I. **Executive Summary**

The Independence Institute, founded in 1985, is one of the nation's original state-based think tanks, and is Colorado's oldest and most respected free market, public policy, non-profit institution. For nearly three decades we have educated Coloradans on how public policy at the national, state, and local levels impacts them, their families, and their livelihoods. Few policy areas have more of an impact on the lives of every single person in our state like energy. Electricity generation touches everyone and everything.

The newly proposed Environmental Protection Agency (EPA) regulations on CO2 emissions, titled the Clean Power Plan (CPP), have us, and many others including lawmakers, citizens, and stakeholder groups, extremely concerned. Because of the enormous scope, any change to current policy should be considered only after a thorough vetting process including comprehensive analysis, which these new regulations have not enjoyed.

Also, vital to success are support and buy-in from all stakeholder groups including consumers, state lawmakers, state regulators, and power producers, which CPP does not have. For those reasons, we are compelled to submit comments in opposition to the CPP. From our perspective problems with the CPP include the following:

- CPP threatens Colorado's jurisdictional authority over retail electricity, which it has exercised for more than a century.
- CPP will be cost prohibitive especially for those at the lowest end of the socio-economic spectrum.
- CPP threatens Colorado's electric grid reliability.
- CPP forces reorganization of Colorado state agencies that will be illegal without enabling legislation.
- CPP has serious legal flaws including its own legality with no enabling congressional legislation.
- CPP's complexity makes its timeline unrealistic.
- CPP 2012 baseline gives no credit for the aggressive action Colorado already has taken to reduce carbon emissions.
- Lack of transparency and vetting process prevents all Colorado stakeholders the ability to analyze the impacts of the CPP on their respective constituencies and make recommendations for improvement.

On behalf of the Independence Institute and our coalition partners who have signed this document personally we respectfully submit the following comments for your consideration.

II. **How EPA's Clean Power Plan Impacts Colorado**

For 101 years, the State of Colorado has exercised exclusive jurisdiction over retail electricity markets within its borders. And with the passage of the Federal Power Act in 1935, the Congress codified Colorado's—and all States'—prerogative to oversee their retail electricity markets, unencumbered by federal intrusion. EPA's Clean Power Plan, by its very terms, would erase this "bright line" in jurisdiction between federal and state governments. Indeed, if finalized in its current form, the rule would effectuate an unprecedented expansion of federal authority into Colorado's rightful affairs, such that

state officials could regulate the provision of electricity only with EPA's approval. As aptly explained by current Federal Energy Regulatory Commission (FERC) Commissioner Tony Clark, "[States] will have entered a comprehensive 'mother may I?' relationship with the EPA that has never before existed."

In addition to usurping the state's rightful authority, the rule adds insult to injury by imposing unreasonable costs on Colorado. According to a study conducted by the economic consulting firm NERA, EPA's proposed Clean Power Plan would be the most expensive regulation ever imposed on the power sector, costing between $41 and $73 billion per year. Residential rates are projected to increase by up to 50 percent as a result of both the proposal and existing State "New Energy Economy" policies implemented by former Governor Bill Ritter. Another analysis, by Energy Ventures Analysis, Inc., estimates that EPA's suite of energy regulations, including the Clean Power Plan, cumulatively would increase the cost of electricity and natural gas by nearly $300 billion in 2020 compared with 2012. The same study projects that gas bills would increase in Colorado by 61 percent and industrial electricity rates would increase 52 percent.

The rule also poses a threat to electric reliability. Nationwide, 132 gigawatts of generating capacity is projected to retire between 2016 and 2020, of which 68 GW is directly attributable to the Clean Power Plan, according to EPA modeling. In Colorado, 645 megawatts of fossil fuel electric generating capacity is projected to retire, and it is uncertain if Colorado, and neighboring states similarly impacted, can afford to lose this capacity. Indeed, state, regional, and federal watchdogs already have sounded warnings regarding the rule's impact on reliability for more than half the country.

A. Colorado Has Exercised Exclusive Jurisdiction over Retail Electricity Markets for More Than a Century

The Colorado Public Utilities Commission has had sole jurisdiction to oversee the state's electricity retail electricity market since 1913—More than a half century before the EPA was formed. Pursuant to the Public Utilities Act, the Public Utilities Commission (PUC) is entrusted with broad oversight powers over the electric industry in the state. The PUC balances consumers' need for reliable service and reasonable rates with regulated entities' need to maintain their financial integrity while attracting sufficient capital to remain in business. The Commission also assures that consumers are protected through utility safety regulations.

In 1935, the Congress codified Colorado's exclusive prerogative to oversee retail electricity provision, with the passage of the Federal Power Act. The law embodied the New Deal philosophy that an electric utility is a "local institution" that should be "locally controlled," as articulated by Montana Senator Burton Wheeler, who was one of the statute's chief sponsors.

To this end, the 1935 Federal Power Act explicitly states that the federal government's jurisdiction shall "extend only to those matters which are not subject to regulation by the States." 16 U.S.C. §824(a). As interpreted by Article III Courts, the Federal Power Act establishes a "'bright line" between state and federal regulation. *Northern States Power Company v. FERC*, 176 F. 3d 1090 (8th Cir. 1999), at 1096. The federal government has jurisdiction over interstate sales of wholesale electricity, while "States retain exclusive authority to regulate the retail market." *Electric Power Supply Association v. FERC*, WL___(D.C. Cir. May 23, 2014).

EPA's Clean Power Plan would erase the "bright line" in jurisdiction between State and Federal governments.. Through the regulation, federal ***environmental*** regulators have proposed to do exactly what has long been denied federal ***energy*** regulators. In recent Congressional testimony, FERC Commissioner Tony Clark aptly addressed the Clean Power Plan's severe impact on federalism:

> More than any regulation I have seen during the time that I have been involved in the energy sector, this EPA proposed rule has the potential to comprehensively reorder the jurisdictional relationship between the federal government and states as it relates to the regulation of public utilities and energy development… [States] will have entered a comprehensive 'mother may I?' relationship with the EPA that has never before existed."

During the same hearing, Clark's colleague FERC Commissioner Philip Moeller quipped that, "If it isn't already obvious, the title of the proposed rule, the Clean Power Plan, makes it clear that EPA is creating national electricity policy."

Colorado regulators already have voiced similar concerns. During a July 15 panel discussion at a conference of the National Association of Regulatory Utility Commissioners (NARUC), Colorado Public Utilities Chairman Joshua Epel said that the rule threatened to "invad[e] our exclusive domain," and that EPA seemed to be "substitute[ing] their judgment for us economic regulators."

EPA, of course, denies that its regulation unduly infringes on state authority. Indeed, the agency stresses the rule's flexibility," and even notes "that the design of the guidelines makes clear that states are not required to reach their targets using precisely the building blocks that EPA used to determine each state's goal." 79 FR 64543. This disclaimer, however, is belied by the substance of the rule. In practice, the four "building blocks," on which EPA established Colorado's carbon cap, are so stringent and so specific as to leave the State no alternatives. And while it's true that Colorado lawmakers have enacted State policies that exceed two of EPA's "building blocks," the troubling fact remains that EPA is exerting jurisdiction over these policymaking endeavors, an authority that has been expressly denied the federal government since 1935.

Of course, it is highly doubtful that Clean Air Act §111(d) authorizes EPA to "comprehensively reorder the jurisdictional relational between the federal government and states" to further "national electricity policy." In the next section, these comments explain how EPA's §111(d) rule severely intrudes upon Colorado's rightful authority to oversee its retail electricity markets.

B. How the Clean Power Plan Usurps Colorado's Long Held Prerogative to Oversee Retail Electricity Markets

1. EPA's Clean Power Plan Infringes on Colorado's Long Term Resource Planning

In a 2007 emergency order (Decision No. C07-0829), the Colorado Public Utilities Commission created a multiphase "Electric Resource Planning" (ERP) process, requiring utilities to submit long term generation acquisition plans to the PUC for approval. These ERP rules were subsequently refined in a 2010 rulemaking (Decision No. C10-0958). The PUC created this process in response to a series of Colorado

energy statutes (HB07-1037, HB07-1281, DB-100, and HB06-1281) that necessitated more technical expertise and more involvement from the Commission in the resource selection process.

Such commission oversight of utility resource planning is common in other states, and normally is known as "integrated resource planning. As defined by the 1992 Energy Policy Act §111(d)(19):

> The term "integrated resource planning" means, in the case of an electric utility, a planning and selection process for new energy resources that evaluates the full range of alternatives…in order to provide adequate and reliable service to its electric customers at the lowest system cost. The process shall take into account necessary features for system operation, such as diversity, reliability, dispatchability, and other factors of risk…and shall treat demand and supply resources on a consistent and integrated basis.

Electric Resource Planning unquestionably falls on Colorado's side of the "bright line" dividing state and federal jurisdiction over the electric industry. It is a process by which many states decide on which power sources they will rely, and, pursuant to the Federal Power Act, the federal government "shall not have jurisdiction…over facilities used for the generation of electric industry." 16 U.S.C. §824(b)(1). Accordingly, federal energy regulators have disavowed any authority over a state's resource planning process. For example, FERC's landmark 2011 Order 1000, which established a cost allocation regime for the transmission of renewable energy, included a disclaimer that "nothing is intended to preempt or otherwise conflict with State authority over…integrated resource planning and similar processes."

In stark contrast to FERC's disavowal of authority over a state's IRP, EPA's Clean Power Plan expressly subsumes state resource planning within the agency's regulatory ambit. In the preamble to the proposed rule, the agency states that, "Those states committed to Integrated Resource Planning would be able to establish their CO2 reduction plans within that framework." 79 FR 34834, June 18 2014. Instead of conducting Electric Resource Planning in order to further energy policies enacted by the State legislature, EPA's Clean Power Plan would force the Public Utilities Commission to oversee utility resource planning in order to further the agency's climate change goals. Troublingly, were the agency to exercise its Clean Air Act §111(d) federal implementation plan authority, the agency would gain the power to impose on Colorado a "carbon" integrated resource plan of the federal government's design. Of course, there is no precedent for the federal government planning a state's electricity industry.

To date, regulated utilities in Colorado have performed resource planning under the aegis of the Public Utilities Commission, which traditionally has judged the plans based on criteria established by state lawmakers, free from federal government intrusion. EPA's Clean Power Plan would effectively commandeer this process. Under the EPA's rule, in lieu of state-determined goals, the Public Utilities Commission would have a federally-determined goal for resource planning: carbon reduction. Colorado's carbon resource plan, in turn, would be subject to EPA approval, which before had never been necessary. In this fashion, EPA's Clean Power Plan robs Colorado of its initiative and authority to conduct resource planning for the retail provision of electricity.

2. EPA's Clean Power Plan Upsets Colorado's Choice to Rely on Economic Dispatch

In the previous subsection, these comments explained how EPA's Clean Power Plan usurps Colorado's authority to oversee which generation capacity to build to power the future. This section explains how the regulation would dictate to Colorado ratepayers which generation source to use in the present.

A key concept in the operation of any power system is "economic dispatch." Section 1234(b) of the Energy Policy Act of 2005 defines economic dispatch to mean "the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and transmission facilities." In simple terms, "economic dispatch" means meeting electric demand by deploying the most affordable power sources in reliable fashion.

Colorado electricity consumers are served by multiple power systems. Much of the Front Range receives electricity from a grid operated by Public Service Company of Colorado, while rural areas receive transmission service from Tri State and the Western Area Power Administration. These grid operators use sophisticated software and supercomputers in assigning load to specific generating stations to effect the most economical supply as demand varies.

Dispatch is so intimately associated with the provision of retail electricity that federal energy regulators have never even thought to challenge the state's authority over this process, save for very narrow reliability emergencies. Yet EPA's Clean Power Plan incorporates dispatch squarely within EPA's regulatory purview. In a technical support document to the rule, the agency states:

> Reduced generation is encompassed by the terms of the phrase "system of emission reduction" in Clean Air Act § 111(a)(1)…because, in accordance with the above-discussed definitions of "system," reduced generation is a "set of things"—which included reduced use of generating equipment and therefore reduced fuel input—that the affected source might take to reduce CO2 emissions. Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Utility Generating Units, at 13-14

In plain terms, the agency is asserting the authority to require a decrease in the dispatch of coal-fired generation, and an increase of virtually all other resources. In particular, EPA based Colorado's Clean Power Plan targets on an assumption that all natural gas combined cycle power plants in the country would operate at a 70 percent capacity factor, despite the fact that the national average in 2012 was 46 percent. In Colorado, for example, there are 28 combined cycle natural gas plants, totaling 1,663 MW of capacity, which operate at 39 percent capacity factor.

Obviously, such a de facto natural gas generation quota would profoundly alter the manner in which electricity is dispatched to serve Colorado ratepayers. In this manner, the Clean Power Plan negates Colorado's long-held, if implicit, prerogative to choose to rely on economic dispatch, and, in its stead, imposes a system of environmental dispatch.

3. EPA's Clean Power Plan Would Result in Federal Jurisdiction over Discrete Energy Policies Enacted & Administrated by Colorado

Colorado's Clean Power Plan target is based on the assumption that renewable energy would account for 21 percent of the state's electricity generation and also that the state's utilities would achieve 1.5

percent annual reductions in electricity demand. While it's true that existing statutes and rules in Colorado already exceed these targets, the important fact remains that the agency is exerting jurisdiction over these discrete energy policies, as is made clear in a technical support document attendant to the rule:

> the EPA is proposing that states be authorized to submit state plans that do not impose legal responsibility on the affected EGUs for the entirety of the emission performance level, but instead, by adopting what this preamble refers to as a "portfolio approach," ***impose requirements on other affected entities—e.g., renewable energy and demand-side energy efficiency measures—that would reduce CO2 emissions from the affected EGUs.*** [Formatting added] Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Utility Generating Units, at 16

Under the Clean Air Act §111(d) regulatory regime, these "requirements" would have to be approved by the agency. Thus, state energy policymaking would become subject to federal oversight. Regarding the possibility that EPA could order states to boost their renewable generation goals or increase their end-use efficiency programs, Colorado PUC Chairman Joshua Epel recently noted that, "This provision concerns me more than just about anything else in the rule," due to its apparent intrusion on the state's rightful authority.

As a practical matter, EPA's asserted authority could dramatically overhaul the choices made by Colorado officials. For example, HB 1001, which authorizes the state's renewable portfolio standard, includes a two percent rate cap. If the rate cap comes into conflict with the green energy production quota, then Colorado officials would get to decide what's in the best interest of their citizens. However, under the proposed Clean Power Plan, this authority would ultimately fall to EPA. Similarly, current PUC rules allow regulated utilities to "bank" renewable energy credits for the purpose of complying with the state's renewable portfolio standard. Accordingly, Public Service Company of Colorado has relied heavily on this provision. Will EPA allow it? Such meddling is an inherent component of the Clean Power Plan.

Notably, the D.C. Circuit recently struck down a FERC order that **indirectly** regulated utility energy efficiency programs, because the program violated the states' exclusive jurisdiction over retail electricity markets. *Electric Power Supply Association v. FERC*, WL___(D.C. Cir. May 23, 2014). By contrast, EPA's Clean Power Plan asserts **direct** authority over Colorado's energy efficiency program,

Of course, EPA's attempt to seize the reins of Colorado's energy policy making is expressly forbidden by the Federal Power Act. And until the proposed Clean Power Plan, the agency never has attempted to use the Clean Air Act to compel States to pass specific energy statutes. Furthermore, it is wholly unclear how the agency would exercise this claimed jurisdiction—i.e., the authority to require Colorado lawmakers to enact energy statutes—were the agency to impose a Clean Air Act §111(d) federal implementation plan.

4. EPA's Clean Power Plan Roils Colorado's Oversight of Retail Electricity Markets

Implementation of the Clean Power Plan raises a host of complicated jurisdictional questions that promise to roil state oversight of the electricity sector in Colorado.

Historically, the Colorado Department of Public Health and Environment, acting pursuant to regulations promulgated by the Air Quality Control Commission, has administered the federal Clean Air Act in Colorado. However, EPA's unprecedented Clean Power Plan is a "national electricity policy" (as described by FERC Commissioner Philip Moeller), and Colorado's electricity sector long has fallen under the purview of the Public Utilities Commission. Unfortunately, the proposed regulation lends no insight into which body should take the lead. In all likelihood, the legislature would have to decide by passing an enabling statute.

Currently, environmental regulators at the Colorado Department of Public Health and Environment (CDPHE) and the Air Quality Control Commission (AQCC) are not authorized to regulate "beyond the fence" of an individual pollution source, so they would not possess the authority to implement much of the Clean Power Plan (i.e., the "building blocks" based on "re-dispatch," renewable energy, and the energy efficiency). Were the legislature to grant this authority to environmental regulators, such a delegation no doubt would conflict with the PUC's century-old jurisdiction over the electric industry.

Finally, EPA's Clean Power Plan would thrust into regulatory limbo the state's 22 electric cooperatives and 29 publicly-owned utilities, which provide approximately 24 percent and 17 percent respectively of Colorado's power. These "coops" and "munis" would have to be part of any Colorado strategy to achieve the Clean Power Plan, but they are exempt from rate regulation by the State, and are otherwise subject to far less onerous oversight from the PUC. Moreover, they have long been opposed to being subjected to enhanced regulation.

The lack of PUC resource planning authority (discussed earlier in these comments) over coops and munis is particularly problematic in the context of the CPP. Unlike investor-owned utilities, generation and transmission provider Tri-State Generation and Transmission Association, Inc. (Tri-State) is only required to file its resource plan with the PUC as a report rather than filing it for approval through a litigated proceeding. Tri-State's member-systems and the other coops in the state have voted to exempt themselves from PUC regulation as allowed for under state law. These coops are therefore not subject to the resource planning jurisdiction of the PUC and do not need to file resource plans for approval – or at all. Similarly, the PUC does not have resource planning or any other regulatory authority over munis. Accordingly, the PUC lacks approval authority over the resource planning activities of all utilities except the two investor-owned utilities in Colorado. Resource planning is the only regulatory process where all "building blocks," as a general matter, are holistically evaluated and considered in conjunction with each other. The proposed Clean Power Plan is silent as to how Colorado should incorporate its "coops" and "munis" into a compliance plan. Any attempt to further regulate these entities no doubt will court political and legal battles.

C. Colorado Costs & Reliability Threats

1. Compliance Costs

According to a study conducted by the economic consulting firm NERA, EPA's proposed Clean Power Plan would be the most expensive regulation ever imposed on the power sector, costing between $41 and $73 billion per year. Another analysis, by Energy Ventures Analysis, Inc., estimates that EPA's suite

of energy regulations, including the Clean Power Plan, cumulatively would increase the cost of electricity and natural gas by nearly $300 billion in 2020 compared with 2012. The same study projects that gas bills would increase in Colorado by 61 percent and industrial electricity rates would increase 52 percent.

Notably, many of the Clean Power Plan's costs to Colorado are "baked in," due to the low-carbon New Energy Economy implemented during the administration of Governor Bill Ritter. Indeed, the agency's proposal frequency references Colorado energy policies as "examples of how statewide targets (or company-wide targets within a state) can be designed with consideration of the wide range of CO2 mitigation options and affected EGUs' flexibility to use those options." 79 FR 34880.

The centerpiece of the New Energy Economy suite of energy policies was HB 1365, the 2010 Clean Air Clean Jobs Act, which effectively required fuel switching from coal to natural gas for 900 megawatts of electricity generation along the Front Range. According to estimates by Public Service Company of Colorado, the law's implementation will cost almost $1 billion, and would raise rates 23.8 percent by 2020. Another New Energy Economy policy was a 30 percent renewable portfolio standard, codified in HB10-1001, whose rate impact is capped at 2 percent incremental costs per year. A third New Energy Economy policy, codified in HB 1037, requires the PUC to operate energy efficiency programs known as Demand Side Management; Public Service Company of Colorado spends about 2 percent of its annual revenue on the program. Taking into account the approximate rate impact of all three New Energy Economy programs (23.8% + 2% + 2%), and Coloradans already are looking at an almost 28 percent rate increase by 2020.

On top of these "baked in" rate increases, the Clean Power Plan's requirement for efficiency improvements at coal-fired power plants and also the "re-dispatch" of natural gas would raise rates further by up to 22 percent, according to the NERA analysis. All told, ratepayers are facing increases of up to 50 percent.

2. Reliability Impact

Nationwide, 132 gigawatts of generating capacity is projected to retire between 2016 and 2020, of which 68 GW is directly attributable to the Clean Power Plan, according to EPA modeling. In Colorado, EPA estimates that 645 megawatts of coal-fired electricity generating capacity would retire as a result of this rule.

It is uncertain if Colorado, and neighboring States similarly impacted, can afford to lose this capacity. Reliability watchdog North American Reliability Corporation has warned that "essential reliability services may be strained by the proposed Clean Power Plan." Similarly, in comments to the EPA, the Edison Electric Institute cautioned that, "The dynamics of compliance, under circumstances of any unexpected shortfall in the non-emitting resources required for compliance, creates the risk of multi-state compliance failures that would disrupt interstate power flows."

Accordingly, FERC Commissioner Philip Moeller warned that the rule threatened the 15-State Midcontinent Independent Service Operator footprint with "widespread rotating blackouts." And in comments to the EPA, the Southwest Power Pool, a regional transmission organization spanning eight states, warned that the Clean Power Plan "introduce[ed] the very real possibility of rolling blackouts or

cascading outages." And in an interview with *Bloomberg* in November, Thomas Fanning, the CEO of Southern Company, which services a multistate region in the southeast, said that "I don't think we have the ability to maintain a reliable system" and also comply with EPA's §111(d) rule. Finally, a reliability analysis performed by ERCOT, the independent service operator that maintains Texas's grid, warned the rule "could result in transmission reliability issues due to the loss of generation resources in and around major urban centers."

The proposal would have serious consequences for Colorado and its citizens. Electric grid operators will be placed into a situation where an increasing amount of backup and emergency procedures are necessary to ensure the adequate supply of electricity. Given that last year's unusually cold winter placed much of the country at risk of blackouts and that projected retirements of coal-fired electric generating capacity under this and other rules will make this a recurring danger.

These dangers potentially could have been avoided if EPA had included a safety valve in its plan, a point echoed by, among others, officials at the PJM Interconnection regional transmission organization and the North American Electric Reliability Corporation: "Grid Operators Detail Call for EPA To Provide ESPS Reliability 'Safety Valve,'" *InsideEPA* (Oct. 31, 2014); NERC Review at 27 ("NERC . . . urges policy makers and the EPA to ensure that a flexible and effective reliability assurance mechanism is included in the rule's implementation"). Similarly, these dangers potentially could have been avoided if EPA had not proposed to require states to make dramatic cuts in GHG emissions by 2020, which is less than six years away, front-loading compliance burdens through a rapidly approaching date that does not provide adequate time for states to make the major planning decisions necessary to comply. See Jonathan L. Ramseur, "EPA's Clean Power Plan Proposal: Are the Emission Rate Targets Front-Loaded?" (CRS Nov. 3, 2014) ("[T]he mathematics of EPA's 2029 interim target effectively require states to make emission reductions in the early years, which some have described as 'front-loading.'"); NERC Review at 27 ("EPA should consider a more timely approach that addresses [bulk power system] reliability concerns and infrastructure deployments.").

III. Legal Flaws in Section 111(d) Proposal

In addition to the burdens that the Section 111(d) proposal would place on state governments and ratepayers, the proposal is contrary to the Clean Air Act in several critical ways. Individually and taken together, these legal infirmities mean that the Section 111(d) proposal, if finalized in a manner that includes one or more of these flaws, would constitute an unlawful rule. Given the fundamental nature of these legal flaws, EPA should withdraw the Section 111(d) proposal.

A. The Section 111(d) Proposal Constitutes an Unlawful Reorganization of State Energy Economies

Section 111 authorizes only the establishment of emission standards that can be met at *individual* new and existing sources of certain air pollutants, and with virtually no exceptions, EPA has implemented it in this manner since its enactment as part of the Clean Air Act Amendments of 1970. But rather than propose emission standards that are achievable by existing fossil fuel-fired power plants, the Section 111(d) proposal overrides state prerogatives by forcing them to prioritize natural gas-fired generation over coal-fired generation, and non-fossil-fuel generation over fossil-fueled generation. In this way, the

Section 111(d) proposal departs from Section 111(d)'s proper scope by imposing a national energy and resource-planning policy, in violation of states' traditional role in making their individual energy policies.

Section 111(d)'s text is clear: it authorizes EPA to establish a procedure under which states will submit to it a plan that "establishes standards of performance *for any existing source* . . . ." C.A.A. § 111(d)(1)(A), 42 U.S.C. § 7411(d)(1)(A) (emphasis added). Only the first "building block" from which EPA derives its proposed "state goals," heat-rate efficiency improvements, resembles the "inside-the-fenceline" measures authorized by Section 111(d). And even in the case of efficiency improvements, there is a good case that EPA is overstepping its authority. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2448 (2014) (warning agency of "important limitations" on its authority to "force . . . energy efficiency" improvements on facilities under the Prevention of Significant Deterioration program).

The other three "building blocks," which constitute nearly all of the GHG emission rate improvements under the Section 111(d) proposal, envision the reorganization of substantially every aspect of a state's power sector. Through these measures, the proposal requires the substantial redispatch of coal-fired electric generation to natural gas-fired generation, without regard to the nature of state resources or the legal and technical difficulties with accomplishing this goal (block 2). The Section 111(d) proposal likewise requires the deployment of new renewable or nuclear energy to replace existing fossil fuel-generated power (block 3). Finally, the proposal requires that states actually *limit* the consumption of electricity through increased deployment of demand-side reduction and end-use energy efficiency measures (block 4). Although the Section 111(d) proposal purports to provides states with "flexibility" by not requiring any particular combination of these "building blocks," the binding emission goals it has proposed for each state are sufficiently stringent that states will be unable to meet them without going beyond the traditional, inside-the-fenceline first block and significantly altering their energy and resource policies.

But these policy choices are not EPA's to make. States—not EPA—are responsible for managing their energy resources through such measures as choosing what type of fuels or resources should be used to generate electricity, whether the limitation of energy consumption is a desirable policy, and the like. In turn, EPA and the states are collectively responsible for managing states' air quality resources by limiting emissions from industrial sources of air pollutants where appropriate. The Section 111(d) proposal aggrandizes EPA's authority beyond the statutory limits of the Clean Air Act by arrogating the role of national energy regulator with no statutory authorization.

There is no precedent in EPA's regulations under Section 111(d), or indeed in any pervious Clean Air Act program, for this power grab. Instead, the Section 111(d) proposal purports to locate its authority solely in the Clean Air Act's definition of "standard of performance." Specifically, the Act defines "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* which . . . the Administrator determines has been adequately demonstrated." C.A.A. § 7411(a)(1), 42 U.S.C. § 7411(a)(1) (emphasis added). Given that the Clean Air Act does not define the term "system of emission reduction," EPA argues that "system" is a broad, unconstrained term equivalent to any "set of things working together as parts of a mechanism or interconnecting network." Proposal, 79 Fed. Reg. at 34,885. On this basis, the agency asserts that Section 111 affords it unconstrained authority to

formulate standards based on "*anything* that reduces the emissions of affected sources," *id.* at 34,886 (emphasis added). Under this view, EPA's authority is essentially unlimited; it could mandate that states prohibit the use of air conditioners during times of peak energy usage or dim the lights in police stations and firehouses.

In this regard, the Section 111(d) proposal violates the core tenet of administrative law that "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities." *E.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Rather, statutory terms must be construed in light of the text of the provision as a whole, its context, its purpose, and relevant precedent and authority. *Id.* Furthermore, agencies cannot ground a claim to regulatory power on the absence of express prohibition. *E.g.*, *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995). The ostensibly open-ended "definitional possibilities" of the word "system" cannot support EPA's attempt to override states' policy choices and impose energy and natural-resource policy on them.

B. The Proposal Abrogates States' Primary Legal Authority Under Section 111(d)

Congress intended Section 111(d) to be a state-driven process, rather than be the subject of federal command-and-control dictate. The Section 111(d) proposal is unlawful because it abrogates states' right under Section 111(d) to state-driven emission standards.

Section 111(d) grants states the prerogative of "submit[ting] to the Administrator a plan which . . . . establishes standards of performance for . . . existing source[s] . . . ." C.A.A. § 7411(d)(1)(A), 42 U.S.C. § 7411(d)(1)(A). In so doing, Congress unquestionably intended for states to be the regulators exercising discretion in establishing emission standards, specifically authorizing states to consider such factors as the remaining useful life of a given source in the standard-setting process. *See id*. In contrast, Congress limited EPA's role to a subsidiary procedural role "prescrib[ing] regulations which shall establish a *procedure*" for plan submission and determining whether a state's submitted plan is satisfactory. *See id.*; *see also* C.A.A. § 111(d)(2), 42 U.S.C. § 7411(d)(2).

The proposal exceeds the proper scope of EPA's authority by proposing binding, inflexible emission rate limits in the *aggregate* for a state's *entire power sector*. Pursuant to the Section 111(d) proposal, once these "goals" are finalized, states will have no authority to change them, despite Section 111(d)'s express grant of authority to the states to consider factors such as the remaining useful life of sources in establishing standards. EPA does not and cannot identify anything in Section 111(d) or elsewhere in the text of the Clean Air Act that authorizes it to displace states' legal authority to establish emission standards. As a result, the Section 111(d) proposal cannot be reconciled with EPA's limited statutory authority and the statutory rights specifically afforded to states.

C. The Proposal Violates Section 111(d)'s Bar On Regulating Sources That Are Also Regulated Under Section 112 of the Act

In order to prevent sources from being subject to multiple costly layers of regulation that could harm their economic competitiveness, the Clean Air Act prohibits EPA from requiring states to submit Section 111(d) plans for source categories that are regulated under Section 112 of the Act. The Section 111(d)

proposal would violate this prohibition by establishing Section 111(d) standards for fossil-fuel fired power plants, which have been regulated under Section 112 of the Act since 2012. For that reason, EPA should abandon the Section 111(d) proposal in its entirety.

Section 112 of the Clean Air Act empowers the agency to regulate "hazardous air pollutants." In 2012, the agency promulgated regulations under this section that limit the emission of mercury and other substances from fossil fuel-fired power plants. 77 Fed. Reg. 9,304 (Feb. 16, 2012); *see generally White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (upholding rule). According to EPA, the Section 112 Rule for electric utilities will impose $9.6 billion annually in costs on electric utilities, *see* 77 Fed. Reg. at 9,413; independent experts peg that figure at $10.4 billion in 2015, rising to $11.9 billion by 2030. NERA Economic Consulting, *An Economic Impact Analysis of EPA's Mercury and Air Toxic Standards Rule*, at 2, Fig. 1 (Mar. 1, 2012).

Section 111(d), in turn, authorizes EPA to require that states submit Section 111(d) plans only for "existing source[s] for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section 7412." C.A.A. § 111(d)(1)(A)(i), 42 U.S.C. § 7411(d)(1)(A)(i) (the "prohibition"). As described above, fossil fuel-fired power plants are regulated under Section 112 of the Act, and it is eminently reasonable that Congress would want to avoid the situation that those sources currently face: $7.5 billion in annual costs from Section 111(d) regulations in 2020, rising to $8.8 billion in 2030, *see* Proposal, 79 Fed. Reg. at 34,839-40 & Tables 1 &2, to compound the over $10 billion that they are currently bearing under Section 112.

The Section 111(d) proposal's attempt to deal with this plain limitation of the Clean Air Act is unreasonable. The Section 111(d) proposal asserts that the prohibition described above only bars it from using Section 111(d) to regulate the emission of a *hazardous* air pollutant (i.e., one listed under Section 112) from a source category that is regulated under Section 112. EPA derives this interpretation from a purported harmonization of ostensibly conflicting amendments to Section 111(d) made by the House and the Senate in the Clean Air Act Amendments of 1990, whereby the Senate erroneously included a "Conforming Amendment" that the codifier of the United States Code determined "could not be executed." As such, EPA's "harmonization" is inappropriate, particularly given that the purported harmonization in the Section 111(d) proposal gives no meaningful effect to the actual language of the United States Code. It is plainly unreasonable for EPA to interpret the prohibition in a manner contradictory to the clear deregulatory thrust of this aspect of Section 111(d).

D. The Proposal Lacks a Lawful New-Source Standard Predicate

In order for EPA to require states to submit Section 111(d) plans to control emissions from existing sources in a particular industrial category, EPA must first have established lawful standards under Section 111(b) for new sources in that category. Because EPA has failed to establish such standards for fossil fuel-fired power plants and its existing regulatory proposal is unlawful, EPA may not finalize any Section 111(d) proposal until it has rectified this issue.

Section 111(d) provides that Section 111(d) is appropriate to regulate only "existing source[s] for any air pollutant . . . . to which a standard of performance under this section would apply if such existing source were a new source . . . ." C.A.A. § 111(d)(1)(A)(ii), 42 U.S.C. § 7412(d)(1)(A)(ii). The Section 111(d)

proposal concedes the plain language of this provision: that a lawful Section 111(b) rulemaking is a "requisite predicate" for a Section 111(d) rule. 79 Fed. Reg. at 34,852.

The Section 111(d) proposal identifies two pending 111(b) proposals as providing this predicate: the proposed rule regulating carbon dioxide emissions from *new* power plants, issued in January 2014, and the proposed rule regulating such emissions from *modified and reconstructed* power plants, issued in June 2014. But neither of these proposals has been finalized.

They are also unlawful and therefore cannot provide the requisite predicate for the 111(d) proposal. The new-source proposal is unlawful because it violates express restrictions on Section 111(b) rulemakings imposed by the Energy Policy Act of 2005 by inappropriately considering certain government-subsidized projects in the Section 111 standard-setting process. *See generally* Comments of the Competitive Enterprise Institute on Clear Air Act § 111(b) Carbon Pollution Standards (May 9, 2014). The modified-source proposal is unlawful because there is no authority under Section 111(b) to issue a regulation covering only modified sources, which the Clean Air Act treats as "new" sources without exception. *See* C.A.A. § 111(a)(1), 42 U.S.C. § 7411(a)(1) ("The term 'new source' means any stationary source, the construction *or modification* of which is commenced after" proposal or finalization, whichever is earlier, of Section 111 standards). These defects preclude EPA from promulgating Section 111(d) standards until such time (if ever) that it adopts lawful Section 111(b) standards.

E. The Proposal Suffers Other Legal Infirmities

There are at least two other serious legal flaws that undermine the proposal. First, EPA's attempt to impose a *de facto* national energy policy is in direct conflict with the Federal Power Act, which carefully reserves to the states their traditional authority to oversee their retail energy markets. *See* 16 U.S.C. § 824(b)(1). The D.C. Circuit has very recently enforced this limitation on the federal government's authority. *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (FERC may not regulate end-use energy demand, authority over which is reserved to the states). It is simply not credible for EPA to assert that, even though the federal agency that is actually tasked with overseeing interstate energy markets cannot engage in demand-side regulation, the federal pollution control agency is *sub silentio* empowered to do so by Section 111(d).

Second, if a state fails to submit a "satisfactory" plan under 111(d), EPA is authorized to directly prescribe a plan itself. C.A.A. § 111(d)(2), 42 U.S.C. § 7411(d)(2). But EPA lacks authority to directly regulate the substance of all but its first "building block"—*e.g.*, to require the development of new renewable generation or to require end-use efficiency measures. These measures are the traditional subject of state police powers, with federal regulation authorized only where Congress has expressly done so. For this reason, EPA would likely be limited to measures under the first "block," *i.e.*, inside-the-fenceline efficiency improvements at individual sources, which would not be sufficient to achieve EPA's binding state-by-state emission goals. Furthermore, any attempt to do so would disproportionately burden the regulated sources, create highly inequitable treatment of one state's sources compared to another, and violate Congress's intent in affording EPA the authority to directly prescribe federal plans. Because EPA has that authority, the only reasonable reading of Section 111(d) is that the measures embraced in EPA's proposed "best system of emission reduction" should be the type of measures which

the agency *could* directly regulate itself under its 111(d)(2) authority, should the need arise. The disconnect between the current proposal and EPA's ability to directly regulate under (d)(2) confirms that the proposal exceeds the agency's authority under Section 111(d).

IV. Conclusion

From the reasons listed above, it is our view that the CPP is so poorly devised, so complex, so impossible to implement, and likely illegal that Congress, the state of Colorado, and all other states should resist this unprecedented executive branch power grab.

Thank you for your attention,

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Incoming Chairman of the Senate Agriculture, Natural Resources, and Energy Committee

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