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COMMENTS OF AMERICAN PUBLIC POWER ASSOCIATION
ON THE CROSS-STATE AIR POLLUTION RULE UPDATE FOR THE 2008 OZONE
NAAQS; PROPOSED RULE
80 Fed. Reg. 75,706 (Dec. 3, 2015); Docket ID No. EPA-HQ-OAR-2015-0500
February 1, 2016

I. Introduction

The American Public Power Association (APPA) is the national service organization for the more than 2,000 not-for-profit, community-owned electric utilities in the U.S. Collectively, these utilities serve more than 48 million Americans in 49 states (all but Hawaii). APPA was created in 1940 as a nonprofit, non-partisan organization to advance the public policy interests of its members and their customers.

APPA members also include joint action agencies (state and regional entities formed by public power utilities to provide them wholesale power supply and other services) and state, regional, and local associations that have purposes similar to APPA. Together, public power utilities deliver electricity to one of every seven electricity consumers. APPA participates on behalf of its members in administrative proceedings under the Clean Air Act (CAA) that affect electric generators.

On December 3, 2015, the U.S. Environmental Protection Agency (EPA) published its Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS; Proposed Rule (CSAPR

Update Rule, or Proposed Rule).¹ Because the Proposed CSAPR Update Rule specifically – and exclusively – targets nitrogen oxide (NO_x) emissions from electric generating units (EGUs) for regulation, APPA and its members have a compelling interest in the rulemaking.

For reasons discussed below, the Proposed Rule and its proposed emission budgets – which are based on incorrect and arbitrary assumptions – are severely flawed and should not be promulgated. If EPA intends to proceed with this rulemaking, EPA should make substantial revisions to its proposal by making available for public comment the details and results of any additional or updated modeling EPA may conduct before taking final action, and should publish a supplemental notice of proposed rulemaking to provide information for comment on a new proposed rule.

II. Any Modeling Results Must Be Made Available for Public Review and Comment Before EPA Takes Final Action

In the Proposed CSAPR Update Rule, EPA indicates that it will conduct new modeling for the final rule, and that in the final rule; it may rely on new assumptions that are not described in the Proposed Rule.² EPA explains that it plans to use th[e] [IPM v.5.15] base case, including the final CAA Section 111(d) rule, for its modeling analysis for the final rule and that “EPA’s analysis for the final rule may include updated or different assumptions about the inclusion of the CPP and the CSAPR phase II NO_x ozone-season or SO₂ annual emissions budgets for those states with budgets that were declared invalid and remanded to the EPA by the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *EME Homer City II*”.³ In the Proposed Rule, EPA states that its use of new modeling and assumptions “could change

¹ 80 Fed. Reg. 75706 (Dec. 3, 2015).

² 80 Fed. Reg. at 75,722

³ Id.

the analysis as to which states have contributions that meet or exceed the [one-percent-of-NAAQS] screening threshold,” and “proposes to finalize revised budgets . . . for whichever of those states may be identified as linked to such air quality problems.”⁴ For this reason, EPA presented proposed budgets for all eastern states in its Ozone Transport Policy Analysis TSD.⁵

The modeling approach outlined by EPA in this rulemaking raises concerns about whether, when, and to what extent the public will have a meaningful opportunity to provide comments on all issues concerning EPA’s modeling and the results of that modeling before the rule is finalized. Even minimal due process requires the ability to fairly know in advance and to rebut or comment on asserted findings and choices made by EPA. Before taking final action, EPA must make modeling results available for public review and comment.

III. EPA Should Not Include Western States in This Rulemaking and Eastern States Should be Evaluated for Possible Exclusion

APPA agrees that EPA should not include western states in this rulemaking.⁶ In the Proposed Rule, EPA bases its exclusion of western states on the possibility that there are “additional criteria to evaluate” relating to interstate transport in the West, and that “the near-term 2017 implementation timeframe constrains [EPA’s] ability to conduct a further evaluation of western states.”⁷ EPA should identify and explain these other criteria and the EPA should also evaluate whether it is necessary and appropriate to review the same criteria with respect to eastern states. For example, eastern states should be evaluated for contributions of

⁴ 80 Fed. Reg. at 75710

⁵ Ozone Transport Policy Analysis TSD

⁶ 80 Fed. Reg. at 75715-16

⁷ Id.

background/boundary sources (e.g. stratospheric Ozone) and biogenic (agricultural, plant, animal) sources in detail before a determination to include each state in the rulemaking is made.

IV. EPA Should Not Include the Final CAA Section 111(d) Rule in the Base Case

EPA created an “adjusted base case” for the Proposed Rule using the Integrated Planning Model (IPM) v.5.15, which includes the 111(d) rule, and plans to use this adjusted base case in modeling for the final rule.⁸ EPA also relied on its adjusted base case, using IPM v.5.15, for its analyses in the Proposed Rule to quantify ozone-season emission budgets.⁹ In creating this adjusted base case, EPA made a number of assumptions regarding implementation of the 111(d) rule, yet state implementation plans for the 111(d) rule have not yet been proposed, let alone finalized, and the 111(d) rule is still subject to pending legal challenges. EPA issued a memorandum on December 2, 2015, acknowledging that “there are several key uncertainties associated with implementation of the CPP that are not reflected in the modeling . . . due to the wide range of implementation flexibility and the role that states play in determining implementation” of the CPP.¹⁰ EPA has characterized this modeling as “illustrative” because it “was based on an assumption that states would use a specific form of rate-based implementation,” and notes that “the way in which the model optimized for a least-cost solution tended to front-load actions within the model.”¹¹ Moreover, EPA acknowledges that “because the 2016-2018 time period is prior to approval or promulgation of state plans or implementation of a federal plan, the actual effects of the 111(d) Rule i[s]...far from certain.”¹²

⁸ 80 Fed. Reg. at 75722; 75730

⁹ Id. at 75730

¹⁰ Memorandum from Reid Harvey, Director, EPA Clean Air Markets Division to the Docket, EPA-HQ-OAR-2015-0500-0212 (Dec. 2, 2015), at 11

¹¹ Id. at 13

¹² Id. at 13-14.

Given this acknowledged level of uncertainty, EPA should not include the final 111(d) Rule in its adjusted base case model and EPA should not use its adjusted base case for any portion of the rule, including modeling to be conducted for the final rule. EPA should make the results of any new or updated modeling it performs for the final rule available for public review and comment.

V. EPA's Assumptions in IPM Regarding EGU Retirements are Arbitrary

The Proposed rule is based upon IPM assumptions regarding which EGUs will retire in each covered state in 2016 and 2018 and the amount of NO_x reductions projected to be cost effective for the EGU to achieve. However, APPA finds that the information used by EPA to model retirements is inaccurate.

EPA has predicted a significant amount of generating capacity will be retired for the years 2016 and 2018. EPA's modeling assumes that 64,454 megawatts (MW) of capacity will be retired, but available information and dates shows that, only about 7,346 MW of capacity will be retired in 2016. In 2018, EPA predicts that a total of 75,093 MW will be retired whereas plant owners and publicly available information indicate that only 16,656 MW of such generation will be retired by 2018. APPA has surveyed several of its members potentially impacted by the Proposed Rule; none have reported plans to retire affected EGUs in the 2016 and 2017 time frame. APPA supports the analysis of EGU unit retirements as discussed in comments on the Proposed Rule by the Utility Air Regulatory Group (UARG).

VI. EPA's Assumptions Regarding Possible Emission Reduction Strategies is Arbitrary

The Proposed Rule assumes EGUs operating in 2016 and 2018 can cost-effectively achieve substantial NO_x reductions by operating their selective catalytic reduction (SCR) systems annually instead of only during the ozone season. EPA appears to believe that if these units operate their SCR systems year-round, it will provide for 51 percent of the targeted NO_x reductions required. An additional 39 percent of the targeted reductions could – according to EPA – come from cost-effectively removing more NO_x with other (undefined) SCR-equipped units. While some units can operate their SCR systems more to modestly reduce NO_x emissions, the real world experience with these control systems does not match EPA assumptions. In order for a SCR system to meet its initial targeted design, such systems would require a major upgrade in maintenance or process improvements (to reduce chronic problems such as fly ash drop out and deposition.). The additional cost to remedy these shortcomings with SCR and restore these units to their maximum NO_x control potential is not accounted for by EPA.

VII. EPA's Assumption on the Retrofit Timeline for NO_x Combustion Controls is Flawed

EPA's assumptions for how about how long it will take to retrofit low NO_x burners (LNB) and overfire air (OFA) on coal-fired boilers that lack such controls is flawed. EPA's analysis assumes that LNB and OFA retrofits can be achieved in the anticipated 11 month window from when the rule is "issued" to the June 1, 2016 compliance date. Muscatine Power and Water (MP&W) located in Iowa is an APPA member and has reported that it took them approximately 30 months for the OFA project to be approved by their board and accepted as a completed project. In addition, MP&W devoted 4-6 months of staff time doing research and analysis to

develop a recommendation for the project. The installation of the OFA was timed with normally scheduled outages to not create reliability issues. MP&W installed OFA at a time when there was not an industry wide rush to acquire the control systems, as we can expect will come with the tight timeline under the Proposed Rule.

Public power utilities encounter a number of unique time constraints when pursuing significant emission control projects, such as the legal requirements to handle contracting via public meetings of the board and engaging in a public bidding process. This process includes but is not limited to the preparation of bid documents, conducting the public bidding, evaluating the bids, contract negotiation, and award the project at public board meetings. This all must be done *before* work can commence. In this case, MP&W had to keep the project broken in to separate phases for engineering and construction because Iowa law no longer allows public projects to be done as design/build basis, which also adds to the time and cost.

As a result, the NO_x reductions targeted by EPA either may not be achieved, or may be achievable at a higher cost than purported. The reductions proposed for many states cannot be met without forcing EGUs retirements and impacting the electric grid reliability.

VIII. Proposed Rule Will Have A Limited Effect on Downwind Ozone Air Quality

EPA acknowledges that the CSAPR Updated Rule is a partial remedy, that reflects NO_x emission reductions projected to be achieved by EGUs in 2017, but does not eliminate all of these 23 states' EPA- projected contributions to downwind nonattainment and maintenance problems for the 2008 ozone NAAQS.¹³ There has been a succession of NO_x emission reduction requirements placed on EGUs to address ozone transport in particular: the NO_x SIP Call, the Clean Air Interstate Rule (CAIR), and the Cross States Air Pollution Rule (CSAPR).

¹³ 80 Fed. Reg. at 75,706

EPA states the Proposed Rule “is beneficial to implement... EGU NO_x reductions since they are achievable in the near term.”¹⁴

However, according to EPA’s analyses, the Proposed Rule will have a very limited effect on ozone air quality at projected downwind nonattainment and maintenance-only receptors.¹⁵ This is despite the very stringent NO_x emission budgets envisioned by the Proposed Rule compared to the existing Phase II CSAPR NO_x budgets.¹⁶ The Proposed Rule ozone season NO_x budget for Iowa represents a 48 percent decrease; the budget for Ohio represents a 57 percent decrease, the budget for Wisconsin represents a 61 percent decrease. EPA has not demonstrated in the Proposed Rule that further EGU NO_x emission reductions are justified based on the air quality improvements available from those reductions.

IX. EPA has Imprudently Proposed Specific Emission Budgets that Will Interfere with the Electric Industry’s Ability to Meet Ozone Season Demand

We are hearing from our members in a number of states that the Proposed Rule’s emission budgets will make it necessary for EGUs to obtain NO_x allowances in order to remain legally capable of operation and energy production. EPA has not examined the Proposed Rule’s impact on state energy markets. The Agency’s failure to fully examine these impacts jeopardizes a utilities ability to provide adequate power to consumers for their homes, businesses and other pursuits. APPA is concerned that State and regional transmission agencies that are assigned the task of assuring reliable electric supplies will not

¹⁴ Id. at 75,709.

¹⁵ Id. at 75,737 (Table VI.D-2) (indicating that all 12 of the projected nonattainment receptors identified in the Proposed Rule remain projected nonattainment receptors at every cost-per-ton threshold considered in the Proposed Rule; 14 of the 21 projected maintenance-only receptors identified in the Proposed Rule remain projected maintenance-only receptors at the \$1,300-per-ton threshold that EPA proposes to use as a basis for state NO_x emission budgets, and 12 remain projected maintenance-only receptors at the \$10,000-per-ton threshold).

¹⁶ 77 Fed. Reg. 34830, 34835-36 (Table III-6) June 12, 2012

be able to integrate the Proposal's requirements in time for the 2017 Ozone season. More time is needed for compliance.

X. EPA Should Address Small Business Concerns

More than 90% of public power systems meet the definition and qualify as small businesses under the Small Business Act and the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA). APPA believes that EPA grossly underestimated the costs for compliance and overall feasibility of this rulemaking on public power utilities. Therefore, APPA believes that the EPA did not fulfill its statutorily required actions and full analysis under the Regulatory Flexibility Act, or “Reg Flex,” and UMRA as well as SBREFA.

Since the regulations that the EPA intends to propose would almost certainly have a significant economic impact on a substantial number of small entities, EPA was required, pursuant to the Regulatory Flexibility Act (RFA), to convene a Small Business Advocacy Review Panel (SBAR) to thoroughly and accurately assess the impact of the proposed regulations on utilities that qualify as small businesses.

The Small Business Regulatory Enforcement and Fairness Act (SBREFA) was enacted by Congress to provide small entities a meaningful voice in major federal rulemakings. Among the Act’s goals are to encourage the “effective participation” of small businesses in the federal regulatory process and to create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented. A regulatory flexibility analysis typically includes descriptions of significant alternatives to the proposed rule, differing compliance or reporting requirements or timetables that take into

account the resources available to small entities, and the clarification, consolidation, or simplification of compliance and reporting requirements for small entities.

If EPA decides to adequately consider small business concerns and regulatory alternatives, APPA suggests modifying the proposed alternative language of “excluding all units smaller than 25 MWe.”¹⁷ to read “excluding units smaller than 100MWe.” By modifying the exclusion threshold from 25MWe to 100MWe EPA would be providing much needed relief for small entities. In particular, this modification would help small entities that are unreasonably allocated too few allowances to meet minimum operating requirements including generator verification test requirements for ISO and other EPA emissions rules, and for equipment and personnel training.¹⁸

XI. Conclusion

For the above discussed reasons APPA recommends EPA withdraw the Proposed Rule and state emissions budgets, as they do not reflect the real world trends where ozone emissions nationwide are decreasing, do not make reasonable assumptions about plant retirements, and do not reflect the real world capabilities of EGUs to reduce NOx emissions. Thank you for your consideration of these comments. You may contact Ms. Carolyn Slaughter (cslaughter@publicpower.org) if there are questions regarding these comments.

¹⁷ 80 Fed. Reg. at 75,761

¹⁸ See the comments of Cedar Falls Utilities to EPA in docket Docket ID No. EPA-HQ-OAR-2015-0500