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OFFICE OF ATTORNEY GENERAL  
STATE OF WEST VIRGINIA



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October 31, 2018

The Honorable Andrew Wheeler  
Acting Administrator  
U.S. Environment Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

Submitted electronically via [Regulations.gov](http://Regulations.gov)

**Re: Comments of the States of West Virginia, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin, Wyoming, the Mississippi Department of Environmental Quality and the Mississippi Public Service Commission on the proposed rule *Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program* (EPA-HQ-OAR-2017-0355; FRL-9982-89-OAR).**

Dear Administrator Wheeler:

The undersigned States and state agencies submit the following comments on the Environmental Protection Agency's ("EPA") proposed rule entitled *Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations; Revisions to New Source Review Program*, 83 Fed. Reg. 44,746 (Aug. 31, 2018) (Docket No. EPA-HQ-OAR-2017-0355), which is known as the "Affordable Clean Energy" rule, or "ACE." ACE would replace the EPA's existing rule, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015), colloquially referred to as the "Clean Power Plan" ("CPP"). Although a final rule, CPP is currently subject to a stay issued by the Supreme Court. *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016). The undersigned States and state agencies strongly support the EPA's proposal to rescind CPP as an unlawful expansion of federal authority in blatant violation of its governing statute, the Clean Air Act ("CAA"), and the traditional

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authority of the States in the areas of energy production and environmental regulation. We offer the following comments on the proposed replacement rule, ACE, which represents significant strides toward returning the EPA's regulatory structure to its proper statutory and constitutional limits.

## BACKGROUND

Section 111 of the Clean Air Act (“CAA”) directs the EPA to identify categories of “stationary sources” that “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A). A “stationary source,” in turn, is defined as “any building, structure, facility, or installation which emits or may emit any air pollutant.” *Id.* at § 7411(a)(3). For *new* stationary sources, the EPA is obligated to establish nationally applicable “standards of performance.” *Id.* at § 7411(b)(1)(B). These standards of performance represent the benchmark “standard for [the] emission[] of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction” (“BSER”) that has been “adequately demonstrated” to limit emissions from an individual source. *Id.* § 7411(a)(1).

By contrast, for *existing* stationary sources the CAA authorizes the EPA to call upon the States to submit plans that contain standards of performance for the same categories of pollutants. *Id.* at § 7411(d)(1). As the EPA previously recognized, this directive reflects Congress's goal to “give States a greater role” in the process of establishing standards of performance for existing sources, including “primary responsibility for developing and enforcing control plans.” 40 Fed. Reg. 53340, 53343 (Nov. 17, 1975). Specifically, section 111(d) authorizes the EPA to “prescribe regulations which shall establish a procedure . . . under which *each State* shall submit to the Administrator a plan” establishing “standards of performance for any existing source” for “any air pollutant” emitted from a source category which is not already “regulated under section [1]12 . . . to which a standard of performance under this section would apply if such existing source were a new source.” 42 U.S.C. § 7411(d)(1)(A) (emphasis added).

Notably, under section 111(d) any “standard of performance” must be “for” and “appl[icable] . . . to a[] particular source.” *Id.* § 7411(d), (d)(1)(B). The plain text of the CAA also directs that regulations established pursuant to a State-submitted plan “shall permit” the State “applying a standard of performance to any particular source . . . to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” *Id.* at 7411(d)(1)(B). Prior to the promulgation of the “Clean Power Plan” rule (“CPP”), the EPA had long adhered to these textual commands, imposing standards of performance that applied only to particular, individual sources, *see, e.g.*, 79 Fed. Reg. 36,880, 36,885 (June 30, 2014) (remarking, in regulation establishing emission standard applicable to petroleum refineries, that “[t]he standard that the EPA develops [is] based on the BSER achievable at that source”), and permitting States to issue variances when warranted by the circumstances, *see n.1, infra*.

In 2015, the EPA took a radical shift from the CAA's text and purpose in promulgating CPP, which set new performance standards for existing coal- and gas-powered plants. Not content

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to set limits for individual stationary sources (although it did that as well), CPP sought to establish an “emission performance rate” that applied to an entire source category—namely, fossil fuel-fired (predominately coal-fired) electricity generating units. *See* 80 Fed. Reg. at 64,667, 64,752, 64,811. Critically, the emissions level applicable to coal-fired units was impossible to meet by application of technological measures alone. *See id.* at 64,727, 64,754. Instead, as the EPA expressly recognized—and in fact intended—the standards CPP set could be met only by a fundamental restructuring of the current mix of power generation. The EPA referred to this reordering as “generation shifting,” that is, the immediate replacement of existing coal-fired electricity generation with natural gas-fired generation, and, over time, the replacement of both coal- and gas-fired generation with generation from renewable sources such as wind and solar. *Id.* at 64,724, 64,734, 64,745-48.

To facilitate this wholesale transformation of America’s electric power supply, CPP was forced to deviate from the definition of “stationary source” set forth in the CAA’s text. Rather than a “building, structure, facility, or installation,” 42 U.S.C. at § 7411(a)(3), CPP improperly equated a “source” with its owner or operator. Under this framework, the emissions of an existing coal-fired power plant—which would necessarily exceed the impossible-to-meet standard set forth in the rule—could be rendered compliant if the source owner or operator “invested in actions at facilities *owned by others.*” 80 Fed. Reg. at 64,733 (emphasis added). By taking these steps, an owner could craft an “adjusted CO<sub>2</sub> emission rate” that combined the existing plant’s actual emissions with proof of lower- or zero-emission generation occurring elsewhere in the system, in the form of a tradable “emission rate credit.” 40 C.F.R. § 60.5790(c)(1). Further, CPP effectively mandated the construction of new renewable energy generation sources, rather than a shift from coal-fired to gas-fired generation, by expressly barring the use of new gas-fired generation when calculating adjusted emissions rates. 80 Fed. Reg. at 64,729-30, 64,903.

A coalition of twenty-seven States, including many of the undersigned, along with a host of other parties, immediately challenged the legality of CPP in the U.S. Court of Appeals for the District of Columbia Circuit. *See West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.). Cognizant of the significant, unprecedented effects CPP would have on the nation’s power sector, and confirming the strength of the parties’ arguments against CPP’s legality, the U.S. Supreme Court took the unprecedented step of staying the rule’s implementation pending judicial review. *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016).

Before the D.C. Circuit issued an opinion in those consolidated cases, however, President Trump issued an Executive Order directing the EPA to “suspend, revise, or rescind” CPP “as appropriate and consistent with law.” Exec. Order No. 13783, 82 Fed. Reg. 16,093 (Mar. 28, 2017). The EPA announced soon after that it was initiating a review of CPP consistent with that Executive Order. 82 Fed. Reg. 16329 (Apr. 4, 2017). The EPA concurrently requested—and the petitioners did not oppose—that the D.C. Circuit cases be held in abeyance in light of these developments. *West Virginia v. E.P.A.*, No. 15-1363 (D.C. Cir.) (motion filed Mar. 28, 2017); *see also id.* (Response in Support filed Apr. 6, 2018). The court granted the motion and the case remains in abeyance pending the EPA’s review in these proceedings. *Id.* (*per curiam* order

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granting motion for abeyance issued Apr. 28, 2017); *see also id.* (*per curiam* orders continuing abeyance issued Aug. 8, 2017, Nov. 9, 2017, Mar. 1, 2018, June 26, 2018).

Since then, in a separate proceeding the EPA explained that it concluded its initial review of CPP and found that it is inconsistent with the policy articulated in the Executive Order: CPP would impose massive costs on consumers and the power sector as a whole, would invade a traditional area of state responsibility, and would “not adequately ensure the national interest in affordable, reliable electricity, including from coal generation.” 82 Fed. Reg. 48,038 (Oct. 16, 2017). The EPA also concluded that CPP departed from the agency’s longstanding regulatory practice and interpretation of the CAA. *Id.* The EPA accordingly proposed to rescind CPP, and many of the undersigned States filed a comment in that proceeding supporting the EPA’s proposed rule. Many of the undersigned States also filed a comment in the earlier stages of this proceeding designed to facilitate the second stage of the review the Executive Order commands: proposing a new rule. 82 Fed. Reg. 61,510 (Dec. 28, 2017).

On August 31, 2018, the EPA published in the Federal Register the proposed Affordable Clean Energy rule (“ACE”), which incorporates many of the comments from the EPA’s prior Advanced Notice of Proposed Rulemaking in this proceeding. 83 Fed. Reg. 44,746. The EPA explained that ACE is intended to “replace the CPP with a rule that corrects the fundamental legal flaws in the CPP [and] . . . more appropriately balance[s] federal and state responsibilities under CAA section 111(d).” *Id.* at 44,748. Critically, ACE recognizes that pursuant to the “plain language” of the CAA, in the context of regulation for existing sources the “EPA’s authorized role . . . is to develop a procedure for states to establish standards of performance.” *Id.* at 44,749. Thus, ACE is designed in large part to “provide information for the development of state plans.” *Id.* at 44,750.

Part of this information includes the EPA’s assessment that the “best system of emission reduction” (“BSER”) adequately demonstrated for coal-fired generation is “heat rate improvements that can be applied at the source.” *Id.* at 44,749; *see also id.* at 44,763 (“EPA is proposing that the BSER is [heat-rate improvement] made at the unit level”); *id.* at 44,768 (describing the EPA’s proposed BSER as “a menu of heat rate improvements”). This same technology was previously identified in CPP itself, *see* 80 Fed. Reg. at 64,709, 64,724; *see also* 83 Fed. Reg. at 44,752. Unlike with the prior rule, however, ACE would stop with these source-based improvements, and not go beyond the CAA’s purview by setting standards of performance that can only be met through generation shifting. And using a framework consistent with the statutory text, the EPA estimates that the adoption of the BSER identified in ACE will result in an annual decrease in CO<sub>2</sub> emissions of between “7 million to 30 million short tons” compared to a regulatory environment with no emissions limitation for greenhouse gases promulgated pursuant to section 111(d). 83 Fed. Reg. at 44,749, 44,784.

## DISCUSSION

Compared to CPP, ACE represents significant improvement. Indeed, because ACE corrects many of the flaws that rendered CPP categorically and unquestionably unlawful, the

undersigned States certainly prefer the proposed new rule to its fundamentally flawed predecessor. And, as discussed below, ACE has many laudable qualities: a healthy respect for the traditional regulatory power of the States over public utilities, a substantially improved fidelity to the text and structure of the CAA, and a proposal to reform New Source Review (“NSR”) that will allow States, should they so choose, to reduce the burden of compliance with any section 111 standard.

With that said ACE is not perfect, as the rule continues to suffer from one of the significant legal defects that plagued CPP: the CAA’s express prohibition on simultaneous double regulation of sources under sections 111 and 112. Without corrective action—*e.g.*, no longer regulating coal-fired power plants under EPA’s section 112 rule concerning mercury emissions—ACE will remain perched on an unstable legal foundation.

### **I. EPA Cannot Regulate The Same Source Category Under Both Section 111 and Section 112.**

The plain text of the CAA is clear and unambiguous: EPA does not have authority to use section 111 of the CAA to regulate “any air pollutant” emitted from a source category that is already “regulated under section [1]12.” 42 U.S.C. § 7411(d)(1). “Regulated” means “[g]overned by rule, properly controlled or directed, adjusted to some standard, etc.” 13 OXFORD ENGLISH DICTIONARY 524(J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). Thus, if a source category is “governed by [a] rule” under section 112, EPA may not require States to set a standard of performance for sources in that category under section 111(d). *Cf. Util. Air Regulatory Grp. v. E.P.A.*, [“UARG”] 573 U.S. 302, 134 S. Ct. 2427, 2446 (2014) (“[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”). As the Supreme Court has expressly said, “EPA may not employ [section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . § [1]12.” *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 n.7 (2011); *see also*, *e.g.*, *New Jersey v. E.P.A.*, 517 F.3d 574 (D.C. Cir. 2008) (invalidating the “Clean Air Mercury Rule” because it represented regulation violative of section 112 exclusion).

This limitation reflects the logic of the statutory and legislative history of the 1990 amendments to the CAA.<sup>1</sup> Before 1990, section 112 covered an extremely narrow category of pollutants. Through the 1990 amendments, Congress greatly expanded the section’s scope to include pollutants “which present, or may present . . . a threat of adverse human health effect . . . or adverse environmental effects,” and also made regulation under section 112 more stringent. 42 U.S.C. § 7412(b)(2). As the EPA has previously acknowledged, barring regulation of sources under section 111(d) that are already regulated under 112 was intended to avoid undue burdens on existing sources, particularly in light of the significant capital investments and sunk costs that emission regulations often require. 70 Fed. Reg. at 16,031-32 (March 29, 2005). In other words, Congress acted to avoid “duplicative or overlapping regulation” by requiring the EPA to choose between regulating existing power plants under the expanded section 112 national standards, or

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<sup>1</sup> Compare Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 301, 104 Stat. 2399, 2531-74 (1990) with Clean Air Amendments of 1970, Pub. L. No. 91-604, § 112, 84 Stat. 1676, 1685-86 (1970).

under the state-proposed standards of section 111(d). *Id.* at 16,031.

Because it is undisputed that coal-fired generating units are already regulated under section 112, 77 Fed. Reg. 9,304 (Feb. 16, 2012), this exclusion prohibits the EPA from regulating those same plants under section 111(d). Indeed, prior to promulgating CPP, the EPA had repeatedly agreed that “a standard of performance under section 111(d) cannot be established for any air pollutant . . . emitted from a source category regulated under section 112.” 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004); *see also* 70 Fed. Reg. 15,994, 16,031 (explaining that in response to the 1990 amendments, Congress “changed the focus of [the section 112 exclusion by] seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112.”); Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines at 1-6 (Dec. 1995) *available at* <http://www3.epa.gov/ttn/atw/landfill/bidfl.pdf>. Thus, it is evident that until it issued the aberrant CPP, EPA understood and adhered to the plain text of the CAA, which precludes regulation under section 111 of air pollutants emitted by a source category (such as the coal-fired electricity generating units subject to ACE) that is regulated by section 112. Acting otherwise (then or now) would require a willful disregard for the plain language of the CAA.

Of course, this otherwise fatal legal defect is entirely avoidable. The plain text of the CAA simply requires EPA to choose: either continue to regulate coal-fired plants under its “Mercury and Air Toxics Standards,” which are issued under the purview of section 112, *see* 82 Fed. Reg. 16,736, 16,738 (April 6, 2017), or stop regulating those sources under that rule and regulate them under section 111 (that is, via ACE) instead. Once that choice is made and the specter of double regulation is removed, ACE would no longer be haunted by the prospect of section 112 exclusion.

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Nevertheless, to the extent that the EPA decides to move forward with a new rule under section 111(d) without eliminating or amending its existing section 112 regulation, the undersigned support ACE because it otherwise hews to the text of the CAA and preserves the States’ role in managing energy generation. ACE is far preferable to the patently unlawful regime CPP would have created, and to the extent the EPA adopts a different view of the section 112 exclusion (and that view is ultimately upheld by the judiciary), the undersigned believe the proposed rule is otherwise legally sound, and reflects sound policy.

## **II. ACE Respects States’ Traditional And Statutory Role In Regulating Energy Generation And Air-Quality Protections In Several Critical Ways.**

“[T]he regulation of utilities is one of [the] most important of the functions traditionally associated with the police power of the States.” *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983); *see also, e.g., Connecticut Dep’t of Pub. Util. Control v. F.E.R.C.*, 569 F.3d 477, 481 (D.C. Cir. 2009). Indeed, the Supreme Court has recognized States’ “traditional role in the regulation of energy production,” in that the “[n]eed for new power facilities, their economic feasibility, and [the associated] rates and services, are areas that have

been characteristically governed by the States” *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 194, 205 (1983). As a result, absent clear and express statutory language indicating Congress’s contrary intent, “States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.” *Id.* at 205; *see also, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“Congress legislated here in [a] field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal [statute] unless that was the clear and manifest purpose of Congress.” (citations omitted)).

In the Federal Power Act, Congress recognized States’ traditional authority in this arena—and declined to intrude on it. *See* 16 U.S.C. § 824(a) (providing that “the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest,” but also that federal regulation in this area “extend[s] only to those matters which are not subject to regulation by the States”). The CAA, as well, is consistent with these principles. Section 111(d), for instance, is clear that the States, *not the EPA*, are ultimately responsible for the regulation of emissions of existing sources. 42 U.S.C. § 7411(d)(1). In contrast to its role with respect to new sources, where the EPA is authorized to develop national standards, *id.* at § 7411(b), under section 111(d) the EPA may promulgate regulations to establish *a procedure* under which the States submit implementation plans establishing standards of performance, *id.* at § 7411(d)(1). The States are tasked primarily with setting the *content* of these standards.

Of course, this division of authority does not leave the EPA completely divorced from the process of setting standards for existing sources under section 111(d). As regulations promulgated in the immediate aftermath of the CAA’s enactment demonstrate, the EPA may properly use its expertise to identify BSER for existing sources, then promulgate “guideline documents” with corresponding “emission guidelines” reflecting those BSER. 40 C.F.R. § 60.22(a), (b)(5). These documents are just that, however: guidelines. Pursuant to their authority under section 111(d), States are tasked with submitting an implementation plan that either adheres to the federal guidelines, or, where supported by sufficient justification, deviates from them. *Id.* at § 60.24(f); *see also* H.R. Rep. No. 95-294, at 195, *reprinted in* 1997 U.S.C.C.A.N. 1274 (discussing the 1977 amendments to the CAA and explaining that “the State[s] would be responsible for determining the applicability of . . . guidelines [under section 111(d)] to any particular source or sources”). Crucially, section 111(d) specifically authorizes States to “take into consideration, among other factors, the remaining useful life of the existing source to which [a] standard applies” when crafting a state implementation plan—and these “other factors” may justify deviation from the federal standard. 42 U.S.C. § 7411(d).<sup>2</sup> Consistent with the CAA’s overall intent to preserve State authority in our federal structure, this guarantee of flexibility when crafting state plans codified preexisting agency practice at the time the CAA was enacted. *See, e.g.,* 40 Fed. Reg. at 53,343-

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<sup>2</sup> The EPA has approved numerous state plans containing standards of performance less stringent than EPA’s guidelines. *See, e.g.,* 49 Fed. Reg. 35,771 (Sept. 12, 1984) (approving Arkansas plan for kraft pulp mill total reduced sulfur emissions); 47 Fed. Reg. 50,868 (Nov. 10, 1982) (approving Georgia plan for same); 47 Fed. Reg. 28,099 (June 29, 1982) (approving California plan for phosphate fertilizer plant fluoride emissions).

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344, *id.* at 53,347; *see also* 40 C.F.R. § 60.24(d), (f). The EPA also respected this division of state and federal authority when promulgating regulations under the CAA: The EPA specifically noted then that “the term ‘emission limitation’ ha[d] been replaced with the term ‘emission guideline’” to underscore that the federal standard is not “a legally enforceable standard.” 40 Fed. Reg. at 53,341. Only when a State fails to submit a “satisfactory” implementation plan does section 111 authorize the EPA to issue and enforce a binding emission standard for existing sources in that State. 42 U.S.C. § 7411(d)(2).

Despite this history of permitting States to deviate from federal standards in appropriate circumstances *and* the plain language in Section 111 authorizing such variation, for the first time CPP set an absolute floor from which States could not deviate. Specifically, CPP forbade relaxation of the federal emission guidelines applicable to coal-fired electricity generating units, even when refusal to approve a state-submitted plan deviating from the guidelines had the effect of forcing a unit to shut down before the end of its useful life. *See* 80 Fed. Reg. at 64,870 (“[C]onsideration of facility-specific factors *and in particular, remaining useful life*, does not justify a state making further adjustments to the performance rates . . . that the guidelines define for affected [units] in a state and that must be achieved by the state plan.” (emphasis added)). CPP’s centerpiece “generation shifting” framework also consciously intruded on this area of traditional State power. By deliberately attempting to force States to adopt a mix of generation capacity that reflected the policy preferences of the prior administration, CPP would have removed from the States the ability to assess the need for “new power facilities” and the “economic feasibility” of renewable sources relative to existing coal- and gas-fired sources. *See* 80 Fed. Reg. at 64, 749 (under the strictures of CPP, “the volume of coal-fired generation will decrease”). In these ways CPP effectively rewrote section 111(d), excising the roles for state policy considerations and source-specific flexibility that Congress expressly included in the CAA. Such intrusions, to the extent permissible at all under our federal structure, would at a minimum have required Congress to announce in plain, unambiguous terms its intent to displace traditional state authority and allow the EPA “to regulate a significant portion of the American economy.” *UARG*, 573 U.S. 302, 134 S. Ct. at 2444 (internal quotation marks omitted). Nothing in the CAA supports such sweeping measures.

ACE, by contrast, corrects many of these unlawful and unwarranted intrusions into the regulatory sphere of the States. ACE fully embraces the cooperative federalism regime baked into the CAA’s text and structure, recognizing the EPA’s proper role as expert adviser, not central planner, and the States’ primacy in ground-level regulation and management of electric power generation. The proposed rule makes clear the EPA’s belief that “it is consistent with the spirit of cooperative federalism to provide information sufficient to assist states in the development of state plans.” 83 Fed. Reg. at 44,764. Consistent with that starting point, the proposed rule properly provides that the information the EPA provides in the form of federal standards is “guidance,” and the States retain ultimate authority to “set standards based on considerations . . . appropriate to individual sources or groups of sources.” *Id.* at 44,763. This process expressly contemplates “unit-specific evaluations of . . . [the] technical feasibility and applicability” of “each of the BSER candidate technologies,” *id.*, as well as other “source-specific factors—including, among other factors, the remaining useful life of the affected source,” *id.* at 44,748. As the EPA explains in



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ACE—and the undersigned fully agree—this approach is consistent with Congress’s express intent that “the state and federal roles complement each other” by recognizing the EPA’s “authority and responsibility to determine a nationally applicable BSER” and the States’ “authority and responsibility to establish and apply existing source standards of performance, in consideration of source-specific factors.” *Id.*

ACE also represents a necessary change to the extent it expressly affirms Congress’s vision that this source-specific review may lead to situations where States “implement standards of performance that vary from EPA’s emission guidelines.” *Id.* at 44,773. The undersigned support the proposed “new variance provision” that “permits states to take into account remaining useful life, among other factors, [when] establishing a standard of performance for a particular affected source,” *id.*, and, where appropriate, ultimately set standards of performance that are “less stringent . . . than would otherwise be suggested by strict implementation of the BSER technologies,” *id.* at 44,764. For example, under ACE a “state is free to give [a] source flexibility to meet [an established] standard of performance using either BSER technologies or some other non-BSER technology or strategy” that will reach the same level of emission reduction, as long as that strategy is “implemented at the source itself” and its effects are “measurable at the source.” *Id.* at 44,765. ACE also “recognizes that for some sources” consideration of “other factors” may “result in [a] determin[ation] that no [emission reduction] measures” are appropriate, such as where a unit has a “very short remaining useful life” or “has already implemented all of the candidate technologies of the BSER.” *Id.* at 44,766. And finally, ACE provides States with leeway to consider the possibility that compliance with a standard of performance at a particular unit may require modifications that can trigger the separate requirements under New Source Review, and factor in the associated costs of that process when determining the appropriate standard for that source. *Id.* at 44,767 (the EPA’s alternate approach to address the interplay between section 111(d) standards of performance and New Source Review are discussed further in Part III below).

These holistic changes from CPP to ACE reflect a fundamental shift from top-down regulation back toward the cooperative federalism structure that the CAA’s text and purpose affirm. ACE properly restores the “considerable flexibility” Congress afforded to States “in developing their plans and establishing and applying standards of performance to existing sources.” *Id.* at 44,764; *see also id.* at 44,765 (“EPA believes it is appropriate . . . to provide considerable flexibility for states to set standards of performance for units and also allow states to have considerable latitude for implementing measures and standards for affected [electricity generating units].” It is clear that ACE was consciously designed to respect States’ traditional and statutory authority over electricity-generating units within their borders, and to afford the States sufficient flexibility to comply with federal environmental mandates without disrupting the flow of affordable, reliable electricity to their citizens and the nation as a whole. We heartily approve these changes in the proposed rule.

The undersigned also support the logistical changes in ACE designed to streamline the process by which States submit implementation plans. For instance, the States generally agree that it would be more efficient and less burdensome to have the option to submit their plans “electronically through an EPA provided platform.” *Id.* at 44,769. Similarly, updating the

implementing regulations associated with section 111(d) as the EPA proposes would reinforce the agency's commitment to interpreting the CAA consistent with its textual limits. *See id.* at 44,770-73. Furthermore, extending the time period for States to develop their implementation plans from nine months to three years is a welcome change because, as the EPA recognizes, the “amount of work, effort, coordination with sources, and the time required to develop state plans” is significant, and a thorough and thoughtful process requires sufficient time. *See id.* at 44769. So too for the EPA's proposal to allow (but not require) the States to satisfy their monitoring obligations through reliance on data most existing sources are already required to collect and submit to the EPA under 40 CFR part 75. *Id.* All of these changes highlight the EPA's commitment to cooperative federalism, and to ensuring that States are set up for success when undertaking the type of careful, multi-factored analysis that regulation in this critical space demands.

Nevertheless, without diminishing the support articulated above, the States also request additional clarity with respect to some of these logistical and procedural changes. For example, it would be beneficial for the EPA to work closely with—and solicit input from—their state-level counterparts when designing the electronic platform to be used for the submission of state plans. The undersigned also seek clarification regarding the EPA's view of their obligations, and those of affected coal-fired sources, during the interim periods while implementation plans are being developed and then reviewed by the EPA. Specifically, given the proposed extension of the timeframe for the EPA's review, *see id.* at 44,771 (proposing to expand the review period from four months to one year), and the requirement that state plans include a compliance schedule for each regulated source, *see id.* at 44,673, there is some uncertainty about whether the clock for a compliance schedule set forth in a state plan would begin to run from the date that plan is promulgated by the State, or the date the EPA approves it. In order to avoid the imposition of regulatory burdens that might not be final, the States suggest that compliance deadlines begin to run from the date of EPA approval.

### **III. ACE Corrects Many Of The Legal Failings Of CPP, And Properly Respects The CAA's Text, Structure, And History.**

An executive agency such as EPA has “only those authorities conferred upon it by Congress.” *Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Where “there is no statute conferring authority, [the EPA] has none.” *Id.*; *see also Nat. Res. Def. Council v. E.P.A.*, 777 F.3d 456, 468 (D.C. Cir. 2014) (“[N]o statutory provision giv[es] [the EPA] free-form discretion to set [requirements] based on its own policy assessment . . .”). ACE, like CPP, has been proposed pursuant to the EPA's statutory authority under section 111 of the CAA. Unlike CPP, however, ACE respects the textual limits Congress set for its regulation in this space.

Section 111 instructs the EPA to “list” categories of “stationary sources” which may emit pollutants that “endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A). As discussed in more detail above, section 111(b) authorizes the EPA to promulgate direct federal standards of performance for new sources in any category, *id.* § 7411(b)(1)(b), whereas section 111(d) requires the EPA to establish a procedure for States to submit plans establishing standards of performance for existing sources within their boundaries, *id.* § 7411(d)(1). In either context, however, the CAA

deals with standards of performance “for” and “applicable . . . to” *individual sources* within a regulatory source category. *Id.* §§ 6411(d)(1), 7411(a)(2). ACE properly interprets this statutory language, and thus corrects at least three fundamental flaws in CPP: conflating a “source” with its owners or operators, adopting an untenable definition of a standard of performance, and defining “source” on a category-wide instead of individual basis.

*First*, ACE rejects CPP’s misreading of the CAA that, “[a]s a practical matter, [a] ‘source’ includes the ‘owner or operator’ of any building, structure, facility, or installation for which a standard of performance is applicable,” 80 Fed. Reg. at 64,762. By contrast, ACE faithfully adheres to the CAA’s text: “[A]fter reconsidering the statutory text, context and legislative history, and in consideration of EPA’s historical practice under CAA Section 111 . . . the Agency proposes to return to a reading of section 111(a) . . . as being limited to emission reduction measures that can be applied to or at an *individual stationary source*.” 83 Fed. Reg. at 44,752 (emphasis added).

The CAA requires this interpretation. The statute defines stationary sources as “building[s], structure[s], facilit[ies], or installation[s].” *Id.* at § 7411(a)(3). Stationary sources fall into one of two categories, existing sources and new sources, with “existing source” defined to mean any stationary source other than a new source. *See id.* at 7411(a)(6). Critically, the statute separately defines “owner or operator”—in the same section—as “any person who owns, leases, operates, controls, or supervises a stationary source.” *Id.* at § 7411(a)(5). ACE’s approach is necessary because Congress’s delineation between “source” and “owner” definitively rejects any argument that the agency could conflate these two concepts when developing national regulatory policy. *See Transbrasil S.A. Linbas Aereas v. Dept’t. of Transp.* 791 F.2d 202, 205 (D.C. Cir. 1986) (“[W]here different terms are used in a single piece of legislation, [a] court must presume that Congress intended th[ose] terms to have different meanings.” (internal quotation marks and citation omitted)).

Even viewed in isolation, the plain language of the definition of “source” makes clear that it is not synonymous with owners or operators. On its face, the statute is plain that a source is a “building, structure, facility, or installation,” not the “owner or operator” of such a facility. *See* 42 U.S.C. § 7411(a). For example, section 111(d) requires States to establish plans for an existing source that would be regulated under section 111(b) “if such existing source were a new source.” *Id.* § 7411(d)(1). But there can be little doubt that States need not assess whether ownership of a source has changed when determining if they have an obligation to establish a standard of performance. Similarly, when establishing a standard of performance, States and the EPA are permitted to take into consideration “the remaining useful life of the existing source.” *Id.* (describing state discretion); *id.* at § 7411(d)(2) (when the EPA promulgates a federal plan in lieu of an unsatisfactory state plan, it “shall take into consideration . . . [the] remaining useful lives of the sources in the category of sources to which [the] standard applies”). Yet it would render the statute absurd if read to permit States and the EPA to consider the remaining life of the owner or operator of a source when establishing such a standard.

Because “the sole function of the courts” when faced with “plain” statutory language “is to enforce it according to its terms,” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*,

530 U.S. 1, 6 (2000) (internal quotation marks omitted), the EPA’s proposed return to its prior understanding of “source” is an important change. ACE is thus necessary to the extent it expressly treats standards of performance as those measures “based on a physical or operational change to a building, structure, facility or installation at that source rather than measures the source’s owner or operator can implement at another location.” 83 Fed. REG. at 44, 752. *See also ASARCO Inc. v. E.P.A.*, 578 F.2d 319, 327 n.24 (D.C. Cir. 1978) (the EPA does not have “authority to rewrite the [statutory] definition of a stationary source”).

*Second*, ACE rejects CPP’s atextual interpretation of the phrase “standard of performance.” A central tenet of CPP—the “generation shifting” discussed above—was the imposition of an emission standard that existing fossil-fuel power plants could only hope to achieve through a reduction in the amount of electric output they produced. The CAA’s use of the word “performance,” however, contemplates “[t]he accomplishment, execution, carrying out . . . [or] doing of any action or work.” 11 OXFORD ENGLISH DICTIONARY 544. Thus, by pushing regulated sources to produce less (and ultimately stop producing altogether), the standard CPP would have imposed is essentially a standard of *non*-performance.

This disconnect between the statutory text and CPP’s central premise is underscored by generation-shifting’s practical effects. Section 111 defines a “standard of performance” as a “standard for emissions,” which reflects the “degree of emission limitation” that a source may “achiev[e],” using the BSER the EPA identifies as having been adequately demonstrated. 42 U.S.C. § 7411(a)(1). And yet, as the EPA has expressly acknowledged, reducing the amount of generation that occurs at fossil-fuel fired plants typically *increases* the emission rate of greenhouse gases like CO<sub>2</sub> that such plants produce. *See* 79 Fed. Reg. 34,960, 34,980 (June 18, 2014). Thus, CPP’s strained view of “standard of performance” would have led to an increase in the rate of emissions by individual sources, an outcome that can hardly be squared with the statutory mandate that “sources” achieve a “degree of emission limitation.” Indeed, the CAA defines “emission limitation” as “a requirement” that “limits the quantity, rate, or concentration of emissions . . . on a continuous basis.” 42 U.S.C. § 7602(k). Notably, the phrase “on a continuous basis” was added to the statute by amendment in 1977 to clarify Congress’s intent that technological or other low-polluting processes be the methods of achieving statutorily mandated emissions reduction. H.R. Rep. No. 95-294, at 11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1088. By inserting this language, Congress specifically intended to preclude “intermittent controls,” such as temporary operations reductions—or “shifting” production to other sources. *Id.* at 92, *reprinted in* 1977 U.S.C.C.A.N. 1170; *see also id.* at 81, 86-87, *reprinted in* 1977 U.S.C.C.A.N. 1159-60, 1164-65. Thus, it is clear that Congress intended for standards of performance to encompass new technological means of pollution control or operational innovations, not simply “load switching from one powerplant . . . to another.” *Id.* at 81, 89, 92, *reprinted in* 1977 U.S.C.C.A.N. 1159, 1167, 1170.

ACE respects this statutory command. The standard of performance the EPA proposes now—a “menu of heat rate improvements” as the BSER for coal-fired power plants, *see* 83 Fed. Reg. at 44,768—is specifically designed to reduce the emission rate of any regulated source. And

given that heat-rate improvements involve various measures that affect *how* a source operates, rather than *when* or *to what extent* it may operate, it represents a regulation of the “accomplishment, execution, carrying out . . . [or] doing of . . . work”—as the CAA’s emphasis on standards of *performance* intends.

*Third*, ACE recognizes that standards of performance must be applicable to—and achievable by—individual sources, not enforced at the source-*category* level. In CPP, by contrast, the EPA established a BSER that would apply to a “source category as a whole,” 80 Fed. Reg. at 64,727, reasoning that “it is the total amount of emissions from the source category that matters, not the specific emission from any one” source, *id.* at 64,734. The BSER identified in ACE, improved combustion efficiencies or “heat-rate improvements,” *see* 83 Fed. Reg. at 44,748, 44,755-756, represents an about-face from CPP’s flawed structure because it refers to a class of technological measures that can be directly implemented by individual stationary sources. Indeed, the EPA expressly recognized in the proposed rule that its proposed heat-rate improvements approach “is reasonable because it focused the BSER on the performance of the emitting unit itself, rather than the performance of the emitting unit and the transmission system to which it belongs.” *Id.* at 44,753.

The unambiguous language of section 111 demonstrates that the EPA’s proposed approach is textually required. Under the CAA, emission regulations, namely any BSRE identified by the EPA, must be applicable at the regulated source itself. Section 111(b) directs the EPA to establish regulations “*for new sources.*” 42 U.S.C. § 7411(b)(1)(B) (emphasis added). Section 111(d) similarly provides a process by which States establish standards of performance “*for any existing source.*” *Id.* at § 7411(d) (emphasis added). Section 111(d) further allows States to take into consideration the “remaining useful life of the existing source” when applying a standard of performance to “any *particular source* . . . for which such standard applies.” *Id.* at § 7411(d)(1). Section 111(e) makes it unlawful to operate a source “in violation of any standard of performance *applicable to such source.*” *Id.* at § 7411(e) (emphasis added). And a definition included in Section 111(a) echoes this refrain: A new source is any stationary source built or modified after promulgation of a regulation establishing a standard of performance “which will be applicable to such a source.” *Id.* at § 7411(a)(2).

Nearly half a century of consistent EPA practice concerning new source performance standards further underscores the need for ACE’s approach (and the patent unlawfulness of the contrary approach in CPP). In each of the approximately one hundred occasions when the EPA has established section 111 emissions standards across 60 different source categories, the identified BSER has been a technological or operational measure that the regulated source could directly implement at the source level. *See generally* 40 C.F.R. pt. 60, subpts. Cb-OOOO. This position can be traced to some of the earliest implementing regulations adopted by the EPA, *see* 40 C.F.R. pt 60, subpt. B (promulgated by 40 Fed. Reg. 53,340 (Nov. 17, 1975)), wherein the EPA determined that emission guidelines established under section 111 must “reflect[] . . . the application of the [BSER] . . . [that] has been adequately demonstrated *for designated facilities,*” 40 C.F.R. § 60.21(e) (emphasis added), and which defined a “designated facility” as “any existing facility . . . which emits a designated pollutant and [is] subject to a standard of performance for

that pollutant,” *id.* § 60.21(b). This interpretation prevailed for over four decades before CPP,<sup>3</sup> a fact exemplified by the EPA’s promulgation of performance standards for petroleum refineries even two years before CPP—which reiterated the EPA’s adherence to the principle that “[t]he standard that the EPA develops [is] based on the BSER *achievable at that source.*” 79 Fed. Reg. 36,880, 36,885 (June 30, 2014).

The EPA’s “area of expertise”—as set forth in the CAA—“is control of emissions at the source.” *Id.* at 44,753. ACE’s focus on source-specific performance standards thus reflects the “purpose of section 111 in a broader sense.” *Id.* at 44,768. Contrary to the approach embedded in CPP, which was “directed toward the aggregate emissions of an industrial sector as a whole,” it is “directed toward the *improvement* of performance of new sources, and through section 111(d)’s specific procedures, of existing sources.” *Id.* (emphasis in original)

#### **IV. The Proposed Changes To New Source Review Give States Appropriate Flexibility And Avoid The Imposition Of Onerous Burdens On Regulated Units.**

In addition to the changes to the regulatory structure for existing sources under section 111(d) discussed above, ACE also represents a needed change by recognizing and striving to minimize the unintended consequences associated with situations where standards of performance in State-submitted plans may trigger the EPA’s New Source Review (“NSR”) requirements. The undersigned also support these optional changes to the NSR regime, which would allow States further flexibility to mitigate the collateral regulatory burdens that may result from ACE’s adoption, without undermining the environmental-protection measures in ACE’s primary reforms under section 111(d).

NSR is a “preconstruction permitting program that requires stationary sources . . . to obtain permits prior to beginning construction.” 83 Fed. Reg. at 44,773. Significantly, NSR applies not only to “new construction,” but also to “modifications of existing sources.” *Id.* Because in many instances compliance with a new BSER in a State-submitted plan may require physical modification to an existing source, the adoption of ACE could bring many existing sources into the zone of the permitting requirements and other regulatory burdens associated with NSR. *See id.* at 44,775 (“A source that is adding equipment or otherwise making changes to its facility . . . to comply with a national or state level requirement will typically need some type of NSR permit prior to making such changes”). These burdens can be quite significant: Acquiring a preconstruction NSR permit “sometimes tak[es] 3 or more years,” *id.* at 44,777. It is a “time and resource intensive” endeavor, with full compliance requiring “substantial time, effort and money.”

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<sup>3</sup> *See, e.g.,* 41 Fed. Reg. 19,585, 19,585 (May 12, 1976) (draft BSER for fertilizer plants based on “spray cross-flow packed scrubbers”); 41 Fed. Reg. 48,706, 48,706 (Nov. 4, 1976) (proposed BSER for sulfuric acid production units of “fiber mist eliminators”); 44 Fed. Reg. 29,828, 29,829 (May 22, 1979) (“[T]he guideline document for kraft pulp mills is written in terms of standards of performance for each designated facility.”); 44 Fed. Reg. at 29,828, 29,829 (May 22, 1979) (pulp mill guideline based on digester systems, multiple-effect evaporator systems, and straight kraft recovery furnace systems); 45 Fed. Reg. 26, 294 (Apr. 17, 1980) (BSER for aluminum plants identified as “effective collection of emissions, followed by efficient fluoride removal by dry scrubbers or by wet scrubbers”).

*Id.* at 44,776.

Recognizing that “[t]his added time and cost to sources and the associated burden on permitting agencies could hinder the effective and prompt implementation of state 111(d) plans,” *id.* at 44,777, ACE offers several proposals that could alleviate this concern. The most viable is modifying the NSR-triggering framework to include an “applicability test for [electricity-generating units] that is based on maximum hourly emissions.” *Id.* at 44,778; *see also id.* at 44,780 (“EPA is proposing to amend the NSR regulations to include an hourly emission increase test for [electricity-generating units]”).

One of the factors that determines if a source will be subject to NSR (as the regulations are currently structured) is whether the proposed modification will cause the source’s annual emissions to increase by more than a specific aggregate amount. *See id.* at 44,775 (explaining that the most stringent requirements of NSR (“major NSR permitting”) are triggered when a source’s emissions will increase by more than 100 or 250 short tons). Yet if ACE is adopted, this threshold may often be exceeded “when sources undertake [heat-rate improvement] projects” as required by new BSER set forth in States’ section 111(d) plans. *Id.* at 44, 776. As the EPA notes, a source that implements heat-rate improvements “will typically experience . . . lower operating costs,” which, in turn, often leads to the source being used more frequently because of an increase in the source’s place in the “dispatch order.” *Id.* at 44,775. The ultimate result is that the particular source may experience “an increase in emissions on an annual basis,” even though the net result after the source implements the modification could be “an emission reduction from a system-wide standpoint.” *Id.*

Under the proposed change, by contrast, as long as a source engaged in heat-rate improvements can show that its “post-change maximum actual hourly emissions rate” will be lower or equal to than its “pre-change maximum hourly emissions rate,” *id.* at 44,778, *see also id.* at 44,780-81, it will not be subject to major NSR permitting requirements—and the hefty regulatory burdens that attend them. Critically, this change will not entirely exempt from oversight sources undergoing modifications. Most would still be subject to “minor” NSR permitting, the more limited regulatory framework designed to “ensure that sources of air emissions are properly regulated so that the [National Ambient Air Quality Standards] are attained and protected.” *Id.* at 44,782. Adoption of an hourly increase threshold would, however, largely spare sources engaged in environmentally friendly changes, such as those necessitated by new BSER requirements, from additional and unduly onerous “major” NSR requirements.

There is an intuitive logic that supports such a change: Sources should not be “punished” for implementing (often already costly) pollution controls or other technological measures designed to reduce emissions or otherwise benefit the environment. Indeed, until the early 2000s, EPA had a “longstanding policy” of declining to impose the strictures of NSR on sources engaged in “environmentally beneficial pollution control projects.” *Id.* at 44,775; *see also id.* at 44,777 (“[F]or many years, EPA applied a policy of excluding pollution control projects from NSR”). ACE’s proposal to consider maximum actual hourly emissions rates is a welcome return to this approach of encouraging projects designed to reduce emissions of greenhouse gases, rather than

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placing additional hurdles in their way in the form of major NSR permitting requirements. The undersigned also support this change as a thoughtful way to address the interplay between NSR and changes to section 111(d) standards. Standards of performance established pursuant to section 111(d) are intended to reduce the emission of greenhouse gases without disrupting the nation's supply of affordable, reliable electricity. Allowing the new standards of performance under section 111(d) that ACE contemplates to trigger major NSR requirements would serve neither of these goals. On the one hand, the associated costs of these measures (in addition to the costs already required by modifications designed to meet new BSER) may lead to the closure of sources rather than expensive retrofitting, which could cause disruptions in price and supply in the nation's energy grid. And on the other hand, the time necessary to comply with the provisions of NSR would delay the timely implementation of those measures that are specifically designed to reduce greenhouse gas emissions in the first place—particularly where the modifications that would otherwise trigger major NSR permitting are the same changes that can be expected to lead to lower, *system-wide* emissions reductions. *Id.* at 44,775. Thus, the States agree with the EPA's suggestion that the “the case for adopting an NSR hourly emissions test for [electricity generating units] . . . [is] compelling.” *Id.*

Finally, the States support ACE's proposal to make the modification of the NSR triggering framework optional. *See id.* (“EPA does not intend the NSR hourly emissions test to be a mandatory element of state programs.”). Consistent with the general tenor in ACE of restoring regulatory flexibility to the States, who are best positioned to respond to the specific concerns posed by existing coal-fired sources in their jurisdictions, the States agree with the proposal to allow “some states [to] determine that they do not need or desire to change the NSR applicability requirements for [electricity generating units].” *Id.*

With respect to the EPA's alternate proposal—factoring the “cost of NSR compliance” into the EPA's the identification of a BSER, *id.* at 44,777—the undersigned agree that this presents a less than ideal solution to the problem of increased applicability of major NSR permitting requirements. As an initial matter, the States do not oppose the EPA's consideration of NSR compliance costs when establishing a BSER. This approach is similar to the States' statutory authority to consider “other factors” on a source-specific level when setting performance standards—including both “remaining useful life” and the potential that an emission standard is prohibitively expensive—which can allow States flexibility to set standards for sources that are less likely to trigger the type of operational changes that would trigger major NSR permitting. Yet the fact remains that the regulatory measures imposed on a source subject to major NSR permitting requirements are determined on a “case-by-case” basis. *Id.* at 44,774. As the EPA recognized when reviewing the idea that *States* could consider the cost of NSR compliance when setting a standard of performance, “the case-specific analysis required to determine NSR applicability” makes it “difficult to predict the expected permitting costs” because those costs can “vary significantly due to a number of factors.” *Id.* So too for EPA's identification of a BSER for a source category; it is too difficult to account effectively for the myriad source-specific factors that go into compliance costs during the major NSR process. Indeed, if States with their greater familiarity with the sources in their boundaries cannot be expected to account sufficiently for NSR costs when setting standards under section 111(d), EPA's more generalized, national assessment



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is unlikely to offer a more accurate solution. And in any event, the concern to avoid unduly onerous regulatory burdens is better headed off directly: rather than accounting for the additional costs of NSR review by setting less stringent performance standards under section 111 on the front end, better to minimize those additional costs on the back-end, and thus allow coal-fired plants to place maximum resources toward changes designed to have direct, measurable consequences for emissions reductions.

Finally, although the undersigned support the EPA's efforts to account for the consequences that new section 111(d) requirements may have for NSR compliance, they also recognize that this aspect of the proposed rule "operate[s] entirely independently of" the remainder of the proposal focused on section 111. *Ariz. Pub. Serv. Co. v. E.P.A.*, 562 F.3d 1116, 1122 (10th Cir. 2009) (citation omitted). In the event that either component of ACE does not withstand judicial review—although, to be clear, the States appreciate the EPA's commitment to measures consistent with the CAA's statutory text and purpose—the EPA should make clear that it "would have adopted" each part of the regulation even without the other, and thus that they are severable. *Id.* The changes proposed under section 111 would be easier to implement with the proposed corresponding changes to NSR, but the absence of the NSR changes would not prevent implementation of the proposed BSER standards or completely hamstring States' ability to set and implement plans. Furthermore, as the EPA has already indicated that relaxation of the NSR standards would be optional rather than mandatory, 83 Fed. Reg. at 44,782, there is little doubt—much less "substantial doubt," *Davis Cty. Solid Waste Mgmt. v. E.P.A.*, 108, F.3d 1454, 1459 (D.C. Cir. 1997) (citation omitted)—that the EPA would want changes under section 111 to stand even if the NSR changes were ever called into question. The undersigned urge the EPA to make this intent plain in its final rule.

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We appreciate the opportunity to comment in this important proceeding. The proposal represents a significant step forward as the EPA considers how best to fulfill its important statutory responsibilities to protect our nation's air resources in a manner consistent with our federal structure and the requirements Congress set forth in the CAA.

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Sincerely,



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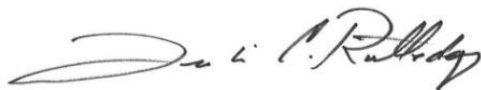
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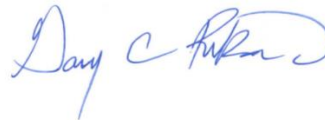
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