

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Adoption and Submittal of State)
Plans for Designated Facilities:) Docket No. EPA-HQ-OAR-2021-0527
Implementing Regulations Under) *Via regulations.gov*
Clean Air Act Section 111(d)) *February 27, 2023*
)

We submit these comments on behalf of the American Public Health Association, Center for Biological Diversity, Clean Air Council, Clean Air Task Force, Clean Wisconsin, Earthjustice, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Southern Environmental Law Center, Union of Concerned Scientists, and Western Environmental Law Center (together, “Joint Environmental Commenters”). Our comments are informed by the ongoing need to reduce emissions of harmful pollutants from sources regulated under section 111(d) of the Clean Air Act (“CAA,” or “the Act”). Joint Environmental Commenters strongly support EPA’s proposed implementing regulations, with certain recommended improvements, and we urge EPA to finalize this rule promptly.

Table of Contents

I. Introduction & summary	1
II. Implementing timelines	2
A. EPA must protect public health and welfare through the schedule in the section 111(d) implementing regulations, as well as accelerated timelines where feasible.	2
B. EPA should commit to promulgate a federal plan within 12 months of learning that a state will not submit an approvable plan.	4
III. Outreach & meaningful engagement	5
IV. Regulatory mechanisms	8
A. EPA must place guardrails on the conditional approval mechanism and take action to develop a federal plan immediately upon issuing a conditional approval.	8
B. EPA must adopt a federal plan within 12 months of issuing a state plan call, unless the plan has been revised to fix the deficiency.	8
V. Remaining useful life & other factors (RULOF)	9
A. EPA should adopt the RULOF guardrails as binding requirements for a state plan to be approvable.	9
B. EPA should clarify in the regulatory text that the “fundamentally different” prerequisite applies to all clauses of the RULOF provisions.	10
C. EPA should be clearer on when “basic process design” can be a basis for a variance.	11
D. EPA should remove “technical infeasibility” as a basis for a variance.	11
E. Potential additional requirements	12
1. <i>Where sources are co-located or emit multiple harmful pollutants</i>	12
2. <i>Where covered sources could share costs</i>	12
F. EPA should specify how cost-effectiveness is determined when establishing an alternative standard.	13
G. Remaining useful life variances should not be available for standards that do not require capital expenditures.	13
H. EPA should prohibit a source operating under a variance from increasing its operating rate without then meeting the emission limitation reflecting the BSER, or from extending operations beyond a committed retirement date.	14
I. EPA must set an outermost limit on “imminent” retirement that could permit a minimal standard and require the source to approximate best historical performance.	15
J. Joint Environmental Commenters support the proposed requirement to consider impacts on vulnerable communities, with suggested improvements.	16
VI. Approving more effective standards	17

A. The CAA permits states, in their section 111(d) plans, to impose standards that are more effective in terms of emission reductions than EPA’s emission guideline requires. 17

VII. Form of standards of performance 18

A. Joint Environmental Commenters support revisions that would clarify that a “standard of performance” may take the form of an allowable rate, quantity, or concentration of emissions.

18

VIII. Trading & averaging..... 19

IX. Conclusion 20

I. Introduction & summary

Joint Environmental Commenters commend EPA for proposing carefully crafted, comprehensive revisions to the agency's regulations implementing CAA section 111(d). These regulations have not been significantly revised since their initial adoption in 1975, and experience and legal developments since that time warrant a meaningful update. In these comments, we express and explain our support for the revisions that EPA has proposed, while recommending several improvements:

- **Timelines** - EPA should anticipate accelerating the timing for development of state plans, and it should start the federal-plan clock early when a state has indicated that it will not submit a plan.
- **Outreach & meaningful engagement** - EPA should require states to conduct meaningful engagement, require states to coordinate their outreach and engagement, and encourage states to follow community-supported principles to guide outreach and engagement.
- **Regulatory mechanisms** - EPA should start the federal-plan clock early when it has determined that a satisfactory state plan may not be forthcoming, even if it has conditionally approved a plan or previously approved a plan and now calls for revisions.
- **Remaining useful life & other factors** - EPA should narrow the circumstances in which a less effective, source-specific standard could be permitted; demand a heightened showing of unreasonableness of deploying the best system in some situations; and require states to assess impacts on, and conduct outreach to, communities that could be harmed.
- **More effective standards** - EPA should commit to approving state plans that are more effective, in terms of emission reductions, than EPA's guideline, where those plans are otherwise satisfactory.
- **Forms of standards** - EPA should define standards to include an allowable rate, quantity, or concentration of emissions, as permitted by the applicable emission guideline.
- **Trading & averaging** - EPA should acknowledge that trading and averaging of emissions may remain available for compliance under section 111(d); however, the agency should defer the decision whether to allow these measures in state or federal plans to specific emission guidelines. Averaging or trading should not be permitted when addressing specific pollutants and source categories where those mechanisms could increase risks to particular localities or populations—including environmental justice communities—which should be evaluated through cumulative impact analysis.

With these targeted enhancements, EPA’s proposed revisions would vastly improve the process for developing and implementing both state and federal plans under section 111(d). Such a well-designed, robust framework for securing prompt and meaningful emission reductions from existing sources will advance the CAA’s overriding goal of protecting public health and welfare.

II. Implementing timelines

Joint Environmental Commenters support EPA’s proposed implementation timelines because they provide for swift implementation of emission guidelines to protect public health and welfare and for developing, reviewing, and adopting section 111(d) plans that are effective, informed by meaningful outreach, and defensible. Nonetheless, in these comments we recommend ways EPA could improve the default timeframes in the final rule. In particular, we recommend one specific change to the timetables: that the agency accelerate the timeline for promulgating a federal plan by keying the start of the 12-month period to the moment when a state indicates that it will not submit a plan.

A. EPA must protect public health and welfare through the schedule in the section 111(d) implementing regulations, as well as accelerated timelines where feasible.

In general, Joint Environmental Commenters support EPA’s revised timelines as improvements over the lax timelines in subpart Ba adopted during the previous administration.¹ Subpart Ba quadrupled the time for states to submit implementation plans compared to the time allowed under the agency’s 1975 implementing regulations. In *American Lung Association v. EPA*, the D.C. Circuit vacated the subpart Ba timelines, holding that EPA had not considered the health and welfare impacts of those extended timelines.² We agree with the proposal’s position that those health and welfare impacts could be adequately addressed by specifying the minimum reasonable time for each step in the process.³ As long as EPA adopts the minimum reasonable

¹ See Comments of Environmental Defense Fund *et al.*, Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, Docket No. EPA-HQ-OAR-2021-0317, at 9-11 (submitted Feb. 13, 2023) [hereinafter “Oil & Gas Methane SNPRM Comments”], attached to these comments.

² 985 F.3d 914, 992-95 (D.C. Cir. 2021), *rev’d on other grounds sub nom. West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

³ See 87 Fed. Reg. at 79176, 79181 (Dec. 23, 2022). EPA’s position that the timelines could be shortened in circumstances “with an exceptional need to expedite implementation (*e.g.*, immediate impact for health and welfare impacts),” *id.* at 79182, is consistent with this rationale because the time “reasonably necessary” depends on the urgency of establishing standards. Thus, it could be important for states and EPA to devote more resources to plan development, approval, and implementation if the regulated sources are inflicting significant public health or welfare harms.

times for the implementation steps, we agree that the agency does not need to further quantify the impacts of emission reductions in justifying the timelines it has selected.

When later promulgating emission guidelines for particular source categories, EPA can consider whether the time “reasonably necessary” for plan development, review, and approval should be shortened or lengthened in the specific circumstances of those categories. The proposal states that “there may be [emission guidelines] for pollutants or source categories that require exceptions or accommodations to these general requirements,” for instance, where state plans would involve “extensive engineering and/or economic analyses,” “an extraordinary number of designated facilities,” or circumstances that are “novel and/or unusually complex.”⁴ Joint Environmental Commenters submit that such a justification would have to be especially compelling.

Conversely, EPA should expressly recognize in the final rule that shorter timeframes may be appropriate where developing a state plan is simple, *i.e.*, when source categories contain few existing sources, few source-specific analyses are expected, or the emission guideline is straightforward or similar to past requirements implemented by states or EPA. For example, the proposed emissions guidelines for methane emissions from oil and gas sources consist largely of work practices or numerical emission limitations that are straightforward, such that state plans should not take much time to develop.⁵ As noted in comments on the methane supplemental proposal, Joint Environmental Commenters believe the circumstances of the oil and gas source category do *not* warrant an extended plan submission schedule.⁶

Furthermore, the final rule should not imply that future emission guidelines will include an “inventory of designated facilities” or “an EPA-provided model rule.” While EPA may be able to provide those items, section 111(d) does not require them and the omission of such information does not warrant longer timelines.⁷ States are well-positioned to understand the sources and regulatory approaches at their disposal. EPA should thus clarify in the final rule that the default timelines apply to all future emission guidelines unless the guideline itself provides otherwise.

Finally, EPA should not defer to lengthy state administrative processes (Comment A1–1).⁸ Commenters are concerned that some states have adopted, or may adopt, procedures that are longer than necessary and that will unnecessarily postpone polluting sources’ emission-reduction obligations. Section 111(d) establishes federal requirements to protect public health and welfare, and EPA should not defer on a blanket basis to state-set timelines.

⁴ *Id.* at 79182.

⁵ *See generally* Oil & Gas Methane SNPRM Comments.

⁶ *See id.* at 10.

⁷ *See* 87 Fed. Reg. at 79182.

⁸ *See id.* at 79182 & n.9.

B. EPA should commit to promulgate a federal plan within 12 months of learning that a state will not submit an approvable plan.

Joint Environmental Commenters generally find reasonable EPA’s proposed timeframe of 12 months for developing and promulgating a federal plan (Comment A4–1).⁹ Because EPA has more resources and will likely be more familiar with its emission guideline than states, it is appropriate to allow slightly less time for federal-plan development (12 months) than for state-plan development (15 months). We support removing the unnecessary requirement that EPA make a formal finding of a state’s failure to submit a plan before beginning development of a federal plan (Comment B–2).¹⁰ The 12-month deadline should also be triggered, however, when a state makes clear that it does not intend to submit a plan.

EPA need not and should not wait for its federal plan obligation to be “triggered” to begin developing such a plan, where a state has indicated that it does not intend to submit a plan. For example, under the “similar” procedure required by section 110 for cross-state ozone pollution,¹¹ EPA proposed a federal implementation plan (FIP) months before formally determining that any state had failed to make complete submissions and then finalized the FIP almost immediately after that finding.¹² Indeed, the Supreme Court has held that EPA “is not obliged to . . . postpone its action even a single day” after its FIP obligation under section 110 is triggered to impose a FIP.¹³ Under section 111, EPA has the “same authority” to promulgate a federal plan immediately upon finding a state has failed to submit a complete plan or upon disapproving a state plan submission.¹⁴ To serve the overriding purpose of protecting public health and welfare under section 111, EPA should start the 12-month clock for federal plan development as soon as it learns that the state does not intend to submit a plan.

To facilitate this mechanism, EPA should require each state to inform the agency, within three months after publishing an emission guideline, whether it will submit a plan.¹⁵ If a state fails to submit such information, then the 12-month federal-plan clock in section 60.27a(c) should begin running at that time. If, after making a negative declaration or failing to submit a declaration, the state (as expected) does not submit a plan, then the federal plan would become effective immediately. Alternatively, if the state ultimately does submit a plan, then that submission would toll the federal-plan clock until EPA determines that the state plan is incomplete or disapproves the plan, whereupon the federal plan would become effective immediately. Likewise, if a state first declares that it does not intend to submit a plan and later

⁹ *Id.* at 79187-88.

¹⁰ *Id.* at 79189-90.

¹¹ 42 U.S.C. § 7411(d)(1).

¹² *See* 81 Fed. Reg. 74504, 74512 (Oct. 26, 2016) (finalizing cross-state FIP including states for which EPA had published notices of incomplete plan submissions 3-4 months before).

¹³ *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 509 (2014).

¹⁴ 42 U.S.C. § 7411(d)(2)(A); *id.* § 7410(c)(1).

¹⁵ This requirement could be added to the proposed 40 C.F.R. § 60.23a(a)(1).

declares that it will, in fact, submit one, that subsequent declaration could also toll the federal plan clock.

Beginning to prepare a federal plan and starting the clock on imposition of a federal plan as soon as a state indicates that it will not submit a plan or fails to make any declaration of its intention to do so will help ensure that the agency does not lose valuable time awaiting submission of a plan that will not materialize.

Finally, we note that there may be instances in which a state submits a plan that is substantially incomplete or deficient, such that EPA can quickly ascertain that it will not be able to approve the state's plan as submitted, and that the state likely will not be able to remedy the deficiencies in a timely manner. In this situation, the agency should begin work on a federal plan immediately, even though the federal plan clock does not start ticking until EPA has formally found the plan incomplete or disapproved it.

III. Outreach & meaningful engagement

Joint Environmental Commenters commend EPA for formalizing the critical procedures to solicit and encourage meaningful public engagement with those communities most affected by pollution sources.

The implementing regulations must “establish a procedure similar to that provided by section 110 under which each State shall submit” a plan implementing the emission guidelines.¹⁶ Section 110 requires, among other things, that plans be adopted by the state “after reasonable notice and public hearings.”¹⁷ The purpose of section 111 is to control “air pollution which may reasonably be anticipated to endanger public health and welfare.”¹⁸ EPA cannot deem a state plan “satisfactory” without confirming, through the proposed documentation of outreach in state plan submissions, that reasonable notice and hearings were provided to those potentially endangered by the air pollution to which the regulated sources contribute.¹⁹

We agree with EPA that input from disadvantaged or overburdened communities that may be exposed to air pollution from existing sources is important in establishing standards especially because these communities might not have had an opportunity to weigh in when those sources were constructed.²⁰ Additionally, the impacts from ongoing pollution from those sources must be considered cumulatively with the impacts of pollution from other proximate sources that were constructed before or since.

¹⁶ 42 U.S.C. § 7411(d)(1).

¹⁷ *Id.* § 7410(a)(1).

¹⁸ *Id.* § 7411(b)(1)(A).

¹⁹ *Id.* § 7411(d)(2)(A).

²⁰ 87 Fed. Reg. at 79191.

Commenters support EPA’s definition of “meaningful engagement” (Comment C–1) and proposed meaningful engagement requirement (Comment C–2).²¹ Meaningful engagement must be active, not just passive; *i.e.*, it is the state’s obligation to reach out to and engage communities and other stakeholders. We suggest that EPA provide states with further guidance as to the groups and individuals considered “pertinent stakeholders”—currently defined as including, but not being limited to, “industry, small businesses, and communities most affected by and vulnerable to the impacts of the plan or plan revision.”²² In line with EPA’s recognition in the proposal that “diverse constituencies may be present within any particular stakeholder community,”²³ EPA should require states to engage with community stakeholders that are fully representative of the diverse populations and constituencies present in an affected community, recognizing that no single group, organization, or local official can presume to speak on the entire community’s behalf.

When the emissions of specific sources may affect communities in another state such that multiple regulated sources in different states could have cumulative, localized impacts on a single community, EPA should require the state to coordinate outreach and engagement with those other states (Comment C-3). Coordination along these lines will ensure that communities are aware of potentially cumulative impacts from sources in multiple states and do not need to attend multiple meetings to participate in the planning for these sources.

Commenters agree that EPA should require states to document meaningful engagement in their plan submissions in order for EPA to ensure that a plan is satisfactory (Comment C–4). We agree that a list of the pertinent stakeholders, a summary of engagement conducted, and a summary of the stakeholder input provided should be included as evidence of meaningful engagement. Additional information that a state could report in its plan submission to demonstrate meaningful engagement may include information on the timing and frequency of engagement within the plan-development process, the languages in which engagement was conducted, the accessibility of the engagement locations and times, and a response to comments document.

Best practices and lessons learned can be derived from past instances of state-level community engagement on clean air and environmental issues (Comment C–5). Some states and state agencies may have existing community engagement requirements or recommendations. For example, a 2007 statute created Oregon’s Environmental Justice Task Force and established requirements for each natural resource agency to “ensure that all persons affected by decisions” of such agencies “have a voice in those decisions”; the Task Force’s 2016 handbook of best practices provides guidance for meaningful public participation.²⁴ Colorado’s 2021

²¹ *Id.* at 79192.

²² Proposed 40 C.F.R. § 60.21a(l).

²³ Proposed 40 C.F.R. § 60.21a(k).

²⁴ State of Oregon Environmental Justice Task Force, Best Practices for Oregon’s Natural Resource Agencies 5-6, 16-19 (2016),

https://www.oregon.gov/odot/Business/OCR/Documents/Oregon_EJTF_Handbook_Final.pdf.

Environmental Justice Act set new community engagement requirements for the state Air Quality Control Commission²⁵ and created an Environmental Justice Action Task Force, which has since issued recommendations that include best practices for community engagement.²⁶ Similarly, at the direction of a state budget proviso, Washington State’s Environmental Justice Task Force issued a report to the governor and state legislature including recommendations to address barriers to community engagement.²⁷ Minnesota’s Pollution Control Agency has developed an Environmental Justice Framework with strategies for outreach, public participation, and engagement.²⁸ And the California Air Resources Board is currently undergoing a process to develop agency-wide community engagement guidance.²⁹

Additionally, other federal agencies and offices have recently solicited comments on outreach and engagement, and there may be lessons from those processes that would be applicable here.³⁰ Government entities, scholars, environmental justice leaders, and community groups have developed a variety of documents describing best practices for public participation, stakeholder outreach, and community engagement, which may be useful resources to EPA and state agencies in the state planning process.³¹ Finally, as a general rule, EPA’s and state agencies’ approach to community engagement in this and other contexts should be guided by the

²⁵ Colo. Rev. Stat. § 24-4-109.

²⁶ Colo. Environmental Justice Action Task Force, Final Report of Recommendations 33-44 (Nov. 14, 2022), https://drive.google.com/file/d/114rN-o3h3OJg8TciUzh-qxytULvyD_NE/view.

²⁷ Washington State Environmental Justice Task Force, Recommendations for Prioritizing EJ in Washington State Government 64-68, Appendix C (2020), https://healthequity.wa.gov/sites/default/files/2022-01/EJTF%20Report_FINAL%281%29.pdf.

²⁸ Minnesota Pollution Control Agency, Environmental Justice Framework 9 (May 2022), <https://www.pca.state.mn.us/sites/default/files/p-gen5-05.pdf>.

²⁹ California Air Resources Board, Community Engagement Model (2023), <https://ww2.arb.ca.gov/community-engagement-model>.

³⁰ *See, e.g.*, White House Office of Information and Regulatory Affairs, Broadening Public Engagement in the Federal Regulatory Process, <https://www.whitehouse.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process/>.

³¹ *See, e.g.*, International Association for Public Participation, Public Participation Pillars, https://cdn.ymaws.com/www.iap2.org/resource/resmgr/communications/11x17_p2_pillars_brochure_20.pdf; WE ACT for Environmental Justice, Community Engagement Brief, <https://www.weact.org/wp-content/uploads/2022/10/Community-Engagement-Brief-092322-FINAL.pdf>; PolicyLink & The Kirwan Institute, The Community Engagement Guide for Sustainable Communities, https://www.policylink.org/sites/default/files/COMMUNITYENGAGEMENTGUIDE_LY_FINAL%20%281%29.pdf; Government Alliance on Race and Equity, Racial Equity Toolkit, https://www.raciaequityalliance.org/wp-content/uploads/2015/10/GARE-Racial_Equity_Toolkit.pdf; Tribal Collaboration Working Group of the All of Us Research Program Advisory Panel, Considerations for Meaningful Collaboration with Tribal Populations, https://allofus.nih.gov/sites/default/files/tribal_collab_work_group_rept.pdf; Facilitating Power, The Spectrum of Community Engagement to Ownership, <https://movementstrategy.org/wp-content/uploads/2021/08/The-Spectrum-of-Community-Engagement-to-Ownership.pdf>.

foundational Principles of Environmental Justice³² and the Jemez Principles for Democratic Organizing.³³

IV. Regulatory mechanisms

Joint Environmental Commenters generally support the proposed regulatory mechanisms designed to enhance efficiency and align the section 111(d) program with similar procedures available under section 110. Below, we make targeted recommendations for improvements to the conditional approval and the state plan call mechanisms.

A. EPA must place guardrails on the conditional approval mechanism and take action to develop a federal plan immediately upon issuing a conditional approval.

EPA proposes to allow conditional approvals where a state plan “substantially meets the requirements of an [emission guideline] but . . . requires some additional, specified revisions to be fully approvable” and the state makes a commitment to “adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision.”³⁴ To foreclose conditional approvals of substantially unsatisfactory plans—thus delaying imposition of a federal plan—EPA should limit conditional approvals to plans either with only procedural deficiencies or with substantive deficiencies that 1) apply to few designated facilities (*e.g.*, no more than five); 2) do not lead to impacts on vulnerable communities; and 3) are likely to be remedied by the state within one year (Comment D2–1).

Further, EPA should not allow the conditional approval mechanism to toll the federal plan clock and thereby delay needed public health and welfare protections. EPA proposes to allow 12 months in which to impose a federal plan following disapproval of a previously conditionally approved plan.³⁵ Instead, EPA should start the clock for developing a federal plan as soon as a state plan submission is conditionally approved, if EPA has determined that there is a significant possibility that the deficiencies will not be corrected (Comment D2–2).³⁶

B. EPA must adopt a federal plan within 12 months of issuing a state plan call, unless the plan has been revised to fix the deficiency.

When EPA identifies deficiencies in a state plan that was previously approved, the agency issues a state plan call (analogous to a SIP call under Section 110) requiring the state to

³² The Principles of Environmental Justice (1991), <https://www.ejnet.org/ej/principles.pdf>.

³³ Jemez Principles for Democratic Organizing (1996), <https://www.ejnet.org/ej/jemez.pdf>.

³⁴ 87 Fed. Reg. at 79193-94.

³⁵ *Id.* at 79194.

³⁶ EPA could incorporate this requirement into the proposed section 60.27a(c)(2). Of course, timely submission of plan corrections by the state would toll the federal plan clock until EPA disapproves those corrections, and, as always, the agency could not impose a federal plan before the time to submit an initial plan has elapsed.

correct the deficiencies. EPA proposes to allow 12 months in which to impose a federal plan following the deadline for necessary revisions identified in a state plan call.³⁷ Because a state plan call is the functional equivalent of a plan disapproval, however,³⁸ EPA should start the federal plan clock as soon as it issues a state plan call, if EPA has determined that there is a significant possibility that the deficiencies will not be corrected. Proposed section 60.27a(c)(2) could be edited to reflect this additional clock start time so that the issuance of a federal plan would not be delayed for an additional 12 months following EPA's eventual disapproval of an inadequate revision. A state's timely submission of a plan revision could toll the 12-month federal plan clock that began upon EPA's issuance of the state plan call.

V. Remaining useful life & other factors (RULOF)

As discussed in recent comments on EPA's supplemental proposed emission guideline for oil and gas methane,³⁹ Joint Environmental Commenters agree that revisions to the RULOF provisions are necessary. The proposed revisions will improve consistency in EPA's plan reviews across states and sources and provide greater regulatory certainty.⁴⁰ They will also prevent some states from undercutting the efforts of others and undermining the overall effectiveness of section 111(d) rules by offering variances on lenient terms. In addition, the proposed revisions will furnish EPA with a clear framework for reviewing variances in state plan submissions, thus speeding approvals or disapprovals, enhancing consistency, and reducing the number of court challenges. Perhaps most importantly, these guardrails will help ensure that full adherence to EPA's emission guideline is the general rule for existing sources, and that variances allowing less effective standards are the rare exception. In this section, we recommend improvements to the proposed revisions that would further these objectives.

A. EPA should adopt the RULOF guardrails as binding requirements for a state plan to be approvable.

The proposed regulations correctly provide that any RULOF variances must be included in the state plan or in a state plan revision.⁴¹ The regulatory text should also make clear that the RULOF guardrails outlined in the preamble are minimum requirements for state plan approval (Comment E2-4).⁴² Simply stating that a plan is presumptively approvable if it meets these requirements does not ensure the disapproval of a state plan that falls short of these requirements.

³⁷ 87 Fed. Reg. at 79194-95.

³⁸ To issue a state plan call, EPA must determine that a previously approved state plan is "substantially inadequate to meet the requirements of the applicable emission guidelines, to provide for the implementation of such plan, or to otherwise comply with any applicable requirement of this subpart or the Clean Air Act." Proposed 40 C.F.R. § 60.27a(i).

³⁹ We incorporate those comments by reference and have attached them to this letter. *See Oil & Gas Methane SNPRM Comments* at 11-20.

⁴⁰ *See* 87 Fed. Reg. at 79196-97.

⁴¹ Proposed 40 C.F.R. § 60.24a(f).

⁴² 87 Fed. Reg. at 79198.

Approval of a plan with deficient variances would fail to safeguard public health and welfare, ensure consistency across states and sources, provide certainty for the states and regulated entities, and establish continuity of decision-making across administrations in implementing current and future section 111(d) rules.

Promoting consistency is particularly important if EPA continues to delegate approval of section 111(d) plans to its regional offices.⁴³ The Act specifically requires EPA to establish “procedures and policies” to “assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the Act.”⁴⁴ In addition to binding requirements for variances, EPA should provide for all variances to be reviewed for final sign-off by its headquarter offices.

B. EPA should clarify in the regulatory text that the “fundamentally different” prerequisite applies to all clauses of the RULOF provisions.

As discussed in the comments on the methane supplemental proposal,⁴⁵ EPA should clarify in the regulatory text that the requirement for a state to show fundamentally different circumstances from those EPA considered in the emission guideline pertains to all three branches of the variance provision, not only the third one (Comment E2–1).

The preamble to the present proposal states as much, noting that “[t]he ‘fundamentally different’ standard . . . undergirds all three circumstances” in which a less effective standard of performance could be acceptable.⁴⁶ The proposed revisions to the regulatory text, however, explicitly include this principle only in the third factor, namely, “[o]ther circumstances specific to the facility (or class of facilities) that are fundamentally different from the information considered in the determination of the best system of emission reduction in the emission guidelines.”⁴⁷ To avoid any ambiguity and preclude an alternative interpretation without a future notice-and-comment rulemaking, EPA should specify in the regulatory text that the fundamentally different circumstances requirement applies to all variance factors, including both the unreasonable-cost-of-control and physical-impossibility factors.

We also strongly recommend that EPA clarify that the guardrails it has proposed for RULOF variances apply to design, equipment, work practice, or operational standards issued under section 111(d) and (h)(1) no less than to performance standards issued under section 111(d) and (a)(1). The same guardrails should apply in any future federal plans as well. Thus, EPA should revise the proposed 40 C.F.R. § 60.24a(e) by adding the phrase “or the EPA” where

⁴³ See, e.g., 86 Fed. Reg. 46989 (Aug. 23, 2021) (section 111(d) state plan revision approved by Acting Regional Administrator).

⁴⁴ 42 U.S.C. § 7601(a)(2)(A).

⁴⁵ See Oil & Gas Methane SNPRM Comments at 17-18.

⁴⁶ 87 Fed. Reg. at 79198.

⁴⁷ Proposed 40 C.F.R. § 60.24a(e).

the provision references the state, adjusting the language so that it encompasses non-numerical design, equipment, work practice, or operational standards (as well as standards of performance) that cannot be shown to achieve equivalent or greater emission reductions than EPA's guideline,⁴⁸ and explicitly requiring that the basis for any different standard reflect circumstances that are fundamentally different from the information that EPA considered in determining the emission limitation that reflects the BSER. These suggested revisions would clarify that the guardrails proposed for variances established by states or by EPA under section 111(d) also apply to variances from requirements established under section 111(h)(1).

C. EPA should be clearer on when “basic process design” can be a basis for a variance.

EPA proposes to retain a provision from the 1975 and 2019 regulations that allows a source to obtain a variance for reasons of “[u]nreasonable cost of control resulting from . . . basic process design.”⁴⁹ EPA should clarify that a source cannot claim a variance based on “basic process design” differences if it uses technology or processes that EPA considered when establishing the emission guideline for that source category or subcategory. In other words, the state must demonstrate both (a) that the source's technology and process design are fundamentally different from those that EPA already considered when establishing the emission limitation reflecting BSER and (b) that the difference gives rise to a fundamentally unreasonable cost.

D. EPA should remove “technical infeasibility” as a basis for a variance.

EPA proposes to add “technical infeasibility” to the second variance factor.⁵⁰ Under the 1975 and 2019 regulation this clause was limited to situations of “physical impossibility.” “Technical infeasibility” is a highly imprecise term that is susceptible to abuse and overapplication, and EPA has provided no definition or guidance on the term. “Technical infeasibility” is not needed as an independent criterion if EPA clarifies that a source may receive a variance only for technological differences that EPA did not consider in establishing the emission guideline for the source category or subcategory and that give rise to fundamentally unreasonable costs. If EPA does retain this factor, it must provide much more specific guidance and limitations on its application and, as noted, clarify that the technical infeasibility must result from fundamentally different circumstances than those EPA considered.

⁴⁸ Throughout these comments, we refer to variances as establishing “less effective,” rather than “less stringent,” standards, to include standards that do not take the form of a numerical limit on emissions.

⁴⁹ Proposed 40 C.F.R. § 60.24a(e)(1).

⁵⁰ Proposed 40 C.F.R. § 60.24a(e)(2).

E. Potential additional requirements

The agency asks for comment on “the circumstances under which it would be appropriate for an [emission guideline] to provide additional requirements or supersede the requirements of these proposed revisions to the RULOF provision (Comment E2–3).”⁵¹ Joint Environmental Commenters agree that this issue should be resolved in the context of specific future guidelines; nonetheless, we offer here two examples of situations in which additional safeguards may be appropriate: 1) where the regulated sources are co-located with other significant sources of air pollutants or emit multiple harmful pollutants; and 2) where sources located near one another could lower their individual compliance costs by sharing relevant infrastructure costs.

1. *Where sources are co-located or emit multiple harmful pollutants*

As discussed in Joint Environmental Commenters’ comments on the supplemental oil and gas methane proposal,⁵² the final implementing regulations and each future emission guideline must require states to conduct an analysis of the impacts of each potential variance on vulnerable communities. The agency should commit to disapproving any less effective standard that would increase harm to such a community.

The final section 111(d) implementing regulations should also require that states make a more substantial showing to support a variance where a source is co-located with other significant air pollution sources or emits multiple locally harmful air pollutants. In these circumstances, EPA should require analysis of whether those factors increase the cumulative impacts on people living or working nearby, and the state should be required to show why the cost of meeting the emission limitation in the emission guideline is unreasonable considering the higher public health or environmental impacts in such cases.

It would be arbitrary and capricious to grant variances without considering the cumulative impacts on neighboring areas of co-located sources (including other emission points at the facility). The BSER for a regulated pollutant may also control other pollutants. For example, methane controls for existing oil and gas equipment also reduce emissions of volatile organic compounds and hazardous air pollutants. While EPA’s and the states’ focus under section 111(d) will be to control the regulated pollutant, it would be arbitrary and capricious to ignore entirely the collateral benefits of reduced co-pollutant emissions when considering a variance of the pollutant being regulated.

2. *Where covered sources could share costs*

Some sources may have opportunities to share with other nearby sources the costs of control equipment, resulting in cost-savings that EPA did not consider when conducting its

⁵¹ 87 Fed. Reg. at 79198.

⁵² Oil & Gas Methane SNPRM Comments at 15-16.

BSER analysis. For example, nearby oil and gas sources may be able to share the cost of gathering lines to take captured methane to a sales line. If one or more such sources apply for variances to keep emitting or combusting such methane on site, EPA should require the state to demonstrate that such options to share and reduce costs are not available.

EPA should expressly and specifically indicate in the final rule that it expects states to consider any factors that could mitigate unreasonable cost or feasibility issues in any RULOF analysis (Comment E3–2), and do likewise in future emission guidelines, where appropriate (Comment E2–3).

F. EPA should specify how cost-effectiveness is determined when establishing an alternative standard.

EPA’s proposed regulations require state plans, when justifying a variance, to “evaluat[e] each technology using the same factors and evaluation metrics as the EPA did in determining the best system of emission reduction for the source category.”⁵³ This correctly avoids the problem of a plan using a different yardstick than EPA.

However, some methodologies may not immediately translate from an entire source category to a single source. For example, in determining the BSER, EPA may consider the cost-effectiveness of technologies based on actual annual emissions from the source category. Yet annual emissions from a single source can fluctuate much more than national averages across multiple sources. Thus, EPA should set requirements for how the baseline emissions for the cost-effectiveness analysis under the RULOF provision are determined. EPA can look to its guidelines for best available retrofit technology (BART) as a starting point: similar to section 111(d), BART applies to existing sources and has a remaining useful life provision.⁵⁴ The BART Guidelines require baseline emissions to “represent a realistic depiction of anticipated annual emissions for the source.”⁵⁵ This requirement avoids the potential for sources to game the system by using a period of lower use to determine cost-effectiveness. EPA should similarly require the use of the source’s potential-to-emit (PTE) to calculate cost-effectiveness in a RULOF analysis, where this cost metric is applicable. If a source elects to accept a federally enforceable limit on its operation to justify a RULOF variance, then the PTE under this limit should be used as the baseline emissions in the cost analysis.

G. Remaining useful life variances should not be available for standards that do not require capital expenditures.

Congress’s primary purpose for enacting the RULOF provision was to avoid imposing otherwise reasonable capital costs on a facility that is nearing the end of its useful life, such that

⁵³ Proposed 40 C.F.R. § 60.24a(f)(1).

⁵⁴ 42 U.S.C. § 7491(g)(2).

⁵⁵ 40 C.F.R. Part 51, App’x Y § IV.D.4.d.

the short period of time remaining for the source to amortize those costs renders them fundamentally different and unreasonable.⁵⁶ This concern does not apply where standards do not involve significant capital investment, such as requirements for leak detection and repair, or other routine activities. All units, no matter their remaining life, face similar annualized costs in this case; therefore, there is no basis for granting variances based on the absence of time to amortize capital costs.

In its recent supplemental proposal for the oil and gas sector, EPA recognized this principle and put it into practice.⁵⁷ There, the agency noted that capital investments would be needed for only four types of equipment; all other requirements could be met through ongoing operation and maintenance expenditures.⁵⁸ Accordingly, the agency permitted only those four types of equipment to apply for variances based on remaining useful life-related cost considerations.⁵⁹ This same policy should apply across-the-board: unless a source must make capital expenditures the reasonableness of which requires an amortization period longer than the source's remaining useful life in order to achieve the degree of emission reduction required by EPA's guideline, it should not be eligible for a variation based on remaining useful life.

H. EPA should prohibit a source operating under a variance from increasing its operating rate without then meeting the emission limitation reflecting the BSER, or from extending operations beyond a committed retirement date.

A source that operates infrequently or intends a near-term retirement may seek a variance on the basis that the costs of complying with an emission guideline are fundamentally different and unreasonable given its limited opportunity to recover the capital costs of compliance. Any variance granted on such a basis must include enforceable conditions respecting the source's capacity factor or retirement date, as EPA has proposed.⁶⁰ In other words, operating the source at a higher capacity factor or beyond the committed retirement date would be a violation.

EPA requests comment on "proposed contingency requirements to address the concern that a designated facility's operations may change over time in ways that do not match the original rationale for a less stringent standard" (Comment E5-1).⁶¹ EPA should not permit a source that has legally committed to a retirement date as a condition of a variance to postpone that date. Even if it committed to meet the emission limitation in EPA's guideline from that point forward, it could not make up for its excess emissions before that time. EPA also should

⁵⁶ Environmental Defense Fund *et al.*, Comment Letter on Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, Docket No. EPA-HQ-OAR-2021-0317-0844, at 214-15 (submitted Jan. 31, 2022), attached to these comments.

⁵⁷ See 87 Fed. Reg. 74702, 74822-23 (Dec. 6, 2022).

⁵⁸ *Id.* at 74823.

⁵⁹ *Id.*; proposed 40 C.F.R. § 60.5365c(e)(1)(vi)(A)-(D).

⁶⁰ Proposed 40 C.F.R. § 60.24a(h).

⁶¹ 87 Fed. Reg. at 79201.

not permit a source that has legally committed to a limitation on its operating rate to increase that operating rate without obtaining an amended variance. And before approving an amended variance, EPA should carefully scrutinize the impacts of increased emissions from the source on affected communities.

I. EPA must set an outermost limit on “imminent” retirement that could permit a minimal standard and require the source to approximate best historical performance.

Unlike the proposal to define, in future emission guidelines, the outermost retirement date for a source potentially eligible for a less effective standard because of its limited remaining useful life,⁶² there is no proposed requirement to define the “imminent” retirement timeframe that could qualify a source for a minimal standard. EPA suggests that it will, in future emission guidelines, define the timeframe that would qualify as an imminent retirement;⁶³ however, the agency does not definitively state that it will establish in the emission guideline an outermost retirement date beyond which a source would be required to deploy a system of emission reduction that achieves significant pollution abatement. EPA should require future emission guidelines to define “imminent” retirement. Furthermore, contrary to the example provided in the proposal,⁶⁴ EPA should narrow that timeframe to the minimum time needed to install any cost-reasonable system of emission reduction from within the universe of systems that EPA evaluated rather than the time needed to install the BSER. The window for minimal action should not be extended to match deployment of the BSER where other systems are available in shorter order.

More fundamentally, EPA cannot permit a state, when issuing a RULOF variance, to set the source’s standard of performance at a “business as usual” level of emissions. The agency promises to provide guidance “regarding the calculation of a business as usual standard.”⁶⁵ Yet every source, including ones operating under a variance, requires an enforceable numerical standard of performance or an enforceable design, equipment, work practice, or operational standard.⁶⁶ As EPA explains, it interprets section 111(d) to mean that a standard issued under the RULOF provision must reflect the best system of emission reduction for that source, considering the relevant factors.⁶⁷ EPA needs to provide binding safeguards against backsliding, for example, by placing an upper limit on “business as usual” with reference to the source’s best historic emissions performance. Without specific, enforceable standards that are upper-bounded by best historical performance, a source could turn off existing controls or switch to dirtier fuels or other inputs.

⁶² *Id.*

⁶³ *Id.* at 79202; *see also* proposed 40 C.F.R. § 60.24a(i)(2) (“The EPA, in an emission guideline, *may* define the timeframe that qualifies for an imminent retirement.” (emphasis added)).

⁶⁴ 87 Fed. Reg. at 79202.

⁶⁵ *Id.*

⁶⁶ *See* 42 U.S.C. § 7411(d)(1).

⁶⁷ 87 Fed. Reg. at 79200.

J. Joint Environmental Commenters support the proposed requirement to consider impacts on vulnerable communities, with suggested improvements.

EPA proposes that states must consider the impacts of any RULOF variance on the communities most affected by and vulnerable to its emissions.⁶⁸ We support this requirement, with several recommended improvements (Comment E8–1). First, EPA should require states to consider the cumulative effects of the emissions from the source in question with emissions from all other sources, including other sources within the source category that may receive less effective standards and sources in other states or jurisdictions.

Second, while we agree that “what is a reasonable level of control[] is highly dependent on the designated pollutant and source category subject to an [emission guideline],” and therefore “a comparative analysis for a localized pollutant may be quantified and evaluated differently from the analysis for a global pollutant,”⁶⁹ EPA must require the cumulative impacts analysis for a source under consideration for a less effective standard to include all locally harmful co-pollutant emissions, given that section 111(a)(1) implicitly requires EPA to consider co-pollutant reductions in identifying the BSER.⁷⁰ Furthermore, EPA should require states to consider measures that will avoid imposing any additional harms on already overburdened communities.

EPA should clarify that it is requiring states to consider impacts on vulnerable communities in any variance proceeding because considering such impacts should be a factor in any BSER analysis, including a variance proceeding in which a state makes an individualized BSER determination for a specific source.⁷¹ The requirement for the state to consider co-pollutants and cumulative impacts derives from EPA’s obligation to consider such impacts to affected, vulnerable communities in any BSER analysis, including in variance proceedings. A

⁶⁸ *Id.* at 79203-04.

⁶⁹ *Id.* at 79203.

⁷⁰ 42 U.S.C. § 7411(a)(1); *see also* 87 Fed. Reg. at 79203 (“As described in this section, if a designated facility qualifies for a less stringent standard based on RULOF, the EPA is proposing the state plan must identify a source-specific BSER based on the same factors and metrics the EPA considered in determining the BSER in the [emission guideline]. Therefore, state plans must consider health and environmental impacts in determining a source-specific BSER informing a RULOF standard, just as the EPA is statutorily required to take into account these factors in making its BSER determination.”). Congress could not have intended EPA to consider the quantities of emission reductions of the regulated pollutant and non-air-quality health and environmental impacts while disregarding the health and environmental impacts of other air pollutants emitted along with the regulated pollutant. Nonetheless, EPA in identifying the BSER (and therefore states in conducting a RULOF analysis) should focus on addressing the public health or welfare impacts of the pollutant being regulated.

⁷¹ 87 Fed. Reg. at 79203-04.

RULOF analysis that ignores these impacts would be irrational and contrary to the purpose of the Act.

VI. Approving more effective standards

- A. The CAA permits states, in their section 111(d) plans, to impose standards that are more effective in terms of emission reductions than EPA’s emission guideline requires.

Joint Environmental Commenters agree with EPA’s proposed interpretation that section 111(d)(1) authorizes state plans to include more effective standards than are required by EPA’s emissions guideline.⁷² Specifically, we support the proposed revisions to the redesignated 40 C.F.R. § 60.24a(n) (currently 40 C.F.R. § 60.24a(f)) and addition of 40 C.F.R. § 60.24a(m). For the reasons discussed in the comments on the supplemental methane proposal for the oil and gas sector,⁷³ section 111(d) does not permit EPA to disapprove a state plan as unsatisfactory merely because it includes standards that are more effective in terms of emission reductions than EPA’s guideline. Here, we elaborate on the rationale in the current proposal, as reflected in EPA’s proposed regulatory text.

We agree with EPA that the text, structure, and purpose of the CAA obligate the agency to approve a plan that includes standards more effective than EPA’s guideline and that is approvable in all other respects. Section 116 expressly removes any preemptive effect of the Act’s other provisions on “any standard or limitation respecting emissions of air pollutants” that a state may choose to adopt, so long as that standard or limitation is at least as stringent as the corresponding federal requirement under the CAA.⁷⁴ In addition, section 111(d) contemplates a cooperative federalist structure “similar to [the procedure] provided by section 110,” in which states devise plans to meet certain statutory objectives.⁷⁵ Under section 110, EPA is not required to parse state plans and approve only the elements that are absolutely necessary for attainment of the National Ambient Air Quality Standards. The Supreme Court held in *Union Electric Co. v. EPA* that EPA has no authority to disapprove a state implementation plan solely because it exceeds minimum requirements for timely attainment.⁷⁶ The Court rejected the contention that such requirements went beyond what was “necessary,” reasoning that “the most natural reading of the ‘as may be necessary’ phrase in context is simply that the Administrator must assure that the minimal, or ‘necessary,’ requirements are met, not that he detect and reject any state plan more demanding than federal law requires.”⁷⁷ A part of the Court’s rationale was that it would be unmanageable to require EPA to determine which state requirements were essential to timely

⁷² *Id.* at 79204-06.

⁷³ *See* Oil & Gas Methane SNPRM Comments at 19-20.

⁷⁴ 42 U.S.C. § 7416.

⁷⁵ *Id.* § 7411(d)(1).

⁷⁶ 427 U.S. 246, 261-66 (1976).

⁷⁷ *Id.* at 263.

attainment and which would achieve earlier attainment.⁷⁸ Rather, it is EPA’s job to approve a state plan that meets or exceeds the minimum requirements, and all elements of an approved state plan become federally enforceable.

The same principles apply under section 111(d). EPA is required to assure that a state plan meets or exceeds the requirements of the relevant emission guideline. EPA is not required to parse the plan’s standards of performance, work practices, and variances to assure that they do not exceed federal minimum requirements. Just as the Court held in *Union Electric*, a standard in a state plan may “reflect” the degree of emission limitation EPA has found achievable through the BSER even if the state requirement surpasses that level. When EPA approves a state plan that meets or exceeds those requirements, the elements of the state plan properly become federally enforceable.

Requiring EPA to parse state plans to identify beyond-bare-minimum requirements would run contrary to the purposes and structure of the statute just as the Court found in *Union Electric*. EPA’s proposed revision to the redesignated 40 C.F.R. § 60.24a(n), indicating that states may adopt more effective standards “as part of the plan,” is therefore consistent with the statute and relevant case law (Comment E9–2). In light of the Court’s ruling in *Union Electric*, there is no need to decide whether EPA’s authority to approve such plans depends on the reference to “other factors” in the RULOF provision. Thus, it would be prudent to replace the phrase “may account for other factors in applying” in the proposed 40 C.F.R. § 60.24a(m) with the simpler formulation “may apply.” This change would leave open the possibility that a state may apply a more effective standard regardless of its consideration of factors that EPA did not consider in the BSER analysis.

VII. Form of standards of performance

- A. Joint Environmental Commenters support revisions that would clarify that a “standard of performance” may take the form of an allowable rate, quantity, or concentration of emissions.

We support the proposed revisions to 40 C.F.R. §§ 60.21a(f) and 60.24a(b) that would clarify that a “standard of performance” may take the form of an allowable rate, quantity, or concentration of emissions.⁷⁹ As many of the undersigned organizations discussed in comments on the proposed revisions to the section 111(d) implementing regulations in 2018,⁸⁰ the language

⁷⁸ *Id.* at 263-64.

⁷⁹ 87 Fed. Reg. at 79206-07.

⁸⁰ Joint Comments of Environmental and Public Health Organizations on Proposed Revisions to Emission Guideline Implementing Regulations, EPA-HQ-OAR-2017-0355-24040, at 28-30 (submitted Oct. 31, 2018), attached to these comments.

of CAA section 302(k), defining “emission limitation” and “emission standard,”⁸¹ makes clear that the emission limitation in EPA’s guidelines (and therefore the standards of performance that reflect that emissions limitation), may take the form of a quantity, rate (input- or output-based), or concentration of emissions of an air pollutant into the atmosphere.

In addition, we support EPA’s proposal to delete the phrase “but not limited to” in 40 C.F.R. § 60.21a(f) and the phrase “or limit” in 40 C.F.R. §§ 60.21a(f) and 60.24a(b). As clarified by the proposed additional terminology, the definitions of “standard of performance” now include the only acceptable forms of a standard. Because EPA has comprehensively and exclusively defined the permissible forms of standards in its proposed language, it should delete the superfluous, misleading phrases “but not limited to” and “or limit,” as proposed.

Finally, EPA’s proposal simply defines the contours of the agency’s authority, and we underscore that any decision about the appropriate design of a future standard of performance depends heavily on facts and circumstances specific to the regulated pollutant and source category and must be made in future rulemaking actions setting standards for those sources. For instance, EPA retains full discretion to limit acceptable forms of standards in future emission guidelines to ensure that standards are designed in a manner that delivers protective and equitable pollution reductions.

VIII. Trading & averaging

EPA has appropriately proposed to rescind the prior administration’s determination that states may not include any form of averaging and trading in state plans under section 111(d).⁸² EPA’s proposal helps to align the implementing regulations with its underlying statutory authority. In the first place, EPA’s authority to approve state plans that incorporate averaging or trading (and EPA’s parallel authority to include averaging or trading in federal plans) is independent of EPA’s authority to consider averaging or trading when establishing emission guidelines.⁸³ While it is appropriate for the final rule to rescind the categorical ban on state plans’ use of trading or averaging, decisions about which compliance mechanisms state or federal plans may use should be made in the context of the emission guidelines for specific categories of sources, and in the context of specific state or federal plans. For example, averaging or trading should not be permitted for either state or federal plans when addressing specific pollutants and source categories where those mechanisms could increase risks to

⁸¹ 42 U.S.C. § 7602(k) (“The terms ‘emission limitation’ and ‘emission standard’ mean a requirement established by the State or the Administrator which limits *the quantity, rate, or concentration of emissions of air pollutants* . . .” (emphasis added)).

⁸² 87 Fed. Reg. at 79208.

⁸³ In *West Virginia v. EPA*, 142 S. Ct. 2587, 2615 (2022), the Supreme Court did not address authority to incorporate trading or averaging in section 111(d) state plans. As to EPA’s authority, the Court stated: “We have no occasion to decide whether the statutory phrase ‘system of emission reduction’ refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER.”

particular localities or populations—including environmental justice communities—which should be evaluated through cumulative impact analysis. EPA has appropriately proposed to determine whether trading or averaging are appropriate for a particular pollutant, source category, and standard of performance in the context of specific emission guideline rulemakings.⁸⁴ Thus, in its recent supplemental proposed emission guideline for the oil and gas sector, EPA properly recognized that many factors would make it inappropriate for EPA to approve a state plan that purports to limit emissions in the aggregate across the state’s oil and gas sources.⁸⁵

IX. Conclusion

Joint Environmental Commenters support EPA’s proposed revisions to the regulations implementing CAA section 111(d) and, in addition, recommend the key improvements discussed above. We encourage the agency to finalize this rule without delay, in order to establish the basic framework for urgently needed emission guidelines addressing air pollution from multiple sectors. The procedures detailed in EPA’s proposal and outlined in these comments will render future emission guidelines and implementation plans more consistent with the CAA’s requirements and responsive to the concerns of affected communities. In turn, those agency actions will help to secure the lasting reductions of harmful air pollutant emissions from existing sources that the Act requires.

⁸⁴ 87 Fed. Reg. at 79208.

⁸⁵ *Id.* at 74813-14.

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