



**U.S. Environmental Protection Agency  
Docket EPA-HQ-OAR-2023-0072**

**Public Hearing on Proposed New Source Performance Standards for  
New Fossil-Fueled Power Plants, Emission Guidelines for Existing Fossil-  
Fueled Power Plants, and Repeal of the Affordable Clean Energy Rule  
88 Fed. Reg. 33,240 (May 23, 2023)**

**June 15, 2023**

**Testimony of Michael J. Myers  
Senior Counsel for Air Pollution and Climate Change Litigation  
Environmental Protection Bureau  
Office of New York State Attorney General  
Letitia James**

Written Testimony of Senior Counsel Michael J. Myers on  
EPA's Proposed Emission Standards and Guidelines for New and  
Existing Fossil-Fueled Power Plants

Good afternoon, I'm Michael J. Myers, Senior Counsel for Air Pollution and Climate Change Litigation in the Environmental Protection Bureau of New York State Attorney General Letitia James. I'm pleased to testify on EPA's proposed rule to limit carbon pollution from new and existing power plants under the Clean Air Act.

EPA's proposal comes at a critical time. Climate change is not only occurring, but it is widespread, rapid, and intensifying. Just last week, wildfires exacerbated by climate change caused the worst air pollution New Yorkers have experienced since passage of the Clean Air Act more than 50 years ago. Two summers ago, the violent remnants of Hurricane Ida caused flash flooding that drowned several New Yorkers. Simply put, we can no longer ignore our obligation to fight climate change and need to do so with urgency.



AP Images

In September 2021, Hurricane Ida, a Category 4 hurricane, swept through the eastern U.S., causing 55 deaths and over \$75 billion in damages. In Queens, NY, record rainfall overwhelmed the drainage systems and flooded apartments, killing 11 residents.



WABC

In June 2023, smoke from more than 400 Canadian wildfires -- fueled by heat and drought -- streamed south over the U.S., exposing millions to unhealthy air. For days, New York City's air quality index reached record unhealthy levels and conditions were the worst of any major city in the world.

New York State has joined this fight. Our Climate Leadership and Community Protection Act requires that 70% of our electricity come from renewable sources by 2030 and that we achieve 100% zero-emissions electricity by 2040.<sup>1</sup> And our experience with the Regional Greenhouse Gas Initiative shows that reductions in power plant carbon emissions can go hand in hand with substantial consumer benefits, including lower energy bills, better grid reliability, and more jobs.<sup>2</sup>

Despite our efforts, and similar ones undertaken by several other states, national limits on power plant greenhouse gases are a necessary strategy to adequately confront climate change.

EPA's proposed rule represents an important step in the right direction. Let me briefly touch on a few highlights:

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<sup>1</sup> See NY CLS Pub Ser § 66-p[2]

<sup>2</sup> See Acadia Center, *Regional Greenhouse Gas Initiative: Findings and Recommendations for the Third Program Review* (Apr. 2023), at 3, available at [https://acadiacenter.wpenginepowered.com/wp-content/uploads/2023/04/AC\\_RGGI\\_2023\\_Layout\\_R6.pdf](https://acadiacenter.wpenginepowered.com/wp-content/uploads/2023/04/AC_RGGI_2023_Layout_R6.pdf).

***Adequate demonstration.*** First, EPA’s proposed emission limits are based on adequately demonstrated technologies, such as carbon capture and storage. Under case law, adequate demonstration merely requires that a technology has been shown to work in practice at a representative plant in the source category or in a similar industry.<sup>3</sup> There is no requirement that it be in widespread use. And the Inflation Reduction Act’s generous tax credits make these technologies cost-effective for power plants in many instances.

***Consistent with Supreme Court precedent.*** Second, the proposal is within the four corners of the Supreme Court’s decision last year in *West Virginia v. EPA*.<sup>4</sup> There, the Court instructed EPA not to focus on the power sector as a whole, but on approaches specific sources could take. That’s what EPA did here: carbon capture and storage and co-firing with clean hydrogen are approaches individual plants can use to meet the required emission limits. This is squarely in the traditional mode of environmental regulation under the Clean Air Act.

***Provide for state flexibility.*** Third, unlike the Trump EPA’s ACE rule, the proposed rule would allow states to permit plants to use emissions averaging and trading to comply—provided those approaches deliver equivalent pollution reductions. This is the way cooperative federalism under the statute is supposed to work.

Now, let me briefly turn to two areas in which EPA can—and should—strengthen the proposed rule.

***Emission limits for coal-fired power plants.*** With respect to emission limits for coal-fired power plants, those plants have been on notice for decades that the time for dumping carbon into the air for free was ending. In the final rule, EPA should jettison or at least reduce the number of subcategories that allow plants to retire at their own pace.

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<sup>3</sup> See, e.g., *Lignite Energy Council v. EPA*, 198 F.3d 930, 933-34 (D.C. Cir. 1999); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973); see also S. Rep. No. 91-116, at 16 (1970) (technology that provides basis for section 111 standards need not “be in actual, routine use somewhere”).

<sup>4</sup> 142 S. Ct. 2587 (2022).

To the extent such plants are truly necessary for grid reliability until cleaner sources come online, EPA can clarify that they could continue to operate under those limited circumstances.

***Emission limits for gas-fired power plants.*** Next, EPA should expand pollution reduction requirements for gas-fired power plants. For example, by including 150 megawatt or larger plants with a 40% or greater capacity factor, EPA would cover nearly 80% of these plants' carbon emissions, compared to the 30% under the proposal.<sup>5</sup> And EPA should require peaking units—which are often located in overburdened communities—to also limit their emissions. New York's RGGI regulations, for example, cover units down to 15 megawatts.<sup>6</sup>

In closing, we urge EPA to move promptly to strengthen and finalize this important proposal to address the climate crisis.

Thank you.

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<sup>5</sup> See Natural Resources Defense Council, “Strengthen Power Plant Carbon Standards for Greater Climate Benefit,” (May 22, 2023), available at <https://www.nrdc.org/bio/amanda-levin/strengthen-power-plant-carbon-standards-greater-climate-benefit>.

<sup>6</sup> See 6 N.Y.C.R.R. § 242-1.4(a)(2)