

Joint Comments of Environmental and Public Health Organizations on Proposed Revisions to Emission Guideline Implementing Regulations

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Environmental and public health organizations (“Joint Environmental Commenters”) submit the following comments on EPA’s proposed revisions to the regulations implementing section 111(d) of the Clean Air Act (CAA), set forth in EPA’s proposed rule “Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program,” 83 Fed. Reg. 44,746 (Aug. 31, 2018).¹

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¹ 83 Fed. Reg. 44,746, 44,803-07 (Aug. 31, 2018) (proposed 40 C.F.R. Subpart Ba, §§ 60.20a-60.29a).

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I. Introduction

As one component of its three-part proposal to undermine climate protections and exempt power plants from requirements to install modern pollution controls when they undertake major modifications, EPA is proposing numerous changes to its longstanding regulations implementing section 111(d) of the Clean Air Act (“CAA”). The agency originally promulgated these regulations in 1975, soon after Congress enacted section 111 in 1970, in a rulemaking that thoroughly examined Congressional intent and thoughtfully delineated EPA’s role in cooperating with states to protect human health and welfare from dangerous air pollution emitted by existing stationary sources.² EPA now seeks to abandon its long-established approach to implementing section 111(d) and seriously weaken requirements that apply to states and sources of air pollution, and thereby seriously delay or undermine entirely the protections from dangerous air pollution that Congress directed EPA to provide for American communities. The proposed changes are arbitrary and capricious and contravene CAA section 111 in several ways.

First, EPA proposes to abolish the core requirement of the emission guidelines that it issues under section 111(d), replacing a binding, quantitative emission limitation with mere “information” on the degree of emission limitation potentially achievable.³ Section 111, however, requires EPA to identify the best system of emission reduction (BSER) for a category of sources and the pollution abatement that results from its application.⁴ EPA cannot lawfully delegate the balancing of statutory factors, at the national level, to state and local air agencies when Congress has expressly assigned that task to the federal agency. If EPA’s role were not clear from the plain language of section 111 itself, the cross-reference to the agency’s similar responsibilities under CAA section 110 and other contextual evidence dispel any doubt as to EPA’s duty to set the environmental benchmark that states must reach. Indeed, the identification of a BSER without an accompanying emission limitation reflecting its application is an incomplete identification of the system of emission reduction itself, as it is the manner and degree of application of a system that often determines the quantity and cost of the emission reductions achieved, as well as any implications for energy requirements—factors that are statutorily a component of the best system of emission reduction analysis delegated to EPA.

The scheme of cooperative federalism embodied in CAA section 111(d) further confirms that EPA must provide a quantitative emission guideline before states formulate plans for controlling pollution from existing sources. Under section 111(d), EPA must determine whether state plan submissions are “satisfactory.”⁵ As the Agency recognized in 1975,⁶ it would be illogical for states to develop plans without any indication of the level of emission reductions that the CAA requires. Moreover, EPA is the best (and as noted above, statutorily-mandated) entity to calculate the degree of emission limitation achievable through the application of the BSER that it has carefully calibrated through an analysis of the relevant statutory factors. Even if states could determine the appropriate level of reductions, they would likely have an incentive to understate potential environmental performance and impose lax requirements on their sources relative to those of other states—the very “race to the bottom” that Congress intended to avoid by enacting the CAA in the first place.⁷ The legislative history of CAA section 111, administrative precedent, and congressional enactments ratifying EPA’s longstanding approach strongly support EPA’s obligation to provide a quantitative, binding emission limitation in its guidelines.

² 40 Fed. Reg. 55,340 (Nov. 17, 1975).

³ 83 Fed. Reg. at 44,804 (proposed 40 C.F.R. § 60.22a(b)(2)).

⁴ 42 U.S.C. § 7411(a)(1).

⁵ *Id.* § 7411(d)(2)(A).

⁶ 40 Fed. Reg. at 53,342.

⁷ See *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 486 (2004).

Not only would the removal of the responsibility to identify an emission limitation violate CAA section 111, but it would also contravene principles of reasoned decisionmaking that Congress has required EPA to follow in CAA rulemakings.⁸ The agency has offered no “good reasons”⁹ for its new policy devolving the choice of environmental stringency to states, instead simply asserting—wrongly—that CAA section 111 does not *require* it to issue a binding emission guideline.¹⁰ Moreover, it has arbitrarily ignored¹¹ important ramifications of its change in course, which would expose states to regulatory and legal risk of plan disapproval or invalidation, subject regulated sources to economic uncertainty, and inflict upon the public the very harms that Congress intended CAA section 111 to prevent.

Second, EPA would needlessly dilate the compliance schedule under section 111(d), in some circumstances almost tripling the amount of time within which sources must meet performance standards after the agency issues an emission guideline.¹² Nowhere has EPA even acknowledged, much less analyzed, the likelihood that delay in implementing crucial health and welfare protections would result in greater emissions and more severe harm to the public—a fact that alone renders the changes arbitrary.¹³ Further, in lengthening the implementation process under section 111(d), EPA would deprive regulated entities of prompt information as to the requirements that they will be expected to meet under state plans, which could paralyze important resource planning decisions. More fundamentally, EPA has offered no evidence of any need to relax compliance schedules, and its comparison to the timing of the much more complicated process of developing and implementing state implementation plans under CAA section 110 is misplaced. The proposed delays would be particularly egregious in this rulemaking, in light of the clear and present danger posed by climate change and the immediate need to reduce greenhouse gas emissions dramatically.

Third, EPA has proposed a number of changes that would flout other legal obligations or interfere with its duties under CAA section 111(d). It is axiomatic that the agency cannot exempt an existing source from all other CAA requirements simply because it is complying with a standard under section 111(d)—and yet EPA has apparently proposed to do just that.¹⁴ The agency must either abandon this change or amend the language to clarify that it does not in any way exempt sources from their statutory obligations. EPA would also needlessly delete the phrase “allowance system” from the definition of “standard of performance” even though such a system fits within the retained term “allowable . . . limit of emissions”¹⁵ and is consistent with administrative precedent permitting different forms of the standard in section 111(d) rules. EPA must also continue to include in its emission guidelines a description of the potential harms posed by the regulated pollutant¹⁶ in order to inform state plan development and assist the agency in prioritizing rulemakings under section 111(d). Finally, EPA must include in its implementing regulations a requirement to consider environmental justice in developing emission guidelines and state plans.

For these reasons, EPA’s proposed revisions to the regulations implementing CAA section 111(d) are unlawful, arbitrary and capricious, and deeply flawed. The agency must adhere to its statutorily required

⁸ 42 U.S.C. 7607(d)(9)(A).

⁹ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁰ See 83 Fed. Reg. at 44,771.

¹¹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹² See *infra*, discussing proposed 40 C.F.R. §§ 60.23a, 60.24a, 60.27a, 60.28a.

¹³ *State Farm*, 463 U.S. at 43.

¹⁴ See 83 Fed. Reg. at 44,803 (proposed 40 C.F.R. § 60.20a(b)).

¹⁵ *Id.* at 44,804 (proposed 40 C.F.R. § 60.21a(f)).

¹⁶ See *id.* at 44,804 (proposed 40 C.F.R. § 60.22a(b) (omitting current 40 C.F.R. § 60.22(b)(1))).

practice of quantifying the emission reductions achievable through the implementation of the BSER that it has identified; it cannot drastically expand the compliance schedule under section 111(d) without considering and appropriately weighing the important implications of doing so for states, regulated entities, and the public; and it must abandon other illegal and unnecessary proposed changes that would compromise its responsibilities under section 111(d) or deviate from statutory requirements. If the agency chooses to proceed with revisions to the implementing regulations, it must codify existing requirements to consider environmental justice when issuing an emission guideline and when reviewing state plan submissions.

Lastly, we note that the relevant documents cited in these comments are being submitted to the docket in a joint appendix provided by the Joint Environmental Commenters.

II. EPA's Proposed Revisions to the Section 111(d) Framework Regulations Unlawfully Remove the Requirement that EPA Establish a Quantitative Emission Limitation for Each Covered Pollutant in an Emission Guideline.

Since it first promulgated the section 111(d) framework regulations in 1975, EPA has included in its emission guidelines a quantitative emission limitation for each covered pollutant that states must then meet in establishing enforceable performance standards. The agency now proposes to re-engineer the program in a way that would remove EPA's obligation to establish a numerical limit for pollutants covered in each set of guidelines. This change violates the text and structure of the Clean Air Act, undermines the core function of section 111(d), runs contrary to the provision's legislative and regulatory history, and is arbitrary and capricious. EPA must therefore abandon these proposed revisions.

a. The Language, Context, Structure, and Purpose of Section 111(d) Require EPA to Establish a Quantitative Emission Limitation for Each Covered Air Pollutant in an Emission Guideline.

EPA contends that nothing in section 111(a)(1) or section 111(d) "compels EPA to provide a presumptive emission standard that reflects the degree of emission limitation achievable by application of the BSER."¹⁷ It therefore proposes to redefine emission guidelines as documents that simply "include[] information" on the degree of emission reduction achievable.¹⁸ The language, context, and structure of the statute, however, preclude an informational approach and charge EPA with quantifying the emission reductions that flow from its best system of emission reduction (BSER) determination.

i. The Plain Language of Section 111(d) Requires EPA to Identify the Degree of Emission Limitation Achievable Through the Application of the BSER.

Under section 111(d), states must submit to EPA plans that establish "standards of performance" for existing sources.¹⁹ States' discretion in regulating existing sources is limited through the definition of "standard of performance" in section 111(a)(1). A standard of performance must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction

¹⁷ 83 Fed. Reg. 44,746, 44,771 (Aug. 31, 2018).

¹⁸ *Id.*

¹⁹ 42 U.S.C. § 7411(d).

which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”²⁰ This definition does not contemplate states’ active participation in determining the emission reductions achievable; rather, standards must “reflect” the reductions that are “achievable” from the application of the BSER. This language leaves no doubt that EPA, and not the states, selects the BSER, and in doing so, the agency must account for various statutory factors when making a BSER determination, such as achievability, the quantity of emission reductions that are available from the BSER, costs, energy requirements, and technological innovation.²¹ Were EPA to approve a state plan that set its own, different emission limitation, it would have delegated the task of applying and balancing these statutory factors to the states—something Congress chose not to do in Section 111(d). Congress has definitively and exclusively assigned EPA that role in Clean Air Act section 111(a)(1):

This statutory scheme, evident from the plain language of section 111, finds further support in section 111(d)’s cross-reference to section 110 of the Clean Air Act which states that “[t]he Administrator shall prescribe regulations which shall establish a procedure similar to that proposed by section 110....”²² Under section 110, states must develop plans that reduce sources’ emissions to achieve the national ambient air quality standards that protect public health and welfare, as determined by EPA.²³ Under Section 111(d), states develop plans that establish performance standards for affected sources, and those standards must reflect the emission reductions achievable through the best system of emission reduction, as determined by EPA. Under both programs, it is EPA that must use its expertise to identify the *amount* of pollution that Congress deemed acceptable under the two approaches.²⁴ It would be unreasonable for EPA to conclude that the cross-reference to Section 110 is limited to plan submission and approval; like section 110, section 111(d) is based on a cooperative federalism model embodied in those provisions. As the agency reasoned in the preamble to its original 1975 implementing regulations, key features under section 110 (such as the difference between primary and secondary standards) must shape the agency’s section 111 program as well.²⁵ Accordingly, EPA’s fundamental duty to quantify pollution limits applies under both sections, in keeping with the agency’s obligation under the statute to ensure the danger to human health and welfare posed by air pollutants is addressed effectively.

ii. Statutory Context Confirms EPA’s Responsibility to Quantify an Emission Limitation.

Statutory context reinforces EPA’s obligation to establish a clear, binding emission guideline that includes numerical pollution limits. Clean Air Act Section 129, which the agency uses together with Section 111 to promulgate performance standards for solid waste incineration units, expressly requires the agency to include emission limitations in its guidelines for existing sources, even where otherwise excluded from regulation under section 111(d).²⁶ Congress thus ratified EPA’s interpretation in its

²⁰ *Id.* § 7411(a)(1).

²¹ *See, e.g.*, 80 Fed. Reg. 64,662, 64,719 (Oct. 23, 2015); *Sierra Club v. Costle*, 657 F.2d 298, 326, 347 (D.C. Cir. 1981); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433-34 (D.C. Cir. 1973) (describing factors EPA must consider in determining the BSER).

²² *Id.* § 7411(d).

²³ *See id.* §§ 7409, 7410(a).

²⁴ *See* 40 Fed. Reg. 54,430, 53,343 (Nov. 17, 1975).

²⁵ *See id.* at 53,344 (distinguishing between health- and welfare-based performance standards).

²⁶ 42 U.S.C. § 7429(b)(1). To permit EPA to include criteria pollutants and HAPs in its guidelines—which would ordinarily be prohibited under section 111(d)—section 129 directed EPA include emission limitations for solid waste incinerators “notwithstanding any restriction in section 7411(d) of this title regarding issuance of such limitations.” 42 U.S.C. s 7429(b)(1). It is for this reason that (for instance) the emission guidelines for

original implementing regulations that EPA must promulgate emission guidelines that include binding limitations.²⁷

Conversely, the definition of work practice standards under Section 111(h) makes no reference to the “degree” of emission reductions achievable.²⁸ This difference distinguishes work practice standards, which do not require numerical limits, from performance standards, which are required to meet the numerical pollution limits provided for in EPA’s guideline document. Indeed, EPA’s current section 111(d) guidelines require state standards to be “no less stringent than the corresponding emission guideline(s).”²⁹ In contrast, EPA’s implementing regulations for section 111(h) direct the *states* to “set forth the emission reductions achievable by implementation of “design, equipment, work practice, or operational standards,” “to the degree possible.”³⁰ The contrast could not be more stark: where standards of performance based on the BSER are feasible, it is EPA’s task to determine the emission limitation; where they are not, states must estimate the emission reductions that their alternative work practice standards will achieve.

iii. The Language and Structure of Section 111(d) Delineate EPA’s Role in Quantifying Achievable Emission Reductions.

The statutory structure makes clear that it is EPA’s duty—not that of the states—to identify the BSER and calculate the level of emission reductions achievable based on the application of that BSER, which then serves as the benchmark for and facilitates the agency’s review of state plans for compliance with the statutory requirements. EPA can only approve a state plan that it concludes is “satisfactory.”³¹ Without first quantifying the degree of emission reductions that states will be expected to achieve, the agency’s review of plan submissions would be *ad hoc*—posing the danger of inconsistent and arbitrary decisions, or unnecessary and time-consuming rejections of state plans that require revisions. Further, EPA would have no basis to prescribe a federal plan where a state plan is unsatisfactory³² if the statute entrusted states with determining the appropriate degree of emission reduction. The agency considered these structural features in issuing its original implementing regulations in 1975 and concluded that “it seems clear that some substantive criterion was intended to govern not only the Administrator’s promulgation of standards but also [the Administrator’s] review of state plans.”³³ EPA has not explained why it is now proposing to depart from this interpretation of section 111(d)’s structural scheme, which remains in substantially the same form today as when it was enacted in 1970.

In determining the BSER, EPA must evaluate the universe of available systems and decide what is adequately demonstrated. Accordingly, in addition to being precluded by the statutory language, it would make no sense for states to calculate emission reductions from the application of the BSER when EPA possesses the knowledge and expertise gained from its analysis of various systems. Indeed, the

hospital/medical/infectious waste incinerators include limitations for various criteria pollutants and HAPs, including carbon monoxide, sulfur dioxide particulate matter, lead, and mercury. See 40 C.F.R. § 60, Subpt. CE, Tables 1a, 1b, 2a, 2b.

²⁷ See P.L. No. 101-549, § 305(a), 104 Stat. 2399, 2579 (1990).

²⁸ See 42 U.S.C. § 7411(h).

²⁹ 40 C.F.R. § 60.24(c).

³⁰ 40 C.F.R. § 60.24(b)(1); see also 83 Fed. Reg. at 44,805 (proposed § 60.24a(b)).

³¹ 42 U.S.C. § 7411(d)(2)(A).

³² *Id.*

³³ 40 Fed. Reg. at 53,342.

agency long ago recognized its advantage over states in selecting the BSER, especially given its experience in regulating new sources in the same category.³⁴ This advantage logically extends to the quantification of achievable emission reductions from the source category, a task the agency must also perform in setting new source performance standards. Thus, EPA's proposed interpretation of section 111(a)(1) as not requiring an emission guideline setting forth emission reductions achievable from existing sources is unreasonable.

The particular nature of EPA's BSER analysis further underscores the senselessness of leaving it to states to guess at the emission limitation that results from the application of the BSER. The statute requires EPA to consider factors including cost, environmental impacts, energy requirements, and—most notably here—emission reductions when deciding what system is the “best.”³⁵ These factors are not necessarily independent; rather, applying a system at a different scale or operating it more frequently will affect compliance costs, environmental side-effects, and energy demands, as well as emissions. EPA must balance all of these factors (and therefore calculate emission reductions achievable) when selecting the BSER.³⁶ Further, this balancing typically involves national-level considerations and analysis that only EPA has the resources and expertise to conduct.³⁷ For the agency then to withhold its emissions calculation from states, or not give it legal meaning by incorporating it into a binding emission guideline, would not only be an enormous waste of resources, but also leave states at risk of establishing standards that do not in fact reflect the emission limitation achievable from EPA's carefully chosen system.

If EPA failed to promulgate binding emission guidelines, states would have an incentive to establish lax standards and thereby give their sources a competitive advantage over those in neighboring states. As we explain in our Joint Environmental Comments on the BSER and other issues, the ensuing “race to the bottom” is precisely the outcome that Congress intended to prevent by enacting the Clean Air Act.³⁸ Even if some states opted to require superior environmental performance from their sources, the dramatically uneven playing field could exacerbate leakage of emissions to more-permissive jurisdictions. This incentive to establish weak and permissive standards is particularly strong in the case of climate pollution, which imposes costs on the country at large and which no individual state has an incentive to fully internalize. Thus, whether through widespread degradation of air quality or the

³⁴ See 40 Fed. Reg. 55,340, 55,343 (Nov. 17, 1975) (noting that section 111 “take[]s advantage of the information and expertise available to EPA from its assessment of techniques for the control of the same pollutants from the same types of sources under section 111(b)”).

³⁵ See 42 U.S.C. § 7411(a)(1); *Sierra Club v. Costle*, 657 F.2d 298, 326 (D.C. Cir. 1981).

³⁶ The D.C. Circuit recognized over three decades in *Sierra Club v. Costle* that the very concept of a “best system of emission reduction” necessarily entails an assessment of how stringently the system must be applied. As the court explained, this is because the evaluation of cost, energy, and environmental impacts that section 111 requires is inseparable from a judgment as to how stringently to apply the BSER. See 657 F.2d at 329 (“*Sierra Club* would permit EPA to consider the enumerated statutory factors only for the purpose of defining the best technology. This exercise, however, would necessarily involve evaluating the cost, energy, and environmental impacts of different technological systems not in the abstract but at some given level of operation. Thus, even the limited determination that *Sierra Club* would allow EPA to make would logically involve determining at what level a particular control system was ‘best’ in terms of cost, environment, and energy.”).

³⁷ See *Sierra Club v. Costle*, 657 F.2d at 330 (“After EPA makes this determination, it must exercise its discretion to choose an achievable emission level which represents the best balance of economic, environmental, and energy considerations. It follows that to exercise this discretion EPA must examine the effects of technology on the grand scale in order to decide which level of control is best.”).

³⁸ See *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 486 (2004).

emergence of state-specific pollution hotspots, EPA's failure to quantify an emission limitation would disserve Congress's goal of protecting human health and welfare.³⁹

The Agency anticipated this problem in 1975, noting the potential for many pollutants to escape regulation given section 111's catchall function:

[I]t would make no sense to interpret section 111(d) as requiring the Administrator to base approval or disapproval of State plans solely on procedural criteria. Under that interpretation, States could set extremely lenient standards—even standards permitting greatly increased emissions—so long as EPA's procedural requirements were met. Given that the pollutants in question are (or may be) harmful to public health and welfare, and that section 111(d) is the only provision of the Act requiring their control, it is difficult to believe that Congress meant to leave such a gaping loophole in a statutory scheme otherwise designed to force meaningful action.⁴⁰

EPA's 1975 warning is well taken: the novel interpretation proposed here in the changes to the implementing regulations—and the application of that interpretation in the proposed rule—would appear to allow states to permit carbon dioxide emissions from coal-fired power plants to continue unabated so long as they follow the non-binding *procedure* suggested here—which merely requires states to “*evaluat[e]* ... the applicability of ... heat rate improvements to each affected EGU” —and simply find that heat rate improvements in question are not achievable at their power plants.⁴¹ Failing to address greenhouse gas emissions from existing power plants threatens devastating impacts to public health and welfare,⁴² contravening section 111's core focus on *preventing* endangerment of public health and welfare.⁴³ The present rulemaking clearly illustrates how the agency's proposed revision of the definition of “emission guideline” undermines statutory language, context and purpose. Worse still, under the proposed amendments to the framework regulations, that non-binding procedure would be replicated across all future section 111(d) emission guidelines.

From a practical standpoint, EPA's failure to quantify the emission reductions that states must achieve through their plans creates considerable uncertainty as to whether the agency (or a future EPA) will approve their plans as “satisfactory.”⁴⁴ Where EPA *does* approve state plans, the absence of a federally defined emission limitation could also result in a greater exposure of those plans to lawsuits challenging EPA's approval decisions.⁴⁵ Subjecting the states to both kinds of uncertainty runs counter to the principles of cooperative federalism inherent in section 111(d). Along the same lines, EPA's omission of a

³⁹ See 42 U.S.C. § 7411(b)(1) (requiring EPA to list categories of sources that “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare”).

⁴⁰ 40 Fed. Reg. at 53,343.

⁴¹ See 83 Fed. Reg. at 44,809 (proposed 40 C.F.R. § 60.5740a(a)(1)).

⁴² See Joint Comments of Environmental and Public Health Organizations on the Best System of Emission Reduction and Other Issues in EPA's Proposed Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program.

⁴³ 42 U.S.C. § 7411(b)(1)(A).

⁴⁴ 42 U.S.C. § 7411(d)(2)(A).

⁴⁵ *Id.* § 7607(b)(1).

definitive environmental benchmark against which to measure state plans would hinder the judicial review that Congress provided for.

iv. EPA's Reasons for Disclaiming Its Responsibility to Establish a Binding Emission Guideline Are Unavailing.

EPA's sparse rationale for abdicating its statutory duty to quantify emission reductions falls flat. Contrary to the agency's newfound assertions, an emission guideline that includes a numerical emission limitation reflecting the BSER is not a "presumptive standard" that encroaches on States' prerogative under section 111(d).⁴⁶ First, nothing that EPA may include in its emission guidelines—including a numerical emission limitation that state plans must satisfy—is enforceable against covered sources; states have the initial responsibility under section 111 to issue standards of performance that create binding legal obligations for existing sources and their owners and operators. As such, there can be no plausible claim that EPA establishes a performance standard by simply providing a minimal quantitative threshold that will dictate whether *state*-issued performance standards are approvable or not. Furthermore, states retain certain flexibilities in issuing their standards of performance that go beyond the numerical limit itself: for instance, states may in some cases be able to choose the form of the standard (*e.g.*, mass- vs. rate-based, alternative state measures such as renewable portfolio standards along with a federal backstop⁴⁷), can require the use of systems of emission reduction different from that identified as the "best" system by EPA provided commensurate emission reductions are achieved, and can include standards in a federally approved and enforceable plan that are more stringent than EPA's emission limitation.⁴⁸ They also take into account remaining useful life and other factors when applying a standard of performance to a specific source, which might in a mass-based program result in a source committing to an early retirement to achieve greater emission reductions than the emission guidelines would require, but without applying the best system of emission reduction.

Nor can EPA avoid its responsibility to set a floor for emission reductions by contending that the regulated sources are too diverse to evaluate at the national level and are only amenable to unit-by-unit analysis.⁴⁹ This claim pertains more to the agency's failure to define a legally appropriate system of emission reduction, as discussed in the Joint Environmental Comments on BSER Issues, and it cannot justify the omission of an emission limitation from the proposed guidelines. EPA's task is to select the BSER for each type of source (subcategorizing where appropriate)⁵⁰ and quantify the emission reductions that result from the BSER's application. All standards must reflect the degree of emission limitation that EPA has determined reflects the BSER; were the state to set source-specific, individualized requirements for its sources that are untethered to any quantitative federal emission limit, the plan would not establish a "standard" as the term is commonly understood. Moreover, if states could customize the BSER for each source, the provision of section 111(d) allowing states to take remaining useful life and other factors into account, within reason, when *applying* a standard to its sources would be rendered superfluous. Thus, the statute plainly requires EPA to establish a BSER and emission limitation for a source *category* or *subcategory*; states to establish a standard reflecting that

⁴⁶ 83 Fed. Reg. at 44,771.

⁴⁷ See 80 Fed. Reg. at 64,833-37.

⁴⁸ 42 U.S.C. § 7416.

⁴⁹ See 83 Fed. Reg. at 44,755-56. Puzzlingly, EPA acknowledges that it was able to evaluate average heat-rate-improvements at the level of the interconnection and calculate the resultant emission reductions from "building block 1" in the Clean Power Plan. See *id.* at 44,756.

⁵⁰ 40 C.F.R. § 60.22(b)(5); see also 83 Fed. Reg. at 44,804 (Proposed § 60.22a(b)(4)).

limitation; and states to apply the standard to their sources, possibly adjusting requirements for sources that are nearing retirement or are otherwise unable to attain compliance to ensure that standards are consistent with the statutory goal of reducing emissions “as much as practicable.”⁵¹

b. The Legislative and Regulatory History of Section 111(d) Confirm that EPA Must Include Numerical Emission Limitations in its Guidelines.

The legislative and regulatory history of section 111(d) both support the argument that EPA must provide quantitative, binding emission limitations in its emission guideline issued under the program. In 1975, EPA promulgated the section 111(d) framework regulations, which have remained largely unchanged until the current proposed amendments.⁵² These framework regulations included (and still include) a requirement that each emission guideline provide a numerical emission limitation that state-issued performance standards must satisfy, allowing for downward deviations only upon the state’s showing of certain enumerated factors with regard to a particular affected source.⁵³ Certain commenters in 1975 objected to this approach, arguing that the language of section 111(d) only permitted EPA to approve or disapprove of state plans on procedural, not substantive grounds.⁵⁴

In response, EPA concluded that the statute does, indeed, require the agency to evaluate state plans not just for procedural regularity, but on the substance of those plans as well.⁵⁵ As EPA explained, in 1970, the Senate originally proposed a set of Clean Air Act amendments that would have required national performance standards for new and existing stationary sources alike.⁵⁶ Under the Senate bill, both new and existing source standards would be issued and enforced against affected sources by EPA itself (unless a state applied for and received delegated enforcement authority).⁵⁷ By contrast, while the corresponding House bill established a new source performance standard program in section 111, it included no such provision for existing sources; it simply left the latter category of sources unregulated at the federal level with regard to emissions performance.⁵⁸

After the passage of both bills, a conference committee convened to reconcile the differences between the House and Senate bills. With regard to performance standards for existing sources, the conference committee charted a middle course between the House and Senate approaches: under a new section 111(d) states would retain authority over the issuance and enforcement of performance standards with respect to covered sources, but would be required to include these standards in state plans and submit them for EPA’s review and approval. In addition, EPA would issue regulations to establish the criteria by

⁵¹ *Costle*, 657 F.2d at 325.

⁵² 75 Fed. Reg. 53,340 (Nov. 17, 1975).

⁵³ 40 C.F.R. § 60.24(c), (f). As discussed elsewhere in these comments, EPA’s current regulation setting forth the circumstances under which it may approve a state plan that grants variances from a standard is too vague and therefore arbitrary. *See, e.g., Oceana, Inc. v. Locke*, 670 F.3d 1238, 1241 (D.C. Cir. 2011) (agency had not adequately identified what circumstances would trigger the exemption process or what standard would apply). If the agency proceeds with revisions to the implementing regulations, it must provide greater specificity as to when a variance would be appropriate.

⁵⁴ 75 Fed. Reg. at 53,342.

⁵⁵ *Id.*

⁵⁶ *See id.* (discussing S. 4358, at §§ 113–114 (1970)).

⁵⁷ S. 4358, §§ 113–114.

⁵⁸ 75 Fed. Reg. at 53,342 (discussing H. 17255, at §111 (1970)).

which it would either approve or disapprove state plans. This was the approach taken in the final bill passed by Congress and signed by the President.⁵⁹

As EPA concluded in 1975, section 111(d) would only make sense if EPA's review and approval of state plans were based on substantive considerations. Unlike the Senate bill, the final bill grouped the existing source program in section 111 along with the new source program described in subpart (b), which required EPA to establish national emission limitations for new sources. Even though, under section 111(d), states are responsible for issuing and enforcing standards as they apply for specific sources, Congress would not likely have grouped the existing source program alongside the new source program if it did not also intend EPA to require state-issued performance standards to conform to nationally uniform emission limitations.⁶⁰ Accordingly, EPA's review of state plans must be based not merely on procedural considerations, but on a particular substantive consideration as well: whether the state plan reflects the degree of emission reduction achievable by the Administrator's selection of the best system of emission reduction.

If Congress had not required EPA to base its review of state plans on pre-defined, substantive criteria, then the new section 111(d) program would have made little progress beyond what had already existed under the law. A program that merely required states to submit *some* level of performance standards to EPA, without any obligation to show that these standards satisfied a minimum, nationally-applicable numerical threshold set by EPA, would result in standards as strong or as weak as states wished them to be. Yet this would achieve nothing new: states already *had* authority prior to 1970 to establish performance standards for existing sources at whatever level of stringency they wished. The entire innovation of this section of the Clean Air Act was to allow states to retain their authority to tailor and enforce source-specific standards,⁶¹ but to ensure that those standards meet a minimum national threshold set by EPA. As the agency noted its 1975 preamble,

[e]ven a cursory examination of the legislative history of the 1970 amendments reveals that Congress was dissatisfied with air pollution control efforts at all levels of government and was convinced that relatively drastic measures were necessary to protect public health and welfare. The result was a series of far-reaching amendments which, coupled with virtually unprecedented statutory deadlines, required EPA and the States to take swift and aggressive action.⁶²

Among these "far-reaching amendments" was section 111(d). "Against this background of Congressional firmness . . . it would make no sense to interpret section 111(d) as requiring the Administrator to base approval or disapproval of State plans solely on procedural criteria. Under that interpretation, States could set extremely lenient standards— even standards permitting greatly increased emissions—so long as EPA's procedural requirements were met . . . [I]t is difficult to believe that Congress meant to leave such a gaping loophole in a statutory scheme otherwise designed to force meaningful action."⁶³

⁵⁹ P. L. 91-604, § 111(d) (Dec. 31, 1970).

⁶⁰ See 42 U.S.C. § 7411(a)(1) (providing a single definition of "standard of performance" for both new and existing sources); see also 83 Fed. Reg. at 44,752 ("['S]tandard of performance' is given a unitary definition for purposes of the entire statutory section.").

⁶¹ See 42 U.S.C. § 7416,

⁶² 40 Fed. Reg. at 53,342–43.

⁶³ *Id.*

Accordingly, the legislative history confirms what is already readily apparent from the text, context, and structure of section 111(d): EPA must review state plans for substance, not just for procedural regularity. Furthermore, substantive review can only be predictable, appropriate for public comment, and amenable to meaningful judicial review if it entails the publication of numerical emission limitations at the outset in each final guideline that the agency issues pursuant to section 111(d). It is precisely for this reason that, in the 1975 framework regulations, EPA included a requirement that all such guidelines include numerical emission limitations, and that, except where certain criteria are met, state-issued performance standards must satisfy those limitations.

In fact, the term “emission guideline” is inherently quantitative. EPA first adopted this term in the 1975 framework regulations specifically to describe a numerical emission limitation that does not apply directly against regulated sources, but that establishes a minimum threshold that state-issued standards—which *do* apply directly against affected sources—must conform to.⁶⁴ Throughout the 1975 preamble and in the text of the framework regulations themselves, EPA makes clear that state-issued emission standards “shall be no less stringent *than the corresponding emission guideline(s)* specified in subpart C of this part.”⁶⁵ The very notion of “stringency” simply makes no sense without a concrete, quantitative benchmark against which to judge whether something is either more or less stringent than that benchmark. Thus, given the mandate that state-issued performance standards be no less stringent than the corresponding guideline, it follows that the term “emission guideline” itself includes a numerical benchmark. EPA has adhered to this logic in issuing guidelines for regulated source categories.⁶⁶

In other words, numerical emission limits are not an optional feature of an “emission guideline” as defined in this section, but are a necessary and defining element. In the years following EPA’s issuance of the 1975 framework regulations, Congress was aware of and ratified the role that emission guidelines play in section 111(d). For instance, in developing the 1977 Clean Air Act amendments, the House committee explained that “[t]he Administrator would establish *guidelines* as to what the best system for each such category of existing sources is.”⁶⁷ Again in 1990, Congress enacted section 129 to force EPA’s hand in regulating emissions from solid waste incinerators. This provision required the agency to issue new source performance standards, section 112 hazardous air pollutant standards, and—referring to the specific term first adopted by the agency in 1975—“*guidelines* promulgated pursuant to section 7411(d) of this title and this section applicable to existing units,” explicitly stating that such guidelines must include “emission limitations”⁶⁸ and that state plans “shall be at least as protective as the guidelines promulgated by the Administrator.”⁶⁹ Thus, Congress has, by amendment, endorsed “emission guidelines” as well as EPA’s conception of it as including quantitative emission limitations that state plans must satisfy.

⁶⁴ See *id.* at 53,341.

⁶⁵ 40 C.F.R. § 60.24(c); see also, e.g., 75 Fed. Reg. at 53,342, 53,344.

⁶⁶ See, e.g., 40 C.F.R. §60.31d (“*The emission guideline for [sulfuric acid production units] is 0.25 grams sulfuric acid mist ... per kilogram (0.5 pounds per ton) of sulfuric acid produced, the production being expressed as 100 percent sulfuric acid.*”) (emphasis added).

⁶⁷ H.R. Rep. No. 95-294, at 195 (1977) (emphasis added).

⁶⁸ See n. 10, *supra*.

⁶⁹ 42 U.S.C. § 7429(b)(1)–(2) (emphasis added).

The same is true of section 111(d)'s "remaining useful life" provision. Along with the requirement for numerical emission limitations in EPA's emission guidelines, the 1975 framework regulations included a "safety valve" that permitted states to issue standards that vary from EPA's federal thresholds for particular sources under a limited set of circumstances (for instance, where an aging unit would otherwise be required to invest in expensive pollution control technology that would not be fully depreciated by the time the unit retired).⁷⁰ As discussed previously, EPA's "variance provisions" adopted in the 1975 framework regulations are meaningless in the absence of an otherwise-mandatory federal standard: there can simply be no "variation" if there is nothing from which to vary.

In the 1977 Clean Air Act amendments, Congress gave statutory effect to the variance provisions by adding the following language to section 111(d): "Regulations 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."⁷¹ Congress was fully aware of EPA's practice under the 1975 regulations to require state plans to achieve mandatory emission limitations reflective of the BSER, but to permit variances in certain limited instances with regard to individual sources. By adopting the "remaining useful life" provisions, in 1977, Congress explicitly endorsed that approach, adding language to the Clean Air Act that makes no sense in the absence of a requirement that EPA include a mandatory emission reduction threshold in its guidelines.

The Supreme Court has made clear that "[i]t is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."⁷² In this case, Congress has not merely acquiesced to EPA's 1975 definition of section 111(d) emission guidelines as requiring mandatory numerical emission limitations, but has actively endorsed it and inscribed it into law, precluding the agency from abandoning it. Even if, *arguendo*, the agency might have authority to consider a different approach, it must provide a good reason for reversing course where Congress has by amendment adopted EPA's earlier understanding of section 111(d).

Furthermore, every section 111(d) guideline EPA has issued thus far has included either numerical emission limitations that state plans must achieve in order to be approved by the agency or qualitative requirements for state plans that will include work practice standards issued under section 111(h) rather than performance standards.⁷³ In no instance has EPA simply outlined a potential BSER and left it up to the states to determine the level of control they feel is sufficient, and Congress has long since ratified this approach. Accordingly, the legislative and regulatory history of section 111(d) leave no doubt that EPA must, under section 111(d), include in its emission guidelines quantitative emission limitations to which state plans must conform.

⁷⁰ 40 C.F.R. §60.24(f)(1)-(3).

⁷¹ 42 U.S.C. § 7411(d)(1); *see also* H.R. Rep. No. 95-294, at 195 (discussing the "remaining useful life" provision).

⁷² *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (internal quotations omitted).

⁷³ *See* 40 C.F.R. §§ 60, Subpt. CB (guidelines for large municipal waste combustors), Subpt. CC (original guidelines for municipal solid waste landfills), Subpt. CD (guidelines for sulfuric acid production units), Subpt. CE (guidelines for hospital/medical/infectious waste incinerators), Subpt. CF (updated guidelines for municipal solid waste landfills), Subpt. Bbbb (guidelines for small municipal waste combustion units), Subpt. Dddd (guidelines for commercial and industrial solid waste incineration units), Subpt. Ffff (guidelines for other solid waste incineration units), Subpt. Mmmm (guidelines for sewage sludge incineration units), Subpt. Uuuu (guidelines for greenhouse gas emissions from electric generating units).

c. EPA’s Proposal to Remove the Requirement That Emission Guidelines Include Numerical Emission Limitations Is Arbitrary and Capricious.

i. EPA Arbitrarily Failed to Explain its Reversal of Policy.

As discussed above, EPA’s decision to no longer issue a binding numerical emission limit in its section 111(d) guidelines is a reversal of policy that has been in place since EPA first issued the 1975 framework regulations. In the preamble to those regulations, EPA explained numerous considerations that informed its decision. For example, in order to be able to substantively review state plans as required under section 111(d), “there must be criteria for the review, and EPA believes it to be desirable (if not legally required) that the criteria be made known in advance to States, to industry, and to the general public.”⁷⁴ In reversing its prior policy, EPA has not made any attempt to engage with its previous record or address the facts and circumstances that informed its previous policy. EPA announced simply that “EPA does not believe anything in CAA section 111(a)(1) or section 111(d) compels EPA to provide a presumptive emission standard that reflects the degree of emission limitation achievable by application of the BSER.”⁷⁵

EPA’s failure to properly explain or justify its policy is arbitrary and capricious under longstanding principles of administrative law. When an agency decides to reverse course on a policy, it must “provide reasoned explanation,” “display awareness that it *is* changing position,” “show that there are good reasons for the new policy” and “*believe[]* it to be better.”⁷⁶ When there are “serious reliance interests that must be taken into account,” or when “the new policy rests upon factual findings that contradict those which underlay [the] prior policy,” agencies must go further and “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”⁷⁷ The agency must also provide “reasoned explanation. . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁷⁸

EPA has not satisfied this legal standard. As discussed above, EPA has offered no good reasons for not including a requirement for binding numerical emission limitations in section 111(d) guidelines, instead simply asserting—wrongly—that nothing in the Clean Air Act requires it to do so. Since states have reliance interests in knowing the criteria upon which EPA will base its approval or disapproval of state plans, EPA has a heightened burden to justify its reversal. EPA must provide a reasoned explanation for why it is now disregarding these concerns.

⁷⁴ 40 Fed. Reg. 53340, 53343.

⁷⁵ 83 Fed. Reg. at 44771

⁷⁶ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁷⁷ *Id.*

⁷⁸ *Id.* at 515-516.

The agency must also properly consider “reasonable alternatives” to its proposed course of action.⁷⁹ EPA’s current policy—which *does* require emission guidelines to include binding numerical emission limits—certainly qualifies as a reasonable alternative to its proposal to *remove* that requirement from the framework regulations. Because EPA has not adequately considered this alternative, its proposal falls short of the governing legal standard.

ii. EPA Arbitrarily Failed to Consider Relevant Factors Such As Regulatory Uncertainty.

Apart from the statutory infirmities discussed above, EPA arbitrarily failed to consider how its proposal not to issue a binding, presumptive emission limit would create practical problems for states, power companies, and the public. Specifically, EPA failed to consider that states will face new administrative and analytical burdens if the agency does not provide them with notice of the level of emissions reduction they are required to achieve under the Clean Air Act. States will have to expend significant resources to make these determinations on their own. In light of the uncertainty about what constitutes a satisfactory plan, states and regulated sources will be vulnerable to legal and regulatory risk at every stage of the 111(d) state plan review and implementation process if EPA fails to include mandatory numerical emission limitations in its section 111(d) emission guidelines.

If states are forced to make these determinations on their own without ground rules from EPA, this is likely to result in significant discrepancies and inconsistent standards between states. Moreover, states are likely to violate the Clean Air Act’s requirement that section 111 regulations achieve the greatest emission reductions practicable because of incentives to set more permissive and lax standards, resulting in a “race to the bottom” and market distortions that defeat the core focus of EPA’s 111 obligation to establish a federally-designated best system of emission reduction that prevents endangerment to public health and welfare.⁸⁰ Here, we provide a brief overview of these issues; the Joint Environmental Comments on BSER Issues discuss them in greater detail.

EPA entirely failed to consider how the proposed framework regulations would decrease regulatory certainty for states and industry and how the proposal would subject state plans to a heightened risk of successful legal challenge, requiring states to expend significantly more resources developing, defending, and amending those plans. EPA also failed to analyze how these concerns harm the public by diminishing the quantity of emission reductions achieved under section 111(d) programs and create uncertainty for regulated industry, resulting in delayed action and higher costs for customers.⁸¹ Because EPA ignored issues that Congress intended EPA to address, the agency “entirely failed to consider an important aspect of the problem,” and it would be arbitrary and capricious to finalize these proposed amendments to the implementing regulations.⁸²

⁷⁹ *Del. Dep’t of Nat. Res. v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015) (“Because EPA too cavalierly sidestepped its responsibility to address reasonable alternatives, its action was not rational and must, therefore, be set aside.”) (citations omitted).

⁸⁰ 42 U.S.C. 7411(a)(1), (b)(1)(A).

⁸¹ Nearly 40 percent of utility executives surveyed named regulatory uncertainty as their greatest challenge with respect to their power mix. See Gavin Bade, *SEU 2018 Survey: utilities shaken, not moved, by Trump policies*, UTILITY DIVE (Feb. 27, 2018), <https://www.utilitydive.com/news/seu-2018-survey-utilities-shaken-not-moved-by-trump-policies/517953/>.

⁸² *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. EPA Arbitrarily Failed to Consider How its Proposal Would Decrease Regulatory Certainty for States Regarding the Agency’s Substantive Criteria for Approving State Plans.

EPA has proposed to eliminate the current requirement that emission guidelines specify the degree of emission limitation achievable by the BSER that states must satisfy in their standards of performance, but arbitrarily fails to consider how this would decrease regulatory certainty for states. Instead, EPA proposes to provide only “*information* on the degree of emission reduction achievable through the application of the [BSER].”⁸³ Without a specific emission limitation, however, it is unclear how states are to use this “information” to craft their state plans or what they would need to demonstrate in terms of emission reductions in order to comply with the Clean Air Act and submit approvable plans to the agency. EPA does not provide enough guidance to ensure that state plans achieve the outcomes mandated under the Clean Air Act, and cannot do so in the absence of numerical emission limitations included in agency-issued guidelines. Under the new proposal, states will be left to guess at what is required of their plans, and those plans will be significantly more vulnerable to disapproval as a result.⁸⁴

Under the proposed amendments, it is wholly unclear how EPA will decide whether to approve a state plan—making it difficult for states to ensure theirs will pass muster. While the proposed regulations require states to provide EPA with a “[d]emonstration that the State plan submittal is projected to achieve emissions performance under the applicable emission guideline”,⁸⁵ this is a meaningless criterion without a binding emission limit specified at the outset in EPA’s emission guideline. Further, EPA has not considered the additional resources it will have to expend to review state plans under more subjective criteria or the additional resources it will have to devote to providing federal implementation plans under the increased likelihood that state plans will not be adequate. The proposal will therefore waste agency resources (which could be used to benefit public health and welfare through work on other projects) as well as taxpayer funds, a fact that has entirely escaped EPA’s analysis.

Even if EPA were to approve state plans in the absence of a binding emission limitation, the approval process itself is subject to notice and comment rulemaking, and those submitting comments would then have an opportunity to challenge EPA’s approval as inconsistent with the Clean Air Act’s requirement for emission reductions. States and regulated entities will thus face greater barriers to implementing emission limits, since what they will ultimately be required to comply with will be subject to change at any of these points. EPA’s failure to address these crucial points amounts to arbitrary and capricious decisionmaking.

2. EPA Failed to Consider How Its Proposal Would Increase Legal Vulnerability of State Plans and Standards of Performance.

⁸³ 83 Fed. Reg. at 44,804 (proposed 40 C.F.R. § 61.21a(e)) (emphasis added).

⁸⁴ This is decidedly *not* a situation in which “the Act does not require EPA to furnish . . . States with information of any kind . . . before a [federal plan] issues.” *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1601 (2014). Section 111 clearly charges EPA with identifying the BSER and resultant degree of emission limitation achievable through its application before it reviews state plans. 42 U.S.C. § 7411(a)(1).

⁸⁵ 83 Fed. Reg. at 44,807 (proposed 40 C.F.R. § 60.27a(g)(3)(iv)).

Under EPA's proposal, not only are state plans vulnerable to EPA disapproval in the absence of guidance about what will be deemed compliant, any *approval* of a state plan by EPA would also be vulnerable to a heightened risk of legal challenge. Without a presumptive, binding emission limit from EPA to rely on and without sufficient direction to steer them, judging whether EPA's approval of a state plan is consistent with the Clean Air Act will be an open question. The risk of inconsistency both as to the stringency of approved standards and as to EPA's rationales for approving them, and the associated risk that EPA's decisions on state plans will be held arbitrary and capricious, would be high. Under the current regulations, if a court were to uphold EPA's emission guidelines containing a mandatory federal emission limit to which state plans must comply, then states would have greater certainty that an EPA decision to approve their plans that adhere to those limits would also be upheld in court, at least on the question of whether the plans established sufficiently stringent standards of performance. That additional legal protection for states vanishes along with EPA's decision to remove numerical emission limits from section 111(d) emission guidelines. The proposed regulations thus reduce judicial economy and increase the chance that states will expend significant resources defending against legal challenges brought to challenge EPA's approval decisions.

3. EPA Failed to Consider How the Proposal's Increase in Regulatory and Legal Uncertainty Would Harm the Public Through Increased Emissions and Higher Costs.

The increase in regulatory and legal uncertainty ultimately will frustrate the Clean Air Act's provisions for reducing emissions to the maximum achievable extent and preventing endangerment of public health and welfare. The proposed regulations will complicate industry's resource planning process by increasing periods of uncertainty before industry knows which standards it must comply with and exposing these standards to being changed. Delayed action by industry harms the public by diminishing emission reductions and increasing threats to public health, as well as by driving up costs for customers.

d. The Proposal Unlawfully Fails to Ensure that States "Shall" Establish "Standards of Performance" That Are Consistent with Section 111.

The proposal's substitution of vague criteria for a binding emission limit fails to meet the mandate of the Clean Air Act for yet another reason: by allowing States so much discretion in how they set standards of performance and apply them to sources, EPA's proposal fails to require states to set standards that achieve the maximum feasible control that the Clean Air Act requires.

The statutory text makes clear what EPA's procedures for state plan development must achieve. Clean Air Act section 111(d)(1) specifically states: "The Administrator shall prescribe regulations which *shall* establish a procedure. . . under which each State shall submit to the Administrator a plan which [] establishes standards of performance [for existing sources]" (emphasis added). "Standards of performance," in turn, must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction. . . the Administrator determines has been adequately demonstrated."⁸⁶

However, EPA's proposed amendments to the section 111(d) framework regulations do *not* ensure that states submit plans with adequate standards of performance. In the preamble to the proposed rule, EPA

⁸⁶ 42 U.S.C. § 7411(a)(1).

states that the changes to the definition of “emission guideline” are intended to remove the requirement that EPA issue a guideline that presumptively reflects the degree of emission limitation achievable by the BSER.⁸⁷ This means states will no longer have to conform their plans to any particular emission limit, instead of—as Section 111(d) requires—one that reflects the degree of emission limitation achievable through application of the BSER.

This change could create several problems for both the states and the agency. EPA’s proposed regulations do not provide adequate ground rules to states so that they can develop standards of performance that satisfy the statutory requirements, nor do they provide the agency itself with the necessary ground rules to ensure that its review of state plans and development of a federal implementation plan, where necessary, would satisfy the statutory requirements that the standards of performance reflect the emission reductions achievable using the BSER. Moreover, a standard of performance that does not reflect the degree of emission limitation achievable through the application of the BSER is no standard at all, because it falls outside the statutory definition. Thus, in failing to require an emission limitation in its guidelines, EPA has failed to require states to fulfill their obligations under section 111(d), and indeed has stymied states’ attempts to do so.

e. Section 111(d)’s Reference to Remaining Useful Life and Other Factors Does Not Diminish EPA’s Role in Ensuring That State Plans Establish Adequate Standards of Performance.

Rather than setting standards of performance that reflect the greatest achievable emission limitation, under EPA’s proposal, states will be required to set standards of performance based on their own speculation about what the proper emission limit should be. As explained above, the Clean Air Act does not delegate this discretion to the states. Section 111(d)’s allowance for states to consider factors such as the remaining useful life of the source as they apply standards of performance to particular regulated entities does not displace EPA’s role to ensure that standards of performance meet the statutory criteria, reflecting the emission reductions achievable through the BSER. This language was intended to accommodate situations where (for instance) facilities near retirement could otherwise be required to make extensive capital investments on expensive retrofit technology,⁸⁸ and instead could, for example, achieve equivalent or greater emission reductions by avoiding life-extending investments and accelerating retirement. It certainly was not intended to prevent EPA from ensuring that state plans establish standards of performance that reflect the greatest achievable emission reductions for all covered sources—including those sources with short remaining useful lives. In fact, as discussed above at pp. 6 and 9, section 111(d)’s remaining useful life language *affirms* that EPA must include a numerical standard in its emission guidelines: this provision would be wholly unnecessary in the absence of a mandatory numerical emission limit established by EPA that state-issued performance standards must satisfy.

f. EPA’s Proposal Fails to Provide States with Sufficient Guidance to Set and Apply Standards of Performance

⁸⁷ 83 Fed. Reg. at 44,771.

⁸⁸ The provision allowing variances where specific factors “make application of a less stringent standard or final compliance time significantly more reasonable,” 40 C.F.R. § 60.24(f)(3), must be read in the context of the other provisions, which appropriately demand a showing of unreasonableness or physical impossibility.

EPA's proposed regulations furthermore do not provide sufficient requirements to ensure that, in the absence of a binding emission limit, states will still submit to EPA plans that include adequate standards of performance. While the proposal would allow states to consider a list of factors (such as a source's remaining useful life) in applying standard of performances to sources, EPA fails to provide ground rules governing how states must apply those factors. Without any guardrails to ensure states do not apply these factors inconsistently and arbitrarily, sources are likely to use them (or attempt to use them) as loopholes to avoid the imposition of standards of performance reflecting greatest achievable emission reductions.

EPA provides a list of broad, vague factors states may consider in proposed 40 C.F.R. § 60.24a(e) with no accompanying requirements governing how to consider these factors in applying a standard.⁸⁹ For example, in proposed 40 C.F.R. § 60.24a(e)(1), EPA lists "unreasonable cost of control" as a factor states may consider, but provides neither a definition nor any standards for determining "unreasonableness." What is considered "unreasonable" is highly subjective, and without a definition or requirements governing how to interpret this term, it is likely to be abused and used to inappropriately allow sources to seek more lenient standards, or even avoid compliance altogether. In proposed 40 C.F.R. § 60.24a(e)(3), EPA allows states to consider "[o]ther factors specific to the facility. . . that make application of a less stringent standard significantly more reasonable." This factor is so vague as to be virtually meaningless, and EPA provides no definition or governing standards for determining what is "significantly more reasonable". This creates a huge loophole for sources to use to justify weaker emission standards.

Furthermore, each of these factors improperly places a thumb on the scale in the direction of weaker standards. Each one arbitrarily includes only considerations that would *increase* the cost of implementing standards of performance—thus apparently allowing only for adjustments that result in weaker standards. If states may consider factors that justify weaker standards, they must also be permitted to consider factors that would justify *greater* stringency, such as more expeditious compliance obligations or the retirement of a source. Additionally, given the Clean Air Act's focus on reducing emissions to prevent endangerment to public health and welfare, if a state were to rely on one of these considerations to justify setting a weaker standard, that state (and EPA in reviewing a plan submission) must also consider the forgone benefits of the emission reductions that would have otherwise resulted. Any failure to do so would be unlawful and arbitrary.

As currently proposed, EPA's revisions to the framework regulations would remove binding emission limits and leave in their place only vague, arbitrary criteria for states to consider as they undertake an intensive process to develop standards of performance and apply them to sources. This flouts the Clean Air Act, and does not require EPA and states to carry out their respective responsibilities under the statute. Specifically, the proposed regulations do not establish a procedure for states to submit adequate standards of performance. On the contrary, the proposed revisions render section 111(d) ineffective.

III. EPA's Proposed Amendments to the Framework Regulation's Timing Provisions Are Arbitrary and Capricious.

⁸⁹ See 83 Fed. Reg. at 44,805.

Joint Environmental Commenters' second major objection to EPA's proposed amendments to the section 111(d) framework regulations concerns the new timelines for state plan development and implementation. These amendments would extend this timeline in a way that will defer for multiple years the date by which covered sources must fully comply with applicable standards of performance. Specifically, we object to the following amendments:

- Proposed 40 C.F.R. § 60.23a(a)(1), which extends the deadline for state plan submittal from nine months (under the current framework regulations at 40 C.F.R. § 60.23(a)(1),) to three years.⁹⁰
- Proposed 40 C.F.R. § 60.28a(a), which extends the deadline for states to submit plan revisions after EPA issues a revised guideline from nine months (under the current framework regulations at 40 C.F.R. § 60.23(a)(2)) to 12 months. In addition, the proposal removes the requirement in the current regulations at 40 C.F.R. § 60.28(a) that states submit to EPA any plan revision that delays compliance or relaxes emission standards within 60 days of adoption.⁹¹
- Proposed 40 C.F.R. § 60.27a(b), which extends the deadline for EPA to either approve or disapprove a complete state plan submission from four months (under the current framework regulations at 40 C.F.R. § 60.27(b)) to 12 months. In addition, whereas the current four-month review period starts on the date that the state plan submission is due, the proposed 12-month review period would begin only when EPA makes a determination that the state plan submission is complete.⁹²
- Proposed 40 C.F.R. § 60.27a(d), which extends EPA's deadline for issuing a federal plan after a state fails to submit an approvable plan from six months (under the current framework regulations at 40 C.F.R. § 60.27(d)) to two years.⁹³
- Proposed 40 C.F.R. § 60.24a(d)(1), which permits state plans to establish compliance schedules of up to 24 months following the date of plan submittal before affected sources must be subject to legally enforceable increments of progress.⁹⁴ By contrast, the current framework regulations permit compliance schedules of just 12 months after plan submittal before enforceable increments of progress must be included in state plans.⁹⁵
- Proposed 40 C.F.R. § 60.24a(d)(1), which states that "within 60 days of the Administrator's receipt of a state submission, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria for completeness have been met."⁹⁶ No such analogous provision exists in the current framework regulations.

⁹⁰ *Id.* at 44,804.

⁹¹ *Id.* at 44,807.

⁹² *Id.* at 44,806.

⁹³ *Id.*

⁹⁴ *Id.* at 44,805.

⁹⁵ 40 C.F.R. § 60.24(e)(1).

⁹⁶ 83 Fed. Reg. at 44,805.

These amendments would dramatically delay the full implementation of the emission reductions that would be achieved under a section 111(d) regulation. Under EPA's proposal, a full 60 months⁹⁷ could elapse between the time that EPA issues a final emission guideline and the time that sources must come into full compliance with state-issued performance standards without being subject to enforceable increments of progress. By contrast, under the existing rules, only 21 months⁹⁸ may elapse between EPA's publication of a final guideline and full implementation of state-issued performance standards. The proposed amendments would thus inject an additional 39 additional months into the compliance process. For the reasons discussed below, joint environmental commenters strongly object to EPA's proposed timing amendments,.

a. EPA Has Disregarded a Relevant Factor: How the Proposed Timing Amendments Would Affect Air Pollution.

The proposed timing amendments would effectively grant all sources subject to future 111(d) regulations an additional 39 months to pollute without limitation before the applicable performance standards take at least partial effect. However, EPA has evinced no awareness of this fact in the rule proposal, let alone explained why the likely pollution impacts of its timing amendments do not outweigh any hypothetical rationale for lengthening the compliance schedule (which it has not offered). This flouts the Clean Air Act. When it erected the statute's major architecture in 1970, Congress specified that "[a] primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention."⁹⁹ It also provided that one of the statute's purposes is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."¹⁰⁰ And section 111 provides that major stationary sources that cause or contribute to air pollution that endangers public health and welfare be subject to emission limitations based on EPA's determination of the best system of emission reduction for each source category.¹⁰¹

Despite the provisions and goals of both the statute as a whole and section 111 in particular, EPA provides no discussion in the rule proposal of how the insertion of over three years into the section 111(d) rulemaking process will necessarily result in additional emissions that would otherwise be controlled during that time under the current framework regulations. The agency's lack of discussion or analysis in this regard is a paradigmatic instance of arbitrary and capricious decisionmaking: it reflects a manifest "fail[ure]" on EPA's part "to consider an important aspect of the problem."¹⁰²

⁹⁷ Under the proposal, states would have 36 months to submit plans; EPA would then have up to 18 months to make determinations of completeness and review the state plans; and states would then have an additional six months to extend a compliance schedule without having to include enforceable increments of progress (this is because the 24-month window for such a compliance schedule would run concurrently with EPA's 18-month period for plan completeness determination and review). These figures add up to 60 months.

⁹⁸ States currently have nine months to submit state plans; EPA has four months to review those plans; and states would then have an additional eight months to extend a compliance schedule without having to include enforceable increments of progress (again, this is because the 12-month window for such a compliance schedule would run concurrently with EPA's four-month period for plan review). These figures add up to 21 months.

⁹⁹ 42 U.S.C. § 7401(c).

¹⁰⁰ *Id.* § 7401(b)(1).

¹⁰¹ *See generally id.* § 7411.

¹⁰² *State Farm*, 463 U.S. at 43.

If it finalizes any of the proposed timing amendments to the framework regulations, EPA must recognize and assess the emission impacts of those amendments as a general matter, as well as the emission implications for power plant CO₂ emissions in particular. To the extent that EPA cannot quantify impacts with regard to future guidelines and state plans that would be governed by the new framework regulations, it must, at a minimum, acknowledge that pollution is likely to increase as a result of its timing amendments and explain why it believes those amendments are justified despite the additional harm to public health and welfare they will cause.

b. EPA Failed to Consider How its Proposal Would Decrease Regulatory Certainty About Planning and Compliance Deadlines.

EPA similarly failed to analyze how the proposal creates new regulatory uncertainty around proper planning and compliance deadlines for regulated entities. By vastly extending deadlines for states to submit plans, for EPA to review and approve plans, and for compliance to begin—including allowing three years for state plan submittal instead of nine months¹⁰³—these revisions will lead to more regulatory uncertainty as affected sources will be left in limbo for far longer with regard to the requirements that will ultimately apply to them. This will encourage sources to postpone resource planning decisions and actions to reduce emissions, resulting in higher costs and lower pollution reductions. EPA has considered none of these critical issues in proposing the timing amendments currently under discussion.

c. EPA’s Justifications for the Proposed Timing Amendments Are Inadequate.

EPA’s primary justification for introducing these major changes to the framework regulations is its assertion that the timing provisions of section 111(d) should “be consistent” with those for state and federal implementation plans under section 110.¹⁰⁴ It further notes in proposing to amend the schedule for state plan submissions that, “[b]ecause of the amount of work, effort, and time required for developing state plans that include unit-specific standards, and implementation of enforcement measures for such standards,” a new three-year deadline is appropriate.¹⁰⁵ The agency also justifies its decision to extend from four to twelve months the deadline for EPA’s approval of state plans based on “the flexibilities section 111(d) and emission guidelines generally accord to states, and EPA’s prior experience on reviewing and acting on state SIPs under section 110.”¹⁰⁶ Likewise, it rationalizes its decision to quadruple the time allotted for developing a federal implementation plan from six to twenty-four months to maintain “consisten[cy] with FIP deadlines under section 110(c).”¹⁰⁷ Finally, to justify its decision to double the amount of time that a state plan may provide for sources to achieve compliance before increments of progress are required, EPA explains that because it has significantly extended its *review* period for state plans, it must *also* extend the allotted time for compliance schedules in state plans.¹⁰⁸

These justifications do not withstand legal or logical scrutiny. First, there is no reason that timing and deadlines for section 111(d) rulemakings must be exactly the same as those for section 110 rulemakings.

¹⁰³ *Id.* at 44,804 (proposed 40 C.F.R. § 60.23a(a)(1)).

¹⁰⁴ 83 Fed. Reg. at 44,771.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 44,771-72.

While section 111(d) states that the procedures for state plan submission, approval, and implementation under that provision are to be “similar” to those under section 110, nowhere does the statute indicate that the two programs must have identical timelines for each step in the process. As EPA correctly observed in 1975, when it first promulgated the section 111(d) framework regulations, “[s]ection 111(d) plans will be much less complex than the SIPs” issued under section 110.¹⁰⁹ Indeed, whereas each section 111(d) plan applies to a single category of sources, a section 110 SIP covers all of the different types of sources whose emissions must be reduced to meet an ambient air quality standard.

And while section 111(d) plans include for each covered source a standard of performance— that is, an emission limitation generally expressed as a maximum permissible emission rate or annual mass limit for that source—a section 110 SIP must ensure that ambient air concentrations of a given pollutant in the state will stay below the EPA-designated standard. This latter goal is far more complicated to both achieve and demonstrate than the former: for instance, meeting the ambient air quality standards involves air quality monitoring, complex modeling procedures, close attention to such factors as topography, wind patterns, cross-board transport of air pollution, and many other considerations. Not only are section 111(d) plans far less complex than this, EPA already does a substantial percentage of the work for states in the first instance by selecting the best system of emission reduction that defines the degree of emission reductions that must be achieved by the individual sources in their jurisdiction through state-issued performance standards. It is thus eminently reasonable and consistent with the statutory scheme that section 111(d) would have a shorter timeframe for plan submission, review, and implementation.

For these reasons, EPA determined in 1975 that the timeframe and deadlines that currently exist were appropriate for state plan submission, review, and implementation—while retaining the authority to adjust where needed for a specific sector and pollutant. Although Congress subsequently amended the section 110 timing provisions in 1990, it took no action to amend the corresponding section 111(d) provisions at that time, nor has it taken any such action in the 28 years since the 1990 Clean Air Act amendments. “It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.”¹¹⁰ Although EPA may amend such timing provisions when it has good grounds to do so (and offers a reasoned explanation of those grounds), it is certainly not the case that Congress intended or required that the section 111(d) timing provisions must at all times be identical to those that apply to section 110.

This same logic applies to EPA’s creation of a six-month window for plan submission completeness determinations. Under the current framework regulations, EPA is not accorded any additional time to determine whether a state plan submission is complete before the agency’s allotted time for reviewing the plan begins to run. The agency indicates that an additional six-month window for determining plan completeness is necessary to maintain “consisten[cy] with the requirements of CAA section 110(k)(1)(B) for SIPs.”¹¹¹ Once again, SIPs under section 110 are far more complex than state plans under section 111(d), and EPA has articulated absolutely no reason why *any* additional time is necessary to review section 111(d) plan submissions for completeness, let alone six months. Nor is there any indication that

¹⁰⁹ 40 Fed. Reg. 53,340, 53,315 (Nov. 17, 1975).

¹¹⁰ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986) (internal quotations omitted).

¹¹¹ 83 Fed. Reg. at 44,772.

EPA has struggled in the past to stay within the existing timelines established in the current framework regulations on account of excessive time spent determining whether state plan submissions were complete.

More generally, EPA points to no evidence indicating that either states or regulated sources have had difficulty in the past meeting the timeframe and deadlines that exist in the current framework regulations, or that states or sources have requested timeline extensions of the kind that EPA is now proposing. To the extent that a particular emission guideline might call for more complex or involved state plans, the current framework regulations already provide that “[t]he Administrator may, whenever he determines necessary, extend the period for submission of any plan or plan revision or portion thereof.”¹¹² Indeed, EPA invoked exactly this provision in adopting extended deadlines for both plan submission and approval under the Clean Power Plan.¹¹³ Accordingly, there is simply no reason for the agency to extend the deadlines in the manner it proposes as a default matter for all subsequent rulemakings under section 111(d).

Lastly, EPA asserts that, because it has increased the timeframes for the agency’s completeness determination and review of state plans to a combined 18 months, it must also increase to 24 months the time that compliance schedules in state plans may extend past the date required for plan submission before affected sources must be subject to increments of progress. According to the agency, because designated sources are uncertain about their final compliance obligations until EPA accepts or rejects a state plan, those sources should not be required to limit their emissions in any way until six months after the expiration of the 18 months allotted for EPA’s review. As noted above, however, EPA has not adequately justified that 18-month period to begin with: it has not demonstrated any need for an additional period to determine plan submission completeness, nor has it provided evidence that the deadline that currently exists for EPA’s substantive review of state plans is unreasonable. Just as EPA should not extend that timeframe as a default matter, it has no basis to extend the time permitted before full compliance must be achieved, which is (according to the agency) entirely contingent upon EPA’s review period.

These extensions are even more egregious given that EPA provides no requirements to states governing development of increments of progress. Even at the point at which states are subject to increments of progress, without requirements from EPA specifying how to determine which steps towards compliance should be taken and on what timeline, sufficient progress necessary to achieve the emission reductions contemplated by section 111 is unlikely to be achieved.

For these reasons, EPA has not offered a satisfactory rationale for amending the timeframe and deadlines for state plan submittal, approval, and implementation under section 111(d). If the agency is truly concerned that the timing provision in the framework regulations are unworkable, it must provide actual evidence of this—which it has not done thus far—and must propose amended provisions that correspond to the actual workload involved in section 111(d) rulemakings, rather than those that are applicable to section 110 rulemakings. The proposed timing amendments are not accompanied by a reasoned explanation, do not reflect consideration of relevant factors, and lack an adequate basis of support in the record. Thus, they are arbitrary and capricious and must be rejected.

¹¹² 40 C.F.R. § 60.27(a).

¹¹³ 80 Fed. Reg. 64,662, 64,703 (Oct. 23, 2015); *see also* 40 C.F.R. § 60.23(a)(1) (states must submit plans within 9 months after publication of final emission guideline “[u]nless otherwise specified in the applicable subpart”) (emphasis added).

d. In Light of the Ongoing Climate Crisis and Decades of Agency Inaction, EPA’s Timing Amendments Are Unlawful and Arbitrary as Applied to the Section 111(d) Rulemaking for Power Plant CO₂ Emissions.

Any further delay in the context of this particular rulemaking—section 111(d) guidelines and performance standards for power plant CO₂ emissions—is particularly egregious. Power plants remain the largest stationary source of greenhouse gas emissions in the United States, and despite decades of unrebutted scientific research and intense public engagement on the issue, there are still no federal standards in effect to limit this pollution from existing EGUs. Atmospheric scientists first identified anthropogenic CO₂ emissions as having a warming effect on the climate in the early 1970s, and by the late 1980s, a scientific consensus had emerged that major reductions in CO₂ emissions were necessary to avoid catastrophic climate impacts. Recognizing this major threat, the United States ratified the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, with another 196 parties ultimately joining the treaty.¹¹⁴ And in 1998, in a memo from General Counsel Jonathan Cannon to Administrator Carol Browner, EPA concluded that it had legal authority under the Clean Air Act to regulate greenhouse gas emissions like CO₂.¹¹⁵

Yet for the twenty years since the Cannon Memo was published, federal action on climate change has been delayed at best and denied at worst. Rejecting the conclusions of the Cannon Memo, the George W. Bush Administration declined to regulate CO₂ emissions under the Clean Air Act, denying a petition requesting vehicle GHG standards.¹¹⁶ That administration also declined to include CO₂ limits in its updated new source performance standards for power plants in 2006,¹¹⁷ despite an earlier lawsuit brought by environmental groups seeking exactly that.¹¹⁸

After the Supreme Court ruled in *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), that greenhouse gases are pollutants subject to EPA’s Clean Air Act regulatory authority, EPA continued to drag its heels, completing no major final actions concerning climate pollutants for the remainder of the Bush Administration. In December 2009 under President Obama, EPA finally made a formal determination that greenhouse gases endanger public health and welfare,¹¹⁹ paving the way for regulatory action. Progress on power plant emissions, however, was glacial: it was not until October 2015—nearly six years later—that the agency issued final CO₂ emission standards and guidelines for EGUs.¹²⁰ As for existing sources, EPA’s rule did not require states to begin enforcing performance standards until 2022.¹²¹

¹¹⁴ United Nations Treaty Collection, *Status of United Nations Framework Convention on Climate Change*, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en, last visited Oct. 24, 2018) (showing U.S. signature of UNFCCC on June 12, 1992 and ratification on October 15, 1992, and also showing 197 total parties to convention).

¹¹⁵ Memorandum from Jonathan Cannon to Administrator Carol Browner on EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998); see also *Massachusetts v. EPA*, 549 U.S. 497, 510–11 (2007) (discussing Cannon memo).

¹¹⁶ 68 Fed. Reg. 52,922, 52,925 (Sep. 8, 2003).

¹¹⁷ 71 Fed. Reg. 9,866, 9,869 (Feb. 27, 2006).

¹¹⁸ *Save Our Children’s Earth Found. v. EPA*, No. 03-cv-00770-CW (N.D. Cal. Feb. 21, 2003); Proposed Consent Decree, Clean Air Act Citizen Suit, 68 Fed. Reg. 65,699 (Nov. 21, 2003); Consent Decree, Dkt. No. 47 (Feb. 9, 2004)

¹¹⁹ 74 Fed. Reg. 66,496 (Dec. 15, 2009).

¹²⁰ 80 Fed. Reg. 64,510 (Oct. 23, 2015) (new source performance standards for power plant CO₂ emissions); 80 Fed. Reg. 64,662 (Oct. 23, 2015) (existing source emission guidelines for power plant CO₂ emissions).

¹²¹ 80 Fed. Reg. at 64,664.

EPA now proposes to introduce changes in the timeline for section 111(d) rulemakings that will delay emission reductions from power plants even further. As noted above, the amendments in question would permit up to 60 months to elapse between the time an EPA emission guideline is finalized and the time that affected sources must, at a minimum, begin reducing their emissions through enforceable increments of progress. Assuming EPA issues a final emission guideline for power plant CO₂ emissions in mid-2019, designated sources can be expected to start reducing emissions in mid-2024. That is 50 years after scientists first identified the substantial harm of anthropogenic CO₂ emissions, 30 years after the United States ratified the UNFCCC, over 25 years after the publication of the Cannon Memo, and over 20 years after environmental groups first filed suit over EPA's failure to issue section 111 regulations for power plant CO₂ emissions.

In starker terms, two generations of Americans will have been born and have grown to adulthood between the time that CO₂ was first recognized as a driver of climate change and the time that existing power plants would first be required to limit their emissions of this pollutant in the United States. In the interim, the world has surpassed not only the 350 ppm threshold—that atmospheric concentration of CO₂ that is considered the maximum safe level—but the 400 ppm threshold as well.¹²² If we are to avoid the worst effects of climate change, deep emission reductions are needed immediately: time is simply of the utmost essence. For EPA to inject even *further* delay into the process of controlling power plant CO₂ emissions after decades of inaction is irresponsible and unconscionable—and flouts the agency's Clean Air Act obligation to require emission reductions to prevent this endangerment to public health and welfare.¹²³ In the alternative, and at an absolute minimum, the agency must critically analyze how its proposed amendments to the framework regulations' timing provisions would, in the context of the section 111(d) rulemaking for power plant CO₂ emissions, result in the emission of additional climate-forcing pollutants and thus further endanger public health and welfare. As the agency has included virtually no discussion of climate change anywhere in the current package of regulatory proposals, and certainly none with regard to the proposed amendments to the framework regulation timing provisions, it has ignored "an important aspect of the problem,"¹²⁴ in violation of its legal obligations and requirements for reasoned, nonarbitrary decisionmaking.

IV. Miscellaneous Issues Regarding EPA's Proposed Amendments to the Section 111(d) Framework Regulations

a. EPA Must Not Finalize the Last Sentence of proposed 40 C.F.R. § 60.20a(b).

The first sentence of proposed 40 C.F.R. § 60.20a(b) reads as follows: "No standard of performance or other requirement established under this part shall be interpreted, construed, or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established by the Administrator pursuant to other authority of the Act (section 112, Part C or D, or any other authority of the Act), or a standard issued under State authority."¹²⁵ This provision simply restates

¹²² *Earth's CO₂ Passes the 400 PPM Threshold—Maybe Permanently*, B. Kahn, Scientific American (Sept. 27, 2016), available at <https://www.scientificamerican.com/article/earth-s-co2-passes-the-400-ppm-threshold-maybe-permanently/>.

¹²³ 42 U.S.C. 7411(a)(1), (b)(1)(A).

¹²⁴ *State Farm*, 463 U.S. at 43.

¹²⁵ 83 Fed. Reg. at 44,803.

what is already the law: regulated sources must comply with *all* of the Clean Air Act emission limitations that apply to them, including the most stringent standards that apply where two or more requirements appear to overlap. The agency simply has no authority under section 111(d) to relax or modify standards issued under other parts of the statute.

However, the second sentence of proposed 40 C.F.R. § 60.20a(b) veers sharply in the other direction, providing that “[t]he Administrator may specify in a specific standard under this part that facilities subject to other provisions under the Act need only comply with the provisions of that standard.”¹²⁶ This language apparently indicates that if a covered source is subject to a section 111(d) emission limitation and one or more other requirement under the Clean Air Act, the Administrator may exempt that source from its compliance obligations under those other provisions provided that the source fulfills its obligations under section 111(d) requirements.

This is blatantly unlawful. Nowhere does the Clean Air Act confer upon EPA the authority to enforce certain requirements and ignore others, and EPA cannot take this action without an affirmative command from Congress.¹²⁷ The case law on this is quite clear: “an agency may not waive congressionally imposed statutory requirements .”¹²⁸ Indeed, “it makes no sense to contend . . . that an agency is free to pick and choose between statutory provisions on any ground it sees fit, with no congressional guidance and no rulemaking authority.”¹²⁹ The second sentence of proposed 40 C.F.R. § 60.20a(b) is therefore in direct contravention of bedrock administrative law principles and the Clean Air Act’s unambiguous requirements; it must be rejected.

b. EPA Must Clarify in Proposed 40 C.F.R. § 60.21a(f) that State-Issued Performance Standards May Take the Form of Mass-Based Allowances or Other Forms Besides Output-Based Emission Rates.

The current framework regulations specify that an “[e]mission standard means a legally enforceable regulation setting forth an allowable rate of emissions into the atmosphere, establishing an allowance system, or prescribing equipment specifications for control of air pollution emissions.”¹³⁰ EPA now proposes to replace the term “emission standard” as it appears in the framework regulation with “standard of performance,” a term that “includ[es], but [is] not limited to, a legally enforceable regulation setting forth an allowable rate or limit of emissions into the atmosphere, or prescribing a design, equipment, work practice, or operational standard, or combination thereof.”¹³¹ This regulatory definition of standard of performance notably excludes references to “an allowance system,” wherein an affected source’s emissions of a regulated pollutant are limited to a certain amount (e.g., tons) over a given time period (e.g., one year).

In the preamble to the ACE Proposal, EPA explains that the reference to “an allowance system” in 40 C.F.R. § 60.21(f)

¹²⁶ *Id.*

¹²⁷ See *La. Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 374 (1986) (“An agency may not confer power upon itself . . . [It] literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”).

¹²⁸ *Equip. of TN, Inc. v. United States*, 876 F.3d 172, 182 (6th Cir. 2017).

¹²⁹ *Regular Common Carrier Conference v. United States*, 820 F.2d 1323, 1331 (D.C. Cir. 1987).

¹³⁰ 40 C.F.R. § 60.21(f).

¹³¹ 83 Fed. Reg. at 44,804 (proposed 40 C.F.R. § 60.21a(f)).

was added as part of EPA's Clean Air Mercury Rule. 70 FR 28605. This rule was vacated by the D.C. Circuit, and therefore this added component to the definition of "emission standard" had no legal effect because of the court's vacatur. Consistent with the court's opinion, EPA signaled its intent to remove this reference as part of its Mercury Air Toxics rule. 77 FR 9304. However, in the final regulatory text of that rulemaking, EPA did not take action removing this reference, and it remains as a vestigial artifact.¹³²

Yet neither the preamble nor the proposed text of proposed 40 C.F.R. § 60.21a(f) is clear as to whether, as a general matter,¹³³ the new definition of "standard of performance" would permit states to implement an allowance system or some other form of the standard apart from an output-based emission rate, such as an input-based emission rate, a maximum concentration of pollutants in the source's flue stream (i.e., pollutants per unit volume), or a mandatory percentage reduction of pollutants.

There are several factors that support a more expansive interpretation of proposed 40 C.F.R. § 60.21a(f). For instance, the provision states that the term a "standard of performance" shall "include[], *but [is] not limited to*" a standard based on "an allowable rate or limit of emissions into the atmosphere, or prescribing a design, equipment, work practice, or operational standard, or combination thereof." This indicates that other forms of the standard beyond emission rates or work practice standards may be permissible. Furthermore, the reference to an allowable "*limit* of emissions into the atmosphere" could be construed to mass-based or other kinds of limits, and the term "rate" does not specify whether the denominator should be based on a source's output (i.e., the product it generates, such as electricity in the case of EGUs), its input (i.e., the fuel or other raw material that is fed into the system), a measure of volume (i.e., a concentration-based standard), or a period of time (i.e., a mass-based limit). Thus, the language of proposed 40 C.F.R. § 60.21a(f) could certainly be interpreted to permit a broad range of forms that state-issued standards of performance may take.

Yet in the absence of more explicit language from EPA, the provision remains ambiguous. The language of the Clean Air Act, on the other hand, provides greater clarity. Section 111(a)(1) defines "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of [the BSER]"¹³⁴ Section 302 of the statute, in turn defines "emission limitation" and "emission standard" (both of which appear in section 111(a)(1)'s definition of "standard of performance") as "a requirement established by the State or the Administrator which limits the *quantity, rate, or concentration* of emissions of air pollutants on a continuous basis."¹³⁵ Congress explicitly intended not to limit emission standards or limitations—including standards of performance under section 111—to output-based rates only, but to encompass rates of any kind, quantities (most logically understood as mass-based limits), or concentrations. EPA

¹³² 83 Fed. Reg. at 44,773.

¹³³ In the context of the proposed ACE rule, EPA makes clear that it will only accept state plans that establish standards of performance that take the form of output-based emission rates. See 83 Fed. Reg. at 44,764. Yet the agency does not clearly state that output-based emission rates must be the form that standards of performance take under *every* section 111(d) rulemaking.

¹³⁴ 42 U.S.C. § 7411(a)(1).

¹³⁵ *Id.* § 7602(k) (emphasis added).

should thus clarify that proposed section 60.21(f) permits any of these forms of the standard, consistent with the statutory language. While EPA may, in the context of a particular emission guideline, determine that a more specific form of the standard is necessary to ensure that the maximum quantity of emission reductions is achieved, the framework guidelines—which establish the default for section 111(d) rulemakings—should unambiguously permit a more expansive understanding of standards of performance.

c. In Proposed 40 C.F.R. § 60.22a(b), EPA Must Restore the Requirement That Emission Guidelines Include Information Concerning Known or Suspected Endangerment of Public Health or Welfare Caused, or Contributed to, by the Designated Pollutant.

EPA has proposed to delete the regulation requiring the agency to include in emission guidelines “[i]nformation concerning known or suspected endangerment of public health or welfare caused, or contributed to, by the designated pollutant.”¹³⁶ EPA offers no rationale whatsoever for abandoning this requirement,¹³⁷ an omission that would itself render the agency’s decision arbitrary and contrary to the Clean Air Act’s notice and comment provision.¹³⁸

There are compelling reasons for EPA retain the regulation that the agency must grapple with before it can eliminate it. First, information about the potential impacts of a pollutant on health and welfare is crucial to the development of state plans under section 111(d), the facilitation of which is the stated purpose of the regulatory provision at issue. States must take into account the likely harms of a pollutant when designing their implementation plans. For example, although a standard must adhere to EPA’s emission limitation, it might also be important for a state to know whether the pollutant could have localized effects. If a state were to submit a plan that concentrates pollution in hotspots or in disadvantaged communities, EPA might have grounds to disapprove it as not “satisfactory.”¹³⁹ Alternatively, communities and other interested persons could rely on this information to challenge EPA’s approval of such a plan.¹⁴⁰

In addition, information on the likely degree of the impacts of a pollutant is also important in prioritizing rulemakings under section 111. The statute already requires EPA to consider the magnitude of the threat posed by a pollutant when setting regulatory priorities for promulgating new source performance standards.¹⁴¹ This information should also guide EPA as it develops emission guidelines for existing sources. There is currently a large backlog of source categories for which EPA has already issued new source standards, but for which it has not issued existing source emission guidelines, as it must under section 111(d). Just as it must consider the impacts of a pollutant for purposes of prioritizing its new source standards, EPA must evaluate the health and welfare impacts of a pollutant in developing its regulatory agenda for developing existing source emission guidelines, and principles of reasoned decision making require it to disclose such information in its proposed and final emission guidelines.

¹³⁶ See 83 Fed. Reg. at 44,804 (proposed 40 C.F.R. § 60.22a(b) (omitting current 40 C.F.R. § 60.22(b)(1))).

¹³⁷ See *id.* at 44,769-73 (discussing proposed changes to the regulations implementing Section 111(d)).

¹³⁸ See 42 U.S.C. § 7607(d)(3) (“In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, United States Code, [and] shall be accompanied by a statement of its basis and purpose.”); see also 83 Fed. Reg. at 44,797 (citing CAA section 307(d) as applicable to the ACE proposal).

¹³⁹ 42 U.S.C. § 7411(d)(2)(A).

¹⁴⁰ *Id.* § 7607(b)(1).

¹⁴¹ See 42 U.S.C. § 7411(f)(2)(C).

For these reasons, EPA's proposal to remove from the implementing regulations its responsibility to describe the potential harmful effects of a pollutant it is regulating under Section 111(d) is unlawful and arbitrary. The agency must retain the provision or, in the alternative, explain why it intends to delete it and provide an opportunity for public comment on its proffered rationale.

d. EPA Should Include Environmental Justice Requirements in the Development of Both Emission Guidelines and State Plans.

Environmental justice refers to the ways in which environmental harms disproportionately impact communities of color and low-income communities, as well the ways in which these communities experience unequal access to environmental benefits and amenities. Environmental justice is not limited to areas of substantive concern, but is deeply invested in process considerations as well. To that end, environmental justice advocates not only work to procure equitable environmental policies, but seek to ensure that the decisionmaking process by which those policies are enacted fully account for and include the participation of environmental justice communities.

In the Clean Power Plan, EPA addressed environmental justice concerns in the emission guidelines.¹⁴² For instance, in developing the rule's emission reduction targets, EPA performed a proximity analysis that found that a higher percentage of low-income people and people of color live near power plants when compared to the national averages. The rule also required states to show that they provided meaningful participation opportunities to environmental justice and community groups in their plan development process as a condition for obtaining an extension for final plan submittal, and encouraged states to conduct their own environmental justice analyses to ensure that their state plans would achieve emissions reductions from sources that affect these communities. EPA developed these aspects of the Clean Power Plan partially in response to Executive Order 12,898 (59 Fed. Reg. 7,629 (Feb. 16, 1994)), which directs federal agencies to consider the environmental justice impacts of their programs and policies.

These actions in the Clean Power Plan should be considered as merely the first steps toward a full engagement with environmental justice considerations and a solution to the dire problems that these communities face. While much more needs to be done to truly address the environmental inequities that low-income populations and communities of color face, the Clean Power Plan represents an important precedent for incorporating environmental justice into the section 111(d) rulemaking process. EPA must make this an official policy by adding provisions to the 111(d) framework regulations that require it to address environmental justice concerns in its emission guidelines and states to address those issues in their plans. The agency should also provide that states must comply with the non-discrimination provisions of Title VI of the Civil Rights Act to the extent that states utilize federal funds in developing their plans. These requirements should address both substantive considerations—for instance, requirements for environmental justice analyses of policies and programs and measures to ensure that emission guidelines and state plans alleviate environmental justice problems—as well as process considerations to help ensure that environmental justice communities are represented in the decisionmaking process itself.

¹⁴² See 80 Fed. Reg. at 64,914–19.

Respectfully submitted,

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Clean Air Council
Clean Air Task Force
Clean Wisconsin
Coalition to Protect America's National Parks
Conservation Law Foundation
Earthjustice
Environmental Defense Fund
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National Parks Conservation Association
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