

The Honorable Gina McCarthy,
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

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Re: Proposed Rule regarding Federal Plan Requirements: Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations

Docket No. EPA-HQ-OAR-2015-0199

Dear Administrator McCarthy,

We, the undersigned nonprofit public interest organizations, respectfully submit these comments in response to the Environmental Protection Agency's ("EPA") notice of proposed rulemaking concerning a Model Federal Implementation Plan for compliance with the Clean Power Plan.

Questions Presented by Group Comments:

1. Is there a distinction between the Model FIP and a cap-and-trade, as the EPA purports?
2. Does the political illegitimacy of a federally administered "emissions trading system" raise Tenth Amendment concerns?
3. Who will pay to administer the proposed Model FIP "emissions trading system"?

Comment 1: EPA officials contradict mainstream understanding when they claim that the Clean Power Plan Model FIP is unrelated to a cap-and-trade, but the agency hasn't explained the difference between an "emissions trading system" and a "cap-and-trade."

Although the EPA is reluctant to concede that its proposed Clean Power Plan Model Federal Implementation Plan ("Model FIP") is a cap-and-trade scheme, the agency's allies more readily admit the obvious. Consider the following titles and headlines regarding the proposal from proponents of the rule:

- Brookings Institution: "The Return of Cap and Trade Is Good News for U.S. Climate Policy"¹
- Climate Central: "Obama Just Created a Carbon Cap-and-Trade Program"²
- Slate: "Obama's Climate Plan Is Basically a Cap-and-Trade"³

¹ Bob Sussman, "The Return of Cap and Trade Is Good News for U.S. Climate Policy," Brookings Institution blog Planet Policy, October 21, 2015, <http://www.brookings.edu/blogs/planetpolicy/posts/2015/10/21-return-cap-and-trade-us-climate-policy-sussman>.

² John Upton, "Obama Just Created a Cap-and-Trade Program," Climate Central, August 4, 2015, <http://www.climatecentral.org/news/obama-just-created-a-carbon-cap-and-trade-program-19309>.

³ Will Oremus, "Obama's Climate Plan Is Basically a Cap and Trade," Slate, August 4, 2015, http://www.slate.com/blogs/moneybox/2015/08/04/clean_power_plan_obama_s_climate_plan_is_cap_and_trade_after_all.html.

Thus, policymakers and media have branded the Model FIP as “cap-and-trade.” EPA, however, refuses to use this widely known phrase. Instead of “cap-and-trade,” the agency calls its preferred proposal an “emissions trading system.” In practice, there is no difference between the two. Both policies are identical in execution. Under a “cap-and-trade” scheme, the government caps total emissions and then operates a system for participants to trade the right to emit. In the same fashion, under EPA’s “emissions trading system,” the agency would assign a nationwide limit for greenhouse gases⁴ and then oversee a market to trade the right to emit.

For some time, EPA has persisted in this confusing effort to draw a distinction between its Model FIP “emissions trading scheme” and “cap-and-trade.” In March 2014, for example, Administrator Gina McCarthy told Congress that, “[The Clean Power Plan] is not going to be designed like a cap and trade program... That’s not what it looks like.”⁵ Even if one accepts for the sake of argument EPA’s contention that there exists some sort of distinction other than semantics between the agency’s Model FIP “emissions trading scheme” and “cap-and-trade,” it is plainly false to suggest that the two policies do not “look like” one another. Administrator McCarthy’s disavowal of any connection whatsoever between an “emissions trading scheme” and “cap-and-trade”—when in fact the two are one and the same—indicates that EPA is being less than forthright.⁶

EPA’s refusal to link the Clean Power Plan with the phrase “cap-and-trade” continues to the present. More than a month after the agency first issued its Model FIP, in October 2015, EPA Assistant Secretary Janet McCabe affirmed to Congress the agency’s understanding that “[t]he Clean Power Plan does not set in place a cap-and-trade program.”⁷

In the final rule, EPA should explain how the agency distinguishes the Model FIP from a “cap-and-trade” scheme, despite the fact that virtually all other stakeholders and commentators recognize that the two policies are the same.

Comment 2: If, as policymakers and the public agree, the Model FIP is a cap-and-trade policy, then this rulemaking is likely the product of a defective political process, and thereby raises concerns under the Tenth Amendment of the U.S. Constitution

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Supreme Court set forth the extent to which federal authority is constitutionally limited by the Tenth Amendment and principles of federalism inherent to American government. As subsequently clarified by the Court, “Garcia holds that the limits are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through

⁴ The aggregate of the 50 State targets is a national target.

⁵ Administrator McCarthy response to Sen. Heitkamp’s question at March 25, 2014, Senate Environment & Public Works hearing, at 25-second mark here: https://www.youtube.com/watch?v=5eyMwAdN_Sg.

⁶ In February 2011, then-EPA Administrator Lisa Jackson testified before Congress that “[EPA is] not planning any cap and trade regulations or standards.” And in a May 2013 [letter](#), then assistant-administrator Gina McCarthy assured the House Energy and Commerce Committee that, “Both former Administrator Jackson and I have said in the past that the EPA has no intention of pursuing a cap and trade program for greenhouse gases and I continue to stand by those statements.”

⁷ As cited in William Yeatman, “Have We Finally Reached Peak Lie on the Clean Power Plan?” GlobalWarming.org, October 20, 2015, <http://www.globalwarming.org/2015/10/20/a-double-feature-airing-of-the-grievances/>.

judicially defined spheres of unregulable state activity.”⁸ Therefore, Congress’s power to regulate interstate commerce runs afoul of the states’ rightful authority only if the federal action was marred by some extraordinary defect in the “workings of the national government itself.”⁹

For starters, Congress considered cap-and-trade bills in past sessions, but none of them ever passed.¹⁰ In fact, the only cap-and-trade bill to ever survive the congressional lawmaking process was passed in order to stop a cap-and-trade; last December, bipartisan majorities in both chambers passed a resolution that would vacate the Clean Power Plan. Under separation of powers principles, it makes little sense that EPA may impose a major policy to which Congress demurred.

Absent a congressional mandate, it is possible that EPA’s proposed Model cap-and-trade scheme might gain democratic legitimacy by virtue of President Obama’s popular mandate. Alas, President Obama conspicuously omitted global warming from his policy platform during his reelection campaign. Consider the following headlines from October 2012:

- *San Francisco Chronicle*: “Obama, Romney Quiet on Climate”¹¹
- *The Guardian*: “U.S. Presidential Debates: Abortion, Climate Change, and other Missing Issues”¹²
- The Associated Press: “Guns, Climate, Gays Missing in Presidential Race”¹³

Far from making climate change a priority, President Obama in 2012 (as a candidate trying to get elected) was an avowed champion of all fossil fuels, even coal. Only when he gained reelection, after which he no longer faced voter scrutiny, did the president announce his Climate Action Plan, of which the Clean Power Plan is the foremost component.¹⁴

The near total lack of political legitimacy for an EPA-administered cap-and-trade system raises constitutional concerns. Again, under the Supreme Court’s Tenth Amendment jurisprudence, “the only substantive restraint on the exercise of Commerce Clause powers” invoked by the states “must be tailored to compensate for possible failings in the national political process.”¹⁵ The Model FIP fits the bill for such a defect in the workings of American government.

⁸ *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

⁹ *Garcia* at 552.

¹⁰ For example, on June 6, 2008, in the immediate wake of the Senate’s refusal to take up the Lieberman-Warner cap-and-trade bill, which had been extensively reworked by Sen. Barkara Boxer, 10 Senate Democrats (about 20 percent of the caucus) sent Sen. Boxer a letter explaining that they voted or would have voted against her cap-and-trade bill, had it received a vote. And during the 2010 summer, a cap-and-trade bill that had passed the House of Representatives (H.R. 2454, American Clean Energy and Security Act) was shelved by Senate Democratic leadership because there was insufficient support in the Senate Democratic caucus.

¹¹ David Baker, “Obama, Romney Quiet on Climate,” *San Francisco Chronicle*, October 3, 2012.

¹² Matt Williams, “U.S. Presidential Debate: Abortion, Climate Change, and Other Missing Issues,” *The Guardian*, October 23, 2012.

¹³ As cited in Tim Dickinson “Don’t Ask, Don’t Tell: 11 Big Questions That Were MIA at the Presidential Debate,” *Rolling Stone*, October 24, 2012.

¹⁴ See, generally, William Yeatman, “EPA’s Clean Power Plan Overreach,” *CEI OnPoint*, July 28, 2015, <https://cei.org/content/epa%E2%80%99s-clean-power-plan-overreach>.

¹⁵ *Garcia* at 554.

Here, we have a policy with significant federalism implications. If all 50 states refused to lift a finger to implement the Clean Power Plan, then EPA would operate a nationwide cap-and-trade scheme. Such a policy has been rejected expressly by Congress. It is untested by the American voter. Yet, a federal agency seeks to impose it. Worse, that agency is actively trying to obfuscate its actions with word games. We cannot imagine a better example of a “failing in the national political process” meriting Tenth Amendment protections.

Comment 3: Past cap-and-trade legislation envisioned significant administration costs, yet the EPA doesn’t address administrative costs in the proposal. Who will pay?

Whether or not the proposal is labeled “cap-and-trade” or “emissions trading scheme,” the Clean Power Plan Model FIP has a massive scope that will entail significant administrative costs. The EPA currently spends \$27 million annually on emissions trading for sulfur dioxide and nitrogen oxide emissions.¹⁶ Greenhouse gases, of course, are emitted on a scale that is orders of magnitude greater than sulfur dioxide or nitrogen oxide, and it stands to reason that administrative costs would rise in a commensurate manner. To this end, the Congressional Budget Office estimates that nationwide cap-and-trade would cost \$7.8 billion over a 10-year period.¹⁷

If, as EPA urges, the proposal is taken by the states as a model for compliance with the Clean Power Plan, then it follows that states would be responsible for the administrative costs of the emissions trading scheme, which are likely to number into the billions of dollars. And, if states refuses to act, then the agency would presumably be responsible for these costs.

In the final rule, EPA should estimate the administrative costs of the Model FIP, so states will have a better idea of their responsibilities pursuant to this unfunded mandate. Also, EPA in the final rule should address whether the agency will seek appropriations from Congress to administer a nationwide “emissions trading scheme.”

Respectfully Submitted,

American Conservative Union

Americans for Prosperity

Americans for Tax Reform

Buckeye Institute for Public Policy Solutions

Cardinal Institute for West Virginia

¹⁶ Environmental Protection Agency, FY-2016 Budget, February 2015, p. 89, http://www.epa.gov/sites/production/files/2015-02/documents/epa_fy_2016_congressional_justification.pdf.

¹⁷ Congressional Budget Office, *Cost Estimate of American Clean Energy and Security Act*, June 5, 2009, “Table 5. Estimated Spending Subject to Appropriation under H.R. 2454,” <https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/hr24541.pdf>.

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