

ATTORNEY GENERAL

STATE OF MONTANA

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Department of Justice
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December 21, 2015

Gina McCarthy, Administrator
U.S. Environmental Protection Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Room 3000
Washington, DC 20004

Re: Final Rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

Dear Administrator McCarthy:

Pursuant to Clean Air Act Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B) and 5 U.S.C. § 553(e); 5 U.S.C. § 705, and Fed R. App. P. 18(a)(1) the State of Montana, (Petitioner) petitions the United States Environmental Protection Agency to grant reconsideration of its decision to adopt its final rule issued in *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Docket No. EPA-HQ-OAR-2013-0602, 80 Fed. Reg. 64662 (October 23, 2015), and to grant a stay of the rule pending reconsideration.

The reasons for our petition for reconsideration and for a stay, are generally that the final rule differs so significantly and substantially from the proposed rule that our State did not have a fair opportunity to evaluate, understand and comment on the rule actually adopted. This means, in turn, that your agency acted without a fair working knowledge of the impacts of the final rule. The changes in the final rule in fact violate the Administrative Procedure Act because they are not a logical outgrowth of the proposed rule, and our State could not have reasonably anticipated the changes which were implemented in the final rule.

More specifically, under the proposed rule, each state's CO₂ emissions rate target was established by applying a series of steps that were dependent upon the energy mix in each state. The energy mix in Montana that was used in the proposed rule consisted of sub-

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MONTANA DEPARTMENT OF JUSTICE

Legal Services Division ★ Division of Criminal Investigation ★ Highway Patrol Division ★ Forensic Science Division
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bituminous coal, lignite coal, waste coal, petroleum coke, and the different types of generating units (including control equipment) used to combust the particular fuel. Montana has no natural gas combined cycle plants so that type of energy wasn't applicable to Montana in the proposed rule.

In the proposed rule, the starting point for Montana's emission rate target was determined based upon the energy mix in Montana as described above. The target was reduced by applying a series of building blocks - four in total. The first block was a uniform heat rate improvement applied to all coal units across the nation, the second block consisted of an individual state's ability to re-dispatch coal generation to natural gas (Montana's target was not reduced by this block in the draft rule as we have no natural gas units as described above), and then blocks three and four further reduced the proposed emissions target for regional renewable energy generation and energy efficiency, respectively.

This approach was, in the proposed rule, applied consistently to all states and resulted in very different impacts (and emission rate targets) across states as each state has a unique energy mix. Montana DEQ based its preparation for the final rule - including its analyses, tools, and final comments, on the premise of the draft rule.

In fact, the State of Montana invested a great deal of time, energy and expertise in evaluating the proposed rule with respect to Montana, as illustrated by the White Paper entitled "Options for Montana's Energy Future" prepared by the Montana Department of Environmental Quality. All of that work went for naught when the EPA abandoned the approach of the proposed rule for the approach of the final rule.

Under the final rule, the starting point for the emissions rate target was established by using an energy mix in one of the three national grids (the eastern grid). This emissions rate target was then further reduced by applying a combination of: re-dispatching coal to natural gas and renewable energy potential at a national level. Energy efficiency was not used as a factor in establishing an emissions rate target but may still be used for compliance. As a result of this, emission rates were developed for two types of electric generating units - steam electric (1305 lbs CO₂/MW-hr) and natural gas-fired power plants (771 lbs CO₂/MW-hr). These emission rates were then used to determine the specific emissions rate target for each state. As described above, Montana does not have any natural gas units so our target was determined to be 1305 lbs CO₂/MW-hr.

This approach resulted in less variability in states' targets as all states fell between 771 and 1305 lbs CO₂/MW-hr, depending upon the energy mix of a state.

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In addition, the final rule includes a provision to be codified at 40 CFR §60.5860(f)(2), which prohibits an electricity generating unit from using CCS (carbon capture and sequestration) technology in conjunction with an off-site CO₂-EOR (enhanced oil recovery) operation as an emission compliance tool unless the CO₂-EOR operation is subjected to regulation under Subpart RR of the EPA's regulations, codified at 40 CFR §§ 98.440 to 98.449.

Subjecting EOR operations to Subpart RR regulation would create significant new regulatory costs and burdens for EOR operators, as well as putting operators into potential conflict with resource conservation and mineral property laws and potentially into breach of mineral leases under which operations are conducted. As a result, EOR operators likely will not purchase, nor will they accept in their facilities, any CO₂ that would trigger Subpart RR regulation of its oil recovery operations.

This unforeseeable change in the rule accordingly adds even further to the burden the final rule imposes on our State because it makes it highly unlikely any of the electrical generating units in Montana will be able to sell captured carbon to oil field operators, and thereby decrease carbon capture costs.

In sum, Montana did not have a fair opportunity to evaluate and comment on the provisions of the final rule. The agency should reconsider its action and stay the final rule during the reconsideration.

Sincerely,



Tim Fox
Attorney General