



David Friedman
Vice President
Regulatory Affairs

American
Fuel & Petrochemical
Manufacturers

1667 K Street, NW
Suite 700
Washington, DC
20006

202.457.0480 office
202.552.XXXX direct
202.457.0486 fax
XXXXXXX@afpm.org

February 26, 2018

The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Attention Docket ID No. EPA- HQ-OAR-2017-0545
EPA Docket Center, U.S. EPA, Mailcode: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, Advance Notice of Proposed Rulemaking, Docket ID No. EPA-HQ-OAR-2017-0545; FRL-9972-50-OAR, 82 Fed. Reg. 61507 (Dec. 28, 2017)

Dear Administrator Pruitt:

The American Fuel & Petrochemical Manufacturers (“AFPM”) appreciates the opportunity to submit comments on the U.S. Environmental Protection Agency’s (“EPA’s”) Advance Notice of Proposed Rulemaking (“ANPRM”) entitled State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, Docket ID No. EPA-HQ-OAR-2017-0545; FRL-9972-50-OAR, 82 Fed. Reg. 61507 (Dec. 28, 2017). AFPM is a national trade association whose members represent virtually all United States refining and petrochemical manufacturing capacity. AFPM’s members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

INTRODUCTION

In a separate rulemaking, EPA has proposed to repeal its final rule commonly known as the Clean Power Plan (“CPP”).¹ The CPP sought to assert unprecedented jurisdiction over U.S. electricity production (and dispatch) that far exceeded the authority Congress granted EPA under the Clean Air Act and would have caused profound adverse consequences across our economy. The CPP would have particularly harmed AFPM’s members for whom the lower cost of electricity in the U.S. is critical to competing in today’s global marketplace.

¹ See Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA- HQ-OAR-2017-0355; FRL-9969-75-OAR, 82 Fed. Reg. 48035 (Oct. 16, 2017). The CPP was promulgated in 2015. Final Rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015). AFPM will separately comment in support of the proposed repeal by EPA’s April 26, 2018 deadline.



Because the CPP exceeded the scope of EPA’s authority under the Clean Air Act, AFPM joined a coalition of trade associations who commented on the proposed CPP in 2014² and challenged the final rule in court. AFPM believes any Rule³ that replaces the CPP with new emission guidelines for greenhouse gas emissions⁴ from existing electric utility generating units (“EGUs”) must be consistent with EPA’s authority under the Clean Air Act and the cooperative federalism embodied in the statute that allocates responsibilities among the federal and state governments. It is important to recognize that there are significant unresolved legal concerns surrounding EPA’s issuance of greenhouse gas regulations for EGUs under Sections 111(b) and 111(d) as a matter of law. Any Rule must, at most, only establish a source category-specific best system of emission reduction (“BSER”) based on “inside the fence line” improvements. Any Rule must also leave to the States the authority to implement that BSER through State plans that set standards of performance at individual sources.

In these comments, we first explain why any Rule EPA may choose to promulgate must provide for an “inside the fence” BSER for the EGU source category which is no more stringent than new source performance standards (“NSPS”) for EGUs, consistent with Section 111(d) of the Clean Air Act. Any Rule should also explicitly exempt industrial combined heat and power (“CHP”) units from regulation, due to the obvious ways they differ from EGUs and their clear energy and environmental benefits. *See infra* Part I. Second, any future Rule must grant States the authority to set the actual performance standards for CO₂ emissions from existing EGUs and give States appropriate flexibility in determining those standards, while providing the EGUs the flexibility to develop measures to comply with the performance standards in the most cost-effective manner. *See infra* Part II. Third, we believe that EPA should take steps to ensure that energy efficiency and equipment upgrades as outlined in the ANPRM would not trigger Clean Air Act New Source Review (“NSR”) program requirements. *See infra* Part III. Finally, any Rule must clarify that modified or reconstructed sources cannot be regulated under both the Rule and the NSPS for CO₂ emissions from EGUs. *See infra* Part IV.

I. ANY RULE MUST PROVIDE FOR A SOURCE CATEGORY-SPECIFIC BEST SYSTEM OF EMISSION REDUCTION NO MORE STRINGENT THAN THE NSPS FOR CO₂ EMISSIONS FROM EGUs AND SHOULD EXEMPT INDUSTRIAL COMBINED HEAT AND POWER UNITS.

² *See* Am. Chem. Council *et al.*, Comments on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generation Units, Proposed Rule, Docket ID No. EPA–HQ–OAR–2013–0602–22581 (Dec. 1, 2014), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0602-22581>.

³ All references to a “Rule” or “Rulemaking” refer specifically to any future Section 111(d) regulation addressing greenhouse gas emissions from existing EGUs.

⁴ The ANPRM states that any Rule would likely be expressed in terms of carbon dioxide (“CO₂”) emissions. 82 Fed. Reg. at 61508. Thus, for simplicity, these comments will generally refer to CO₂ emissions.



A Rule establishing emission guidelines for CO₂ emissions from existing EGUs must fit squarely within the four corners of Section 111(d).⁵ In fashioning a Rule, EPA must recognize its limited authority under Section 111(d) to establish a source category BSER for existing EGUs that is no more stringent than the NSPS for EGUs under Section 111(b). Further, any Rule must exempt industrial CHP units from the definition of EGU.

A. Any Rule Must Include a Source Category-Specific BSER.

In the ANPRM, EPA states that its “principal task under Section 111(d)...is to publish a guideline document for use by the States, with that guideline document containing, among other things, an ‘emission guideline’ that reflects the BSER, as determined by the Agency, for the category of existing sources being regulated.” 82 Fed. Reg. at 61509. According to the ANPRM, the States would then submit plans that establish the actual existing source performance standards, standards that reflect the federally-determined BSER. *Id.* EPA recognized this allocation of federal-State authority in the preamble to its existing source implementing regulations. *See* Final Rule, State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53340, 53343 (Nov. 17, 1975) (“EPA’s emission guidelines will not have the purpose or effect of national emission standards” and “will not be requirements enforceable against any source”). Furthermore, this BSER must be source category-specific and focused on “measures that” States could use to develop performance standards that would “apply to and at individual sources.” 82 Fed. Reg. at 61511.

⁵ In the ANPRM, EPA has stated that it is not soliciting comments on its 2009 endangerment finding under Section 202(a) of the Clean Air Act, the legal basis for applying that finding to sources other than mobile sources, and EPA’s Section 111(b) new source performance standard for new EGUs which it intends to reconsider. 82 Fed. Reg. at 61508-09 and n.3. Accordingly, AFPM will not address those legal issues in depth here, but preserves all rights to raise its arguments related to them in any subsequent proceeding or rulemaking. That said, it remains AFPM’s view that before EPA regulates CO₂ emissions from a source category under Section 111(b) or 111(d), the Agency must first find that the emissions of CO₂ from the source category are a significant contributor to the endangerment of public health or welfare. The text of Section 111 of the Clean Air Act compels this. 42 U.S.C. § 7411(b)(1)(A) (EPA must first determine whether “a category of [stationary] sources... causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare”); 42 U.S.C. § 7411(d)(1) (an NSPS for a source category must be issued before EPA can issue emission guidelines for existing sources in the same source category); *see also* 40 C.F.R. § 60.22(b)(1) (“Guideline documents published under this section will provide information for the development of State plans, such as:...Information concerning known or suspected endangerment of public health or welfare caused, or contributed to, by the designated pollutant.”). Moreover, the Agency’s Section 202(a) endangerment finding does not provide the required legal foundation, as it was based on a different and less stringent legal standard. *Compare* 42 U.S.C. § 7521(a)(1) (EPA “shall by regulation prescribe...standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare”) *with* 42 U.S.C. § 7411(b)(1)(A) (applying, as noted above, to different regulated entities and requiring that contribution be “significant”).



AFPM concurs with EPA's position in the ANPRM. First, as EPA notes, the BSER must be for the EGU "source category." *See, e.g.*, 82 Fed. Reg. at 61511 (EPA must set a BSER which "is adequately demonstrated for the source category."). Second, AFPM agrees that any BSER for CO₂ emissions from existing EGUs must take a "within the fence line" approach.⁶ A "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which...the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). Standards of performance are source-specific. *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 which (A) establishes standards of performance for any *existing source*...") (emphasis added). "Stationary sources," in turn, mean "any building, structure, facility, or installation." 42 U.S.C. § 7411(a)(3). Thus, Section 111(d) unambiguously requires States to set source-specific standards of performance, based on a BSER focused on measures applicable at the source and "within the fence line." *See also* 42 U.S.C. § 7411(d)(1) (describing existing source standards of performance as "for" and "apply[ing]" to existing sources); *Nat'l-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 837 n.3 (6th Cir. 1988) (Section 111 performance standards "specif[y] the maximum rate at which an *individual source* may emit pollution") (emphasis added).

EPA's current existing source implementing regulations support this source-category, "within the fence line" approach for BSER. In those regulations, EPA determined that Section 111(d) emissions guidelines must "reflect[...the application of the best system of emission reduction...[that] has been adequately demonstrated *for designated facilities*." 40 C.F.R. § 60.21(e) (emphasis added). A "designated facility" is defined as "any existing facility" which would be subject to a NSPS if it were a new source. 40 C.F.R. § 60.21(b). Moreover, until the CPP, EPA had in place regulations for four pollutants from five source categories under Section 111(d), and in each case, EPA had developed a source-category BSER based on adequately demonstrated technology that was used to develop performance standards for individual sources.⁷ Thus, any Rule should return to this approach by establishing a BSER for the source category that States may then use to set source-specific standards.

⁶ As the ANPRM requests, AFPM will comment more fully on the scope of EPA's authority under Section 111(d) in its comments on the proposed repeal of the CPP. *See* 82 Fed. Reg. at 61510.

⁷ *See, e.g.*, Final Rule, Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905, 9907 (Mar. 12, 1996) (establishing "[a] well-designed and well-operated [gas] collection system" and "a control device capable of reducing [nonmethane organic compounds] in the collected gas by 98 weight-percent," such as a flare, as best demonstrated technologies); Notice, Primary Aluminum Plants; Availability of Final Guideline Document, 45 Fed. Reg. 26294, 26294 (Apr. 17, 1980) ("[Emissions guidelines] are...presented as average fluoride control efficiencies expected from the application of certain recommended control technologies that are applied as new retrofits to existing plants. These control



B. Standards for Existing Sources Must be No More Stringent Than Standards of Performance for New Sources.

Any future Rule’s emission guidelines must also not be more stringent than the NSPS standard governing CO₂ emissions from new EGUs. Both the language and structure of Section 111 make clear that the standards of performance for new and existing sources must be interpreted and applied in a consistent manner. As noted above, the regulation of new sources under Section 111(b) is a necessary prerequisite for regulation of existing sources from the same source category under Section 111(d), which specifies that standards of performance may only be established for an existing source “to which a standard of performance... would apply if such existing source were a new source.” 42 U.S.C. § 7411(d)(1). By making regulation of existing sources contingent upon the promulgation of standards of performance for new sources, Congress intended that Section 111(d) be a supplementary program that is informed by the BSER analysis and standards of performance for new sources.

Moreover, the Clean Air Act also makes clear that standards of performance established under Section 111(b) provide the ceiling for the Section 111(d) standards, which are more flexible and must take into account challenges associated with retrofitting existing facilities with pollution controls. 42 U.S.C. § 7411(d)(1) (“Regulations of the Administrator... 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”). Section 111(d) thus provides only additional *flexibility* for existing sources, not criteria for imposing *more stringent* standards.

Until the CPP, EPA had explicitly long acknowledged that Section 111(d) regulations should not be stricter than NSPS standards for the same source category. Instead, EPA has recognized that *existing* sources (which must retrofit changes) cannot be expected to meet more stringent requirements than *new* sources (which can more cost-effectively incorporate changes into their original designs). *See, e.g.*, 40 Fed. Reg. at 53341, 53344 (“[T]he degrees of control represented by EPA’s emission guidelines will... be less stringent than those required by

technologies are based on effective collection of emissions, followed by efficient fluoride removal by dry scrubbers or by wet scrubbers.”); Notice, Kraft Pulp Mills; Final Guideline Document; Availability, 44 Fed. Reg. 29828, 29829 (May 22, 1979) (establishing emission guidelines for total reduced sulfur emissions from a variety of sources at Kraft pulp mills which were based on “retrofit[ting]” the sources with control technologies described in a separate guidance document); Final Rule, Emission Guideline for Sulfuric Acid Mist, 42 Fed. Reg. 55796, 55797 (Oct. 18, 1977) (setting emission guidelines for sulfuric acid mist from existing sulfuric acid plants based on the degree of control achievable via control technology specified in the proposed rule); Final Guideline Document Availability, Phosphate Fertilizer Plants, 42 Fed. Reg. 12022, 12022 (Mar. 1, 1977) (establishing emission guidelines for fluoride emissions from existing phosphate fertilizer plants based on spray-crossflow packed bed scrubbers as the BSER).



standards of performance for new sources because the costs of controlling existing facilities will ordinarily be greater than those for control of new sources” and as “physical limitations may make installation of particular control systems” at an existing facility “impossible or unreasonably expensive”); Proposed Rule, Emission Guidelines for the Control of Sulfuric Acid Mist from Existing Sulfuric Acid Production Units, 41 Fed. Reg. 48706, 48706 (Nov. 4, 1976) (proposing higher emission guideline for fiber mist eliminators in existing sulfuric acid plants than in new sulfuric acid plants due to the costs associated with retrofitting).

Hence, in any proposed Rule, EPA should not propose a BSER framework for existing sources in the source category that is more stringent than the BSER it has established to date for new EGUs. Indeed, in this or a future rulemaking, EPA should revise its governing existing source regulations to solidify these principles further. *See* 40 C.F.R. § 60.20 *et seq.* Currently, EPA’s regulations authorize draft emission guidelines for existing sources “[c]oncurrently upon or after proposal of” a NSPS for the same category of sources, and the finalization of emission guidelines for existing sources “upon or after promulgation of” a NSPS for the same source category. 40 C.F.R. § 60.22(a). This provision should be amended to only allow the Agency to propose and finalize emission guidelines after a NSPS has been finalized for that source category, with standards that are no more stringent than those for a new source, consistent with Section 111(d)’s requirement that an emission guideline be issued only if “a standard of performance under this section would apply if such existing source were a new source.” 42 U.S.C. § 7411(d)(1). This approach would be fully consistent with the language of Section 111(d) and would allow EPA to take advantage of its findings in the NSPS process when setting an emission guideline for existing sources in a source category.

C. Industrial Combined Heat and Power Units Should Be Exempt under Any Future Rule.

In the ANPRM, EPA specifically asked for comment on whether a proposed Rule should continue to exempt industrial CHP units. 82 Fed. Reg. at 61517. CHP units use “heat that would otherwise be wasted” to provide both electricity and thermal energy (steam) for industrial use.⁸ These units are efficient, environmentally beneficial, economically advantageous sources of reliable power. EPA should broadly exempt existing industrial CHP units from the definition of “affected EGU” under any future Rule.

For one, industrial CHP units should be excluded from any Rule because there is broad diversity among these units. Unlike standard EGUs, there are many different types of industrial CHP units, and many existing industrial CHPs are unique, site-specific systems. For example,

⁸ EPA, *Combined Heat and Power (CHP) Partnership: What is CHP?*, <https://www.epa.gov/chp/what-chp> (last updated Oct. 31, 2016).



the refining and petrochemical industries use CHP units at many of their facilities, and the types of existing industrial CHP units and uses of the electricity generated vary significantly. Thus, these industrial CHP units are typically tailored to their facility's very specific needs. Due to the broad differences among industrial CHP units, these units are particularly ill-suited for a federally-determined source category-specific BSER and for State-issued standards of performance for individual industrial CHP units.

Further, industrial CHP units should also be excluded because these highly efficient units provide clear energy and environmental benefits, a fact EPA consistently recognized during its Section 111(b) and 111(d) rulemakings for CO₂ emissions from EGUs during the previous Administration. *See* 80 Fed. Reg. at 64902 (“CHP units are low-emitting electric generating resources that can replace generation from affected EGUs.”); Proposed Rule, Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34960, 34982 (June 18, 2014) (“CHP requires less fuel to produce a given energy output, and because less fuel is burned to produce each unit of energy output, CHP reduces air pollution and greenhouse gas emissions. CHP has lower emission rates and can be more economic than separate electric and thermal generation.”).

In addition, industrial CHP units should not be captured by a Rule governing EGUs, because industrial CHP units have a fundamentally different purpose than EGUs and utility CHPs. The primary purpose of industrial CHP units is to provide steam and electricity to a host facility, not to sell power to the grid. EPA acknowledged this very fact previously: “[U]tility CHP units ... serve essentially the same purpose as electric-only EGUs (*i.e.*, the sale of electricity to the grid)” while “[i]ndustrial CHP units, on the other hand, serve a different primary purpose (*i.e.*, providing useful thermal output with electric sales as a by-product).” *See* Final Rule, Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510, 64533 (Oct. 23, 2015).

Hence, any future Rule should recognize the many advantages of industrial CHP by broadly exempting industrial CHP units from the definition of “affected source,” rather than relying on the approach in the CPP, which had conditioned the exemption on the presence of a federally enforceable permit limit or historical limit on annual net electric sales to a utility power distribution system. 80 Fed. Reg. at 64716. A broad exemption not only recognizes the value of using industrial CHP units, but also would further incentivize industry to continue to adopt and maintain this already efficient, low emission, and reliable power source.

Moreover, exempting industrial CHP units would be consistent with the U.S. Department of Energy's (“DOE's”) program to further the installation of “cost-effective, highly efficient



combined heat and power (CHP) technologies.”⁹ As DOE has recognized, using “CHP can support U.S. economic competitive advantage, promote economic development, instill resiliency in businesses and communities, create and maintain local energy-related jobs, and provide solutions for modernizing energy generation and delivery.”¹⁰ EPA should avoid burdening industrial CHP use with any additional regulation of the type that is contemplated by the ANPRM.

II. ANY RULE MUST RECOGNIZE STATES’ AUTHORITY TO SET PERFORMANCE STANDARDS AND PROVIDE THE APPROPRIATE FLEXIBILITY FOR FACILITIES IN DEVELOPING COMPLIANCE MEASURES.

In contrast with Section 111(b), Section 111(d) grants States the authority to establish emission standards for each individual source within their jurisdictions. Thus, any future Rule must provide the authority to set performance standards for individual existing EGUs to the States, not EPA, and must explicitly give the States appropriate flexibility when setting those standards. Furthermore, any future Rule must allow States discretion to pursue compliance options in their plans, as long as those options give facilities themselves as much flexibility as allowed under the Clean Air Act to achieve the performance standards in a cost-effective manner.

A. In Any Future Rule, EPA Must Give States the Authority to Set Performance Standards for CO₂ Emissions from Existing EGUs and Provide States with Appropriate Flexibility when Establishing Those Standards.

AFPM agrees with the ANPRM’s position that Section 111(d) regulations must allow “States...[to] establish standards of performance for existing sources,” rather than EPA mandating those standards. 82 Fed. Reg. at 61512. That allocation of authority to the States is grounded in the unambiguous language of the statute. *See* 42 U.S.C. § 7411(d)(1) (providing for “each State [to] submit to the Administrator a plan which (A) *establishes standards of performance* for any existing source.”) (emphasis added); *see also* 40 Fed. Reg. at 53341 (noting, in finalizing the existing source implementing regulations, that “to emphasize that a legally enforceable standard is not intended, the term ‘emission limitation’ has been replaced with the term ‘emission guideline.’”). EPA should expressly confirm this allocation of authority in any future existing source Rule, consistent with this clear statutory framework.

⁹ U.S. Dep’t of Energy, *Energy Department Announces \$25 Million for Combined Heat and Power Technologies* (Nov. 28, 2017), <https://energy.gov/articles/energy-department-announces-25-million-combined-heat-and-power-technologies>.

¹⁰ *Id.*



In addition, in any future Rule, EPA should allow each State to “consider[] the unique circumstances of the State and the EGU[s]” in its boundaries when establishing standards of performances. 82 Fed. Reg. at 61511. This approach is clear from the plain language of the statute. While the standards of performance must apply to individual sources, the Clean Air Act’s text mandates that States be permitted to consider such source-specific variables as “the remaining useful life” of the source as well as “other factors” in setting those standards. *See* 42 U.S.C. § 7411(d)(1).

Any future Rule therefore should ensure the States have the ability to apply “less stringent emission standards” and “longer compliance schedules” in all cases where appropriate, consistent with EPA’s existing source implementing regulations. Specifically, where EPA “has determined that a designated pollutant may cause or contribute to endangerment of public welfare,” but has not made a conclusion regarding public health effects, States may weigh “other factors of public concern” in setting emission standards. 40 C.F.R. § 60.24(d). Where EPA “has determined that a designated pollutant may cause or contribute to endangerment of public health,” the implementing regulations provide that State “emission standards...be no less stringent” than EPA’s emission guidelines, unless 40 C.F.R. 60.24(f) applies. 40 C.F.R. § 60.24(c). However, under 40 C.F.R. § 60.24(f), States may “provide for the application of less stringent emissions standards or longer compliance schedules” if they demonstrate that a wide range of facility- or class-specific factors justify different standards. 40 C.F.R. § 60.24(f). These factors include “[u]nreasonable cost[s] of control resulting from plant age, location, or basic process design,” “[p]hysical impossibility of installing necessary control equipment,” and “other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable.” *Id.* In considering these relevant factors, States should also give substantial weight to the demonstration made by regulated sources when assessing whether a standard would present “unreasonable costs” or be physically impossible to satisfy given the equipment configuration at an existing source. Thus, the existing implementing regulations provide States with flexibility in setting performance standards, which EPA should reaffirm.

This approach makes abundant sense. As EPA notes in the ANPRM, “[e]ach State has its own unique circumstances to consider when regulating air pollution emissions from the power industry within that State.” 82 Fed. Reg. at 61511. Only by considering source-specific characteristics can States tailor standards of performance to the unique circumstances of the specific sources within their boundaries, which will by necessity contain a different mix of ages of EGUs, baseload versus peaking EGUs, EGUs for which recovery of capital investments is in different stages, and other differences. The ANPRM lists a variety of potential factors States could consider in setting standards of performance, including the remaining useful life of the State’s existing EGUs, boiler- and turbine-specific characteristics, and other factors. *Id.* Any future Rule should confirm that States could consider appropriate factors, consistent with their



authority provided by the Clean Air Act, when setting standards of performance for existing EGUs.

B. Any Future Rule Should Include Flexibility for Facilities to Develop Measures to Comply with the Performance Standards in the Most Cost-Effective Manner, Consistent with Existing Statutory Authority.

Any future Rule must clearly state that facilities have as much flexibility as permitted under the Clean Air Act to comply with performance standards. While facilities in a source category will have some similarities, each will differ in many ways, including, for example, in the type of equipment, equipment layout, age of equipment, and efficiency measures already implemented, among others. Under this approach, facilities would be free to adopt the most efficient and cost-effective measures that enable them to comply with the applicable performance standard, as long as those measures are otherwise consistent with law. Other federal regulatory regimes authorize a similar compliance approach – the regulator sets the standard and a deadline, but gives the facility the latitude to decide how best to comply with the standard. *See, e.g.*, 40 C.F.R. §§ 68.170, 68.175 (under Clean Air Act Risk Management Plan Programs 2 and 3, owner/operator must address certain elements in Plan, but decides how to implement those elements); 6 C.F.R. §§ 27.225, 27.230 (Department of Homeland Security regulations provide that covered facilities will develop their own site security plans to demonstrate how they will “meet or exceed each applicable performance standard”); 49 C.F.R. §§ 172.800, 172.802 (Department of Transportation security plans for transportation of hazardous materials in commerce must include listed components, such as measures to address security risks, but “[s]pecific measures put into place by the plan may vary”).

There is no reason for regulations that cover CO₂ emissions to be any different. Indeed, providing this flexibility will spur facilities to innovate and identify creative, cost-effective solutions.

III. EPA SHOULD CONSIDER ADDRESSING NSR REGULATIONS TO ENSURE THAT THEY ARE NOT TRIGGERED WHEN DEVELOPING AND IMPLEMENTING ANY FUTURE RULE.

EPA should consider the regulatory burdens and obstacles associated with implementing any proposed Rule due to interactions with existing Clean Air Act regulatory programs, such as NSR. 82 Fed. Reg. at 61510.

First, EPA should consider how modifications that may be made to a facility to comply with a Rule may trigger NSR requirements. For example, in the ANPRM, EPA has identified that possible equipment upgrades, additional technologies, and good practices could be used to improve boiler efficiency/heat rate in order to address CO₂ emissions. 82 Fed. Reg. at 61514-15



(Tables 1-2). In general, the improvements to EGUs outlined in the ANPRM can be done as part of their scheduled maintenance and capital planning cycles and would likely qualify as routine maintenance, repair and replacement, which are exempt from NSR and the NSPS general modification requirements. *E.g.*, 40 C.F.R. § 52.21(b)(2)(iii)(a); 40 C.F.R. § 60.14(e)(1). However, replacing equipment in EGUs with improved technology that is more energy efficient has resulted in enforcement actions or citizen suits filed by EPA, States and environmental NGOs, alleging these measures were “modifications” that resulted in emissions increases of other pollutants subject to regulation. To alleviate this issue and promote additional CO₂ emissions reductions, EPA should issue guidance to clarify equipment that is replaced with more energy-efficient equipment may qualify under the routine maintenance, repair and replacement exclusion under NSR and NSPS.

The measures that a source must take to comply with one Clean Air Act regulatory regime should not lead to potentially costly additional obligations to control unrelated pollutants under another Clean Air Act regulatory regime. EPA should consider steps that could address this concern by issuing guidance and/or modifying the NSR program as appropriate through EPA’s ongoing process of NSR reform that would apply these kinds of changes to NSR across all of industry.¹¹ At the same time, EPA should consider the implications across industry of potentially adjusting NSR requirements that could affect State Implementation Plans, such as planning in non-attainment areas and the available increment in attainment areas. EPA should also acknowledge the cost and permitting schedule of these obligations in its analysis of establishing the appropriate levels of CO₂ reduction under a Rule.

In regards to other ongoing NSR reform efforts, EPA should consider issuing guidance that would clarify the actual-to-projected-actual (“ATPA”) test regarding the calculation methodologies for taking into account demand growth of the facility and what it was capable of accommodating before it was modified. This guidance should be applicable to all industries, be an extension of the Pruitt NSR Memo’s position on these issues, and would have the effect of promoting energy efficiency improvements. The guidance should clarify that any increase in emissions from other pollutants that could have been accommodated by the facility prior to the change are unrelated to the modification, if the rate of emissions per unit of production is less after the modification than before it, and the modification did not result in an increase in the design capacity of the facility.

¹¹ See EPA, Memorandum, Administrator E. Pruitt to Regional Administrators, New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual to Projected Actual Applicability Test in Determining Major Modification Applicability 1 (Dec. 7, 2017) (“Pruitt NSR Memo”) (EPA “is conducting a review” of the NSR program and evaluating “opportunities for the EPA to make improvements by clarifying or revising the EPA” NSR rules). Such revisions should apply program-wide, not just to existing EGUs.



EPA also should consider issuing guidance to clarify that states are not mandated to adjust a facility's Plantwide Applicability Limit ("PAL") emission limits downward upon renewal when emitting less than 80% of the PAL level. The regulations provide criteria for the states to consider in making their decision whether or not to adjust the PAL level when this occurs.

Finally, EPA should provide guidance that specifies that activities undertaken at EGUs for regulatory compliance purposes can be assessed under NSR individually since changes to each EGU could be implemented independently from each other.

IV. EXISTING EGUs THAT BECOME SUBJECT TO THE FEDERAL NSPS UNDER SECTION 111(b) DUE TO MODIFICATION OR RECONSTRUCTION SHOULD ONLY BE SUBJECT TO THAT STANDARD.

EPA requested comment on whether there are any potential interactions between a Section 111(d) Rule covering existing EGUs and a federal program under CAA Section 111(b) covering newly constructed, reconstructed, and modified EGUs. 82 Fed. Reg. at 61519. The Rule should clarify that existing sources that become subject to Section 111(b) should only be subject to that standard and not be subject to Section 111(d) as well. For example, if a facility increased its design capacity, thereby increasing its maximum allowable CO₂ emissions and becomes subject to the federal program under Section 111(b), it should not also be subject to the State program under 111(d). Sources should not be subject to both standards.

In sum, AFPM believes that any Rule replacing the CPP must fit strictly within the authority Congress granted EPA under Section 111 of the Act. As such, any Rule should be limited to setting BSER for the EGU source category, based on "inside the fence line" improvements, leaving to the States the discretion to develop a plan for source-specific performance standards to achieve BSER, and exclude all industrial CHP units from the Rule's requirements. We look forward to continuing to engage with the Agency on this important matter. If you have any further questions, please contact me at dfriedman@afpm.org.

Sincerely,

David N. Friedman
Vice President, Regulatory Affairs