E N V I R O N M E N T A L   P R O T E C T I O N   N E T W O R K

Comments of the Environmental Protection Network
on future emission guidelines issued under section 111(d) of the Clean Air Act as part of EPA's Proposed "Affordable Clean Energy" Rule
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On August 21, 2018, the Administration proposed a new rule to replace the Clean Power Plan. The "Affordable Clean Energy" or "ACE" rule contains four main actions:

- defining "best system of emissions reduction" (BSER),
- providing states with "candidate technologies" to incorporate in state plans,
- revising the New Source Review (NSR) permitting program, and
- revising emissions guidelines (EG) that inform the development, submittal, and implementation of state plans to reduce greenhouse gas (GHG) emissions from certain Existing Electric Utility Generating Units (EGUs) and any future emissions guidelines issued under section 111(d) of the Clean Air Act (CAA) (the so-called implementing regulations).

This document sets out the comments of the Environmental Protection Network (EPN) exclusively on the fourth action: the proposed revisions to EPA's implementing regulations for emissions guidelines.

EPN is a bi-partisan organization of former EPA employees and others who have come together to provide an informed and rigorous defense against efforts to undermine the protection of public health and the environment. EPN understands that numerous other organizations have been deeply engaged in the Clean Power Plan and will be commenting on the other elements of "ACE" that propose to substitute for it. We are aware that these organizations will be offering a comprehensive set of comments involving all of the issues raised by the ACE proposal; therefore, we will limit our comments to the more narrow implementing regulations. In some instances, we have suggested text changes to

direct quotes from the proposal and have differentiated our verbiage from the original with **<u>bold underlined text</u>.** As former EPA employees, we are particularly experienced with, and interested in, changes to rules that provide general procedures for state planning obligations, and feel that we have a unique perspective to offer.

EPA's implementing regulations under Section 111(d) were initially promulgated in 1975, and we agree that there are updates that will improve them and make them more consistent with other similar regulations that have been more recently revised. In these comments, we express our agreement with many of the updates included in this proposal and offer suggestions that we believe would strengthen or clarify the rule in some areas. We also identify some proposed changes that we believe should not be adopted, either because they are inconsistent with the Clean Air Act, or because they would weaken or confuse the program. The comments track in direct order the sections of the proposal. We would be happy to discuss any of these suggestions further with EPA staff.

<u>Comments on Proposed Amendments to 111(d) implementation rules</u>

60.20a(a)(1)

- It is a good idea to let an individual 111(d) guideline differ from, or add requirements to, the basic requirements being updated here, as long as those changes have to go through notice and comment rulemaking.
- It would strengthen the proposal and avoid future problems that arise from ambiguities to say that any individual changes cannot reduce opportunities for public notice and comment of state plans; and that any superseding requirements must be more stringent.

60.20a(b)

- We agree with the first sentence of this provision, but strongly disagree with the second sentence. Not only is it inconsistent with the first sentence, but it purports to allow the Administrator to relieve facilities of other legal obligations. EPA has addressed in other programs, for example the Title V program[1], situations where facilities are subject to more than one requirement and suggest that EPA look to this or other situations for language that will be both clear and consistent with the Administrator's responsibilities under the law.

[1] EPA developed guidance for streamlining multiple requirements that applied to one emissions unit. That guidance, which includes a procedure for determining the most stringent requirement, is found in the White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, March 5, 1996, https://www.epa.gov/sites/production/files/2015-08/documents/wtppr-2.pdf.

60.21a(e)

- EPN strongly opposes the proposed redefinition of “Emission Guidelines” to the extent it redefines the EG as providing “information” on emission reductions achievable through the Best System of Emission of Reduction (BSER) rather than a specific quantitative emissions reduction to be achieved through BSER.

60.22a(a)

- We **s**uggest that EPA clarify that the “standards of performance” referenced in the first sentence of this section refers to standards promulgated under section 111(b) of the CAA. Assuming that is correct, we agree with the language in this section.

60.22a(b)(2)

- Instead of “on the costs, nonair quality health environmental effects and energy requirements,”the language should say “on the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.” The suggested replacement language tracks the CAA language exactly.

60.22a(b)(4)

- In this section, there is a typo; “the cost of such achieving reduction” should be “the cost of achieving such reduction.”

60.23a(a)(1)

- Concerning the time for states to submit a plan, we agree that 9 months is too short, but think 3 years is too long for the generic requirement. It would be better to have a shorter generic timeframe that can be lengthened (after proposal and opportunity for comment), rather than a longer time frame that can be shortened. If an emission guideline applies to numerous sources in a way that may be complex to determine, a longer period may be warranted and EPA can propose it in the context of a specific emission guideline. Thus, we suggest changing this to say “Unless **a shorter or longer period is** ~~otherwise~~ specified in the applicable subpart, within **eighteen months** after notice of availability of a final emission guideline is published under s. 60.22(a)....”.

60.23a(c)

- We suggest that the regulations provide more guidance on the number of hearings to be held, as it only requires “one or more.” If there are affected sources all across a sizable state, the state should make some attempt to propose to hold more than one hearing in order to reasonably provide the public with a non-burdensome opportunity to attend. Since the rules allow the state to not hold a hearing if they do not get a request for one that has been offered, this should not be a hardship.

60.23a(d)(1) and (2)

- The proposed rule says that internet advertisement is acceptable notification of hearings and posting the draft plan. We do not object, but suggest that the rule say that the state must use whatever public notice procedures it already has approved in its state implementation plan (SIP) for giving notice of SIP revisions. There’s no reason for states to have different notice processes for 111(d) plans and SIPs, and it will just be confusing for the public if they can’t count on the public notice procedures they are used to. A state may want to propose changes to public notice

procedures but the default expectation should be that public notice provisions are the same for SIPs and plans under s. 111(d).

60.23a(d)(3)

- Language should specify that notice to the Administrator should include (or means) notice to the Office of Air Quality and Standards (OAPQS) and the local EPA regional office Air Director. Just saying "Administrator" isn't specific enough, and could result in submissions being delayed getting to the appropriate EPA offices.

60.23a(g)

- Make sure this requirement is consistent with Section 60.27a, which deals explicitly with state plan submittals (or delete it because it is addressed in a later section).

60.23a(g)(2)

- In addition to the brief summary of each presentation or written submission from the public, the state should also provide a response to those comments: "A list of ….appearing at the hearing, ~~and~~ a brief written summary of each presentation or written submissions **and the state's response to each significant comment.**"

60.24a(b)

- At the end of the first sentence, add "expressed as an emission rate or limit."
- In the last sentence, add "a" between "or" and "combination."

60.24a(b)(1)

- This says that the state can approve an alternate test method "if shown to be equivalent." If a state wants to use an alternate test or compliance method, EPA should have to approve that alternative. This was the subject of the "directors discretion" issue that led to SIP calls across the country. Alternative test methods can, in some instances, result in substantial differences to the protectiveness of a particular emission standard. State determinations of equivalence, for a standard, such as one adopted under 111(d) that is required under the Clean Air Act, should be reviewed and approved by USEPA.

60.24a(c)

- The implementing regulations should include a timeframe for compliance. A specific subpart could propose a shorter or longer timeframe for compliance, but otherwise the general timeframe would apply. We suggest alternative language as follows: "….final compliance shall be required as expeditiously as practicable, but no later than **two years from the effective date of the state's plan, unless different compliance schedules are specified in the applicable subpart."**

60.24a(d)(2)

- Take out the first sentence. There is no reason schedules of compliance should be allowed to come in after the plan submittal.

60.24a(e)

- This section allows states to use vague and subjective criteria to excuse individual facilities from the standard of performance established in the state's 111(d) plan. This will lead to inconsistent interpretation by states and less protective standards.

- EPA should set criteria and define limits as to how states may use the "remaining useful life of a facility to apply the standard of performance." For power plants in particular, history has shown that there is essentially no limit to the useful life of a facility, if the owner is willing to invest in ongoing major maintenance (as has become clear from all the New Source Review enforcement cases). EPA's proposal to exempt power plant efficiency upgrades from New Source Review will only exacerbate this phenomenon. This is contrary to basic principles underpinning the Clean Air Act--that over time older polluting facilities will be replaced by newer, cleaner ones subject to EPA's New Source Review program. However, with no guidance to the states on how to interpret "remaining useful life," we fear that states will conclude that old plants do not have enough remaining useful life to justify requiring controls or upgrades under 111(d), but then those plants nevertheless will continue to run indefinitely. We suggest that states only be able to excuse a plant from controls based on "remaining useful life" if that plant is under a permanent legal obligation to close by a certain date. Item (1) speaks of "unreasonable cost of control" without providing any guidance on how to interpret "unreasonable,"which is highly subjective.
- Item (3) uses the term "significantly more reasonable." Same comment as above. It also refers to factors specific to "the facility (or class of facilities)." The criteria laid out in this section that effectively allow a state to weaken a standard or not apply it at all should not be applied generally to a "class of facilities." These are facility-specific criteria that should only be considered on a facility-specific basis.
- The state should also have to consider foregone benefits in determining whether the costs of control are reasonable. Item (1) should be amended to state: "Unreasonable cost of control resulting from plant age, location, or basic process design, **taking into consideration foregone benefits**."

60.24a(f)

- EPN agrees with this section.

60.25a(c)

- The rule should explain how the compliance data will be "made available to the general public." The most straightforward way is to post compliance data on the state website. But possibilities include using the state's already approved public notice procedures, providing for interested stakeholders to sign up to get notice, or other options.
- Also, it would be good to state affirmatively what CANNOT be confidential business information (CBI) to short circuit later CBI claims. For example, emissions data cannot be CBI. This section should also specify that data from Continuous Emissions Monitoring Systems (CEMS) also cannot be CBI.

60.25a(f)

- Add a new "(1) Status of compliance for each source, including inspection reports, any notices of violation or other compliance-related communication between the state and the source."
- Renumber the subsequent sections. EPA should also require the state to include in the progress report not just initiation of enforcement actions but also results of any such actions.

60.26a(a)(2)

- At the end of this item, add "and monetary penalties for noncompliance." In other contexts, for example SIPs, states must be able to show they have legal authority not only to seek injunctive relief for noncompliance, but also penalties. Section 111(d) plans should be no different.

60.27a(a)

- This section states that the Administrator can shorten the period for submission of a plan whenever he determines necessary. While the language is ambiguous, if it gives the Administrator authority to shorten time for an individual state without a public process, that is inappropriate. In addition, the regulations address lengthening or shortening submittal timeframes elsewhere; this subsection (a) should be removed to avoid inconsistency and confusion and the subsequent subsections renumbered.

60.27a(c)

- This section should specify the time within which the Administrator must propose a federal plan if he or she finds that the state has failed to submit a plan or disapproves the plan. One option would be to require the proposed federal plan at the time of disapproval. A second option would be to require it within one year of the disapproval, since (d) says a final federal plan must be completed within 2 years of the disapproval.

60.27a(e)

- In (2), there may be a citation typo because of renumbering. Should be 60.24a(e), not (f) at the end of the sentence.

60.27a(f)(2)

- The default should be that the hearing would be held in the state, not in DC, and it's not clear that (1) makes sense. We suggest that this section be edited to say "Prior to promulgation of a federal plan **<u>for a state</u>** under paragraph (d) of this section, the Administrator will provide the opportunity for at least one public hearing in **<u>that state. If EPA is promulgating federal plans for multiple states simultaneously, the EPA shall provide the opportunity for a public hearing in each EPA Region that includes a state for which a federal plan is being promulgated."</u>**

60.27a(g)(1)

- The last sentence of (1) says "Where the Administrator determines that a plan submission does not meet the minimum criteria of this paragraph, the state will be treated as not having made the submission and the requirements of 60.27a regarding promulgation of a federal plan shall apply." We suggest adding at the end of this sentence "...until such time as the Administrator subsequently determines that the state plan is complete."

60.27a(g)(2)

  - Make sure the requirements in (iv) are all consistent with what's in 60.26a(b)(1) and (2).
  - Make sure the requirements of 60.23a(g) are consistent with what's in (viii).

60.27a(g)(3)

- Add a new (iii) after (ii) to the effect: "Explanation of any standard of performance that is less stringent than what is included in the applicable subpart of this regulation and explanation of how the factors in 60.24a(c) were used, if they were used." Renumber the subsequent sections.
- In (iii), add at the end "including an explanation for any compliance schedule that is longer that provided in the applicable subpart or 2 years, if no specific schedule is provided."
- If the state uses exactly what EPA prescribes in the applicable standards of performance, it doesn't make sense that the state have to provide the information in (vi).

- Add a new item at the end: " (viii) Explanation of how the state has considered environmental justice in development of its plan."

EPN hopes these comments are constructive and helpful and would be glad to provide further information to EPA if it is desired.

Respectfully submitted on behalf of the Environmental Protection Network,

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