

## Comments by the NYSBA Environmental and Energy Law Section on 82 Fed. Reg. 48035 (October 16, 2017)

### EPA Docket ID No. EPA-HQ-OAR-2017-0355

Environmental #5

December 19, 2017

The New York State Bar Association Section of Environmental and Energy Law (“SEEL”) submits these comments to the proposed rule, published in the October 16, 2017 Federal Register,<sup>1</sup> regarding the intention of the U.S. Environmental Protection Agency (“EPA”) to repeal the Clean Power Plan.<sup>2</sup>

SEEL urges EPA not to finalize this proposed rule unless and until it devises an equally effective alternative plan for the reduction of greenhouse gas emissions from existing power plants. If finalized, EPA’s proposal would leave greenhouse gas emissions from existing power plants—the largest domestic stationary source of carbon dioxide emissions<sup>3</sup>—unregulated for an indefinite period of time. As the *Climate Science Special Report* (“CSSR”) recently published by the U.S. Global Change Research Program makes clear, the U.S. cannot afford such delays in the mitigation of greenhouse gas emissions.

Our principal comment is that repeal of the Clean Power Plan without such a substitute plan is unacceptable and unlawful. The proposed rule would simply push the decision of how—or even whether—to regulate greenhouse gas emissions from existing power plants down the road. As explained below, this deferral of action contravenes EPA’s statutory obligations.

Human-induced climate change poses significant risk to the environment and public health and welfare. The CSSR provides an alarming compendium of the impacts that our historical emissions are already having, and of the environmental havoc that is projected in the absence of prompt and effective measures to reduce emissions. It reports that annual average temperatures in the U.S. increased by 1.2°F for the 1986–2016 period relative to the period from 1901 to 1960, and projects with high confidence that record-setting temperature years may be “common” over the next few decades.<sup>4</sup> The concentration of carbon dioxide in the atmosphere now exceeds 400 parts per million—a

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<sup>1</sup> 82 Fed. Reg. 48035 (Oct. 16, 2017).

<sup>2</sup> 80 Fed. Reg. 64662 (Oct. 23, 2015).

<sup>3</sup> See 80 Fed. Reg. at 64664.

<sup>4</sup> U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME I, at 17 (2017) [hereinafter CSSR].

level that last occurred 3 million years ago—and continued emissions growth could lead to concentrations that exceed anything experienced in *tens of millions* of years.<sup>5</sup> The CSSR also indicates that human activities are “extremely likely” to have been the “dominant cause” of warming since the mid-20th century.<sup>6</sup>

The environmental risks identified in the CSSR are enormous: increasing frequency and intensity of extreme heat and heavy precipitation events; increasing risk of “chronic, long-duration hydrological drought” under higher-emission scenarios; increased incidences of forest fires in the western U.S. and Alaska; sea level rise of one to four feet by the end of the century, in addition to the seven- to eight-inch rise that has occurred since 1900; increases in the depth, frequency, and extent of tidal flooding; and an “unparalleled” rate of ocean acidification that threatens marine ecosystems.<sup>7</sup>

The physical impacts of climate change are only part of the story: they will necessarily lead to social and economic impacts as well. These threats to public health, agriculture, indigenous peoples, and urban and rural communities were well documented in the U.S. Global Change Research Program’s Third National Climate Assessment in 2014.<sup>8</sup>

Appreciation of the seriousness of climate change is not a recent phenomenon. It has been at the forefront of national and international dialogue for decades. In 1965, a report of the Environmental Pollution Panel of the President Lyndon B. Johnson’s Science Advisory Committee warned that carbon dioxide emissions from the burning of fossil fuels might “produce measurable and perhaps marked changes in climate” that “could be deleterious from the point of view of human beings.”<sup>9</sup> In 1990, the United Nations Intergovernmental Panel on Climate Change published its First Assessment Report. In the U.S., the First National Climate Assessment was published in 2000, 10 years after enactment of the Global Change Research Act of 1990.<sup>10</sup>

Most relevant to these comments, however, is EPA’s 2009 endangerment finding issued pursuant to the Clean Air Act, in which EPA formally recognized the dangers posed by greenhouse gas emissions.<sup>11</sup> EPA concluded “that the body of scientific evidence compellingly supports” the finding “that greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare.”

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<sup>5</sup> *Id.* at 31.

<sup>6</sup> *Id.* at 14.

<sup>7</sup> *Id.* at 14, 19, 22, 25, 27–28.

<sup>8</sup> *National Climate Assessment*, GLOBALCHANGE.GOV, <http://nca2014.globalchange.gov/> (last visited Nov. 15, 2017).

<sup>9</sup> ENVTL. POLLUTION PANEL, PRESIDENT’S SCIENCE ADVISORY COMM., RESTORING THE QUALITY OF OUR ENVIRONMENT 126–27 (Nov. 1965).

<sup>10</sup> U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS ON THE UNITED STATES: THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE (2000).

<sup>11</sup> 74 Fed. Reg. 66496 (Dec. 15, 2009).

Having issued the endangerment finding, EPA has an affirmative, non-discretionary obligation to regulate greenhouse gas emissions from power plants. Section 111(b) requires EPA to issue new source performance standards (“NSPS”) for categories of sources that contribute significantly to air pollution that “may reasonably be anticipated to endanger public health or welfare.”<sup>12</sup> EPA has done so,<sup>13</sup> and those standards remain in place.<sup>14</sup> Section 111(d) requires EPA to regulate existing sources that would be subject to an NSPS if they were new sources.<sup>15</sup> These Section 111 provisions employ the verb “shall” and therefore impose a mandate that EPA may not neglect so long as the endangerment finding remains in effect.<sup>16</sup>

EPA states in the proposed repeal that the Agency “has not determined the scope of any potential rule under [Clean Air Act] section 111(d) to regulate greenhouse gas (GHG) emissions from existing [electric generating units], and, if it will issue such a rule, when it will do so and what form that rule will take.” The proposal indicates that EPA “is intending to issue an Advance Notice of Proposed Rulemaking (ANPRM) in the near future.”<sup>17</sup>

The Clean Air Act does not allow such a failure to act in the face of the clear and present danger that is posed by climate change. As the CSSR emphasized, “[c]hoices made today will determine the magnitude of climate change risks beyond the next few decades.”<sup>18</sup> Substantial emissions reductions *in the near term* are essential to any realistic plan for keeping the increase in global average temperature below 3.6°F (2°C) above preindustrial levels.<sup>19</sup> The Clean Power Plan is a step towards those necessary reductions (though not sufficient by itself to achieve them). Any repeal of the Clean Power Plan must be accompanied by a proposal for an equally effective substitute plan for regulating greenhouse gas emissions from existing power plants.

SEEL appreciates the opportunity to submit these comments on this issue of crucial importance to the future of our planet.

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<sup>12</sup> 42 U.S.C. § 7411(b).

<sup>13</sup> 80 Fed. Reg. 64510 (Oct. 23, 2015).

<sup>14</sup> At this time, EPA has not proposed to repeal the performance standards for greenhouse gas emissions from new, modified, and reconstructed power plants, although EPA did identify withdrawal of the NSPS as a long-term action in the most recent Unified Agenda of Federal Regulatory and Deregulatory Actions. Even if EPA were to repeal the current NSPS, however, it would be very difficult to argue that power plants do not require a NSPS for greenhouse gas pollution given their status as the largest domestic stationary source of such emissions.

<sup>15</sup> 42 U.S.C. § 7411(d).

<sup>16</sup> *See* *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 126 (D.C. Cir. 2012) (“By employing the verb ‘shall,’ Congress vested a non-discretionary duty in EPA.”).

<sup>17</sup> 82 Fed. Reg. 48035, 48036 (Oct. 16, 2017).

<sup>18</sup> CSSR, *supra* note 4, at 31.

<sup>19</sup> *See id.* (“Stabilizing global mean temperature to less than 3.6°F (2°C) above preindustrial levels requires substantial reductions in net global CO<sub>2</sub> emissions prior to 2040 relative to present-day values before 2040 and likely requires net emissions to become zero or possibly negative later in the century.”).