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September 2, 2015

The Honorable Gina McCarthy, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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

Dear Administrator McCarthy:

The State of New Jersey opposes the unprecedented regulatory overreach represented by the United States Environmental Protection Agency's (EPA) Final Rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (the Rule or Final Rule), as announced on August 3, 2015, and respectfully requests that you exercise your authority as Administrator to issue an Administrative Stay of the implementation of the Rule and convene a proceeding for Reconsideration of the Rule.

When this Rule was proposed on June 18, 2014, the New Jersey Department of Environmental Protection (DEP) undertook an extensive and detailed analysis of the proposal. Our analysis found that the Proposed Rule was fundamentally flawed and could not be redeemed through mere revisions. We also concluded that the proposal was incomplete, needlessly complex, and would be difficult to implement.

Our examination of the Final Rule has confirmed the conclusions we reached based on our study of the Proposed Rule and which we transmitted to you in writing on November 26, 2014. New Jersey supports clean power – and has demonstrated that support time and again over the course of at least three decades. The State cannot, however, support EPA's ill-conceived Clean Power Plan, which is uncommonly cumbersome, difficult and costly to implement, could undermine reliability, and would yield insufficient results given the effort to comply. The Final Rule is riddled with vague, ambiguous, and uncertain provisions and the cost-benefit analysis lacks credibility.

The Final Rule punishes states, including New Jersey, that have already achieved significant reductions in carbon emissions, by setting even stricter goals for them, even though many other states have made much less progress in reducing emissions and are given less stringent emission targets than New Jersey under the Final Rule.

The Final Rule adds disproportionate costs to states like New Jersey that have already invested heavily in renewable energy and energy efficiency measures. This is especially egregious because EPA disallows credit for any measures that predate 2013, and compromises the value of facilities developed prior to 2018, as part of the Clean Energy Incentive Program (CEIP).

The Final Rule also sets goals that squander real opportunities for addressing both carbon emissions and pollutants such as sulfur dioxide, nitrogen oxides, and particulates that cause cross-state air pollution. The incomplete, overly complicated, and inconsistent Final Rule fails to establish a solid foundation for future emission reductions that would benefit the public health.

New Jersey has the fifth-lowest carbon emission rate in the country, with an emission rate less than half of most other states, including all other states within the PJM region, and lower than seven of the nine Regional Greenhouse Gas Initiative (RGGI) states.

Accordingly, an Administrative Stay and Reconsideration of the Rule is justified to ensure that EPA does not unfairly burden the State of New Jersey with this Final Rule.

The bases for issuing an Administrative Stay and for Reconsideration of the Rule are enumerated below.

Request for a Stay

The State of New Jersey hereby moves for a stay of the Rule.[1]

When considering a stay request, an agency must apply the same four-factor test applied at the judicial level.[2] Namely, the agency must consider: (1) whether the petitioner is likely to prevail on the merits of the appeal; (2) whether the petitioner is likely to suffer irreparable harm in the absence of a stay; (3) the relative harms of issuing a stay; and (4) the public interest.[3] As explained below, each of these factors, in addition to the general interests of justice, compel issuance of a stay.

[1] See Fed. R. App. P. 18(a)(1) (requiring a petitioner to move first before the agency for a stay); see also 5. U.S.C. § 705 (authorizing the Administrator to stay its actions "when justice so requires").
[2] *Sierra Club. v. Jackson*, 833 F. Supp. 2d 11, 29-30 (D.D.C. 2012).
[3] *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977).

1. **The State of New Jersey is likely to succeed on the merits in its challenge of the Final Rule.**[4]

   a. EPA's Final Rule reflects an improper interpretation of the phrase "performance standard" because the Rule regulates "beyond the fence," which includes such sources as nuclear power, renewable energy, energy efficiency, and hydropower, which Congress did not provide authority to EPA to regulate because they are not sources of emissions. Even if EPA is found to have authority to regulate existing power plants under Section 111(d), the Clean Air Act only authorizes the EPA to regulate the source of emissions. However, in the Final Rule, EPA ignored this regulatory limit and set its performance standards based on outside-the-fence assumptions about renewable energy generation and statewide dispatch rates from regulated sources.

   Furthermore, the Final Rule goes well beyond EPA's jurisdiction for the regulation of emissions from existing electric generating units. The Final Rule invades the jurisdiction of the Federal Energy Regulatory Commission (FERC), the North American Electric Reliability Corporation (NERC), the Nuclear Regulatory Commission (NRC), regional transmission organizations such as PJM, and the jurisdiction exclusively reserved to the states and, in doing so, introduces legal, economic, reliability and other unintended consequences.

   b. EPA is ignoring the clear intent of Congress by setting a performance rate for existing power plants (under Section 111(d)) that is more stringent than the performance rate for new power plants (under Section 111(b)). Section 111(d) expressly instructed states and EPA to consider "the remaining useful life" of existing sources. This language clearly conveys two things: 1) Congress intended for existing sources to be given less stringent standards than new sources; and 2) within a class of existing sources, older sources are to have less stringent standards than more recent sources. EPA inverted both of these commonsense inferences; the Final Rule creates performance standards for existing sources that are more stringent than the standards for new sources. In addition, EPA applies a single performance standard to all existing sources, thereby ignoring the fact that older sources likely have a different "remaining useful life" than newer sources. Indeed, EPA's Final Rule completely ignores the intent of the Congress and represents an egregious and unjustified expansion of its regulatory authority.

   c. EPA's interpretation of Section 111(d) is contrary to the text of the statute and Congressional intent. The text of Section 111(d) provides, "[t]he Administrator shall . . . establish a procedure . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing

[4] This is not an exhaustive list of the legal flaws in the Final Rule, but rather a highlight of the most glaring shortcomings. New Jersey does not waive any argument not raised in this section.

source for any air pollutant."[5] A plain reading of the text makes clear that Congress intended for states to establish standards of performance under Section 111(d), and for EPA to establish a procedure for states' submission of plans to implement the standard. However, in its Final Rule, EPA established both a procedure and binding emission targets that apply to affected sources. Therefore, EPA's proposal is inconsistent with the delegation of authority provided for in Section 111(d).

d. EPA is precluded from regulating greenhouse gases from existing power plants under Section 111(d) of the Clean Air Act. The source category is already regulated under Section 112 of the Act.

2. **The State of New Jersey will suffer irreparable harm should the Final Rule not be stayed.** Among other reasons, the Final Rule will cause irreparable harm to the State of New Jersey because:

   a. Voluntary compliance by the State of New Jersey would cede to the Federal government the State's existing authority to manage and oversee its own energy future. The State of New Jersey has been a national leader in advancing thoughtful, future-oriented energy policy. Guided by the New Jersey Energy Master Plan, which was issued in 2011 and is in the process of being updated, the State has succeeded in driving down emission rates to among the lowest in the country, promoting a diverse portfolio of new, low-emission in-state generation, lowering energy costs for consumers, and rewarding energy efficiency and conservation. New Jersey also is on target to meet its renewable energy portfolio standard interim target of 22.5 percent renewable generation by 2021. The enormous regulatory overreach represented by the Final Rule could put these achievements – and future progress – at risk.

   b. The Final Rule disallows credit for renewable energy sources and increases in nuclear power plant capacity developed before 2013. As a national leader in the development and use of clean and renewable energy, New Jersey would be punished for that leadership in the Final Rule because all of the State's efforts before 2013 are entirely ignored.

      As a result, the value of older renewable energy will decline in favor of renewable energy produced in 2018 and beyond. The State of New Jersey believes that this arbitrary cut-off date will damage the viability of New Jersey's investments in renewable energy, as power plants will only want to purchase renewable energy that provides credit for both the federal and the state programs. Without a stay, New Jersey and its citizens will be irreparably harmed because their investments will be undermined.

[5] 42 U.S.C. § 7411(d)(1)(A).

It is unfair that a solar panel or a wind turbine that predates 2013 is not allowed to generate emission rate credits (ERCs), and that renewable energy facilities that predate 2018 are not eligible for the extra federal credits available in 2020 and 2021.

It also is unfair that nuclear power plants that increased capacity before 2013 are not allowed to generate ERCs, while those that waited until after 2012 will. New Jersey will be irreparably harmed because the costs borne by ratepayers and the environmental benefits of capacity increases in New Jersey's nuclear plants that were performed before 2013 will not be recognized by EPA for compliance credit.

c. In setting the mass based goal for a state, the Final Rule only provides for the then-existing usage of the total capacity of regulated units that were operating in 2012. This could forever limit the ability of those existing units to expand the usage of their capacity no matter how clean they are. Conversely, and illogically, an identical new Natural Gas Combined Cycle (NGCC) unit subject to Section 111(b) has no limit on its capacity or on the usage of that capacity.

   While 52 percent of New Jersey's power is generated by carbon-free nuclear energy, New Jersey's fossil fuel baseline is made up of 92 percent NGCC units, many of which are relatively new and not yet working at full capacity. Should New Jersey elect to pursue a mass-based goal, it would be unable to ramp up NGCC units to full capacity. It would also be faced with shutting down or reducing the use of existing, low emitting NGCC units, even as other states are building similar units to replace coal units. A limit for existing sources should not be more stringent than a limit for a new source. This both harms New Jersey and its ratepayers and defies simple logic.

d. Billions of dollars invested by New Jersey in renewable energy are ignored in the Final Rule. From 2001-2012, $3.27 billion was invested in renewable energy and energy efficiency in New Jersey. New Jersey ratepayers should not be expected to shoulder the burden of additional costs just because the Final Rule does not recognize the multi-billion dollar investments already made in renewable energy and energy efficiency.

e. The Final Rule will increase the cost of energy for New Jersey ratepayers while providing little if any benefit. EPA's purported average national cost savings cannot rationally be applied on a state-by-state basis, especially given that EPA set individual state goals. Although the State has not yet completed its cost-benefit analysis of the Final Rule, New Jersey can state with a high level of certainty that complying with this Rule will not save money for New Jersey ratepayers but will, instead, further increase their energy costs with insignificant if

any benefit. If the Final Rule is ultimately overturned, ratepayers will bear the costs of EPA's failed effort because suppliers will pass on those costs to their ratepayers.

f. The State of New Jersey will needlessly expend taxpayers' dollars to analyze this complex and often contradictory Final Rule, which is likely to be successfully challenged. At least as many resources would be required to develop a plan to implement the Final Rule. This represents a needless and wasteful expenditure over the next three years if, as is likely, the Final Rule is overturned in the courts due to its numerous flaws.[6] Those resources would be much better spent addressing lawful and effective efforts to further advance the already substantial improvements New Jersey has made in reducing carbon emissions. New Jersey's past efforts helped it become the State with the fifth-lowest carbon emission rate, even though it is the twenty-second largest producer of electricity.

3. **The balancing of harms and public interest favors issuance of a stay.** New Jersey will be harmed if a stay is not granted, whereas there will be no resultant harm if a stay is issued. It is therefore in the public interest to stay implementation of the Rule.

a. If the Rule is not stayed New Jersey and its citizens will suffer significant harm. New Jersey will be forced to expend significant state resources to comply with the Rule even though it is likely to be invalidated. As discussed, New Jersey would be required to immediately begin designing the State plan, at a significant cost to New Jersey taxpayers. Moreover, ratepayers in New Jersey would see their electricity bills increase as a result of the Rule. These increased expenditures are not in the public interest.

b. There would be no resultant harm if the Rule is stayed, because the compliance deadlines in the Rule would remain unchanged. In the unlikely event that the Rule is upheld, the 2022 initial compliance deadline and 2030 final compliance deadline will likely remain in place. Thus, a stay would only postpone the development and submission of State plans until after the validity of the Rule is adjudicated. Staying the Rule will ensure that time and resources are not wasted on a regulation that will later be invalidated. Moreover, EPA cannot plausibly claim that a stay will cause harm given that EPA missed its own stated deadline to finalize this Rule by more than three years.[7]

c. The public interest favors granting a stay of the Rule. Given the harm to New Jersey if a stay is not granted, and the lack of any harm if a stay is granted, the public interest favors granting a stay of the Rule.

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[6] *See, e.g., Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").

[7] *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010) (stating that EPA will finalize Section 111(d) rule by May 26, 2012).

Accordingly, New Jersey's Request for a Stay of the Final Rule should be granted until EPA's authority for promulgating this rule is adjudicated.

Request for Reconsideration of the Final Rule

The State of New Jersey hereby requests Reconsideration of the Rule for the following reasons:

1. **New Jersey has objections to the Final Rule that were impracticable to raise during the public comment period and are of central relevance to the outcome of the Rule.** The Final Rule contains significant, material elements that were not identified in the Proposed Rule.

   As Mark Rupp, EPA's deputy associate administrator for intergovernmental affairs, said in June, "The final rule will not look like the proposed rule."[8] And as you stated earlier this year, "I think one of the things I'm most proud of is how much this rule changed between proposal and final."[9]

   As a result, the Final Rule includes changes that could not be raised during the public comment period but are of central relevance to the outcome of the Final Rule. In such instances, the Clean Air Act requires the Administrator to convene a proceeding for reconsideration of the Rule to "provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed."[10]

   These changes, discussed below, also constitute a violation of the Administrative Procedure Act because they are not a "logical outgrowth" of the Proposed Rule. Neither the State of New Jersey nor members of the public could have reasonably anticipated these changes. This has the practical effect of depriving the State and the public of the opportunity to comment on these new, unexpected provisions. EPA's approach violates both the spirit and the letter of the law by depriving the public of a meaningful notice and comment period for this massive new regulatory regime.

   Below is a list of some aspects of the Final Rule for which notice was not properly given in the proposal:

   a. EPA issued voluminous highly technical data and support documents essential to a thorough evaluation of the Proposed Rule as late as October and November 2014, just days before the close of the public comment period. These documents covered fundamental aspects of the Proposed Rule, ranging from building block methodology, the calculation of state-specific goals, emission reduction compliance trajectories, and the translation of emission rate-based goals to mass-

[8] E&E News, June 8, 2015
[9] E&E News, August 12, 2015
[10] 42 U.S.C. § 7607(d)(7)(B).

based equivalents. This left insufficient time for New Jersey to meaningfully study, evaluate, and comment on the Proposed Rule.

b. EPA failed to identify in the Proposed Rule all of the changes it intended to make to allowances and compliance credits and its intention to undermine existing state Renewable Portfolio Standards programs with its ill-defined Emission Reduction Credit (ERC) program and the mass-based and rate-based trading programs. EPA's decision to include in the Final Rule provisions that disallow credit for a significant portion of New Jersey's existing renewable energy is not a logical outgrowth of the Proposed Rule and could not be anticipated.

c. EPA did not identify in the Proposed Rule that renewable energy facilities constructed before 2013 would not receive compliance credits during compliance years. Nor did EPA identify that those constructed before 2018 would be denied extra compliance credit from 2020-2021 under the Clean Energy Incentive Program (CEIP) because the CEIP does not credit any facilities built before the final program submittal, which is due on or about September 6, 2018.

d. EPA revised its "Building Blocks" without giving the public an opportunity to comment on the changes. The Rule's Building Blocks are the foundation of the performance standards, yet New Jersey did not have an opportunity to comment on the new assumptions for heat-rate improvements for coal plants, dispatch rates for natural gas plants, and expansion of renewable generation.

In addition, EPA applied the Building Blocks to affected sources in a new manner. The performance standards in the Final Rule were developed by applying the Building Blocks to three regional interconnection systems. This novel approach was not contemplated in the proposal. In sum, the Building Blocks and the manner in which they were applied are indisputably of central relevance to the Final Rule, and therefore New Jersey's Reconsideration request should be granted.

2. **The Final Rule cannot be implemented because it contains vague, ambiguous, uncertain provisions that remain unresolved and/or will not be resolved until adoption of the Proposed Federal and Proposed Model Rules.** Accordingly, the Final Rule must be considered a Proposed Rule. Among the vague, ambiguous, and uncertain provisions in the Final Rule are:

a. The Final Rule contains dozens of issues that await resolution through the adoption of the Proposed Federal Plan and Proposed Model Rules during the summer of 2016, which makes it difficult if not impossible to evaluate the requirements and implications of the Rule.

b. The EPA failed to perform a state-by-state cost-benefit analysis of compliance with the rule. The EPA purports that the Final Rule will actually reduce the cost of electricity to ratepayers but offers no credible analysis to support that assertion since it did not perform a state-by-state analysis, which would be appropriate given the fact that each state has its own target for emissions reduction. The State of New Jersey does not believe that the Clean Power Plan will result in cost savings to New Jersey's ratepayers; indeed, we expect that the cost of compliance would increase the costs of electricity in our State.

c. EPA acknowledges that Section 111(d) of the Clean Air Act does not explicitly authorize multi-state plans; nevertheless such plans are authorized by the Final Rule. Furthermore, the Final Rule suggests that mass-based goals and multi-state plans can be used as a method for "moving pollutants around," rather than actually achieving net reductions in pollutants, even while the Rule acknowledges that such an approach could create problems for low income communities.

d. It is unclear by what authority EPA will develop an Emission Reduction Credit (ERC) program because some details about the ERC are not contained in the Final Rule, but instead will not be revealed until adoption of the Proposed Federal Plan and proposed Model Rule. Equally, it is uncertain how EPA will enforce such a program, ensure that pricing is reasonable, and ensure that sufficient credits are available.

e. Under the Final Rule, EPA makes it unlikely that energy suppliers will buy New Jersey's Renewable Energy Credits (RECs) that do not qualify under EPA's ERC program. Because EPA's ERC program provides advantages to renewable energy facilities constructed in 2018, EPA's ERC program may well leave states and developers with stranded renewable energy assets, since it will limit early action credit and will preclude any credit for renewable energy facilities constructed prior to 2013.

f. EPA's arbitrary and unexplained decision to change the methods for measuring emissions to an unconventional and uncertain new method could have unintended consequences and may actually hinder compliance. Furthermore, by disallowing the early reduction benefit, the Final Rule may harm the zero carbon renewable and nuclear energy that comprises approximately 60 percent of New Jersey's in-state generation.

As I wrote to you on November 26, 2014, the State of New Jersey shares EPA's goal of improving the quality of the air every American breathes. New Jersey is proud to have achieved significant improvements in air quality, both to improve the health of our environment and the health of our people. These improvements reflect forward-thinking policy and significant investments over the course of several decades.

Unfortunately, the Final Rule will not advance that shared goal. Instead, it will burden the citizens of our state with unjustifiable increases in electricity costs while also complicating New Jersey's efforts to make further reductions in carbon emissions.

Consistent with our 2011 Energy Master Plan, New Jersey has already promoted cleaner and more efficient energy. Adding this cumbersome and poorly designed federal regulation is counter-productive and unfair to the people of New Jersey. Therefore, on behalf of the State of New Jersey, I respectfully and urgently request that you exercise your authority as Administrator to issue an Administrative Stay and to convene a proceeding for Reconsideration of the Rule.

Sincerely,

Bob Martin
Commissioner