August 7, 2025

Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Proposed Repeal of GHG Performance Standards for Fossil-Fuel-Fired Power Plants, EPA–HQ–OAR–2025–0124, 90 Fed. Reg. 25752 (June 17, 2025)

Introduction

Mountain States Legal Foundation, Western Energy Alliance, and the Independent Petroleum Association of New Mexico respectfully submit these comments in support of the Environmental Protection Agency's proposed repeal of all greenhouse gas "performance standards" for fossil-fuel-fired power plants, which the agency previously promulgated in an unconstitutional, unlawful, or otherwise unreasonable manner pursuant to Section 111 of the Clean Air Act, 42 U.S.C. § 7411. In this letter, Mountain States and the other commenters refer to that proposal published in the Federal Register, 90 Fed. Reg. 25752 (June 17, 2025), as the "Proposed Repeal."

Mountain States is a nonprofit, public-interest law firm dedicated to promoting limited government, individual liberty, and the constitutional separation of powers. We have long represented landowners, energy producers, local governments, and others across the United States in litigation challenging unlawful regulatory overreach by federal agencies, including the Department of the Interior, EPA, and others. For at least the last decade, EPA and its regulators have viewed the Constitution and the laws codifying the Clean Air Act not as limits on their authority, but as points of departure. In doing so, the agency has vilified the businesses and people who have provided the affordable, reliable energy that has helped our Nation prosper. In pursuit of decarbonization goals, EPA has often disregarded statutory limits and constitutional safeguards, imposing regulatory burdens on working communities and energy producers without legal justification. Accordingly, Mountain States views the Proposed Repeal as a much delayed and needed effort to rein in the agency, and Mountain States fully supports it.

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Working with a vibrant membership base of independent oil and natural gas companies for over 50 years, **Western Energy Alliance** stands as a credible leader, advocate, and champion of industry in the West. Its expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. The Alliance supports the Proposed Repeal as a necessary correction to a rule that imposed unworkable mandates and disregarded the realities of energy production in the West.

The **Independent Petroleum Association of New Mexico** is a non-profit trade association formed in 1978 to preserve and advance the interests of independent oil and gas producers across New Mexico. Representing more than 350 members, IPANM advocates for the safe and responsible extraction of New Mexico's abundant natural resources, and for a regulatory environment that recognizes the vital role of fossil fuels in powering the economy. IPANM supports EPA's proposal to repeal overly burdensome greenhouse gas performance standards that threaten the reliability and affordability of fossil-fuel-fired electricity.

Comments

A. EPA's treatment of fossil-fuel energy is unconstitutional.

The Commerce Clause (U.S. Const. art. I, § 8, cl. 3) grants Congress the authority to regulate activities that substantially affect interstate commerce. Exercising this power, Congress enacted the Clean Air Act (CAA), which delegates to the Environmental Protection Agency (EPA) the authority to set and revise performance standards for air pollutants from stationary sources. 42 U.S.C. § 7411. If EPA goes outside this statutory delegation, then its decisions are unconstitutional and further unlawful.

Under the Supreme Court's "major questions" doctrine, agencies lack authority to issue rules on matters of substantial political or economic importance absent "clear congressional authorization." *West Virginia v. EPA*, 597 U.S. 697, 723–24 (2022) (holding that EPA lacked authority to impose generation shifting requirements on power plants without a clear statutory mandate). In *West Virginia*, the Court held that EPA cannot use § 7411 to fundamentally transform the energy sector; therefore, the Clean Power Plan's attempt to destroy fossil-fuel based energy without explicit congressional authorization was unconstitutional. *Id.* at 724–25.

Here, the prior rule that this Proposed Repeal eliminates is the same type of overreach the Supreme Court condemned in *West Virginia*. While the Clean Power Plan relied on generation shifting, the prior rule's mandate that new and existing power plants implement carbon capture and storage (CCS) at an

unworkable scale reflects the same kind of expansive, industry-transforming interpretation that *West Virginia* forbids. Mandating CCS at this scale reshapes the Nation's energy mix without congressional authorization. "[I]t is extremely unlikely that the infrastructure necessary for CCS can be deployed by the January 1, 2032 compliance date," and hitting the goals of the mandate "is not achievable." 90 Fed. Reg. at 25755. Whether to force an entire industry or worse, the Nation, to adopt an energy system that is not achievable is a "major question" requiring an answer from Congress, not EPA. The Proposed Repeal remedies this constitutional defect by withdrawing a rule the agency lacked constitutional authority to issue in the first place.

B. The prior rule's mandates were untethered from the Clean Air Act.

In addition to fixing a constitutional problem, the Proposed Repeal appropriately responds to the unlawfulness of the prior rule and aligns EPA's regulatory actions with both its statutory mandate and Supreme Court precedent. In particular, the rule as finalized in 2023–2024 exceeded the agency's authority under Section 111 by requiring industry-wide technological transformation—for example, the implementation of 90% carbon capture by 2032 for coal plants—based not on demonstrated, cost-effective technology, but on speculative projections and future infrastructure that does not yet exist at the required scale. *E.g.*, 90 Fed. Reg. at 25755–56, 25768–69, 25733 ("that position relied on the assumption of best-case scenarios").

If Congress intended for EPA to fundamentally alter the Nation's affordable and reliable energy systems in service of costly generation-shifting disguised as a "performance standard," then Congress would have said so. But Congress did not say that. *See* 42 U.S.C. § 7411. Further, "requiring States to expend resources to develop plans to regulate just these sources would be unduly burdensome from an administrative standpoint given that such plans would most likely have no significant benefit." 90 Fed. Reg. at 25775.

Even apart from these lawfulness concerns, the prior rule was further legally flawed. Section 111 of the Clean Air Act requires that EPA's standards be based on "the best system of emission reduction . . . adequately demonstrated," considering cost, non-air quality health and environmental impacts, and energy requirements. *See* 42 U.S.C. § 7411(a)(1); *see also Michigan v. E.P.A.*, 576 U.S. 743, 752 (2015) ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."). By relying on CCS mandates rather than actual emission performance standards, the prior rule ignored the law and the lack of large-scale CCS deployment and the excessive cost and infrastructure requirements that make the emission-reduction system speculative, not "adequately demonstrated."

Further, by placing heavy compliance burdens on fossil-fuel-fired power—the power that has enabled non-fossil alternatives and grid balancing—the 2023 rule risked destabilizing the energy market. Rural communities and resource-producing states faced disproportionate economic impacts. So for example, EPA appropriately admits now that "[t]he EPA has re-evaluated the costs and associated assumptions underlying the cost analysis of 90 percent CCS on existing long-term coal-fired steam generating units and is proposing to determine that the costs are not reasonable." 90 Fed. Reg. at 25752.

The prior rule also infringed upon traditional areas of state authority. Under Section 111(d), states are intended to serve as the primary implementers of emission standards for existing sources. *Cf. Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 308 (2014) ("States have primary responsibility for implementing the NAAQS by developing State implementation plans."). The prior rule's prescriptive, top-down approach cut state discretion across a diverse national energy landscape. EPA's proposal to repeal that approach will restore the cooperative federalism structure envisioned by the Clean Air Act. As EPA now explains, "[this] repeal reaffirms the principle that States must retain discretion under CAA section 111(d) to consider their own energy needs, costs, and policy priorities." 90 Fed. Reg. at 25765.

And on endangerment, while this Proposed Repeal does not itself reopen EPA's 2009 Endangerment Finding, the agency's broader climate policy framework must remain subject to statutory and constitutional guardrails.

C. The Prior Rule was unreasonable because it was not based on the "Best System of Emission Reduction."

The prior rule was also unreasonable—not just unconstitutional and unlawful—because its designated "best system of emission reduction" (BSER) did not consider the factors required by Section 111 of the Clean Air Act. The statute explicitly requires that any BSER determination be based on a system that is "adequately demonstrated," taking into account not only emission reductions but also "the cost of achieving such reduction . . . and any nonair quality health and environmental impact and energy requirements." 42 U.S.C. § 7411(a)(1). By mandating 90% carbon capture—a technology with exorbitant costs and significant energy penalties that divert power from the grid—the prior rule elevated a single factor, emission reduction, above all others. This approach ignored the profound negative impacts on energy affordability and grid reliability, making the BSER determination fundamentally unreasonable. A system cannot be the "best" if its implementation would destabilize the energy supply and impose crippling costs on American consumers and businesses, factors the statute requires EPA to weigh.

Furthermore, the agency's choice of high-level CCS as the BSER was unreasonable because it disregarded more practical, cost-effective, and truly "adequately demonstrated" systems. The BSER analysis inherently requires a comparative assessment of available technologies. For decades, fossil-fuel-fired power plants have successfully implemented heat-rate efficiency improvements and other operational upgrades that reduce emissions per unit of electricity generated without threatening grid stability or requiring trillions of dollars in new infrastructure that does not exist. By fixating on a speculative, high-cost technology like CCS and ignoring readily available alternatives, EPA did not conduct a reasonable analysis. The agency began with a preferred policy outcome—the phaseout of fossil fuels—and worked backward to justify it. This failure makes the prior rule a clear example of unreasonable agency action. Repealing the rule is a critical, legally sound, and reasonable course correction that better aligns EPA's regulations with the technological and economic realities Congress required the agency to consider.

Conclusion

The Proposed Repeal reflects sound constitutional, legal, and practical judgment. It respects the limits of agency authority and returns to a regulatory model that recognizes both technological reality and state discretion. Mountain States, Western Energy Alliance, and IPANM respectfully ask EPA to finalize the Proposed Repeal and restore constitutional accountability, legal certainty, and regulatory restraint. We further encourage EPA to continue reviewing GHG-related regulations to ensure they are grounded in law, science, and achievable performance standards.

Respectfully submitted,

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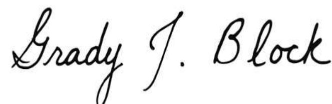

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