

**COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

on the

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S

**REPEAL OF CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING
STATIONARY SOURCES: ELECTRIC UTILITY GENERATING UNITS;
PROPOSED RULE**

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I. Introduction

The American Public Power Association (APPA or Association) submits the following comments in response to the U.S. Environmental Protection Agency's (EPA or Agency) proposed rule entitled "Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" (Proposed Repeal).¹ The Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our Association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power. The Association participates on behalf of its members collectively in EPA's rulemakings and other Clean Air Act (CAA or Act) proceedings that affect the interests of public power utilities. For these reasons, APPA has a clear interest in the present rulemaking, as well as the other EPA rulemakings that address carbon dioxide (CO₂) and other greenhouse gas (GHG) emissions under the CAA.

In this rule, EPA has proposed to repeal the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, which was promulgated under section 111 of the CAA and is also known as the Clean Power Plan (CPP).² APPA believes the CPP exceeded EPA's CAA authority and would have seriously disrupted the markets in which APPA members operate. APPA therefore supports the Proposed Repeal because it is unlawful and because it represents an unworkable policy.

¹ 82 Fed. Reg. 48,035 (Oct. 16, 2017).

² 80 Fed. Reg. 64,662 (Oct. 23, 2015).

The Proposed Repeal falls within EPA's well-recognized regulatory authority. The Proposed Repeal seeks to: (1) correct the Agency's mistake in promulgating the transformative CPP without statutory authority; (2) effectuate different legal conclusions that are consistent with the CAA and are otherwise lawful; and (3) effectuate different policy about the most appropriate way to address CO₂ emissions from existing electric generating units (EGUs). Any of these grounds is sufficient reason to support the Proposed Repeal.³

The Association also supports EPA's decision to issue an Advance Notice of Proposed Rulemaking to explore the issues related to development of lawful section 111(d) emission guidelines under which States would submit plans that set standards of performance for existing EGUs. APPA encourages EPA to propose and finalize new 111(d) emission guidelines, thus providing regulatory certainty for the electric generating sector. APPA also encourages EPA to move forward with reviewing its new source performance standards for GHG emissions from new, modified, and reconstructed coal-fired EGUs. In addition, APPA supports EPA's decision to exclude the 2009 Endangerment Finding from the scope of this proposed rulemaking.

As described in greater detail in the following sections, EPA's Proposed Repeal is clearly within the Agency's statutory authority, supported by sound policy, and should be made final. APPA appreciates the opportunity to submit these comments in support of EPA's proposed action.

II. The CPP Should Be Repealed for Consistency with the New Administration's Stated Policy Priorities.

As will be discussed in Section IV, the CPP violates the CAA, thus giving EPA ample justification for repeal. More importantly, however, there are substantial policy-related issues

³ APPA incorporates by reference and supports the comments of the Utility Air Regulatory Group (UARG) on the Proposed Repeal.

with the CPP that also merit its rescission. As EPA notes, the CPP, if implemented, would impose significant costs on the electricity generating sector and on consumers, it raises reliability concerns, and it invades traditional areas of State concern.⁴ Additionally, the CPP is inconsistent with the Trump Administration’s policies outlined in Executive Order (EO) 13783. This EO declares that it is “in the national interest to ensure that the Nation’s electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.”⁵

A. The CPP Ignores States’ Role Under CAA § 111(d) and Invades Traditional Areas of State Responsibility.

The CPP violates express provisions of section 111(d) of the CAA and EPA’s own regulations, by setting strict emission limits for States. It further invades traditional areas of State responsibility by determining the balance of energy resources within the State and prioritizing development of future generation resources. These violations of law justify repeal.

The CPP establishes national performance rates that States must use as the basis for their State plans. Under the CPP, these national performance rates are fixed and may not be varied for consideration of the remaining useful life of any particular source subject to a plan or any other State and source-specific factors.⁶ This is inconsistent with Congress’s allocation of authority to States to fashion State plans and to adjust performance standards for individual regulated sources within the State’s plan. Section 111(d) of the CAA expressly requires EPA to allow States “to

⁴ 82 Fed. Reg. at 48,038.

⁵ EO 13783 § 1(b), 82 Fed. Reg. 16,093 (Mar. 31, 2017).

⁶ 80 Fed. Reg. at 64,870 (“[C]onsideration of facility-specific factors and in particular, remaining useful life, does not justify a state making further adjustments to the performance rates . . . that the guidelines define for affected [units] in a state and that must be achieved by the state plan.”).

take into consideration, among other factors, the remaining useful life of the existing source” when “establish[ing] standards of performance.”⁷

Additionally, EPA’s current regulations under Section 111(d) allow States to deviate from the recommended standard of performance if a proper showing can be made. Under these rules, consistent with the statute, EPA’s role is to issue a “guideline document” to assist the States in preparing a plan that establishes standards of performance.⁸ The guideline document sets “[a]n emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated.”⁹ States are then permitted to submit plans establishing standards of performance less stringent than the EPA emissions guideline, if the States can meet certain demonstrations, such as infeasibility or unreasonable cost due to a plant’s age.¹⁰ As explained above, the CPP prohibits States from implementing emission standards that are less stringent than those stated in the national performance rates established by EPA, in direct contravention of EPA’s rules.¹¹

In addition to violating the CAA and its regulations, the CPP also usurped States’ traditional role in determining the balance of energy resources within the State and in prioritizing development of future energy resources. This effort to transform the electric generating industry invades the States’ traditional authority to determine for themselves the extent to which they

⁷ CAA § 111(d)(1).

⁸ When promulgating these procedural rules, EPA noted, “to emphasize that a legally enforceable standard is not intended, the term ‘emission limitation’ has been replaced with the term ‘emission guideline.’” 40 Fed. Reg. 53,340, 53,341 (Nov. 17, 1975).

⁹ 40 C.F.R. § 60.22(b)(5).

¹⁰ *Id.* § 60.24(f).

¹¹ 80 Fed. Reg. at 64,870.

should (or should not) mandate particular levels of renewable generation and violates fundamental principles of federalism.¹²

Prior to the CPP, States had the authority to balance the benefits of renewable generation with other considerations, including the risks that variable energy sources dependent on unpredictable weather events pose to the grid's reliability.¹³ The demanding standards set by the CPP, however, force States to shift generation away from traditional baseload plants and to invest heavily in new renewable resources. This would have required States to enact many legislative and regulatory measures they may not have otherwise chosen for themselves. Thus, the CPP supplants the power generation decisions that are within the States' traditional and exclusive jurisdiction.

B. The Nation's Interest in Affordable and Reliable Electricity is Threatened by the CPP.

Despite the former Administration's stated goal to "aggressive[ly] transform[] the domestic energy industry,"¹⁴ EPA failed to assess the CPP's impacts on the reliability and affordability of the nation's energy supply. Stating that it lacks the expertise to assess grid

¹² EO 13783 § 1(d), 82 Fed. Reg. at 16,093 ("It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.").

¹³ Indeed, the U.S. Energy Information Administration has documented the fact that a majority of the States and the District of Columbia have established enforceable renewable portfolio standards while others have adopted voluntary renewable energy targets. U.S. Energy Information Administration, *Today In Energy, Most States have Renewable Portfolio Standards* (Feb. 3, 2012), *available at* <https://www.eia.gov/todayinenergy/detail.cfm?id=4850>.

¹⁴ State Petitioners' Motion for Stay, Ex. B "White House Fact Sheet," *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015), ECF No. 1579999 (White House Fact Sheet).

reliability,¹⁵ EPA did “not attempt to perform a detailed power flow analysis or to project new transmission additions” when estimating the CPP’s impacts.¹⁶

Instead, EPA simply made projections of the renewable capacity that might be available by 2030, as well as projections for capacity shifts from coal- to gas-fired generation during this time. EPA received many comments from entities responsible for maintaining the reliability of the nation’s electric grid that identified problems with these projections and cast doubt on whether the necessary generation-shifts would materialize.¹⁷

Under the CPP, any shortfall in projected renewable capacity would seriously jeopardize the reliability of the nation’s electricity supply, given that lower-than-projected renewable generation would simultaneously increase the need for generation from affected EGUs while reducing the supply of available emission rate credits (ERCs) to cover increased generation by affected EGUs. These two consequences in tandem would cause the prices for ERCs to spike, increasing consumer costs significantly and further threatening reliability. This is particularly true in public power communities, where some EGUs would have been forced to retire prematurely, stranding those communities’ investments in those units.

¹⁵ See 80 Fed. Reg. at 64,874-81.

¹⁶ EPA, Greenhouse Gas Mitigation Measures, Technical Support Document at 4-20 (Aug. 3, 2015), EPA-HQ-OAR-2013-0602-36859. EPA did prepare a technical support document addressing reliability issues. Technical Support Document: Resource Adequacy and Reliability Analysis (Aug. 2015), EPA-HQ-OAR-2013-0602-36847. EPA’s analysis, however, simply assumed “that adequate transmission capacity exists to deliver any resources located in, or transferred, to [a] region.” *Id.* at 3. EPA never conducted a true reliability assessment.

¹⁷ See, e.g., Midcontinent Independent System Operator, Inc. Comments at 3 (Nov. 25, 2014), EPA-HQ-OAR-2013-0602-22547; Southwest Power Pool, SPP’s Reliability Impact Assessment of the EPA’s Proposed Clean Power Plan, at 3, 5-6 (Oct. 8, 2014), <https://www.spp.org/publications/CPP%20Reliability%20Analysis%20Results%20Final%20Version.pdf>; NERC, Potential Reliability Impacts of EPA’s Proposed Clean Power Plan, Initial Reliability Review at 19 (Nov. 2014), EPA-HQ-OAR-2013-0602-37006.

III. EPA Has Clear Authority to Repeal the CPP

A. EPA Has the Power to Modify or Repeal its Regulations.

The Administrator has the authority under the CAA to “prescribe such regulations as are necessary to carry out his functions under this chapter.”¹⁸ Moreover, EPA has the power to engage in “rulemaking” to take “such other actions as the Administrator may determine.”¹⁹ The power to modify or repeal any such rule is included in the rulemaking authority.²⁰ Repealing the CPP would be an entirely appropriate exercise of the Administrator’s unambiguous authority to make, and modify, regulations under the CAA.

B. Agencies Have the Power to Revisit or Repeal Prior Regulatory Decisions.

The Supreme Court has repeatedly confirmed that agencies have authority to repeal or amend rules for purposes of correcting prior mistakes, reflecting a new legal interpretation, or implementing a change in policy.²¹ An agency may change its mind and revise or repeal a rule, so long as it acknowledges its changing position,²² and “suppl[ies] a reasoned analysis for the change.”²³

¹⁸ CAA § 301(a).

¹⁹ *Id.* § 307(d)(1)(V).

²⁰ *See* 5 U.S.C. § 551(5) (defining “rule making” to include “amending[] or repealing a rule.”).

²¹ *See, e.g., Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739 (D.C. Cir. 1990) (per curiam) (“[A]n agency *always* retains the power to revise a final rule through additional rulemaking.”) (emphasis in original).

²² *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox*).

²³ *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (*State Farm*).

Courts apply the same “narrow” standard of review—the traditional “arbitrary and capricious” test—in reviewing the repeal of a rule as is applied to newly promulgated rules.²⁴ EPA need not do more to justify the repeal or revision of a rule than it must to promulgate a rule in the first place. The Administrative Procedure Act neither distinguishes “between initial agency action and subsequent agency action undoing or revising that action,” nor requires a “more detailed justification” for repeal.²⁵

The Supreme Court has also recognized that a new Administration’s change in policy may be sufficient reason to amend or repeal a rule.²⁶ Likewise, EPA may revisit existing rules to correct its own errors or to give effect to a changed interpretation of the law.²⁷

The Proposed Repeal is well within EPA’s authority to revise or repeal its own regulations and is justified under several rationales. EPA is entitled to correct the errors in the legal positions underlying the CPP. EPA also has the authority to adopt its proposed interpretation of the relevant statutory language, which is both consistent with the Act and otherwise lawful. Lastly, the Proposed Repeal would give effect to the new Administration’s preferred policy on addressing CO₂ emissions from existing EGUs.

²⁴ *Id.* at 43; *Ctr. for Sci. in the Pub. Interest v. Dep’t of Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986) (“[A]n agency which examines the relevant data and articulates a satisfactory explanation for its action has met its burden of justification.”) (internal citation and quotation marks omitted).

²⁵ *Fox*, 556 U.S. at 515.

²⁶ *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part, dissenting in part) (“As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”).

²⁷ *See, e.g., Ctr. for Sci. in the Pub. Interest*, 797 F.2d at 998-99 (“[I]t is not improper for an agency to engage in new rulemaking to supersede defective rulemaking.”) (internal citation and quotation marks omitted); *id.* at 999 (if an “existing rule has no rational basis to support it,” an agency may repeal the rule) (internal quotation marks omitted); *Fox*, 556 U.S. at 538 (upholding change in FCC policy based on updated reading of case law) (Kennedy, J., concurring).

IV. The CPP Is Based on Incorrect Legal Conclusions and Should Be Repealed.

A. The CPP Relied on a Flawed Interpretation of Key Statutory Terms.

1. The CPP's Interpretation of Best System of Emission Reduction and Standard of Performance

The CPP establishes emission guidelines in the form of uniform national emission performance rates for existing fossil fuel-fired EGUs, which States would be required to incorporate into State plans as standards of performance. As the basis for these emission guidelines, EPA determined that the “best system of emission reduction” (BSER) consists of three “Building Blocks” representing different ways the electric generation industry could reduce *overall* CO₂ emissions.²⁸ Building Block 1 seeks to lower CO₂ emissions by improving the heat rate of individual, existing coal-fired EGUs.²⁹ But, as EPA explained, the emission reductions associated with Building Block 1 would be insufficient to satisfy the Agency’s policy goals.³⁰ Thus, EPA added two additional building blocks into the BSER. Building Block 2 seeks to lower CO₂ emissions by displacing large quantities of generation supplied by existing, coal-fired EGUs with increased generation from existing natural gas combined cycle (NGCC) facilities.³¹ Finally, Building Block 3 seeks to increase generation from new renewable energy sources, such as wind and solar, by displacing generation from both existing coal-fired EGUs and NGCC facilities.³² Together, Building Blocks 2 and 3 represent what EPA euphemistically called “generation shifting.”

²⁸ 80 Fed. Reg. at 64,719-20, 64,752.

²⁹ *Id.* at 64,745.

³⁰ *See id.* at 64,769.

³¹ *Id.* at 64,745-46.

³² *Id.* at 64,747-48.

To establish emission guidelines based on these Building Blocks, EPA determined the theoretical CO₂ emission rates at which existing fossil fuel-fired EGUs would have to operate to obtain the emission reductions assumed to be achievable through implementation of the Building Blocks.³³ EPA concluded that the rate for existing coal-fired EGUs would be 1,305 pounds of CO₂/MWh, and 771 lb CO₂/MWh for existing NGCC facilities.³⁴ These rates are the “chief regulatory requirement of th[e] rulemaking,” and existing fossil fuel-fired EGUs may not emit CO₂ in excess of these rates.³⁵

Yet, as EPA admits in the CPP, no existing facility can actually meet these rates through changes in its emission performance or operations.³⁶ EPA’s performance standards are not achievable through the use of pollution controls, operational improvements, or simply reducing generation at the source. Instead, to satisfy the emission guidelines, the *owner or operator* of an affected EGU would need to induce *another entity* to generate electricity or otherwise acquire such generation capacity directly. Thus, representing the Building Blocks, the CPP’s performance rates are based on the availability of tradable ERCs. A source’s owner or operator must demonstrate compliance by “calculat[ing] an adjusted CO₂ emission rate” using stack emissions data and proof (in the form of ERCs) that lower- or zero-emitting generation elsewhere has occurred in a sufficient amount to bring the source’s adjusted emission rate in line with the required performance standard.³⁷ In other words, a regulated source’s compliance with

³³ See generally EPA, CO₂ Emission Performance Rate and Goal Computation Technical Support Document for CPP Final Rule (Aug. 2015), EPA-HQ-OAR-2013-0602-36850 (Goal Computation TSD).

³⁴ 40 C.F.R. part 60, Subpart UUUU, Table 1.

³⁵ 80 Fed. Reg. at 64,823.

³⁶ See *id.* at 64,752.

³⁷ 40 C.F.R. § 60.5790(c)(1).

the CPP requires the owner or operator to shift generation to reduce the overall CO₂ emissions of the combined source category. Importantly, this effort cannot be taken within the boundaries of an individual source.

To justify this unprecedented approach, EPA offered evolving legal rationales based on new interpretations of key statutory provisions. In the proposed rule, EPA asserted for the first time that the BSER is ambiguous and should be interpreted to include “virtually any ‘set of things’ that reduce emissions,” from “add-on controls . . . to measures that replace production or generation at the affected sources,” including obligations imposed on entities beyond the regulated sources themselves.³⁸ In the final rule, however, EPA conceded that BSER “must be limited to measures that can be implemented—‘appl[ied]’—by the sources themselves.”³⁹ Nevertheless, EPA preserved its approach by simply interpreting the scope of the term “source” to “include[] the ‘owner or operator’ of any building, structure, facility, or installation for which a standard of performance is applicable.”⁴⁰ With this broad interpretation, a standard of performance applicable to the source may be based, according to EPA, on “actions that may occur off-site and actions that a third party takes.”⁴¹ EPA claimed an owner or operator can “invest in actions at facilities owned by others,”⁴² including generation from other sources or facilities, in order to generate “emission rate credits,”⁴³ to offset the regulated source’s emission

³⁸ Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units at 51-52 (undated), EPA-HQ-OAR-2013-0602-0419.

³⁹ 80 Fed. Reg. at 64,720 (revision in original).

⁴⁰ *Id.* at 64,762.

⁴¹ *Id.* at 64,761.

⁴² *Id.* at 64,733.

⁴³ *Id.* at 64,669.

rate.⁴⁴ Alternatively, the owner or operator can comply with the performance rate by simply shutting the regulated source down.⁴⁵ Therefore, EPA concluded, all of these measures can be part of the BSER.

2. EPA Lacked a Clear Statement of Authority from Congress.

APPA supports the repeal of the CPP because EPA exceeded its authority under the CAA. The agency adopted a transformative rule with profound economic and political significance without a clear statement of authority from Congress. In the CPP, EPA claimed that its legal conclusions underlying the rule were accorded deference under the principles of *Chevron, U.S.A., Inc. v. NRDC, Inc.*,⁴⁶ as the Agency's interpretation of ambiguous statutory provisions. But even if section 111 were ambiguous (and it is not), the Supreme Court has held that statutory ambiguity alone is not sufficient to justify an agency's assertion of "unheralded power to regulate a significant portion of the American economy."⁴⁷ When an agency seeks to make "decisions of vast 'economic and political significance'" or "bring about an enormous and transformative expansion" in its authority under "a long-extant statute," it must point to a "clear[]" statement from Congress.⁴⁸

The CPP was, by EPA's own admission, a "transformative" exercise of regulatory authority with great economic and political significance for the nation. According to the former administration, the CPP sought to effect an "aggressive transformation" of the electric sector by

⁴⁴ 40 C.F.R. § 60.5740(a)(2)(i); *see also id.* § 60.5790(c).

⁴⁵ 80 Fed. Reg. at 64,750, 64,780 n.590.

⁴⁶ 467 U.S. 837, 842-43 (1984).

⁴⁷ *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks omitted).

⁴⁸ *Id.*; *see also King v. Burwell*, 135 S. Ct. 2480 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

reducing fossil fuel-based power generation.⁴⁹ This is not a rule that, like previous EPA rulemakings under CAA § 111, seeks merely to set standards that improve the emissions performance of individual sources. Rather, the CPP is an attempt to entirely restructure an entire industry with serious consequences for the economy, national security, and public health and safety. EPA claims it has authority to mandate that States reorder their electricity generation mix, to force the closure of coal-fired EGUs, to require the owners of sources to subsidize and invest in other generation sources, and to develop a CO₂ emissions trading system previously rejected by Congress.

In addition to the concerns about the transformative scope of the rule, the CPP usurped the States' traditional role in structuring their own energy markets and resources.⁵⁰ Traditionally, decisions regarding the need for new power generating facilities and the proper mix of generating resources to promote reliability, affordability, economic growth, and environmental benefits have been within the purview of the States.⁵¹

Because the CAA contains no clear statement providing the regulatory authority EPA claimed in the CPP nor authorizing this intrusion into the States' domain, repeal of the CPP is warranted. Indeed, EPA has never claimed that such a clear statement exists, either in the CPP rulemaking or the subsequent litigation challenging the rule. The Agency admitted before the Supreme Court that section 111(d) "does not expressly address" its concept of "generation-

⁴⁹ White House Fact Sheet.

⁵⁰ *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (noting the "well-established principle that it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers").

⁵¹ See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (stating "[n]eed for new power facilities, their economic feasibility, and rates and services are areas that have been characteristically governed by the States").

shifting.”⁵² Instead, the Agency has argued that the statutory language of section 111 is ambiguous and that EPA’s legal interpretations of that language are therefore due deference under the *Chevron* doctrine.⁵³ But this defense, even if true, would be fatal to the rule. If section 111 is in fact ambiguous,⁵⁴ then by definition it must lack a clear statement of the scope of the Agency’s authority.

3. The CAA’s Plain Language Unambiguously Requires a Narrower Interpretation of EPA’s Authority Under Section 111.

EPA’s claim that the CPP can be based on measures that cannot be implemented at an individual source not only lacks clear authorization from Congress, it is also contradicted by the plain language of the CAA. Under traditional administrative law principles, where Congress has spoken clearly, that is the end of the matter.⁵⁵ Section 111 unambiguously directs EPA to adopt an emission guideline to be used by States in developing standards of performance that apply to individual sources. The standards of performance, moreover, must be based on a BSER that can be implemented at individual sources.

The plain text of the statute requires that the standards of performance must be “for” and “applicable . . . to” individual regulated sources.⁵⁶ Section 111 applies to “stationary sources” of air pollution, which Congress defined as “any building, structure, facility, or installation which emits or may emit any air pollutant,” not owners and operators of those sources.⁵⁷ In fact,

⁵² EPA Opp’n to Mot. for Stay at 41, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 4, 2016).

⁵³ *See, e.g.*, 80 Fed. Reg. at 64,719 n.301.

⁵⁴ As discussed below, CAA § 111 is not ambiguous: the plain text of the statute clearly limits the scope of the BSER to measures that can be implemented at the regulated source itself.

⁵⁵ *Chevron*, 467 U.S. at 863-64.

⁵⁶ CAA § 111(a)(2), (b)(1)(B), (d)(1).

⁵⁷ *Id.* § 111(a)(3).

Congress defined the “owner or operator” separately from the source itself, invalidating EPA’s claim that a “stationary source” is equivalent to its owner or operator.⁵⁸

Further, judicial precedent is clear that section 111 standards must apply to individual sources, rather than to groups of sources or to a category as a whole.⁵⁹ In *ASARCO*, the court rejected the so-called “bubble concept” for section 111 requirements, holding that EPA’s approach in that case would “rewrite the definition of a stationary source.”⁶⁰ According to the court, the statute “limit[s] the definition of ‘stationary source’ to one ‘facility’” and not a “‘combination of’ facilities.”⁶¹ The D.C. Circuit’s decision forecloses EPA’s interpretation of section 111 in the CPP. EPA cannot treat as a single source distinct EGUs that may be separated by hundreds if not thousands of miles.

The statutory context of section 111’s requirements emphasizes its source-focused nature. Section 111 must be read in harmony with the Act’s Prevention of Significant Deterioration provisions, which rely on any applicable section 111 standard of performance as a floor for Best Available Control Technology (BACT) standards.⁶² If, however, a standard of performance were to rely on a “system of emission reduction” that goes beyond the source itself, it could not meaningfully inform a BACT standard for sources in that category. EPA has appropriately recognized this in the Proposed Repeal, noting that the Agency’s consistent policy has been that “BACT must be applied to the source itself.”⁶³

⁵⁸ *Id.* § 111(a)(5).

⁵⁹ *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978).

⁶⁰ *Id.* at 324, 326 n.24.

⁶¹ *Id.* at 324.

⁶² CAA § 169(3).

⁶³ 82 Fed. Reg. at 48,042.

The CAA’s other programs establishing emission standards for new and existing sources focus solely on achieving emission reductions at individual sources.⁶⁴ These programs regulate emissions from individual sources based on what other similar sources can or already have achieved. For example, emission standards for hazardous air pollutants must be based on the maximum achievable control technology and reflect the application of “measures, processes, methods, systems or techniques” directly to individual sources.⁶⁵

In contrast, where Congress did authorize emission control measures that go beyond a specific source for the purpose of meeting aggregate emission reduction goals—such as the National Ambient Air Quality Standards (NAAQS) or Title IV programs—it spoke clearly and precisely. For example, when Congress took action in the 1990 CAA Amendments to cap sulfur dioxide emissions and establish a program for emissions allowances and trading, it added an entirely new title to the Act (Title IV) spelling out the requirements and implementation procedures for that program in great detail.⁶⁶

Finally, EPA’s long and consistent history of implementing section 111 with a singular focus on individual sources confirms the plain language of the statute. Since the early 1970s, shortly after the CAA was passed, EPA has consistently interpreted section 111 as limited to considering control techniques that could be applied at a source. The CPP, however, departs from this 45-year practice in which EPA has promulgated approximately 100 new source performance standards in more than 60 source categories based solely on “systems of emission reduction” that can be achieved with technological or operational measures implemented at the source itself.

⁶⁴ See CAA §§ 112(d)(2), 165(a)(4), 169A(b)(2)(A).

⁶⁵ *Id.* § 112(d)(2).

⁶⁶ See *id.* §§ 401-416.

4. Even if Section 111 Could Be Read as Ambiguous (Which It Cannot), the Interpretation EPA Has Proposed Is Reasonable and Entitled to Deference.

As discussed above, the CAA unambiguously requires that the BSER be focused on measures that can be applied at or to an individual source. EPA’s proposed interpretation is consistent with that requirement. EPA proposes to “return to a reading of CAA section 111(a)(1) . . . as being limited to emission reduction measures that can be *applied to or at* an individual stationary source . . . rather than measures that the source’s owner or operator *can implement on behalf of* the source at another location.”⁶⁷ APPA supports this approach.

APPA disagrees, however, with EPA’s statement at several places in the Proposed Repeal that the BSER on which a standard of performance is based “must be based on a physical or operational *change* to a building, structure, facility, or installation at that source.”⁶⁸ Standards of performance applicable to existing sources may not always require individual sources to implement changes in order to comply. Further, EPA may not require States to submit plans that would require a source to install and operate any particular emission control measure under section 111.⁶⁹ EPA merely establishes an emission guideline that States then use to develop standards of performance. Affected sources may then comply with those standards of performance using any method capable of achieving that standard—or, if the source’s emissions already meet that standard, without taking any affirmative steps at all.

Even if section 111 were ambiguous, EPA’s proposed interpretation here is reasonable and entitled to deference. An agency may change its interpretation and need not show that the

⁶⁷ 82 Fed. Reg. at 48,039 (emphases in original).

⁶⁸ *Id.* (emphasis added).

⁶⁹ *See* CAA § 111(b)(5).

old reading was incorrect. It merely needs to show that the new one is reasonable.⁷⁰ Under *Chevron* Step Two, an agency is granted deference in interpreting an ambiguous statute provided its interpretation is reasonable.⁷¹ Agency interpretations are granted particular deference when the interpretation is made contemporaneously with the passage of the statute and is maintained consistently over decades. With the sole exception of the CPP, EPA has consistently interpreted section 111(a)(1) in the same way as described in the Proposed Repeal since that provision was adopted in 1970. Further, Congress has acquiesced to EPA’s interpretation, leaving the relevant statutory language substantially untouched, despite two major amendments to other parts of the CAA over four decades and over 100 instances of EPA’s consistent implementation.

5. EPA Should Withdraw the CPP in Its Entirety and Should Not Leave “Building Block 1” in Place.

In light of the prior Administration’s reliance on flawed legal conclusions as the fundamental basis of the CPP, EPA should repeal the CPP in its entirety to address these deficiencies and promulgate lawful section 111(d) emission guidelines for existing EGUs that allow each State to meaningfully participate in the adoption of performance standards to fit that State’s needs and goals. Since the flawed legal conclusions pervade every aspect of the CPP, a full repeal is needed—including Building Block 1.

EPA must repeal the Building Block 1 portion of the CPP because that Building Block was developed using flawed heat rate improvement assumptions. EPA developed Building Block 1 by observing that units’ heat rates appeared to be lower at sometimes or in some years than others, and then assumed that coal units could proactively and continually replicate past

⁷⁰ See *Fox*, 556 U.S. at 515 (“[An agency] need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.”) (emphasis in original).

⁷¹ *Chevron*, 467 U.S. at 863-64.

optimum heat rate observations simply by using good maintenance and operating practices. The record in the CPP rulemaking, however, established the opposite: that heat rate variation is often driven by factors beyond a unit's control.⁷² Moreover, many of the measures that can affect a unit's heat rate and are within its control have already been implemented.⁷³ Despite record evidence of this fact, EPA failed to evaluate whether any specific measures are available for units to achieve the Building Block 1 targets. As a result, Building Block 1 is unsupported, arbitrary, and must be repealed.

EPA states that a rule based solely on Building Block 1 “cannot stand on its own.”⁷⁴ To support this, EPA cites a discussion in the original rulemaking that concludes “unless at least one other building block is also implemented” with Building Block 1, a “‘rebound effect’ arising from improved competitiveness and increased generation at the EGUs implementing heat rate improvements would weaken or potentially even eliminate the ability of building block 1 to achieve CO₂ emission reductions.”⁷⁵ Thus, in the CPP, EPA acknowledged that Building Block 1 can't stand on its own because it would not “achieve meaningful degrees of emission reductions.”⁷⁶

APPA agrees that EPA must withdraw the CPP in its entirety rather than severing and preserving the Building Block 1 component of the Rule. But APPA does not agree that Building Block 1 cannot stand on its own as the basis for a section 111 standard due to a lack of

⁷² J. Edward Cichanowicz & Michael C. Hein, Evaluation of Heat Rate Improving Techniques for Coal-Fired Utility Boilers as a Response to Section 111(d) Mandates at 5-1 to 5-2 (Oct. 13, 2014).

⁷³ *Id.*

⁷⁴ 82 Fed. Reg. at 48,038, 48,039 n.5.

⁷⁵ 80 Fed. Reg. at 64,758 n.443.

⁷⁶ *Id.* at 64,758.

“meaningful emission reductions” – a term that doesn’t appear in section 111. Unlike the CAA provisions governing NAAQS and other CAA regulatory programs, section 111 was not written to achieve specific emission reduction goals from individual sources or from any source category as a whole. Instead, as a technology-based program, section 111 authorizes EPA only to adopt emission guidelines that reflect the BSE—regardless of the “significance” of the emission reductions that will be achieved.⁷⁷ Once the BSE is identified, the emission standards that flow from application of BSE to individual sources must be “achievable,” after considering cost, non-air quality health and environmental impacts, and energy requirements.⁷⁸ EPA cannot seek to require more stringent emission reductions than the statutory language and precedent would support.

When promulgating the CPP, EPA did not claim that it would have a “meaningful” effect on climate change. Overall, the CPP was estimated to mitigate less than one percent of global GHG emissions.⁷⁹ Therefore, any concern now that Building Block 1 alone would not result in meaningful emissions reductions would seem inconsistent with EPA’s previous implied conclusion that CPP emission reductions need not have a meaningful effect on climate change to be warranted.

Therefore, although APPA agrees that EPA should entirely repeal the CPP, APPA disagrees with the contention that Building Block 1 cannot stand on its own, even with limited emissions reductions.

⁷⁷ CAA § 111(a).

⁷⁸ *Id.*

⁷⁹ The full CPP was estimated by EPA to reduce CO₂ emissions by roughly 415 million tons in 2030. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule at 3-19, Tbl. 3-5 (Aug. 2015). Global GHG emissions were approximately 49 billion tons of CO₂ equivalent in 2010. Intergovernmental Panel on Climate Change (IPCC), Climate Change 2014, Mitigation of Climate Change, at 6 (2014) (IPCC 2014).

B. The CPP Disregarded Section 111’s Requirement that Standards of Performance Be “Achievable” Based on a BSER that Has Been “Adequately Demonstrated.”

Legal errors in addition to those identified by EPA in the Proposed Repeal lend support to the repeal of the CPP. One such flaw lies with the BSER EPA identified in the CPP. Even if it was permissible for EPA to base a section 111 rule on measures that a source owner or operator may take on behalf of the source outside of the affected source itself, which, as described above, it is not, the BSER in the CPP was not “adequately demonstrated,” and the emission guidelines EPA promulgated were not “achievable” for individual sources.⁸⁰

The CPP’s BSER was premised on “generation shifting” from affected fossil fuel-fired EGUs to renewable energy resources not subject to the CPP, within a regional or national interstate trading system. An “adequately demonstrated” system of emission reduction is “one which has been shown to be reasonably reliable, reasonably efficient, and [not] exorbitantly costly in an economic or environmental way.”⁸¹ EPA is not required to prove that a system of emission reduction is in regular use, but it must “adequately demonstrate[]” that there will be “available technology.”⁸² By EPA’s own acknowledgment, emissions trading was “integral” to its assessment of BSER.⁸³ Yet, EPA lacks the authority to require States to establish such a trading system.⁸⁴ Further, the CPP did not demonstrate that requisite trading systems would be created, but merely asserted EPA “anticipate[d]” that “organized markets will develop.”⁸⁵

⁸⁰ CAA § 111(a)(1).

⁸¹ *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973).

⁸² *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973) (citation omitted).

⁸³ 80 Fed. Reg. at 64,733-35.

⁸⁴ See CAA § 111(d)(1)(A).

⁸⁵ 80 Fed. Reg. at 64,731-32.

Because EPA cannot show that the trading system on which it relied will be available, the CPP's BSER has not been "adequately demonstrated."

The CPP also failed to ensure its BSER would be available in every State. Section 111(d) vests the responsibility for developing State plans that establish and implement standards of performance for individual existing sources with the States. Although States may choose to adopt trading programs under the CPP, they are not required to do so. Neither must States allow for interstate trading with sources in other States in the region.

EPA itself found in the CPP rulemaking that some States have insufficient low- or zero-emitting generating capacity to create the requisite ERCs for affected EGUs in their State to be able to comply. For example, EPA found that without a trading system in Montana, which has only existing coal-fired EGUs and no existing NGCC units, sources could achieve an overall emission rate of only 2,114 lb CO₂/MWh—more than 800 lb CO₂/MWh away from meeting final 1,305 lb CO₂/MWh rate-based goal for the State in 2030.⁸⁶ Furthermore, ERCs created by Montana's limited renewable energy development potential would account for a reduction in its affected EGUs' overall emission rate of only 1,936 lb CO₂/MWh.⁸⁷ Montana's affected EGUs could achieve the CPP's targets only through the ability to trade ERCs interstate. Because the ability to ensure access to a regional or national trading system for sources to take advantage of generation shifting is outside the EPA's authority, the CPP is not achievable for many sources.

As an alternative to the CPP's nationally uniform performance rates, the rule also establishes State-specific mass-based CO₂ emission goals.⁸⁸ To comply with these mass-based goals, affected EGUs would need to reduce their overall level of operations to the level dictated

⁸⁶ Goal Computation TSD, App'x 5, EPA-HQ-OAR-2013-0602-36849.

⁸⁷ *Id.*

⁸⁸ 80 Fed. Reg. at 64,820, 64,823.

by the availability of CO₂ emission allowances. With only a limited number of emission allowances available, some sources would be forced to restrict their operations significantly, if not cease altogether, to comply. A standard of performance that is “achievable” for every source in the source category cannot be premised on a “system of emission reduction” requiring some sources to close or curtail their operations in order for others to continue operating. A “standard of performance” that requires sources to reduce or cease operations is in fact a standard of *non-performance* and clearly outside the scope of section 111.

V. EPA’s Regulatory Impact Analysis Further Supports the Proposed Repeal.

The Supreme Court has recognized that costs are an important and necessary factor in any assessment of whether and how to regulate air pollution under the CAA.⁸⁹ An important part of considering the costs of regulation is weighing them against the benefits that can reasonably be expected to flow from the rule under consideration.⁹⁰ When EPA evaluated the costs and benefits of the CPP in 2015, it relied on a methodology and on key assumptions that vastly overestimated the benefits of the rule.⁹¹ The draft Regulatory Impact Analysis for the Proposed Repeal presents a better reasoned and more realistic assessment and demonstrates that the costs of the CPP will exceed the benefits of the rule, supporting its repeal.⁹²

In addition to these comments, APPA support the comments of UARG with respect to the 2015 RIA and the new Draft RIA, as well as the analysis of the RIA prepared for the American

⁸⁹ *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

⁹⁰ *See id.* at 2707 (“One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”).

⁹¹ *See* EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule at 3-19, Tbl. 3-5, EPA-452/R-15-003 (Aug. 2015), EPA-HQ-OAR-2017-0355-0011 (2015 RIA).

⁹² *See* EPA, Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal, EPA-452/R-17-004 (Oct. 2017), EPA-HQ-OAR-2017-0355-0110 (Draft RIA).

Coalition for Clean Coal Electricity and UARG by NERA Economic Consulting that is being submitted with UARG's comments.

A. The CPP Cannot Be Justified on a Cost-Benefit Basis.

Federal agencies must conduct quantitative cost-benefit analyses when proposing new regulations and must ensure that any final rules that are promulgated are justified on the basis of a cost-benefit analysis.⁹³

EPA's 2015 RIA projected that the CPP would result in \$20 billion in monetized benefits by 2030 and billions of dollars of annual costs.⁹⁴ Even that analysis, however, acknowledged that the purported benefits of the CPP were not the result of the rule's CO₂ emission reductions or the effect of those emission reductions on climate change. Indeed, as noted above, the information available makes clear that the CPP would have no appreciable impact on climate.⁹⁵ Moreover, repeal of the CPP cannot, as a practical matter, impose costs or have any significant regulatory or environmental impact, because the rule has been stayed by the Supreme Court pending judicial review. Therefore, States and affected industry have withheld implementing the rule, such that repeal will merely preserve the status quo.

For all of these reasons, the cost-benefit analysis required by EO 12866 cannot justify retaining the CPP. Accordingly, APPA supports the Proposed Repeal.

⁹³ EO 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Memorandum from Dominic J. Mancini, Acting Administrator, Office of Information and Regulatory Affairs, to Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions, "Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs'" (M-17-21) at 13 (Apr. 5, 2017) (affirming EO 12866 and its cost-benefit analysis requirements), at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

⁹⁴ 2015 RIA at ES-20, Tbl. ES-7, 3-22 to 3-23, 3-25 to 3-27, 3-30.

⁹⁵ *Compare* 80 Fed. Reg. at 64,924, Tbl. 15 (projecting CO₂ reduction of approximately 415 million tons in 2030 due to the CPP) *with* IPCC 2014 Report at 6 (showing global anthropogenic GHG emissions of 49 billion tons per year).

B. APPA Generally Supports EPA’s Transparent Approach to Considering Costs and Benefits in the Proposed Repeal’s RIA.

EPA’s approach to cost-benefit analysis reflected in the Draft RIA is more transparent and methodologically sound than the approach taken in the 2015 RIA prepared in support of the CPP. The Draft RIA adopts four key reforms to the methodology used in 2015 that significantly improve its reliability and usefulness: (1) the treatment of uncertainties; (2) reliance on domestic rather than global impacts; (3) adoption of a 7 percent discount rate; and (4) the revised presentation of “co-benefits” analysis.

The Draft RIA “underscores the uncertainty associated with any agency action of this magnitude, especially in actions where discretion is afforded to State governments.”⁹⁶ It does so by presenting disaggregated information in a variety of ways and by presenting additional sensitivity analyses and a more comprehensive description of uncertainties. These are not only significant improvements over the approach taken in the 2015 RIA, they are also more fully in line with the policies set out in the Office of Management and Budget’s (OMB) Circular A-4, which emphasizes transparency and reproducibility in an agency’s assessment of uncertainties and the identification of assumptions underlying the agency’s analysis.⁹⁷ Indeed, for rules with annual economic impacts over \$1 billion, such as the CPP, OMB guidance encourages a “formal quantitative analysis of the relevant uncertainties about benefits and costs.”⁹⁸ In keeping with the Agency’s goals and the values expressed in Circular A-4, APPA encourages EPA to provide additional analysis in the final RIA. The RIA should, for instance, evaluate costs associated with market impacts and demand-side energy efficiency projects. Such information will not only

⁹⁶ 82 Fed. Reg. at 48,043 n.22.

⁹⁷ OMB, Circular A-4 Regulatory Analysis at 3 (Sept. 17, 2013) (Circular A-4), at https://obamawhitehouse.archives.gov/omb/circulars-a004_a-4/.

⁹⁸ *Id.* at 40.

inform the repeal of the CPP but will better position the public and EPA to evaluate any possible replacement program for the CPP.

EPA's decision to evaluate costs and benefits on a domestic, rather than international, basis is also sound and consistent with the law. OMB Circular A-4 directs agencies to "focus on benefits and costs that accrue to citizens and residents of the United States."⁹⁹ EO 13783 directs agencies to comply with Circular A-4's guidance to the extent permitted by law.¹⁰⁰ The purpose of the CAA, the statute under which the CPP was promulgated, is exclusively domestic, except for the specific provisions designed to focus on international issues: "[T]o protect and enhance the quality of the *Nation's* air resources [for] ... *its* population."¹⁰¹ Accordingly, emphasis of domestic costs and benefits is appropriate in assessing repeal of the CPP. EPA's analysis demonstrates that, based on such considerations, the CPP costs far exceed its benefits.

EPA has properly included cost and benefit figures using both 3 percent and 7 percent discount rates in the Draft RIA. In the 2015 RIA, EPA only presented climate benefit figures using 3 percent and 5 percent discount rates, while using a 7 percent discount rate for air pollution health co-benefits. These decisions irrationally inflated projected benefits and minimized projected costs. The 2015 RIA was also inconsistent with OMB Circular A-4, which directs agencies to assess costs and benefits using both 3 percent and 7 percent discount rates.¹⁰² The Draft RIA properly follows this guidance. Adopting a 7 percent discount rate, moreover, is likely the more accurate approach to assessing costs and benefits, given the large uncertainties

⁹⁹ *Id.* at 15.

¹⁰⁰ EO 13783 § 5(c), 82 Fed. Reg. at 16,096.

¹⁰¹ CAA § 101(b) (emphases added); *see, e.g., id.* § 115; *see also* 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009).

¹⁰² OMB Circular A-4 at 34.

and the fact that projected costs and benefits are expected to occur many years from now.¹⁰³ To provide even greater transparency, APPA recommends that EPA add figures using a 5 percent discount rate as well.

The Draft RIA also significantly improves on EPA's 2015 approach to assessing "co-benefits" associated with implementing the CPP. In 2015, EPA estimated that the CPP would lead to co-benefits from reductions in emissions of PM_{2.5} and ozone of between \$13 to \$34 billion in 2030.¹⁰⁴ There were several fundamental flaws in EPA's previous approach to evaluating co-benefits. First, EPA attributed benefits to emission reductions without any threshold, even when those emission reductions resulted in PM_{2.5} and ozone levels that fell below the current NAAQS for those pollutants. The NAAQS establish the levels of air pollution that are requisite to protect the public health with a margin of safety. EPA cannot reasonably calculate public health benefits from emission reductions that the agency has necessarily determined are not necessary to protect public health. Second, EPA attributed emission reductions to the CPP, and their purported co-benefits, that would occur *even in the absence* of the CPP. Indeed, the 2015 RIA acknowledged that "[s]ome of the emissions reductions estimated to result from implementation of the final emission guidelines may achieve some of the air quality improvements that resulted from the hypothesized attainment strategies presented in the illustrative NAAQS RIAs."¹⁰⁵ It is not appropriate for EPA to attribute such benefits to the CPP. The Agency's revised approach in the Draft RIA, by presenting potential thresholds for co-benefits and additional sensitivity analyses, represents a significant improvement.

¹⁰³ *See id.* at 32 ("The further in the future the benefits and costs are expected to occur, the more they should be discounted.").

¹⁰⁴ 80 Fed. Reg. at 64,680, Tbl. 1.

¹⁰⁵ 2015 RIA at 4-12.

VI. Conclusion

As discussed above, the Association supports the Agency's Proposed Repeal. We believe the Agency exceeded its authority under the CAA when it established standards of performance for existing sources in the fossil fuel-fired category that cannot be achieved in practice by any existing EGU through either technological or operational measures that limit the rate at which CO₂ is emitted by that source. The Association is not aware of any precedent under Section 111 whereby EPA has required the owner or operator of a source to take actions separate and apart from the source. Furthermore, the CPP set standards of performance that would have resulted in the curtailment or closure of some affected facilities, replacing their generation by EPA-preferred sources such as wind and solar. We do believe EPA has the authority to require existing EGUs to make feasible improvements in their performance and look forward to working with the Agency as it explores the development of lawful section 111(d) emission guidelines that allow states to set unit-by-unit performance standards that account for an EGU's remaining useful life.