ORAL ARGUMENT NOT YET SCHEDULED

Case No. 24-1009

United States Court of Appeals
for the District of Columbia Circuit

WEST VIRGINIA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PROOF BRIEF OF STATE RESPONDENT-INTERVENORS

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Dated: September 16, 2024

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties

Petitioners

The following parties appear in these cases as petitioners: State of West Virginia, State of Alabama, State of Alaska, State of Arkansas, State of Georgia, State of Idaho, State of Indiana, State of Iowa, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of Nebraska, State of North Dakota, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of Texas, State of Utah, Commonwealth of Virginia, State of Wyoming, Arizona Legislature, and the Texas Commission on Environmental Quality.

Respondents

The United States Environmental Protection Agency ("EPA") and Michael S. Regan, EPA Administrator, are respondents in these consolidated cases.

Intervenors

Intervenor-respondents in this matter include: State of New York, State of California, State of Colorado, State of Hawai'i, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of Minnesota, State of New Jersey, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, State of Wisconsin, the District of Columbia, Clean Air Council, Clean Wisconsin, Dakota Resource Council, Environmental Defense Fund, Ft. Berthold Protectors of Water and Earth Rights. GreenLatinos, Natural Resources Defense Council, and Sierra Club.

B. Ruling Under Review

The agency action under review is a rule entitled "Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d)," published at 88 Fed. Reg. 80,480 (Nov. 17, 2023).

C. Related Cases

The rule at issue has not been previously reviewed in this or any other court and there are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
Rule	Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), published at 88 Fed. Reg. 80,480 (Nov. 17, 2023)
State Intervenors	New York, California, Colorado, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia
State Petitioners	West Virginia, Oklahoma, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming, Arizona Legislature, Texas Commission on Environmental Quality

PRELIMINARY STATEMENT

This case involves a challenge to an Environmental Protection Agency rule that governs state plans under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). Under Section 111(d), EPA establishes an overall level of certain pollution allowable for a category of stationary sources, and States prepare plans to establish standards for individual existing sources. The rule challenged here amends previous EPA regulations on the procedure for States to prepare those plans.

State Intervenors disagree with State Petitioners that the challenged rule deprives States of the ability to consider facility-specific factors or sets an unrealistic deadline for state plans. Because the rule faithfully implements the statute's cooperative-federalism approach, the petition for review should be denied.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions not included with State Petitioners' or EPA's briefs are contained in the Addendum with this brief.

STATEMENT OF THE CASE

A. SECTION 111

Section 111 of the Clean Air Act requires EPA to limit pollution from any source category that EPA determines "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). The statute refers to those emission limits as "standards of performance," defined as 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 nonair quality health and environmental impacts and energy requirements) the Administrator determines has been adequately demonstrated." *Id.* § 7411(a)(1).

Section 111(b) requires EPA to establish standards of performance for new stationary sources. *Id.* § 7411(b)(1)(B). Once EPA establishes performance standards for new stationary sources, it must issue emission guidelines for the control of certain types of air pollutants—those not regulated as criteria or hazardous air pollutants—from existing sources in the same category. *See id.* § 7411(d)(1). Although EPA promulgates standards of performance under Section 111(b) that directly apply to new

sources, States establish standards of performance for existing sources under Section 111(d). *Id.* Those standards are informed by EPA's emission guidelines, which include EPA's determination of the best system of emission reduction for the source category and the degree of emission limitation achievable through applying the best system. *West Virginia v. EPA*, 597 U.S. 697, 709-10 (2022).

The statute instructs EPA to issue regulations that establish a procedure under which States submit plans stating how they intend to establish and enforce standards for existing sources. 42 U.S.C. § 7411(d)(1). Those procedures are to be "similar" as under Section 110 of the Act, which governs state plans to implement the National Ambient Air Quality Standards (NAAQS). *Id.* (citing 42 U.S.C. § 7410). In the 1977 Clean Air Act amendments, Congress amended Section 111(d) to provide that EPA's regulations "shall permit" States—in establishing a standard of performance for a particular source—"to take into consideration, among other factors, a source's remaining useful life." Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 109(b)(1), 91 Stat. 685, 699. This language tracked EPA's regulations at the time, which allowed States to set performance standards that varied from EPA's emission

guidelines based on, among other things, unreasonable cost of control resulting from plant age. *See infra* at 4.

Section 111(d) delegates to EPA an important oversight role to ensure state plans are "satisfactory" in meeting Section 111(d) requirements. 42 U.S.C. § 7411(d)(2)(A). If a State fails to submit a plan or EPA determines that a state plan is not satisfactory, EPA must promulgate a federal plan to regulate those sources. *Id.*

B. THE RULE

In 1975, EPA issued its first implementing regulations to govern Section 111(d) plans. 40 Fed. Reg. 53,340 (Nov. 17, 1975). Among other things, those regulations required States to submit plans within nine months after publication of EPA's emission guidelines. *See* 40 C.F.R. § 60.23(a)(1). The regulations also included criteria for States to use on a case-by-case basis to determine whether a less stringent emission standard or longer compliance schedule than in EPA's emission guidelines was justified for a particular source. Those criteria included: (1) unreasonable cost of control resulting from plant age, location, or basic process design, (2) physical impossibility of installing pollution controls, or (3) other facility-specific factors that made application of a less

stringent standard or longer compliance schedule significantly more reasonable. *Id.* § 60.24(f).

In 2019, as part of its Affordable Clean Energy (ACE) rule, EPA revised the time period for state plan reviews, including significantly lengthening the time period for state plan submission, from nine months to three years. *See* 84 Fed. Reg. 32,520, 32,568 (July 8, 2019). This Court 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*, 597 U.S. 697 (2022). Specifically, this Court held that (i) EPA erred in adopting the same deadline in Section 111(d) for state plan submittal as in Section 110 of the Act without meaningfully addressing the differences in the scale of effort required for development of those respective plans; (ii) EPA failed to justify why the existing deadline for state plans was unworkable; and (iii) EPA failed to consider the public health and welfare implications of its longer timelines. *Id.* at 992-95.

To "address the vacatur of the timing provisions by the D.C. Circuit in [*American Lung Association*], and to further improve the state and Federal plan development and implementation process," EPA proposed

to revise the implementing regulations. *See* 87 Fed. Reg. 79,176, 79,180 (Dec. 23, 2022). EPA finalized the rule at issue in this case the following year. *See* 88 Fed. Reg. 80,480 (Nov. 17, 2023) (Rule). The Rule includes the following provisions relevant here:

Remaining useful life and other factors. EPA clarified the circumstances under which States may consider remaining useful life and other factors in standard-setting for specific sources. *See* 40 C.F.R. § 60.24a(e), (f). A State must show fundamental differences between facility-specific circumstances and the information EPA considered in its emission guidelines before the State may apply a less stringent standard or longer compliance schedule. *Id.* § 60.24a(e)(2). A State may show such fundamental differences based on unreasonable cost of control, physical impossibility, or other facility-specific circumstances. *Id.* § 60.24a(e)(1).

Timing of state plan process. The Rule establishes an eighteen-month deadline for a State to submit its plan following EPA's issuance of emission guidelines. *See* 40 C.F.R. § 60.23a(a)(1). The eighteen-month deadline is a default, and EPA may set a longer deadline in the emission guidelines for a particular category of sources. *Id.*

Regulatory mechanisms for state plan implementation. The Rule takes several tools EPA currently uses in reviewing state implementation plans under Section 110 of the Act—such as partial approvals and conditional approvals—and makes those tools available to implement Section 111(d) plans as well. *See* 88 Fed. Reg. at 80,503; 40 C.F.R. § 60.27a(b), (c), (h)-(j).

Since the Rule was issued, EPA has published two emission guidelines under Section 111(d): one for oil and gas facilities, 89 Fed. Reg. 16,820 (Mar. 8, 2024) and the other for fossil-fueled power plants, 89 Fed. Reg. 39,798 (May 9, 2024). In both guidelines, EPA determined that a slightly longer time frame (two years) was warranted for state plan preparation. *See* 89 Fed. Reg. at 17,010; 89 Fed. Reg. at 39,997.

State Petitioners filed suit in January 2024 (ECF#2036191), and now challenge the Rule's provisions regarding remaining useful life, timing for state plan submittal, and regulatory mechanisms for state plan implementation.

SUMMARY OF ARGUMENT

1. Section 111(d)'s text and history, as well as relevant precedent, support the Rule's requirement that States identify fundamental differences with EPA's best-system determination before establishing less stringent standards for a particular source. Under Section 111(d), EPA's regulations "shall permit" States "to take into consideration" the remaining useful life of a particular source and other factors. The Rule does so by permitting States to consider the remaining useful life of a particular source by identifying fundamental differences as to that source's cost, feasibility of control, or other site-specific circumstances compared to other sources in the category. Contrary to State Petitioners' contention, Section 111(d)'s "shall permit" language requires only that EPA's regulations allow States "to take into consideration" remaining useful life and other factors, and does not dictate *how* EPA must do so.

In the 1977 amendments to the Act, upon which State Petitioners rely, Congress did not adopt specific aspects of EPA's existing implementing regulations and reject others. Instead, Congress directed EPA to enable States "to take into consideration" remaining useful life and other factors, which the agency has done here. Petitioners also

distort the extent of discretion that States have under the Act. The Supreme Court made clear in *West Virginia* that EPA, not the States, decides the level of pollution reduction that state plans must achieve. The fundamental-differences requirement implements EPA's primary role while giving States flexibility where facility-specific consideration is warranted.

2. The Rule's default deadline of eighteen months for state plan submittals is also consistent with the statute. Consistent with this Court's decision in *American Lung Association*, EPA articulated how the deadline strikes a balance between ensuring prompt pollution reduction and manageable administrative burdens on States. Moreover, the Rule enables EPA to supersede the default deadline in any emission guidelines for a category of sources, and the agency has demonstrated a willingness to provide States with additional time where necessary.

ARGUMENT

State Petitioners' challenges to the Rule's remaining useful life and deadline provisions are meritless. The Rule is consistent with

Section 111(d) and EPA reasonably explained its rationale for adopting those provisions.[1]

I. THE RULE PERMITS STATES TO CONSIDER FACILITY-SPECIFIC FACTORS IN SETTING STANDARDS FOR PARTICULAR SOURCES.

Contrary to State Petitioners' arguments, the Rule's remaining useful life provision is consistent with the statute's text, history, and case precedent.

A. The Rule Enables States to Take Into Consideration the Remaining Useful Life of a Particular Source.

Section 111(d)(1) provides in relevant part that:

> [r]egulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph *to take into consideration*, among other factors, the remaining useful life of the existing source to which such standard applies.

42 U.S.C. § 7411(d)(1) (emphasis added). Since 1975, EPA's regulations have enabled States to consider a source's remaining useful life via two specific factors—unreasonable cost of pollution control and physical impossibility of installing controls—and a third catchall criterion

[1] State Intervenors also agree that EPA lawfully adopted, in the Section 111(d) context, implementation tools that EPA currently uses under Section 110 of the Act.

concerning other factors specific to the facility. *See* 40 C.F.R. § 60.24(f) (1975); *id.* § 60.24a(e) (2019). For the catchall factor to apply, the previous regulations required States to show that a facility-specific factor made applicability of a less stringent standard "significantly more reasonable." 40 C.F.R. § 60.24(f)(3) (1975); 40 C.F.R § 60.24a(e)(3) (2019).

In the Rule, EPA retained the longstanding principle that facility-specific factors must be meaningful, through revised language: States must now identify "fundamental differences" between the information specific to the facility and the information EPA considered in determining the degree of emission limitation achievable through application of the best system of emission reduction. 40 C.F.R. § 60.24a(e)(2). And rather than requiring a demonstration that a less stringent standard would be "significantly more reasonable," States must now explain that the fundamental differences make achieving the degree of emission limitation in the emission guidelines "unreasonable" for that facility. *Id.* EPA explained that the change was necessary because the "significantly more reasonable" language was "vague and potentially open-ended." 88 Fed. Reg. at 80,514. EPA further explained that the revised approach would "provide more objective and consistent criteria that will aid both

states and the EPA in developing and reviewing standards of performance consistent with CAA section 111(d), as well as ensure the equitable treatment of states and sources that avail themselves of the [remaining useful life] provision." *Id.* at 80,514-15. Thus, although the Rule changed *how* States apply the remaining useful life criteria, it still follows Section 111(d)'s requirement that EPA's regulations permit States to take into consideration remaining useful life in establishing standards of performance.

State Petitioners argue that the "fundamental differences" requirement is inconsistent with the statutory text, suggesting that the statute's "shall permit" language means EPA must defer to any state decision to establish a more lenient standard based on a source's remaining useful life. *See* Pet'rs' Prelim. Opening Br. ("Br.") 15-16. But the statute directs only that EPA's regulations permit States "to take into consideration" other factors, such as remaining useful life; it does not dictate how EPA sets parameters for that consideration. *See* 42 U.S.C. § 7411(d)(1). Congress's choice of language—coupled with directing EPA to adjudge whether state plans are "satisfactory," *id.* § 7411(d)(2)(A)—reflects a balance between ensuring that States adequately control

dangerous pollution from existing sources and acknowledging that a State may be aware of source-specific considerations warranting a less stringent standard. *See West Virginia*, 597 U.S. at 710 (EPA decides the overall level of pollution reduction that states plans must achieve).

State Petitioners contend (Br. 15) that Section 111(d)'s language is analogous to the law in *Board of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987), which required the parole board to grant parole "if certain findings were made." But Section 111(d) is structured differently: it requires EPA to allow States to take into account a source's remaining useful life, but does not require EPA to accept the States' determination about what result must occur. As the Supreme Court has explained, under Section 111(d) and EPA's implementing regulations, "EPA *may* [not "must"] permit state plans to deviate from generally applicable emissions standards upon demonstration that costs are 'unreasonable.'" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011) (emphasis and bracketed words added). When a statute directs or requires the government to allow an activity, the statute typically permits the government to put reasonable conditions on the exercise of that authority. For example, a statute that directs that a prosecutor "'shall

permit . . . defense counsel to examine . . . [any] tangible objects . . . material to the preparation of the defense,'" would ordinarily permit the government to provide access only at specified times and places. *See In re al Baluchi*, 952 F.3d 363, 370 (D.C. Cir. 2020) (quoting R.M.C. 701(c)). Section 111(d) similarly contemplates that remaining useful life decisions by States will be subject to reasonable restrictions that EPA is congressionally authorized to set. That reading also aligns with EPA's oversight role, discussed above, to ensure that state plans are "satisfactory," including that the standards a State sets for an individual source comply with the level of reduction in EPA's emission guidelines. *See* 42 U.S.C. § 7411(d)(1), (2)(A); *West Virginia*, 597 U.S. at 710.[2]

State Petitioners also argue (Br. 17) that Section 111(d) lacks Section 191(b)(1)'s express requirement that state pollution control determinations be made "pursuant to . . . [EPA] guidelines." But while

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[2] State Petitioners' citation to the language in Section 209(e)(2)(A) of the Clean Air Act, which authorizes California to regulate emissions from nonroad engines or vehicles separate and apart from the federal nonroad program (Br. 16), is wholly inapposite. That provision directs EPA to grant authorization where California determines its standards are, in the aggregate, at least as protective as federal standards, unless the record establishes that one of three statutory exceptions applies. *See* 42 U.S.C. § 7543(e)(2)(A). It has no bearing at all on how EPA reviews state plans to meet a federal standard or guideline.

Section 191(b)(1) provides that the best available retrofit technology is to be "determined by *the State*," 42 U.S.C. § 7491(b)(2)(A) (emphasis added), Section 111(d) provides that a State establishes standards based on the degree of emission reduction applying the best system of emission reduction "the *Administrator* determines," *id.* § 7411(a)(1) (emphasis added). Thus, the "primary regulatory role" for States that is built into Section 191 is not merely absent from Section 111(d), it is assigned to EPA. *See West Virginia*, 597 U.S. at 710.[3]

By contrast, while Section 111(d) says that a State may "take into consideration" remaining useful life to justify more *lenient* standards, Section 116 of the Act unequivocally allows a State to impose more *stringent* emission standards, including under Section 111. It expressly reserves the "right of any State . . . to adopt or enforce . . . any standard or limitation respecting emissions of air pollutants" so long as such standard or limitation is at least as stringent as one "in effect under an

[3] State Petitioners' other two statutory examples (Br. 16) undercut their position because those provisions (42 U.S.C. §§ 7475(e)(3) and 13235(a)(1)) simply contain language requiring EPA to promulgate specific types of regulations. As explained above, the Rule does so by "establish[ing] a procedure" for States "to take into consideration, among other factors, the remaining useful life of the existing source." 42 U.S.C. § 7411(d)(1).

applicable implementation plan or under section [7411]" of the Act. 42 U.S.C. § 7416. As EPA correctly noted in the Rule, in light of this unequivocal language, the agency lacks the authority to reject more stringent state standards included in Section 111(d) plans. *See* 88 Fed. Reg. at 80,529 (citing *Union Elec. Co. v. EPA*, 427 U.S. 246, 263-64 (1976)). The Rule thus correctly respects the policy decisions Congress has already made regarding the ability of States to set different standards than EPA, consistent with Section 111(d)'s aim of reducing dangerous pollution from existing stationary sources.

B. The Rule Is Consistent with Section 111(d)'s History and Precedent.

State Petitioners contend (Br. 18) that the history of Section 111(d) supports their view that the "fundamental differences" language is unlawful. Specifically, they argue that, when Congress codified the remaining useful life concept as part of the 1977 amendments to the Act, it "reject[ed]" language in EPA's then-existing regulations that States demonstrate that a less stringent standard would be "significantly more reasonable" than the level of reduction called for in EPA's guidelines. Br. 19.

State Petitioners are mistaken. The 1977 amendments did not adopt some certain regulatory provisions and reject others. Rather, the amendments directed EPA to issue regulations that enabled States "to take into consideration" remaining useful life and other factors. 42 U.S.C. § 7411(d)(1). Indeed, if State Petitioners were correct, then provisions of the 1975 regulations that they favor—including the ability to adopt a less stringent standard based on "[u]nreasonable cost of control resulting from plant age, location, or basic process design," 40 C.F.R. § 60.24(f)(1)—would also have been "rejected" by Congress because they were not enacted into statute. Nor do State Petitioners identify any indication in the legislative history that Congress viewed the "significantly more reasonable" language in a different light from the other specific regulatory language it did not codify in Section 111(d).[4]

State Petitioners next argue (Br. 20) that the "fundamental differences" language runs afoul of precedent recognizing the "wide

[4] Moreover, EPA did not understand that Congress had rejected the "significantly more reasonable" language, which continued to be in EPA's regulations until replaced by the Rule last year. And State Petitioners did not bring a legal challenge to that language in the regulations despite it being in effect for more than forty years following passage of the 1977 Amendments.

discretion" that States enjoy under Section 111(d). State Petitioners cite *West Virginia* for the proposition that "States set the actual rules" for existing sources, *id.* at 15 (citing *West Virginia,* 597 U.S. at 710), but ignore the Supreme Court's statements in *West Virginia* that EPA "retains the primary regulatory role in Section 111(d)" and "[t]he Agency, *not the States*, decides the amount of pollution reduction that must ultimately be achieved" through state plans. *West Virginia*, 597 U.S. at 710 (emphasis added). The Court has thus already rejected the idea that States have more expansive discretion under Section 111(d). And the Court's understanding aligns with Congress's directive that EPA ensure state plans are "satisfactory"—including that the standards States set for individual sources comply with the level of reduction in EPA's emission guidelines, or reasonably explain why a more lenient standard is necessary under the circumstances. *See* 42 U.S.C. § 7411(d)(1), (2)(A).

Contrary to State Petitioners' assertion (Br. 15), *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) does not stand for the proposition that EPA must defer to a State's reasoned decision-making on pollution standards. In that case, the Supreme Court held that Congress's interest in ensuring a baseline level

of pollution reduction under the Act's New Source Review program, as embodied through EPA oversight of permitting decisions made by state agencies, trumped a state's decision on a lesser form of pollution control. *See id.* at 490. Here, Section 111(d)(2)(A) fulfills a similar purpose by requiring EPA to ensure that each State's plan satisfactorily controls existing source pollution.

As EPA notes in its brief, under State Petitioners' contrary view, a State could "even [set] standards that would allow a source to increase its emissions." EPA Br. 32. That is not an exaggeration. One need look no further than the Section 111(d) plan that West Virginia's environmental agency submitted in 2020, which would have allowed a coal-fired power plant to *increase* its greenhouse gas emissions compared to its historical emission rate. *See* 89 Fed. Reg. at 39,838 (discussing West Virginia agency's proposed plan). State Petitioners' contention that they merely are seeking a ruling from this Court upholding "reasonable" state determinations (Br. 21) rings hollow.[5]

[5] Furthermore, State Petitioners fail to identify any examples of less stringent standards in state plans approved by EPA under the prior regulations that are unlikely to be approved under the "fundamental differences" language. Indeed, State Petitioners do not even pose any

This Court's decision in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) is also inapposite. State Petitioners argue that, as in *Michigan*, EPA has impermissibly shifted the burden of persuasion to States under the statute. Br. 21-22. In *Michigan*, this Court held that EPA erred in interpreting the statute's "good neighbor" provision when it shifted the burden to upwind States to demonstrate that they were not contributing to air quality problems in downwind States. *See Michigan*, 213 F.3d at 683-84. But nothing analogous occurred in the Rule. Because the Act expressly authorizes EPA to determine whether a state plan is satisfactory, 42 U.S.C § 7411(d)(2)(A), States have always had, and continue to have, a responsibility to make an affirmative showing that a less stringent standard than EPA's emission guidelines is justified. The Rule merely clarifies how that showing may be made.

II. EPA REASONABLY EXPLAINED THE EIGHTEEN-MONTH DEFAULT DEADLINE FOR SUBMITTING STATE PLANS.

State Petitioners further argue that the Rule's default deadline for state plan submissions—eighteen months after publication of an EPA

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hypothetical instances in which they believe a State's "reasoned analysis" would not pass muster under the Rule.

emissions guideline—is arbitrary and capricious. WV Br. 31. But, consistent with this Court's decision in *American Lung Association*, EPA reasonably explained how that deadline—and a related regulatory provision that enables EPA to provide states with additional time as necessary—strikes a reasonable balance between ensuring prompt pollution reduction and manageable administrative burdens on States.

In *American Lung Association*, this Court vacated the ACE rule's three-year deadline for state plans, finding that EPA had failed to consider the "central purpose of Section 7411(d) of the Clean Air Act," namely the "[c]ontrol of emissions from existing sources before they harm people and the environment," when it extended the previous nine-month deadline to three years. *American Lung Ass'n,* 985 F.3d at 993. In the Rule, after analyzing previous state plan submissions, EPA chose an eighteen-month deadline "based on the minimum administrative time reasonably necessary for each step in the implementation process." 88 Fed. Reg. at 80,486. The agency explained that this timeframe "represents a reasonable balance between providing states sufficient time to develop and submit a plan that satisfies the applicable requirements and ensuring that the emission reductions contemplated in

an [emission guideline] are achieved as expeditiously as practicable." *Id.* at 80,488.

Ignoring EPA's well-reasoned decision-making, State Petitioners contend (Br. 40-43) that Congress envisioned a three-year deadline. They cite Section 111(d)'s language that procedures for state plans be "similar" to those for state implementation plans under Section 110(a)(1), which in turn requires submissions "within 3 years (or such shorter period as the Administrator may prescribe)." But, as State Petitioners concede, Section 111(d) does not mention a specific timeframe for submitting state plans. And, as this Court found EPA failed to do when it adopted that three-year time frame in the ACE rule, West Virginia similarly "fail[s] to engage meaningfully with the different scale of the two types of plans." *American Lung Ass'n*, 985 F.3d at 993.

For example, while Section 111(d) plans apply only to a single category of sources, state implementation plans under Section 110 cover multiple types of sources. *Id.* at 992. Moreover, unlike Section 111(d) plans, Section 110 plans "must ensure that ambient air concentrations of a given pollutant in the state will stay below the EPA-designated standard," *id.*, as well as prevent pollution from significantly

contributing to nonattainment in downwind States, 42 U.S.C. § 7410(a)(2)(D)(i). And unlike Section 111(d)'s process of setting emission standards for the same types of sources using EPA's emission guidelines, Section 110's process requires consideration of several (sometimes many) different sources of the pollutant and "involve[] air quality monitoring, complex modeling procedures, close attention to such factors as topography, wind patterns, cross-[border] transport of air pollution, and many other considerations." *See American Lung Ass'n,* 985 F.3d at 992-93 (citation and internal quotations omitted). West Virginia fails to acknowledge these important distinctions.

West Virginia also ignores an important feature of the regulations that can provide States with additional time to prepare their plans. Specifically, EPA retained the provision from its previous regulations that enables it to adjust the default state plan deadline as necessary when it issues emission guidelines for a particular source category. 88 Fed. Reg. at 80,488 (citing 40 C.F.R. § 60.20a(1)). Adjusting the deadline may be appropriate, for example, where the emission guidelines apply to a large number of sources or require States to perform extensive analysis. *See id.* at 80,486-87. As noted above, in the two emission

guidelines EPA has promulgated since it finalized the Rule—regulating methane from oil and gas facilities and carbon dioxide from power plants—EPA invoked this provision in lengthening the state plan timeline to 24 months. *See* 89 Fed. Reg. at 17,010 (citing the potential need for States to conduct "engineering and/or economic analyses" in setting standards for oil and gas sources and/or to demonstrate equivalency of existing state regulations); *id.* at 39,997 (noting that power plants are "a relatively complex source category" and that state plans "will require significant analysis, consultation, and coordination between states, utilities, reliability authorities, and the [plant] owners"). Given EPA's ability—and demonstrated willingness—to provide States additional time to prepare state plans as warranted, the Rule's eighteen -month default deadline is reasonable.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Dated: Albany, New York
September 16, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Michael J. Myers, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's briefing schedule order dated April 24, 2024. According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 4,543 words. This amount, combined with the 4,544-word brief filed by Environmental and Public Health Respondent-Intervenors, does not exceed 9,100 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook.

/s/ Michael J. Myers

MICHAEL J. MYERS

CERTIFICATE OF SERVICE

I certify that on September 16, 2024, the foregoing Proof Brief of State Intervenor-Respondents was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

/s/ Michael J. Myers

MICHAEL J. MYERS

STATUTORY AND REGULATORY ADDENDUM

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judgment of the Administrator, have been adequately demonstrated.

(3) Information on the degree of emission limitation which is achievable with each system, together with information on the costs, nonair quality health environmental effects, and energy requirements of applying each system to designated facilities.

(4) Incremental periods of time normally expected to be necessary for the design, installation, and startup of identified control systems.

(5) The degree of emission limitation achievable through the application of the best system of emission reduction (considering the cost of such achieving reduction and any nonair quality health and environmental impact and energy requirements) that has been adequately demonstrated for designated facilities, and the time within which compliance with standards of performance can be achieved. The Administrator may specify different degrees of emission limitation or compliance times or both for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, or similar factors make subcategorization appropriate.

(6) Such other available information as the Administrator determines may contribute to the formulation of State plans.

(c) The emission guidelines and compliance times referred to in paragraph (b)(5) of this section will be proposed for comment upon publication of the draft guideline document, and after consideration of comments will be promulgated in subpart C of this part with such modifications as may be appropriate.

§ 60.23a Adoption and submittal of State plans; public hearings.

(a)(1) Unless otherwise specified in the applicable subpart, within three years after notice of the availability of a final emission guideline is published under § 60.22a(a), each State shall adopt and submit to the Administrator, in accordance with § 60.4, a plan for the control of the designated pollutant to which the emission guideline applies.

(2) At any time, each State may adopt and submit to the Administrator any plan revision necessary to meet the requirements of this subpart or an applicable subpart of this part.

(b) If no designated facility is located within a State, the State shall submit a letter of certification to that effect to the Administrator within the time specified in paragraph (a) of this section. Such certification shall exempt the State from the requirements of this subpart for that designated pollutant.

(c) The State shall, prior to the adoption of any plan or revision thereof, conduct one or more public hearings within the State on such plan or plan revision in accordance with the provisions under this section.

(d) Any hearing required by paragraph (c) of this section shall be held only after reasonable notice. Notice shall be given at least 30 days prior to the date of such hearing and shall include:

(1) Notification to the public by prominently advertising the date, time, and place of such hearing in each region affected. This requirement may be satisfied by advertisement on the internet;

(2) Availability, at the time of public announcement, of each proposed plan or revision thereof for public inspection in at least one location in each region to which it will apply. This requirement may be satisfied by posting each proposed plan or revision on the internet;

(3) Notification to the Administrator;

(4) Notification to each local air pollution control agency in each region to which the plan or revision will apply; and

(5) In the case of an interstate region, notification to any other State included in the region.

(e) The State may cancel the public hearing through a method it identifies if no request for a public hearing is received during the 30 day notification period under paragraph (d) of this section and the original notice announcing the 30 day notification period states that if no request for a public hearing is received the hearing will be cancelled; identifies the method and time for announcing that the hearing has been cancelled; and provides a contact phone number for the public to call to find out if the hearing has been cancelled.

(f) The State shall prepare and retain, for a minimum of 2 years, a record of each hearing for inspection by any interested party. The record shall contain, as a minimum, a list of witnesses together with the text of each presentation.

(g) The State shall submit with the plan or revision:

(1) Certification that each hearing required by paragraph (c) of this section was held in accordance with the notice required by paragraph (d) of this section; and

(2) A list of witnesses and their organizational affiliations, if any, appearing at the hearing and a brief written summary of each presentation or written submission.

(h) Upon written application by a State agency (through the appropriate Regional Office), the Administrator may approve State procedures designed to insure public participation in the matters for which hearings are required and public notification of the opportunity to participate if, in the judgment of the Administrator, the procedures, although different from the requirements of this subpart, in fact provide for adequate notice to and participation of the public. The Administrator may impose such conditions on his approval as he deems necessary. Procedures approved under this section shall be deemed to satisfy the requirements of this subpart regarding procedures for public hearings.

§ 60.24a Standards of performance and compliance schedules.

(a) Each plan shall include standards of performance and compliance schedules.

(b) Standards of performance shall either be based on allowable rate or limit of emissions, except when it is not feasible to prescribe or enforce a standard of performance. The EPA shall identify such cases in the emission guidelines issued under § 60.22a. Where standards of performance prescribing design, equipment, work practice, or operational standard, or combination thereof are established, the plan shall, to the degree possible, set forth the emission reductions achievable by implementation of such standards, and may permit compliance by the use of equipment determined by the State to be equivalent to that prescribed.

(1) Test methods and procedures for determining compliance with the standards of performance shall be specified in the plan. Methods other than those specified in appendix A to this part or an applicable subpart of this part may be specified in the plan if shown to be equivalent or alternative methods as defined in § 60.2.

(2) Standards of performance shall apply to all designated facilities within the State. A plan may contain standards of performance adopted by local jurisdictions provided that the standards are enforceable by the State.

(c) Except as provided in paragraph (e) of this section, standards of performance shall be no less stringent than the corresponding emission guideline(s) specified in subpart C of this part, and final compliance shall be required as expeditiously as practicable, but no later than the compliance times specified in an applicable subpart of this part.

(d) Any compliance schedule extending more than 24 months from the date required for submittal of the

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plan must include legally enforceable increments of progress to achieve compliance for each designated facility or category of facilities. Unless otherwise specified in the applicable subpart, increments of progress must include, where practicable, each increment of progress specified in § 60.21a(h) and must include such additional increments of progress as may be necessary to permit close and effective supervision of progress toward final compliance.

(e) In applying a standard of performance to a particular source, the State may take into consideration factors, such as the remaining useful life of such source, provided that the State demonstrates with respect to each such facility (or class of such facilities):

(1) Unreasonable cost of control resulting from plant age, location, or basic process design;

(2) Physical impossibility of installing necessary control equipment; or

(3) Other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable.

(f) Nothing in this subpart shall be construed to preclude any State or political subdivision thereof from adopting or enforcing:

(1) Standards of performance more stringent than emission guidelines specified in subpart C of this part or in applicable emission guidelines; or

(2) Compliance schedules requiring final compliance at earlier times than those specified in subpart C of this part or in applicable emission guidelines.

§ 60.25a Emission inventories, source surveillance, reports.

(a) Each plan shall include an inventory of all designated facilities, including emission data for the designated pollutants and information related to emissions as specified in appendix D to this part. Such data shall be summarized in the plan, and emission rates of designated pollutants from designated facilities shall be correlated with applicable standards of performance. As used in this subpart, ''correlated'' means presented in such a manner as to show the relationship between measured or estimated amounts of emissions and the amounts of such emissions allowable under applicable standards of performance.

(b) Each plan shall provide for monitoring the status of compliance with applicable standards of performance. Each plan shall, as a minimum, provide for:

(1) Legally enforceable procedures for requiring owners or operators of designated facilities to maintain records and periodically report to the State information on the nature and amount of emissions from such facilities, and/or such other information as may be necessary to enable the State to determine whether such facilities are in compliance with applicable portions of the plan. Submission of electronic documents shall comply with the requirements of 40 CFR part 3 (Electronic reporting).

(2) Periodic inspection and, when applicable, testing of designated facilities.

(c) Each plan shall provide that information obtained by the State under paragraph (b) of this section shall be correlated with applicable standards of performance (see § 60.25a(a)) and made available to the general public.

(d) The provisions referred to in paragraphs (b) and (c) of this section shall be specifically identified. Copies of such provisions shall be submitted with the plan unless:

(1) They have been approved as portions of a preceding plan submitted under this subpart or as portions of an implementation plan submitted under section 110 of the Act; and

(2) The State demonstrates:

(i) That the provisions are applicable to the designated pollutant(s) for which the plan is submitted, and

(ii) That the requirements of § 60.26a are met.

(e) The State shall submit reports on progress in plan enforcement to the Administrator on an annual (calendar year) basis, commencing with the first full report period after approval of a plan or after promulgation of a plan by the Administrator. Information required under this paragraph must be included in the annual report required by § 51.321 of this chapter.

(f) Each progress report shall include:

(1) Enforcement actions initiated against designated facilities during the reporting period, under any standard of performance or compliance schedule of the plan.

(2) Identification of the achievement of any increment of progress required by the applicable plan during the reporting period.

(3) Identification of designated facilities that have ceased operation during the reporting period.

(4) Submission of emission inventory data as described in paragraph (a) of this section for designated facilities that were not in operation at the time of plan development but began operation during the reporting period.

(5) Submission of additional data as necessary to update the information submitted under paragraph (a) of this section or in previous progress reports.

(6) Submission of copies of technical reports on all performance testing on designated facilities conducted under paragraph (b)(2) of this section, complete with concurrently recorded process data.

§ 60.26a Legal authority.

(a) Each plan or plan revision shall show that the State has legal authority to carry out the plan or plan revision, including authority to:

(1) Adopt standards of performance and compliance schedules applicable to designated facilities.

(2) Enforce applicable laws, regulations, standards, and compliance schedules, and seek injunctive relief.

(3) Obtain information necessary to determine whether designated facilities are in compliance with applicable laws, regulations, standards, and compliance schedules, including authority to require recordkeeping and to make inspections and conduct tests of designated facilities.

(4) Require owners or operators of designated facilities to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such facilities; also authority for the State to make such data available to the public as reported and as correlated with applicable standards of performance.

(b) The provisions of law or regulations which the State determines provide the authorities required by this section shall be specifically identified. Copies of such laws or regulations shall be submitted with the plan unless:

(1) They have been approved as portions of a preceding plan submitted under this subpart or as portions of an implementation plan submitted under section 110 of the Act; and

(2) The State demonstrates that the laws or regulations are applicable to the designated pollutant(s) for which the plan is submitted.

(c) The plan shall show that the legal authorities specified in this section are available to the State at the time of submission of the plan. Legal authority adequate to meet the requirements of paragraphs (a)(3) and (4) of this section may be delegated to the State under section 114 of the Act.

(d) A State governmental agency other than the State air pollution control agency may be assigned responsibility for carrying out a portion of a plan if the plan demonstrates to the Administrator's satisfaction that the State governmental agency has the legal

CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

(a) *Generally*.

(1) In interviewing and obtaining statements, oral and written, from witnesses, both trial and defense counsel may use audio-visual and/or telecommunications technology when practicable, and shall have equal access to such technology in preparation for and during trial.

(2) The right to examine, under this rule, includes the right to copy, subject to 10 U.S.C. § 949p-4. The defense's right to examine classified evidence under this rule is subject to section (f) and Mil. Comm. R. Evid. 505 and 506 as applicable.

(3) The military judge may specify the time, place and manner of discovery and may prescribe such terms and conditions as are necessary to the interests of justice, the protection of national security, and the safety of witnesses.

(4) In the event that the accused has elected to represent himself and the military judge has approved that election, standby defense counsel shall examine the evidence and be prepared to provide advice to the accused.

(5) The duty to provide discovery is continuing, meaning that if at any time prior to or during a military commission, a party discovers additional material subject to discovery under the rule, that party shall promptly notify the other party or military judge as to the existence of the material.

(b) *Disclosure by the trial counsel*. Except as directed by the military judge pursuant to section (a), the trial counsel shall provide the following information or matters to the defense:

(1) Papers accompanying charges; convening orders; statements. As soon as practicable after service of charges the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to examine:

(A) Any paper which accompanied the charges, when they were referred to military commission including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) *Witnesses*. Before the beginning of trial on the merits the trial counsel shall notify the defense of the names of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi or lack of mental responsibility, when trial counsel has received timely notice under this rule.

Discussion

Such notice should be in writing except when impracticable.

(3) *Prior convictions of accused offered on the merits*. Before trial on the merits, the trial counsel shall notify the defense of any records of prior criminal convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to examine such records when they are in the trial counsel's possession.

(c) *Examination of documents, tangible objects, reports*. After service of charges, upon a request of the defense, the Government shall permit the defense counsel to examine the following materials:

(1) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

(2) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

(3) The contents of all relevant statements—oral, written or recorded—made or adopted by the accused, that are within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.

Discussion

For the definition of "material to the preparation of the defense" in subsections (1), (2), and (3), *see United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). Evidence introduced by the Government at trial must be disclosed to the accused. *See* 10 U.S.C. § 949a(b)(A).

(d) *Information to be offered at sentencing*. Upon request of the defense the trial counsel shall:

(1) Permit the defense to examine such written material as will be presented by the prosecution at the presentencing proceedings; and