UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

79 Fed. Reg. 34830 (June 18, 2014) Docket ID No. EPA-HQ-OAR-2013-0602

COMMENTS OF LAURENCE H. TRIBE AND PEABODY ENERGY CORPORATION

December 1, 2014

EXECUTIVE SUMMARY

These comments are submitted by Laurence H. Tribe, professor of constitutional law at Harvard Law School and the Carl M. Loeb University Professor at Harvard University,[1] and Peabody Energy Corporation.[2]

The defects in the Proposed Rule transcend political affiliations and policy positions and cut across partisan lines. The central principle at stake is the rule of law – the basic premise that EPA must comply with fundamental statutory and constitutional requirements in carrying out its mission. The Proposed Rule should be withdrawn. It is a remarkable example of executive overreach and an administrative agency's assertion of power beyond its statutory authority. Indeed, the Proposed Rule raises serious constitutional questions.

Both Democrats and Republicans should stand in strong support of the rule of law. And both Democratic and Republican Administrations have promoted the prudent use of domestic coal in order to reduce dependence on imported oil. In contrast, the Proposed Rule will require a dramatic decline in coal-fired generation of electricity, in order to implement EPA's system of state-by-state mandates. In fact, under EP A ' s plan, the agency envisions that coal generation would be eliminated altogether in 12 states. The Proposed Rule thus reverses policies that reach back to John F. Kennedy. As Hillary Clinton observed in 2007, "I think you have got to admit that coal — of which we have a great and abundant supply in America — is not going away."[3]

[1] Affiliation provided for identification purposes only. Professor Tribe was retained by Peabody Energy Corporation to provide his independent analysis as a scholar of constitutional law. The opinions expressed in these comments represent his judgments in that capacity, not views that it would be proper to attribute to Harvard Law School or Harvard University.

[2] Peabody Energy Corporation ("Peabody") hereby joins in these comments as a supplement to the comments separately submitted by Peabody in this Docket on December 1, 2014, titled "Comments of Peabody Energy Corporation."

[3] "An interview with Hillary Clinton about her presidential platform on energy and the environment," available at http://grist.org/article/clinton1/.

The Proposed Rule lacks legal basis and represents an improper attempt by EPA unilaterally to remake a vast portion of the American economy on the basis of a hitherto obscure provision of the Clean Air Act, Section 111. This section previously has been used in only a handful of instances. Nothing like the Proposed Rule has ever been premised on Section 111 before. Just last Term, in *Utility Air Regulatory Group v. EPA*,[4] the Supreme Court voiced powerful concerns regarding EPA's unilateral assertions of power that are equally apposite here:

EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long- extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[5]

The Proposed Rule rests on a fatally flawed interpretation of Section 111. According to EPA, in enacting the 1990 amendments to the Clean Air Act, Congress effectively created *two different* versions of Section 111, and the agency should be allowed to pick and choose which version it wishes to enforce. According to EPA, since 1990 the U.S. Code has reflected the wrong version of Section 111, and EPA has discovered a mistake made by the Office of Law Revision Counsel of the House of Representatives – the part of Congress responsible for compiling enacted bills into statutory books. According to EPA, both the D.C. Circuit and the U.S. Supreme Court have previously misinterpreted Section 111. According to EPA, the two different versions of Section 111 have created "ambiguity" triggering deference to the agency's statutory construction under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*.[6]

[4] 134 S. Ct. 2427 (2014). [5] 134 S. Ct. at 2444.
[6] 467 U.S. 837 (1984).

Every part of this narrative is flawed. The 1990 amendments did not create two different versions of Section 111. The Senate amendment was a substantive amendment, and the House amendment was a conforming one that merely updated a statutory cross-reference. Both were enacted. Once the Senate amendment was made law, the House amendment was rendered moot, as the Office of Law Revision Counsel in the House of Representatives properly concluded. Such a situation – where a substantive amendment moots a conforming one – is a familiar occurrence in the U.S. Code, and EPA's position would call into question dozens if not hundreds of statutory changes throughout the Code. Instead of harmonizing legislation, as Supreme Court precedents instruct, EPA's argument would lead to chaos.

Moreover, EP A ' s interpretation of Section 111 would raise serious constitutional questions. If there were indeed two versions of Section 111, EPA's claim that it is entitled to pick and choose which version it prefers represents an attempt to seize *lawmaking* power that belongs to Congress. Under Article I, Article II, and the separation of powers, EPA lacks the ability to make law.

Further, the Proposed Rule violates principles of federalism and seeks to commandeer state governments in violation of the Tenth Amendment. It raises serious questions under the Fifth Amendment as well, because it retroactively abrogates the federal government's policy of promoting coal as an energy source. Private companies – and whole communities – reasonably relied on the federal government's commitment to the support of coal.

These constitutional concerns eliminate any deference EPA would otherwise receive under *Chevron*. The Proposed Rule lacks any legal basis and should be withdrawn.