

EPA Public Hearing: Repealing the Clean Power Plan
Charleston, West Virginia

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Good morning. Thank you for the opportunity to present this testimony. My name is James Van Nostrand, and I am a Professor and Director of the Center for Energy & Sustainable Development at the WVU College of Law.

My testimony is divided into three parts: the legality, the reality and the cruelty.

The Legality

The proposed action by EPA to repeal the Clean Power Plan will, as a practical matter, preclude the D.C. Court of Appeals from ruling on the legitimate legal issues that were raised by the Clean Power Plan. The EPA under the prior administration took an expansive view of its authority under 111(d) of the Clean Air Act and included “building blocks” that went outside the fence, and would have required the utility to adjust its portfolio of resources to decarbonize in order to meet the required GHG reductions (e.g., substitute natural gas-fired generation and renewables for coal-fired generation). The expectation is that a replacement rule regulating GHG emissions under the Clean Air Act will limit the scope to “inside-the-fence” GHG reductions that can be achieved through improving the heat rates at individual coal plants. That measure alone, of course, would produce very minor reductions in GHG emissions—comments received by the EPA in connection with the Clean Power Plan suggested that heat rate improvements of only 2-3% would be achieved—and would fall far short of the 32% reductions in GHG emissions by 2030 required under the Clean Power Plan.

This administration has the legal authority to take a different interpretation of the EPA’s authority under the Clean Air Act to regulate GHG emissions, and to take a more conservative approach that limits the regulation to inside-the-fence measures, such as heat rate improvements. Elections have consequences, and this EPA is perfectly within its power to interpret its authority under Section 111(d) of the Clean Air Act differently than did the EPA under the prior administration.¹ This more limited measure alone, of course, would be relatively meaningless in achieving the objective of addressing climate change, which requires reductions in GHG emissions in sufficient magnitudes to limit the concentration of CO₂ in the atmosphere. This administration,

¹ “A change in administration brought about by people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.” *Motor Vehicle Manufacturers Ass’n of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), (Rehnquist, concurring in part and dissenting in part)

for its part, chooses not to acknowledge climate change, which in my view is one of the most pressing issues of this generation, and must be addressed immediately through aggressive measures in order to prevent irreversible consequences for the planet and, in turn, the United States. So the bad news from this proceeding is that the legal issues associated with the Clean Power Plan will not be resolved by a reviewing court, and this administration's interpretation of the EPA's authority under the Clean Air Act will likely be upheld, to the detriment of all.

Second, the Reality

At the same time, however, there is some good news that cannot be expunged by repeal of the Clean Power Plan. Two points in particular come to mind.

First, we learned some things about our state and our region through analysis of the Clean Power Plan that are going to survive, regardless of this administration's misguided actions to dismantle the Clean Power Plan and disregard the urgent issue of climate change. In West Virginia, the Public Service Commission and the Department of Environmental Protection (DEP) started coordinating with each other, to begin to develop an implementation plan that would have been necessary under the Clean Power Plan. That exercise required some modeling and long-term energy planning that was formerly lacking in this state. In addition, PJM began to do modeling to evaluate the likely impact of the Clean Power Plan on electricity prices and coal plant operations within the PJM service territory, which covers 13 mid-Atlantic states.² The West Virginia DEP developed a feasibility study that examined the impacts of Clean Power Plan implementation on West Virginia.³ For my part, WVU College of Law's Center for Energy and Sustainable Development, which I direct, worked with Downstream Strategies in Morgantown to conduct a study of implementation strategies.⁴

What did we learn from these modeling efforts? The impact of the Clean Power Plan on electricity prices, and on the operation of remaining coal plants, would have been minimal. Coal plants would operate with nearly the same capacity factors as now, and electricity prices would remain almost unchanged. Why? Because if there were interstate trading of emissions allowances, there would be enough inexpensive emissions allowances in the region, due to energy efficiency programs and renewable energy resources. Essentially, coal plants would continue to operate as usual, and the "excess" emissions would be covered through purchase by the utility of nearly zero-cost emission allowances made available from throughout the region, due to energy efficiency programs and renewable energy mandates in surrounding states.

The second point is that the electricity industry is decarbonizing whether the EPA requires it or not. In short, ***the Clean Power Plan did not kill the coal industry, and repealing the Clean***

² PJM Interconnection, *EPA's Final Clean Power Plan Compliance Pathways Economic and Reliability Analysis*, September 2016, available at <http://www.pjm.com/~media/library/reports-notice/clean-power-plan/20160901-cpp-compliance-assessment.ashx>

³ West Virginia Department of Environmental Protection, *Feasibility Report For a State Plan under EPA's Clean Air Act Section 111(d) Rule Regulating Carbon Dioxide Emissions from Existing Fossil Fuel-Fired Electric Generating Units* (April 2016), available at <http://dep.wv.gov/pio/Documents/WVDEP%20Feasibility%20Report%204%2020%202016.pdf>

⁴ Van Nostrand, Hansen and James, *Expanding Economic Opportunities for West Virginia under the Clean Power Plan* (July 2016), available at <https://energy.law.wvu.edu/files/d/585cffce-0aea-4535-84d0-7344591cfbb8/cpp-phase-ii-final.pdf>

Power Plan will not bring it back. The Clean Power Plan would have required a 32% reduction in GHG emissions by 2030, from 2005 levels. We are well over halfway there, without the Clean Power Plan ever having been implemented. According to Environmental Defense Fund (EDF), by the end of 2016, carbon pollution from U.S. power plants had already declined to 25 percent below 2005 levels—meaning the power sector is already almost 80 percent of the way to achieving the Clean Power Plan’s 2030 targets.⁵

Why? The widespread availability of cheap and plentiful natural gas, cost-competitive renewables (wind, utility-scale solar and distributed solar), and utility energy efficiency programs. In short, market forces are producing the decarbonization required under the Clean Power Plan, regardless of anything the EPA does to try to reverse this course. No utility is building a new coal plant; it simply cannot compete with natural gas, wind or solar. According to a study of levelized cost of electricity performed by Lazard earlier this month: “As values for alternative energy technologies continue to decline, in some scenarios the full-lifecycle costs of building and operating renewables-based projects have dropped below the operating costs alone of conventional generation technologies such as coal or nuclear.”⁶ In other words, it makes more economic sense in many situations to build *new* renewable projects than to continue to operate *existing* coal plants.

What caused the decline in the coal industry? Mechanization. Cheap and plentiful natural gas. Dramatic declines in the cost of renewables, both wind and solar. International concerns about climate change, which means no one wants our coal exports. In our region, the increased costs of extracting coal, since the cheap coal seams have already been mined. The role of EPA in the demise of the coal industry? Number 6 on that list, *at best*, due primarily to the Mercury and Air Toxic Standards, not the Clean Power Plan, which was years away from implementation.

Third, the Cruelty

Which brings me to my final point: the shameful demagoguery of this administration and the politicians in West Virginia who continue to talk about a “war on coal” and the need to repeal the Clean Power Plan as part of ending this “war on coal.” In this regard, we had EPA Administrator Scott Pruitt announcing the proposed repeal to coal miners in eastern Kentucky on October 9, saying the “war against coal is over.” According to EPA spokeswoman Liz Bowman, Pruitt chose to speak about his plans in Kentucky because coal workers have a direct economic stake in policies aimed at curbing emissions from coal burning. “He’s speaking directly to people in coal country about how the rule negatively affected the whole industry,” Bowman said.⁷ We are having this hearing, the only public hearing where the EPA is taking comment on the proposed repeal of the Clean Power Plan, in West Virginia, the heart of coal country. We heard from two candidates for

⁵ Charlie Jiang, *Climate and Clean Energy Progress Continues in Spite of Clean Power Plan Repeal Rumors*, Environmental Defense Fund (October 17, 2017), available at <http://blogs.edf.org/climate411/2017/10/05/climate-and-clean-energy-progress-continues-in-spite-of-clean-power-plan-repeal-rumors/>

⁶ Lazard’s Levelized Cost of Electricity Analysis Version 11.0 (November 2017), available at <https://www.lazard.com/perspective/levelized-cost-of-energy-2017/>

⁷ Juliet Eilperin and Brady Dennis, *EPA Chief Scott Pruitt Tells Coal Miners He Will Repeal Power Plant Rule Tuesday: ‘The War Against Coal Is Over’*, WASHINGTON POST (October 9, 2017) available at https://www.washingtonpost.com/news/energy-environment/wp/2017/10/09/pruitt-tells-coal-miners-he-will-repeal-power-plan-rule-tuesday-the-war-on-coal-is-over/?utm_term=.961e0ad70b0e

the U.S. Senate this morning, competing to decry the economic ruin caused by Clean Power Plan and raising hopes for the brighter future for the coal industry once the Clean Power Plan is repealed.

It is cruel to raise the hopes of coal miners that their jobs will be coming back once this tiresome “war on coal” is over. Their jobs are not coming back in any significant numbers. ***The Clean Power Plan had virtually no impact on the decline of the coal industry, and repealing the Clean Power Plan will not bring the jobs back.*** It is shameful to raise the hopes that repealing the Clean Power Plan will make any difference. We deserve better from our government, from our elected officials, and from appointed agency heads. What we have here, plain and simple, is a change in direction of regulatory policy, due to the outcome of an election. This change affects the item with the least impact in the long list of drivers contributing to the decline of the coal industry—the role of EPA. It does ***nothing*** to affect the real drivers, which will continue to determine the future of the coal industry in the U.S.