-2, *available at* https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf

Sources," published in the Federal Register on June 3, 2016 (the "2016 Rule").[2] More recently, EPA issued notices of data availability (NODAs) discussing "the technological, resource, and economic challenges with implementing" certain compliance requirements in the 2016 Rule.[3] The NODAs reference feedback from stakeholders that affected facilities are unable to implement certain requirements in the 2016 Rule and therefore a stay or "extended phase-in" of compliance requirements is necessary.

The documents sought by this FOIA request will assist the public's understanding of methane emissions from the oil and gas sector, cost effective methods of controlling those emissions. The documents will also assist the public's understanding of the volume of natural gas currently escaping to the atmosphere, where it cannot be put to productive use, and the economic cost of failure to control those emissions. Finally, the documents sought by this FOIA will provide the public's understanding about EPA's responses to methane emissions and the bases for those responses.

The Disclosure Is Very Likely to Contribute to an Understanding of Government Activities and Operations.

Americans are deeply concerned about the impacts of climate change, which are already being felt across the United States. A recent 2017 poll by the Yale Program on Climate Communication shows that Americans broadly support action on climate change—seven in ten Americans support regulating carbon dioxide from coal-fired power plants, and seventy-five percent support regulation of carbon dioxide more generally.[4] The Yale polling shows that most Americans know that climate change is occurring now, and a majority agree it is already harming people in the United States.[5]

A poll conducted from March 30 through April 3, 2017, by Quinnipiac University found that two-thirds of Americans are "very concerned" or "somewhat concerned" that climate change will affect them or a family member personally.[6] Three-quarters are "very" or "somewhat"

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[2] *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements*, 82 Fed. Reg. 27,641 (June 16, 2017); *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources*: Stay of Certain Requirements, 82 Fed. Reg. 27,645 (June 16, 2017).

[3] 82 Fed. Reg. 51,788 (Nov. 8, 2017).

[4] Nadja Popovich , John Schwartz, Tatiana Schlossberg, *How Americans Think About Climate change in Six Maps*, N.Y. TIMES (Mar. 21, 2017), https://www.nytimes.com/interactive/2017/03/21/climate/how-americans-think-about-climate-change-in-six-maps.html

[5] *Id.*

[6] Hannah Hess, *Voters object to cutting climate research—poll*, E&E NewsPM (Apr. 5, 2017), http://www.eenews.net/eenewspm/2017/04/05/stories/1060052676

concerned about climate change, and fifty-nine percent want government action to address the threat of climate change.[7]

Climate change is having a very real, significant, and adverse impact on American families and businesses. Just this year, after drought and unseasonably high temperatures set the stage, wildfires ravaged California, Kansas, Oklahoma, and Texas. Without reduction in global warming pollution like methane, the impacts of climate change will only worsen. *See generally, Our Changing Planet*, U.S. Global Change Research Program for FY 2017 at 2 (hereinafter, "USGCRP Report") (climate-driven impacts include risks to human health; more frequent and intense storms that threaten food security, infrastructure, and livelihoods; sea level rise and coastal flooding; international stability; and U.S. national security).

The National Aeronautics and Space Administration ("NASA") and the National Oceanic and Atmospheric Administration ("NOAA") have confirmed that 2016 was the warmest year on record globally.[8] NASA observed, "2016 is remarkably the third record year in a row in this series . . . . We don't expect record years every year, but the ongoing long-term warming trend is clear." *See also* USGCRP Report at 2 (internal citations omitted) ("The global environment is changing rapidly. . . . [G]lobally-averaged temperatures in 2015 shattered the previous record, which was set in 2014; and 2016 is on track to break the 2015 record."). According to NASA, the Earth's average temperature has risen about two degrees Fahrenheit since the late nineteenth century, due largely to increased carbon dioxide and other human-made emissions in the atmosphere. And most of that warming has occurred in our lifetimes, in the past thirty-five years. Indeed, sixteen of the seventeen warmest years on record have occurred since 2001.

The documents that the States seek through this request are based on private oil and gas sector data reported to the EPA regarding methane emissions and are not generally available in the public domain. The documents are critically important to the public's understanding of the volume and sources of methane emissions from new, reconstructed, and modified oil and gas facilities' standard production, processing and transmission activities. *See* 40 C.F.R. § 2.107(l)(2)(i). The documents will likely be highly informative because of its potential to shed significant light on the merits of the EPA's standards for new, reconstructed, and modified oil and gas facilities, and also on cost-effective measures that EPA may opt to pursue to satisfy its Clean Air Act statutory obligation to protect the environment and human health by controlling methane emissions from existing oil and gas sector sources. *Id.*

Contribution to an Understanding of the Subject by the Public Is Likely to Result from the Disclosure.

The States routinely engage with the public and press, and serve as a source of information to promote public understanding of issues, while advocating in the public interest.

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[7] *Id.*

[8] NASA, NOAA Data Show 2016 Warmest Year on Record Globally, NASA (Jan. 18, 2017), https://www.nasa.gov/press-release/nasa-noaa-data-show-2016-warmest-vear-on-record-globally.

For example, California's Office of the Attorney General regularly issues press releases in connection with its work that are made available on the Attorney General's website, *see* https://oag.ca.gov/media/news, and representatives of the Office frequently speak on issues of public concern. California's Attorney General also posts regularly on issues of public concern to the Office's Twitter account, which has over 50,000 followers, *see* https://twitter.com/AGBecerra.

Moreover, the Offices of Attorney General from the States have specialized expertise in environmental regulation and they regularly engage in enforcement of state and federal environmental laws. These attorneys general intend to analyze the data released pursuant to this request and inform the public of any newsworthy information found in the documents requested. Thus, the States are particularly well suited to present information from the documents presented to the public in a manner that is accessible and understandable to non-experts. Accordingly, disclosure will contribute to the understanding of the subject of the request by a broad public audience. See 40 C.F.R. § 2.107(l)(2)(iii).

The Disclosure is Likely to Contribute "Significantly" to Public Understanding of Government Operations or Activities.

As set forth above, climate change, and controlling the pollution that is causing climate change, is a topic about which the public is deeply concerned. Information gathered from the requested documents will help the public to understand more about the sources of and potential options for controlling oil and gas sector methane pollution, and EPA's actions as they relate to regulation of those emissions. *See* 40 C.F.R. § 2.107(l)(2)(iv). While the public is very familiar with the contribution of carbon dioxide to climate change, it is less familiar with the role of methane in driving climate change, and, in particular, the contribution of methane emissions from the oil and gas sector to climate change. The public is also less familiar with the NODAs and their bases. Disclosure of the requested records will help the public to better understand the magnitude of existing oil and gas sector emissions, the options and costs of controlling those emissions, and the efficacy of significance of EPA's Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources. 81 Fed. Reg. 35,824 (June 3, 2016).

Please send a copy of the requested records to the attention of Daniel M. Lucas at the California Department of Justice, 300 S. Spring Street, Suite 1702, Los Angeles, California 90013. For ease of administration and to conserve resources, we will accept documents produced in a readily accessible electronic format. In the event that the State's request for a fee

waiver is denied or if you have any questions about this request, please contact Daniel M. Lucas immediately by telephone at (213) 269-6345 or by email at Daniel.Lucas@doj.ca.gov. Thank you in advance for your attention to this matter.

Sincerely,

DANIEL M. LUCAS
Deputy Attorney General

For XAVIER BECERRA
Attorney General of the State of California

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November 17, 2017

Via Certified Mail, E-mail, and Regulations.gov
Assistant Administrator William Wehrum
Office of Air and Radiation, Code 6101A
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
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Attn: RIN 2060-AT59; RIN 2060-AT65

RE: **Request for Publication of 40 C.F.R. Part 60 Subpart OOOOa Annual Compliance Reports and for Extension of Comment Periods on EPA's Notices of Data Availability in Support of Proposed Rules "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements" and "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements"**

Dear Assistant Administrator Wehrum:

The Attorneys General of California, Iowa, Maine, Maryland, the Commonwealth of Massachusetts, New Mexico, New York, Oregon, the Commonwealth of Pennsylvania, Rhode Island, Vermont, and the District of Columbia, the State of Colorado, and the Corporation Counsel of the City of Chicago ("States") respectfully request that the Environmental Protection Agency ("EPA") make public the data underlying EPA's recent notices of data availability in support of the proposed rules titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements" and "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements" (collectively, the "NODAs").[1] Specifically, we request that EPA make public the annual reports submitted to EPA pursuant to 40 C.F.R. Part 60, Subpart OOOOa, and any related records that have been created by EPA. In addition, we request that EPA extend the comment deadline for the NODAs to ninety days after the reports are made available to allow adequate time for review and comment.

[1] 82 Fed. Reg. 51,788 (Nov. 8, 2017); 82 Fed. Reg. 51,794 (Nov. 8, 2017).

On June 16, 2017, EPA proposed two rules that would collectively stay, for a period of two years and three months, the compliance requirements contained in the final rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," published in the Federal Register on June 3, 2016 (the "2016 Rule").[2] Our States submitted a comment letter strongly opposing EPA's proposed rules. Last week, EPA issued the NODAs discussing "the technological, resource, and economic challenges with implementing" certain compliance requirements in the 2016 Rule.[3] The NODAs reference feedback from stakeholders contending that affected facilities are unable to implement certain requirements in the 2016 Rule and therefore a stay or "extended phase-in" of compliance requirements is necessary. However, EPA's NODAs, despite their name, are devoid of data, and instead merely cite a few unsubstantiated comment letters in support of the NODAs' bald assertion of implementation challenges. EPA's failure to make data available is glaring given that the 2016 Rule, which is in effect, required affected facilities to submit to EPA annual reports documenting compliance with its requirements by October 31, 2017. Thus, EPA should currently be in possession of information and data that is directly relevant to the NODAs and the proposed rules. The public must have access to that information in order to adequately evaluate and comment on the NODAs.

We therefore request that EPA make public the annual reports submitted to the agency pursuant to 40 C.F.R. Part 60, Subpart OOOOa, and extend the comment deadline for the NODAs to ninety days after the reports are made available. An extension of the comment period is warranted given EPA's failure to provide the underlying data for the NODAs, thereby depriving the public and our States of the ability to effectively comment. An extension of ninety days is further warranted given EPA's discussion of new legal theories and technical issues in the NODAs, including, but not limited to, an updated economic analysis that both newly incorporates forgone climate benefits[4] and applies EPA's new "interim" domestic social cost of methane.

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[2] *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements*, 82 Fed. Reg. 27,641 (June 16, 2017); *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements*, 82 Fed. Reg. 27,645 (June 16, 2017).

[3] 82 Fed. Reg. 51,788 (Nov. 8, 2017).

[4] "Originally, EPA did not present estimates of the forgone climate benefits expected from the proposed two-year stay because quantitative estimates that were consistent with E.O. 13783 were not available at that time." Memorandum, "Estimated Cost Savings and Forgone Benefits Associated with the Proposed Rule, 'Oil and Natural Gas: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements'" (October 17, 2017), p. 7.

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Proposed Rules

Federal Register
Vol. 79, No. 44
Thursday, March 6, 2014

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60, 70, 71 and 98

[EPA–HQ–OAR–2013–0495; FRL–9907–42–OAR]

RIN 2060–AQ91

Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of extension of public comment period.

SUMMARY: The EPA is announcing that the period for providing public comments on the January 8, 2014, proposed "Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units" and on the February 26, 2014, notice of data availability soliciting comment on the provisions in the Energy Policy Act of 2005, is being extended by 60 days.

DATES: *Comments.* The public comment period for the proposed rule published January 8, 2014 (79 FR 1352) and the notice of data availability published on February 26, 2014 (79 FR 10750), is being extended by 60 days to May 9, 2014, in order to provide the public additional time to submit comments and supporting information.

ADDRESSES: *Comments.* Written comments on the proposed rule may be submitted to the EPA electronically, by mail, by facsimile or through hand delivery/courier. Please refer to the proposal (79 FR 1352) for the addresses and detailed instructions.

Docket. Publicly available documents relevant to this action are available for public inspection either electronically at *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying. The EPA has established the official public docket No. EPA–HQ–OAR–2013–0495.

Worldwide Web. The EPA Web site containing information for this rulemaking is: *http://www2.epa.gov/carbon-pollution-standards.*

FOR FURTHER INFORMATION CONTACT: Dr. Nick Hutson, Energy Strategies Group, Sector Policies and Programs Division (D243–01), U.S. EPA, Research Triangle Park, NC 27711; telephone number (919) 541–2968, facsimile number (919) 541–5450; email address: *hutson.nick@epa.gov* or Mr. Christian Fellner, Energy Strategies Group, Sector Policies and Programs Division (D243–01), U.S. EPA, Research Triangle Park, NC 27711; telephone number (919) 541–4003, facsimile number (919) 541–5450; email address: *fellner.christian@epa.gov.*

SUPPLEMENTARY INFORMATION:

Comment Period

The EPA is extending the public comment period for an additional 60 days. The public comment period will end on May 9, 2014, rather than March 10, 2014. This will ensure that the public has sufficient time to review and comment on all of the information available, including the proposed rule, the notice of data availability and other materials in the docket.

List of Subjects

40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Environmental Protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

40 CFR Part 98

Environmental protection, Greenhouse gases and monitoring, Reporting and recordkeeping requirements.

Dated: February 25, 2014.

Mary Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2014–04633 Filed 3–5–14; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 102–36

[FMR Case 2012–102–4; Docket No. 2012–0014; Sequence No. 1]

RIN 3090–AJ30

Federal Management Regulation; Disposal and Reporting of Federal Electronic Assets (FEA)

AGENCY: Office of Government-wide Policy, General Services Administration (GSA).

ACTION: Proposed rule with request for comments.

SUMMARY: GSA is proposing to amend the Federal Management Regulation (FMR) by changing its personal property policy regarding the disposal and reporting of Federal Electronic Assets (FEA). The proposed changes are to provide policy for the safe handling and disposal of FEA, and make minor clarifying edits to existing policies.

DATES: Interested parties should submit comments in writing on or before May 5, 2014 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FMR Case 2012–102–4 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting "FMR Case 2012–102–4" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "FMR Case 2012–102–4." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FMR Case 2012–102–4" on your attached document.
- Fax: 202–501–4067
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street NW., Washington, DC 20405.

State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
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February 21, 2014

Via Certified Mail, Email & Regulations.gov (EPA-HQ-2013-0495)
The Honorable Gina McCarthy
Administrator
U.S. Environment Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
McCarthy.Gina@EPA.gov

Re: Request for withdrawal and re-proposal (EPA-HQ-2013-0495)

Dear Administrator McCarthy:

This letter concerns the Environmental Protection Agency's ("EPA") failure to provide meaningful opportunity for public comment on additional documents only recently docketed to the proposed Standards of Performance for Greenhouse Gas Emissions From Stationary Sources: Electric Utility Generating Units ("NSPS"),[1] which was published in the *Federal Register* on January 8, 2014.[2] In particular, the Notice of Data Availability ("NODA") and accompanying Technical Support Document ("TSD") were only docketed on February 6, *and neither has yet been published in the Federal Register*.[3] Despite this late docketing, EPA has not extended the period for public comments on the underlying proposal, which remain due by March 10, 2014. The public has barely a month to review and comment on one of the most wide-ranging and unprecedented rules ever to have been issued by a federal agency.

Section 307(d) of the Clean Air Act ("CAA") requires that upon publication, a proposal like the NSPS include a "statement of basis and purpose . . . [which] shall include a summary . . . [of the] . . . factual data on which the proposed rule is based, . . . the methodology used in obtaining the data and in analyzing the data, . . . [and the] major legal interpretations and policy

[1] 79 Fed. Reg. 1430 (Jan. 8, 2014).

[2] The Commonwealth of Kentucky has also made the same request in a previous letter to EPA.

[3] "Technical Support Document: Effect of EPAct 05 on BSER for New Fossil Fuel-fired Boilers and IGCCs, January 8, 2014", Docket No. EPA-HQ-2013-0495-1873, Feb. 6, 2014. The TSD is time-stamped January 8, 2014, but was not placed in the docket until February 6. Likewise, a pre-publication version of the NODA was not posted to the docket until February 6.

considerations underlying the proposed rule." 42 U.S.C. 7607(d). Critically, section 307(d) also requires that "[a]ll data, information, and documents . . . on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule." This was not done here.

Yet, EPA has only now released the NODA and TSD's full legal justification for the proposed NSPS, *more than halfway through the proposal's comment period ending on March 10, 2014.* These documents contain *new* technical information and legal interpretations addressing how EPA believes facilities can be considered under the proposed NSPS despite statutory prohibitions in the Energy Policy Act of 2005 to the contrary. The NODA and TSD make clear that the new information includes "major legal interpretations and policy considerations underlying the proposed rule" and addresses new "data, information and documents." Deprived of these documents, the notice of proposed rulemaking published on January 8 "fail[ed] to provide an accurate picture of the reasoning that has led [EPA] to the proposed rule." *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530–31 (D.C. Cir. 1982). This is particularly true where, as here, the proposal overhauls the electric generating sector on an unprecedented scale. *See Maryland v. Envtl. Prot. Agency*, 530 F.2d 213, 222 (4th Cir. 1975) (vacating rule due to EPA's failure to comply with notice and comment requirements, emphasizing the "drastic impact" that compliance with rule would have), *vacated on other grounds*, 431 U.S. 99 (1977).

The simultaneous comment deadline for the NODA and TSD provides insufficient time for stakeholders to meaningfully analyze and formulate comments not only on the proposed NSPS, but now also the NODA and TSD individually and as they relate to the proposal. In short, EPA is leaving the public with *less than a month* to not only complete comments on the proposal, but also fully analyze and provide comments on the 27 additional issues raised by the TSD. Forcing States and stakeholders to draft comments on the proposed NSPS, as well as the NODA and TSD by March 10, 2014, is unreasonable and will burden states. *See Conn. Light & Power Co.*, 673 F.2d at 530–31 ("An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.").

Moreover, this failure to comply with section 307(d) places any final rule in serious legal jeopardy. *See Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 540 (D.C. Cir. 1983) ("late docking [is] highly improper" and "prohibit[ed]. . . in no uncertain terms"); *Sierra Club v. Costle*, 657 F.2d 298, 396–400 (D.C. Cir. 1981) ("If . . . documents . . . upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment . . . , then both the structure and spirit of section 307 would have been violated."); *see also Conn. Light & Power*, 673 F.2d at 530–31 ("If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals."); *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982) (EPA improperly placed economic forecast data in the record only one week before issuing its final regulations); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004) (vacating rule because agency "deprived the

public of a meaningful opportunity to submit comments and participate in the administrative process mandated by law").

To comply with section 307(d), EPA must withdraw and re-propose the proposed NSPS so that major legal interpretations and policy considerations in the NODA and TSD are "included in the docket on the date of publication of the proposed rule." 42 U.S.C. § 7607(d). Therefore, the undersigned States request EPA withdraw and re-propose the NSPS to comply with applicable law, and provide interested parties 90 days to review and comment on the re-proposal. If EPA declines to do so, we request that the comment deadline for the proposed NSPS be extended to 90 days after publication of the NODA in the *Federal Register*, to allow for adequate review and comment on the proposed NSPS along with and in light of the new supporting data and major legal interpretations in the NODA and TSD.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

E. Scott Pruitt
Oklahoma Attorney General

Luther Strange
Alabama Attorney General

Alan Wilson
South Carolina Attorney General

Derek Schmidt
Kansas Attorney General

Greg Abbott
Texas Attorney General

Jon Bruning
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