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Attention: Docket No. EPA-HQ-OA-2017-0190

EPA Docket Center
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

RE: COMMENTS OF THE LARGE PUBLIC POWER COUNCIL ON EXISTING FEDERAL ENVIRONMENTAL REGULATIONS

The Large Public Power Council (LPPC) appreciates the opportunity to submit the following comments to the U.S. Environmental Protection Agency (EPA or Agency) on key existing EPA regulations impacting the electric power sector. The focus of our comments is on identifying those federal regulations for which we believe it may be appropriate for EPA to reform in order "to alleviate unnecessary regulatory burdens" on the U.S. economy pursuant to Executive Order 13777, *Enforcing the Regulatory Reform Agenda.*[1] LPPC is committed to working together with EPA and the Administration in reforming each regulation identified below in a balanced manner that reduces unnecessary regulatory burdens while ensuring the protection of human health and the environment.

Founded in 1987, the LPPC is comprised of 26 of the nation's largest public power systems, providing power to 30 million Americans. LPPC has been deeply involved in the recent major EPA rulemakings affecting the power generation sector, and remains focused on working with the Agency to ensure the continued delivery of reliable, low-cost electricity while protecting the environment. LPPC member utilities own and operate more than 71,000 MW of diverse generation capacity and will be greatly affected by EPA's efforts to identify and evaluate those existing environmental regulations for which reform may be appropriate.

The comments below provide a brief description of the concerns or issues that each of the federal environmental regulations pose for LPPC members specifically, and the power generation sector generally. The regulations discussed below include the following:

[1] See 82 Fed. Reg. 17,793 (April 13, 2017) (requesting submission of comments on existing regulations).

- Effluent Limitation Guidelines that EPA recently established for limiting the discharge of effluent from the electric utility steam generating units under the Clean Water Act;

- Requirements for assuring the proper management and disposal of coal combustion residuals produced by coal-fired power plants under the Solid Waste Disposal Act;

- New requirements for reducing regional haze in affected federal parks and wildlife areas under the Clean Air Act (CAA or Act);

- The treatment of excess emissions during periods of startup, shutdown, and malfunction and the establishment of work practice standards under CAA; and

- The CAA rules for determining whether existing major facilities trigger the New Source Review permitting requirements.

EFFLUENT LIMITATION GUIDELINES FOR ELECTRIC POWER SECTOR

On November 3, 2015, the Environmental Protection Agency (EPA or Agency) issued a final rule to revise the effluent limitation guidelines (ELGs) that all apply to all existing and new electric utility steam generating units (EGUs) under the Clean Water Act. The ELG rule sets minimum federal effluent discharge limits that states must require for controlling certain pollutants, such as total suspended solids, oil and grease, and various metals.

Many of effluent limits set by the ELG rule are overly stringent and burdensome for affected power plants with minimal environmental benefit. This is particularly the case with the effluent limits established for bottom ash transport water and flue gas desulfurization (FGD) scrubber wastewater. In the case of bottom ash transport water, the ELG rule imposes a zero discharge limit that prohibits the discharge of any bottom ash transport water into the surface water. To comply, plant owners and operators have no option but to stop sluicing their bottom ash from the boiler and incur major capital costs to install a dry handling system for transferring the bottom ash from the boiler to landfills. Another major problem with the ELG rule is the overly stringent and prescriptive requirements for FGD wastewater from the scrubbers that control SO_2 emissions from coal-fired plants. For this wastestream, the ELG rule establishes discharge limits for selenium and other metal constituents that cannot be reliably met by best available control technology identified by EPA (chemical precipitation with biological treatment). Notably, the limits are the same across the industry without regard to coal type burned or whether the effluent is subject to additional treatment.

These unduly stringent ELG requirements could force the premature retirement of many existing coal-fired power plants and thereby result in significant job losses and adverse economic impacts on local communities. Notably, these problems are exactly the types of regulatory shortcomings that

would justify the repeal and replacement of the overly burdensome regulations under President Trump's recent Executive Orders for regulatory reform.[2]

COAL COMBUSTION RESIDUALS

On April 17, 2015, EPA issued a final rule that sets minimum federal standards for the management and disposal of coal combustion residuals (CCR) generated by coal-fired power plants. The CCR rule establishes stringent requirements as to the location, design, structural integrity, and operation of all surface impoundments (ash ponds) and landfills, as well as extensive requirements for groundwater monitoring, corrective action (if there is groundwater contamination), and the closure of affected CCR disposal facilities.

There are two major concerns with the CCR rule. The first is that it will force the premature retirement of many coal-fired power plants across the nation, along with the resulting job losses and other adverse economic impacts on our local communities. This is due to the rule's overly prescriptive, "one-size-fits-all" approach that precludes the tailoring of the rule's requirements based on site-specific conditions.

For example, the failure to meet many of the rule's requirements immediately trigger an obligation to close existing CCR disposal facilities even though other corrective action measures may be available at considerably less cost for ensuring the protection of human health and the environment based on site-specific circumstances at the particular disposal facility.[3] This requirement unnecessarily poses severe operational and logistical problems that could effectively force the shutdown of power plant if there is no economical alternative option for disposing of the CCR. Furthermore, because some CCR disposal facilities also handle wastewater from natural gas combined cycle (NGCC) units at the plant site, such NGCC units could also be forced to discontinue operation once the disposal facility can no longer receive CCR or non-CCR wastestreams under the current regulations.[4]

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[2] For example, Executive Order 13771 (issued on January 30, 2017) establishes a new federal framework for reducing regulation and controlling regulatory costs of both new and existing federal regulations, while, Executive Order 13777 (issued on February 24, 2017) requires each federal agency (including EPA) to establish a Regulatory Reform Task Force for, among other things, implementing this new federal regulatory reform framework. Notably, the President has directed the Regulatory Reform Task Force for each agency to target for "repeal, replacement, or modification" those overly burdensome regulations that "eliminate jobs or inhibit job creation," are "unnecessary or ineffective," or "impose costs that exceed benefits." The ELG discharge limits for bottom ash transport water and FGD scrubber wastewater are the type of existing regulatory requirements for which replacement or modification is appropriate under these two new executive orders.

[3] *See* 257.101 (imposing mandatory closure requirements on CCR disposal facilities, including the prohibition against receiving any CCR or non-CCR wastestreams within 6 months of a triggering event for a violation of a groundwater protection standard, location restriction, or other federal CCR requirement).

[4] Other CCR requirements that need to be evaluated for possible reform include the following: (1) modifying the prerequisites for qualifying for extended closure and avoiding premature closure of the facility, as provided at 40 C.F.R. § 257.103; (2) repealing the provisions for regulating inactive disposal facilities at 40 C.F.R. §§ 257.50(c) and 257.100; (3) clarifying that the exclusion for CCR beneficial use includes CCR use in closing CCR units at 40 C.F.R. § 257.50(g); (4) excluding from regulation the placement of CCR at active or abandoned mine sites, as opposed to limiting the exclusion solely to active or abandoned coal mine sites as provided at 40 C.F.R. § 257.50(h); (5) allowing the use of state-approved liner systems at 40 C.F.R. § 257.71; and (6) modifying the definition of "beneficial use of CCR" at 40 C.F.R. § 257.53

A second problem is that EPA crafted the CCR rule as a self-implementing program, which is no longer necessary or appropriate with the recent enactment of federal CCR legislation, as part of the Water Infrastructure Improvements for the Nation Act (WIIN Act) in December 2016. This legislation establishes a new regulatory paradigm that authorizes, for the first time, states to implement and enforce the requirements of the CCR rule through state permitting programs. With the passage of this legislation, EPA's concerns over potential abuses by regulated entities to consider site-specific conditions under a self-implementing program no longer exist. For example, the final CCR rule expressly declined to adopt certain provisions that would have allowed for tailoring of the rule's groundwater monitoring and corrective action programs based on site-specific conditions (as is allowed under federal solid waste programs). EPA did this because there would be no regulatory authority overseeing the implementation of these provisions through an enforceable permit program.[5]

With the enactment of the WIIN Act, the states and EPA may now implement the requirements of the CCR rule through a permit program. Therefore, EPA's rationale for not including these risk-based provisions in the final rule no longer exist and the rule should be amended to include these common sense, risk-based management options.[6] Like the ELG rule, the CCR rule's inflexible requirements are precisely the type of requirements that justify replacement and modification under President Trump's recent Executive Orders for regulatory reform.

EPA should initiate a rulemaking to correct the substantive problems with the CCR rule discussed above. These changes will greatly reduce the inflexibility and the tremendous costs of the current CCR rule, which will lead to the premature closure of many coal-fired power plants. Furthermore, these inflexible and overly prescriptive requirements are the exact types of unnecessarily burdensome regulations that EPA has been directed to replace or modify under the Executive Order recently issued on regulatory reform.

It also is critical for EPA to take immediate action to stay or extend the CCR compliance deadlines while EPA reviews and revises the substantive requirements of the CCR rule. LPPC members and other electricity generators must make many long-term and operational decisions over the next few months in order to assure compliance with the current requirements of the CCR rule. A stay or extension of the CCR compliance deadlines is therefore essential so that electricity generators do not

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such that the fourth condition for qualifying as beneficial use applies only to unencapsulated uses exceeding 75,000 tons of CCR.

[5] EPA explained: "In particular, the possibility that a state may lack a permit program for CCR units made it impossible to include some of the alternatives available in 40 CFR Part 258 [the Municipal Solid Waste Landfill program], which establish alternative standards that allow a state, as part of its permit program to tailor the default requirements to account for site specific conditions at the individual facility." 80 Fed. Reg. 21302, 21396-97 (April 17, 2015).

[6] Notable examples of common sense, risk-based management provisions that should now be included in CCR permit program include the following: (1) allowing for the use of alternative risk-based groundwater protection standards; (2) increased flexibility in the selection of the corrective action remedy by allowing for the consideration of other technologies as well as a determination that corrective action is not be necessary because there would not be in any meaningful environmental benefit (*e.g.*, where the groundwater is not a source of drinking water and there is a low likelihood of contamination migrating offsite); and (3) providing a facility with the option to determine the appropriate point of compliance for the groundwater monitoring system based on site-specific conditions, and providing the ability to tailor the constituents subject to groundwater monitoring based on site-specific conditions.

make irreversible operational decisions (including decisions on plant closures) and major irretrievable capital investments before EPA has time to reconsider and revise the key requirements of the CCR rule. In addition, such a stay or extension of the compliance deadlines is necessary to allow states enough to develop and obtain EPA approval for their state CCR permit programs that implement the requirements of the rule. This extra time is especially important to allow EPA to review and approve state CCR programs in those cases where the state has developed alternative risked-based programs, including those allowing for site-specific flexibility and the tailoring of regulatory requirements, that are "as protective as" the federal CCR requirements.

REGIONAL HAZE

On January 10, 2017, just prior to the end of the Obama Administration, EPA issued a final rule to revise its regional haze regulations.[7] According to EPA, these amendments were intended to relieve some of the administrative burdens imposed on the states in the form of simplifying the process for progress reports, extending the deadline for the next regional haze SIP, and clarifying the data needed for progress reports, among others. That said, several of the amendments make major changes to the substantive requirements of states' regional haze regulatory obligations and infringe on the lead role that states are supposed to take in designing and implementing regional haze programs to achieve pristine conditions by 2064.

Most importantly, the new regional haze rule has fundamentally changed the process that states must follow for setting reasonable progress goals and long-term strategies for a particular planning period under the regional haze program. Specifically, states must now first establish a long-term strategy for remedying visibility impairment in an affected Class I area. The development of a long-term strategy must involve the adoption of federally enforceable emission reduction measures for existing sources within the state, where the state sets the reduction levels based on the application of four factors – costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected source of visibility impairment. Only after the state adopts its long-term strategy are the reasonable progress goals set for a state and those goals are based on the reduction levels that are determined to be "reasonable" for a particular planning period based on the four factors noted above, even if those reductions are not necessary for meeting the visibility improvement goals of the regional haze program. In effect, this newly adopted regulatory process gives EPA the authority to compel coal-fired power plants to achieve very substantial SO_2 or NO_x reductions through the installation of scrubbers and SCR systems even if visibility improvements resulting from those reductions greatly exceed the levels that are necessary for meeting the "uniform rate of progress goals" set for the state under the program.

EPA should reopen and revise this and other problems with the new regional haze rule. As a general matter, the new revised regulations should establish a more objective and even-handed

[7] *See* Protection of Visibility: Amendments to Requirements for State Plans, 82 Fed. Reg. 3078 (January 10, 2017).

methodology for setting the emissions reduction levels that states must achieve to meet their reasonable progress goals during the second and subsequent planning periods of the regional haze program. Most importantly, this new methodology should provide states with broad discretion in determining the appropriate glide path of reductions for the particular planning period, rather than compelling the states to impose overly stringent reduction obligations that are not necessary for achieving the visibility goals of the program.

STARTUP, SHUTDOWN AND MALFUNCTION AND WORK PRACTICE STANDARDS

EPA has issued federal policy explaining its position on the treatment of excess emissions occurring during periods of startup, shutdown, and malfunction (SSM).[8] In that policy, EPA declared that all excess emissions during all time periods must be treated as violations of the applicable numeric emission limits, and that all automatic exceptions to emission limitations are unlawful.

There are fundamental problems with EPA's SSM policy. Most importantly, EPA has effectively taken the position that emission standards applicable to normal operations must also apply during periods when the control equipment breaks or malfunctions. This position is unrealistic given that even the best designed and well-maintained equipment can break down over its lifespan. Furthermore, the courts have held that EPA needs to take these situations into account when setting performance standards and not force companies into "noncompliance" when unpreventable malfunctions occur.[9]

While recent court decisions indicate that an outright exemption from performance standards under the CAA is not permitted for startup, shutdown, and malfunction situations,[10] EPA's response has imposed unnecessary regulatory burdens on power plants and other affected stationary sources. Rather than systematically developing "work practice" standards for these situations, EPA has often concluded that it would simply apply the standards developed based on data for normal operating modes during these short-lived transient operating modes. For example, EPA issued in June 2015 a notice (referred to as a SIP call) that directed 36 states to correct "substantially inadequate" provisions of their state implementation plans (SIPs) because they contained provisions that established "automatic exemptions" from emission limitations during SSM periods or established an "affirmative defense" for excess emissions. Notably, EPA's position is not based on findings or even specific concerns that the stationary source emissions are causing or contributing to a violation of ambient air quality standards, but rather on the Agency's rigid interpretation of the statutory definition of "emission limitation" under the CAA, which EPA argues requires that emission limitations apply "continuously."

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[8] On September 20, 1999, EPA issued federal guidance entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" in order to articulate and clarify its position on the SSM issue.
[9] 34 See, e.g., Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 433 (D.C. Cir. 1973) (a "standard . . . must be achievable" under section 111); Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 433 (D.C. Cir. 1980) (EPA bears the burden of explaining "how the standard proposed is achievable under the range of relevant conditions which may affect the emissions to be regulated")
[10] See Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2008).

Furthermore, EPA has incorrectly applied this same approach to the CAA regulatory programs for setting New Source Performance Standards (NSPS) under CAA section 111, MACT standards under CAA section 112, and Operating Permit Program under Title V of the Act. The Agency can take steps to address immediately these problems by establishing work practice standards for the NSPS and MACT programs that can apply during SSM periods as well as by reinstating previous guidance on affirmative defense and withdrawing its proposal to remove the emergency affirmative defense provisions from EPA's Title V operating permit program.[11] A similar approach could be developed and implemented for SIP emission control measures. In each case, EPA should allow for the use of "work practice standards" during SSM and other periods for which numerical limitations are not feasible. Work practice standards, for these limited periods of time, assure that best practices are followed to limit emissions until startup and shutdown cycles reach the point at which emissions controls can safely and efficiently function.[12] Such an approach will ensure responsible operation of plants that minimizes emissions, while not creating unreasonable and unattainable requirements for power plants and other major stationary sources.

NEW SOURCE REVIEW

Air emissions can be cost-effectively reduced by improving the generating efficiency of existing fossil-fuel-fired power plants and making similar types of efficiency improvements at other major stationary sources. However, EPA's New Source Review (NSR) permit program has become a major impediment to the implementation of many efficiency improvement projects at existing stationary sources. Similarly, the NSR program can also be an impediment to major maintenance projects that may be necessary for ensuring the reliability and safety of the existing source.

One major reason for this problem is the regulatory uncertainty regarding the types of power plant projects that might trigger the onerous NSR permitting requirements. Despite years of litigation and multiple regulatory reform initiatives, considerable uncertainty still remains as to whether physical or operational changes at existing major stationary sources would be "modifications" that are subject to NSR permitting review. EPA, for example, has taken the position that many types of energy efficiency improvements that could be undertaken at existing power plants may be non-routine and could cause emission increases that triggers NSR. Furthermore, courts have been unable to resolve this uncertainty and provide clear guidance on what a non-routine change is and how to determine whether the non-routine change might cause a significant net emissions increase that triggers NSR review.

This uncertainty has adverse competitive and economic repercussions for the power generation sector and other U.S. industries by creating a strong disincentive to undertake projects that can

[11] *Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Programs*, 81 Fed. Reg. 38,645 (June 14, 21016).

[12] For example, many post-combustion control systems need time during startup for the flue gas to reach optimum operating temperatures for efficiently removing air pollutants. This is particularly the case with respect to SCR systems for reducing NOx and various control devices for controlling particulate matter.

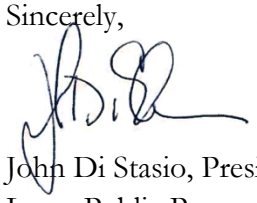
improve the efficiency and productivity of our existing electric generating and manufacturing facilities. In the case of power plants, the disincentive to undertake such projects results from the significant regulatory consequences of triggering NSR review. These consequences include lengthy permitting delays, potential enforcement actions, and incurring large capital retrofit costs for the installation of SO_2 scrubbers and NO_x SCR systems. Furthermore, it has significant adverse environmental repercussions because this uncertainty creates a strong disincentive to undertake efficiency projects that can cost-effectively reduce CO_2 and other air emissions from its existing fleet of plants. For example, the overhaul of the steam turbine at an existing coal-fired power plant can achieve very substantial emissions reductions by increasing power plant efficiency by a small increment of 1 to 3 percent.

For these reasons, EPA should initiate a rulemaking to reform the NSR rules for determining when a power plant project is a modification that triggers the NSR permit requirements.[13]

CONCLUSION

LPPC appreciates the opportunity to submit these comments on key existing EPA regulations impacting the electric power sector for which we believe it may be appropriate for EPA to reform pursuant to Executive Order 13777, *Enforcing the Regulatory Reform Agenda*.[14] LPPC is committed to working together with EPA and the Administration in reforming each of the regulations discussed above in a balanced manner that reduces unnecessary regulatory burdens while ensuring the protection of human health and the environment. Furthermore, we urge the Agency to move quickly in the review and reform of these regulations, particularly in the case of those regulations under which the compliance deadlines are fast approaching and expeditious action is critical for providing regulatory relief.

Sincerely,



John Di Stasio, President
Large Public Power Council

[13] Alternatively, EPA could develop guidance on determining what types of projects trigger the NSR review. However, this approach is far less preferable given that the guidance is limited by the current NSR regulatory language.

[14] See 82 Fed. Reg. 17,793 (April 13, 2017) (requesting submission of comments on existing regulations).