

January 16, 2014

The Honorable Gene L. Dodaro  
Comptroller General of the United States  
United States Government and Accountability Office  
441 G Street, NW  
Washington, D.C. 20548

Comptroller General Dodaro:

As a Member of the U.S. Senate concerned about the viability of our nation's coal industry and the cost of electricity for U.S. consumers and businesses, I write to request the Government Accountability Office's (GAO) promptly review and determine Congress's authority to take up a resolution under the Congressional Review Act (CRA) in regards to the Environmental Protection Agency's (EPA) proposed Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Unit (Docket No. EPA-HQ-OAR-2006-0790) (the "Proposed GHG Rule").

As you know, the CRA was first enacted by Congress as a part of the Contract with America Advancement Act of 1996 (P.L. 104-121) to provide Congress with an expedited legislative process to consider and disapprove rules issued by the Executive Branch. It is my understanding that, to date, resolutions under the CRA have only been filed on rules considered "finalized" by their respective federal agency. The CRA, however, does not place any such limitation on the authority of Congress to review and disapprove agency rules. Section 801(b)(1) simply states that "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." A rule is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." I believe that the Proposed GHG Rule clearly meets this definition and should be eligible for review under the Congressional Review Act.

I am not asking the GAO to address the question of whether all proposed rules are eligible for CRA review. EPA issued the Proposed GHG Rule under a very unusual provision of the Clean Air Act (CAA) that gives immediate legal effect to the notice of proposed rulemaking. Ordinarily, the publication of a proposed rule by EPA (or any other agency) does not have any immediate legal impact and is only the first public step in a process that may or may not be finalized. However, the Proposed GHG Rule was issued under Section 111(b) of the CAA, which contains a highly unusual "applicability" provision. Any power plant whose construction is commenced "after the publication of regulations (*or, if earlier, proposed regulations*) prescribing a standard of performance . . . which will be applicable to such source" is considered to be a "new source" subject to that standard. 42 U.S.C. § 7411(a)(2) (emphasis added).

Thus, the Proposed GHG Rule immediately changes the legal landscape for anyone seeking to develop a fossil fuel power plant. Any company that commences construction on a new power plant after publication of the Proposed GHG Rule will have to comply with GHG limits that did not apply before that time. In addition, any CAA permit issued for a new power plant after the publication of the Proposed GHG Rule must contain GHG limits that are at least as stringent as the standards in the Proposed GHG Rule. Under these circumstances, it is clear that the Proposed GHG Rule is “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”

It is also clear that the rule will have enormous economic and practical ramifications. Highly efficient, state-of-the art coal-fired power plants being built around the world today have an average carbon-dioxide (CO<sub>2</sub>) emissions rate of roughly 1,900 pounds per megawatt hour (lbs/MWh), but the new rule restricts CO<sub>2</sub> emissions for U.S. plants to only 1,100 lb/MWh — a level that is not attainable without a carbon capture and sequestration (CCS) system. Such CCS systems are still in the developmental stages and are extremely costly. In April 2012, EPA estimated that the installation of CCS would add approximately 80 percent to the cost of a new coal-fired power plant. Thus, the Proposed GHG Rule will effectively ban new coal-fired power plants in the U.S. for the foreseeable future – which is apparently the intent of EPA and the President.

Sadly, this new regulation is merely the federal government’s latest salvo against the coal industry and American electricity. In recent years, coal has fueled over 40 percent of the 4 trillion kilowatt hours of electricity generated in the U.S., and more than 80 percent of U.S. coal is used to generate our domestic supply of electricity. Given that our nation has the world’s largest estimated recoverable reserves of coal, I believe that the federal government should not be blocking the procurement and development of this important resource. Given the damaging impacts that will inevitably result from the Proposed GHG Rule, I also believe that Congress should have the opportunity to review it under the Congressional Review Act.

I appreciate your prompt review and consideration of this request. Should you or your staff have any questions or concerns, please do not hesitate to contact Neil Chatterjee in Senator McConnell’s office at (202)-224-3135 or at [Neil\\_Chatterjee@McConnell.Senate.Gov](mailto:Neil_Chatterjee@McConnell.Senate.Gov).

Sincerely,



MITCH McCONNELL  
UNITED STATES SENATOR

MM/bd