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The Honorable Michael S. Regan
Administrator
US Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Adoption and Submittal of State Plans for Designated Faculties: Implementing Regulations Under Clean Air Act Section 111(d) Docket No. EPA-HQ-OAR-2021-0527

Dear Administrator Regan,

The following Comments are submitted on the above-referenced proposed rulemaking ("Proposal") on behalf of the following national and state trade associations: the Independent Petroleum Association of America ("IPAA"), Arkansas Independent Producers and Royalty Owners ("AIPRO"), Domestic Energy Producers Alliance ("DEPA"), Eastern Kansas Oil & Gas Association ("EKOGA"), Illinois Oil & Gas Association ("IOGA"), Gas & Oil Association of West Virginia ("GO-WV"), Independent Petroleum Association of New Mexico ("IPANM"), Indiana Oil and Gas Association ("INOGA"), International Association of Drilling Contractors ("IADC"), Kansas Independent Oil & Gas Association ("KIOGA"), Kentucky Oil & Gas Association ("KOGA"), Michigan Oil and Gas Association ("MOGA"), National Stripper Well Association ("NSWA"), North Dakota Petroleum Council ("NDPC"), Ohio Oil and Gas Association ("OOGA"), The Petroleum Alliance of Oklahoma ("The Alliance"), Petroleum Association of Wyoming ("PAW"), Pennsylvania Independent Oil & Gas Association ("PIOGA"), Texas Alliance of Energy Producers ("Texas Alliance"), Texas Independent Producers & Royalty Owners Association ("TIPRO"), and Western Energy Alliance (collectively, "Producer Associations").

These comments are submitted to address proposed changes to the adoption and submittal of state plans implementing regulations under Clean Air Act ("CAA") Section 111(d), 42 U.S. Code § 7411. The proposed changes would revise 40 CFR Part 60, Subpart Ba ("Subpart Ba"). The generic modifications to Subpart Ba are integrally related to the Environmental Protection Agency's ("EPA") proposed Subpart OOOOc which would create Emissions Guidelines ("EG") for the oil and natural gas production industry. While the Subpart OOOOc proposal contains specific provisions regarding the application of Section 111(d), these generic changes to Subpart Ba would apply where Subpart OOOOc does not provide specific overrides. Moreover, the Producer Associations believe the concepts included in both proposals create broader issues that need to be addressed.

I. EPA's Proposed Implementation Timelines Put Form Over Substance – To the Detriment of the Regulated.

EPA proposes the following timelines:

- 15 months for state plan submissions after publication of the final EG;
- Two months for EPA to make a determination on state plan completeness after plan submission;
- 12 months for EPA to take final action on a state plan after completeness determination;
- 12 months for EPA to promulgate a Federal plan either after the state plan deadline, if a state has failed to submit a complete plan, or after EPA's disapproval of a state plan submission; and,
- Requiring state plans to include increments of progress if the plan requires final compliance with standards of performance later than 16 months after the plan submission deadline.

There is a subtle, but critical, unfairness in this schedule. In the final stage of the proposed timeline, EPA proposes increments of progress if final compliance is more than 16 months after plan submission. If one assumes that there could be final compliance at 16 months and EPA has 14 months to take final action on a state plan, the newly regulated existing emissions source would have two months to comply with a set of regulations after they become final. Giving existing sources two months to comply with a complex and stringent set of regulations is fundamentally unfair.

This is an unreasonable expectation based solely on EPA arbitrarily creating compliance deadlines in the finalization of its EG. Unlike other compliance deadlines in the CAA, such as those for National Ambient Air Quality Standards ("NAAQS") which are set by Congress, the compliance deadlines under Section 111(d) EG are set solely by EPA.

While EPA ambitiously sets tight limits on its actions, EPA's failure to meet Congressionally and judicially imposed deadlines is legendary. In this Proposal, the consequences of EPA's failure would fall completely on the regulated source, where presumably EPA could then initiate enforcement actions.

In the case of EPA's deadlines in Subpart OOOOc, sources are required to be compliant within three years after submittal of a state plan. In the Subpart OOOOc proposal, approximately one million wells, or more than three million designated facilities, that are spread across more than 30 states will be competing for resources to revise or add equipment to comply with new regulations. Meanwhile, while EPA takes its 14 months – or longer – to approve state plans, the regulated entities are presented with a Hobson's choice: on one hand they invest substantial time and resources preparing to comply with regulations that are not yet final, or, on the other, they wait until the regulations are approved by EPA knowing more likely than not that they cannot come into compliance in the remaining time thus exposing themselves to enforcement action.

The solution is straightforward. EPA should provide that the compliance period begins after EPA completes final approval of the state plans.

II. Remaining Useful Life and Other Factors ("RULOF") Are Meant to Enhance State's Flexibility – Not Limit It.

A. EPA's Proposed Revisions are Antithetical to Congress' Intent with Regard to RULOF.

Many of the issues proposed in this regulatory action were presented similarly in EPA's Subpart OOOOc proposal. As a part of the Subpart OOOOc proposal, EPA includes a framework of the application of Section 111(d) for oil and natural gas production facilities. Now, EPA has released this Proposal revising its Section 111(d) implementing regulations. This creates an immediate problem because these are two different proposals on different completion schedules.

The intent of Congress in crafting Section 111(d) was to create a program to fill the potential gaps regulating existing sources of emissions when new source regulations were created for pollutants that were neither criteria pollutants nor hazardous air pollutants, both of which have existing source provisions. Because Section 111(d) was written long before EPA decided to regulate greenhouse gases ("GHG"), it did not envision a circumstance where there would be a million existing sources to regulate. This difference is substantial regarding the structure of state programs and the structure of EPA's Section 111(d) requirements. Some of these issues are inherent in the challenges of regulating so many sources; others result from EPA putting its thumb on the balance to limit state options.

Several elements of this EPA Proposal are similar to the Subpart OOOOc proposal and are designed to maintain control by EPA and limit states flexibility. It begins with something as simple as the definition of "satisfactory" in the context of approving state plans that provide for less stringent regulations of sources based on Congress providing that:

> Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.[1]

EPA has characterized the authority to consider RULOF. As EPA notes:

> CAA section 111(d)(2)(A) authorizes the EPA to promulgate a Federal plan for any state that "fails to submit a satisfactory plan" establishing standards of performance under CAA section 111(d)(1). Accordingly, the EPA interprets "satisfactory" as the standard by which the EPA reviews state plan submissions.[2]

Consequently, EPA presents this strained assessment of the definition of "satisfactory":

[1] Section 111(d)(1).
[2] 87 FR 79197, note 38 (Dec. 23, 2022).

> Additionally, while states have discretion to consider RULOF under CAA section 111(d), it is the EPA's responsibility to determine whether a state plan is "satisfactory," which includes evaluating whether RULOF was appropriately considered. The relevant dictionary meaning of "satisfactory" is "fulfilling all demands or requirements." The American College Dictionary 1078 (C.L. Barnhart, ed. 1970). In addition to the requirements of the applicable emission guideline, state plans must be consistent with the underlying statutory purpose of mitigating the air pollution emissions which endanger public health or welfare. Thus, the most reasonable interpretation of a "satisfactory plan" is a CAA section 111(d) plan that meets the applicable conditions or requirements, which means that the EPA must assess a state's application of RULOF to determine whether it meets the regulatory requirements and whether the state employed RULOF in a manner that supports the statutory purpose.[3]

Why EPA has chosen this particular 1970 dictionary as the relevant dictionary is mysterious. Other contemporary dictionaries such as the 1975 American Heritage Dictionary define "satisfactory" as "giving satisfaction; sufficient to meet a demand or requirement; adequate." The contemporary Merriam-Webster Online Dictionary definition for "satisfactory" is "adequate" and the Oxford American English Dictionary Online definition is "good enough for a particular purpose." Given this substantial difference in definitions, one can only assume that EPA wants to establish a different standard to constrain the state flexibility that Congress chose to establish.

B. Congress Intended "New" Sources to be Treated Differently than "Existing Sources" or Section 111(d) Would Not Exist.

In another instance of EPA trying to limit a state's ability to develop regulatory approaches, including RULOF decisions, EPA proposes that states must use EPA's Best System of Emissions Reduction ("BSER") development approach. However, there is no absolute guarantee that EPA's analytical approach is sound or accurate for every state, as no two states are identical. Therefore, it is likely that states will assess issues and create approaches based on their individual experience. In the context of regulating existing sources, an individual state's approach is far more comprehensive than EPA's experience since its authority is primarily directed at new sources. Perhaps more significantly, in the Subpart OOOOc proposal, EPA has effectively applied its New Source Performance Standards ("NSPS") BSER analysis to its Section 111(d) assessment where existing sources are affected. This transposition of a new source analysis to existing sources fails to follow the Congressional intent evident throughout the CAA that new and existing sources need to be treated differently. The issue of existing source BSER has been largely excluded from the discussions of Section 111(d) modification. While Congress used the same terms in describing the technological requirements for both new and existing sources – including the factors that EPA must consider in developing BSER – it requires EPA to make separate analyses and decisions for existing source BSER. Clearly, if Congress wanted EPA to use the same standards, it would have referenced Section 111(b) as part of its structuring of Section 111(d). However, in the case of oil and natural gas production facilities, EPA rather cavalierly concludes that its new source BSER applies to existing sources without ever making a

[3] 87 FR 79197.

full analysis. In part, it games the decision by defining affected facilities under Section 111(b) as components of operations rather than entire facilities. Then, it transposes these definitions to designated facilities under Section 111(d). EPA fails to meet the task demanded of it in addressing existing source BSER and needs to clearly develop analyses based on existing sources. Cost of compliance is to be factored into BSER. It is accepted, almost universally in the engineering world, that the cost of retrofitting existing equipment to meet new, stringent emission controls is greater than the cost of designing new equipment to meet the more stringent requirements. In the context of EPA's Subpart OOOOc assessment of RULOF, the fact that EPA's BSER analysis for existing sources concludes that existing sources must meet the same limitations as new sources defies common sense and logic.

Moreover, Congress went further than just distinguishing between new and existing sources by adding the RULOF process to address even more unique problems. First, it includes a requirement that, "[i]n promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies."[4] This requires EPA to generally address the RULOF factors as a part of its EG. Next, it provides states with more specific authority:

> Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.[5]

One of the challenges in analyzing the EPA proposal on RULOF relates to putting it into a realistic framework. EPA presents its discussion at a largely theoretical level but, as the oil and natural gas production facilities proposal demonstrates, it needs to be discussed in context. The RULOF issues that must be addressed in Subpart OOOOc will be related to low production oil and natural gas wells, those producing 15 barrels of oil equivalent ("boe") per day or less. This has always been the issue with over 700,000 low production wells in the United States equating to thousands in each producing state. The effect of regulation on these facilities will be the most compelling.

Here is where the RULOF decision-making process needs to be considered. EPA proposes in both this rulemaking of Section 111(d) and in Subpart OOOOc that state plans should include source by source decisions on the application of RULOF. Such an approach is impractical when large numbers of existing sources are in play. At the same time these individual decisions would be considered, the state would be developing its overall plan and would not know whether EPA would approve it. This is no small matter. In general, EPA's framework for its proposals does not track with state regulatory approaches. If states use different approaches, there is a built-in federal/state conflict that must be resolved. For example, in the Subpart OOOOc proposal, no state appears to use EPA's component count approach to define well categories for fugitive emissions programs. Similarly, as noted above, EPA has divided wells sites into different facilities – *e.g.*, pneumatic controllers, pneumatic pumps, storage vessels, and fugitive well sites.

[4] Section 111(d)(2)(B).
[5] Section 111(d)(1).

If states use different approaches, inherent conflicts will arise in approving state plans. EPA's response to these inevitable conflicts is for EPA to takeover with a Federal Implementation Plan ("FIP"). EPA is entirely aware that states do not use a component count to make regulatory decisions. Nonetheless, EPA made no attempt in the Subpart OOOOc proposal to accommodate states, further demonstrating EPA's intent to contradict Congress' intent and limit a state's ability to utilize RULOF.

Similarly, if states must make source by source RULOF interpretations, the compliance schedules to develop state plans will be inadequate. EPA needs to create a clear process that would allow states to present a plan by which it would assess RULOF for facilities in its state and for approval of those processes. States could then get approval for a state plan in a timely manner while making its source-by-source determinations thereafter.

EPA's approach to assessing RULOF appears to be driven by the assumption that it applies to facilities that have a predetermined end of life less than the cost recovery period associated with the application of the Subpart OOOOc regulations. If so, states can consider less stringent requirements for the facility until it shuts down, but it must shut down in a finite and prescribed period. This framework, however, ignores the more realistic situation where it is the new requirements that make the facility uneconomic and drives it to shut down. For example, in the Subpart OOOOc proposal, many low production wells can continue to operate for decades at production rates that may be in the less than 2 boe/day range. Low production wells pose minimal methane emissions threats. Federal regulation should not be the cause of their demise and states should have the authority to provide for a regulatory framework that allows low production wells to continue operation until their normal end of life. This situation is ignored by the proposed interpretation of RULOF. EPA seems inordinately concerned that different states could create different RULOF approaches for similar facilities. Congress did not share this view. In granting states authority to distinguish source requirements within its jurisdiction, Congress makes no mention of requiring consistency with other state programs. EPA is creating a complicating factor from its own agenda of limiting state authority. For example, the nature of oil and natural gas production results in different production challenges that do not appear evident from casual comparisons. EPA has observed these differences in its programs and should recognize that they can result in consequences to emissions management and economic implications. As a part of the federal/state partnership, EPA must not try to impose uniform regulatory requirements on state plans after the state has addressed the different operations under its jurisdiction.

III. Other Proposed Modifications and Clarifications.

In this Proposal, EPA asserts that:

> CAA section 111(d) and these implementing regulations authorize the EPA to approve state plans establishing standards of performance that meet the emission guidelines promulgated by the EPA, including plans that authorize sources to

> meet their emission limits in the aggregate, such as through standards that permit compliance via trading or averaging.[6]

The concept of trading or averaging emissions reductions across facilities has been a component of regulatory strategies for a long time. Properly applied it can be a cost effective approach. The concept needs to have borders such as utilization within the boundaries of a facility. Here then, the concept of a facility becomes significant. Historically, the concept of a facility has been fairly straightforward. It has typically been the geographic area behind the fence line of a factory or plant, or the area where a collection of process equipment exists to undertake the industrial operations. However, recently EPA has strayed from these common perceptions to advance approaches that served different purposes. In its Clean Power Plan, EPA essentially advanced the idea that an entire state could be covered by its BSER interpretations. In its oil and natural gas production facilities regulations under Subparts OOOO and OOOOa, it reduces a facility to a single pneumatic controller or pump. EPA needs to return to a more commonplace understanding of facility. Only then should a regulatory framework that permits trading and averaging be allowed.

Ironically, EPA raises then dismisses the possibility of states getting plan approval for a mix of regulations that embrace parts of the Subpart OOOOc proposal and supplementing those elements with other regulations that produce a comparable overall methane management program. In this Proposal, EPA supports programs for compliance flexibility including trading and other mechanisms that provide for state flexibility. EPA should not preclude such options under Subpart OOOOc plan development.

Respectfully submitted,

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/s/ James D. Elliott

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cc: Dr. Michelle Bergin, EPA

[6] 78 FR 79207