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U.S. Environmental Protection Agency
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1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d); 87 Fed. Reg. 79,176 (Dec. 23, 2022)

To the Environmental Protection Agency:

The undersigned Attorneys General and chief legal officers submit these comments on EPA's proposed rule to revise its implementing regulations governing state plans under section 111(d) of the Clean Air Act. We support EPA's proposed rule, which would improve transparency in the state plan process while promoting section 111's goal of protecting public health and welfare from stationary source pollution. We further submit these comments to convey suggestions on some areas in which the proposal could be strengthened or clarified.

Our comments are organized as follows: The first section provides background concerning the need for the proposed rule. The second section contains our comments on specific aspects of EPA's proposal.

1. Background

EPA issued the proposed rule under section 111 of the Clean Air Act, which governs standards of performance for stationary sources. Section 111 requires a source category to be regulated if EPA

determines that it "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Section 111(b) requires standards of performance for new stationary sources. *Id.* § 7411(b)(1)(B). A "standard of performance" is a "standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impacts and energy requirements) the Administrator determines has been adequately demonstrated." *Id.* § 7411(a)(1).

Once EPA establishes a performance standard for new stationary sources, it must issue an emissions guideline for existing sources in the same category. *See* 42 U.S.C. § 7411(d)(1). The approach for regulating existing sources (also referred to as "designated facilities") under section 111(d) differs from the one for regulating new facilities under section 111(b). While EPA promulgates standards of performance under section 111(b) that are directly applicable to new (as well as modified and reconstructed) facilities, states establish standards of performance for existing sources under section 111(d). *Id.* § 7411(d)(1). Those standards are informed, however, by the EPA emissions guideline that sets forth its determination of the best system of emission reduction (BSER) for the source category and the degree of emission limitation achievable through applying the BSER. *West Virginia v. EPA*, 142 S. Ct. 2587, 2601-02 (2022). Section 111(d) also directs that EPA permit states—in establishing a standard of performance for particular sources—to take into account a source's remaining useful life and other factors. 42 U.S.C. § 7411(d)(1).

Of direct relevance here, section 111(d) directs EPA to issue regulations that establish a procedure for states to submit plans on how they intend to establish and enforce standards of performance for existing sources of certain air pollutants (*i.e.*, pollutants not regulated as criteria or hazardous air pollutants). *Id.* § 7411(d)(1). These procedures are similar to the statutory procedures provided by section

110 of the Act—which governs state implementation plans to implement the National Ambient Air Quality Standards (NAAQS) for designated criteria pollutants and the procedures in Section 129(b)(2) – which governs state plans for solid waste incinerators. *Id.* § 7429(b)(2).

EPA has an important oversight role under section 111(d). EPA evaluates state plans to ensure that they are "satisfactory" in meeting section 111(d) requirements. 42 U.S.C § 7411(d)(2). If a state fails to submit a plan or EPA determines that a state plan is not satisfactory, EPA has the same authority to promulgate a federal plan to regulate the sources as it does in the NAAQS context under section 110(c). *Id.*

EPA issued its first set of implementing regulations to govern section 111(d) plans in 1975. 40 Fed. Reg. 53,340 (Nov. 17, 1975). These regulations set forth procedures for submission of state plans and deadlines for states and EPA to meet. In 2019, as part of its "Affordable Clean Energy" rulemaking, EPA revised its implementing regulations, including significantly lengthening the time period for state submission and EPA review of section 111(d) plans. 84 Fed. Reg. 32,520 (July 8, 2019).

The D.C. Circuit subsequently vacated those timing provisions as arbitrary and capricious. *American Lung Ass'n v. EPA*, 985 F.3d 914, 991 (D.C. Cir. 2021), *rev'd on other grounds*, *West Virginia v. EPA*, 145 S. Ct. 2587 (2022). The court held that EPA had erred in adopting in the section 111(d) context the timelines for state and federal plans in section 110—such as the three-year deadline for state plan submittal—without sufficient explanation. 985 F.3d at 992-93. In addition, by failing to take into account the public health and welfare implications of the extended time frames, EPA erred by not considering an important aspect of the rule. *Id.* at 992 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

In the current proposal, EPA seeks to "address the vacatur of the timing provisions by the D.C. Circuit in *ALA*, and to further improve the state and federal plan development and implementation process." 87 Fed. Reg. at 79,180.

2. Comments on Proposed Rule

As noted at the outset, the Attorneys General and chief legal officers support the revisions to the implementing regulations set forth in the proposed rule. We also offer some suggestions for further improvement. This section of our comments is organized based on the order in the preamble: (a) timeline for state plan submission and EPA review, (b) federal plan authority, (c) meaningful engagement, (d) regulatory mechanisms for state plan implementation, (e) remaining useful life and other factors, (f) more stringent state plans, (g) electronic submission of state plans, and (h) other proposed revisions.

a. Timeline for State Plan Submission and EPA Review

With respect to the time frames for state plan development and EPA review, EPA proposes new timelines that represent a middle ground approach between the expeditious deadlines in the 1975 regulations and the lengthy deadlines in the ACE rule. As EPA notes, these timelines "are critical to ensuring that the emission reductions anticipated by the EPA in an [emissions guideline] become federally enforceable measures and are timely implemented by the designated facilities." 87 Fed. Reg. at 79,181.

The proposal contains deadlines for five actions in state plan development and review: state plan submission, completeness review, EPA evaluation (for approval or disapproval), federal plan issuance, and schedules for increments of progress. 87 Fed. Reg. at 79,182, tbl. 1. First, state plans would be due within 15 months of the effective date of the emissions guideline. Proposed 40 C.F.R. § 60.23a(a)(1). Second, EPA would have two months to determine whether a state plan is complete. *Id.* § 60.27a(g)(1). Third, EPA would be required to decide on the approvability of a state plan within one year of the completeness finding. *Id.* § 60.27a(b). Fourth, federal plans would be due within one year of a disapproval of a state plan or a state failure to submit a plan. *Id.* § 60.27a(c). Fifth, any state plans that allow for compliance longer than 16 months would have to include a schedule requiring increments of progress in achieving the standards. *Id.* § 60.24a(d).

These deadlines would be the default provisions for section 111(d) plans, but EPA would retain the authority to supersede the deadlines in each emissions guideline issued for specific source categories. *Id.* at 79,181.[1] For an emissions guideline that supersedes the timelines in the implementing regulations, EPA is proposing to require that it justify the differing timelines and address how the changed timing would impact public health and welfare. *Id.* at 79,182.

To address the flaws in the ACE rule's timing provisions cited by the D.C. Circuit, EPA took the approach of developing timeframes "based on the minimum administrative time reasonably necessary for each step in the implementation process." 87 Fed. Reg. at 79,181. EPA reasoned that such an approach would address the flaws in the previous rule cited by the court because "EPA and states will take no longer than necessary to develop and adopt plans that impose requirements consistent with the overall objectives of CAA section 111(d)." *Id.*

In determining the minimum administrative time that would be reasonably necessary, EPA considered the effort necessary by states and EPA for previous state plan submissions under section 111(d), as well as under other provisions of the Act, including section 129 (which, like section 111(d), requires state plans to limit emissions from existing sources). Based on this review, EPA concluded, for example, that states will typically need more than one year to develop a state plan to implement an emissions guideline, particularly for a program like section 111(d) that permits more source-specific analysis. *Id.* at 79,183. Regarding the proposed one-year deadline for EPA evaluation of state plans, the agency explains why this period is necessary for staff analysis and the consideration of public comments. *Id.* at 79,185-86.

We generally support the revised deadlines set forth in the proposed rule. Based on our understanding that some states have rulemaking requirements under state law that could result in states

[1] For example, in the proposed emissions guideline for oil and gas facilities, EPA has proposed an 18-month deadline for the submission of state plans. *See* 87 Fed. Reg. at 74,831.

exceeding the 15-month deadline in the proposal, we suggest that EPA include language in the final rule allowing states to seek additional time for submission of plans as necessary to meet those requirements. We otherwise concur that EPA has adequately explained the basis for the proposed timeframes, including why the more expeditious timelines are needed to further public health and welfare.

b. Federal Plan Authority

EPA also proposes to change the triggering event for it to proceed to issue a federal plan. Rather than the current approach of requiring that it affirmatively issue a finding of failure to submit before EPA's obligation to issue a federal plan is triggered, EPA proposes that its timeline for issuing a federal plan for any state that has not submitted a complete plan will be triggered by the state plan submission deadline. Proposed 40 C.F.R. § 60.27a(c). EPA explains that in the context of state implementation plans under section 110, EPA has not always timely met its obligation to issue a finding of failure to submit, leading to delays in when it puts a federal plan in place. Therefore, EPA is proposing to streamline the process in the section 111(d) context to ensure that the emission reductions anticipated by promulgation of an emissions guideline are realized in a timely way through promulgation of any necessary federal plan. 87 Fed. Reg. at 79,189-90.

We support EPA's proposed change to begin the clock for a federal plan deadline with the state plan submission deadline. This streamlining should result in the more expeditious promulgation of federal plans where they are necessary, and in turn prompter achievement of emissions reductions that benefit public health and welfare.

c. Meaningful Engagement

To ensure adequate consideration of the impacts of standards of performance for designated facilities on public health and welfare, EPA proposes to require that states have meaningful engagement with pertinent stakeholders. Proposed 40 C.F.R. § 60.27a(g)(2)(ix). As part of their plan submissions, states would have to submit a list of identified

pertinent stakeholders, a summary of the engagement conducted, and a summary of stakeholder input received. *Id.* § 60.23a(i)(1). EPA proposes to define "meaningful engagement" as:

> the timely engagement with pertinent stakeholder representation in the plan development or plan revision process. Such engagement must not be disproportionate in favor of certain stakeholders. It must include the development of public participation strategies to overcome linguistic, cultural, institutional, geographic, and other barriers to participation to assure pertinent stakeholder representation, recognizing that diverse constituencies may be present within any particular stakeholder community. It must include early outreach, sharing information, and soliciting input on the state plan.

Proposed 40 C.F.R. § 60.21a(k). "Pertinent stakeholders" would "include, but are not limited to, industry, small businesses, and communities most affected by and/or vulnerable to the impacts of the plan or plan revision." *Id.* § 60.21a(l).

The States and Cities support making meaningful engagement with impacted communities and other stakeholders a state plan requirement. Such a requirement is consistent with the statutory design. Section 111(d) provides that EPA regulations are to follow a procedure similar to the development of state plans under section 110 of the Act, which expressly calls for "reasonable notice and public hearings." 42 U.S.C. §§ 7411(d)(1), 7410(a)(1). The proposed meaningful engagement and pertinent stakeholder definitions and requirements would help to implement the reasonable notice and public hearing language set forth in the statute by adding parameters designed to ensure that the input of affected communities and businesses is taken into account. In addition, EPA has authority to establish minimum criteria for public participation under its oversight role to ensure state plans are "satisfactory." *Id.* § 7411(d)(2).

Several of our states already require or regularly practice robust engagement with stakeholders concerning proposed agency actions. In recent years, these efforts have increasingly focused on making sure that communities that would be most impacted have opportunities to meaningfully participate.

For example, Massachusetts law directs the Department of Environmental Protection and other state agencies to consider environmental justice principles—including enhanced public outreach, transparency, meaningful involvement of all people with respect to development, implementation, and enforcement of environmental laws, regulations, and policies—in making policies or determinations under its state environmental review statute to reduce inequitable effects on environmental justice populations. *See* Section 56 of Chapter 8 of the Acts of 2021, *An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy (*Massachusetts Climate Roadmap Act) (amending G.L. c. 30, § 62); *see also id.* § 60 (adding G.L. c. 30, § 62J, to require enhanced public participation measures for projects affecting environmental justice populations). And as part of New York's implementation of its Climate Leadership and Community Protection Act—which will include rulemakings to limit greenhouse gas emissions from stationary and other sources—state agencies have been directed to address barriers disadvantaged communities may face by "provid[ing] meaningful opportunities for public input in government processes and proceedings." New York State Climate Action Council, *Scoping Plan: Full Report* (Dec. 2022) at 68.[2] Similarly, New Jersey's environmental justice law requires analysis of environmental and public health stressors in overburdened communities and has significant public participation requirements in connection with making permitting decisions on certain new and expanded facilities and renewals of existing major source air permits. *See* N.J.S.A. 13:1D-157 to -161. Therefore, we support the meaningful engagement concept and request

[2] Available at https://climate.ny.gov/-/media/project/climate/files/NYS-Climate-Action-Council-Final-Scoping-Plan-2022.pdf.

that EPA take existing state practices into account when it evaluates state plan submissions under section 111(d).

d. Regulatory Mechanisms for State Plan Implementation

To provide "useful flexibilities for states' and EPA's actions that help ensure emission reductions are appropriately and timely implemented," EPA proposes to adopt five regulatory mechanisms for use in implementing section 111(d) that it currently uses in administering section 110 of the Act. 87 Fed. Reg. at 79,192. These include:

- partial approval and disapproval of state plans
- conditional approval of state plans
- parallel processing of plans by EPA and states
- state plan calls
- error correction

Proposed 40 C.F.R. §§ 60.27a(b)(1)-(2), (i), (j).

We support these proposed changes, which give states and EPA flexibility to effectively and efficiently implement state plans under section 111(d). As EPA notes, in section 111(d), Congress expressly referenced the state implementation plan process under section 110 and directed the agency to adopt "similar" procedures in implementing section 111(d). 42 U.S.C. § 7411(d)(1).

e. Remaining Useful Life and Other Factors

Section 111(d) permits states in establishing standards of performance for existing facilities to take into account the remaining useful life of a specific facility as well as other factors. 42 U.S.C. § 7411(d)(1). With respect to federal plans, the statute requires EPA to take remaining useful life and other factors into account in establishing standards of performance for facilities. *Id.* § 7411(d)(2).

EPA proposes several additional requirements to guide states that decide to take into account remaining useful life and other factors in

establishing standards of performance for specific.[3] We discuss EPA's overall approach and rationale in subsection (1). In subsection (2), we discuss the agency's specific proposed revisions.

(1) Overall approach and rationale

The proposed changes stem from EPA's concerns that the current section 111(d) implementing regulations do not provide clear parameters for states on how and when they may apply remaining useful life or other factors to establish a less stringent standard for a particular facility. Specifically, without a clear analytical framework for applying remaining useful life and other factors, the current provision may be used by states to set less stringent standards that could effectively undermine the overall presumptive level of stringency envisioned by EPA's BSER determination. Furthermore, EPA's evaluation of whether each state plan is "satisfactory," including application of remaining useful life and other factors, must be generally consistent from one plan to another. Accordingly, if states do not have clear parameters on how to consider the remaining useful life and other factors, they face the risk of submitting plans that are inconsistent in achieving the standards and that EPA may not be able to consistently approve as satisfactory. 87 Fed. Reg. at 79,196-97.

To address these concerns, EPA's proposed revisions would tether the remaining useful life and other factors analysis to the statutory factors EPA considered in its BSER determination. This change would enable states to adjudge whether the application of the BSER factors to a particular designated facility is fundamentally different than the EPA determinations made to support the BSER and presumptive level of stringency in the emissions guideline. Under this approach, the

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[3] EPA has proposed parallel provisions in its supplemental proposed rule to limit methane emissions from new and existing oil and gas facilities. *See* 87 Fed. Reg. at 74,816-27. Many of the undersigned states and cities submitted similar comments on that supplemental proposal. *See* Comments of California, et al. on Standards of Performance for New, Modified, and Reconstructed Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review (Feb. 13, 2023) (EPA-HQ-OAR-2021-0317-2410).

remaining useful life and other factors generally would be applicable only for a subset of sources for which implementing the BSER would impose unreasonable costs or not be feasible due to unusual circumstances that are not applicable to the broader source category. EPA finds further legal support for this approach in variance procedures under other environmental statutes, such as the fundamentally different factors approach under the Clean Water Act. 87 Fed. Reg. at 79,197-98.

We agree that changes to help guide states in applying remaining useful life and other factors would improve consistency in EPA evaluations, promote equity among states, and further section 111's pollution reduction aims. We offer comments on the specific aspects of EPA's proposed changes below.

(2) Specific proposed revisions

EPA proposes several changes that would revise the way in which states apply remaining useful life and other factors in establishing standards of performance. Those changes include or relate to: threshold requirements, source-specific BSER, contingency requirements, retirement provisions, and consideration of impacts on local communities.

- ***Threshold requirements for considering remaining useful life and other factors***. The current regulations contain certain threshold criteria that must be triggered for a state to establish a less stringent standard based on the remaining useful life of a facility (or other factors). EPA proposes to retain the threshold requirements in the current regulations that refer to an unreasonable cost of control resulting from plant age, location, or basic process design or physical impossibility of installing necessary control equipment. But EPA proposes to modify the current "catchall" third criterion to apply if a state demonstrates that there are other factors specific to the facility (or class of facilities) "that are fundamentally different from the factors considered in the establishment of the emission guidelines."

Proposed 40 C.F.R. § 60.24a(e)(3). For example, if the state could demonstrate that the cost-per-ton of pollution reduction at a particular facility would be significantly higher than estimated by EPA in its BSER analysis, that facility may be evaluated for a less stringent standard. States would not be permitted to invoke the remaining useful life and other factors provision based on minor, non-fundamental differences. 87 Fed. Reg. at 79,199.

We support these proposed revisions to the threshold requirements for applying remaining useful life and other factors. The "fundamentally different" language adds clarification on applying the other factors criteria, is consistent with variance provisions in the Clean Water Act and other environmental laws, and would prevent widespread application of these factors, which could complicate implementation, result in foregone emission reductions, and undermine the level of stringency in the emissions guideline.

- ***Source-specific BSER***. EPA is proposing several requirements that would apply for calculation of a standard of performance that incorporates remaining useful life and other factors, including a source-specific BSER for the designated facility. The state plan submission would have to identify all control technologies available for the source and evaluate the BSER factors (cost, non-air quality health and environmental impacts, energy requirements, amount of reductions, and advancement of technology) for each technology. The standard would have to be in the same form (*e.g.*, numerical rate-based emission standard) as the presumptive standard. Proposed 40 C.F.R. § 60.24a(f).

  We support the source-specific BSER requirement. The BSER factors encompass all the information relevant to a state's determination of an appropriate emission standard for a facility to which the remaining useful life or other factors could properly apply.

- ***Contingency requirements***. Where a state seeks to rely on a designated facility's operational conditions—such as currently restricted capacity—as a basis for setting a less stringent standard, EPA proposes to require enforceable conditions for that facility in the state plan to address the scenario where a source's operations change. Proposed 40 C.F.R. § 60.24a(h). This requirement would address operating conditions such as operation times, operational frequency, process temperature and/or pressure, and other conditions subject to the discretion and control of the facility. 87 Fed. Reg. at 79,200-01.

  We support imposing contingency requirements in instances where a less stringent standard is based on an operational constraint within a facility's control. As EPA notes, in the absence of an enforceable requirement, a subsequent (unforeseen) change in a facility's operations could result in foregone emission reductions and undermine the level of stringency in the emissions guideline.

- ***Retirement provisions***. EPA is proposing certain requirements for when a state seeks to establish a less stringent standard on the ground that a designated facility has limited remaining useful life. First, EPA proposes to require that to qualify for a less stringent standard, the facility's retirement date must be no later than a date EPA has set forth in the emissions guideline or—if the emissions guideline contains no retirement date—a date determined by the state using the methodology and considerations provided by EPA. Proposed 40 C.F.R. § 60.24a(i)(1). Second, retiring facilities would need to have their retirement date included as a federally enforceable requirement and comply with a standard that corresponds to applying a reasonably achievable source-specific BSER. *Id.* § 60.24a(i)(3). EPA would exempt facilities that are retiring imminently, *i.e.*, about to retire in the near term relative to the compliance date in the emissions guideline. Such facilities would have to comply with a standard

that is no less stringent than one that reflects the designated facility's business as usual. EPA may also define in each emissions guideline the time frame that would constitute an imminent retirement. *Id.* § 60.24a(i)(2).

We support making retirement dates federally enforceable conditions and requiring that facilities that qualify for a less stringent standard due to remaining useful life be subject to a standard that corresponds to applying a reasonably achievable source-specific BSER. In addition, we support EPA's specifying in each emissions guideline what would constitute an "imminent" retirement to enable a facility to avoid having to meet such a standard.

- ***Consideration of impacted communities***. For situations in which a state seeks to consider a facility's remaining useful life in establishing a performance standard that would be less stringent than called for in the emissions guideline, EPA proposes to require that the state consider the potential health and environmental impacts on communities most affected by and vulnerable to the impacts from the facility. Proposed 40 C.F.R. § 60.24a(k). These communities would be identified by the state as pertinent stakeholders under the proposed meaningful engagement requirements. EPA explains that it has authority under section 111(d)'s "other factors" language and section 111(d)(2)'s general requirement that state plans be "satisfactory" to impose this requirement. 87 Fed. Reg. at 79,203.

  We support requiring states to consider impacts of less stringent standards on communities impacted by a facility. Congress's inclusion of the "other factors" language indicates that it envisioned that additional factors aside from remaining useful life could be relevant in determining the appropriate performance standard for individual facilities. Also, section 111(d)'s language directing that EPA "permit" states to consider remaining useful life indicates that the agency has some discretion regarding how

states can apply remaining useful life, among other factors, in establishing performance standards. Given that the purpose of regulating stationary source pollution under section 111 is to address emissions that endanger public health and welfare, requiring that states take into account how excess pollution (above the level reflected in application of the BSER) may impact the health and welfare of local communities furthers the statutory design. Finally, EPA's oversight authority in ensuring that state plans do a "satisfactory" job of adopting standards that reflect the degree of emission reduction from applying the BSER provides additional support for requiring that potential harms from exceeding the emissions guideline be adequately considered.

f. More Stringent State Plans

In addition to clarifying the parameters under which states may establish less stringent emission standards, EPA also proposes to change its approach in evaluating state plans that establish more stringent standards than called for in EPA's emissions guideline. In the ACE rule, EPA took the position that more stringent standards in state plans would not be federally enforceable and the agency further opined that it would likely disapprove of more stringent state plans. 84 Fed. Reg. at 32,559-60. Now, EPA proposes that states may include more stringent standards of performance in their state plans under section 111(d) and that EPA would have to approve such plans provided that they met the other plan submittal requirements. 87 Fed. Reg. at 79,204; *see* Proposed 40 C.F.R. § 60.24a(m). A state seeking to establish a more stringent standard would be required to adequately demonstrate its stringency, and would have to meet all other applicable plan requirements. *Id.*

We support EPA's changed approach. As EPA notes, there is nothing in the language of section 111(d) suggesting that the agency has the authority to preclude states from determining that it is appropriate to regulate certain sources within their jurisdiction more strictly than otherwise required by federal requirements. And the

inclusion of the "other factors" language in section 111(d) shows that Congress envisioned that states could consider additional circumstances—such as effects on local communities—in determining the appropriate level of standards of performance for specific facilities.

Furthermore, EPA's statement in the ACE rule that it would likely disapprove of state plans that were more stringent ran afoul of section 116, which expressly reserves the "right of any State . . . to adopt or enforce . . . any standard or limitation respecting emissions of air pollutants" as long as such standard or limitation is at least as stringent as one "in effect under an applicable implementation plan or under section 7411" of the Act. 42 U.S.C. § 7416. EPA's revised interpretation in the proposed rule also adopts the same approach to more stringent state plans that the Supreme Court endorsed in the section 110 context in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976). There, the Supreme Court held that EPA could not disapprove a section 110 state implementation plan on the grounds that it contained stricter emission standards than federally required, citing section 116 as supporting its interpretation of section 110. *Id.* at 264. In light of the similarities between the state plan processes under section 111(d) and section 110—and the former's cross reference to the latter—*Union Electric's* logic likewise applies to section 111(d) plans. Given the proposed rule's consistency with the statutory language and Supreme Court precedent, we urge EPA to incorporate these revisions into the final rule.

g. Electronic Submission

EPA proposes that state plan submissions be done electronically, rather than in paper format. 40 C.F.R. § 60.23a(a)(1).

We support this proposed change given that electronic submission is more convenient for state agencies.

h. Other Proposed Revisions

The proposed rule contains several other revisions to the implementing regulations. First, EPA proposes to revise the definition of "standard of performance" to expressly provide that such standards

may be in the form of an allowable mass limit of emissions. Proposed 40 C.F.R. § 60.21a(f). Second, EPA proposes to disagree with the ACE rule's conclusion that state plan compliance measures, including regulations that meet the standards of performance established by EPA, must always correspond with the approach that EPA uses to set the BSER. 87 Fed. Reg. at 79,206-08.

Regarding the revised definition of "standard of performance," we support amending the definition to clarify that mass-based limits are permissible where they otherwise satisfy plan criteria (especially the requirement that their stringency be equivalent to or greater than that of federal emissions guideline). We have had experience implementing state programs, such as those states involved in the Regional Greenhouse Gas Initiative, that set emission limitations using a mass-based approach, *e.g.*, tons of carbon pollution. We believe that well-designed mass-based emission limits can work well for pollutants such as greenhouse gas emissions, and can be easier for sources to implement and for states to monitor compliance.

With respect to emissions trading and averaging, we concur that the ACE rule improperly restricted state (and facility) compliance flexibilities when it precluded trading and averaging in state plans. EPA's role is to determine the BSER and the degree of limitation achievable from applying the BSER. 42 U.S.C. § 7411(a)(1). EPA lacks the authority to mandate that state plans require facilities to adopt the BSER or any specific measure EPA may favor. Provided that state plans will achieve the necessary emission reductions established in the emissions guideline, section 111(d) affords states flexibility in how to achieve those reductions.

And, as EPA notes, the flexibility that section 111(d) gives to states in establishing standards of performance is not unfettered: section 111(d)(2) requires EPA to evaluate state plans to ensure that they are satisfactory. In addition, section 116's reservation of state authority to adopt equally (or more) stringent standards may not apply in a situation in which the use of emissions trading or averaging would result in the creation (or continuation) of a pollution hotspots, as such

trading-based standards may not in that case "reflect the degree of emission reduction achievable through application of the best system of emission reduction." 42 U.S.C. § 7411(a). EPA's proposed interpretation that emissions trading and averaging are permissible compliance tools where they are "consistent with the intended environmental outcomes of the guideline," 87 Fed. Reg. at 79,208, strikes the right balance recognized in the statute.

Finally, although we agree with EPA that the D.C. Circuit correctly concluded that the ACE rule's inside-the-fenceline statutory interpretation was erroneous, 87 Fed. Reg. at 79,208, we do not believe it is necessary for EPA to adopt this position in this rulemaking in order to justify its position on trading and averaging discussed above.

Conclusion

EPA's proposed revisions to its section 111(d) implementing regulations would improve transparency in the state plan process while promoting the statute's goal of protecting public health and welfare from stationary source pollution. We support the proposed revisions, and urge EPA to finalize them promptly.

Sincerely,

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