Comment by the Competitive Enterprise Institute on EPA's Clean Power Plan
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William Yeatman, Senior Fellow, Competitive Enterprise Institute
1899 L St., NW, Washington, D.C. 20036, contact: wyeatman@cei.org

A. Summary

In establishing the applicability of the Clean Power Plan, EPA aggregates disparate categories of stationary sources into a regulated entity that incorporates virtually all power plants, regardless of technology type or fuel source. This action directly contravenes §111(d) implementing regulations requiring the agency to "subcategorize" within industries. Because the implementing regulations that mandate "subcategorization" are extant and therefore carry the force of law, EPA would have to amend them with a legislative rule before the agency could permissibly pursue its Clean Power Plan strategy of combining categories. Until the agency does so, the proposed Clean Power Plan will remain impermissibly inconsistent with its underlying regulations.

B. Legal Framework

It is a bedrock principle of administrative law that, "so long as [a] regulation is extant it has the force of law." 418 *United States v. Nixon*, 418 U.S. 683 (1974) at 696. Even when an agency's discretionary decision comports with its enabling statute, the rule is unlawful it is inconsistent with the implanting regulations.

To be sure, an agency is afforded the latitude to "adapt their rules and policies to the demands of changing circumstances," (*Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) at 784), but there are criteria the agency is bound to abide when doing so.

First, an agency can amend or rescind a legislative rule only by the same procedures that wrought the rule. "[I]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." *American Mining Congress v. MSHA*, 995 F. 2d 1106 (D.C. Cir. 1994) at 1109. Second, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change." *Motor Vehicles Manufacturing Association of the United States v. State Farm Mutual Automobile Insurance Co*., et al., 463 U.S. 29 (1983) at 42.

As is explained in the following sections, EPA, in the Clean Power Plan, has effectively "changed course" with respect to its policy of "subcategorizing" within industrial sectors when the agency establishes existing source performance standards. However, before doing so, the agency failed to amend or rescind its extant rule. Far from providing a "reasoned analysis" for "changing its course," the agency fails to even mention the discrepancy.

C. Argument

1. 40 C.F.R. §60.22(b)(5) Is an Extant Regulation Requiring EPA To “Subcategorize” within Industries When Formulating Emissions Guidelines

After undergoing notice and comment rulemaking, EPA on November 17, 1975 (40 FR 53340) promulgated Standards of Performance for New Stationary Sources (Title 40 C.F.R. Part 60), pursuant to the agency’s authority under 41 U.S.C. §7411(d).

In 40 C.F.R. §60.22(b)(5), EPA requires that,

> The Administrator will specify different emission guidelines or compliance times or both for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, or similar factors make subcategorization appropriate.

The preamble to the rule plainly establishes that EPA promulgated 40 C.F.R. §60.22(b)(5) only after careful deliberation and consideration of comments to the proposed regulation (39 FR 36102):

> Many commentators apparently confused the degree of control to be reflected in EPA’s emission guidelines under section 111(d) with that to be required by corresponding standards of performance for new sources under section 111(b)….In addition, the regulations have been amended to make clear that the Administrator will specify different emission guidelines for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, and similar factors make subcategorization appropriate” (40 FR 53341, formatting added)

Later in the preamble, the agency again explained the justification for 40 C.F.R. §60.22(b)(5):

> “Finally, as discussed elsewhere in the preamble, EPA’s emission guidelines will reflect subcategorization within source categories where appropriate…Thus, EPA’s emission guidelines will in effect be tailored to what is reasonably achievable by particular classes of existing sources…” 40 FR 53343

In promulgating 40 C.F.R. §60.22(b)(5), it was the agency’s avowed intent in to provide flexibility to States implementing §111(d) emissions guidelines by “subcategorizing” within industrial classes. This legislative rule has been neither amended nor rescinded since its promulgation. As such, “the Executive Branch is bound by it, and indeed the United States as the sovereign composed of three branches is bound to respect and enforce it.” *U.S. v. Nixon* at 697.

2. EPA’s Clean Power Plan Plainly Conflicts with Title 40 C.F.R. §60.22(b)(5)

Rather than “subcategorize,” as provided for in Title 40 C.F.R. §60.22(b)(5), EPA’s Clean Power Plan adopts the opposite approach—namely, the agency ***aggregates*** source categories. In fact, the Clean Power Plan’s “rate-based CO2 emissions performance goals” are applicable to “affected electricity generating units,” which are defined as “any affected steam generating unit, IGCC, or stationary combustion turbine that commences construction on or before January 8, 2014.” (proposed 40 C.F.R.

§60.5795). In this fashion, EPA's Clean Power Plan regulations would apply to all fossil fuel power plants, regardless the type of combustion technology or fuel source.

This is a stark "change in course" for the agency, which to date has treated steam generating units and combustion turbines as distinct technologies warranting their own categories for purposes of regulation pursuant to Clean Air Act §111. (Compare 40 C.F.R. Part 60 Da—Standards of Performance for Electric Utility Steam Generating Units and 40 C.F.R. Part 60 KKKK—Standards of Performance for Stationary Combustion Turbines).

Indeed, the agency emphasized subcategorization within the power sector when it established the applicability of the proposed Carbon Pollution Standards (the regulatory precursor of the Clean Power Plan):

> As related matters, in this notice, we are proposing to establish regulatory requirements for CO2 emissions of affected units, which are included in source categories (both steam-generating units and turbines) that the EPA already listed under CAA section 111(b)(1)(A) for regulation under CAA and we are not proposing a listing of a new source category. ***We are, however, proposing to subcategorize different sets of sources, and establish different CO2 standards of performance for them, in accordance with CAA section 111(b)(2). To avoid confusion, we are proposing to codify the CO2 standards of performance in the same subparts—Da and KKKK, depending on the types of units—that currently include the standards of performance for conventional pollutants***. (79 FR 1453; formatting added).

Crucially, the 111(d) implementing regulations define the applicability of existing source standards by referring to the applicability of new source standards.[1] Accordingly, because the Carbon Pollution Standards apply to subparts Da and KKKK, the Clean Power Plan can apply no more broadly than to subparts Da and KKKK. From there, the §111(d) implementing regulations require EPA to "subcategorize" when appropriate, but there is no such authorization for aggregating categories. Simply put, the §111(d) implementing rules grant EPA's only one option: subcategorizing within subparts Da and KKKK. Instead, the agency amalgamated these subparts into a meta-category, known as "affected EGUs."

As explained above, the EPA is required to address the Clean Power Plan's incompatibility with its underlying implementing, by either amending or rescinding 40 C.F.R. §60.22(b)(5). In so doing, the agency is required to conduct a legislative rulemaking and also to provide a "reasoned analysis." Until

[1] Existing source standards apply to "designated facilities," which are defined by §60.21(b) as being "any existing facility (see §60.2(aa)) which emits a designated pollutant and which would be subject to a standard of performance for that pollutant if the existing facility were an affected facility (see §60.2(e))." The references attendant to the definitions of both "existing facility" and "affected facility" direct the reader to the implementing regulations for new source standards. An "affected facility" is "any [stationary source] to which a standard is applicable," while an "existing facility" is "any [stationary source] of the type for which a standard is promulgated in this part." Finally, the definition of "standard" is "a standard of performance proposed or promulgated under this part" (i.e., the New Source Performance Standards).

such actions are performed, the Clean Power Plan's inconsistency with the §111(d) implementing regulations evidences arbitrary and capricious decision making by the EPA.