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February 26, 2018

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

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

Dear Administrator Pruitt:

The U.S. Chamber of Commerce, the American Chemistry Council, the American Coke and Coal Chemicals Institute, the American Forest & Paper Association, the American Iron and Steel Institute, the American Wood Council, and the Council of Industrial Boiler Owners (collectively, “the Associations”) appreciate the opportunity to comment on the U.S. Environmental Protection Agency’s (“EPA’s”) State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, Advance Notice of Proposed Rulemaking, Docket ID No. EPA-HQ-OAR-2017-0545; FRL-9972-50-OAR, 82 Fed. Reg. 61507 (Dec. 28, 2017) (“ANPRM”).

The **U.S. Chamber of Commerce** (“the Chamber”) is the world’s largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America’s free enterprise system.

The **American Chemistry Council** (“ACC”) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$797 billion enterprise and a key element of the nation's economy.

The **American Coke and Coal Chemicals Institute** (“ACCCI”), which was founded in 1944, is the international trade association that represents 100% of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100% of the nation's producers of coal chemicals, who combined have operations in 12 states. It also represents chemical processors, metallurgical coal producers, coal and coke sales agents, and suppliers of equipment, goods and services to the industry.

The **American Forest & Paper Association** (“AF&PA”) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

The **American Iron and Steel Institute** (“AISI”) serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI also plays a lead role in the development and application of new steels and steelmaking technology. AISI is comprised of 21 member companies, including integrated and electric furnace steelmakers, and approximately 120 associate members who are suppliers to or customers of the steel industry.

The **American Wood Council** (“AWC”) is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs approximately 400,000 men and women in family-wage jobs.

The **Council of Industrial Boiler Owners** (“CIBO”) is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations.

I. INTRODUCTION

The Associations represent the United States' leading energy and manufacturing sectors that form the backbone of the nation's industrial ability to grow our economy and provide jobs. The Associations support the EPA's proposal to repeal and consider replacing its final rule regulating greenhouse gas emissions ("GHGs")¹ from existing electric utility generating units ("EGUs") known as the Clean Power Plan ("CPP").² The CPP transgressed EPA's statutory authority under the Clean Air Act, as the Agency attempted to aggressively transform the way electricity is produced and dispatched across the United States. The CPP was not only unlawful, but it would have caused significant economic disruption across the American economy.³

The Associations also maintain that there is a better way to address carbon dioxide emissions under the Clean Air Act, through thoughtful policies that respect the clear limits in existing statutory authority. Thus, the Associations would support a reasonable Rule⁴ that replaces the Clean Power Plan with emission guidelines limiting CO₂ emissions from existing EGUs, as long as those guidelines fall squarely within EPA's authority under Section 111(d) of the Clean Air Act. The guiding principles of any Rule should include:

- *First*, any Rule to establish standards of performance under Section 111(d) must reflect what can be demonstrated and accomplished "within the fence line" of the emissions source. This scope would be consistent with the plain text of the statute, EPA regulations, and historical EPA practice.
- *Second*, EPA's role is to issue guidelines establishing the best system of emission reduction ("BSER") for the source category of EGUs. For EGUs, the BSER should be based on emissions limitations that can be adequately demonstrated at existing sources, and no more stringent than the New Source Performance Standard ("NSPS") established for CO₂ emissions from EGUs.
- *Third*, it is up to the States to develop and submit to EPA their plans establishing the source-specific performance standards based on the BSER. In a Rule, EPA should provide guidance to the States on how to set their standards of performance, including "presumptively approvable" standards. However, any Rule must expressly reaffirm that the States have broad flexibility to identify the appropriate factors to consider

¹ The ANPRM states that any replacement rule would be expressed in terms of carbon dioxide ("CO₂") emissions. 82 Fed. Reg. at 61508. Thus, these comments will generally refer to CO₂ emissions.

² See Final Rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015).

³ As noted above, EPA has separately proposed to repeal the Clean Power Plan. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA-HQ-OAR-2017-0355; FRL-9969-75-OAR, 82 Fed. Reg. 48035 (Oct. 16, 2017). The Associations will separately comment on the proposed repeal by the deadline of April 26, 2018.

⁴ All references to a "Rule" or "Rulemaking" refer specifically to any future Section 111(d) regulation addressing CO₂ emissions from existing EGUs.

when setting performance standards based on the unique circumstances of their State and the regulated sources therein.

- *Fourth*, any Rule should also clarify that the States have broad authority and flexibility to incorporate appropriate compliance mechanisms into their plans. Those mechanisms may be based on State law programs and should provide the maximum flexibility available under those programs, including the ability to interact with other States' programs and sources to accomplish the reductions described by the performance standards.
- *Fifth*, the Associations believe that EPA should take steps to reduce the likelihood that efforts to comply with any future Rule independently trigger requirements under the Clean Air Act's New Source Review ("NSR") provisions.
- Finally, *sixth*, any Rule should not drive a harmful increase in electricity costs. Affordable and reliable electricity provides American businesses a competitive advantage in the global economy. Any effort to develop a new Rulemaking should take great care to avoid measures that would raise the cost of electricity for consumers and businesses and threaten that important economic advantage.⁵

II. EPA SHOULD PROPOSE A RULE CONSISTENT WITH ITS CLEAN AIR ACT SECTION 111(d) AUTHORITY TO REGULATE AT THE SOURCE.

In the ANPRM, EPA solicits comment on the "application, in the specific context of limiting GHG emissions from existing EGUs, of reading CAA section 111(a)(1) as limited to emission measures that can be applied to or at a stationary source, at the source-specific level." 82 Fed. Reg. at 61510. This interpretation of Section 111(d) is exactly correct: Any future Rule can only include a BSER and provide for the development of standards of performance focused on what can be accomplished at the source level.⁶

Section 111(d) of the Clean Air Act mandates this source-specific approach. Section 111 defines "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a)(1). Section 111(d) requires EPA to develop "procedure[s]" for States to promulgate these standards "for...existing source[s]." 42 U.S.C.

⁵ The Associations also note that regulation of CO₂ emissions from existing EGUs is unique in a number of respects including, but not limited to, the nature of the nation's electrical grid, EPA's decision to previously regulate this sector under the CPP, and other factors. Thus, these comments do not endorse whether or how EPA could or should approach regulation of other sectors under Section 111(d), including, for instance, whether EPA must issue a pollutant- and source-specific endangerment finding before addressing those sectors. Moreover, in the ANPRM, EPA has stated that it is not soliciting comments on its endangerment finding under Section 202(a) of the Clean Air Act and the legal basis for applying that finding to sources other than mobile sources. 82 Fed. Reg. at 61508-09 and n.3. Thus, the Associations will not address those issues here, but reserve their rights to address them in any subsequent proceeding.

⁶ As the ANPRM requests, 82 Fed. Reg. at 61510, the Associations will detail their position on the scope of EPA's Section 111(d) authority in their forthcoming comments on EPA's proposed repeal of the Clean Power Plan.

§ 7411(d)(1) (emphasis added). Section 111 further defines a “stationary source” as “any building, structure, facility, or installation.” 42 U.S.C. § 7411(a)(3). EPA’s regulations implementing Section 111(d) confirm this “inside the fence” focus, because they too define an “emission guideline” as reflecting the BSER “for designated facilities.” 40 C.F.R. § 60.21(e). A “designated facility” is “an existing facility” which would be subject to a NSPS if it were a new source. 40 C.F.R. § 60.21(b).⁷

Indeed, until the judicially-stayed Clean Power Plan, EPA had in place regulations for five source categories under Section 111(d), and in each of those the Agency had uniformly developed a BSER for the source category used to develop source-specific performance standards. *See, e.g.*, Final Rule, Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905, 9914 (Mar. 12, 1996) (landfill guideline based on “[p]roperly operated gas collection and control systems achieving 98 percent emission reduction”); Notice, Primary Aluminum Plants; Availability of Final Guideline Document, 45 Fed. Reg. 26294, 26294 (Apr. 17, 1980) (“[Emissions guidelines] are...presented as average fluoride control efficiencies expected from the application of certain recommended control technologies that are applied as new retrofits to existing plants.”); Notice, Kraft Pulp Mills; Final Guideline Document; Availability, 44 Fed. Reg. 29828, 29829 (May 22, 1979) (issuing pulp mill guidelines for digester systems, multiple-effect evaporator systems, straight recovery furnace systems, and other systems and tanks based on various control technologies, such as incineration and process controls); Final Rule, Emission Guideline for Sulfuric Acid Mist, 42 Fed. Reg. 55796, 55797 (Oct. 18, 1977) (setting emission guidelines for sulfuric acid mist from existing sulfuric acid plants based on the degree of control achievable via control technologies from the proposed rule); Final Guideline Document Availability, Phosphate Fertilizer Plants, 42 Fed. Reg. 12022, 12022 (Mar. 1, 1977) (using spray-crossflow packed bed scrubbers as the “principal control device” for establishing emission guidelines for fluoride emissions from existing phosphate fertilizer plants).

In contrast, the Clean Power Plan attempted to circumvent this statutory limitation by improperly conflating the term “source” with the term “owner or operator.”⁸ As petitioners challenging the CPP noted, this unilateral textual revision was the “conceptual linchpin” underlying “an unprecedented reimagining of section 111.”⁹ As such, the Clean Power Plan sought to “transform[] a program that for nearly a half-century ha[d] been limited to setting emission limitations ‘for’ and ‘achievable’ by ‘sources’ into a program that [would] set[]

⁷ Furthermore, the D.C. Circuit supported this approach in *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978). In *ASARCO*, the court held that EPA may not “embellish[]” the statutory definition of “stationary source” in Section 111 by “rewrit[ing] the definition of a stationary source.” 578 F.2d at 324, 326 n.24. According to the court, the statute “limit[s] the definition of ‘stationary source’ to one ‘facility’” and not a “‘combination of facilities.’” *Id.* at 324. As a result, EPA cannot “change the basic unit to which the [standards] apply from a *single* building, structure, facility, or installation—the unit prescribed in the statute—to a *combination* of such units.” *Id.* at 327 (emphasis in original).

⁸ Reply Brief of Petitioners on Core Legal Issues at 16, *West Virginia v. U.S. Envtl. Prot. Agency*, No. 15-1363 (D.C. Cir. Apr. 15, 2016), ECF No. 1608991.

⁹ *Id.* at 16.

emission limitations based on systems ‘for’ plants’ owners and operators, that are unachievable by individual ‘sources’.”¹⁰ Further, petitioners emphasized that limiting Section 111 rulemakings to measures achievable at the source “is critical: without it, EPA’s authority would be virtually unbounded. Under [such an expansive] reading, nearly *anything* could qualify as part of the best system of emission reduction.”¹¹

Thus, Section 111(d)’s unambiguous text authorizes regulation at the level of the source, only. This approach is echoed by EPA regulations and by historical Agency practice prior to the Clean Power Plan, and EPA must adhere to these limitations in any future Rule.

III. EPA SHOULD PROPOSE A RULE THAT ESTABLISHES A CLEAR FRAMEWORK FOR REGULATION OF CO₂ EMISSIONS FROM EXISTING EGUs, BUT PROVIDES APPROPRIATE FLEXIBILITY TO STATES.

A. Any Rule would set the BSER, but leave it to individual States to set the standards of performance.

The Associations support EPA’s position, as stated in the ANPRM, that the Agency “determine[]” the BSER, which is the “principal piece of information States use to develop their plans,” including State performance standards for existing EGUs. 82 Fed. Reg. at 61509. This approach is clearly laid out in the statute. *See* 42 U.S.C. § 7411(d)(1) (EPA “shall prescribe regulations which shall establish a procedure...under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for...existing source[s].”).

EPA’s existing source implementing regulations confirm this division of responsibility between the federal and State governments under Section 111(d). These regulations separately establish requirements for federal emission guidelines in 40 C.F.R. § 60.22, which “reflect[]” the BSER but do not include emission standards, and for State plans at 40 C.F.R. § 60.24, which must “include emission standards.” 40 C.F.R. § 60.24(a); *see also* Final Rule, State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53340, 53343 (Nov. 17, 1975) (“EPA’s emission guidelines will not have the purpose or effect of national emission standards.”). Reinforcing this, Section 111(d) further provides that States are the entities that “apply[] a standard of performance to any particular source” and are entitled to adjust the standard to account for the individual circumstances of the source. 42 U.S.C. § 7411(d)(1). Thus, EPA’s central task in any future Rule should be to establish an appropriate BSER.

B. EPA should set a BSER, based on efficiency improvements, that is no more stringent than the NSPS.

There are two key factors for EPA to consider in setting an appropriate BSER. First, Section 111 requires EPA to determine that a system of emission reduction “has been adequately demonstrated” before it can designate it as the BSER. 42 U.S.C. § 7411(a)(1). The D.C. Circuit

¹⁰ *Id.*

¹¹ *Id.* at 14.

has determined that “[a]n adequately demonstrated system” “has been shown to be reasonably reliable, reasonably efficient, and...[not] exorbitantly costly in an economic or environmental way.” *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973). While EPA “may make a projection based on existing technology,...that projection is subject to the restraints of reasonableness and cannot be based on ‘crystal ball’ inquiry.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973) (addressing NSPS for new or modified Portland cement plants), *superseded in part by statute*, 15 U.S.C. § 793(c)(1) (1974), *as recognized in Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). Hence, EPA should ensure that any final Rule does not establish a BSER that would cause increased electricity prices that would harm the American economy.

Second, Section 111(d) emission guidelines should not be stricter than standards set for new sources under Section 111(b) for a given source category. The statutory text and structure confirm this limitation. Section 111(d) only permits the establishment of standards of performance for existing sources “to which a standard of performance would apply if such existing source were a new source.” 42 U.S.C. § 7411(d)(1). By making regulation of existing sources contingent upon the regulation of new sources, Congress demonstrated an unambiguous intent to make Section 111(d) a supplementary program. This approach allows any Section 111(d) regulation to be informed by the BSER analysis and standards of performance for new sources. Additionally, as noted, the statute provides additional flexibility for existing sources, due to cost-related and other issues associated with existing source retrofits—concerns that do not apply to new sources. 42 U.S.C. § 7411(d)(1) (“Regulations of the Administrator...shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”); 40 Fed. Reg. at 53341 (“[T]he degrees of control represented by EPA’s emission guidelines will ordinarily be less stringent than those required by standards of performance for new sources because the costs of controlling existing facilities will ordinarily be greater than those for control of new sources.”). It would make no sense to require existing sources that are constrained by their current designs to implement emission reductions greater than those possible at new sources integrated with the most up-to-date technologies and processes. Nevertheless, that is precisely what the flawed CPP proposed to impose upon EGUs.

Based on these principles, the Associations suggest that the appropriate BSER for an EGU should focus upon efficient operations and upgrades implemented at the source. There is no add-on technology that an existing EGU can install to reduce or control CO₂ emissions – and carbon capture and storage (“CCS”) has not been adequately demonstrated.¹² Hence, the BSER

¹² The Associations agree with EPA’s position in the ANPRM that “CCS (or partial CCS) should not be a part of the BSER for existing fossil fuel-fired EGUs because it [is] significantly more expensive than alternative options for reducing emissions.” 82 Fed. Reg. at 61517. This view is consistent with EPA’s final CPP rulemaking, which concluded that “use of full or partial CCS technology should not be part of the BSER for existing EGUs because it would be more expensive than the measures determined to be part of the BSER.” 80 Fed. Reg. at 64756. There are a multitude of other reasons why CCS should not guide the establishment of the BSER, including but not limited to the fact that CCS is not commercially available throughout the nation, has not been demonstrated to be feasible, and relies on measures employed at facilities other than the regulated source.

for EGUs should be founded on currently demonstrated technologies that can be applied at the source to improve operational efficiency/heat rate and thereby reduce the rate of carbon emissions. Moreover, basing BSER on efficiency improvements is a “reasonably reliable” approach, *Essex Chem, supra*, as EGUs have substantial experience with developing and implementing measures to increase plant efficiency by improving heat rate. A more efficient plant burns less fuel, which is the largest variable cost that an electricity generator can control, and thus EGUs are incentivized to improve their heat rate.¹³

C. EPA should provide guidance to the States on how to set standards of performance for CO₂ emissions from existing EGUs, but should also ultimately grant the States ample flexibility in determining those standards.

While authority to set the specific performance standards that would satisfy BSER at particular sources must remain with the States, EPA should consider including in any final Rule sufficient guidance to provide States a path to implement a “presumptively approvable” performance standard. The presumptive standard could set out a process for the States to use to set source-specific performance standards based on demonstrated technology. EPA should be clear that such an approach is not mandatory, but it would offer an option to the States that could streamline efforts to comply with BSER, expedite EPA’s review of State plans, and thereby facilitate regulatory certainty.

In contrast, EPA should avoid overly restrictive approaches that simply specify a prescriptive list of technological improvements that qualify toward the achievement of BSER and then require States to adopt a subset of them. Such an approach could unduly complicate the development of State performance standards and overly limit the latitude toward developing performance standards granted to the States.

In addition, any future Rule should clearly reaffirm that the States have discretion to consider multiple factors when actually setting the standard appropriate for a particular source or class of sources. As noted, the Clean Air Act’s text mandates that States be permitted to consider a range of source-specific variables in setting those standards. *See 42 U.S.C. § 7411(d)(1)* (EPA must “permit the State in 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.”). Moreover, EPA’s current existing source implementing regulations reflect that authority as inherent in the States. Where EPA “has determined that a designated pollutant may cause or contribute to endangerment of public welfare,” but has not made a conclusion regarding public health effects, States may weigh “other factors of public concern” in setting emission standards. 40 C.F.R. § 60.24(d). Where EPA “has determined that a designated pollutant may cause or contribute to endangerment of public health,” the implementing regulations provide that State “emission standards...be no less

¹³ At this stage of the proceeding, the Associations are not yet in position to comment on the possible range of specific technologies, equipment upgrades, and good practices in Tables 1 and 2 of the ANPRM. 82 Fed. Reg. at 61514-15. The Associations note that a variety of principles impact the advisability of these technologies, upgrades, and practices, including cost-effectiveness, space constraints, effectiveness as units age, and other factors.

stringent” than EPA’s emission guidelines, unless 40 C.F.R. 60.24(f) applies. 40 C.F.R. § 60.24(c). Under 40 C.F.R. § 60.24(f), however, States can “provide for the application of less stringent emissions standards or longer compliance schedules” on a “case-by-case” basis. 40 C.F.R. § 60.24(f). This provision allows States to show that various facility-specific factors apply, such as unreasonable costs of control resulting from plant age, physical impossibility of installing control equipment, or other factors, and would then be empowered to adjust standards of performance accordingly. 40 C.F.R. § 60.24(f). The provisions confirm - and EPA should reaffirm - the States’ broad discretion and responsibility to consider the costs associated with applying a particular standard, including the effect of an overall increase in the cost of electricity for consumers and businesses that could threaten important economic interests, when setting performance standards.

Policy considerations support the Associations’ position as well. Down to the level of a “boiler or turbine,” each EGU possesses “characteristics” that are “unique” and “specific” to it. 82 Fed. Reg. at 61511. Given the high stakes and capital-intensive nature of dealing with the nation’s electrical grid, any future Rule should allow States to amply consider these facility-specific characteristics when setting performance standards for CO₂ emissions from existing EGUs.

D. Any Rule should clearly provide States with flexibility in establishing compliance mechanisms.

Consistent with Section 111(d), the Associations urge EPA to confirm in any future Rule that States have broad authority to include a wide range of compliance mechanisms in their plans. Under Section 111(d)(1), Congress directed that the State plans would “provide[] for the implementation and enforcement of such standards of performance.” 42 U.S.C. § 7411(d)(1); *see also* 40 C.F.R. § 60.21(c) (“*Plan* means a plan under section 111(d) of the Act which establishes emission standards for designated pollutants from designated facilities and provides for the implementation and enforcement of such emission standards.”). In implementing their standards of performance, States can rely on State law in addition to the Clean Air Act. That means that States can use alternative means to achieve the same level of emissions reduction.

Additionally, Section 111(d) incorporates certain elements of Section 110 of the Clean Air Act. For example, Section 111(d) states that the “procedure” under which States submit plans establishing performance standards for existing sources should be “similar to that provided by” Section 110. 42 U.S.C. § 7411(d)(1). Section 110(a)(2) provides that State implementation plans (“SIPs”) should include “other control measures,” including “economic incentives such as fees, marketable permits, and auctions of emissions rights.” 42 U.S.C. § 7410(a)(2)(A). Moreover, Section 110(a)(2) allows SIPs to use these types of techniques “to meet the applicable requirements of this chapter,” which include Section 111(d). 42 U.S.C. § 7410(a)(2)(A).

Therefore, as EPA properly recognized in the ANPRM, any final Rule should make clear that States have substantial flexibility in establishing compliance measures in their State plans. 82 Fed. Reg. at 61512. EPA’s Rule may offer examples of programs that could be used to facilitate cost-effective compliance with a State performance standard or achieve equivalent

emissions reductions. These could include market-based CO₂ emissions trading, compliance credit for investing in lower carbon and non-fossil resources as may be appropriate for a State's particular generation mix, mechanisms to recognize EGU investments in measures that reduced CO₂ emissions before the standard is issued, as well as other existing and future State or local programs that address CO₂ emissions.¹⁴ However, EPA should make clear that the above are just a non-exhaustive list of examples of compliance options that States may incorporate into their plans. Quite simply, a Rule should explicitly recognize the States' broad discretion to adopt compliance mechanisms, including, without limitation, any EPA may outline, while also noting that States are free to adopt other approaches to comply with the Rule's emission guideline.

IV. EPA SHOULD TAKE STEPS TO MINIMIZE THE RISK THAT EFFORTS UNDERTAKEN TO COMPLY WITH ANY FUTURE RULE WOULD TRIGGER NSR REQUIREMENTS.

EPA's determination of BSER at existing EGUs may well have important implications under the Clean Air Act's NSR¹⁵ program. Under the Clean Air Act, a physical or operational change can trigger the applicability of NSR requirements. *See, e.g.*, 42 U.S.C. § 7479(2)(C) (defining, for the purposes of the PSD program, "construction" to include "the modification (as defined in section 7411(a) of this title) of any source or facility"); 42 U.S.C. § 7411(a)(4) ("The term 'modification' means any physical change in, or change in the method of operation of, a stationary source...."). In other contexts, including a well-publicized, lengthy enforcement initiative against coal-fired power plants, EPA has alleged that efficiency/heat rate improvements constituted major modifications which triggered NSR requirements.¹⁶ If efforts to comply with any future Rule implicated NSR, EPA must evaluate cost, permitting burdens, and potential alternatives. EPA also should consider taking separate steps to address these concerns.

Importantly, EPA has stated that it is conducting program-wide NSR reform efforts. *See, e.g.*, EPA, Memorandum, Administrator E. Pruitt to Regional Administrators, New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability (Dec. 7, 2017). The Associations support EPA's ongoing efforts to simplify the NSR process for all sectors and request that EPA specifically consider issues associated with any future Rule in the context of broader NSR reform efforts.

¹⁴ In the ANPRM, EPA solicits comment on whether CCS should be permitted as a compliance option, "especially when [companies] are able to use the captured CO₂ in enhanced oil recovery operations." 82 Fed. Reg. at 61517. The Associations support the ability to use captured CO₂ in enhanced oil recovery ("EOR") operations as a compliance measure. Where CO₂ is captured for use in EOR operations, and the operator would like to generate a credit to participate in a trading program or other compliance program, EPA should recognize 40 C.F.R. Part 98 Subpart UU's requirements as providing the appropriate level of monitoring, reporting and verification, because the inherent physical properties of the geologic formation ensure the CO₂ is secure.

¹⁵ The "NSR program" as described in these comments includes both the Prevention of Significant Deterioration ("PSD") program and the Nonattainment NSR ("NNSR") program.

¹⁶ *See* EPA, Coal-Fired Power Plant Enforcement, <https://www.epa.gov/enforcement/coal-fired-power-plant-enforcement> (last updated Sept. 6, 2016).

V. CONCLUSION

For the reasons detailed above, the Associations would support a future decision by EPA to replace the Clean Power Plan with a Rule that comports with the requirements of Clean Air Act Section 111 and EPA's historical practice. Thus, any Rule must (1) regulate only at the source, (2) include a source-category specific BSER based on "within the fence line" efficiency improvements, (3) provide States with guidance on developing their standards of performance for existing EGUs, but make abundantly clear the wide flexibility afforded to States in determining unit-specific standards and establishing compliance measures, (4) aim to minimize potential negative interactions with the NSR program and (5) minimize any increase in electricity prices and related negative effects on the American economy.

Respectfully submitted,

U.S. Chamber of Commerce
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