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October 31, 2018

VIA EMAIL

Honorable Andrew Wheeler
Acting Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
a-and-r-Docket@epa.gov

Re: Docket ID No. EPA-HQ-OAR-2017-0355 - Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, a.k.a. the Affordable Clean Energy (ACE) Rule

Dear Acting Administrator Wheeler:

The New York State Department of Environmental Conservation (DEC), New York State Energy Research and Development Authority (NYSERDA), and New York State Public Service Commission (NYPSC)¹ strongly oppose the so-called Affordable Clean Energy (ACE) Rule proposal. As proposed, the ACE Rule is at odds with the Environmental Protection Agency's (EPA) mission and legal obligations under the Clean Air Act (Act) to reduce emissions and protect public health and the environment. To the contrary, this proposal would lead to additional emissions of greenhouse gases (GHGs) and other harmful air pollutants, forego billions of dollars in benefits that would have been realized by the Clean Power Plan (CPP), and result in significant adverse public health impacts – most notably hundreds of premature deaths. In contrast, New York's experience with a cap-and-invest program under the Regional Greenhouse Gas Initiative (RGGI) demonstrates that substantial reductions of carbon dioxide (CO₂) emissions can occur as our economy continues to grow. We urge EPA to withdraw the ACE proposal, and

¹ The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to Section 12 of the New York State Public Service Law, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.



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instead implement the CPP as finalized by EPA in October 2015 (See 80 FR 64622).

First, New York State is already experiencing significant harms from climate change, which will be exacerbated if the ACE rule is finalized. Even EPA's own self-serving analyses acknowledge many of the harms that would result from the proposal. Second, while the CPP was consistent with Section 111(d) of the Act, the ACE proposal would fail to implement the "best system of emission reduction" (BSER) and therefore fail to meet EPA's statutory obligations. Third, EPA does not properly account for the costs and benefits of the proposal. Fourth, EPA should not be using the ACE proposal as a mechanism to impose dangerous changes to the separate New Source Review program. Finally, other aspects of the ACE proposal are at odds with the longstanding cooperative federalism structure of the Act and would undermine the effectiveness of programs to reduce emissions.

Climate Change Impacts and Other Harms of ACE

New York, along with the rest of the country, is already experiencing significant harms due to climate change, including increased temperature and precipitation, more frequent and severe extreme weather events, and sea-level rise. These and other impacts are expected to increase as climate change worsens due to continuing GHG emissions. In addition, ozone pollution from upwind sources, including transported ozone from the coal-fired electric generating units identified in the ACE proposal, negatively impacts the health of thousands of New Yorkers every year. This proposal will exacerbate these real economic and public health impacts. Even EPA's own estimate projects that the proposal could cause as many as 1,400 additional premature deaths annually beginning in 2030 as compared to the CPP. This fact alone should be more than enough reason for EPA to withdraw and not finalize this severely misguided proposal.

Notably, the twelve inches of sea level rise the New York City area has experienced in the past century exacerbated the flooding caused by Hurricane Sandy by about twenty-five square miles, damaging the homes of an additional 80,000 people in the New York City area alone.² That flooding devastated areas of New York, including Brooklyn-Queens Waterfront, the East and South Shores of Staten Island, South Queens, Southern Manhattan, and Southern Brooklyn, which in some areas lost power and other critical services for extended periods. Overall Hurricane Sandy caused 53 deaths and the estimated costs of damage and loss in New York State exceeded 30

² New York City Panel on Climate Change 2015 Report, Chapter 2: Sea Level Rise and Coastal Storms. Ann. N.Y. Acad. Sci. ISSN 0077-8923, available at: <http://onlinelibrary.wiley.com/doi/10.1111/nyas.12593/full>

billion dollars.³ This is just one example of the types of real harm that will be worsened by the increasing emissions caused by a finalization of the ACE Rule.

Best System of Emission Reduction

The CPP's application of BSER reflected the significant emission reductions that the power sector could achieve, as well as the way the interconnected power grid actually operates in practice. This legally proper interpretation of BSER also reflected how states and power companies have been cost-effectively reducing power sector emissions of both GHG and non-GHG emissions for decades. For example, emissions have been reduced by lessening the use of high-emitting plants and increasing the use of lower- or zero-emitting plants. As demonstrated by the fact that the power sector continues to transition to cleaner generation, the CPP targets—and indeed, deeper targets—are eminently achievable, without compromising reliability or affordable electricity.

In fact, despite EPA's claims in the ACE proposal and in prior regulatory proposals, the CPP's interpretation of the BSER did not exceed EPA's authority under the Act or improperly limit the role of states or other federal regulators. The BSER that has been demonstrated for CO₂ includes a variety of measures across the overall interconnected electric system. That includes approaches demonstrated in New York and other states that participate in RGGI. In fact, under RGGI, states have already reduced CO₂ emissions from power plants by over 50% since 2005, far greater than even the 32% reduction that would have been achieved by 2030 under the CPP. Moreover, further disproving many of the claims relied upon by EPA in the ACE proposal, New York and other states have achieved this level of emissions reductions all while reducing energy bills, creating jobs, and providing substantial public health benefits.

Even EPA's own analyses show that the proposed approach has the potential to increase emissions of CO₂ and other harmful air pollutants, reducing air quality, causing and exacerbating illnesses, and even causing premature deaths. In other words, EPA itself acknowledges that the ACE proposal may actually lead to increases in emissions of CO₂ from existing electric utility generating units (EGUs). But the Act, including Section 111(d), requires EPA to *reduce* CO₂ emissions from such sources. A statutory obligation to *reduce* emissions cannot be satisfied with a regulatory framework that has the potential to *increase* emissions. Rather, given EPA's legal obligation to reduce CO₂ emissions from existing fossil fuel-fired EGUs, any final rule must fulfill EPA's duty to

³ FEMA expenditures in New York State totaled \$16.9 billion (<https://www.fema.gov/news-release/2015/10/21/fema-aid-reaches-169-billion-new-yorks-hurricane-sandy-recover>). US HUD expenditures totaled \$7 billion (HUD Archives News Release, HUD #13-153, 10/28/13. <https://archives.hud.gov/news/2013/pr13-153.cfm>). Total insurance payments in New York State totaled \$8.3 billion, including National Flood Insurance payments, and private auto, homeowner, and commercial property insurance. (Hurricane Sandy: Rebuilding Task Force: Hurricane Sandy Rebuilding Strategy, August 2013, page 29. <https://www.hud.gov/sites/documents/hsrebuildingstrategy.pdf>)

identify the BSER and ensure it achieves meaningful reductions, particularly in light of the danger posed by climate change to human health and the environment.

Given both the demonstrated success of New York and other states in reducing emissions from existing EGUs, as well as the fact that EPA itself recognizes that the ACE rule could lead to *increases* in emissions, EPA's proposed replacement rule does not implement the BSER for reducing GHG emissions from existing power plants. EPA's consideration of a much more limited approach, focused merely on heat rate efficiency improvements at coal-fired power plants, could actually increase – not reduce – emissions. The limited nature of this proposal ignores the interconnected nature of the electricity grid and fails to recognize that states have already demonstrated more robust systems of emission reductions through programs like RGGI, as well as increased use of renewable energy and energy efficiency. The power sector as a whole has already realized a 28% reduction in emissions, as compared to the 32% overall reduction that the CPP would have required by 2030, further demonstrating the feasibility and availability of methods to reduce emissions.

Further, EPA's proposal arbitrarily fails to appropriately consider and fully evaluate other systems of emission reduction that EPA has previously evaluated as available systems of emission reduction for GHGs. Existing coal-fired power plants would achieve far greater pollution abatement by implementing these mechanisms, including generation shifting, co-firing with natural gas or converting to natural gas, and carbon capture and sequestration. All of these systems would achieve far greater emissions abatement, and thus are superior candidates for the "best" system of emission reduction as compared to EPA's proposed limited approach. But while any of these mechanisms would be better than the ACE proposal, as EPA found in the CPP, these systems would not be as cost-effective as the more holistic CPP approach. Therefore, the CPP continues to reflect BSER as required under the Act, while the ACE proposal fails to meet this requirement.

Cost and Benefits

In addition to implementing a legally- and environmentally- flawed level of emission reductions, EPA also fails to properly account for the costs and benefits of the ACE proposal. Any rulemaking must fully consider the effects of a proposal on air quality and public health. This includes accounting for the full social cost of carbon in identifying BSER and developing emission guidelines. We continue to object to EPA's changes to the Regulatory Impact Analysis's (RIA) methodology for projecting economic costs and benefits of complying with the regulations. The RIA's faulty methodology unjustifiably diminishes the health, environmental, and economic benefits of reducing CO₂ emissions and other pollutants. In its analysis, EPA also relies on severely flawed analyses in a transparent and hypocritical attempt to provide misleading support for its proposal, including by improperly accounting for the social cost of carbon and exaggerating CPP compliance costs. And yet even these flawed analyses acknowledge

that the proposal will forego up to \$6.9 billion in annual net economic benefit, or \$76 billion total by the 2030s, as compared to the CPP. A more robust and defensible analysis of the costs and benefits of the ACE proposal would likely result in even larger environmental, economic, and public health figures. This further demonstrates that EPA must withdraw the ACE proposal.

New Source Review

New York State is also troubled by EPA's legally baseless efforts to overhaul the New Source Review (NSR) program as part of the ACE proposal. EPA's proposed changes to the NSR program would endanger public health and are in direct conflict with the Act's statutory requirements and with the objectives of the program. The proposed changes are dramatic and the effects would be far-reaching. A proposal this consequential for the entirely separate and critical NSR program should not be combined with a proposed change to guidelines for coal-fired EGUs issued under a separate part of the Act. We urge EPA to sever these proposals so that each can be given appropriately rigorous examination.

That EPA is seeking these NSR revisions is itself a recognition by EPA that emissions from coal-fired power plants will increase as a result of the rollbacks in the ACE proposal. While EPA wrongly claims that the NSR program has been an obstacle to heat rate improvements, EPA's efforts to ease the emissions triggers for NSR from an annual to an hourly test will allow for industry to increase operations and actual annual emissions without undergoing critical NSR review. This approach, which is inconsistent with the requirements of the Act and previous court decisions, would ensure that NSR protections are almost never triggered and would allow old coal-fired facilities to continue to operate indefinitely without adding controls to address increased emissions. Because New York's air quality is substantially impaired by emissions from coal-fired power plants located upwind of the State, the proposed approach of shifting to an hourly test has the potential to prevent New York from maintaining or attaining the National Ambient Air Quality Standards (NAAQS), which is the fundamental purpose of the NSR program. EPA must withdraw this element of the ACE proposal.

Cooperative Federalism and Establishment of Minimum Standards

Finally, procedural aspects of the proposal would further undermine the ACE rule along with other programs under the Act, particularly Section 111(d). The cooperative federalism structure of the Act is intended to divide responsibility between EPA and states: EPA creates a federal framework for regulation and identifies a consistent minimum level of emission reductions that is needed, and states determine the best way to achieve those targets based on the cost-effective emission reduction opportunities in their states. While the CPP was consistent with this longstanding cooperative federalism structure of the Act, EPA's proposed ACE

rule fails to even identify any actual emissions standard, in that it only lists candidate technologies and does not identify the emission reductions that could be achieved by deploying the BSER. While states have the authority to establish more stringent standards under the Act and determine the most effective compliance strategies, EPA must at least set a consistent minimum standard – i.e., a regulatory floor. The ACE proposal departs from this longstanding approach. The risks of EPA's failure to meet this requirement under ACE are clear. That is, without EPA's establishment of a minimum emission reduction performance standard, some states will opt to determine that little to no emission reductions are cost-effective or required.

The ACE proposal also fails to provide states the guidance needed to effectively establish standards of performance for existing power plants that will meet the statutory requirements as they have been proposed. The proposed approach of simply listing candidate technologies will impose a significant administrative burden to states in a manner that is inconsistent with the Act, all while failing to achieve any meaningful emission reductions. Under EPA's proposal, states would be required to undertake unit-by-unit determinations of the standard of performance. The proposal would also unnecessarily constrain the ability of states to consider innovative approaches to regulating GHG emissions from the power sector that may prove more cost-effective, achieve greater reductions, and that may be preferable for our states, our residents, and our stakeholders. Finally, the proposed regulatory changes fail to require compliance by specific dates or to ensure states require emission reductions as soon as achievable. These features of the ACE proposal further weaken an already feckless and legally deficient effort to reduce GHG emissions from existing EGUs.

While the CPP already provided appropriate flexibility to the states in determining the best means of compliance, the ACE proposal would provide so much flexibility as to render the rule meaningless at best, and counter-productive at worst. In addition to the proposed changes to NSR, the lack of specific emission limits, the lack of any proposed standard for review and approval of State Plans, and the allowance for the application of "useful life" in a state's evaluation set the stage for emissions to increase to the detriment of public health and environment. Simply put, the proposal does not reduce emissions, let alone constitute the best system of emission reduction as required under the Act.

For all of these reasons, we urge EPA to withdraw the ACE proposal, and instead implement the CPP as finalized in October 2015. Thank you for considering these comments.

Sincerely,



John Rhodes
Chair
New York Public Service
Commission



Basil Seggos
Commissioner
Department of
Environmental
Conservation



Alicia Barton
President and CEO
New York State Energy
Research and
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