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RE: COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION ON THE ADOPTION AND SUBMITTAL OF STATES PLANS FOR DESIGNATED FACILITIES: IMPLEMENTING REGULATIONS UNDER CLEAN AIR ACT SECTION 111(D); PROPOSED RULE; 87 FED. REG. 79176 (DECEMBER 23, 2022); DOCKET ID NO. EPA–HQ–OAR–2021–0527

Administrator Regan:

The American Public Power Association (APPA or Association) appreciates the opportunity to provide comments on the Environmental Protection Agency's (EPA or Agency) proposed rule entitled, "Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d)" (the Proposed Rule).[1]

APPA represents community-owned, not-for-profit public power utilities that power homes and businesses in 2,000 communities — from small towns to large cities. Public power utilities safely provide reliable, low-cost electricity to more than 49 million Americans while protecting the environment. These utilities generate or buy electricity from diverse sources. They employ 96,000 people and earn $58 billion in revenue each year. Public power supports local commerce and jobs and invests back into the community.

APPA and its members continue to be dedicated to clean air in their communities and the protection of the environment. We welcome the opportunity to work with the agency to improve the Proposed Rule. Should you have questions regarding these comments, please contact Carolyn Slaughter via email (CSlaughter@PublicPower.org) or telephone at (202) 467-2900.

[1] 87 Fed. Reg. 79176 (December 23, 2022).

Sincerely,

Carolyn Slaughter
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American Public Power Association

COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION ON THE ADOPTION AND SUBMITTAL OF STATE PLANS FOR DESIGNATED FACILITIES: IMPLEMENTING REGULATIONS UNDER CLEAN AIR ACT SECTION 111(D); PROPOSED RULE

87 Fed. Reg. 79176 (December 23, 2022)

Docket ID No. EPA–HQ–OAR–2021–0527

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I. Introduction

The American Public Power Association (APPA or Association) appreciates the opportunity to provide comments on the Environmental Protection Agency's (EPA or Agency) proposed rule entitled, "Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d)" (the Proposed Rule).[1]

APPA is a trade association composed of not-for-profit, community-owned utilities that provide electricity to 2,000 towns and cities nationwide. APPA protects the interests of the more than 49 million people that public power utilities serve, and the 96,000 people they employ. The association advocates and advises on electricity policy, technology, trends, training, and operations. APPA members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community- owned power. The Association and its members have a strong interest in revisions to Clean Air Act regulations, including the New Source Performance Standards (NSPS) under Clean Air Act (CAA) section 111. Our members operate power generation plants that currently comply with section 111 standards and are expected to be subject to EPA's future greenhouse gas proposal under section 111(b) and section 111(d).

APPA and its members have and continue to be dedicated to clean air in their communities and the protection of the environment. Our members have made significant investments to reduce emissions and comply with the suite of air regulations that EPA has promulgated over the last ten years. Many members continue to pay for those investments through loan obligations. For these reasons, APPA members have a significant stake in the Proposed Rule, which sets the framework within which the forthcoming proposed section 111(d) greenhouse rule will be implemented.

APPA highlights the following points for EPA's review and consideration, which are discussed in more detail herein:

- APPA supports a time frame of 36 months, but no shorter than 24 months, for state plan development.

[1] 87 Fed. Reg. 79176 (December 23, 2022).

- EPA should adopt a 24-month period for Increments of Progress from the deadline for state plan submittal.
- APPA recommends a federal plan timeline no shorter than 18 months.
- APPA supports community engagement in the section 111(d) implementation process. Public participation requirements should be complementary to existing state and local practices. Public participation demonstrations should not be required in section 111(d) state plans.
- New Remaining Useful Life and Other Factors (RULOF) provisions are unworkable and unlawfully limit state authority.
- APPA supports EPA's proposal to allow electronic submittals of state plans as an option.
- Compliance choices beyond emission-rate limitations are appropriate for state plans.

Thank you for your consideration of the following specific comments.

II. EPA's State and Federal Implementation Timelines Are Impracticable.

A. States need more than fifteen months to develop section 111(d) state plans.

States must have adequate time to prepare state plans. Congress dictated CAA section 111(d) rule development through a cooperative federalism approach. After EPA sets emissions guidelines, section 111(d) assigns the state role as: "[E]ach State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title." 42 U.S.C. § 7411(d)(1). *West Virginia v. EPA* recognizes the section 111 cooperative regulatory framework and the role of states in implementing emission guidelines within their borders.[2]

[2] *West Virginia*, 142 S.Ct. 2587, 2606 (2022) (finding states were harmed by the section 111(d) Clean Power Plan, which required they more stringently regulate power plant emissions). The Court reviewed the framework of section 111 for states to submit plans with emissions restrictions "not to exceed the permissible level of pollution established by EPA." *Id.* at 2602.

States must have a fair opportunity to perform their role. Otherwise, states are essentially written out of the cooperative process, contrary to statute. If states are not afforded enough time to fulfill their roles, Congress's intent is thwarted. The rulemaking framework effectively collapses into an EPA-only standard setting and federal plan implementing approach.

The current proposal of only 15 months does not provide states adequate time. The following reasons provide particularized support for a longer time frame, as required by *American Lung Association v. EPA*:[3]

- Proposed "Meaningful Engagement" Requirements add a new layer of requirements that states must fulfill.

The Proposed Rule requires that states conduct "meaningful engagement" of "pertinent stakeholders." State plan submissions must include a list of these stakeholders, a summary of engagement, and a summary of stakeholder input received. EPA's definition of "meaningful engagement" requires "early outreach" and solicitation of input on the state plan. The effort entailed to engage meaningfully should not be taken lightly. States must define the relevant stakeholders first. These parties may be numerous, depending on the section 111(d) rule at issue and the number of affected sources and geographic areas. Then states must undertake "meaningful engagement". Finally, states have the burden of reviewing and summarizing oral and written comments by providing EPA with "evidence" of the process.[4]

- Proposed RULOF requirements are substantial and will require significant time to satisfy.

In the Proposed Rule, EPA fundamentally changes and enhances RULOF requirements for state plans. Setting aside the substantive concerns with these requirements discussed *infra*,

[3] *American Lung Assoc. v. EPA*, 85 F.3d 914 (D.C. Cir. 2021) (vacating the implementing regulations and finding that EPA must provide more particularized support for its time frames than "the general claim of need for more processing time.").
[4] EPA provides some relief to states via parallel processing provisions, but the circumstances appear to be limited and subject to approval by EPA.

the time necessary to satisfy them will be considerable. EPA's redline proposal[5] of 40 CFR § 60.24a adds new sections (f)-(i) that enumerate EPA's new RULOF expectations for state plans.

States must embark on a comprehensive analysis of any source to be considered for a less stringent standard of performance. EPA squarely places the responsibility of making this demonstration on states. The analysis must identify *all* control technologies or other systems of emissions reductions available for the source. This evaluation would involve an emissions analysis for each. There is also a feasibility component of the RULOF analysis to prove that the source cannot meet the best system of emission reduction (BSER) identified by EPA. The state plan must present details, such as monitoring, reporting, and recordkeeping, in addition to the proposed emission standard. Further, states must undertake an environmental justice analysis of the less stringent standard on vulnerable communities.

In addition to the broad scope of the RULOF analysis, EPA expects state plans to include extensive documentation as backup. EPA directs states to using "sources published by EPA, permits, environmental consultants, control technology vendors, and inspection reports."[6] Site-specific analyses of this magnitude require cooperation between sources and states and time to hire third-party resources and undertake projects. The proposed documentation is akin to EPA's expectations in four-factor analyses under the Regional Haze program. Four-factor analyses frequently take more than a year to complete and often require additional work to respond to follow-up questions and information requests from states.

If EPA retains the proposed RULOF state plan requirements, states must have time to implement them. The RULOF process can proceed concurrently with other aspects of the state plans; however, a minimum period of 24-36 months is needed. Otherwise, the rule will have a chilling effect on the use of RULOF.

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[5] EPA opted not to publish the redline of proposed regulatory changes in the Proposed Rule. These changes are contained in a docket memo found at: https://www.epa.gov/system/files/documents/2023-01/Regulatory%20Text%20proposed%20changes%20to%2040%20CFR%20part%2060%20subpart%20Ba_0.pdf (Regulatory Redline Memo).

[6] Regulatory Redline Memo at proposed 40 CFR § 60.24a(j)(2).

- States must have time to determine the reliability impacts of state plans.

Section 111(d) emissions guidelines may have impacts on grid reliability. For instance, the Supreme Court observed that there were no controls that a coal plant operator could install and operate to attain compliance with Clean Power Plan limits. Rather, compliance was achieved by forcing a shift throughout the power grid from one energy source to another.[7] This approach would have impacted reliability by forcing certain assets offline, had the Clean Power Plan taken effect. Likewise, if EPA imposes a section 111(d) rule that effectively achieves compliance via reduced generation, reliability impacts must be thoroughly evaluated.

States are the first line of inquiry in their implementation role. States have a vested interest in ensuring that their citizens receive consistent, reliable power. States must be afforded time to interact with sources to target at-risk units that serve important reliability roles. Then there must be time to coordinate with regional transmission organizations (RTOs) and independent system operators (ISOs) to verify and better understand reliability concerns based on the projected impacts of a future section 111(d) rule. If the rule affects multiple generation assets in the same area, the analysis may become more complicated. As an example, PJM (an RTO) requires generation owners to provide 90 days advance notice prior to a proposed deactivation date.[8] PJM then conducts a reliability analysis of potential deactivations in linear sequence according to other deactivation notices received. This analysis focuses on whether any transmission grid reinforcement is necessary to continue the reliable power flow to load centers in PJM. The RTO/ISO analysis could be complicated if there are multiple requests involving collectively large capacity deactivations within a narrow, overlapping time frame. For these reasons, states must have time to engage with sources and transmission organizations to understand and ensure reliability is not compromised. RTOs/ISOs must also have time to perform reliability analyses based on the projected section 111(d) rule impacts. EPA should not

[7] *West Virginia v. EPA*, 142 S.Ct. 2587, 2595-96 (2022) ("By contrast, and by design, there are no particular controls a coal plant operator can install and operate to attain the emissions limits established by the Clean Power Plan.").

[8] PJM Open Access Transmission Tariff (OATT), Part IV, Section 113.1.

shortcut these processes. As further discussed in Part IV.C. of these comments, reliability concerns as to a specific unit should also be considered as an "Other Factor" under RULOF.

- States consistently cite budget and staffing constraints.

Many states have competing budgetary and resource constraints. APPA members have reached out to their states. The consistent feedback from these conversations is the lack staff to prepare and process state plans, particularly to the level that EPA has charted in this proposal. The Proposed Rule's state plan requirements place additional stress on already scant resources. Without adequate personnel to undertake public engagement, state plan drafting, and outreach and interaction with sources, these steps cannot take place concurrently. EPA must not place unrealistic timing constraints on states, while setting a high bar with respect to state plan content.

- States must have time to develop a reasoned proposal that implements EPA's emissions guidelines.

Aside from the new requirements for "meaningful engagement" and RULOF, states require time to meet basic state plan requirements. For example, states must develop an inventory of designated facilities and emissions data for each. Plans must have standards of performance, test methods, and procedures for determining compliance. These basics require emissions data verification, interaction with sources, and plan preparation. For section 111(d) rules with many facilities involved, this effort can be time-consuming and labor-intensive. While implementation of a basic emission rate as BSER may be straightforward, EPA may put forward more complex emission guidelines with optionality. For example, EPA allowed for emissions trading as part of the Clean Power Plan, as well as options for efficiency improvements and dispatch of gas over coal-fired assets through mass-based goals. Although *West Virginia* has constrained the scope of EPA's emissions guidelines, the Proposed Rule elects to provide states the choice of exploring outside-the-fence options. States must have adequate time to carry this burden.

- Many state plans will be subject to state regulatory approval processes before submittal to EPA.

EPA acknowledges in its proposal that there are state-specific factors that affect the amount of time that states need to develop and submit state plans.[9] One significant factor that varies from state to state is the state regulatory process. States require administrative and sometimes legislative engagement and approval of plans prior to submittal to EPA. Such processes typically involve public involvement through a public comment period, review of written comments, public meetings, and final approval (by agency, legislative committee, Governor, or citizen board). Obviously, this process cannot commence until a draft state plan has been prepared.

EPA acknowledges these state processes, which often involve public outreach, in the Proposed Rule. However, it is not appropriate to assume that state approval processes are duplicative of the rule's outreach requirements. Rather, they create another layer of complexity for states.

States take 1 to 3 years to promulgate implementing regulations in accordance with state-level procedural requirements. This estimated timeframe captures the external administrative review process requirement only. It does not take into consideration the planning process and regulatory development necessary prior to proposal.

For example, in Kansas, non-technical regulations with minimal amendments take 1 to 2 years, while lengthy and technical regulations can take 2 to 4 years. The Kansas Department of Health and Environment (KDHE) is likely to consider the section 111(d) state plan process as technical due to the need to evaluate and determine the inventory of all designated facilities and to work with industry and stakeholders. Therefore, KDHE has estimated that the state plan process under 40 CFR Subpart Ba will take three years.

Likewise, environmental requirements in Missouri go through an administrative process that must be factored into state plan time frames. Regulatory development is subject to Missouri Air Conservation Commission timelines. Once a proposed rule has been developed, and a draft rule is ready to proceed through the rulemaking process, it takes at least 13 months to finalize a draft rule. A complex rule will take longer than 13 months, while a rule that does not require a

[9] 87 Fed. Reg. at 79184.

regulatory impact report can be processed more quickly. Approximately eleven months is the fastest a rule can proceed. A section 111(d) rule will likely have regulatory impacts. In summary, the Missouri Department of Natural Resources (DNR) must develop the draft rule first. Then at least 13 months are needed to finalize the rule administratively. If EPA's proposal of 15 months is finalized, Missouri DNR would only have two months for rule development. Two months is plainly not enough time for inventory identification, stakeholder outreach, public engagement, rule drafting, and RULOF evaluations.

The Texas Commission on Environmental Quality (TCEQ) outlined its stagged approach to develop a state plan in comments responding to the proposed Affordable Clean Energy rule. TCEQ's noted the complex work required to develop a state plan would include: (1) the develop an application form or information request seeking detailed information from the owner/operator of each regulated unit; (2) perform an administrative and technical review of the information provided; (3) ask clarifying questions and possibly seek additional information from owners/operators; (4) develop a proposed state plan; (5) seek TCEQ Commissioner approval for the proposed state plan at a formal TCEQ Agenda (public meeting); (6) if approved by the Commissioners, publish the proposed state plan in the Texas Register; (7) open a formal comment period and hold a public meeting to accept verbal and written comments (comments may also be submitted electronically or mailed); (8) develop a formal Response to Comment document and revise the proposed state plan based on comments; (9) seek TCEQ Commissioner approval for the final state plan at a TCEQ Agenda; and (10) if approved by the Commissioners, publish the final state plan in the Texas Register.[10] TCEQ, in its comments, suggests it could take five years for a state plan to be submitted.[11] And, depending upon EPA's expectations for public outreach and engagement, there could be additional steps.

Given these considerations, APPA supports a time frame of 36 months but certainly no shorter than 24 months for state plan development. The time frame for National Ambient Air Quality Standards state implementation plans under Clean Air Act section 110(a) is also 36

[10] EPA DOCKET ID NO. EPA-HQ-OAR-2017-0355-23666.
[11] *Id*.

months or three years. EPA tethers itself to certain aspects of section 110[12] but departs from the 36-month timeline.[13] APPA encourages EPA to consider the obligations it is placing on states. A more reasonable timeframe should be adopted to preserve the state's role in the section 111 process.

B. The timeline for Increments of Progress is overly burdensome on sources.

EPA must not impose prematurely set Increments of Progress. Increments of Progress are predicated on the certainty of a *final* state plan. They include steps taken by a source of an affected facility, such as development of a final control plan, award of contracts for emissions controls installation, or commencement of construction projects and/or control device installation to achieve final compliance. These measures can be undertaken once EPA approves the state plan, so sources know the appropriate BSER applied (emissions limitations, work practices, or other measures), monitoring requirements, and, if applicable, whether EPA approves RULOF demonstrations.

EPA proposes to require that the first Increment of Progress will be due only two months after the expected date when EPA will approve state plans. Specifically, EPA provides that the first legally enforceable Increment of Progress is due 16 months from state plan submittal.[14] Sixteen months is devised by calculation of the 60-day completeness determination by EPA plus the 12-month period for EPA state plan review. Then EPA provides a two-month buffer before the first legally enforceable Increment of Progress takes effect, totaling 16 months. This timeline is not practically workable. Sources will not know final state plan requirements until EPA approval. It is unduly burdensome for sources to expend resources on developing hypothetical final control plans and committing resources to construction projects that may ultimately be inconsistent with the final, EPA-approved state plan.

[12] *See* 42 U.S.C. § 7411(d)(1) ("The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by *section 7410 of this title* under which each State shall submit to the Administrator a plan . . . ." (emphasis added).
[13] 87 Fed. Reg. at 79182.
[14] 87 Fed. Reg. at 79189 (Comment A5-1).

APPA and its members are committed to expeditious compliance; however, a reasonable implementation schedule is needed. APPA proposes that EPA adopt a 24-month period from the deadline for state plan submittal. This time frame assures 10 months after EPA plan approval. Alternatively, if the first Increment of Progress is triggered by *the date of EPA plan approval*, a 10-month period from that date would also be acceptable and even preferred, should EPA miss its approval deadlines. Again, sources require plan certainty before state plan implementation can begin.

C. The federal plan promulgation deadline should be at least eighteen months.

EPA must provide itself adequate time to develop federal plans. EPA proposes that federal plan promulgation occur within 12-months from failure to submit or disapproval of a state plan. This aspirational deadline is likely to fail based on APPA's members' experiences with federal plan promulgation in other CAA programs. As EPA is well-aware, the agency contends with a multitude of litigation cases enforcing missed actions on state implementation plans and promulgation of federal plans when states miss deadlines. An aggressive deadline for section 111(d) federal plan development will place unnecessary pressure on EPA and will result in uncertainty for states, sources, and stakeholders if deadlines are missed.

In addition, federal plans should not be rushed. As EPA highlights in the rule, federal plan development has many layers.[15] EPA contemplates collaboration through an interagency workgroup and meaningful public engagement. Careful consideration of stringency of the emissions guidelines and translating them to numerical standards will require work. RULOF consideration presents another time-consuming element of the analysis, as discussed in Part II.A of these comments in reference to state plans. APPA and its members emphasize the importance of putting together a thorough section 111(d) implementation plan that contains achievable standards and appropriate compliance measures, based on outreach with states, sources, and stakeholders. An unrealistic deadline may lead to plan content shortcuts that will cause future

[15] 87 Fed. Reg. at 79,187.

compliance issues. APPA recommends a federal plan timeline no shorter than 18 months, which is still shorter than the 24-month vacated Subpart Ba timeline.

III. Outreach and "meaningful engagement" are important but should defer to state engagement processes for section 111(d) state plan development.

APPA fully supports community engagement in the section 111(d) implementation process. We agree that the public, as well as states and sources, should have an opportunity to provide meaningful comments and engage. Oral and written comments should be considered by EPA and states in the development of plans. This process also helps to educate the public regarding stationary source emissions and favorable emissions trends.

Although APPA encourages public engagement in general, EPA's proposal is problematic. The Proposed Rule inserts inflexible, federally-mandated "meaningful engagement" requirements. The Proposed Rule's approach ignores state engagement processes and places the burden of implementing this onerous, new federal overlay on states. EPA's approach to lean on states and intrude on state outreach policies to this extent is unprecedented. EPA goes far beyond simply ensuring states hold a public hearing in the current state plan process. Moreover, the legal authority underlying EPA's approach is absent in CAA section 111. Even though EPA has broad discretion to protect human health and the environment, there are limits to EPA's interpretative license. Here, EPA has crossed the boundary by intruding on state procedural processes.[16]

Current state engagement processes should not be discounted. State administrative regulations typically involve initial outreach to stakeholders (affected permittees and conservation groups) by posting notices in newspapers, environmental agency websites, and social media.[17] State environmental justice offices provide additional outreach to ensure that underserved communities are engaged.[18] Often environmental agencies post website information

[16] For further discussion of EPA's legal boundaries and discretion, see EPA Guidance on considering Environmental Justice during the Development of Regulatory Actions (May 2015) at https://www.epa.gov/sites/default/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf

[17] *See, e.g., https://epd.georgia.gov/public-announcements-0/air-protection-branch-public-announcements* (listing public notices of air regulatory activities, including state plans, and opportunities for engagement via public meeting and written comment period).

[18] *See, e.g.,* https://www.deq.virginia.gov/get-involved/environmental-justice (Virginia's environmental justice policy office); https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/Summaries-and-Documents.aspx (Pennsylvania environmental justice and public outreach initiatives);

regarding draft regulations to educate citizens regarding resulting environmental impacts and community concerns.[19] Many regulatory processes also have stakeholder interest committees to inform the regulatory process. Public hearings, in-person or via video conferencing, to encourage oral comments and comment periods for written comments are almost universal. Given existing state engagement infrastructure, EPA should pursue a less expansive, detailed approach. For example, a more effective approach might include basic engagement requirements. Yet those requirements should not be so specific as to usurp state primacy over state engagement processes.

A. Public participation requirements should be complementary to existing state and local practices.

Section 111(d) plan development should involve public participation but with deference to state public participation processes. Section 111(d) implementation regulations should provide minimum public participation requirements to ensure that adequate input occurs. Many states have robust engagement processes in place. State sovereignty should be preserved. State choices for effective "meaningful engagement" involvement are more likely to take into account the unique state geography, infrastructure, culture, and resources. Federal requirements should be complementary and should not usurp or duplicate existing processes.

APPA appreciates EPA's recognition of the potential overlap of state engagement requirements in this proposal.[20] EPA proposes an approval process by which a state may ask the EPA Regional Office for approval of alternate engagement procedures.[21] An approval process will build more time into the state plan development process and should be avoided. Instead, EPA should outline basic engagement obligations in the implementation regulations at a high level. If a state engagement process satisfies the requirements, this should be sufficient to

https://www.oregon.gov/deq/about-us/Pages/Environmental-Justice-laws.aspx (Oregon environmental justice policy and outreach considerations).

[19] *See, e.g.*, *https://www.ahs.dep.pa.gov/eComment/*, which outlines participation dockets.

[20] 87 Fed. Reg. at 79192.

[21] Regulatory Redline Memo at proposed 40 CFR § 60.23a(i)(2).

achieve EPA's goals as articulated in the proposal, strengthening "meaningful engagement" beyond the existing public hearing requirement.

B. Public participation demonstrations in section 111(d) plans are problematic.

Enhanced public engagement requires additional time in the section 111(d) plan development process, as discussed in Part II.A. On top of the time needed to engage the public, EPA proposes that state plan submittals include an unprecedented level of detail. States must compile "evidence" of "meaningful engagement" that includes a stakeholder list, summary of engagement, and a summary of stakeholder input. This requirement places an additional burden on states and represents an unnecessary level of scrutiny.

The public engagement demonstration can be used by EPA to find an otherwise substantively acceptable state plan incomplete. This is not appropriate or consistent with the framework in section 111. State plan requirements should reflect elements that implement Congress's intent in section 111. The statute is silent on outreach. EPA can accomplish its "meaningful engagement" goals by placing the requirements in the regulation, without a state plan obligation. This is consistent with the current regulatory approach that mandates a public hearing yet does not require evidence thereof in plans. It is not necessary for EPA to second guess states' outreach efforts in plans.

IV. New Remaining Useful Life and Other Factors Provisions (RULOF) Are Practically Unworkable and Limit State Authority.

As a threshold matter, EPA's RULOF changes will effectively prohibit the consideration of RULOF. In the proposal, EPA has set a higher threshold standard to meet RULOF, then EPA outlines substantial enhancements to the evidential showing required in state plans. On top of this, EPA proposes a short window for state plans to be developed. Finally, EPA imposes a stringent standard of review over the demonstrations. The combination of these changes makes it practically infeasible to make a successful RULOF showing. This result is contrary to the statutory language of section 111 that allows RULOF consideration and will limit states from

considering these factors. APPA appreciates your consideration of the following specific areas of EPA's RULOF proposal.

A. The new "fundamentally different" RULOF threshold element unlawfully narrows consideration of site-specific factors allowed by section 111(d)(1).

EPA's proposal narrows the circumstances in which RULOF can be applied by rewriting and narrowing the third RULOF criterion. The new limiting factor only allows RULOF to apply when facility circumstances were not considered in the course of setting BSER. Previously, facilities could use the third criterion when there were "[o]ther factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable."[22] The new revision would allow EPA to disqualify facilities that cannot show infeasibility or unreasonable cost, yet may have unique circumstances if those circumstances relate to a topic EPA considered in the BSER emission guideline setting process.[23]

"Fundamentally different" should not be a RULOF threshold consideration. First, it is circular. EPA conflates the emissions guideline process with the implementation process. In doing so, EPA sets an artificial, circular standard that is confusing in the abstract (i.e., hard to conceptualize without the context of a specific section 111(d) rule) and unnecessarily restrictive. It is unclear why the general consideration of a criterion in the context of an emission guideline should preclude a site-specific evaluation in the implementation process. For example, if EPA were to generally discuss geology as precluding a control device option for setting an emission guideline, it is unclear why that justifies ignoring site-specific geologic evidence. This logic inaccurately assumes that EPA's BSER emission guideline analysis is so comprehensive that it takes into account all site circumstances. In fact, Congress allowed consideration of RULOF in section 111 precisely to account for this contingency. For this reason, the "fundamentally different" principle is misplaced in the section 111 RULOF analysis and should be struck.

B. The ROLUF State Plan Demonstration is onerous and time consuming.

[22] 40 CFR § 60.24a(e)(3).
[23] *See, e.g.*, *infra* the discussion in Part IV.C regarding reliability as an "Other Factor."

EPA proposes a large volume of new RULOF requirements for inclusion in state plans. While previously state plans did not have to include a RULOF demonstration, now states are incumbered with a new time-intensive analysis. Specifically, the Proposed Rule would require:

- A source-specific analysis of all control technologies or systems;
- A source-specific emissions reduction analysis;
- A source-specific analysis and identification of feasible monitoring, reporting and recordkeeping;
- Site-specific information from reliable sources, vendors, and consultants;
- A source-specific analysis of impacts on vulnerable communities; and
- For retiring units, a source-specific business-as-usual analysis.

States clearly do not have the information available to conduct these analyses to the level that this Proposed Rule contemplates. A successful demonstration will likely require study of an emission unit, an engineering feasibility study and analysis of control options, and further study of monitoring options. States will likely look to sources to make this showing, given resource constraints. Then states will need to vet the demonstrations. This is a time intensive process that will begin with third-party studies and end with state-source collaboration.

This level of detail is similar to feasibility and cost studies performed for the Regional Haze program. However, EPA allows *years* for sources to develop this data and for state oversight of the studies. Here, EPA must either provide time to develop this information or create a more expedient demonstration.

EPA requests comment on whether it is appropriate for a specific emissions guideline to provide additional requirements or supersede RULOF requirements in these implementing regulations.[24] Obviously, EPA is not permitted by statute to eliminate the ability for RULOF consideration in a specific emission guideline. But we can envision benefits of a RULOF demonstration tailored to a specific emission guideline. APPA recognizes and agrees with EPA's

[24] 87 Fed. Reg. at 79198 (Comment E2-3).

observation that one-size-fits-all RULOF provisions may be inadequate when applied to a specific set of sources and emission guidelines. These circumstances could be identified on a case-by-case basis. APPA is supportive of unique RULOF requirements that supersede the implementation guidelines so long as the RULOF provision remains workable in state and federal plans. As previously discussed, EPA's present, robust RULOF proposal raises this concern.

C. Reliability is an appropriate "Other Factor" to consider in the RULOF analysis.

Reliability concerns are an "other factor" that must be eligible for RULOF consideration. The plain language of section 111(d) allows other factors to be weighed by states when determining if a less stringent standard is appropriate. Reliability – and the impact of environmental compliance on baseload assets – must be evaluated, particularly if a future section 111(d) rule forces the reduction in capacity factors.[25]

Our country's generation needs are changing rapidly and projected to increase substantially. The utility sector requires time to adjust to these changes to ensure it is meeting its obligation to provide affordable, reliable, and sustainable power. New generation will be built and improved low and non-emitting generation technologies are under development. However, grid stability is at risk if fossil generation is forced off-line prematurely without replacement generation. Some fossil fuel assets are in transmission-constrained areas or in areas in which RTOs have a generation deficit.

Reliability is of particular importance to APPA's members. Public power utilities operate small systems (single units or plants) that power small towns and rural communities. Often these assets are committed to multiple towns in their area through long-term power purchase contracts. Restrictions in operation or shutdowns may jeopardize reliable power to these communities.

[25] Further complicating reliability, EPA is promulgating an unprecedented number of regulations in 2023-2024 that will directly or indirectly affect fossil fuel assets. The timelines of these rules may also impact reliability considerations and compliance strategies.

Municipalities and public power utilities require time to transition, which may involve leveraging assets to build new generation or undertaking time consuming transmission line projects. Municipalities and public power utilities do not have the same dispatch optionality as large investor-owned utility fleets. *Even if EPA generally considers reliability*[26] in the context of setting a future emission guideline, reliability constraints must be considered in the RULOF evaluation. Each circumstance is unique based on geography, generation capabilities, load requirements, and the transmission system in the area. EPA should acknowledge reliability as a highly relevant factor. EPA must also provide states adequate time to coordinate with RTOs and ISOs to evaluate reliability impacts and transmission constraints for impacted units.

D. Federally enforceable operating restrictions and retirement dates are beyond EPA's authority to regulate under section 111.

Sources that qualify for RULOF should not be subject to federally enforceable conditions. The statutory language of section 111(d) contemplates a one-time implementation of emission guidelines and RULOF evaluation. The statute does not go further to lock down sources to specific conditions in their permits. Rather, the evaluation represents a point in time application of the NSPS.

Aside from overreaching statutory authority, contingency provisions are problematic for sources. Sources require flexibility. A federally enforceable condition that cements a source into a specific operating scenario is unreasonable; power demands, regulatory requirements, equipment changes, and many other variables often change. The source would be forced to reopen its permit to address an unworkable permit condition. The result is uncertainty for the source and a larger burden on permitting authorities to reopen permits.

For example, many CAA New Source Review consent decrees contain federally enforceable operational requirements that were placed in Title V permits. Unforeseeable changes in the power sector occurred due to market forces (e.g., cycling), new air regulations (e.g.,

[26] *See* our discussion in Part IV.A. regarding the "fundamentally different" concept.

Mercury & Air Toxics Standards), and equipment changes (e.g., dual fuel capabilities). Many consent decree operational limitations became too inflexible, as unit behavior changed. Consent decree-regulated sources had to seek modifications of federally enforceable operational requirements. As a result, EPA, states, and sources have expended time and resources to make these federally enforceable modifications. Setting inflexible restrictions for RULOF sources have a high likelihood of generating the same problematic scenarios for regulators and sources.

Likewise, forcing retirement dates into permits as federally enforceable conditions are beyond EPA's statutory authority. Had Congress envisioned such rigidity, the statutory language would have included retirement requirements. Rather, section 111 is silent. In fact, the statutory language reflects *emission limitation flexibility* based on remaining useful life. This flexibility is particularly necessary, given market changes, the transitioning power sector fleet, reliability concerns, and many other factors outside of the source's control. An integrated resource plan (IRP) or public announcements may reasonably project a retirement date based on the information available at the time. However, often IRP retirement dates or public announcements are changed or revised for these reasons. Flexibility is needed to accommodate these fluctuations.

E. EPA must apply an achievable standard of review for RULOF demonstrations.

RULOF flexibility is critical to APPA and its members. The nation-wide fleet of municipalities and public power are small generators. As owners of single plants and/or units, our sector has fewer units to leverage for compliance averaging or trading, unlike larger systems with more generation assets. Municipalities and public power operate on a thinner margin to meet the generation demands of communities, without backup generation assets to gap-fill for unavailable EGUs. Our members are dependent on fewer resources and require more time for fossil generation replacement. Public power's unique portion of the power sector is more likely to need RULOF consideration due to older generation assets, cost considerations, and lack of dispatch optionality. APPA urges EPA to refrain from eliminating RULOF by setting an unreachable standard of review.

The Proposed Rule seeks to "further bolster" the RULOF provision by invoking a stringent EPA standard of review.[27] This rigorous standard is composed of the following changes:

- States must carry the RULOF burden exclusively;
- EPA may reject entire state plans as not "satisfactory" due to an insufficient RULOF demonstration;
- Source-specific information from the specific designated facility is required in most circumstances; and
- Source information must be reliable and adequately documented (such as EPA sources, permits, and vendors), which will be judged by EPA.[28]

EPA expects states and sources to pull together this information in 15 months. Ultimately, EPA will be the sole judge of whether the standard is met. It is questionable whether this level of documentation is even achievable. But it is certainly not feasible for states and sources to meet this standard in such a short time period.

All-or-nothing state plan disapprovals prejudice states that submit plans with RULOF demonstrations. EPA should allow states the opportunity to submit additional information if EPA is not satisfied. In addition, states should be permitted to augment and update RULOF demonstrations if new information becomes available. These opportunities favor EPA, states, and sources to achieve an acceptable plan rather than scrapping a time-intensive demonstration.

EPA's expectations should be viewed in the context of section 111(d) rules. Section 111(d) existing source rules are promulgated for pollutants for which that source sector is not otherwise subject to a NAAQS or air toxics standard under section 112. Therefore, it is less likely that sources have already undertaken site-specific studies for the pollutant at issue. For example, commissioned site-specific analyses for particulate matter, nitrogen oxide or sulfur

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[27] 87 Fed. Reg. at 79202.
[28] *Id.*

dioxide are unlikely to be relevant to a RULOF evaluation for greenhouse gases. If EPA requires site-specific studies, sources will find themselves competing for third-party consultants and engineering firms. Again, state plan time constraints will be problematic.

APPA encourages EPA to amend its proposed standard of review documentation requirements to help states complete RULOF evaluations. EPA should allow more flexibility for sources to use verified industry information, even if it is not site-specific. For example, the Electric Power Research Institute and other reputable sources should be acceptable information sources. While we agree that site-specific information is ideal, resource availability and cost are concerns for our members.

F. Evaluation of impacted communities in RULOF analysis

EPA cannot impose a mandatory requirement to consider potential pollution impacts to vulnerable communities without a legal basis to do so. EPA argues in the proposal that "other factors" provide the Agency with the discretion to impose this evaluation. However, section 111 plainly does not mandate an analysis of vulnerable communities. CAA section 111 provides for state discretion in evaluating RULOF:

> 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.[29]

It does not mandate review of a specific factor. In addition, it is unclear whether "other factors" even go beyond the existing source at issue itself. Certainly, a review of vulnerable communities goes beyond the traditional interpretation of RULOF as a review of unique factors regarding the emissions unit itself. EPA's authority for imposing this requirement is questionable. APPA

[29] Clean Air Act, Section 111(d)(1) (emphasis added).

requests that EPA clarify the legal underpinnings that justify this additional RULOF requirement or make it optional.

V. EPA should allow procedural flexibility for state plan submissions.

APPA generally supports EPA's proposal to allow electronic submittals of state plans. Regardless, we suggest that EPA provide states with the option to submit plans in traditional paper format. The Proposed Rule outlines a lengthy list of documents to substantiate RULOF demonstrations. These documents may be more difficult to submit electronically and could be in a variety of formats, such as STL, X3D, and Excel. If EPA develops a new platform for accepting state plans electronically, APPA recommends that the platform be flexible enough to accept a wide range of document formats.

VI. Standard of Performance definitional changes allow more state plan flexibility.

Compliance choices beyond emission rate limitations can be helpful for state plans. The Proposed Rule would amend the definition of "Standard of Performance" to "clarify" that state plans may include standards in the form of an allowable mass limit of emissions.[30] The present definition in 40 CFR § 60.21a(f) provides for an "allowable rate" although it does state "not limited to," which suggests potential flexibility to apply other forms of emissions limitations.[31] EPA's proposed regulatory markup of Standard of Performance reads as follows:

> (f) Standard of performance means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated, including, ~~but not limited to~~ a legally enforceable regulation setting forth an allowable rate, quantity, or concentration or limit of

[30] 87 Fed. Reg. at 79206.
[31] 40 CFR § 60.21a(f).

> emissions into the atmosphere, or prescribing a design, equipment, work practice, or operational standard, or combination thereof.[32]

EPA explains that the changes are intended to provide states with the flexibility.

Traditionally, most state plans under section 111(d) have simply incorporated federal emission guidelines by reference.[33] Those guidelines typically apply an emission rate but may include other operational limitations and control device requirements.[34] Regardless of this observation, APPA supports state flexibility to explore equally stringent compliance options rather than simply incorporating emission guidelines in their plans. States are in the best position to evaluate whether there are benefits to applying emissions averaging, mass rates, or trading programs for sources in their boundaries.

APPA has concerns and questions regarding whether the Proposed Rule envisions extending the same implementation flexibility to federal plans. The proposal addresses state flexibilities *only* in this context but not federal plans. Yet, the definitional change to "Standards of Performance" could be interpreted to apply to 40 CFR 60.27a(d)-(e)(1), which provides for EPA to "prescribe standards of performance" in a final federal plan. The structure of the regulations could be read to allow states *and EPA* to impose emissions averaging and trading programs in section 111(d) plans. While states have unique in-state knowledge of sources, EPA is not in the same position. The Agency must not take advantage of this definitional change to force nation-wide trading programs or other multi-state averaging in federal plans. *West Virginia* constrains EPA from imposing emissions caps through trading or averaging mechanisms that would have a transformative impact on the power sector and grid reliability. Without a clear mandate from Congress, EPA does not have unbridled authority under section 111(d) to effectuate a federal plan with requirements equivalent to the Clean Power Plan.

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[32] Regulatory Redline Memo at proposed 40 CFR § 60.21a(f).

[33] *See, e.g.*, 40 CFR Part 62 (listing Section 111(d) plans state-by-state). For example, Tennessee's Section 111(d) plans in Subpart RR incorporate by reference the federal emission guidelines or provide a negative declaration that no applicable state sources exist.

[34] *See, e.g.*, 40 CFR Part 60, Subpart FFFF (Emission Guidelines for Solid Waste Incineration Units) (including unit-specific emission limits and operational limitations in Tables 2 and 3).

The short time frame for state plans further amplifies this concern – given that states may miss plan deadlines, therefore entitling EPA to push its preferred national implementation format on states.

In summary, APPA requests that EPA clarify its intentions with respect to federal plans. In addition, as stated in Part II, states must be afforded sufficient time to submit plans. Otherwise, states are set up for failure, which collapses the cooperative federalism framework of section 111.

VII. Conclusion

Thank you for your consideration of these comments. APPA looks forward to working with the Agency in this rulemaking and in the forthcoming section 111(d) greenhouse gas rulemaking process for the power sector. Should you have any questions regarding these comments, please contact Ms. Carolyn Slaughter (202-467-2900) or cslaughter@publicpower.org.