COMMENTS OF THE POWER GENERATORS AIR COALITION ON EPA'S PROPOSED RULE ENTITLED "ADOPTION AND SUBMITTAL OF STATE PLANS FOR DESIGNATED FACILITIES: IMPLEMENTING REGULATIONS UNDER CLEAN AIR ACT SECTION 111(D)"

87 Fed. Reg. 79,176 (Dec. 23, 2022)

Docket ID No. EPA-HQ-OAR-2021-0527

The Power Generators Air Coalition ("PGen") respectfully submits these comments to the U.S. Environmental Protection Agency ("EPA" or "the Agency") on its proposed rule entitled "Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d)," which was published in the Federal Register on December 23, 2022 (hereinafter, "Proposed Rule").[1] The Proposed Rule proposes to amend the regulations governing implementation of emission guidelines under section 111(d) of the Clean Air Act ("CAA" or "the Act").

I. Background

PGen is an incorporated nonprofit 501(c)(6) organization whose members are diverse electric generating companies—public power, rural electric cooperatives, and investor-owned utilities—with a mix of solar, wind, hydroelectric, nuclear, and fossil generation. PGen is a collaborative effort of electric generators to share information and expertise in the interest of effectively managing air emissions to meet and exceed environmental laws and regulations and in the interest of informing sound regulation and public policy.[2] Our members include leaders in the fundamental transition to cleaner energy that is currently occurring in the industry. PGen as an organization does not participate in legislative lobbying or litigation. PGen and its members work to ensure that environmental regulations support a clean, safe, reliable, and affordable electric system for the nation.

PGen members own and operate fossil fuel-fired electric generating units ("EGUs"), as well as renewable resources like wind and solar. Greenhouse gas ("GHG") emissions from new, modified, and reconstructed fossil fuel-fired EGUs are regulated under section 111(b) of the CAA. Because GHGs are neither a criteria air pollutant under the Act's national ambient air quality standards ("NAAQS") program nor regulated as a hazardous air pollutant under section 112 of the Act, GHG emissions from existing fossil fuel-fired EGUs owned and operated by PGen members will be subject to regulation under section 111(d). As such, PGen has an interest in the Proposed Rule.

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[1] 87 Fed. Reg. 79,176 (Dec. 23, 2022).

[2] Additional information about PGen and its members can be found at https://pgen.org/.

EPA's proposed revisions to the section 111(d) implementing regulations are important. While historically section 111(d) has been invoked only rarely,[3] EPA's regulation of GHGs will lead to this provision being invoked much more frequently and for a broad spectrum of source categories given the ubiquitous nature of carbon dioxide ("CO_2") (a GHG) emissions. EPA recently proposed a section 111(d) emission guideline rule to regulate methane (another GHG) emissions from existing sources in the oil and natural gas sector,[4] and has announced plans to release a proposed rule regulating GHG emissions from fossil fuel-fired EGUs under section 111(d) in the next few months. PGen has been working with EPA regarding how best to regulate CO_2 emissions from existing EGUs, including meeting with EPA in November 2022, and submitting comments to EPA's pre-proposal non-rulemaking docket in December 2022.[5]

As part of the Affordable Clean Energy Rule,[6] EPA amended its section 111(d) implementing regulations to promulgate a new Subpart Ba of 40 C.F.R. part 60, which would apply to any emission guidelines issued after July 18, 2019. The original section 111(d) implementing regulations are promulgated as Subpart B and apply to emission guidelines issued before that date. Part of the Subpart Ba amendments included changing the deadlines for submittal and approval of state plans (and where necessary promulgation of federal plans) to align them with the deadlines in section 110 of the CAA for state implementation plans ("SIPs") under the NAAQS program. This aspect of the Subpart Ba regulations was challenged in the U.S. Court of Appeals for the D.C. Circuit. The court vacated the extensions of the compliance periods contained in Subpart Ba because it found that EPA had failed to adequately explain why the extensions were needed and because it further found that EPA had failed to address what the public health and environmental effects would be from the extension of the compliance periods.[7] The Proposed Rule proposes new timing provisions for Subpart Ba in response to the court's decision.

As an initial threshold matter, it is important for EPA to recognize that Congress limited its role under section 111(d). Unlike section 111(b) of the Act where EPA controls all aspects of a performance standard for new and modified sources in a source category, section 111(d) is a state-driven program. Under section 111(d), it is the states that "establish[] standards of performance for any existing source … to which a standard of performance … would apply if such existing source were a new source."[8] EPA must allow the state "in applying a standard of performance to any particular source under a plan … to take into consideration, among other

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[3] *See* 87 Fed. Reg. at 79,179.

[4] 87 Fed. Reg. 74,702 (Dec. 6, 2022).

[5] Comments of the Power Generators Air Coalition to EPA's Pre-Proposal Non-Rulemaking Comments on Reducing Greenhouse Gas Emissions from New and Existing Fossil Fuel-Fired Electric Generating Units, Docket ID No. EPA-HQ-OAR-2022-0723-0031 (Dec. 22, 2022) (hereinafter, "Pre-Proposal Comments").

[6] 84 Fed. Reg. 32,520 (July 8, 2019).

[7] *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 991-95 (D.C. Cir. 2021).

[8] CAA § 111(d)(1), 42 U.S.C. § 7411(d)(1).

factors, the remaining useful life of the existing source to which such standard applies."[9] EPA has oversight authority and determines whether a state plan is "satisfactory."[10] If a state fails to submit a satisfactory plan, then EPA puts in place a federal plan and *must* take into consideration the remaining useful life of the source, among other factors ("RULOF").[11] In promulgating these implementation regulations for section 111(d), EPA should be careful to honor the cooperative federalism approach set out by Congress and not encroach on the states' authority. Further, states should be afforded adequate time to develop their state plans, aligned with the state's rulemaking process.

PGen offers the following specific comments on the Proposed Rule.

II. While EPA Acknowledges More Time Is Needed and Attempts to Rectify this Issue, Several of the Timing Provisions Set Forth in the Proposed Rule Do Not Provide Sufficient Time, Are Unrealistic Based on Evidence in the Record, and Will Result in Missed Deadlines.

A. The D.C. Circuit's decision in *American Lung Association v. EPA* does not foreclose longer timelines than those proposed.

It is important to note at the outset that the D.C. Circuit did not hold that the previous timing deadlines under the Subpart Ba implementation regulations were *per se* unlawful. Rather, the court said that EPA had failed to provide an adequate explanation for why the longer timing deadlines were needed (particularly given the fact that a state plan under section 111(d) is "simpler" and of a "different scale" than a SIP) and had failed to examine at all the public health and welfare implications of the longer deadlines.[12]

EPA has included empirical evidence in the preamble to the Proposed Rule that demonstrates that longer deadlines are needed. Indeed, as discussed further below, that empirical evidence shows that some of the deadlines in the Proposed Rule need to be longer to avoid missed deadlines. EPA needs to ensure that the deadlines that it sets are realistic and can be met. If deadlines are missed, this only further delays implementation of the program because the clock resets for EPA to promulgate a federal plan. As EPA acknowledges, "[a]llowing states sufficient time to develop feasible implementation plans for their designated facilities … *ultimately helps* ensure more timely implementation of an [emissions guideline], and therefore *achievement in*

[9] *Id.*

[10] *Id.* § 111(d)(2)(A), 42 U.S.C. § 7411(d)(2)(A).

[11] *Id.* § 111(d), 42 U.S.C. § 7411(d).

[12] *Am. Lung Ass'n*, 985 F.3d at 991-93.

actual emission reductions, than would an unattainable deadline that may result in the failure of states to submit plans and requiring the development and implementation [of a] Federal plan."[13]

To ensure emission reductions are achieved in a timely manner, EPA should extend some of the deadlines in the Proposed Rule, as discussed in further detail below.

B. The proposed deadline for state plan submissions is too short and will be missed, particularly given the increased requirements associated with state plan preparation. (Comments A1-1, A1-2, A1-3, A1-4, and A1-5)

EPA proposes to give states 15 months to submit state plans under section 111(d) unless EPA specifies otherwise in the emissions guideline.[14] EPA provides evidence in the preamble to the Proposed Rule that shows that 15 months is not sufficient and that more time is needed. In the preamble, EPA appropriately examines the time it takes for states to submit plans under section 129 of the CAA.[15] Section 129 plans are very similar to section 111(d) plans, but section 111(d) plans "involve more complicated analyses" because of the fact that section 111(d) allows states to take RULOF into account.[16] EPA is proposing new requirements for states that choose to propose a less stringent standard for a designated facility based on RULOF, and these new requirements will add more time to the state's preparation of a plan. EPA notes that states take on average between 14 to 17 months after publication of an emissions guideline to prepare a state plan under section 129.[17] Given that plans under section 111(d) "permit[] more source-specific analysis," which takes more time, it is clear that 15 months does not provide sufficient time.

In addition to the individualized, source-specific analysis of RULOF that results in a section 111(d) plan taking more time than a section 129 plan, EPA is proposing to add significant new requirements for outreach and engagement.[18] Under the current regulations, a state must hold a public hearing prior to adopting a state plan.[19] In contrast, under the Proposed Rule, a state would be required to "conduct meaningful engagement" with pertinent stakeholders.[20] Meaningful engagement encompasses much more than the current requirement for a public hearing, including "the development of public participation strategies" and "early outreach, sharing information, and soliciting input on the state plan."[21] Depending on the number

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[13] 87 Fed. Reg. at 79,183 (emphases added).

[14] Proposed 40 C.F.R. § 60.23a.

[15] 87 Fed. Reg. at 79,183.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 79,190-92; Proposed 40 C.F.R. § 60.23a(i).

[19] 40 C.F.R. § 60.23a(c).

[20] Proposed 40 C.F.R. § 60.23a(i)(1).

[21] *Id.* § 60.21a(k).

of communities that might be affected by the state plan,[22] this outreach could be a significant effort on the part of the states. Because of these new community engagement requirements and the new requirements for states that wish to undergo a RULOF analysis, additional time is needed to ensure that the states can realistically meet the deadline. The proposed time of 15 months simply is insufficient.

States may also have unique procedures that could further lengthen the time they need.[23] For example, some states require a state plan to be approved by the state legislature, and many state legislatures meet only for a few months a year. Depending on when in the legislative cycle a state plan is completed and ready for state legislative review, it may be several months before the legislature is back in session. This provides yet more justification for why additional time is needed for states to submit plans.

In the Proposed Rule, EPA compares state plan preparation under section 111(d) to preparation of attainment plans for the 2012 $PM_{2.5}$ NAAQS, which had a statutory deadline of 18 months from the date an area was designated nonattainment.[24] EPA fails to acknowledge, however, that states have *much* more notice that they have an area that is nonattainment long before the area is formally designated nonattainment. Looking at the complete timeline for the 2012 $PM_{2.5}$ NAAQS shows the true amount of time states have to prepare attainment SIPs. The 2012 $PM_{2.5}$ NAAQS were finalized on January 15, 2013.[25] At that point, states had notice that they may have areas that are not in attainment with the NAAQS. Indeed, the Governors of each state have to submit initial designations regarding attainment of a NAAQS within one year of a NAAQS being promulgated.[26] EPA finalized the designations for the 2012 $PM_{2.5}$ NAAQS for most areas on January 15, 2015—*two years* after the NAAQS were finalized—and those designations became effective on April 15, 2015.[27] The 18-month time period for states to submit their attainment SIPs that EPA references in the Proposed Rule[28] began to run on that effective date (i.e., April 15, 2015). In examining how long a state has to prepare attainment SIPs, EPA needs to account for all the time leading up to the running of the 18-month clock where the state had notice that they had a nonattainment area. In this case, that was a period of *27 months* (January 15, 2013, to April 15, 2015), bringing the total amount of time the states had to prepare attainment SIPs to *45 months* (i.e., nearly four years).[29] In contrast, with regard to

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[22] *See id.* § 60.21a(l).

[23] 87 Fed. Reg. at 79,182 n.9 (acknowledging "[i]n many states, the agency must submit its rule to a particular independent commission or the legislature for review and approval before the rule is finally adopted").

[24] *Id.* at 79,183.

[25] 78 Fed. Reg. 3086 (Jan. 15, 2013).

[26] CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A).

[27] 80 Fed. Reg. 2206 (Jan. 15, 2015).

[28] 87 Fed. Reg. at 79,183.

[29] Even if one assumes that the state did not have notice that it had a nonattainment area at the time the NAAQS was finalized, it is absolutely true that the state knew a year later when the

state plan submission under section 111(d), there is not a period of years where a state knows what it is going to have to do before the clock begins to run. A state does not know what EPA's determination of the BSER and the resulting presumptive level of stringency is until the final emissions guideline is issued.

In its Pre-Proposal Comments, PGen suggested that a minimum of two years is needed for submission of state plans from the time of publication of a final emissions guideline.[30] Since that time, however, PGen has seen that states are saying that even more time than two years is needed, and PGen respectfully suggests that EPA defer to the states regarding how much time is needed for state plan submission as they are in the best position to know what is involved in preparing a plan. For example, the State of Tennessee recently said in its comments on EPA's proposed section 111(d) emissions guideline for the oil and gas sector that given the new requirements for RULOF and community engagement that it needed 30 months to prepare its state plan.[31]

As discussed above, the D.C. Circuit's decision in *American Lung Association v. EPA* did not foreclose the current deadlines; rather, EPA must provide a better explanation for why that amount of time is needed. As further discussed above, the evidence provided by EPA in the preamble to the Proposed Rule demonstrates that the proposed time of 15 months is insufficient.

C. PGen supports the proposed 60-day limit for EPA to determine completeness of state plans. (Comment A2-1)

PGen generally supports EPA's proposal to require EPA to determine whether a state plan is complete within 60 days after receipt of the plan. Under the Proposed Rule, a state plan would be deemed automatically complete by operation of law if EPA misses this deadline.[32] As EPA notes, the completeness determination is a "ministerial" one that "requires no exercise of discretion or judgment on the Agency's part."[33]

PGen is concerned, however, that a state plan that is automatically deemed complete by operation of law could later be disapproved by EPA because it is missing something that should have been caught during the completeness determination process. This would unfairly impact the state because the clock for a federal plan would start ticking. The state should not be penalized for making a mistake that should have been caught during the completeness determination

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Governor made the initial designations. That still provided the state with 33 months to prepare and submit its attainment SIP, which is far more than the 18 months EPA references in the Proposed Rule.

[30] Pre-Proposal Comments at 15.

[31] Tennessee Comments on Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review at 6, Docket ID No. EPA-HQ-OAR-2021-0317-2157 (Feb. 7, 2023).

[32] Proposed 40 C.F.R. § 60.27a(g)(1).

[33] 87 Fed. Reg. at 79,184.

process, and if the only reason a state plan would face disapproval is because it is missing something that should have been caught during that review, the state should be given a reasonable period of time to cure the defect before the plan is disapproved and before the federal plan clock begins to run.

D. EPA does not appear to be giving itself enough time to act on state plans based on the evidence in the record. (Comment A3-1)

Under the Proposed Rule, EPA proposes to give itself 12 months after a state plan is determined to be complete (either by EPA or by operation of law) to determine whether the plan is "satisfactory." PGen notes that based on the evidence presented in the preamble to the Proposed Rule, this timeline appears to be unrealistic. EPA provides the following timelines and steps for the Agency to make a determination that a state plan is satisfactory:

- First, EPA has to evaluate a state plan, draft a proposed action on the plan, and have that proposed action edited, reviewed, and signed. According to EPA, this typically takes between 6 to 8 months.[34]
- Second, the proposed action needs to be published in the Federal Register, which EPA says can take several weeks of processing.[35]
- Third, the public must be given at least 30 days to comment on the proposed action, and this might be extended if requested.[36]
- Fourth, EPA has to review the comments, prepare updated recommendations for review, consult with agency decision makers, prepare a final rule, prepare a response to comments document and any necessary record support, and possibly prepare proposed regulatory text. EPA says this typically takes between 4 to 7 months.[37]

Assuming the *average* amount of time under these estimates, it is apparent that the 12-month deadline is unrealistic: 7 months for step one + 0.5 months to publish in the Federal Register + 1 month for public comment + 5.5 months to prepare final rule = 14 months. Only the *best-case scenario* might make this deadline (meaning everything happens at the low end of EPA's estimates and the rule is published in the Federal Register within one week): 6 months for step one + 1 week to publish + 1 month for comment + 4 months to finalize the rule = 11.25 months. It is unlikely that the review of every state plan can meet the high hurdle of the best-case scenario.

PGen suggests that EPA consider giving itself more time to ensure that it has adequate time to review state submissions. This is far preferable to the current proposal, which sets the

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[34] *Id.* at 79,185.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 79,185-86.

Agency up to miss a deadline—or worse puts EPA in a position where it needs to rush to meet an unreasonable deadline and acts in a less than thorough manner. PGen suggests that EPA consider setting a deadline for itself between 14 months (the average scenario) and 18 months (a scenario on the longer side of the estimates).[38]

E. EPA should ensure it has sufficient time to consider remaining useful life, as is required under the CAA, when it is promulgating a federal plan. (Comment A4-1)

PGen is concerned that EPA has not provided itself with sufficient time to consider RULOF when it is promulgating a federal plan. EPA has proposed to give itself 12 months to promulgate a federal plan after either: (a) a state fails to submit a state plan by the deadline; or (b) EPA disapproves a state plan because it fails to meet the "satisfactory" standard.[39] EPA needs to ensure that it gives itself enough time to consider RULOF in its preparation of a federal plan. Unlike states where this consideration is optional, Congress *requires* EPA to take RULOF into account.[40] Particularly given the proposed additional requirements around RULOF, EPA needs to ensure it has enough time to conduct this important analysis.

As previously stated with regard to EPA's review and action on state plans, EPA should not set itself up for failure. Rushing to meet an unreasonable deadline will not result in a federal plan that considers all affected facilities in a meaningful way, including RULOF. EPA provides the following timelines and steps for the Agency to promulgate a federal plan:

- First, EPA has to form an intra-agency workgroup that develops recommendations for the components of the federal plan, including determining the standards of performance for designated facilities that generally reflect the presumptive level of stringency of the emissions guideline, including possible adjustments based on RULOF, any testing, monitoring, reporting, and recordkeeping requirements, and that complies with the meaningful engagement requirements of the Proposed Rule. The recommended components of the federal plan are reviewed and then a proposed federal plan is drafted, along with a technical support document. The proposed federal plan is then reviewed by the relevant EPA offices and signed. According to EPA, this step typically takes "a minimum" of 6 to 9 months.[41]

[38] The scenario based on the longer side of the estimates is calculated as follows: 8 months for step one + 1 month to publish in the Federal Register + 2 months for public comment + 7 months to prepare final rule = 18 months.

[39] Proposed 40 C.F.R. § 60.27a(c).

[40] CAA § 111(d)(2), 42 U.S.C. § 7411(d)(2) (noting "the Administrator *shall* take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which a standard applies") (emphasis added).

[41] 87 Fed. Reg. at 79,187-88.

- Second, the proposed federal plan needs to be published in the Federal Register, which EPA says can take several weeks of processing.[42]
- Third, notice of at least 15 days must be given for a public hearing where members of the public can submit oral comments on the proposed federal plan, and notice of at least 30 days must be given for submission of written comments on the proposed federal plan. Because of the public hearing requirement, EPA says it "should allow for at least 45 days for public comment."[43]
- Fourth, EPA has to review the comments, prepare updated recommendations for review, consult with agency decision makers, prepare a final federal plan, prepare a response to comments document and any necessary record support, and prepare proposed regulatory text. EPA says this typically takes between 4 to 8 months.[44]

Assuming the *average* amount of time under these estimates, it is apparent that the 12-month deadline is unrealistic: 7.5 months for step one + 0.5 month to publish in the Federal Register + 1.5 months for public comment and public hearing + 6 months to prepare final rule = 15.5 months. Only the *best-case scenario* might make this deadline (meaning everything happens at the low end of EPA's estimates and the rule is published in the Federal Register within one week): 6 months for step one + 1 week to publish + 1.5 months for comment and public hearing + 4 months to finalize the rule = 11.75 months. It is unlikely that the preparation of a federal plan will always be able to meet the aggressive timelines of a best-case scenario.

PGen suggests that EPA consider giving itself more time to ensure that it has adequate time to promulgate a federal plan so that it does not set itself up to miss a deadline—or worse rush to meet an unreasonable deadline and set itself up for a legal challenge that it failed to adequately consider RULOF or another requirement. PGen suggests that EPA consider setting a deadline for itself between 16 months (the average scenario) and 20 months (a scenario on the longer side of the estimates).[45]

F. The timeline for increments of progress should run from EPA's approval of a state plan—not from the state plan submission deadline. (Comment A5-1)

PGen believes that it is reasonable to require states to show increments of progress when a compliance schedule for a state plan is going to extend more than 16 months.[46] PGen is concerned, however, with connecting the timing of the increments of progress to the state plan submission deadline. States should not be required to begin implementation on a state plan until

[42] *Id.* at 79,185, 79,188.

[43] *Id.* at 79,188.

[44] *Id.*

[45] The scenario based on the longer side of the estimates is calculated as follows: 9 months for step one + 1 month to publish in the Federal Register + 2 months for public comment and public hearing + 8 months to prepare final rule = 20 months.

[46] Proposed 40 C.F.R. § 60.24a(d).

they know that EPA has approved it. As a result, the timing of increments of progress needs to be tied to the date EPA approves the plan—not the state plan submission deadline. EPA suggests that "[p]roviding a 2-month buffer after approval of plans but before the increments of progress are required allows for the owner or operator of designated facilities reasonable time to initiate actions associated with the increments of progress."[47] PGen believes that this does not provide a reasonable period of time.

Thus, PGen respectfully suggests that EPA require that state plans include increments of progress for any compliance schedule extending more than 16 months from EPA's *approval* of the plan.

G. EPA should continue to link the authority and timeline for a federal plan to a finding of failure to submit. (Comment B-1)

EPA proposes to revise the section 111(d) implementing regulations to link the 12-month clock for EPA to issue a federal plan to the missed state plan submission deadline—rather than what it is linked to now, which is a finding of failure to submit on the part of EPA.[48] As EPA notes, "a finding of failure to submit has value in notifying states and the public of the status of plans."[49] While the Agency says that it will still issue a finding of failure to submit, it says it will do so "anytime between the deadline for state plan submissions and the EPA's promulgation of a Federal plan."[50] The value of a finding of failure to submit is greatly diminished, however, the closer it occurs to the time a federal plan is issued, and is practically valueless if it occurs right before a federal plan is issued. The preparation and publication of a finding of failure to submit is not an onerous task that requires particular agency expertise or many man hours. There is no reason why this could not be done easily once the deadline has been missed.

EPA should not remove its own obligations and deadlines to issue a finding of failure to submit. The 12-month clock should continue to run from the publication of a finding of failure to submit.

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[47] 87 Fed. Reg. at 79,189.

[48] *Compare* Proposed 40 C.F.R. § 60.27a(c)(1) (requiring a federal plan be issued "after … [t]he State fails to submit a plan or plan revision within the time prescribed") *with* 40 C.F.R. § 60.27a(c)(1) (requiring a federal plan be issued "after the Administrator … [f]inds that a State fails to submit a required plan or plan revision").

[49] 87 Fed. Reg. at 79,190.

[50] *Id.*

III. EPA's Enhanced Requirements for Outreach and Meaningful Engagement Will Require States to Need More Time for State Plan Preparation, Could Strain Limited State Resources, and Need to Be More Clearly Defined if They Are Part of the Completeness Determination. (Comments C-1, C-2, and C-4)

EPA proposes significant new requirements for outreach by states to communities that are "most affected by and vulnerable to the impacts" of a state plan.[51] PGen agrees with EPA that public outreach, particularly with vulnerable communities, is valuable and worthwhile as a policy matter. EPA needs to consider, however, how these enhanced requirements add a layer of complexity to state plan development that will increase the time needed for states to submit state plans to EPA, and the Agency further needs to consider how these increased requirements may strain already limited state resources.

Under the current regulations, a state is simply required to hold a public hearing.[52] In contrast, the Proposed Rule would require states to "conduct meaningful engagement," with "pertinent stakeholders."[53] Pertinent stakeholders are defined to "include … industry, small businesses, and communities most affected by and/or vulnerable to the impacts of the plan or plan revisions."[54] In addition, meaningful engagement encompasses much more than the current requirement for a public hearing, including "the development of public participation strategies" and "early outreach, sharing information, and soliciting input on the state plan."[55] Depending on the number of communities that might be affected by the state plan, this outreach could be a significant effort on the part of the states (and can be even more time if the state invokes RULOF to propose a less stringent emission limitation for a designated facility).[56] All of these requirements, while laudable and good public policy, need to be accounted for in the amount of time that a state will need to prepare a state plan.

Under the Proposed Rule, as part of the completeness determination, a state plan must include "[e]vidence of meaningful engagement, including a list of pertinent stakeholders, a summary of the engagement conducted, and a summary of stakeholder input received."[57] EPA specifically asks for comment on whether evidence of meaningful engagement should be included in the completeness criteria.[58] PGen does not object in theory to the idea of meaningful engagement being part of the completeness analysis, but it does respectfully suggest that before this can be required that EPA needs to provide much more information to the states as to what exactly the state needs to do and what evidence it needs to provide in the state plan to be

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[51] *Id.*

[52] 40 C.F.R. § 60.23a(c).

[53] Proposed 40 C.F.R. § 60.23a(i)(1).

[54] *Id.* § 60.21a(l).

[55] *Id.* § 60.21a(k).

[56] *Id.* § 60.24a(k).

[57] *Id.* § 60.27a(g)(2)(ix).

[58] 87 Fed. Reg. at 79,192.

considered complete. The Proposed Rule as currently written is too vague, and states will be unsure of exactly what it is that they are required to do for a plan to be considered complete, leading to the determination of "completeness" potentially being overly subjective.

Finally, EPA's statement that meaningful engagement with pertinent stakeholders will "help ensure that plans achieve the appropriate level of emission reductions"[59] has no basis as a matter of law under the CAA. Under section 111(a)(1) of the Act, a standard of performance "reflects the degree of emission limitation achievable through the application of the [BSER]."[60] While meaningful engagement with the public and with vulnerable communities is generally good public policy, it does not have any bearing on the emission reductions that are achieved under section 111.

IV. EPA's Proposed Regulatory Mechanisms for State Plan Implementation (Comment D-1)

EPA is proposing to incorporate five regulatory mechanisms as amendments to the implementing regulations: (1) partial approval and disapproval of state plans; (2) conditional approval of state plans; (3) parallel processing of state plans; (4) a "state plan call"; and (5) error correction. PGen generally supports most of these proposed revisions, with the exception of the "state plan call" amendment.

Partial Approval and Disapproval (Comment D1-1). EPA proposes to revise the implementation regulations to add a provision similar to section 110(k)(3) of the CAA that would allow EPA to "partially approve or partially disapprove a state plan when portions of the plan are approvable, but a discrete, severable portion is not."[61] PGen supports this proposed revision.

Conditional Approval (Comments D2-1 and D2-2). EPA proposes to revise the implementation regulations to add a provision similar to section 110(k)(4) of the Act that would allow EPA to conditionally approve a state plan "that substantially meets the requirements of an [emissions guideline] but that requires some additional specified revisions to be fully approvable."[62] After conditional approval, a state would have one year to adopt and submit the necessary revisions to EPA. PGen supports this proposed revision and believes that one year is a sufficient amount of time for the state to submit the necessary revisions. Under the Proposed Rule, if a state failed to meet this one-year deadline, the conditional approval would automatically convert to a disapproval, which would begin the clock for EPA to issue a federal plan. PGen supports this proposed revision, but reiterates its concerns, expressed above in Section II.E., that the one-year period of time for EPA to promulgate a federal plan seems unrealistic based on the evidence EPA provides in the preamble to the Proposed Rule regarding how long it typically takes to issue a federal plan. Any deadline for a federal plan following a

[59] *Id.*

[60] CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1).

[61] 87 Fed. Reg. at 79,193; *see also* 40 C.F.R. § 60.27a(b)(1).

[62] 87 Fed. Reg. at 79,193-94; *see also* 40 C.F.R. § 60.27a(b)(2).

conditional approval should match the amount of time generally given for EPA to promulgate such a plan.

Parallel Processing (Comments D3-1, D3-2, and D3-3). EPA proposes to revise the regulations "to include a mechanism similar to that for SIPs under 40 CFR part 51 appendix V, section 2.3.1., for parallel processing a plan that does not meet all of the administrative completeness criteria."[63] This provision would provide a state with additional time to complete its process to fully adopt the plan. PGen supports this proposed revision.

State Plan Calls (Comments D4-1, D4-2, D4-3, and D4-4). EPA proposes to add to the section 111(d) implementation regulations a provision similar to section 110(k)(5) that would allow EPA to call for revision of a state plan if EPA "find[s] that a previously approved state plan does not meet the applicable requirements of the CAA or of the relevant [emissions guideline]."[64] EPA notes that such an action "would be generally appropriate under two circumstances": (1) "when legal or technical conditions arise after the EPA's approval of a state plan that undermines the basis for the approval" (such as a subsequent court decision or design assumptions about control measures proving to be inaccurate); or (2) "a state fails to adequately implement an approved state plan."[65]

With regard to the first circumstance proposed by EPA (where legal or technical conditions arise that undermine the basis for EPA's approval), PGen believes that this situation can be rectified under the Error Correction provision that EPA proposes because the approval in these circumstances would have been "in error."[66]

With regard to the second circumstance proposed by EPA (where a state is failing to adequately implement an approved state plan), this situation is addressed directly in section 111(d)(2)(B) of the CAA, which specifies that EPA has "the same authority … to enforce the provisions of [a state] plan in cases where the State fails to enforce them as [the Administrator] would have under sections [113 and 114 of the CAA] with respect to an implementation plan."[67] Congress thus directed EPA not to call for a revision of a state plan, but instead to employ the federal enforcement measures set forth in sections 113 and 114 of the Act. This forecloses EPA from employing a "state plan call" to address a situation where a state plan is not being adequately implemented. For this reason, the proposed State Plan Call revision is unauthorized and should not be finalized.

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[63] 87 Fed. Reg. at 79,194.

[64] *Id.*

[65] *Id.* at 79,194-95.

[66] Proposed 40 C.F.R. § 60.27a(j).

[67] CAA § 111(d)(2)(B), 42 U.S.C. § 7411(d)(2)(B).

Error Correction (Comments D5-1 and D5-2)

As a general matter, PGen does not object to the proposed revisions that allow EPA to correct a situation where a plan was approved, disapproved, or promulgated in error.[68] This provision could be used in the event of a court decision that undermines the basis of an EPA decision on a state plan or to correct any typographical errors that might have occurred in a final rule. EPA should make clear in the regulations, however, that this provision cannot be used to effect a change in policy because of a change in perspective on implementation that may arise from an administration transition. Designated facilities need regulatory certainty, and the error correction provision should not be able to be used to radically change a designated facility's requirements.

V. EPA Should Be Careful Not to Unduly Limit the Discretion that Congress Gave States to Consider RULOF.

Congress directed that EPA's implementing regulations under section 111(d) "shall permit the State in applying a standard of performance to any particular source under a plan submitted [under section 111(d)] to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."[69] While EPA has the authority to approve or disapprove of a state plan, it should not unduly limit a state's discretion to take RULOF into account. PGen generally supports EPA's proposed regulations regarding the steps that a state must take to apply a standard of performance to a designated facility that is less stringent than otherwise required by the emissions guideline based on RULOF.

A. EPA needs to be clear that if a state plan results in the same outcome in terms of environmental benefits that would have been achieved under EPA's presumptive level of stringency, that the RULOF provisions do not apply. (Comment E2-1)

PGen suggests that EPA make more clear that the RULOF provisions set forth in proposed § 60.24a(f) are required *only* when a state is proposing a less stringent emission standard for a designated facility, and these provisions do not apply if a state is achieving EPA's presumptive level of stringency through means other than the BSER identified by EPA. If a state plan results in the same outcome in terms of environmental benefits that would have been achieved under EPA's presumptive level of stringency, EPA needs to approve that state plan as "satisfactory." This conclusion is implied in the preamble to the Proposed Rule, which states that:

> [T]he proposed RULOF provisions … would apply where a state intends to *depart* from the presumptive standards in the [emissions guideline] and propose a less stringent standard … and not where a state intends to *comply* by demonstrating that a facility or group of facilities subject to a state program would, in the aggregate,

[68] Proposed 40 C.F.R. § 60.27a(j).

[69] CAA § 111(d)(1), 42 U.S.C. § 7411(d)(1).

> achieve equivalent or better reductions than if the state instead imposed the presumptive standards required under the [emissions guideline] at individual designated facilities.[70]

This conclusion is further implied in the proposed § 60.24a(g), which says that a state "may not apply a less stringent standard in cases where a designated facility can reasonably implement a technology or other system of emissions reduction other than one identified as the [BSER] to achieve the degree of emission limitation required by an emission guideline."[71]

To avoid any potential confusion on this point, EPA should be clear in the preamble to the final rule that the RULOF provisions are required *only* when a state is proposing a less stringent emission standard for a designated facility—not when a state is achieving EPA's presumptive level of stringency through means other than the BSER identified by EPA.

B. PGen supports EPA's revisions that would allow for operational conditions based on remaining useful life or restricted operating capacity as a basis for setting a less stringent standard. (Comment E5-1)

PGen agrees with EPA's proposed approach for contingency requirements that would allow a state to invoke RULOF on the basis that a source "is running at lower utilization … than is anticipated by the BSER and intends to do so for the duration of the compliance period…."[72] As PGen stated in its Pre-Proposal Comments, existing fossil fuel-fired EGUs that operate rarely should be allowed to comply with alternative emission limitation requirements, and "[t]hese units could be subject to limitations on the amount they may operate in a given year."[73] There may be important reliability reasons why an electric generator may want to keep open a plant that is used rarely. Companies will not be willing to invest large sums in such a unit. Allowing states to invoke RULOF to allow for a less stringent standard for these facilities makes good sense.

PGen also agrees with the Proposed Rule's requirement that where a state plan contains a less stringent emissions limitation for a designated facility based on RULOF "on the basis of an operating condition(s) within the designated facility's control, such as remaining useful life or restricted capacity, the plan must also include such operating condition(s) as an enforceable requirement."[74] PGen also agrees with the approach where a state may change its plan in the future to address changes in operating conditions.[75]

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[70] 87 Fed. Reg. at 79,198 (emphasis in original).

[71] Proposed 40 C.F.R. § 60.24a(g).

[72] 87 Fed. Reg. at 79,200.

[73] Pre-Proposal Comments at 7.

[74] Proposed 40 C.F.R. § 60.24a(h).

[75] 87 Fed. Reg. at 79,201 (noting "a state may submit a plan revision to reflect [a] change in operating conditions" and "[s]uch a plan revision must include a new standard of performance that accounts for the change in operating conditions").

C. PGen generally supports EPA's proposal regarding how retirements may factor into state plans. (Comment E6-1)

EPA proposes to allow states to apply a less stringent standard on the grounds that a designated facility will retire within a period of time identified by EPA or determined by the states through a methodology provided by EPA.[76] PGen supports this proposal. As PGen said in its Pre-Proposal Comments, states should be permitted to provide alternative, less-stringent emission limitation requirements in their state plans for fossil fuel-fired EGUs that will retire within a reasonable amount of time.[77] PGen appreciates that EPA has made clear that "[i]f a designated facility's retirement date is both imminent and prior to the outermost retirement date identified in an emission guideline, the plan may apply a standard that reflects the designated facility's business as usual."[78]

As EPA knows, the electric generation industry is undergoing a transition away from fossil fuel-fired generation. As a result, many EGUs may not operate until their useful lives have expired, and EPA's Proposed Rule adequately takes that into account. States should be able to require less from units that are not expected to operate much longer under their consideration of RULOF. Owners and operators will not want to put significant monetary resources into units that will not be operating in the near future. If required to do so, these units may be prematurely retired, and this could have significant impacts on electric reliability.

In the Proposed Rule, EPA proposes to establish a date or a methodology for determining what announced retirement dates will qualify for alternative emission limitation requirements in an emissions guideline. PGen asks EPA in setting any retirement deadline for EGUs in its upcoming proposed emissions guideline for fossil fuel-fired EGUs to consider other statutes and regulations that may be driving retirements, such as EPA's Effluent Limitations Guidelines for fossil fuel-fired EGUs. EPA should coordinate the deadlines in these other rules with the outer limit that it establishes for retirements under section 111(d).

VI. PGen Supports EPA's Proposed Revisions to Change the Definition of Standard of Performance and to Allow Compliance Flexibility.

EPA proposes to revise the section 111(d) implementation regulations "to clarify that the definition of 'Standard of performance' allows for state plans to include standards in the form of an allowable mass limit of emissions."[79] PGen supports this proposed change. As PGen said in its Pre-Proposal Comments, "EPA should allow a state to express the emissions limits as a mass-based emission rate (e.g., tons of CO_2 per year)…."[80]

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[76] Proposed 40 C.F.R. § 60.24a(i).

[77] Pre-Proposal Comments at 7.

[78] Proposed 40 C.F.R. § 60.24a(i)(2).

[79] 87 Fed. Reg. at 79,206.

[80] Pre-Proposal Comments at 16.

PGen also agrees with and supports EPA's proposed reversal of its prior interpretation of section 111(d) that prohibited compliance flexibilities, including emissions averaging and trading.[81] States should be permitted to allow emissions averaging, trading, and other flexible measures to aid owners and operators of designated facilities in complying with emissions limitations established under section 111(d). As EPA noted when it proposed the Clean Air Mercury Rule, the Agency's "significant experience" with cap-and-trade programs for utilities has shown that such programs cause emissions to fall *below* the mandated cap, despite increased electric generation, while "maximizing overall cost-effectiveness."[82]

Ensuring that states have maximum flexibility in terms of compliance strategies will result in another significant benefit: electric reliability. As PGen noted in its Pre-Proposal Comments, "[a] trading program will allow fossil fuel-fired EGUs that are rarely used to continue to be operated for the purpose of stabilizing the grid during times of peak load (such as during times of extreme heat or cold or because of an extreme weather event)…."[83] As further discussed in PGen's comments, flexible compliance tools such as emissions trading or averaging have been shown to result in significant benefits to environmental justice communities.[84]

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PGen appreciates the opportunity to comment on EPA's Proposed Rule. If EPA has any questions on PGen's comments, or if EPA would like to meet with PGen members to discuss these comments further, it should contact PGen's counsel below, who will work with PGen's Board of Directors to arrange a convenient time.

Dated: February 27, 2023

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[81] 87 Fed. Reg. at 79,207-08.

[82] 69 Fed. Reg. 4652, 5697 (Jan. 30, 2004); *see also id.* (noting that trading "maximizes the cost-effectiveness of the emissions reductions in accordance with market forces" and that "[s]ources have an incentive to endeavor to reduce their emissions below the number of allowances they receive").

[83] Pre-Proposal Comments at 10.

[84] *Id.* at 10-15 (Section VI).