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6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA-HQ-OAR-2021-0527; FRL-8606-02-OAR]

RIN 2060-AV48

Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes amendments to the implementing regulations that govern the processes and timelines for state and Federal plans that implement emission guidelines under Clean Air Act (CAA) section 111(d). The proposed amendments include revisions to the timing requirements for state plan submittal, the Environmental Protection Agency (EPA)'s action on state plan submissions, the EPA's promulgation of a Federal plan, and for when states must establish increments of progress. These proposed amendments address the vacatur of certain timing requirements by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *American Lung Association. v. EPA*. The EPA is also proposing to add regulatory mechanisms to improve flexibility and efficiency in the submission, review, approval, revision, and implementation of state plans. This action further proposes new requirements for meaningful engagement with pertinent stakeholders as part of state plan development, including, but not limited to, industry, small businesses, and communities most affected by and vulnerable to the impacts of the plan. This action additionally proposes clarifying requirements for states' consideration of 'remaining useful life and other factors' (RULOF) in applying a standard of performance. This action proposes to amend the definition of standard of performance and provide clarification associated with CAA section 111(d) compliance flexibilities, including

trading or averaging. Finally, this action proposes requirements for the electronic submission of state plans and several other clarifications and minor revisions.

DATES: *Comments.* Comments must be received on or before February 27, 2023.

Public hearing: The EPA will hold a virtual public hearing on January 24, 2023. See **SUPPLEMENTARY INFORMATION** for additional information on the hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OAR-2021-0527, by any of the following methods:

- Federal eRulemaking Portal: *https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- Email: *a-and-r-docket@epa.gov*. Include Docket ID No. EPA-HQ-OAR-2021-0527 in the subject line of the message.
- Fax: (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2021-0527.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA-HQ-OAR-2021-0527, Mail Code 28221T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.
- *Hand/Courier Delivery:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/*, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Dr. Michelle Bergin, Sector Policies and Programs Division (Mail Code D205-01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research

Triangle Park, North Carolina 27711; telephone number: (919) 541-2627; fax number: (919) 541-4991; and email address: *bergin.michelle@epa.gov*.

SUPPLEMENTARY INFORMATION:

Participation in virtual public hearing. The public hearing will be held via virtual platform on January 24, 2023, and will convene at 11 a.m. Eastern Time (ET) and conclude at 7 p.m. ET. If the EPA receives a high volume of registrations for the public hearing, we may continue the public hearing on January 25, 2023. On each hearing day, the EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce any further details at *https://www.epa.gov/stationary-sources-air-pollution/adoption-and-submittal-state-plans-designated-facilities-40-cfr*.

Upon publication of this document in the *Federal Register*, the EPA will begin pre-registering speakers for the hearing. The EPA will accept registrations on an individual basis. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/adoption-and-submittal-state-plans-designated-facilities-40-cfr* or contact the public hearing team at (888) 372-8699 or by email at *SPPDpublichearing@epa.gov*. The last day to pre-register to speak at the hearing will be January 19, 2023. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/stationary-sources-air-pollution/adoption-and-submittal-state-plans-designated-facilities-40-cfr*.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 4 minutes to provide oral testimony. The EPA encourages commenters to submit a copy of their oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

The EPA does not intend to publish a document in the *Federal Register* announcing updates. While the EPA expects the hearing to go forward as described in this section, please monitor *https://www.epa.gov/stationary-sources-air-pollution/adoption-and-submittal-state-plans-designated-facilities-40-cfr* for any updates to the information described in this document, including information about the public hearing, or contact the public hearing team at (888) 372-8699 or by email at *SPPDpublichearing@epa.gov*.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by January 9, 2023. The EPA may not be able to arrange accommodations without advanced notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2021-0527. All documents in the docket are listed in the Regulations.gov index. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in Regulations.gov or in hard copy at the EPA Docket Center, Room 3334, WJC West Building, 1301 Constitution Avenue, NW, Washington, DC The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

Instructions. Direct your comments to Docket ID No. EPA-HQ-OAR-2021-0527. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically through *https://www.regulations.gov/* any information that you consider to be CBI or other information whose disclosure is restricted by statute. See *Submitting CBI* for instructions for submitting this type of information.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*.

The *http://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be

free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets*.

Throughout this proposal, the EPA is soliciting comment on numerous aspects of the proposed rulemaking. The EPA has indexed each explicit comment solicitation with an alpha-numeric identifier (e.g., ''C–1'', ''C–2'', ''C–3'', . . .) to provide a framework for effective and efficient provision of comments. The EPA asks that commenters include the corresponding identifier when providing comments relevant to that solicitation in either a heading, or within the text of each comment (e.g., ''In response to solicitation of comment C–1, . . .'') to make clear which comment solicitation is being addressed. The identifiers are helpful to the Agency for purposes of organizing its responses, but do not necessarily comprise an exhaustive index of issues on which the EPA is soliciting comment and which the public may address in their comments. The EPA is soliciting comment on the issues described in this proposal.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/*. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI, note the docket ID, and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* section of this document. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.*, Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office using the email address, *oaqpscbi@epa.gov*, and should include clear CBI markings and note the docket ID, as described above. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404-02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2021-0527. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

ACE	Affordable Clean Energy Rule
ALA	American Lung Association
BSER	Best System of Emission Reduction
CAA	Clean Air Act
CBI	confidential business information
CDC	Centers for Disease Control and Prevention
CDX	Central Data Exchange
CFR	Code of Federal Regulations
EG	Emission Guideline
EGU	electric generating unit
EPA	Environmental Protection Agency
FIP	Federal Implementation Plan
ICR	Information Collection Request
NAAQS	National Ambient Air Quality Standards
OAQPS	Office of Air Quality Planning and Standards
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act
PM2.5	fine particulate matter
RFA	Regulatory Flexibility Act
RIN	Regulatory Information Number
RULOF	remaining useful life and other factors
SIP	State Implementation Plan

SPeCS	State Planning Electronic Collaboration System
SSM	startup, shutdown, and malfunctions
TAR	Tribal Authority Rule
TIP	Tribal Implementation Plan
UMRA	Unfunded Mandates Reform Act
U.S.C.	United States Code

Organization of this document. The information in this preamble is organized as follows:

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I. General Information

A. Does this action apply to me?

This action applies to states in the development and submittal of state plans pursuant to CAA section 111(d), and to the EPA in promulgating a Federal plan pursuant to CAA section 111(d). After the EPA promulgates a final emission guideline (EG), each state that has one or more designated facilities must develop, adopt, and submit to the EPA, a state plan under CAA

section 111(d). The term ‘‘designated facility’’ means ‘‘any existing facility … which emits a designated pollutant and which would be subject to a standard of performance for that pollutant if the existing facility were an affected facility’’. See 40 CFR 60.21a(b). If a state fails to submit a plan or the EPA determines that a state plan is not satisfactory, the EPA has the authority to establish a Federal CAA section 111(d) plan in such instances.

Under the Tribal Authority Rule (TAR), eligible tribes may seek approval to implement a plan under CAA section 111(d) in a manner similar to a state. See 40 CFR part 49, subpart A. Tribes may, but are not required to, seek approval for treatment in a manner similar to a state for purposes of developing a Tribal Implementation Plan (TIP) implementing an EG. If a tribe obtains approval and submits a TIP, the EPA will use similar timelines and criteria and will follow similar procedures as those for state plans. Tribes that choose to develop plans will have the same flexibilities available to states in this process. The TAR authorizes tribes to submit CAA programs; however, it does not require tribes to develop CAA programs. Tribes may implement those programs, or even portions of programs, that are most relevant to the air quality needs of tribes. If a tribe does not seek and obtain the authority from the EPA to establish a TIP, the EPA has the authority to establish a Federal CAA section 111(d) plan for designated facilities that are located in areas of Indian country. A Federal plan would apply to all designated facilities located in the areas of Indian country covered by the Federal plan unless and until the EPA approves a TIP applicable to those facilities.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/adoption-and-submittal-state-plans-designated-facilities-40-cfr.* Following publication in the *Federal Register*, the EPA will post the *Federal Register* version of the proposal and key technical documents at this same website.

A memorandum showing the rule edits that would be necessary to incorporate the changes to 40 CFR part 60 subpart Ba proposed in this action is available in the docket (Docket ID No. EPA-HQ-OAR-2021-0527). Following signature by the EPA Administrator, the EPA also will post a copy of this document to *https://www.epa.gov/stationary-sources-air-pollution/adoption-and-submittal-state-plans-designated-facilities-40-cfr.*

II. Background

A. What is the statutory authority for this action?

The statutory authority for this action is provided by sections 301 and 111 of the CAA (42 U.S.C. 7411 and 7601). Section 301 of the CAA contains general provisions for the administration of the CAA. As described further in the next section, CAA section 111 requires the EPA to establish emission standards for certain stationary sources that, in the Administrator's judgment, "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA section 111(b) provides the EPA's authority to regulate new and modified sources, while CAA section 111(d) directs the EPA to "prescribe regulations which shall establish a procedure" for states to establish standards for existing sources of certain air pollutants to which a standard of performance would apply if such existing source were a new source. The EPA addresses its obligation under CAA section 111(d) to establish a procedure for states to submit plans both through its promulgation of the general implementing regulations addressed by this action as well as through promulgation of EGs for specific source categories.

B. What is the background for this action?

Clean Air Act section 111(d) governs the establishment of standards of performance for existing stationary sources. CAA section 111(d) directs the EPA to "prescribe regulations which shall establish a procedure similar to that provided by [CAA section 110]" for states to submit state plans to establish standards of performance for existing sources of certain air pollutants to which a standard of performance would apply if such an existing source were a new source under

CAA section 111(b). Therefore, an existing source can only be regulated under CAA section 111(d) if it belongs to a source category that is regulated under CAA section 111(b). The EPA's implementing regulations use the term "designated facility" to identify those existing sources. See 40 CFR 60.21a(b).

CAA section 111(b)(1)(A) requires that a source category be included on the list for regulation if, "in [the EPA Administrator's] judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Once a source category is listed, CAA section 111(b)(1)(B) requires that the EPA propose and then promulgate "standards of performance" for new sources in such source category. CAA section 111(a)(1) defines a "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 which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." This provision requires the EPA to determine both the best system of emission reduction (BSER) for the regulated source category and the degree of emission limitation achievable through application of the BSER. The EPA must then, under CAA section 111(b)(1)(B), promulgate standards of performance for new sources that reflect that level of stringency.

Once the EPA promulgates standards of performance for new sources within a particular source category, the EPA is required, in certain circumstances, to regulate emissions from designated (existing) facilities in that same source category.[1] Under CAA section 111(d), the Agency has, to date, issued EGs regulating five pollutants from six source categories that remain

[1] In accordance with CAA section 111(d), states are required to submit plans pursuant to these regulations to establish standards of performance for existing sources for any air pollutant: (1) the emission of which is subject to a Federal New Source Performance Standard; and (2) which is neither a pollutant regulated under CAA section 108(a) (*i.e.*, criteria air pollutants such as ground-level ozone and particulate matter, and their precursors, like volatile organic compound) or a hazardous air pollutant regulated [from the same source category] under CAA section 112. See also definition of "designated pollutant" in 40 CFR 60.21a(a).

in effect (*i.e.*, sulfuric acid plants (acid mist), phosphate fertilizer plants (fluorides), primary aluminum plants (fluorides), kraft pulp plants (total reduced sulfur), municipal solid waste landfills (landfill gases)), and fossil-fuel fired electric generating units (carbon dioxide). See ''Phosphate Fertilizer Plants; Final Guideline Document Availability,'' 42 FR 12022 (March 1, 1977); ''Standards of Performance for New Stationary Sources; Emission Guideline for Sulfuric Acid Mist,'' 42 FR 55796 (October 18, 1977); ''Kraft Pulp Mills, Notice of Availability of Final Guideline Document,'' 44 FR 29828 (May 22, 1979); ''Primary Aluminum Plants; Availability of Final Guideline Document,'' 45 FR 26294 (April 17, 1980); "Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills," 81 FR 59276 (August 29, 2016); "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," 84 FR 32520 (July 8, 2019) (Affordable Clean Energy (ACE) Rule).[2,3] On November 15, 2021, the EPA proposed EGs to regulate greenhouse gas emissions (in the form of methane limitations) from sources in the oil and natural gas industry. 86 FR 63110. In addition, the Agency has regulated additional pollutants for solid waste incineration units under CAA section 129 in accordance with CAA section 111(d)[4].

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[2] The EPA has also issued several EGs that have subsequently been repealed or vacated by the courts. The EPA regulated mercury from coal-fired electric power plants in a 2005 rule that was vacated by the D.C. Circuit, "Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Final Rule," 70 FR 28606 (May 18, 2005) (Clean Air Mercury Rule), vacated by *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). The EPA also issued CAA section 111(d) EGs regulating GHG emissions from fossil fuel-fired electric power plants in a 2015 rule "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule," 80 FR 64662 (October 23, 2015) (Clean Power Plan). The EPA subsequently repealed and replaced the 2015 rule with the ACE Rule.

[3] The ACE Rule was initially vacated by *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021). The Supreme Court subsequently reversed and remanded the D.C. Circuit's opinion, *West Virginia v. EPA*, 142 S. Ct. 2587 (June 30, 2022). On October 27, 2022, the D.C. Circuit amended its judgement and recalled the partial mandate vacating the ACE Rule, effectively reinstating ACE. Order, *ALA v. EPA*, No. 19-1140, ECF No. 1970895.

[4] CAA Section 129 directs the EPA Administrator to develop regulations under CAA section 111 limiting emissions of nine air pollutants from four categories of solid waste incineration units.

The mechanism for regulating designated facilities under CAA section 111(d) differs from the mechanism for regulating new facilities under CAA section 111(b). Pursuant CAA section 111(b), the EPA promulgates standards of performance that are directly applicable to new, modified, and reconstructed facilities in a specified source category. In contrast, CAA section 111(d) operates together with CAA section 111(a)(1) to collectively establish and define roles and responsibilities for both the EPA and the states in the regulation of designated facilities. Under the regulatory framework for designated facilities, states are authorized to establish standards of performance. However, such standards of performance must reflect the degree of emission limitation achievable through the application of the BSER[5] that the EPA has determined for the designated facilities in the source category. As with standards of performance under CAA section 111(b), the requirement for the EPA to determine the BSER derives from the definition of "standard of performance" under CAA section 111(a)(1). Further, CAA section 111(d)(1) requires the EPA's regulations to permit states, in applying a standard of performance to particular sources, to take into account the source's remaining useful life and other factors, a process addressed in more detail in section III.E of this preamble.

The EPA addresses its obligation under CAA section 111(d) to establish a procedure for states to submit plans both through its promulgation of general implementing regulations for section 111(d) as well as through promulgation of EGs for specific source categories. While CAA section 111(d)(1) authorizes states to develop state plans that establish standards of performance and provides states with certain discretion in determining the appropriate standards, CAA section 111(d)(2) provides the EPA a specific oversight role with respect to such state plans. This latter provision authorizes the EPA to prescribe a Federal plan for a state "in cases where the state fails to submit a satisfactory plan." The states must therefore submit their plans to the EPA, and the EPA must evaluate each state plan to determine whether each plan is

[5] In this proposal, the EPA is also referring to "the degree of emission limitation achievable through application of the BSER" as the presumptive level of stringency.

"satisfactory." If a state fails to submit a plan or the EPA determines that a state plan is not satisfactory, CAA section 111(d)(2) gives the EPA the "same authority" to prescribe a Federal plan in such instances as it has to promulgate a Federal Implementation Plan (FIP) under CAA section 110(c).

In 1975, the EPA issued the first general implementing regulations to prescribe the process for the adoption and submittal of state plans for designated facilities under CAA section 111(d) (codified at 40 CFR part 60, subpart B (subpart B)). 40 FR 53340 (November 17, 1975). Responding to the direction to "establish a procedure similar to that provided by" CAA section 110, in promulgating subpart B the EPA aligned the timing requirements for state and Federal plans under CAA section 111(d) with the then-applicable timeframes for State Implementation Plans (SIPs) and FIPs prescribed in CAA section 110, as established by the 1970 CAA Amendments. The implementing regulations were not significantly revised after their original promulgation in 1975[6] until 2019, when the EPA promulgated a new set of implementing regulations codified at 40 CFR part 60, subpart Ba. 84 FR 32520 (July 8, 2019) (subpart Ba).

In promulgating subpart Ba in 2019, the EPA intended to update and modernize the implementing regulations to align the procedures for CAA section 111(d) state and Federal plans with CAA amendments made after subpart B was first promulgated in 1975. Notably, subpart B did not align either with CAA section 111(d) as amended by Congress in 1977 or with the timelines in CAA section 110 as amended by Congress in 1990. The EPA therefore considered it appropriate to update the implementing regulations for CAA section 111(d) to mirror changes to CAA section 110, given that section 111(d)(1) of the CAA directs the EPA to "prescribe regulations which shall establish a procedure similar to that provided by section 110" of the CAA for states to submit plans to the EPA. In promulgating subpart Ba, the EPA directly aligned the timing requirements for CAA section 111(d) state and Federal plans (40 CFR 60.23a(a)(1)

[6] In 2012, the EPA revised several provisions of subpart B, mainly to include allowance systems as a form of an emission standard. 77 FR 9303 (February 16, 2012).

and 60.27a(c), respectively) with the timing requirements for SIPs and FIPs under CAA section 110 (see CAA section 110(a)(1) and 110(c)(1), respectively).

In promulgating subpart Ba, the EPA also added the definition of "standard of performance" (40 CFR 60.21a(f)) (defined under subpart B as "emission standard" (40 CFR 60.21(f))) and the remaining useful life provision (40 CFR 60.24a(e)) (referred under subpart B as the variance provision (40 CFR 60.24(d))). The EPA further added required minimum administrative and technical criteria for inclusion by state plans (40 CFR 60.27a(g)). Applying these criteria, the EPA determines whether a state plan or portion of a plan submitted is complete (referred to as a completeness review). Once a state plan or portion of a plan is determined to be complete, the EPA will approve or disapprove the plan or portions of the plan. For details on the EPA's rationale for the promulgation of these provisions see 84 FR 32520 (July 8, 2019).

Subpart Ba is applicable to any final EG published or ongoing after July 8, 2019. However, in this action, the EPA is proposing to amend subpart Ba to be applicable only to any final EG published after July 8, 2019 (see section III.G.2.i of this preamble). This includes, if finalized, the proposed EGs to regulate greenhouse gas emissions from sources in the oil and natural gas industry, to the extent the final EG does not contain EG-specific requirements superseding subpart Ba. 86 FR 63110, November 15, 2021. Subpart B (pre-2019) continues to apply to EGs promulgated prior to July 8, 2019, and to EGs issued pursuant to CAA section 129.

In January 2021, the D.C. Circuit vacated several provisions of subpart Ba, all of which relate to timelines for state plans and Federal plans. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 991. (D.C. Cir. 2021) (*ALA*).[7] In this vacatur, the court identified several flaws in the EPA's rationale for extending CAA section 111(d) state and Federal plan timelines. First, the court found that the

[7] The Supreme Court subsequently reversed and remanded the D.C. Circuit's opinion. *West Virginia v. EPA*, 142 S.Ct. 2587 (June 30, 2022). However, no Petitioner sought certiorari on, and the *West Virginia* decision did not implicate, the D.C. Circuit's vacatur of portions of subpart Ba. *See* Amended Judgment, *ALA v. EPA*, No. 19-1140 (D.C. Cir. October 27, 2022), ECF No. 1970898 (ordering that petitions for review challenging the timing portion of implementing regulations be granted).

EPA erred in adopting the timelines for SIPs and FIPs in CAA section 110 without meaningfully addressing the differences in the scale of effort required for development and evaluation of CAA section 110 SIPs, as compared with the scale of effort needed for CAA section 111(d) state plans. *Id.* at 992-93. The court also concluded that in promulgating the timelines in subpart Ba, the EPA failed to justify why the shorter deadlines under subpart B were unworkable. *Id.* at 993. Further, the court held that the EPA was required to consider the effect of its subpart Ba timelines on public health and welfare, consistent with the statutory purpose of CAA section 111(d). In the court's view, the EPA's "complete failure to say anything at all about the public health and welfare implications of the extended timeframes" meant that the EPA failed to consider an important aspect of the problem. *Id.* at 992 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*. 463 U.S. 29, 43 (1983)).

Based on these reasons, the court vacated the timeline for state plan submissions after publication of a final EG (40 CFR 60.23a(a)(1)), the EPA's deadline for taking action on state plan submissions (40 CFR 60.27a(b)), the EPA's deadline for promulgating a Federal plan (40 CFR 60.27a(c)), and the timeline associated with requirements for increments of progress (40 CFR 60.24a(d)). Because of the vacatur, subpart Ba currently does not provide generally applicable timelines for state plan submissions, the deadline for the EPA's promulgation of a Federal plan, and the timeline associated with requirements for increments of progress. The EPA notes that while it is proposing generally applicable timelines for the implementing regulations, a particular EG may include its own specific timelines. 40 CFR 60.20a(a)(1).

III. What actions are we proposing?

The EPA is proposing several revisions to subpart Ba both to address the vacatur of the timing provisions by the D.C. Circuit in *ALA*, and to further improve the state and Federal plan development and implementation process. In response to the *ALA* decision, this action proposes timeframes for (1) state plan submittal, (2) the EPA's action on state plan submissions, (3) the

EPA's promulgation of a Federal plan, and (4) requirements to establish increments of progress (see section III.A of this preamble). This action further proposes to revise the timeframe for the EPA's determination of completeness on a state plan submission. Additionally, the EPA is proposing to revise the conditions under which the EPA must promulgate a Federal plan in instances where a state has not submitted a complete plan (see section III.B of this preamble).

The EPA is also proposing to enhance requirements for reasonable notice and opportunity for public participation in subpart Ba to require that states, as part of the state plan development or revision process, undertake outreach and meaningful engagement with a broad range of pertinent stakeholders. Pertinent stakeholders include communities most affected by and vulnerable to the impacts of the plan or plan revision (see section III.C of this preamble). Increased vulnerability may be attributable, among other reasons, to both an accumulation of negative and lack of positive environmental, health, economic, or social conditions within these populations or communities.

To improve flexibility and efficiency in the submission, review, approval, and implementation of state plans, the EPA is proposing to include the following regulatory mechanisms in subpart Ba, all of which currently exist under CAA section 110: (1) partial approval/disapproval, (2) conditional approval, (3) allowance for parallel processing, (4) a mechanism for the EPA to call for plan revisions, and (5) an error correction mechanism (see section III.D).

The EPA is also proposing revisions to properly implement the remaining useful life and other factors (RULOF) provision of the statute. These revisions are intended to provide clarity and consistency for states and the EPA in considering RULOF when applying standards of performance to individual sources, while still fulfilling the statutory purpose of CAA section 111(d) (see sections III.E of this preamble). The EPA is also proposing to require electronic submissions of state plans (see section III.F of this preamble).

Finally, this action proposes clarifying amendments to the subpart Ba definition of standard of performance and proposes to amend the Agency's interpretation of CAA section 111(d) with respect to permissible compliance (see section III.G of this preamble). In particular, the EPA is proposing to determine that, under appropriate circumstances, the EPA may approve state plans that authorize sources to meet their emission limits in the aggregate, such as through standards that permit compliance via trading or averaging. In doing so, the EPA is also proposing to conclude that CAA section 111 does not limit the BSER to controls that can be applied at and to the source. The EPA is also proposing several additional minor clarifications or revisions as described in section III.G of this preamble.

The EPA recognizes that, under certain circumstances, some provisions of the implementing regulations may not fit the needs of a specific EG. Therefore, the implementing regulations provide that each EG may include specific implementing provisions in addition to or that supersede the requirements of subpart Ba. 40 CFR 60.20a(a)(1). The EPA will address unusual circumstances or facts that are not accommodated by the general provisions of subpart Ba through a specific EG as the time and processes needed for development and adoption of state plans to implement the EG may be affected by unusual characteristics of a source category. An example of an EG where the EPA is proposing to supersede certain requirements of subpart Ba to address the specific facts and circumstances of the source category (including to diverge from some of the general requirements proposed in this action) is the proposed EGs to regulate greenhouse gas emissions (in the form of methane limitations) from sources in the oil and natural gas industry.[8]

The EPA notes that the remaining provisions in subpart Ba were not affected by the *ALA* decision and remain legally effective. This includes 40 CFR 60.20a(a), which makes subpart Ba

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[8] For example, see supplemental notice of proposed rulemaking titled "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review," where, due to the size and variety of emission sources in the oil and gas sector, the EPA has proposed to permit states 18 months to submit state plans rather than the general 15 months proposed here.

applicable to any final EG published after July 8, 2019. 40 CFR 60.20a(a). Therefore, the revisions to subpart Ba proposed in this action, if finalized, would apply to any EG published after July 8, 2019. The EPA is not soliciting comment on this action as it applies to any specific EG or source category. The EPA is only soliciting comment on the proposed changes to subpart Ba as specifically described in this preamble. The EPA is not reopening any other provisions of subpart Ba not addressed by these proposed changes. The EPA will only consider comments that pertain to the topics discussed in this action.

A. Revised Implementing Timelines

As described in section II.A. of this preamble above, the subpart Ba timing requirements were vacated by the D.C. Circuit in the *ALA* decision. These vacated timing requirements are: the timeline for state plan submissions, the timeline for the EPA to act on a state plan, the timeline for the EPA to promulgate a Federal plan, and the timeline that dictates when state plans must include increments of progress. These timelines are all critical to ensuring that the emission reductions anticipated by the EPA in an EG become federally enforceable measures and are timely implemented by the designated facilities. The EPA is proposing revised timelines for these key aspects of implementation that both appropriately accommodate the process required by states and the EPA to develop and evaluate plans to effectuate the EG and are consistent with the objective of CAA section 111(d) to ensure that designated facilities control emissions of pollutants that the EPA has determined may be reasonably anticipated to endanger public health or welfare. These timelines will be applicable to any final EG published after July 8, 2019, including those currently proposed to regulate greenhouse gas emissions (in the form of methane limitations) from sources in the oil and natural gas industry, to the extent the final EG does not contain EG-specific requirements superseding subpart Ba. 86 FR 63110, November 15, 2021.

As described in greater detail above in section II of this preamble, the D.C. Circuit's vacatur of the extended timelines in subpart Ba was based both on the EPA's failure to substantiate the necessity for the additional time at each step of the administrative process, and

the EPA's failure to address how those extended implementation timelines would impact public health and welfare. Accordingly, the EPA has evaluated these factors and is proposing timelines, as described in the following sections, based on the minimum administrative time reasonably necessary for each step in the implementation process, thus minimizing impacts on public health and welfare while accommodating the time needed for states to develop an effective plan. This approach addresses both aspects of the *ALA* decision because the EPA and states will take no longer than necessary to develop and adopt plans that impose requirements consistent with the overall objectives of CAA section 111(d).

The EPA is proposing the following timelines to replace those vacated in *ALA*, as discussed in further detail in this preamble: 15 months for state plan submissions after publication of a final EG; 12 months for the EPA to take final action on a state plan after submission; 12 months for the EPA to promulgate a Federal plan either after the state plan deadline if a state has failed to submit a complete plan, or after the EPA's disapproval of a state plan submission; and, requiring state plans to include increments of progress if the plan requires final compliance with standards of performance later than 16 months after the plan submission deadline. A summary of the timelines is shown in Table 1.

TABLE 1— PROPOSED SUBPART Ba TIMELINES COMPARED WITH THOSE VACATED FROM SUBPART Ba AND WITH THOSE FROM SUBPART B.

Process Step	2022 Subpart Ba Proposal	Subpart Ba (2019) Vacated Timelines	Subpart B (1975)
State Plan submittal after effective date of EG	15 months	36 months	9 months
State Plan completeness determination	2 months after State Plan submission	6 months after State Plan submission	N/A
State Plan evaluation	12 months after completeness	12 months after completeness	4 months after State Plan submittal deadline
EPA Federal Plan promulgation	12 months after failure to submit or disapproval	24 months after finding of failure to	6 months after State Plan submittal deadline

		submit or disapproval	
Requirements for Increments of Progress after submittal deadline	If compliance is > 16 months	If compliance is > 24 months	If compliance is > 12 months

The EPA acknowledges these deadlines are not identical to those for SIPs under CAA section 110. This is consistent with the requirement of CAA section 111(d) that the EPA to promulgate a procedure "similar" to that of CAA section 110, rather than an identical procedure. This is also consistent with the *ALA* decision, which requires the EPA to "engage meaningfully with the different scale" of CAA section 111(d) and 110 plans. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 993 (D.C. Cir. 2021). Accordingly, the EPA evaluated each step of the implementation process to independently determine the appropriate duration of time to accomplish the given step as part of the overall process, and the timelines proposed in these implementing regulations represent what the EPA has determined will be necessary for the implementation of most EGs. An EG for a typical source category or pollutant, for which the proposed timelines would be appropriate, might include: an inventory of designated facilities; a well-defined BSER and presumptive level of stringency so that states need to do little analytical work to establish standards of performance; an EPA-provided model rule; and state plan requirements that do not significantly deviate from these general implementing regulations.

The EPA recognizes that there may be EGs for pollutants or source categories that require exceptions or accommodations to these general requirements. Examples of circumstances that may require an exception could include EGs that require states to perform extensive engineering and/or economic analyses for their plan; EGs with an exceptional need to expedite implementation (*e.g.,* immediate impact for health and welfare impacts); EGs that apply to an extraordinary number of designated facilities; or EGs that are novel and/or unusually complex. For situations like these, 40 CFR 60.20a(a)(1) provides that an EG may supersede any aspect of the implementing regulations, including the implementation timelines. It is within the EPA's

discretion to determine whether a proposed change in implementation time may be justified within an individual EG based on these or other appropriate factors. For EGs that supersede implementation timelines, the EPA is proposing to require that the EPA both provide a justification for the differing timelines and address how the change in timeline will impact health and welfare. The EPA is not in this action seeking comment on whether to supersede the presumptive subpart Ba timelines for any particular EG.

1. State Plan Submission Timelines

This section discusses the EPA's proposal for the duration of time states will have to submit plans to the EPA following the publication of a final EG. Under CAA section 111(d), it is first the EPA's responsibility to establish a BSER and a presumptive level of stringency via a promulgated EG. It is then each state's obligation to submit a plan to the EPA which establishes standards of performance for each designated facility. The EPA is proposing to require that each state adopt and submit to the Administrator, within 15 months after publication of a final EG, a plan for the control of the designated pollutant(s) to which the EG applies.

The implementing regulations promulgated under subpart B currently provide that states have 9 months to submit a state plan after publication of a final EG. 40 CFR 60.23(a)(1). In 2019, the EPA promulgated subpart Ba and provided 3 years for states to submit plans, consistent with the timelines provided for submission of SIPs pursuant to CAA section 110(a)(1). This 3-year timeframe was vacated in the *ALA* decision, and thus currently there is no applicable deadline for state plan submissions required under EGs subject to subpart Ba. In evaluating the appropriate timeline for plan submittal to replace the vacated provision, the EPA reviewed steps that states need to carry out to develop, adopt, and submit a state plan to the EPA, and its history in implementing EGs under the timing provisions of subpart B. The EPA further evaluated statutory deadlines, contents, and processes for relatively comparable state plans under CAA section 129, and attainment planning SIPs pursuant CAA sections 189(a)(2)(B) and 189(b)(2))

for the 2012 National Ambient Air Quality Standards (NAAQS) for fine particulate matter (PM2.5). 78 FR 3085 (January 15, 2013).

In developing a CAA section 111(d) state plan, a state must consider multiple components in meeting applicable requirements. Subpart Ba specifies the elements that must be included in a state plan submission (see 40 CFR 60.24a, 60.25a, 60.26a) and certain processes that a state plan must undergo in adopting and submitting a plan (see 40 CFR 60.23a). In addition to the requirements of these implementing regulations, there are also state-specific processes applicable to the development and adoption of a state plan. In particular, the component that the EPA expects to take the most time and have the most variability from state to state is the administrative process (*e.g.,* through legislative processes, regulation, or permits) that establishes standards of performance. State rulemaking usually involves several phases, including providing notice that the agency is considering adopting the rule; taking public comment; and approving or adopting the final rule. The final process required to formally adopt a rule is different in many states.[9] Considering this variability, 15 months should adequately accommodate the differences in state processes necessary for the development of a state plan that meets applicable requirements. The EPA evaluated data from previously implemented EGs, and the statutory deadlines and data from analogous programs (*i.e.,* CAA sections 129 and 189), as described below, to help inform this proposed 15-month timeline. The EPA solicits comment on whether the proposed 15-month timeline adequately accommodates state-level administrative processes in developing and adopting plans without substantially or unnecessarily delaying emission reductions that are protective of public health or welfare (Comment A1-1).

As previously described, subpart B provides 9 months for states to submit plans after publication of a final EG. The EPA's review of state's timeliness for submitting CAA section

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[9] In many states, the agency must submit its rule to a particular independent commission or the legislature for review and approval before the rule is finally adopted. Generally, adopted rules are filed with a state entity, such as the Secretary of State, and eventually published in a register and placed into the state's administrative code. State law establishes when an adopted rule is effective.

111(d) plans under the 9-month timeline indicates that most states either did not submit plans or submitted plans that were substantially late.[10] We note that the plans submitted under subpart B were not subject to the additional requirements the EPA is proposing for meaningful engagement and consideration of RULOF, respectively described in sections III.C and III.E of this preamble. For these reasons, the EPA finds that 9 months is not a suitable amount of time for most states to adequately develop a plan for an EG.

To help inform what is an appropriate proposal for the state plan submission deadline, the EPA also reviewed CAA section 129's statutory deadline and requirements for state plans, and the timeliness and responsiveness of states under CAA section 129 EGs. CAA section 129 references CAA section 111(d) in many instances, creating considerable overlap in the functionality of the programs. Notably, existing solid waste incineration units are subject to the requirements of both CAA sections 129 and 111(d). CAA section 129(b)(1). The processes for CAA sections 111(d) and 129 are very similar in that states are required to submit plans to implement and enforce the EPA's EGs. However, there are some key distinctions between the two programs, most notably that CAA section 129(b)(2) specifies that state plans be submitted no later than 1 year from the promulgation of a corresponding EG, whereas the statute does not specify a particular timeline for state plan submissions under CAA section 111(d) and is instead governed by the EPA's implementing regulations (*i.e.,* subparts B and Ba). Moreover, CAA section 129 plans are required by statute to be at least as protective as the EPA's EGs. However, CAA section 111(d) permits states to take into account remaining useful life and other factors, which suggests that the development of a CAA section 111(d) plan could involve more complicated analyses than a CAA section 129 plan (see section III.E for more information on RULOF provisions). The contrast between the CAA section 129 plans and CAA section 111(d)

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[10] The EPA reviewed the information available in 40 CFR part 62. The supporting information reviewed is available at Docket ID No. EPA-HQ-OAR-2021-0527. Part 62 codifies the Administrator's approval and disapproval of state plans for the control of pollutants and facilities under CAA section 111(d), and under CAA section 129 as applicable, and the Administrator's promulgation of such plans or portions of plans thereof.

plans suggests that in determining the timeframe for CAA section 111(d) plan submissions the EPA should provide for a longer timeframe than the 1-year timeframe the statute provides under CAA section 129.

The EPA found that a considerable number of states have not made required state plan submissions in response to a CAA section 129 EG. In instances where states submitted CAA section 129 plans, a significant number of states submitted plans between 14 to 17 months after the promulgated EG.[11] This suggests that states will typically need more than 1 year to develop a state plan to implement an EG, particularly for a program that permits more source-specific analysis than under CAA section 129 as CAA section 111(d) does.

In the 2019 promulgation of subpart Ba, the EPA mirrored CAA section 110 by giving states 3 years to submit plans. As previously described, the court partly faulted the EPA for adopting the CAA section 110 timelines without accounting for the differences in scale and scope between CAA section 110 and 111(d) plans. The EPA has now more closely evaluated the statutory deadlines and requirements in the CAA section 110 implementation context to determine what is feasible for a CAA section 111(d) state plan submission timeline. The EPA specifically focused on statutory SIP submission deadline and requirements in the context of attainment plans for the 2012 PM2.5 NAAQS under CAA section 189. CAA section 189(a)(2)(B) requires states to submit attainment planning SIPs within 18 months after an area is designated nonattainment. The 2012 PM2.5 NAAQS attainment plans were, in most cases, more complicated for states to develop when compared to a typical plan under CAA sections 111(d). For example, attainment plans require states to determine how to control a variety of sources, based on extensive modeling and analyses, in order to bring a nonattainment area into attainment of the NAAQS by a specified attainment date. Under CAA section 111(d), it is clear which

[11] The EPA reviewed the information available in 40 CFR part 62. The supporting information reviewed is available at Docket ID No. EPA-HQ-OAR-2021-0527. Part 62 codifies the Administrator's approval and disapproval of state plans for the control of pollutants and facilities under CAA section 111(d), and under CAA section 129 as applicable.

designated facilities must be subject to a state plan, and the standards of performance for these sources must reflect the level of stringency determined by the EG unless a state chooses to account for RULOF. As further described in section III.E of this preamble, accounting for RULOF is expected to be a limited, rather than broadly used, exception. The difference in complexity between the CAA section 189 plan requirements and the CAA section 111(d) plan requirements suggests that a timeline shorter than 18 months is more appropriate for development of CAA 111(d) state plans submissions.

Thus, based on the EPA's evaluation of states' responsiveness to previous CAA section 111(d) EGs, the contrast between the development of CAA section 111(d) plans and CAA section 129 plans, and the relative difference in complexity between attainment plan requirements under CAA section 189 and CAA section 111(d) state plan requirements, the EPA is proposing to require that state plans under CAA section 111(d) be due 15 months after publication of a final EG. This proposed timeframe is substantially shorter than the 3 years deadline vacated by the D.C. Circuit; however, the timeline should provide states adequate time to adopt and submit approvable plans without extending the timing such that significant adverse impacts to health and welfare are likely to occur from the foregone emission reductions during the state planning process. Allowing states sufficient time to develop feasible implementation plans for their designated facilities that adequately address public health and environmental objectives also ultimately helps ensure more timely implementation of an EG, and therefore achievement in actual emission reductions, than would an unattainable deadline that may result in the failure of states to submit plans and requiring the development and implementation a of Federal plan. The EPA is soliciting comment on the proposed state plan submission timeline and the analysis supporting the EPA's proposed determination regarding the amount of time reasonably necessary for plan development and submission. The EPA is also soliciting comment on whether the EPA should consider any other factors in setting this timeline (Comment A1-2).

The EPA recognizes that the court, in *ALA,* faulted the Agency for failing to consider the potential impacts to public health and welfare associated with extending planning deadlines. The EPA does not interpret the court's direction to require a quantitative measure of impact, but rather consideration of the importance of the public health and welfare goals when determining appropriate deadlines for implementation of regulations under CAA section 111(d). Because 15 months is the generally expeditious period of time in which the EPA finds that most states can create and submit a plan per the EPA's corresponding emission guidelines that is both comprehensive and legally sound, it follows that the EPA has appropriately considered the potential impacts to public health and welfare associated with this extension of time by providing no more time than the states reasonably need to ensure a plan is comprehensive and timely. To the extent the EPA considers deviating from these expeditious timeframes in promulgating an EG in the future, the EPA will consider the public health and welfare impacts associated with the change, consistent with the court's direction in *ALA*, particularly where the EPA is providing additional time for state plan development.

While the EPA is proposing and soliciting comment on all components of the implementation timelines proposed in this action, the EPA is especially interested in comments regarding the proposed state plan submission timeline. The EPA acknowledges that there are a number of individual state-specific factors that can affect the amount of time required for the development and submission of state plans. The EPA is therefore soliciting specific comments on details of state plan development and adoption processes and how those should inform a state plan submission deadline, including whether there are reasons why the EPA should consider either a longer or a shorter timeframe (Comment A1-3).

As discussed in section III.C of this preamble below, the EPA is proposing to revise subpart Ba to include a requirement for states to undertake outreach and meaningful engagement with pertinent stakeholders as part of the state plan development process. The EPA solicits comment on how much, if any, time this additional engagement will take in the state plan

development process (Comment A1-4). The EPA recognizes that the time needed to conduct meaningful engagement will be highly dependent on the number and location of designated facilities addressed by an EG, as well as on the type of health or environmental impacts of the associated emissions. If stakeholder and public involvement required by the proposed amendments does not generate a large number of specific and unique comments, data, or other considerations, then the level of effort states will employ to review them will be lower in comparison to when meaningful engagement comments are voluminous. Also, to the extent that states already employ significant engagement with pertinent stakeholders, the proposed meaningful engagement amendments would not result in additional costs, while other states that do not have engagement procedures already in place may be required to increase their level of effort to engage with pertinent stakeholders.

In section III.E of this preamble, the EPA is also proposing revisions to the RULOF provision. These proposed revisions would clarify the procedures for considering RULOF by establishing a robust analytical framework that would require a state to provide a sufficient justification when applying a standard of performance that is less stringent than the EPA's presumptive level of stringency, thereby allowing the EPA to readily determine if the state's plan is satisfactory and therefore approvable. The proposed state plan submission timeline of 15 months should adequately provide time for states to conduct the analyses required by this provision; however, the EPA is soliciting comment on whether states will need additional time in the plan development to account for instances where RULOF is considered. The EPA is specifically requesting comment on how much additional time might be required for this consideration and how that additional time fits within the entire process of state plan development (Comment A1-5).

The proposed state plan submission timeline should be generally achievable by states. The EPA notes it is obligated to promulgate a Federal plan for states that have not submitted a plan by the submission deadline. Once the obligation to promulgate a Federal plan is triggered, it

can only be tolled by the EPA's approval of a state plan. If a Federal plan is promulgated, a state may still submit a plan to replace the Federal plan. A Federal plan under CAA section 111(d) is a means to ensure timely implementation of EGs, and a state may choose to accept a Federal plan for their sources rather than submit a state plan. While the EPA encourages states to timely submit plans for EGs, there are no sanctions associated with failing to timely submit an approvable plan or with the implementation of a Federal plan.[12]

2. Timeline for the EPA to Determine Completeness of State Plans

Once a state plan has been submitted to the EPA, the EPA reviews the plan for "completeness" to determine whether the plan includes certain elements necessary to ensure that the EPA can substantively evaluate the plan. The EPA determines completeness by comparing the state's submission against the administrative and technical criteria specified in subpart Ba to see if the submission contains the elements specified therein (see 40 CFR 60.27a(g) for completeness criteria). In the 2019 promulgation of subpart Ba, the timeline provided for the EPA to determine the completeness of a state plan mirrored the language in CAA section 110(k)(1)(B): "Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria [for completeness] have been met."

After a state plan is complete through either an affirmative determination or by operation of law, the EPA will act on the state plan submission through notice-and-comment rulemaking. The proposed timeline for the EPA to act on a state plan submission can be found in section III.A.3 of this preamble below.

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[12] CAA section 179 provides that sanctions should be applied in states that fail to submit approvable SIPs for certain specified requirements for NAAQS implementation. The EPA has not promulgated any similar sanctions provisions governing the submission of state plans pursuant to section 111(d).

If a state plan submission does not contain the elements required by the completeness criteria, the EPA would find that the state has failed to submit a complete plan and notify the state through a letter. The determination of incompleteness treats the state as if the state has made no submission at all. The determination that a submission is incomplete and that the state has failed to submit a plan is ministerial in nature and requires no exercise of discretion or judgment on the Agency's part.

As part of the EPA's overall effort to set implementation timelines under CAA section 111(d) that are as expeditious as possible, the EPA is proposing to revise the timing element of the completeness review in subpart Ba. In light of the ministerial nature of the completeness determination, the EPA proposes to provide a maximum of 60 days from receipt of the state plan submission for the EPA to make a determination of completeness. The EPA is additionally proposing to provide that any state plan or plan revision submitted to the EPA that has not received a completeness determination within 60 days of receipt, shall on that date be deemed, by operation of law, to meet the completeness criteria, which will trigger the EPA's obligation to take substantive action on the state plan. Sixty days provides an expeditious timeframe for the EPA to evaluate state plans for completeness and to notify the states of the determination. Because the EPA may be required to evaluate up to 50 state plans during this period, in addition to plans submitted by territories, tribes and local governments, the EPA does not find that this timeframe could reasonably be shortened any further. The EPA is soliciting comment on the appropriateness of providing a 60-day timeline for the EPA to conclude its completeness review (Comment A2-1).

The EPA notes that, because the EPA's finding of a plan as incomplete puts a state in the legal status of not having submitted a plan at all, the status and potential delinquency of a state's plan is evaluated against the state plan submission deadline. If the EPA determines that a plan is incomplete and this occurs at some point after the state plan submission deadline, the EPA treats the state as if the state has made no submission at all and thus the EPA's authority to provide a

Federal plan is triggered. If a state submits a plan prior to the state plan submission deadline and the EPA also makes a determination that the plan is incomplete prior to the state plan submission deadline, the EPA will treat the state as if the state has made no submission at all, but this determination does not yet trigger further action by the EPA. Instead, because the state still has an opportunity to submit a complete plan before the state plan submission deadline, the EPA's authority to promulgate a Federal plan is only triggered if the state fails to timely submit a new plan to replace the incomplete plan by the state plan deadline.

3. Timeline for the EPA's Action on State Plans

After a state plan has been determined to be complete or is deemed complete by operation of law, the EPA must evaluate and determine whether the plan or plan revision is approvable, in part or in whole (see section III.D.1 of this preamble for discussion on proposed partial plan approvals). In order to determine whether it is appropriate to approve or disapprove a state plan, CAA section 111(d) provides that the EPA must evaluate whether the plan is "satisfactory," that is, whether the components of the plan meet all the requirements of the statute, these implementing regulations, and the corresponding EG, through a proposed notice-and-comment rulemaking. After the EPA reviews comments on the proposed action, the EPA will finalize its action to approve or disapprove the plan. If the EPA approves a state plan, the standards of performance and other components of that state plan become federally enforceable. If the state plan is disapproved, in part or in whole, the EPA is obligated to promulgate a Federal plan for designated facilities within that state (see section III.A.4 of this preamble below for the EPA's timeline to publish a Federal plan).

Subpart B requires the EPA to take action on applicable state plans (*e.g.*, approve or disapprove) within 4 months after the date required for submission. 40 CFR 60.27(b). In the development of subpart Ba, the EPA contended that 4 months was an inadequate time to review and take action on state plans and therefore instead provided a deadline of 12 months for final action on a state plan (mirroring the maximum time permitted under CAA section 110(k)(1)(2)

for the EPA's action on complete SIPs). 84 FR 32520, July 8, 2019. In the *ALA* decision, the D.C. Circuit vacated this revised timeline in subpart Ba on the basis that the EPA did not adequately justify the extended timeframes and did not consider the public health and welfare impacts of extending the implementation times. As is discussed below, the EPA has now closely evaluated the process, steps, and timeframes for the EPA to substantively review and act upon each state plan submission through a public notice-and-comment rulemaking process. After considering the time anticipated to be necessary for generally expeditious EPA action on state plans, the EPA is again proposing to require that it must take final action on a state plan or plan revision submission within 12 months after a plan is determined to be complete or becomes complete by operation of law.[13]

The first step of the EPA acting on a plan is that once a state plan submittal has been deemed "complete" under 40 CFR 60.27a(g), an intra-agency workgroup reviews the plan components to determine whether they conform to the applicable regulatory requirements. The workgroup may require a broad range of expertise in legal, technical, and policy areas, potentially including attorneys, engineers, scientists, economists, air monitoring experts, health and welfare analysts, and/or policy analysts from across a variety of EPA programs. After review and coordination, the workgroup then develops recommendations for approval or disapproval of each plan component and presents them to Agency decision-makers for review. Once the Agency completes its internal decision-making process, the workgroup proceeds to prepare a written notice of proposed rulemaking. The notice of proposed rulemaking contains the EPA's legal, policy, and technical bases for its proposed action on a state plan submission, which must be thoroughly developed and explained in writing to provide clear and concise information and reasoning to support the public in understanding the Agency's decision and the justification for that decision, and so that the public may provide informed comments on the proposal. The EPA

[13] The deadlines for the EPA action under subpart Ba would apply to any state plan submission regardless of when it is submitted.

may further develop technical support documents as record support for the proposal. The draft proposed rulemaking and any record support then undergo a multi-layered review process across EPA offices and levels of management before being processed for signature. The process to evaluate the state plan, draft a proposed action on a CAA section 111(d) state plan, and get the proposed action edited, reviewed, and signed typically requires a minimum of between 6 to 8 months to complete. The signed notice of proposed rulemaking is then submitted for publication in the *Federal Register*, which may require several weeks processing prior to publication.

The publication of the proposed rulemaking triggers the start of a public comment period of at least 30 days with possible extension if requested. Because of the types of sources and pollutants regulated under CAA section 111(d), the EPA reasonably anticipates that many of its proposed actions on state plans will garner significant public interest from individuals, industry, states, and environmental and public health advocates. After completion of the comment period, the EPA then reviews all comments and determines whether, based on any comment, it should alter its proposed action or further augment the legal, policy, and technical rationales supporting that action. Comments received on a proposed action may include technical information that was not available to the EPA at the time of proposal. In the event technical data are received as part of comments on the proposed action, the EPA would then be required to review the new data and evaluate whether and how it should affect the EPA's proposed conclusions regarding the state plan. If a substantive comment is raised that merits reconsideration of the EPA's proposed action, the EPA may determine that it is necessary to revise and repropose its action on the state plan or it may go to the state for more information to help the Agency determine how to proceed.

Once this review of comments is complete, the workgroup drafts and presents updated recommendations for action for internal review and consideration by Agency decision-makers. Once the Agency completes its internal decision-making process, the workgroup then drafts a notice of final rulemaking on the plan submission, which includes responses to comments, any necessary record support, and may also include final regulatory text. The draft final action is then

reviewed by senior management and other interested EPA offices within the Agency prior to signature of the final rulemaking approving or disapproving, in whole or in part, a state plan. It is reasonable to permit at least 4 to 7 months for evaluation of the comments received, any necessary technical analysis, decision-making, and drafting and review of the final action.

The duration of each step in this deliberative process varies. The amount of time the EPA needs to review a state plan submission and the time it needs to finalize a notice of proposed rulemaking, depends in part on the plan's complexity and the nature of the technical, policy, and legal issues that it implicates. For example, a state plan submission that invokes RULOF for several designated facilities is more complex and time consuming to review than a plan that simply establishes standards of performance reflecting the presumptive level of stringency for all sources. Similarly, the amount of time needed to respond to comments and issue a final rulemaking depends in part on the number and type of comments received on the EPA's proposed rulemaking. Additionally, the EPA reasonably anticipates that it will be required to review multiple plan submissions at a given time, and these phases of review for a given plan are impacted by the EPA's review of other state plan submissions, as the EPA will need to assure its review across multiple plans and regional offices is consistent from a legal, technical, and policy perspective.

The EPA finds 12 months is a reasonably expeditious timeframe to accommodate the EPA to act on a state plan or plan revision submission and the considerations described above, while ensuring that an EG is expeditiously implemented. The process and steps described above highlight the fact that it would be unreasonable, if not impossible, to accomplish all of the steps in a legally and technically sound manner within a 4-month timeframe as required under subpart B. Particularly, the EPA's proposed action has to be open for public comment for at least 30 days, therefore the 4-month timeline provided in subpart B only gives the EPA 3 months to do the substantive work of both the proposed and final actions, including evaluating the state plan submission, drafting preamble notices, responding to comments, and developing record support

at both the proposed and final action stages. A 12-month timeframe after a plan is determined to be complete more reasonably accommodates the process and steps described above.[14]

The EPA recognizes that the court in *ALA* faulted the Agency for failing to consider the potential impacts to public health and welfare associated with extending planning deadlines. The EPA does not interpret the court's direction to require a quantitative measure of impact, but rather consideration of the importance of the public health and welfare goals of CAA section 111(d) when determining appropriate deadlines. Because 12 months is an adequate period of time in which the EPA can both expeditiously act on a plan submission *and* ensure that its action is technically and legally sound, it follows that the EPA has appropriately considered the potential impacts to public health and welfare associated with this extension of time by providing no more time than the EPA reasonably needs to ensure a plan submission contains appropriate and protective emission reduction measures. If the EPA does not have adequate time to evaluate a state plan submission, its ability to ensure the plan contains appropriate measures to satisfactorily implement and enforce the standards necessary to comply with the EG may be compromised, which would in turn compromise the EPA's ability to ensure that the public health and welfare objectives of the EG are satisfied.

The EPA is soliciting comment regarding its rationale for proposing a 12-month timeframe for the EPA's action on a complete state plan or plan revision submission, including whether there are reasons that the EPA should consider either a longer or a shorter timeframe (Comment A3-1). The EPA notes that this timeframe for the EPA's action on complete state plan submission would apply to any final EG regulating greenhouse gas emissions from sources in the oil and natural gas industry. 86 FR 63110, November 15, 2021.

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[14] While the EPA would have the discretion to act on a state's submission more quickly than 12 months where specific circumstances allow (*e.g.*, where there are no public comments on the proposed action), the EPA does not believe that it would be reasonably possible to act significantly more quickly than 12 months in most cases.

4. Timeline for the EPA to Promulgate a Federal Plan

CAA section 111(d)(2) provides that the EPA has the same authority to prescribe a Federal plan for a state that fails to submit a satisfactory plan as it does for promulgating a FIP under CAA section 110(c). Accordingly, the EPA's obligation to promulgate a Federal plan is triggered in three situations: where a state does not submit a plan by the plan submission deadline; where the EPA determines a portion or all of a state plan submission did not meet the completeness criteria and the time period for state plan submission has elapsed and, therefore, the state is treated as having not submitted a required plan; and where the EPA disapproves a state's plan. 40 CFR 20.27a(c). In the first two instances of triggering a Federal plan, the EPA is proposing to require that its timeline to promulgate a Federal plan for those states would begin the day after the state plan is due.[15] In the third instance, the EPA is proposing to require that its timeline to promulgate a Federal plan would begin at its disapproval of the state's plan.

The original implementing regulations in subpart B provided the EPA with 6 months to promulgate a Federal plan once its obligation to do so was triggered. 40 CFR 60.27(d). When the EPA promulgated subpart Ba in 2019, it concluded that this amount of time was insufficient and consequently extended the time for the EPA to promulgate a Federal plan to 24 months, mirroring the timeframe permitted for promulgation of a FIP under CAA section 110. 84 FR 32520, July 8, 2019. In the *ALA* decision, the D.C. Circuit vacated this revised timeline in subpart Ba on the basis that the EPA did not adequately justify the extended timeframe and did not consider the health and welfare impacts of extending the implementation timeframe.

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[15] The EPA has discretion to address its obligation to promulgate a Federal plan in a variety of ways for states that do not have an approved state plan. For example the EPA may initially promulgate a single Federal plan that applies to all appropriate states and then update that Federal plan as necessary to accommodate the inclusion of other states that trigger the need for a Federal plan in the future (*e.g.* a Federal plan that applies to states that fail to submit a plan can be updated to include applicability for states that later have a plan disapproved); or the EPA may promulgate Federal plans each time its authority to do so has been triggered (*e.g.* the EPA will promulgate a Federal plan for all states that fail to submit a plan and another Federal plan for all states that have their plan disapproved).

In this action, the EPA reevaluated the process, steps, and timeframes for the EPA to promulgate a Federal plan through a public notice-and-comment rulemaking process.[16] Based on this assessment as presented below, the EPA is proposing to require that it promulgate a Federal plan within 12 months after either the date required for submission of a state plan (for states that fail to submit a complete plan) or the date the EPA disapproves a state's plan. The EPA is also proposing a change to the trigger for the EPA's obligation and timeline to provide a Federal plan for states that do not submit a timely plan and that discussion is found in section III.B of this preamble.

A Federal plan must meet the requirements of CAA section 111(d) and therefore contain the same components as a state plan, namely standards of performance for designated facilities and measures that provide for the implementation and enforcement of such standards. CAA section 111(d)(2)(B) also explicitly requires the EPA to consider RULOF in promulgating a standard of performance under a Federal plan. Additionally, Federal plans containing standards of performance are subject to the procedural requirements of CAA section 307(d), such as the requirements for proposed rulemaking and opportunity for public hearing. CAA section 307(d)(1)(C). 40 CFR 60.27a implements these various statutory requirements and contains

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[16] The EPA reviewed the information available in 40 CFR part 62 associated with the promulgation of Federal Plans under CAA section 111(d). The supporting information reviewed is available at Docket ID No. EPA-HQ-OAR-2021-0527. Under the provisions of CAA section 111 and subpart B, the EPA promulgated Federal plans for municipal solid waste landfills EG 40 CFR part 60 subpart Cc (Federal plan codified at 40 CFR part 62 subpart GGG) and municipal solid waste landfills EG 40 CFR part 60 subpart Cf (Federal plan codified at 40 CFR part 62 subpart OOO).

The EPA also reviewed information available in 40 CFR part 62 associated with the promulgation of Federal Plans under CAA 129. The supporting information reviewed is available at Docket ID No. EPA-HQ-OAR-2021-0527. Under the provisions of CAA sections 111 and 129 and subpart B, the EPA has promulgated Federal plans for large municipal waste combustors EG 40 CFR part 60 subpart Cb (Federal plan codified at 40 CFR part 62 subpart FFF); small municipal waste combustors EG 40 CFR part 60 subpart BBBB (Federal plan codified at 40 CFR part 62 subpart JJJ); hospital, medical, and infectious waste incinerators EG 40 CFR part 60 subpart Ce (Federal plan codified at 40 CFR part 62 subpart HHH); commercial and industrial solid waste incinerators EG 40 CFR part 60 subpart DDDD (Federal plan codified at 40 CFR part 62 subpart III) and sewage sludge incinerators EG 40 CFR part 60 subpart MMMM (Federal plan codified at 40 CFR part 62 subpart LLL).

general regulatory requirements for the EPA's promulgation of a Federal plan. To meet these applicable requirements, the process, and steps for the EPA to promulgate a Federal plan is described in the following paragraphs.

Once the EPA's obligation to promulgate a Federal plan is triggered, the EPA establishes an intra-agency workgroup to develop the rulemaking action to address that obligation. The workgroup first develops recommendations for the components of the Federal plan to be proposed, and on legal, policy, and technical rationales that support the recommendations. These components are identified in subpart Ba as well as in the corresponding EG and are generally the same as those required for a state plan. One of these fundamental components is the determination of standards of performance for designated facilities. Based on the requirements of CAA sections 111(d) and 111(a)(1), these standards must generally reflect the presumptive level of stringency the EPA determines as part of the EG. Depending on the form of the presumptive level of stringency given in a particular EG, the EPA may need to do additional work to calculate standards of performance that reflect this level of stringency. For example, an EG may provide the presumptive level of stringency as numerical emission rates, which a Federal plan could adopt as the requisite standards of performance. However, if an EG provides the presumptive level of stringency in a form other than numerical standards, the EPA may need to calculate appropriate standards of performance in the context of a Federal plan. Further, CAA section 111(d)(2) requires the EPA to consider RULOF for sources in the source category in setting standards of performance as part of a Federal plan which requires the EPA, at least, to identify and evaluate the remaining useful lives, among other appropriate factors, and accordingly establish corresponding standards of performance. The development of a Federal plan may also necessitate a determination of appropriate testing, monitoring, reporting, and recordkeeping requirements to implement the standard if the EG does not provide presumptive requirements to address those aspects of implementation. Further, the EPA will need to consider associated compliance times for designated facilities in circumstances where they are not provided by an

EG, or in cases where a standard of performance is adjusted to account for RULOF. There may also be situations where increments of progress are warranted, and the EPA will correspondingly need to identify and determine the appropriate increments of progress. The development of a Federal plan with these components will also include the element of meaningful engagement, as being proposed in this action and further described in section III.C of this preamble.

Once the recommendations for each component are developed, the workgroup presents them to Agency decision-makers for review. After the Agency completes its internal decision-making process, the workgroup proceeds to prepare a written notice of proposed rulemaking. The proposal must include the following elements, as required by CAA section 307(d)(3): the factual data on which the proposed rulemaking is based; the methodology used in obtaining the data and in analyzing the data; and the major legal interpretations and policy considerations underlying the proposed rulemaking. These elements must be thoroughly developed and explained in the proposal to meaningfully provide the public adequate information to comment on the proposal. The EPA may further develop a technical support document as record support for the proposal.

The draft proposed rulemaking and any record support are then reviewed by the relevant EPA offices and processed for signature. The signed notice of proposed rulemaking is then submitted for publication in the *Federal Register*. To develop the proposed Federal plan rulemaking, establish unique standards for RULOF, allow review of materials by senior management, go through an interagency review process and have the package signed typically requires a minimum of between six to 9 months to complete.

As previously noted, the EPA's promulgation of a Federal plan is subject to the requirements of CAA section 307(d), which includes providing the public with an opportunity to provide an oral presentation at a public hearing. CAA section 307(d)(5). The Federal Register Act requires the EPA to provide sufficient notice of a public hearing, which (in the absence of a different time specifically prescribed by the relevant Act of Congress) is satisfied if the EPA

provides at least 15 days' notice. 44 U.S.C. 1508. Section 307(d)(5) of the CAA further provides that the EPA must keep the record for the proposed action open for public comment for 30 days after any public hearing for the submission of rebuttal and supplemental information. Because the EPA reasonably expects to provide notice of the required public hearing at the time its proposed action is published in the *Federal Register*, in order to allow for both a 15-day notice of the public hearing and a subsequent 30-day comment period on the open record, the EPA should allow for at least 45 days for public comment on the notice of proposed action.

As with state plans, because of the types of sources and pollutants regulated under CAA section 111(d), the EPA reasonably anticipates that many of its proposed actions on a Federal plan will garner significant public interest from individuals, industry, states, and environmental and public health advocates. After completion of the comment period, the EPA then reviews all comments and determines whether, based on any comment, it should alter any components of the proposed Federal plan, or further augment the legal, policy, and technical rationales supporting that proposed action. Additionally, in the EPA's experience, comments may include technical information that was not in front of the Agency at the time of proposal. In the event technical data are received as part of comments on the proposed action, the EPA would then be required to review the new data and evaluate whether and how it should affect the EPA's proposed Federal plan. If a substantive comment is raised that merits reconsideration of any component in the proposed Federal plan, the EPA would need to repropose the plan.

Once this review of comments is complete, the workgroup drafts and presents updated recommendations for internal review and decision making. Once the Agency completes its internal decision-making process, the workgroup then drafts a notice of final rulemaking, which includes responses to comments and any necessary record support, and final regulatory text as the Federal plan directly regulates certain designated facilities. The draft final action is then reviewed by relevant offices within the Agency prior to signature of the final rule promulgating the Federal plan. The EPA typically anticipates that the process of reviewing comments received,

making corresponding changes to the rulemaking, and promulgating the final Federal plan to be between 4 and 8 months.

The duration of each step in this deliberative process varies. The amount of time the EPA needs to develop, propose, and finalize a Federal plan depends in part of the plan's complexity and the nature of the technical, policy, and legal issues that it implicates. For example, some states needing a Federal plan may have thousands, if not hundreds of thousands, of designated facilities that the EPA will need to establish standards of performance and implementation measures for, while other Federal plans may be significantly smaller in scale. Similarly, the amount of time needed to respond to comments and issue a final rule depends in part on the number and type of comments received on the EPA's proposed rulemaking. Additionally, the EPA reasonably anticipates that it may need to promulgate a Federal plan for multiple states at a given time, which can amplify the amount of time and work needed.

The EPA has determined that 12 months reasonably accommodates the amount of time that the EPA needs to undertake the process, steps, and the considerations described above, while ensuring that an EG is expeditiously implemented. The process and steps described above that must be taken in promulgating a Federal plan highlight the fact that it would be unreasonable, if not an impossibility, to accomplish all of the steps in a legally and technically sound manner within a 6-month timeframe as required under subpart B.[17]

As with the EPA's proposal for its timeline to act on state plan submissions, 12 months is generally the period of time in which the EPA can both expeditiously act on a plan submission *and* ensure it is technically and legally sound. Therefore, this extension of time considers potential impacts to public health and welfare by giving the EPA a reasonably expeditious timeframe to promulgate a Federal plan that contains appropriate and protective emission

[17] While the EPA would have the discretion to promulgate a Federal plan more quickly than 12 months where specific circumstances allow (*e.g.*, where there are no public comments on the proposed action), the EPA does not believe that would be reasonably possible to act significantly more quickly than 12 months in most cases.

reduction measures. This is especially true in the context of a Federal plan, where there is otherwise no state plan in place that is adequately protective of public health and welfare. If the EPA does not have adequate time to promulgate a Federal plan, its ability to ensure the plan contains appropriate measures to satisfactorily implement and enforce the standards necessary to comply with the EG may be compromised, which would in turn compromise the EPA's ability to ensure that the public health and welfare objectives of the EG are satisfied.

The EPA is soliciting comment regarding its rationale for proposing a 12-month timeframe for the EPA's promulgation of a Federal plan, including whether there are reasons why the EPA should consider either a longer or a shorter timeframe (Comment A4-1). The EPA notes that this timeframe for the EPA's promulgation of a Federal plan would apply to any final EG regulating greenhouse gas emissions from sources in the oil and natural gas industry. 86 FR 63110, November 15, 2021.

The EPA notes that a state may submit a plan to replace a Federal plan, even after the state plan submission deadline. However, once the EPA's authority and obligation to promulgate a Federal plan has been triggered, the act of a state submitting a plan alone does not abrogate the EPA's authority or obligatory timeline to promulgate a Federal plan. Only an approved state plan can supplant an already promulgated Federal plan or abrogate the EPA's responsibility to timely promulgate a Federal plan. Where a state submits a late plan, that may have the practical effect of concurrent timelines for promulgation of the Federal plan and the EPA's action on that late state plan; the EPA is not obligated to act on a late state plan prior to promulgating a Federal plan (40 CFR 60.27a(d)).

5. Timeline for Increments of Progress

As part of the EPA's statutory responsibility to determine the BSER and related presumptive level of stringency, the EPA also determines in an EG "the time within which compliance with standards of performance can be achieved." 40 CFR 60.22a(b)(5). As previously described, while it is the states' responsibility to provide standards of performance,

those standards of performance must reflect the presumptive level of stringency, unless a state chooses to account for RULOF for a particular source. Accordingly, states also have an obligation to include the corresponding compliance schedules as part of their state plans.[18] Specifically the standards and compliance schedules "shall be no less stringent than the corresponding emission guideline" (40 CFR 60.24a(c)) unless the RULOF provision is invoked (see section III.E of this preamble for discussion of proposed revisions to this provision). These compliance schedules are an integral component to realizing the emission reductions required by an EG to address the health and welfare impacts from a relevant source category and pollutant. The sooner that the standards are implemented, the more quickly the public health and welfare benefits of those reductions can be achieved.

In the 1975 subpart B implementing regulations for CAA section 111(d), the EPA required that any compliance schedule extending more than 12 months from the date required for submittal of the plan must include legally enforceable increments of progress to achieve compliance for each designated facility or category of facilities. 40 CFR 60.24(e). In the 2019 promulgation of subpart Ba, the EPA modified this requirement to apply to any compliance schedule extending more than 24 months from the state plan submittal deadline to align with the extended timeline for state plan submissions. As discussed previously, the D.C. Circuit vacated the extended implementation timelines in subpart Ba, including the timeline for increments of progress.[19]

Both subparts B and Ba require that standards of performance are implemented in a timely manner through provisions that require legally enforceable increments of progress if the compliance schedule extends beyond a specific time frame.[20] In the definition of "increments of

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[18] "Each plan shall include standards of performance and compliance schedules." 40 CFR 60.24a(a)

[19] Petitioners did not challenge, and the court did not vacate, the substantive requirement for increments of progress.

[20] Subpart Ba at 40 CFR 60.24a(a) and 60.24a(d), and subpart B at 40 CFR 60.24(a) and 60.24(e)(1).

progress", the EPA provides requirements for legally enforceable increments of progress that states must include as a part of the standard of performance for a given designated facility.[21] The use of increments of progress will vary from EG to EG based on the source category and type of regulation. There are also situations that may lead the EPA to limit or prohibit the use of increments of progress in a particular EG based on the nature of the BSER and presumptive standards, for example if the overall implementation timeline for a particular EG is relatively short. The EPA may alternatively provide presumptive increments of progress for a specific EG. The EPA will address these circumstances as appropriate in a specific EG, if the general requirements for increments of progress of subpart Ba need to be superseded.

Because increments of progress are important to expeditiously addressing public health and welfare, the EPA is proposing to generally require that any compliance schedule extending more than 16 months from the date required for submittal of a state plan must include legally enforceable increments of progress to achieve compliance for each designated facility or category of facilities. This proposed time period accounts for the 60-day completeness review following a state plan submittal and the 12-month period for the state plan review proposed in this action, and further provides a 2-month buffer for the case of a state plan approval by the EPA (approval occurring 14 months after the plan submission deadline) before increments of progress are required. While this time period of 16 months is longer than the 12 months previously provided under subpart B, it is significantly shorter than the 24 months vacated from subpart Ba. Additionally, the time between a state plan approval and the initiation of requirements for increments of progress is less than both the 8 months previously provided by

[21] 40 CFR 60.21a(h) defines "increments of progress" and requires states to include the following steps: (1) Submittal of a final control plan for the designated facility to the appropriate air pollution control agency; (2) Awarding of contracts for emission control systems or for process modifications, or issuance of orders for the purchase of component parts to accomplish emission control or process modification; (3) Initiation of on-site construction or installation of emission control equipment or process change; (4) Completion of on-site construction or installation of emission control equipment or process change; and (5) Final compliance.

subpart B and less than the 6-month buffer provided by the vacated subpart Ba timeline. Providing a 2-month buffer after approval of plans but before the increments of progress are required allows for the owner or operators of designated facilities reasonable time to initiate actions associated with the increments of progress before these are required.

This proposed timeline for increments of progress will ensure standards of performance are implemented as expeditiously as possible so that the intended emission reductions are achieved, and the public health and welfare are protected. The EPA solicits comment on the proposed requirement that CAA 111(d) plans include increments of progress for any compliance schedule extending more than 16 months from the state plan submission deadline, and whether a different timeline for increments of progress should be considered. If another timeline is considered, the EPA requests specific comments on why this other timeline is more appropriate than 16 months (Comment A5-1).

B. Federal Plan Authority and Timeline upon Failure to Submit a Plan

In subpart Ba, the EPA incorporated language from CAA sections 110(c)(1)(A) and 110(k)(1)(B) addressing the circumstances which trigger the EPA's authority for promulgating a Federal plan. Specifically, the EPA adopted language at 40 CFR 60.27a(c)(1), which requires the EPA to promulgate a Federal plan after it finds that a state fails to submit a required plan or plan revision or finds that the plan or plan revision does not satisfy the completeness criteria under 40 CFR 60.27a(g). The EPA is currently required, under 40 CFR 60.27a(g), to determine whether completeness criteria have been met no later than 6 months after the date by which a state is required to submit a plan. These current provisions under subpart Ba taken together mean that, no later than 6 months after the state plan submission deadline has passed, the EPA must make a determination (often referred to as a "finding of failure to submit") as to whether any states have

failed to submit a plan that meets the completeness criteria, and such finding is what triggers the EPA's obligation and timeline to promulgate a Federal plan.[22]

The EPA acknowledges that in the CAA section 110 context, it has not always timely met its obligation to issue a finding of failure to submit, which further delays the timing for when the EPA promulgates a FIP to achieve the necessary emission reductions. Accordingly, the EPA finds that there is an opportunity to streamline the process in the CAA section 111(d) context to ensure that the emission reductions anticipated by the promulgation of the EG are realized in a timely way through the promulgation of any necessary Federal plan. Rather than requiring the EPA to affirmatively issue a finding of failure to submit before the EPA's obligation to issue a Federal plan is triggered, the EPA is proposing that the EPA's timeline for issuing a Federal plan for any state that has not submitted a complete plan will be triggered by the state plan submission deadline, consistent with the requirements under subpart B. In this proposed change for subpart Ba, the EPA's obligation and timeline to promulgate a Federal plan starts the day after state plans are due. Accordingly, based on the proposed timeline described in section III.A.4 of this preamble above, the EPA is proposing that the EPA will have 12 months from the state plan deadline to promulgate a Federal plan for states that do not submit a plan. Note, the EPA is also proposing 12 months to promulgate a Federal plan for states whose plans are disapproved, but in those instances the EPA's obligation and timeline to provide a Federal plan is based on its disapproval of a state plan.

As part of this proposal to trigger the timeline for the EPA to promulgate a Federal plan based on the state plan submission date instead of from when the EPA makes a finding of failure to submit, the EPA considered the value and role of such finding. A finding of failure to submit was intended to serve three purposes under subpart Ba, consistent with its purpose under CAA

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[22] Note that this procedure does not address circumstances when the EPA promulgates a Federal plan for states whose plan is disapproved. In these circumstances, the EPA's disapproval itself is the conclusion that the state plan submission was unsatisfactory and triggers the EPA's obligation and timeline to promulgate a Federal plan.

section 110: to notify the public of the status of state plan submissions (*i.e.,* providing transparency to the process); to notify states that the EPA has not received a plan; and to formally start the clock for the EPA to promulgate a Federal plan. While these concepts are generally an important part of the overall Federal plan development and implementation process, the EPA finds that in the CAA section 111(d) context there is minimal value in coupling the notification aspects of a finding of failure with the initiation of the clock for the EPA to promulgate a Federal plan. These aspects are not inextricably linked to one another in that nothing necessitates a finding of failure to submit as the vehicle that triggers the timeline for the EPA to promulgate a Federal plan. By decoupling the timeline from the finding of failure to submit, the timeline to provide a Federal plan by the EPA can be triggered without the interim step and potential lag associated with a finding of failure to submit. By removing this interim process for promulgating a Federal plan, the EPA will be required to promulgate the Federal plan more expeditiously, and, in turn, overall implementation of the corresponding EG will be timelier. This proposal is also consistent with the spirit of the *ALA* decision, where the D.C. Circuit emphasized the need for implementation timelines that consider potential impacts on public health and welfare. By expeditiously and efficiently promulgating a Federal plan and by removing an interim step of a finding of failure, the EPA is further addressing the potential impacts of implementation times on health and welfare.

The EPA notes that its proposal does not affect the EPA's obligation under CAA section 110(c) to promulgate a FIP within 2 years of making a finding that a state has failed to submit a complete SIP. In the case of the CAA section 110, the obligation for the EPA to first make a finding of failure to submit is derived from the statute, whereas nothing in CAA section 111(d) obligates the EPA to make such a finding before promulgating a Federal plan. CAA section 111(d)(1) directs the EPA to promulgate a process "similar" to that of CAA section 110, rather than a process that is identical. Therefore, the fact that a finding of failure to submit serves as the legal predicate for the EPA's obligation to issue a FIP under CAA section 110 does not mean

that the EPA is also required to treat such a finding as a legal predicate for a Federal plan under CAA section 111(d). While a finding of failure to submit has value in notifying states and the public of the status of plans, the EPA does not find that it is integral to the timing of promulgating a Federal plan for states that do not submit plans. The EPA is therefore proposing to retain the requirement to make a finding of failure to submit, though this finding will no longer be considered the event that triggers the timeline for the EPA's issuance of a Federal plan. The EPA will make this finding by publishing a notice in the *Federal Register* anytime between the deadline for state plan submissions and the EPA's promulgation of a Federal plan. The EPA is soliciting comment on its proposal to link the authority and timeline for a Federal plan to the state plan deadline rather than to a finding of failure to submit (Comment B-1).

This proposed change is consistent with the requirements that applied to the EPA's issuance of CAA section 111(d) plans under subpart B before subpart Ba was issued in 2019. In subpart B (*i.e.,* the previously applicable implementing regulations for CAA section 111(d) EGs and currently applicable implementing regulations for CAA section 129 EGs), the EPA's obligation to promulgate a Federal plan is triggered by the state plan deadline. The EPA is proposing to revise 40 CFR 60.27a(c)(1) to adopt similar language from subpart B under 40 CFR 60.27(d). The EPA is seeking comment on its proposal to link the authority and timeline for a Federal plan to the state plan deadline particularly based on experiences with the application of subpart B's Federal plan authority to CAA section 129 implementation and other Federal plans issued under CAA section 111(d) where the authority and timeline for a Federal plan are based on the state plan deadline (Comment B-2).

C. Requirement for Outreach and Meaningful Engagement

The fundamental purpose of CAA section 111 is to reduce emissions from certain stationary sources that cause or significantly contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. Therefore, a key consideration in the state's

development of a state plan, in any significant plan revision[23], and in the EPA's development of a Federal plan pursuant to an EG promulgated under CAA section 111(d) is the potential impact of the proposed plan requirements on public health and welfare. A robust and meaningful public participation process during plan development is critical to ensuring that the full range of these impacts are understood and considered.

States often rely primarily on public hearings as the foundation of their public engagement in their state plan development process because a public hearing is explicitly required pursuant to the applicable regulations. The existing provisions in subpart Ba (40 CFR 60.23a(c) through (f)) detail the public participation requirements associated with the development of a state plan. Per these implementing regulations, states must provide certain notice of, and conduct one or more public hearings on, their state plan before such plan is adopted and submitted to the EPA for review and action.[24] However, robust and meaningful public involvement in the development of a plan should sometimes go beyond the minimum requirement to hold a public hearing depending on who is most affected by and vulnerable to the impacts being addressed by the plan. The CAA section 111(d) program addresses existing facilities; however, communities may not have had a voice when the source was originally constructed, or previous outreach may have focused largely on engaging the sources and the industry itself.

In this action, the EPA is proposing to strengthen the public participation provisions in subpart Ba by requiring meaningful engagement with pertinent stakeholders in the state's development of a state plan, in any significant plan revision, and in the EPA's development of a Federal plan pursuant to an EG promulgated under CAA section 111(d). In particular, the EPA is proposing to add the requirement for meaningful engagement with pertinent stakeholders into 40

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[23] Significant state plan revision includes, but is not limited to, any revision to standards of performance or to measures that provide for the implementation or enforcement of such standards.

[24] States may cancel a public hearing if no request for one is received during the required notification period. 40 CFR 60.23a(e).

CFR 60.23a(i) and 60.27a(f) and to define meaningful engagement and pertinent stakeholders in 40 CFR 60.21a.

The EPA is proposing to define meaningful engagement as it applies to this subpart as "… timely engagement with pertinent stakeholder representation in the plan development or plan revision process. Such engagement must not be disproportionate in favor of certain stakeholders. It must include the development of public participation strategies to overcome linguistic, cultural, institutional, geographic, and other barriers to participation to assure pertinent stakeholder representation, recognizing that diverse constituencies may be present within any particular stakeholder community. It must include early outreach, sharing information, and soliciting input on the state plan." The EPA is proposing to define that pertinent stakeholders "… include, but are not limited to, industry, small businesses, and communities most affected by and vulnerable to the impacts of the plan or plan revision."

In particular, pertinent stakeholders include those who are most affected by and vulnerable to the health or environmental impacts of pollution from the designated facilities addressed by the plan or plan revision. Increased vulnerability of communities may be attributable to, among other reasons, both an accumulation of negative and lack of positive environmental, health, economic, or social conditions within these populations or communities. Examples of such communities have historically included, but are not limited to, communities of color (often referred to as "minority" communities), low-income communities, Tribal and indigenous populations, and communities in the United States that potentially experience disproportionate health or environmental harms and risks as a result of greater vulnerability to environmental hazards. Sensitive populations (*e.g.* infants and children, pregnant women, the elderly, individuals with disabilities exacerbated by environmental hazards) may also be most affected by and vulnerable to the impacts of the plan or plan revision depending on the pollutants or other factors addressed by an EG. An example of greater vulnerability to environmental hazards more generally is populations lacking the resources and representation to combat the

effects of climate change, which could include populations exposed to greater drought or flooding, or damaged crops, food, and water supplies.

Tribal communities or communities in neighboring states may also be impacted by a state plan and, if so, should be identified as pertinent stakeholders. In addition, to the extent a designated facility would qualify for a less stringent standard through consideration of RULOF as described in section III.E.8 of this preamble, the state, must identify and engage with the communities most affected by and vulnerable to the health and environmental impacts from the designated facility considered in a state plan for RULOF provisions. The EPA expects that the inclusion of the definitions of meaningful engagement and pertinent stakeholders in subpart Ba provide the States specificity around the meaningful engagement requirement while allowing for flexibility in the implementation of such requirements.

The requirement for meaningful engagement will ensure that states share relevant information with and solicit input from pertinent stakeholders at critical junctures during plan development, which helps ensure that a plan is adequately addressing the potential impacts to public health and welfare that are the core concern of CAA section 111. Meaningful engagement can provide valuable information regarding health and welfare impacts experienced by the public (*e.g.,* reoccurring respiratory illness, missed work or school days due to illness associated with pollution, and other impacts) and allow regulatory authorities to explore additional options to improve public health and welfare. Because the CAA section 111(d) program is designed to address widely varying types of air pollutants that may have very different types of impacts, from highly localized to regional or global, ensuring fair and balanced participation among a broad set of pertinent stakeholders is critical. Early engagement is especially important for those stakeholders directly impacted by a particular state plan. In particular, the processes for meaningful engagement must allow for fair and balanced participation and must allow communities most affected by and vulnerable to the impacts of a plan an opportunity to be informed of and weigh in on that plan.

The EPA's authority for proposing to strengthen the public participation provisions by requiring meaningful engagement is provided by the authority of both CAA sections 111(d) and 301(a)(1). Under CAA section 111(d), one of the EPA's obligations is to promulgate a process "similar" to that of CAA section 110 under which states submit plans that implement emission reductions consistent with the BSER. CAA section 110(a)(1) requires states to adopt and submit SIPs after "reasonable notice and public hearings." The Act does not define what constitutes "reasonable notice and public hearings" under CAA section 110, and therefore the EPA may reasonably interpret this requirement in promulgating a process under which states submit state plans.

Subpart Ba currently includes certain requirements for notice and public hearing under 40 CFR 60.23a(c) through (f). The notice requirements include prominent advertisement to the public of the date, time, and place of the public hearing, 30 days prior to the date of such hearing, and the advertisement requirement may be satisfied through the internet. *Id.* at (d). A state may choose to cancel a public hearing if no request for one is received during the required notification period.

The EPA recognizes that a fundamental purpose of the Act's notice and public hearing requirements is for all affected members of the public, and not just a particular subset, to participate in pollution control planning processes that impact their health and welfare. [25] Accordingly, in order for a meaningful opportunity for the public to participate in hearings over CAA section 111(d) state plans, the notice of such hearings must be reasonably adequate in its ability to reach affected members of the public. Many states provide for notification of public engagement through the internet, however there cannot be a presumption that such notification is

[25] Consistent with this principle of providing reasonable notice under the CAA, under programs other than CAA section 111(d), the EPA similarly requires states to provide specific notice to an area affected by a particular proposed action. See e.g., 40 CFR 51.161(b)(1) requiring specific notice for an area affected by a state or local agency's analysis of the effect on air quality in the context of the New Source Review program; 40 CFR 51.102(d)(2), (4), and (5) requiring specific notice for an area affected by a CAA section 110 SIP submission.

adequate in reaching all those who are impacted by a CAA section 111(d) state plan and would benefit the most from participating in a public hearing. For example, data shows that as many as 30 million Americans do not have access to broadband infrastructure that delivers even minimally sufficient speeds, and that 25 percent of adults ages 65 and older report never going online.[26] Examples of prominent advertisement for a public hearing, in addition to notice through the internet, may include notice through newspapers, libraries, schools, hospitals, travel centers, community centers, places of worship, gas stations, convenience stores, casinos, smoke shops, Tribal Assistance for Needy Families offices, Indian Health Services, clinics, and/or other community health and social services as appropriate for the emission guideline addressed.

Given the public health and welfare objectives of CAA section 111(d) in regulating specific existing sources, it is reasonable to require meaningful engagement as part of the state plan development public participation process in order to further these objectives. Additionally, CAA section 301(a)(1) provides that the EPA is authorized to prescribe such regulations "as are necessary to carry out [its] functions under [the CAA]." The proposed meaningful engagement requirement would effectuate the EPA's function under CAA section 111(d) in prescribing a process under which states submit plans to implement the statutory directives of this section. Therefore, the EPA is proposing additional meaningful engagement requirements in subpart Ba to ensure that pertinent stakeholders have reasonable notice of relevant information and the opportunity to participate in the state plan development throughout the process.

During the state plan process, the EPA expects states to identify the pertinent stakeholders, utilizing additional guidance that will be provided by applicable EG. In particular, the EG will provide information on impacts of designated pollutant emissions that EPA expects

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[26] FACT SHEET: Biden-Harris Administration Mobilizes Resources to Connect Tribal Nations to Reliable, High-Speed Internet (December 22, 2021). https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/22/fact-sheet-biden-harris-administration-mobilizes-resources-to-connect-tribal-nations-to-reliable-high-speed-internet/; 7 percent of Americans don't use the internet. Who are they? Pew Research Center (April 2, 2021), https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/

will assist the states in the identification of their pertinent stakeholders. As part of efforts to ensure meaningful engagement, states will share information and solicit input on plan development and on any accompanying assessments. This engagement will help ensure that plans achieve the appropriate level of emission reductions, that communities most affected by and vulnerable to the health and environmental impacts from the designated facilities share in the benefits of the state plan, and that these communities are protected from being adversely impacted by the plan. In addition, the EPA recognizes that emissions from the designated facilities could cross state and/or Tribal borders, and therefore may affect communities in neighboring states or Tribal lands. The EPA is soliciting comment on the proposed definitions of pertinent stakeholders and of meaningful engagement (Comment C-1) and on the proposed meaningful engagement requirement (Comment C-2). The EPA is also soliciting comment on how meaningful engagement should apply to pertinent stakeholders inside and outside of the borders of the state that is developing a state plan, for example if a state should coordinate with the neighboring state and/or Tribes for outreach or directly contact the affected communities (Comment C-3).

To ensure that a robust and meaningful public engagement process occurs as the states develop their CAA section 111(d) plans, the EPA is also proposing to amend the requirements in 40 CFR 60.27a(g) to include as part of the completeness criteria the requirements for states to demonstrate in their plan submittal how they provided meaningful engagement with the pertinent stakeholders. The state would be required to provide, in their plan submittal, evidence of meaningful engagement, including a list of the pertinent stakeholders, a summary of engagement conducted, and a summary of the stakeholder input provided. The EPA would evaluate the states' demonstrations regarding meaningful public engagement as part of its completeness evaluation of a state plan submittal. If a state plan submission does not meet the required elements for notice and opportunity for public participation, including requirements for meaningful engagement, this may be grounds for the EPA to find the submission incomplete or

to disapprove the plan. The EPA is soliciting comment on the proposed inclusion of meaningful engagement in completeness criteria for state plan submission, (Comment C-4), as well as requesting examples or models of meaningful engagement performed by states, including best practices and challenges (Comment C-5).

The EPA further notes that the implementing regulations allow a state to request the approval of different state procedures for public participation pursuant 40 CFR 60.23a(h). The EPA proposes to require that such alternate state procedures do not supersede the meaningful engagement requirements, so that a state would still be required to comply with the meaningful participation requirements even if they apply for a different procedure than the other public notice and hearing requirements under 40 CFR 60.23a. The EPA is also proposing under 40 CFR 60.23a(i)(1) that states may apply for, and the EPA may approve, alternate meaningful engagement procedures if, in the judgement of the Administrator, the procedures, although different from the requirements of this subpart, in fact provide for adequate notice to and meaningful participation of the public. The EPA is soliciting comment on the distinction between request for approval of alternate state procedures to meet public notice and hearing requirements from those to meet meaningful engagement, and comment on the consideration of request for approval of alternate meaningful engagement procedures (Comment C-6).

D. Regulatory Mechanisms for State Plan Implementation

CAA section 111(d)(1) requires the EPA to promulgate regulations that establish a procedure "similar" to that provided by CAA section 110 for each state to "submit to [the EPA] a state plan which … establishes standards of performance … and … provides for the implementation and enforcement of such standards." The EPA reasonably interprets this provision, particularly the "similar" clause, as referring to all the procedural provisions provided in CAA section 110 which serve the same purposes of providing useful flexibilities for states' and EPA's actions that help ensure emission reductions are appropriately and timely implemented.

The EPA is proposing to incorporate five regulatory mechanisms as amendments to the implementing regulations under 40 CFR part 60, subpart Ba, governing the processes under which states submit plans and the EPA acts on those plans. The regulatory mechanisms that are being proposed in this action include: (1) partial approval and disapproval of state plans by the EPA; (2) conditional approval of state plans by the EPA; (3) parallel processing of plans by the EPA and states; (4) a mechanism for a state plan call by the EPA of previously approved state plan revisions; and (5) an error correction mechanism for the EPA to revise its prior action on a state plan.[27] These mechanisms update the implementing regulations to better align with the flexible procedural tools that Congress added into section 110 of the CAA in the 1990 Amendments. The EPA is proposing to adopt and incorporate the mechanisms into subpart Ba as the EPA has interpreted and applied them in the context of CAA section 110.

The interpretation that CAA section 111(d)(1) authorizes the EPA to adopt procedures "similar" to those under CAA section 110 for the overall state plan process, and not just the initial plan submission process, is strengthened by the provisions in CAA section 111(d)(2), which provide that the EPA has the "same" authority to enforce state plan requirements as it does for SIPs under CAA sections 113 and 114, and to promulgate a Federal plan for a state that has failed to submit a satisfactory plan, as under CAA section 110(c). This is because, read together, CAA section 111(d)(1) and (2) provide the set of essential procedural requirements for state and Federal plans that generally reflect the essential procedural requirements for SIPs and FIPs in section 110.[28] In that context, it is reasonable to read CAA section 111(d)(1) as authorizing the

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[27] These regulatory mechanisms were proposed to be added to subpart B in 2015 and largely received support from states, the public, and stakeholders, but were never finalized. 80 FR 64965 (October 23, 2015).

[28] Compare CAA section 111(d)(1) (requiring states to submit state plans that include specified types of measures that, in turn, meet minimum EPA requirements) and section 111(d)(2) (indicating that the EPA must review and approve or disapprove state plans, requiring the EPA to promulgate a Federal plan if the state does not submit a satisfactory plan, authorizing the EPA to enforce state plan measures) with section 110(a)(1)-(2) (requiring states to submit SIPs that include specified types of measures that in turn meet minimum EPA requirements), section 110(k) (requiring the EPA to review and approve or disapprove SIPs), section 110(c) (requiring

EPA to promulgate procedures for section 111(d) that are comparable to CAA section 110 procedures for the overall state plan process, which is associated with those requirements.

The availability of these five regulatory mechanisms would streamline the state plan review and approval process, accommodate variable state processes, facilitate cooperative federalism, further protect public health and welfare, and generally enhance the implementation of the CAA section 111(d) program. Together, these mechanisms provide greater flexibility, reduce processing time, and have proven to be very useful tools for the review and processing of CAA section 110 SIPs. The EPA is seeking comment from all stakeholders on the incorporation of these five proposed mechanisms into subpart Ba (Comment D-1).

1. Partial Approval and Disapproval

The EPA is proposing a provision similar to that under CAA section 110(k)(3) for the EPA to partially approve and partially disapprove severable portions of a state plan submitted under CAA section 111(d). Under CAA section 110(k)(3), "[i]f a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter." Subpart Ba currently authorizes the EPA to "approve or disapprove [the state] plan or revision or each portion thereof." (40 CFR 60.27a(b)). The EPA proposes to revise this provision so that it is similar to CAA section 110(k)(3), providing clarity on the EPA's authority to partially approve plans and the circumstances under which it may be used.

Pursuant to this proposal, the EPA may partially approve or partially disapprove a state plan when portions of the plan are approvable, but a discrete, severable portion is not. In such cases, the purposes of a CAA section 111(d) EG would be better served by allowing the state to

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the EPA to promulgate a FIP if the state does not submit a plan or the EPA disapproves the state plan) and 113(a)(1) (authorizing the EPA to enforce SIP measures).

move forward with implementing those portions of the plan that are approvable, rather than to disapprove the full plan. This mechanism is consistent with the *ALA* decision's emphasis on ensuring timely mitigation of harms to public health and welfare, as problematic parts of a state plan submission would not stall the implementation of emission reductions at designated facilities for which a portion of a plan could be approved, thus efficiently reducing the time from EG promulgation to implementation of emission reductions at those facilities.

As proposed, the portion of a state plan that the EPA may partially approve must be "severable." A portion is severable when: 1) the approvable portion of the plan does not depend on or affect the portion of the plan that cannot be approved, and 2) approving a portion of the plan without approving the remainder does not alter the approved portion of a state plan in any way that renders it more stringent than the state's intent. See *Bethlehem Steel v. Gorsuch*, 742 F.2d 1028, 1034 (7th Cir. 1984). The EPA's proposed decision to partially approve and partially disapprove a plan must go through notice and comment rulemaking. As a result, the public will have an opportunity to submit comment on the appropriateness and legal application of this mechanism on a particular state plan submission. A partial disapproval of a plan submission would have the same legal effect as a full disapproval for purposes of the EPA's authority under CAA section 111(d)(2)(A) to promulgate, for the partially disapproved portion of the plan, a Federal plan for the state. See section III.A.4 of this preamble for proposed timelines for promulgation of a Federal plan. If the EPA does promulgate a Federal plan for a partially disapproved portion, the state may, at any time, submit a revised plan to replace that portion. If the state does so, and the EPA approves the revised plan, then the EPA would withdraw the Federal plan for that state.

This partial approval/disapproval mechanism also enables states to submit, and authorizes the EPA to approve or disapprove, state plans that are partial in nature and to address only certain elements of a broader program. For example, with this mechanism, states would be able

to submit partial plans intended to replace discrete portions of a Federal plan, where appropriate. As proposed, partial submittals must meet all completeness criteria.

The EPA is soliciting comment on the reasonableness and appropriateness of this proposed partial approval/disapproval mechanism as described in this section (Comment D1-1).

2. Conditional Approval

The EPA is proposing a mechanism analogous to the authority under CAA section 110(k)(4) to grant the EPA the ability to conditionally approve a state plan under CAA section 111(d). Under CAA section 110(k)(4), "[t]he Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment." This provision authorizes the EPA to conditionally approve a plan submission that substantially meets the requirements of an EG but that requires some additional, specified revisions to be fully approvable. For the EPA to conditionally approve a submission, the state Governor or their designee must commit to adopt and submit specific enforceable provisions to remedy the stipulated plan deficiency. The provisions required to be submitted by the state pursuant to a conditional approval would be treated as an obligation to submit a plan revision and be subject to the same processes and timeframes for the EPA action as other plan revisions (*e.g.,* completeness determination, approval and/or disapproval). The EPA proposes that the state be required to commit to adopt and submit the necessary revisions to the EPA no later than 1 year from the effective date of the conditional approval.

As proposed, if the state fails to meet its commitment to submit the measures within 1 year, the conditional approval automatically converts to a disapproval. If a conditionally approved state plan converts to a disapproval due to either the failure of the state to submit the required measures or if the EPA finds the submitted measures to be unsatisfactory, such disapproval would be grounds for implementation of a Federal plan under CAA section

111(d)(2)(A). The EPA will publish a notice in the *Federal Register* and, if appropriate, on the public website established for the EG notifying the public that the conditional approval is converted to a disapproval. As described in section III.A.4 of this preamble, the EPA will promulgate a Federal plan within 12 months of state's failure to submit the required measures or the EPA's disapproval of measures submitted to address the conditional approval.

Incorporating this mechanism under the implementing regulations for CAA section 111(d) would have the benefit of allowing a state with a substantially complete and approvable program to begin implementing it, while also promptly making specific changes that ensure it fully meets the requirements of CAA section 111(d) and of the applicable EGs.

The EPA solicits comment on this proposed mechanism, including the timeframe for state adoption and submission of revisions to address the deficiencies that serve as the basis for the conditional approval (Comment D2-1), and the process and timing for promulgating a Federal plan if approvable revisions are not submitted (Comment D2-2).

3. Parallel Processing

The EPA is proposing to include a mechanism similar to that for SIPs under 40 CFR part 51 appendix V, section 2.3.1., for parallel processing a plan that does not meet all of the administrative completeness criteria under 40 CFR 60.27a(g)(2). This streamlined process allows the EPA to propose approval of such a plan in parallel with the state completing its process to fully adopt the plan in accordance with the required administrative completeness criteria, and then allows the EPA to finalize approval once those criteria have been fully satisfied.

In order to parallel process a plan, the EPA proposes to require that the state must meet the following requirements. The state must submit the proposed plan with a letter requesting the EPA propose approval through parallel processing in lieu of the letter required under 40 CFR 60.27a(g)(2)(i). Further, a state would be temporarily exempt from the administrative completeness criteria as defined by 40 CFR 60.27a(g)(2) regarding legal adoption of the plan (40 CFR 60.27a(g)(2)(ii) and (v)) and from public participation criteria (40 CFR 60.27a(g)(2)(vi),

(vii), and (viii)), including the meaningful engagement criteria proposed in this action (see III.C of this preamble above, proposed at 40 CFR 60.27a(g)(2)(ix)), as appropriate. However, as with parallel processing for SIPs under 40 CFR part 51 appendix V, the EPA proposes to require that, in lieu of these administrative criteria, the state must include a schedule for final adoption or issuance of the plan and a copy of the proposed/draft regulation or the document indicating the proposed changes to be made, where applicable. Note that a proposed plan submitted for parallel processing must still meet all the criteria for technical completeness as defined by 40 CFR 60.27a(g)(3) and meet all other administrative completeness criteria as defined by 40 CFR 60.27a(g)(2). If these conditions are met, the submitted plan may be considered for purposes of the EPA's initial plan evaluation and proposed rulemaking action.

The exceptions to the administrative criteria described above only apply to the EPA's proposed action. If the EPA has proposed approval through parallel processing, the state must still submit a fully adopted and final plan that meets all of the completeness criteria under 40 CFR 60.27a(g) before the EPA can finalize its approval, including the requirements for legal adoption and public engagement. If the state finalizes and submits to the EPA a plan that includes changes from the plan the EPA has proposed for approval under parallel processing, the EPA will evaluate those changes for significance. If any such changes are found by the EPA to be significant (*e.g.*, changes to the stringency or applicability of a particular standard of performance), then the state submittal would be treated as an initial submission and the EPA would be required to re-propose its action on the final plan and to provide an opportunity for public comment.

Note further that once the state plan submission deadline passes, the EPA retains the authority to initiate development of a Federal plan at any time for a state that has not submitted a complete plan, even if a state has requested parallel processing and the EPA has proposed an action. The EPA intends to continue working collaboratively with states who are in the process of adopting and submitting state plans but notes that states must remain mindful of regulatory

deadlines for CAA section 111(d) plan submissions even when seeking to use the parallel processing mechanism.

The EPA is requesting comment on the reasonableness of its proposal to add a parallel processing mechanism to subpart Ba (Comment D3-1), including the conditions under which a state may request parallel processing (Comment D3-2) and the conditions under which the EPA may allow for parallel processing (Comment D3-3).

4. State Plan Call

Under CAA section 110(k)(5), the EPA may call for a revision of a state plan "[w]henever the Administrator finds that the . . . plan . . . is substantially inadequate to… comply with any requirement of [the Act]." The EPA is proposing to add a mechanism analogous to this "SIP call" provision to subpart Ba under CAA section 111(d) which would authorize the EPA to find that a previously approved state plan does not meet the applicable requirements of the CAA or of the relevant EG and to call for a plan revision. This mechanism is a useful tool for ensuring that state plans continue to meet the requirements of the EGs and of the CAA over time. This is particularly important because EGs that achieve emission reductions from specific source categories may be implemented over many years.

The proposed state plan call mechanism would permit EPA to require a state to submit a revised state plan whenever it finds an approved CAA section 111(d) plan is "substantially inadequate" to comply with applicable requirements of the statute, the implementing regulations, and/or the applicable EG. The EPA finds that a plan call would be generally appropriate under two circumstances. The first is when legal or technical conditions arise after the EPA's approval of a state plan that undermines the basis for the approval. Under these conditions, the approved plan could be considered substantially inadequate and require revision to align with current conditions. For example, a court decision subsequent to the approval of a plan may render that

plan substantially inadequate to meet applicable requirements resulting from the change in law.[29] Additionally, the EPA may determine that technical conditions, such as design assumptions, about control measures that were the basis for a state plan approval later prove to be inaccurate, meaning that the plan would be substantially inadequate to achieve the emission reductions required by the EG and therefore the plan should be revised.[30] In response to a state plan call under such legal or technical circumstances, a state would be required to submit a plan revision so that the state plan is substantially adequate to meet applicable requirements, such as by updating a provision affected by a court decision or by revising control measures to achieve the required emission reductions.

The second circumstance under which the EPA could apply the state plan call mechanism is when a state fails to adequately implement an approved state plan. In this case, the approved state plan facially meets all applicable requirements, but a failure in implementation (*e.g.,* due to changes in available funding, resources, or legal authority at the state level) renders the plan substantially inadequate to meet the requirements of the EG and CAA section 111(d). In this circumstance, a state, in response to a plan call, would either be required to submit a plan revision that aligns with the state's actual implementation of the plan or to provide demonstration that the plan is being adequately implemented as approved.

Under the proposed state plan call provision, consistent with the SIP call process under CAA section 110(k)(5), after the EPA finds that a state's approved section 111(d) plan is substantially inadequate to comply with applicable requirements, the EPA shall publish notice of its finding in the *Federal Register*. The plan call notice will identify the plan inadequacies

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[29] An example of this circumstance in the context of CAA section 110 is the 2015 "SSM SIP Call", which required states to correct previously approved SIP provisions based on subsequent court decisions regarding startup, shutdown, and malfunctions (SSM) operations. 80 FR 33840, June 12, 2015.

[30] For example, the 1998 "NOx SIP call" required states to submit SIP revisions addressing NOx emissions found, after SIP approvals, to significantly impact the attainment of air quality standards in other states due to atmospheric transport. 63 FR 57356, October 27, 1998.

leading to the plan call and establish reasonable deadlines for submission of plan revisions and/or for demonstration of appropriate implementation of the approved plan.[31]

The EPA is further proposing to require that any deadline it establishes for the submission of a state plan revision shall not exceed 12 months after the date of the call for plan revisions. The EPA proposes to determine that, while this period is less than the time allotted for the submission of a full state plan (proposed in III.A.1 of this preamble above as 15 months), it provides a reasonable timeframe for public outreach and state processes while ensuring the deficiency is expeditiously corrected to address any outstanding public health and welfare concerns associated with a deficient plan, consistent with the *ALA* decision. The deadline for submission of state plan revisions to address the identified inadequacies will start when notice of the action is published in the *Federal Register*.

Any failure of a state to submit necessary revisions by the date set in the call for state plan revisions constitutes a failure to submit a required plan submission. Therefore, pursuant to CAA section 111(d)(2)(A), the EPA would have the authority to promulgate a Federal plan for the state within 12 months, as proposed in section III.A.4 of this preamble, after the necessary revisions are due. If the state fails to submit a plan revision, to make an adequate demonstration within the prescribed time, or if the EPA disapproves a submission, then the EPA will promulgate a Federal plan addressing the deficiency for sources within that state.[32]

The EPA solicits comment on the proposed state plan call mechanism as described in this section (Comment D4-1), including the circumstances of use (Comment D4-2), the process of notification (Comment D4-3), and the proposed maximum deadline for submission of plan revisions (Comment D4-4).

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[31] If the EPA has promulgated a Federal plan to implement an EG that does not contain the deficiency, a potential corrective action could include a plan revision to adopt the Federal plan.
[32] If the EPA has promulgated a Federal plan to implement an EG that does not contain the deficiency, the EPA could apply the existing Federal plan to the state if appropriate.

5. Error Correction

Under CAA section 110(k)(6), the EPA may, on its own, revise its prior action on a state plan under certain circumstances: "[w]henever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof) … was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State." The EPA is proposing to add a mechanism analogous to this 'error correction' provision to subpart Ba under CAA section 111(d).

This error correction provision would authorize the EPA to revise its prior action when the EPA determines its own action on the state plan was in error. Specifically, this provision would allow the EPA to revise its prior action in the same manner as used for the original action (*e.g.*, through rulemaking) without requiring any further submissions from the state. In this manner, the proposed error correction mechanism does away with unnecessary burdens on states to respond to an error made by the EPA, such as submitting a plan revision and the public participation related requirements under 40 CFR 60.23a (*e.g.,* providing notice and holding a public hearing).

CAA section 110(k)(6) is phrased broadly, and its legislative history makes clear that it "explicitly authorizes EPA on its own motion to make a determination to correct any errors it may make in taking any action, such as ... approving or disapproving any plan." See House Report No. 101-490 at 220. The circumstances that may give rise to an error that the EPA may correct with this mechanism depend on the specific facts and plan at issue, and the use of the mechanism is more appropriately justified on a case-by-case basis. The EPA has previously used CAA section 110(k)(6) for correction of technical or clerical errors[33], for removal of substantive provisions from an EPA-approved state plan that did not relate to attainment of the NAAQS or

[33] For example, see 74 FR 57051, November 3, 2009, for correction of clerical and typographical errors in a portion of an Arizona SIP.

other CAA program[34], and when EPA, in error and without knowledge, approved a SIP that did not meet applicable requirements at the time of approval[35]. These examples are not the only circumstances when the EPA has used CAA section 110(k)(6) in the past and do not limit the EPA for circumstances of error correction under section 111(d) in the future.

While the EPA maintains that this proposed error mechanism would be available for acting on state plans when appropriate, the EPA expects that it will work with states, as it has done previously in the SIP context, to correct any deficiencies in their plans. The EPA is soliciting comment on this error correction mechanism (Comment D5-1) and the conditions under which it may be applied (Comment D5-2). The EPA is seeking comment on these five proposed mechanisms from all stakeholders.

E. Remaining Useful Life and Other Factors (RULOF) Provisions

The EPA is proposing revisions to 40 CFR 60.24a(e) in order to provide clear requirements for the consideration of RULOF in state plans that propose to set a less stringent standard for a particular source.[36] This provision currently allows states to consider RULOF to apply a less stringent standard of performance for a designated facility or class of facilities if they demonstrate one of the three following circumstances: unreasonable cost of control resulting from plant age, location, or basic process design; physical impossibility of installing necessary control equipment; or other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable. The implementing regulations also specify that, absent such a demonstration, the state's standards of performance must be "no less stringent than the corresponding" EG. 40 CFR 60.24a(c). This proposal would largely retain this provision, including the three circumstances

[34] For example, see 85 FR 73636, November 19, 2020, for removal of an air pollution nuisance rule from an Ohio SIP and 86 FR 24505, May 7, 2021, for removal of asbestos requirements from a Kentucky SIP.
[35] For example, see 86 FR 23054, April 30, 2021, for error correction with respect to Kentucky's "good neighbor obligations" and SIP disapproval.
[36] The court's vacatur in *ALA* did not impact 40 CFR 60.24a(e).

under which a less stringent standard of performance may be applied, and provide further clarification of what a state must demonstrate in order to invoke RULOF when submitting a state plan. Specifically, the proposal would require the state to demonstrate that a particular facility cannot reasonably achieve the degree of emission limitation achievable through application of the BSER, based on one or more of the three circumstances. The EPA is also proposing to clarify the third circumstance by specifying that a state may apply a less stringent standard if the state demonstrates, to the EPA's satisfaction, that factors specific to the facility are fundamentally different than those considered by the EPA in determining the BSER.

Section III.E.1 of this preamble describes the statutory and regulatory background, and section III.E.2 of this preamble explains the agency's rationale for its revisions. Sections III.E.3-8 of this preamble describe further proposed additions to the RULOF provision in cases where states seek to apply a standard that is less stringent than the degree of emission limitation achievable through application of the BSER. These proposed additions include requirements for the calculation of a less stringent standard, contingency requirements in cases where an operating condition is the basis for RULOF, and the consideration of impacted communities. Finally, section III.E.9 of this preamble describes proposed revisions to address cases where states seek to apply a more stringent standard.

1. Statutory and Regulatory Background

Under CAA section 111(d), the EPA is required to promulgate regulations under which states submit plans establishing standards of performance for designated facilities. While states establish the standards of performance, there is a fundamental obligation under CAA section 111(d) that such standards reflect the degree of emission limitation achievable through the application of the BSER, as determined by the EPA. As previously described, this obligation derives from the definition of "standard of performance" under CAA section 111(a)(1). The EPA identifies the degree of emission limitation achievable through application of the BSER as part of its EG. 40 CFR 60.22a(b)(5). While standards of performance must generally reflect the degree

of emission limitation achievable through application of the BSER, CAA section 111(d)(1) also requires that the EPA regulations permit the states, in applying a standard of performance to a particular designated facility, to take into account the designated facility's RULOF.

The 1970 version of CAA section 111(d) made no reference to the consideration of RULOF in the context of standards for existing sources. In the 1975 regulations promulgating subpart B, however, the EPA included a so-called variance provision. For health-based pollutants, states could apply a standard of performance less stringent than the EPA's EGs based on cost, physical impossibility, and other factors specific to a designated facility that make the application of a less stringent standard significantly more reasonable. 40 CFR 60.24(f). For welfare-based pollutants, states could apply a less stringent standard by balancing the requirements of an EG "against other factors of public concern." 40 CFR 60.24(d). As part of the 1977 CAA amendments, Congress amended CAA section 111(d)(1) to require that the EPA's regulations under this section "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." At the time, the EPA considered the variance provision under subpart B to meet this requirement and did not revise the provision subsequent to the 1977 CAA amendments until promulgating new implementing regulations in 2019 under subpart Ba. As part of the 2019 revisions, the EPA removed the health and welfare-based pollutants distinction and collapsed the associated requirements of the previous variance provision into a single, new RULOF provision. 40 CFR 60.24a(e).[37]

2. Rationale for the Proposed Revisions

As previously described, the statute expressly requires the EPA to permit states to consider RULOF for a particular designated facility when applying a standard of performance to

[37] Petitioners did not challenge, and the court in *ALA* did not vacate, the new RULOF provision under 40 CFR 60.24a(e).

that facility. The consideration of remaining useful life in particular can be an important consideration, as the cost of control for a specific designated facility that is expected to cease operations in the near term could significantly vary from the average cost calculations done as part of the BSER determination for the source category as a whole. In such an instance, and in others as described throughout section III.E of this preamble, a less stringent standard may be justifiable in lieu of a standard of performance that reflects the presumptive level of stringency. However, as currently written, the RULOF provision in subpart Ba does not provide clear parameters for states on how and when to apply a standard less stringent than the presumptive level of stringency given in an EG to a particular source.

As written, the references to reasonableness in this provision are potentially subject to widely differing interpretations and inconsistent application among states developing plans, and by the EPA in reviewing them. Without a clear analytical framework for applying RULOF, the current provision may be used by states to set less stringent standards such that they could effectively undermine the overall presumptive level of stringency envisioned by the EPA's BSER determination and render it meaningless. Such a result is contrary to the overarching purpose of CAA section 111(d), which is generally to require meaningful emission reductions from designated facilities based on the BSER in order to mitigate pollution which endangers public health or welfare.

Additionally, while states have discretion to consider RULOF under CAA section 111(d), it is the EPA's responsibility to determine whether a state plan is "satisfactory,"[38] which includes evaluating whether RULOF was appropriately considered. The relevant dictionary meaning of "satisfactory" is "fulfilling all demands or requirements." The American College Dictionary ("ACD") 1078 (C.L. Barnhart, ed. 1970). In addition to the requirements of the applicable

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

emission guideline, state plans must be consistent with the underlying statutory purpose of mitigating the air pollution emissions which endanger public health or welfare. Thus, the most reasonable interpretation of a "satisfactory plan" is a CAA section 111(d) plan that meets the applicable conditions or requirements, which means that the EPA must assess a state's application of RULOF to determine whether it meets the regulatory requirements and whether the state employed RULOF in a manner that supports the statutory purpose. That is, the EPA must determine both whether the plan meets the requirements of the particular emission guideline, as well as meets the requirements of the implementing regulations that the EPA is directed to promulgate pursuant to CAA section 111(d).[39]

The EPA's determination of whether each plan is "satisfactory", including the application of RULOF, must be generally consistent from one plan to another. If the states do not have clear parameters for how to consider RULOF when applying a standard of performance to a designated facility, then they face the risk of submitting plans that the EPA may not be able to consistently approve as satisfactory. For example, under the current broadly structured provision, two states could consider RULOF for two identically situated designated facilities and apply completely different standards of performance on the basis of the same factors. In this example, it may be difficult for the EPA to substantiate finding both plans satisfactory in a consistent manner, and the states and sources risk uncertainty as to whether each of the differing standards of performance would be approvable. Accordingly, providing a clear analytical framework for the invocation of RULOF will provide regulatory certainty for states and the regulated community as they seek to craft satisfactory plans that EPA can ultimately approve.

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[39] Although there is no case law specifically on the standard of review of a section 111(d)(1) state plan or the EPA's duty to approve satisfactory plans, the EPA's action on a 111(d)(1) state plan is structurally identical to the EPA's action on a SIP. Under section 110(k)(3), EPA must approve a SIP that meets all requirements of the Act. See *Train v. NRDC*, 421 U.S. 60 (1975) (discussing the 1970 version of the Act); *Virginia v. EPA*, 108 F.3d 1397, 1408-10 (D.C. Cir. 1995) (discussing the 1970, 1977, and 1990 versions).

Notably, CAA section 111(d) does not require states to consider RULOF, but rather requires that the EPA's regulations "permit" states to do so. In other words, the EPA must provide states with the ability to account for RULOF, but states may instead choose to establish a standard of performance that is the same as the presumptive level of stringency set forth in the EGs. The optionality, rather than mandate, for states to account for RULOF further supports the notion that this provision is not intended to undermine the presumptive level of stringency in an EG for the source category broadly. The EPA is not aware of any CAA section 111(d) EGs under which an EPA-approved state plan has previously considered RULOF to apply a standard of performance that deviates from the presumptive level of stringency. Clarifying parameters may better enable states to effectively use this provision in developing their state plans without undermining the overall purpose of CAA section 111 to mitigate pollution which endangers public health or welfare.

For these reasons, the EPA is proposing to revise the RULOF provision under subpart Ba, consistent with the statutory construct and goals of CAA section 111(d), in order to provide states and sources with clarity regarding the requirements that apply to the development and approvability of state plans that consider RULOF when applying a standard of performance to a particular designated facility. The following describes the guiding principles for the EPA's proposed revisions.

CAA section 111(a)(1) requires that the EPA determine the BSER is "adequately demonstrated" for the regulated source category. In determining whether a given system of emission reduction qualifies as BSER, CAA section 111(a)(1) requires that the EPA take into account "the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements." The EPA's proposed revisions to clarify the RULOF provision do so by tethering the states' RULOF demonstration to the statutory factors the EPA considered in the BSER determination. This is appropriate under the statute because the EPA will have demonstrated that the BSER identified in the EG is "adequately demonstrated" as achievable for

sources broadly within the source category. Therefore, RULOF is appropriately applied to permit states to address instances where the application of the BSER factors to a particular designated facility is fundamentally different than the determinations made to support the BSER and presumptive level of stringency in the EG. For example, the D.C. Circuit has stated that to be "adequately demonstrated," the system must be "reasonably reliable, reasonably efficient, and . . . reasonably expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way." *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973). The court has further stated that the EPA may not adopt a standard in evaluating cost that would be "exorbitant,"[40] "greater than the industry could bear and survive,"[41] "excessive,"[42] or "unreasonable."[43] These formulations use reasonableness in light of the statutory factors as the standard in evaluating cost, so that a control technology may be considered the "best system of emission reduction … adequately demonstrated" if its costs are reasonable (i.e., not exorbitant, excessive, or greater than the industry can bear), but cannot be considered the BSER if its costs are unreasonable. Similarly, in making the BSER determination, the EPA must evaluate whether a system of emission reduction is "adequately demonstrated" for the source category based on the physical possibility and technical feasibility of control. Under this construct, it naturally follows that most designated facilities within the source category should be able to implement the BSER at a reasonable cost to achieve the presumptive level of stringency, and that RULOF will be justifiable only for a subset of sources for which implementing the BSER would impose unreasonable costs or not be feasible due to unusual circumstances that are not applicable to the broader source category that the EPA considered when determining the BSER.[44]

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[40] *Lignite Energy Council* v. *EPA,* 198 F.3d 930, 933 (D.C. Cir. 1999).
[41] *Portland Cement Ass'n* v. *EPA,* 513 F.2d 506, 508 (D.C. Cir. 1975).
[42] *Sierra Club* v. *Costle,* 657 F.2d 298, 343 (D.C. Cir. 1981).
[43] *Sierra Club* v. *Costle,* 657 F.2d 298, 343 (D.C. Cir. 1981).
[44] This construct is also supported by CAA section 111(d) use of the term "establishing" in directing states to create and set standards of performance. As previously described, "standard of

The proposed revisions to the regulatory RULOF provision, as described in section III.E. 3-8 of this preamble, are also consistent with how the EPA has approached RULOF in the implementing regulations previously. Subparts B and Ba both currently contain the same three circumstances for when states may account for RULOF, and reasonableness in light of the statutory criteria is an element of all three circumstances. Under those subparts as currently written, states may consider RULOF if they can demonstrate unreasonable cost of control, physical impossibility of control, or other factors that make application of a less stringent standard "significantly more reasonable." 40 CFR 60.24(f) and 60.24a(e). The EPA's proposal retains the first circumstance in whole and revises the second one to add "technical infeasibility" of installing a control as a situation where application of consideration of RULOF may be appropriate. The proposal further clarifies the third catch-all circumstance, which the first two circumstances also fall under, by specifying that states may consider RULOF to apply a less stringent standard if factors specific to a facility are fundamentally different from the factors considered in the determination of the BSER in an EG. The proposed clarification of this third criteria provides parameters for states and the EPA in developing and assessing state plans, as this criteria was previously vague and potentially open-ended as to the circumstances under which states could consider RULOF.

The "fundamentally different" standard, which undergirds all three circumstances, is also consistent with other variance provisions that courts have upheld for environmental statutes. For example, in *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978), the court considered a regulatory provision promulgated under the Clean Water Act (CWA) that permitted owners to seek a variance from the EPA's national effluent limitation guidelines under CWA sections 301(b)(1)(A) and 304(b)(1). The EPA's regulation permitted a variance where an individual

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performance" is defined under CAA section 111(a)(1) as reflecting the degree of emission limitation achievable through application of the BSER, which sets the initial parameters for development of the standards of performance by states. The statute does not provide that states may account for RULOF in "establishing" standards of performance in the first instance, but permits states to do so in "applying" such standards to a particular source.

operator demonstrates a "fundamental difference" between a CWA section 304(b)(1)(B) factor at its facility and the EPA's regulatory findings about the factor "on a national basis." *Id.* at 1039. The court upheld this standard as ensuring a meaningful opportunity for an operator to seek dispensation from a limitation that would demand more of the individual facility than of the industry generally, but also noted that such a provision is not a license for avoidance of the Act's strict pollution control requirements. *Id.* at 1035.

For the reasons described in this section, the EPA is proposing to clarify the existing RULOF provision under 40 CFR 60.24a(e) by: (1) revising the threshold requirements for consideration of RULOF; (2) adding requirements for calculating a less stringent standard accounting for RULOF; (3) adding requirements for consideration of communities most affected by and vulnerable to the health and environmental impacts from the designated facilities being addressed; and (4) adding requirements for the types of information and evidence the states must provide to support the invocation of RULOF in a state plan. The EPA solicits comment on the proposed revisions described in the following sections (Comment E2-1), including the use of the BSER factors as a framework governing the invocation and application of the RULOF provision (Comment E2-2). The EPA notes a specific EG may provide additional requirements or supersede the requirements of the implementing regulations. 40 CFR 60.20a(a)(1). This extends to any requirements of the RULOF provision, as the EPA cannot necessarily anticipate the appropriate and potentially unique implementation needs for every future EG. The EPA solicits comment on the circumstances under which it would be appropriate for an EG to provide additional requirements or supersede the requirements of these proposed revisions to the RULOF provision (Comment E2-3).

The EPA also solicits comment about whether, instead of establishing firm requirements for the application of RULOF, the EPA should instead consider establishing a framework, consistent with the proposed requirements in the following discussion, pursuant to which state plans would be considered presumptively approvable (Comment E2-4). In this scenario, states

would have certainty regarding what type of demonstration the EPA would find satisfactory as they develop their plans, but states could also submit an alternative RULOF demonstration for the EPA's consideration. In the latter case, states would bear the burden of proving to the EPA that they have proposed a satisfactory alternative analysis and standard, considering all factors relevant to addressing emissions from the source or sources at issue. The EPA also solicits comment on what different approaches might be appropriate for a state in applying RULOF to a particular source and that the EPA should consider in determining whether to finalize the provisions discussed below, either as requirements or as presumptions (Comment E2-5).

Note that the EPA considers the proposed RULOF provisions to apply in circumstances distinct from the flexible compliance mechanisms, such as trading and averaging, discussed in section III.G.1 of this preamble. In other words, these provisions would apply where a state intends to *depart* from the presumptive standards in the EG and propose a less stringent standard for a designated facility (or class of facilities), and not where a state intends to *comply* by demonstrating that a facility or group of facilities subject to a state program would, in the aggregate, achieve equivalent or better reductions than if the state instead imposed the presumptive standards required under the EG at individual designated facilities.

3. Threshold Requirements for Considering Remaining Useful Life and Other Factors

Under the existing RULOF provision in subpart Ba, 40 CFR 60.24a(e), a state may only account for RULOF in applying a standard of performance provided that it makes a demonstration based on one of three criteria. These criteria are: (1) unreasonable cost of control resulting from plant age, location, or basic process design; (2) physical impossibility of installing necessary control equipment; or (3) other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable. However, the existing version of this provision in subpart Ba provides no further guidance on what constitutes reasonableness or unreasonableness for these demonstrations. The EPA proposes to clarify this provision by revising it to require that in order to account for

RULOF in applying a less stringent standard of performance to a designated facility, a state must demonstrate that the designated facility cannot reasonably apply the BSER to achieve the degree of emission limitation determined by the EPA because it entails (1) an unreasonable cost of control resulting from plant age, location, or basic process design; (2) physical impossibility or technical infeasibility of installing necessary control equipment; or (3) other circumstances specific to the facility (or class of facilities) that are fundamentally different from the information considered in the determination of the BSER in the emission guidelines.[45] The first criterion remains the same as under the existing RULOF provision in 40 CFR 60.24a(e). For the second criterion, the EPA is proposing to add a reference to technical infeasibility, as a similar yet distinct factor from that of physical impossibility of control. Finally, the EPA is proposing to revise the third criterion by referring to any circumstances at a specific designated facility that are "fundamentally different from the information [the EPA] considered in the determination of the best system of emission reduction", rather than the current regulation, which applies to factors "that make application of a less stringent standard or final compliance time significantly more reasonable." This revision to the third criterion will ensure that application of RULOF is akin to the types of circumstances anticipated by the first two criteria and consistent with the statutory construct of CAA section 111(d), as further described below, rather than based on subjective criteria that is untethered to the statute and that could result in widely diverging and potentially arbitrary application by states.

The EPA proposes to require that, in order to demonstrate that a designated facility cannot reasonably meet the presumptive level of stringency based on one of these three criteria, the state must show that implementing the BSER is not reasonable for the designated facility due

[45] States may also account for RULOF when applying standards of performance to a class of designated facilities. For purposes of administrative efficiency, a state may be able to calculate a uniform standard of performance that accounts for RULOF using a single set of demonstrations to meet the proposed requirements described in this section if the group of sources has similar characteristics.

to fundamental differences between the factors the EPA considered in determining the BSER, such as cost and technical feasibility of control, and circumstances at the designated facility.

Per the requirements of CAA section 111(a)(1), the EPA determines the BSER by first identifying control methods that it considers to be adequately demonstrated, and then determining which are the best systems by evaluating 1) the cost of achieving such reduction, 2) health and environmental impacts, 3) energy requirements, 4) the amount of reductions, and 5) advancement of technology. So, for example, if the EPA applied a specific dollar-per-ton threshold in determining the BSER, the state would be required to show that the cost of implementing the BSER in order to achieve the presumptive level of stringency at a particular designated facility is unreasonably high relative to the EPA's cost threshold applied in the EG. Or, by way of further example, if the EPA were to determine that a specific back-end control technology at a 95 percent reduction in emissions of a specific pollutant is the BSER for a source category, a state could evaluate whether it would be physically possible to install that control technology at a designated facility given the size and physical constraints needed to install it. If the state could show that the cost-per-ton was significantly higher at a specific designated facility or that a specific designated facility does not have adequate space to reasonably accommodate the installation, that designated source may be evaluated for a less stringent standard because of the consideration of RULOF. Requiring states to hew to the same types of factors and analyses considered in the EPA's BSER determination in making the demonstration that the BSER is not reasonable to implement at a particular designated facility is consistent with the statutory construct that defines RULOF as a limited exception to the level of stringency otherwise required by the BSER.

In examining the factors that the EPA considered in determining the BSER and how they apply to a specific facility, states may not invoke RULOF based on minor, non-fundamental differences. There could be instances where a designated facility may not be able to comply with the level of stringency required by the EG based on the precise metrics of the BSER

determination but is able to do so within a reasonable margin. For example, if the EPA determined a BSER based on a cost-effectiveness threshold of $500/ton, it would not be reasonable for a state to apply the RULOF provision to propose a less stringent standard for a designated facility that can meet the standard of performance at a slightly higher cost, such as $525/ton. There might also be instances where the EPA determines the BSER for a source category as a particular technology, but a particular designated facility does not currently have the capability to implement that technology, and it would be cost prohibitive to gain that capability. However, if that designated facility has the ability instead to reasonably install a different, non-BSER technology to achieve the presumptive level of stringency, the designated facility would not be eligible for a less stringent standard that accounts for RULOF. The EPA notes the examples described here are meant to be illustrative hypotheticals and are not determinative of whether state plans that include similar scenarios would be approvable under a specific EG.

The EPA acknowledges that what is considered reasonable in light of the statutory factors is a fact-specific inquiry based on the source category and pollutant that is being regulated pursuant to a particular EG, and that the EPA cannot anticipate and address all circumstances that may arise in these general implementing regulations. Thus, the EPA may consider additional factors and establish additional requirements governing the consideration of RULOF, including what deviations from the presumptive standard may be considered reasonable, in a particular EG.

The EPA solicits comment on the proposal to require states to demonstrate, as a threshold matter when determining whether a state may account for RULOF in order to set a less stringent standard, that the designated facility cannot reasonably apply the BSER to achieve the presumptive level of stringency determined by the EPA (Comment E3-1). The EPA further solicits comment whether other considerations should inform the circumstances under which the EPA should permit RULOF to be used to set a less stringent standard for a particular source (Comment E3-2).

4. Calculation of a Standard which Accounts for Remaining Useful Life and Other Factors

If a state has made the proposed demonstration that accounting for RULOF is appropriate for a particular designated facility, the state may then apply a less stringent standard. The current RULOF provision in subpart Ba is silent as to how a less stringent standard should be calculated, raising the potential for inconsistent application of this provision across states and the potential for the imposition of a standard less stringent than what would be reasonably achievable by a designated facility. In order to fill this gap and ensure the integrity of the CAA section 111(d) program, the EPA is proposing several requirements that would apply for the calculation of a standard of performance that accounts for RULOF. The proposed requirements described in this section are designed to provide a framework for the state's analysis in evaluating and identifying a less stringent standard, and in doing so would prevent the application of a standard that is less stringent than what is otherwise reasonably achievable by a particular designated facility, while remaining general in order to account for possible differences across source categories and designated facilities that may be addressed by specific EGs.

The EPA is first proposing to require that the state determine and include, as part of the plan submission, a source-specific BSER for the designated facility. As described previously, the statute requires the EPA to determine the BSER by considering control methods that it considers to be adequately demonstrated, and then determining which are the best systems by evaluating 1) the cost of achieving such reduction, 2) health and environmental impacts, 3) energy requirements, 4) the amount of reductions, and 5) advancement of technology. To be consistent with this statutory construct, the EPA proposes that in determining a less stringent BSER for a designated facility, a state must also consider all these factors in applying RULOF for that source.

Specifically, the state in its plan submission must identify all control technologies available for the source and evaluate the BSER factors for each technology, using the same metrics and evaluating them in the same manner as the EPA did in developing the EG using the

five criteria noted above.[46] For example, if the EPA evaluated capital costs as part of its cost analysis in setting the BSER, the state must do the same in evaluating a control technology for an individual designated facility, rather than selecting a different cost metric. The state must then calculate the emission reductions that applying the source-specific BSER would achieve and select the standard which reflects this degree of emission limitation. This standard must be in the form or forms (*e.g.*, numerical rate-based emission standard) as required by the specific EG. The EPA notes there may be cases where a state determines that a designated facility cannot reasonably implement the BSER but can instead reasonably implement another control measure to achieve the same level of stringency required by an EG. In such cases, the standard of performance that reflects the source-specific BSER would be the same level of stringency as the degree of emission limitation achievable through application of the EPA's BSER.

The EPA solicits comment on these proposed requirements for the calculation and form or forms of the less stringent standard that accounts for remaining useful life and other factors (Comment E4-1). The EPA believes that the five identified BSER factors generally address all relevant information that states would reasonably consider in evaluating the emission reductions reasonably achievable for a designated facility. Moreover, the EPA considers that these factors provide states with the discretion to weigh these factors in determining the BSER and establishing a reasonable standard of performance for the source. However, the EPA solicits comments on whether there are additional factors, not already accounted for in the BSER analysis, that the EPA should permit states to consider in determining the less stringent standard for an individual source (Comment E4-2). The EPA also solicits comments on whether we should consider these factors to be part of a presumptively approvable framework for applying a less stringent standard of performance, rather than requirements, and, if so, what different

[46] To the extent that a state seeks to apply RULOF to a class of facilities that the state can demonstrate are similarly situated in all meaningful ways, the EPA proposes to permit the state to conduct an aggregate analysis of these factors for the entire class.

approaches states might use to evaluate and identify less stringent standards that the EPA should consider to be satisfactory in evaluating state plans that apply RULOF (Comment E4-3).

The EPA notes that CAA section 111(d) requires that state plans include measures that provide for the implementation and enforcement of a standard of performance. This requirement therefore applies to any standard of performance established by a state that accounts for RULOF. Such measures include monitoring, reporting, and recordkeeping requirements, as required by 40 CFR 60.25a, as well as any additional measures specified under an applicable EG. In particular, any standard of performance that accounts for RULOF is also subject to the requirement under subpart Ba that the state plan submission include a demonstration that each standard is quantifiable, non-duplicative, permanent, verifiable, and enforceable. 40 CFR 60.27a(g)(3)(vi). The EPA is not proposing to modify these requirements, and therefore not reopening them in this action.

5. Contingency Requirements

The EPA recognizes that a source's operations may change over time in ways that cannot always be anticipated or foreseen by the EPA, state, or designated facility. This is particularly true where a state seeks to rely on a designated facility's operational conditions, such as the source's remaining useful life or restricted capacity, as a basis for setting a less stringent standard. If the designated facility subsequently changes its operating conditions after the state applies a less stringent standard of performance, there is potential for the standard to not match what is reasonably achievable by a designated facility, resulting in forgone emission reductions and undermining the level of stringency set by an EG. For example, a state may seek to invoke RULOF for an electric generating unit (EGU) on the basis that it is running at lower utilization (and therefore less efficiently) than is anticipated by the BSER and intends to do so for the duration of the compliance period required by an EG. Under this scenario, the state may be able to demonstrate that it is not reasonably cost-effective for the designated facility to implement the BSER in order to achieve the presumptive level of stringency, and the state could set a less

stringent standard of performance for this EGU. However, because reduced utilization is not a physical constraint on the designated facility's operations, it is possible that the source's utilization could increase in the future without any other legal constraint.

The implementing regulations do not currently address this potential scenario. To address this issue, the EPA is proposing to add a contingency requirement to the RULOF provision that would require a state to include in its state plan a condition making a source's operating condition, such as remaining useful life or restricted capacity, enforceable whenever the state seeks to rely on that operating condition as the basis for a less stringent standard. This requirement would not extend to instances where a state applies a less stringent standard on the basis of an unalterable condition that is not within the designated source's control, such as technical infeasibility, space limitations, water access, or geologic sequestration access. Rather, this requirement addresses operating conditions such as operation times, operational frequency, process temperature and/or pressure, fuel parameters, and other conditions that are subject to the discretion and control of the designated facility.

As previously discussed, the state plan submission must also include measures for the implementation and enforcement of a standard that accounts for RULOF. For standards that are based on operating conditions that a facility has discretion over and can control, the operating condition and any other measure that provides for the implementation and enforcement of the less stringent standard must be included in the plan submission and as a component of the standard of performance. For example, if a state applies a less stringent standard for a designated facility on the basis of a lower capacity factor, the plan submission must include an enforceable requirement for the source to operate at or below that capacity factor, and include monitoring, reporting, and recordkeeping requirements that will allow the state, the EPA, and the public to ensure that the source is in fact operating at that lower capacity. A specific EG may detail supplemental or different requirements on implementing the proposed general requirement that a

state plan submission include both the operating condition that is the basis for a less stringent standard, and measures to provide for the implementation and enforcement of such standard.

The EPA notes there may be circumstances under which a designated facility's operating conditions change permanently so that there may be a potential violation of the contingency requirements approved as federally enforceable components of the state plan. For example, a designated facility that was previously running at lower capacity now plans to run at a higher capacity full time, which conflicts with the federally enforceable state plan requirement that the facility operate at the lower capacity. To address this concern, a state may submit a plan revision to reflect the change in operating conditions. Such a plan revision must include a new standard of performance that accounts for the change in operating conditions. The plan revision would need to include a standard of performance that reflects the level of stringency required by the EG and meet all applicable requirements, or if a less stringent standard is still warranted for other reasons, the plan revision would need to meet all of the applicable requirements for considering RULOF. The new standard of performance would only become effective upon the EPA's determination that the plan revision is satisfactory.

The EPA requests comment on the proposed contingency requirements to address the concern that a designated facility's operations may change over time in ways that do not match the original rationale for a less stringent standard (Comment E5-1).

6. Requirements Specific to Remaining Useful Life

Remaining useful life is the one "factor" that CAA section 111(d) explicitly requires that the EPA permit states to consider in applying a standard of performance. While the age of a fleet can be a consideration of a BSER determination, it is a factor that can have considerable variability and the annualized costs can change considerably based on the applied technology at a particular designated facility and the amortization period. When the EPA determines a BSER, it considers cost and, in many instances, the EPA specifically considers annualized costs associated with payment of the technology associated with the BSER. The shorter that payback period is

(*i.e.,* shorter remaining useful life), the less cost-effective that BSER may become. The current RULOF provision generally allows for a state to account for remaining useful life to set a less stringent standard. However, the provision does not provide guidance or parameters on when and how a state may do so. Consistent with the principles described previously in this section (section III.E), the EPA is proposing certain requirements for when a state seeks to apply a less stringent standard on grounds that a designated facility will retire in the near future.

The EPA is proposing to require that in order to account for remaining useful life in setting a less stringent standard for a particular designated facility, the source's retirement date must be no later than a date to be established by the EPA in an EG, or if the EPA does not provide such a date in an EG, a date determined by the state using the methodology and considerations provided by EPA in the EG. More specifically, in order for a state to determine whether a retiring source qualifies for a less stringent standard, the EPA is proposing to require either that the Agency must identify in an EG an outermost remaining useful life date that would provide the latest retirement date that states can rely on for a designated facility or that the Agency must provide the methodology and considerations to be applied by states as part of their plans in determining whether a retiring source qualifies for a less stringent standard.

The outermost retirement date or the methodology to establish such date for a designated facility will be established based on the technical record for the EG, and as with any requirement of an EG, subject to notice-and-comment rulemaking through the EG proposal. By identifying the outermost retirement date or methodology that states may use to account for remaining useful life, the EPA is ensuring consistency and appropriate implementation of an EG across designated facilities and states. If the EPA did not identify an outermost retirement date or specified methodology and conditions, then a state plan could attempt to account for the remaining useful life for a designated facility whose retirement date does not reasonably warrant a less stringent standard, undermining the control objectives of the EG and CAA section 111(d) itself.. Based on these concerns, the EPA is proposing that states may account for remaining useful life if the

retirement date is not further out than the outermost date identified or determined through the methodology and conditions provided by the EPA in the applicable EG.

If a designated facility's retirement date is within the period identified by the EPA in an EG or by the state in its plan through the methodology provided, then the state may account for the remaining useful life of that source in applying a less stringent standard of performance. As previously discussed, the EPA is proposing to require that when an operational condition is used as the basis for applying a less stringent standard, the state plan must include that condition as a federally enforceable requirement. Accordingly, if a state applies a less stringent standard by accounting for remaining useful life, the EPA is proposing to require that the state plan must include the retirement date for the designated facility as an enforceable commitment and include measures that provide for the implementation and enforcement of such commitment. For example, the state could adopt a regulation or enter into an agreed order requiring the designated facility to shut down by a certain date, and that regulation or agreed order should then be incorporated into the state plan. The state could also choose to incorporate the shutdown date into a permit and incorporate that permit into the state plan.

The EPA is further proposing to add an explicit requirement in the implementing regulations that the state impose a standard that applies to a designated facility until its retirement. This standard must reflect a reasonably achievable source-specific BSER and be calculated and supported by the demonstration described in section III.E.3 of this preamble. The EPA recognizes that, in some instances, a designated facility may intend to retire imminently after the promulgation of an EG, and in such cases it may not be reasonable to require any controls based on the source's exceptionally short remaining useful life. In the case of an imminently retiring source, the EPA is proposing that the state apply a standard no less stringent than one that reflects the designated facility's business as usual. This requirement equitably accommodates practical considerations without impermissibly exacerbating the impacts of the pollutant regulated under CAA section 111(d). The EPA generally expects that an "imminent"

retirement is one that is about to happen in the near term relative to the compliance date in the EG. The EPA may also define what is considered to be the timeframe for an imminent retirement for purposes of a specific EG, with consideration to the time and costs associated with meeting compliance obligations for a given BSER and associated standard of performance. For example, if a BSER for a given EG is established to be a back-end control device with a 90 percent reduction of the given pollutant from the emission stream, there may be considerable time and money to be invested in meeting that compliance obligation. The EPA may define the timeframe that qualifies as an imminent retirement for this situation to be in line with the time needed to install the control device plus some additional marginal time that the EPA deems to fit within the timeline of "imminence" given the specific nature and analytics associated with the source category and BSER. This definition of the timeframe for an imminent retirement would differ from an example situation where the BSER is established to be operation and maintenance techniques which may require minimal lead time and capital costs. In this counter example, the EPA may define in the respective EG a short timeframe for imminent retirements or may instead establish that there is no such timeframe that qualifies for a business-as-usual standard and that retiring sources must comply with an interim standard that requires some appropriate level of control. If the EPA defines an imminent timeframe in a specific EG a state may then apply a business as usual standard to a retiring designated facility that is retiring within such timeframe. The EPA intends to provide guidance as appropriate in the context of a specific EG regarding the calculation of a business as usual standard.

The EPA solicits comment on the proposed requirements specific to the consideration of remaining useful life as described in this section (Comment E6-1).

7. The EPA's Standard of Review of State Plans Invoking RULOF

Under CAA section 111(d)(2), the EPA has the obligation to determine whether a state plan submission is "satisfactory." This obligation extends to all aspects of a state plan, including the application of a less stringent standard of performance that accounts for RULOF. The

revisions to the RULOF provision under the implementing regulations are intended to provide parameters not only for the development of CAA section 111(d) state plans, but for the EPA to evaluate for the approvability of such plans. The EPA is proposing the following requirements to further bolster the RULOF provision and to facilitate the EPA's review of a state plan to determine whether the plan implementing the RULOF provision is "satisfactory." As an initial matter, the EPA proposes to explicitly require that the state must carry the burden of making the demonstrations required under the RULOF provision. States carry the primary responsibility to develop plans that meet the requirements of CAA section 111(d) and therefore have the obligation to justify any accounting for RULOF that they invoke in support of standards less stringent than those provided by the EG. While the EPA has discretion to supplement a state's demonstration, the EPA may also find that a state plan's failure to include a sufficient RULOF demonstration is a basis for concluding the plan is not "satisfactory" and therefore disapprove the plan.

The EPA is further proposing that for the required demonstrations, the state must use information that is applicable to and appropriate for the specific designated facility, and the state must show how information is applicable and appropriate. As RULOF is a source-specific determination, it is appropriate to require that the information used to justify a less stringent standard for a particular designated facility be applicable to and appropriate for that source. The EPA anticipates that in most circumstances, site-specific information will be the most applicable and appropriate to use for these demonstrations and proposes to require site-specific information where available. In some instances, site-specific information may not be available, and a state may instead be able to use general information about a source category to evaluate a particular designated facility. In such cases, the state plan submission must provide both the general information and a clear assessment of how the information is applicable to and appropriate for the designated facility. The use of general information must also be appropriate and consistent

with the overall assessment and conclusions regarding consideration of RULOF for the specific designated facility.

Finally, the EPA proposes to require that the information used for a state's demonstrations under the new RULOF provisions must come from reliable and adequately documented sources, such as EPA sources and publications, permits, environmental consultants, control technology vendors, and inspection reports. Requiring the use of such sources will help ensure that an accounting of RULOF is premised on legitimate, verifiable, and transparent information. The EPA notes that an EG may also specify aspects of the demonstrations that require certification from third-party industry experts, such as certified engineering firms. The EPA solicits comment on the proposed list of information sources (Comment E7-1) and whether other sources should be considered as reliable and adequately documented sources of information for purposes of the RULOF demonstration, including but not limited to reliable and adequately documented sources of cost information (Comment E7-2).[47]

These requirements will aid both the EPA in evaluating whether RULOF has been appropriately accounted for, and the public in commenting on the EPA's proposed action on a state plan that includes a less stringent standard on the basis of RULOF. The EPA solicits comment on the proposed requirements described in this section regarding the EPA's standard of review for state plans that invoke consideration of RULOF (Comment E7-3).

8. Consideration of Impacted Communities

CAA section 111(d) does not specify what are the "other factors" that the EPA's regulations should permit for a state to consider in applying a standard of performance. The EPA interprets this as providing discretion for the EPA to identify the appropriate factors and conditions under which the circumstance may be reasonably invoked in establishing a standard

[47] The EPA acknowledges there may be reliable and adequately documented sources of information other than those described in this section. The EPA encourages states to consult with their Regional Offices if there are questions about whether a particular source of information would meet the applicable requirements.

less stringent than the EG. Additionally, CAA section 111(d)(2)'s requirement that the EPA determine whether a state plan is "satisfactory" applies to such plan's consideration of RULOF in applying a standard of performance to a particular facility. Accordingly, the EPA must determine whether a plan's consideration of RULOF is consistent with section 111(d)'s overall health and welfare objectives.

While the consideration of RULOF can be warranted to apply a less stringent standard of performance to a particular facility, such standards have the potential to result in disparate health and environmental impacts to communities most affected by and vulnerable to those impacts from the designated facilities being addressed by the state plan. These communities could be put in the position of bearing the brunt of the greater health or environmental impacts resulting from that source implementing less stringent emission controls than would otherwise have been required pursuant to the EG. The EPA considers that a lack of attention to such potential outcomes would be antithetical to the public health and welfare goals of CAA section 111(d) and the CAA generally.

In order to address the potential exacerbation of health and environmental impacts to these communities as a result of applying a less stringent standard, the EPA is proposing to require states to consider such impacts when applying the RULOF provision to establish those standards. The EPA is proposing to require that, to the extent a designated facility would qualify for a less stringent standard through consideration of RULOF, the state, in calculating such standard, must consider the potential health and environmental impacts and potential benefits of control to communities most affected by and vulnerable to the impacts from the designated facility considered in a state plan for RULOF provisions. These communities will be identified by the state as pertinent stakeholders under the proposed meaningful engagement requirements described in section III.C of this preamble.

The EPA proposes to require that state plan submissions seeking to invoke RULOF for a source must identify where and how a less stringent standard impacts these communities. In

evaluating a RULOF option for a facility, states should describe the health and environmental impacts anticipated from the application of RULOF for such communities, along with any feedback the state received during meaningful engagement regarding its draft state plan submission, including on any standards of performance that consider RULOF. Additionally, to the extent there is a range of options for reasonably controlling a source based on RULOF, the EPA is proposing that in determining the appropriate standard of performance, states should consider the health and environmental impacts to the communities most affected by and vulnerable to the impacts from the designated facility considered in a state plan for RULOF provisions and provide in the state plan submission a summary of the results that depicts potential impacts for those communities for that range of reasonable control options.

This requirement to consider the health and environmental impacts in any standards of performance taking into account RULOF is consistent with the definition of "standard of performance" in CAA section 111(a)(1). This definition requires the EPA to take into account health and environmental impacts in determining the BSER. As described in this section, if a designated facility qualifies for a less stringent standard based on RULOF, the EPA is proposing the state plan must identify a source-specific BSER based on the same factors and metrics the EPA considered in determining the BSER in the EG. Therefore, state plans must consider health and environmental impacts in determining a source-specific BSER informing a RULOF standard, just as the EPA is statutorily required to take into account these factors in making its BSER determination.

As an example, the state plan submission could include a comparative analysis assessing potential controls on a designated facility and the corresponding potential impacts on affected vulnerable communities in controlling the source. If the comparative analysis shows that a designated facility may be controlled at a certain cost threshold higher than required under the EPA's proposed revisions to the RULOF provision, and such control benefits a vulnerable community that would otherwise be adversely impacted by a less stringent standard, the state in

accounting for RULOF could use that cost threshold to apply a standard of performance. Given that the statute provides states with the discretion, rather than mandate, to consider RULOF in applying a standard of performance under CAA section 111(d), it is reasonable for states to consider the potential health and environmental impacts to communities most affected by and vulnerable to the impacts from a particular designated facility in calculating the level of stringency for such standard.[48]

The EPA recognizes that the consideration of communities in the standard setting process, such as what constitutes a benefit to a vulnerable community and what is a reasonable level of control, is highly dependent on the designated pollutant and source category subject to an EG. For example, a comparative analysis for a localized pollutant may be quantified and evaluated differently from the analysis for a global pollutant. The EPA is therefore proposing general requirements for the consideration of impacts to vulnerable communities, and, where feasible, an EG will provide more specific guidance or requirements on how to meet these provisions under the implementing regulations.

Additionally, under CAA section 111(d)(2)(B), the EPA has the authority to prescribe a Federal plan promulgating standards of performance for designated facilities located in a state that fails to submit a satisfactory plan. Consistent with the statute's mandate for the EPA's regulations under CAA section 111(d) to permit states to account for RULOF, this provision further directs that the EPA "shall" take into account RULOF in promulgating standards of performance for a Federal plan. Therefore, because the statute uses the same "other factors" phrasing in both CAA sections 111(d)(1) governing state plans and 111(d)(2) governing Federal plans, the EPA proposes to require that health and environmental impacts to vulnerable

[48] As previously described, CAA section 111(d) gives states the discretion to consider RULOF for a particular source and are not required to do so. States thus have the authority to choose to impose a more stringent standard, including the presumptive standard, than would be permissible under RULOF for other reasons, e.g. based on consideration of communities other than identified impacted communities.

communities be considered in both the state and Federal plan contexts when accounting for RULOF.

The EPA solicits comment on the proposed requirements described in this section for consideration of vulnerable communities in the context of RULOF (Comment E8-1).

9. Authority to Apply More Stringent Standards as Part of the State Plan

The current RULOF provision in subpart Ba under 40 CFR 60.24a(e) governs instances where states seek to apply a less stringent standard of performance to a particular designated facility. In promulgating this provision, the EPA received comments contending that if states may consider factors that justify less stringent standards, they must also be permitted to consider factors that would justify greater stringency than required by an EG, such as more expeditious compliance obligations or the retirement of a source. EPA's Responses to Public Comments on the EPA's Proposed Revisions to Emission Guideline Implementing Regulations at 56 (Docket ID No. EPA-HQ-OAR-2017-0355-26740) (July 8, 2019). In response to these comments, the EPA explained that it interpreted the statutory RULOF provision as intended to authorize only standards of performance that are less stringent than the presumptive level of stringency required by a particular EG. *Id.* at 57. The EPA has reevaluated its prior interpretation and is now proposing to amend subpart Ba to reflect its revised interpretation that the statute authorizes the EPA to permit states to consider other factors that justify application of a more stringent standard to a particular source than required by an EG. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). The EPA's rationale for its revised interpretation and proposal is as follows.

First, allowing states to apply a more stringent standard as part of their CAA section 111(d) plans is consistent with CAA section 116, which generally authorizes states to include more stringent standards of performance or requirements regarding control or abatement of air pollution in their plans. The provisions at 40 CFR 60.24a(f) provide that nothing in the implementing regulations shall be construed to preclude states from adopting or enforcing a standard of performance or compliance schedule that is more stringent than required by an EG.

This language is consistent with the anti-preemption requirements of CAA section 116. CAA section 116 provides that nothing in the statute shall preclude or deny the right of states to adopt or enforce "any standard or limitation respecting emissions of air pollutants." While CAA section 116 clearly does not preclude a state from adopting or enforcing a standard of performance more stringent than required under CAA section 111(d), 40 CFR 60.24a(f) does not explicitly speak to whether the EPA can approve a state plan that includes such standard of performance. However, the EPA finds that CAA section 116, as interpreted through the Supreme Court decision in *Union Electric Co. v. EPA*, gives the EPA the authority to approve such state plan under CAA section 111(d). 427 U.S. 246, 263-64 (1976). The EPA proposes to modify this provision, clarifying that to the extent a state chooses to submit a plan that includes standards of performance or compliance schedules that are more stringent than the requirements of a final EG, states have the authority to do so under this provision and CAA section 116. Further, the EPA proposes to clarify that it has the obligation, and therefore the authority, to review and approve such plans and render the more stringent requirements federally enforceable if all applicable requirements are met.

The EPA acknowledges that it previously took the position in the ACE Rule that *Union Electric* does not control the question of whether CAA section 111(d) state plans may be more stringent than Federal requirements. The EPA took this position in the ACE Rule on the basis that *Union Electric* on its face applies only to CAA section 110, and that it is "potentially salient" that CAA section 111(d) is predicated on specific technologies whereas CAA section 110 gives states broad latitude in the measures used for attaining the NAAQS. 84 FR 32559-61. The EPA no longer takes this position. Upon further evaluation, the EPA finds that, because of the structural similarities between CAA sections 110 and 111(d), CAA section 116 as interpreted by *Union Electric* requires the EPA to approve CAA section 111(d) state plans that are more stringent than required by the EG. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

The Court in *Union Electric* rejected a construction of CAA sections 110 and 116 that measures more stringent than those required to attain the NAAQS cannot be approved into a federally enforceable SIP but can be adopted and enforced only as a matter of state law. The Court found that such an interpretation of CAA section 116 "would not only require the Administrator to expend considerable time and energy determining whether a state plan was precisely tailored to meet the Federal standards but would simultaneously require States desiring stricter standards to enact and enforce two sets of emission standards, one federally approved plan and one stricter state plan." 427 U.S. at 263-64. The Court concluded there was no basis "for visiting such wasteful burdens upon the States and the Administrator." *Id*. Both CAA sections 111(d) and 110 are structurally similar in that both require EPA to establish targets to meet the objectives of each respective section (*i.e.* the level of stringency set by an EG under CAA section 111(d), and attainment and maintenance of the NAAQS under CAA section 110) and states must adopt and submit to the EPA plans which include requirements to meet these targets. Specifically, the EPA establishes a presumptive level of stringency in an EG, and state plans under CAA section 111(d) must include standards of performance that generally reflect this level of stringency. Because CAA section 116 applies to "any standard or limitation", this provision clearly applies to standards of performance adopted under CAA section 111(d). Therefore, the Court's rationale in *Union Electric* also applies to CAA section 111(d). Requiring states to enact and enforce two sets of standards of performance, one that is a federally approved CAA section 111(d) plan and one that is a stricter set of state requirements, runs directly afoul of *Union Electric*'s holding that there is no basis for interpreting CAA section 116 in such manner.

Moreover, there is nothing in CAA section 111(d) that precludes states from adopting, and EPA from approving, more stringent standards of performance. As described previously, while standards of performance must generally reflect the presumptive level of stringency identified in an EG, CAA section 111(d) also requires the EPA to permit states to "take into consideration, among other factors, the remaining useful life" in applying a standard of

performance to a particular designated facility. Aside from the explicit reference to remaining useful life, the statute is silent as to what the "other factors" are that states may consider in applying a standard of performance and whether such factors can be used only to weaken the stringency of a standard of performance for a particular designated facility. Therefore, the EPA may reasonably interpret this ambiguity both as to what the "other factors" are that states may use to apply a standard of performance to a particular source, and how such consideration may affect the stringency of such standard. Accordingly, the EPA reasonably interprets this phrase as authorizing states to consider other factors in exercising their discretion to apply a more stringent standard to particular a source. This is a reasonable interpretation of the statute because if Congress intended the RULOF provision to be used only to allow states to apply less stringent standards, it would have clearly specified that its intent or enumerated "other factors" that are appropriate for relaxing the stringency of a standard. The statute's explicit reference to remaining useful life shows that if there were factors that Congress specifically wanted the EPA to allow or disallow states to consider, it knew how to expressly make its intent clear in the RULOF provision.

In addition to finding that the statute does not preclude the EPA's reasonable interpretation of the statutory RULOF provision as described above, the EPA has reevaluated the bases for its prior interpretation that states may only consider RULOF to apply a less stringent standard and determined those bases were flawed. In taking its prior interpretation, the EPA noted that the new regulatory RULOF provision under subpart Ba at 40 CFR 60.24a(e) was substantively similar to the variance provision under subpart B, which authorizes the use of other factors that "make application of a less stringent standard or final compliance time significantly more reasonable." 40 CFR 60.24(f)(3). The EPA reasoned that because the variance provision under subpart B is similar to and predated Congress's addition of the statutory RULOF provision to CAA section 111(d) as part of the 1977 CAA Amendments, "Congress effectively ratified the EPA's implementing regulations' clear construct that remaining useful life and other factors are

only relevant in the context of setting less stringent standards." EPA's Responses to Public Comments on the EPA's Proposed Revisions to Emission Guideline Implementing Regulations at 57 (Docket ID# No. EPA-HQ-OAR-2017-0355-26740) (July 8, 2019). The EPA has closely reexamined the variance provision under subpart B and the RULOF provision under CAA section 111(d) and does not find that these provisions support the proposition that Congress clearly ratified the aspect of the variance provision in subpart B allowing states to apply only less stringent standards under certain circumstances. There are notable differences between the subpart B variance provision and the CAA section 111(d) RULOF provision that indicate Congress did not intend to incorporate and ratify all aspects of the EPA's regulatory approach when amending CAA section 111(d) in 1977. Particularly, for pollutants found to cause or contribute to endangerment of public health, subpart B allows states to apply a less stringent standard under certain circumstances unless the EPA provides otherwise in a specific EG for a particular designated facility or class of facilities. 40 CFR 60.24(c), (f). Subpart B places no similar exception for states in authorizing them to seek a variance for a standard addressing a pollutant for which the EPA has made a welfare-based, but not public health-based, endangerment finding under 111(b)(1)(A). 40 CFR 60.24(d). By contrast, the statutory RULOF provision does not make a similar distinction between public health and welfare-based pollutants, which the EPA itself acknowledged in promulgating the regulatory RULOF provision in subpart Ba. 84 FR 32570, July 8, 2019. Therefore, the EPA cannot clearly ascertain whether the statutory RULOF provision ratified the variance provision under subpart B, given that certain key elements of the latter are not present in the former. There is nothing in CAA section 111(d) or the legislative history that suggests Congress enacted the statutory RULOF provision by ratifying certain elements of the regulatory variance provision in subpart B but not others.

Additionally, in taking its prior position that states may only consider RULOF to apply a less stringent standard, the EPA asserted that the legislative history of the 1977 CAA Amendments supported its interpretation. The EPA highlighted the following statement in the

House conference report adopting the amendment to add the statutory RULOF provision: "The section also makes clear that standards adopted for existing sources under section 111(d) of the Act are to be based on available means of emission control (not necessarily technological) and must, unless the State decides to be more stringent, take into account the remaining useful life of the existing sources." H.R. Conf. Rep. No. 94–1742, (Sep. 30, 1976), 1977 CAA Legis. Hist. at 88. Based on this statement, the EPA found that the caveat that states have the choice to not invoke the RULOF provision and instead "be more stringent" suggests that considering RULOF is only intended to allow a state to make a standard less stringent. The EPA now finds that its prior reliance on this legislative history was flawed. The cited statement only speaks to remaining useful life, which is a factor that inherently suggests a less stringent standard, but it is completely silent as to the "other factors" the statute references. Thus, there is no indication that Congress intended to limit the "other factors" that states may apply in developing their plans only to permit less stringent, and not more stringent standards. Rather, the cited statement explicitly acknowledges that states may choose to "be more stringent", which supports the EPA's interpretation of the statute to permit states to consider other factors to set standards more stringent than the degree of emission limitation achievable through application of the BSER.

Interpreting the statutory RULOF provision as authorizing states to apply a more stringent standard of performance to a particular source is also consistent with the purpose and structure of CAA section 111(d). CAA section 111(d) clearly contemplates cooperative federalism, where states bear the obligation to establish standards of performance. Nothing under CAA section 111(d) suggests that the EPA has the authority to preclude states from determining that it is appropriate to regulate certain sources within their jurisdiction more strictly than otherwise required by Federal requirements. To do so would be arbitrary and capricious in light of the overarching purpose of CAA section 111(d), which is to require emission reductions from existing sources for certain pollutants that endanger public health or welfare. It is inconsistent with the purpose of CAA section 111(d) and the role it confers upon states for the EPA to

constrain them from further reducing emissions that harm their citizens, and the EPA does not see a reasonable basis for doing so.

Other factors states may wish to account for in applying a more stringent standard than required under an EG include, but are not limited to, early retirements, and availability of control technologies that allow a source to achieve greater emission reductions. However, the EPA cannot in the implementing regulations anticipate each and every factor under which a state may seek to apply a more stringent standard. Therefore, the EPA is proposing general requirements under which states may use the RULOF provision to apply a more stringent standard and may identify any further parameters in a specific EG. The EPA is also proposing to require that states seeking to apply a more stringent standard of performance based on other factors must adequately demonstrate that the different standard is in fact more stringent than the presumptive level of stringency. Such standard of performance must meet all applicable statutory and regulatory requirements, including that it is adequately demonstrated[49], and the state plan must include measures that provide for the implementation and enforcement of the standard as with any standard of performance under CAA section 111(d).

For the reasons described in this section, the EPA proposes to revise the RULOF provision under subpart Ba to permit states to consider factors which justify applying a standard of performance that is more stringent than required under an EG. The EPA solicits comment on its proposed interpretation of the statutory RULOF provision and revision to the regulatory provision (Comment E9-1).

Moreover, the EPA proposes to clarify that under subpart Ba, per the authority of CAA sections 111(d) and 116, states may include more stringent standards of performance in their

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[49] The EPA is not proposing to require the state to conduct a source-specific BSER analysis for purposes of applying a more stringent standard, as the EPA proposes to require for application of a less stringent standard. So long as the standard will achieve equivalent or better emission reductions than required by the EG, the EPA believes it is appropriate to defer to the state's discretion to, for example, choose to impose more costly controls on an individual source.

plans and that the EPA must approve and render such standards as federally enforceable, so long as the minimum requirements of the EG and subpart Ba are met.[50] The EPA solicits comment on its proposal as described in this section (Comment E9-2).

F. Provision for Electronic Submission of State Plans

The provision at 40 CFR 60.23a(a)(1) currently requires state plan submissions to be made in accordance with the provision in 40 CFR 60.4. Pursuant to 40 CFR 60.4(a), all requests, reports, applications, submittals, and other communications to the Administrator pursuant to 40 CFR part 60 shall be submitted in duplicate to the appropriate regional office of the EPA. The provision in 40 CFR 60.4(a) then proceeds to include a list of the corresponding addresses for each regional office. In this action we are proposing to revise 40 CFR 60.23a(a)(1) to require electronic submission of state plans instead of paper copies as according to 40 CFR 60.4. In particular, we are proposing to add a sentence to 40 CFR 60.23a(a)(1) that reads as follows: "The submission of such plan shall be made in electronic format according with § 60.23a(a)(3) or as specified in an applicable emission guideline." In 40 CFR 60.23a(a)(3), the EPA is proposing the general requirements associated with the electronic submittal of plans.

As previously described, CAA section 111(d) requires the EPA to promulgate a "procedure" similar to that of CAA section 110 under which states submit plans. The statute does not prescribe a specific platform for plan submissions, and the EPA reasonably interprets the procedure it must promulgate under the statute as allowing it to require electronic submission. Requiring electronic submission is reasonable for the following reasons. Providing for electronic submittal of CAA section 111(d) state plans in subpart Ba in place of paper submittals aligns with current trends in electronic data management and as implemented in the individual EGs,

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[50] The EPA notes that its authority is constrained to approving measures which comport with applicable statutory requirements. For example, CAA section 111(d) only contemplates that state plans would include requirements for designated facilities regulated by a particular EG; therefore, the EPA concludes that section 116 does not provide it with the authority to approve and render federally enforceable measures on entities other than those on designated facilities.

will result in less burden on the states. It is the EPA's experience that the electronic submittal of information increases the ease and efficiency of data submittal and data accessibility. The EPA's experience with the electronic submittal process for SIPs under CAA section 110 has been successful as all the states are now using the State Planning Electronic Collaboration System (SPeCS). SPeCS is a user-friendly, web-based system that enables state air agencies to officially submit SIPs and associated information electronically for review and approval to meet their CAA obligations related to attaining and maintaining the NAAQS. SPeCS for SIPs is the EPA's preferred method for receiving such SIPs submissions. The EPA has worked extensively with state air agency representatives and partnered with E-Enterprise for the Environment and the Environmental Council of the States to develop this integrated electronic submission, review, and tracking system for SIPs. SPeCS can be accessed by the states through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). The CDX is the Agency's electronic reporting site and performs functions for receiving acceptable data in various formats. The CDX registration site supports the requirements and procedures set forth under the EPA's Cross-Media Electronic Reporting Regulation, 40 CFR part 3.

The EPA is proposing to include in 40 CFR 60.23a(a)(3) the general requirements associated with the electronic submittal of a state plan in subpart Ba. As proposed, 40 CFR 60.23a(a)(3) will require state plan submission to the EPA be via the use of SPeCS or through an analogous electronic reporting tool provided by the EPA for the submission of any plan required by this subpart. The EPA is also proposing to include in the new provision at 40 CFR 60.23a(a)(3) language to specify that states are not to transmit confidential business information (CBI) through SPeCS. Even though state plans submitted to the EPA for review and approval pursuant to CAA section 111(d) through SPeCS are not to contain CBI, this language will also address the submittal of CBI in the event there is a need for such information to be submitted to the EPA. Any other specific requirements associated with the electronic submittal of a particular state plan will be provided within the corresponding EG. The requirements for electronic

submission of CAA section 111(d) state plans in EGs will ensure that these Federal records are created, retained, and maintained in electronic format. Electronic submittal will also improve the Agency's efficiency and effectiveness in the receipt and review of state plans. The electronic submittal of state plans may also provide continuity in the event of a disaster like the one our nation experienced with COVID-19. The EPA requests comment on whether the EPA should provide for electronic submittals of plans as an option instead of as a requirement (Comment F-1). The EPA requests comment on whether a requirement for electronic submissions of 111(d) state plans should be via SPeCS or whether another electronic mechanism should be considered as appropriate for CAA section 111(d) state plan submittals (Comment F-2).

G. Other Proposed Modifications and Clarifications

1. Standard of Performance and Compliance Flexibility

i. Definition of Standard of Performance

The EPA proposes to amend 40 CFR 60.21a(f) and 60.24a(b) to clarify that the definition of "Standard of performance" allows for state plans to include standards in the form of an allowable mass limit of emissions. The current regulatory definition states that under CAA section 111 the establishment of standards of performance is to reflect the degree of emission limitation achievable through the application of the BSER, as determined by the EPA. Per the definition in 40 CFR 60.21a(f), such a standard for emissions of air pollutants includes, "but [is] not limited to a legally enforceable regulation setting forth an allowable rate or limit of emissions into the atmosphere, or prescribing a design, equipment, work practice, or operational standard, or combination thereof". The term "an allowable rate or limit of emissions" was intended to encompass standards of performance based on quantity, rate, or concentration of emissions of air pollutants, consistent with the definition of "emission limitation" and "emission standard" in

CAA section 302(k).[51] To address any potential ambiguity about this term, the EPA is proposing to amend this provision to clarify that the term "an allowable rate or limit of emissions" means "an allowable rate, quantity, or concentration of emissions" of air pollutants. The EPA is also proposing to amend the definition of standard of performance under 40 CFR 60.24a(b) to read "… in the form of an allowable rate, quantity, or concentration of emissions" rather than "… either be based on allowable rate or limit of emission". Moreover, the EPA proposes to remove the phrase "but not limited to" from 40 CFR 60.21a(f) as unnecessary and potentially confusing verbiage that is redundant of the word "including," particularly where the definition already identifies a wide breadth of potential standards that may be included in a state plan.

ii. Compliance Flexibilities, Including Trading or Averaging

CAA section 111(d) and these implementing regulations authorize the EPA to approve state plans establishing standards of performance that meet the emission guidelines promulgated by the EPA, including plans that authorize sources to meet their emission limits in the aggregate, such as through standards that permit compliance via trading or averaging. (The EPA herein refers to all these flexibilities as trading or averaging.) In taking this position that CAA section 111(d) and these implementing regulations authorize the EPA to approve state plans that include trading or averaging, the EPA is reversing, after reconsideration, the contrary interpretation of CAA section 111(d) provided in the ACE Rule. As a related matter, the EPA is also reversing the ACE Rule's interpretation that CAA section 111 limits the best system of emission reduction (BSER) to controls that can be applied at and to the source (commonly referred to as inside-the-fenceline controls).

Provisions of Section 111. Under CAA section 111(d)(1), each state is required to submit to the EPA "a plan which … establishes standards of performance for any existing source" that emits certain types of air pollutants, and which "provides for the implementation and

[51] See 84 FR 32570, July 8, 2019 (explaining that the definition of "standard of performance" at 40 CFR 60.24a(b) is intended to permit either rate- or mass-based forms, depending on the considerations specific to a particular emission guideline).

enforcement of such standards of performance." Under CAA section 111(a)(1), a "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction … adequately demonstrated." Under CAA section 111(a)(6) and (a)(3), "existing source" is defined as a "stationary source," which, in turn, is defined, in relevant part, as "any building, structure, facility or installation…."

Rulemaking and Caselaw. In the Clean Power Plan (CPP), the EPA interpreted the term "system" in CAA section 111(a)(1) to be broad and therefore to authorize the EPA to consider a wide range of measures from which to select the BSER. 80 FR 64662, 64720 (October 23, 2015). Similarly, the CPP took the position that states had broad flexibility in choosing compliance measures for their state plans. See, e.g., 80 FR 64887, October 23, 2015. The CPP went on to determine that generation shifting qualified as the BSER, 80 FR 64707, October 23, 2015, and that states could include trading or averaging programs in their state plans for compliance. 80 FR 64840, October 23, 2015.

The ACE Rule included the repeal of the CPP. It interpreted CAA section 111 so that the type of "system" that the EPA may select as the BSER is limited to a control measure that could be applied inside the fenceline of each source to reduce emissions at each source. 84 FR 32523-24, July 8, 2019. Specifically, the ACE Rule argued that the requirements in CAA section 111(d)(1), (a)(3), and (a)(6) that each state establish a standard of performance "for" "any existing source," defined, in general, as any "building … [or] facility," and the requirements in CAA section 111(a)(1) that the degree of emission limitation must be "achievable" through the "application" of the BSER, by their terms, impose this limitation. The ACE Rule also concluded that the compliance measures the states include in their plans must "correspond with the approach used to set the standard in the first place," 84 FR 32556, July 8, 2019, and therefore must also be limited to inside-the-fenceline measures that reduce the emissions of each source. For these reasons, the ACE Rule invalidated the CPP's generation-shifting system as the BSER,

on grounds that it was an outside-the-fenceline measure, and precluded states from allowing their sources to trade or average to demonstrate compliance with their emission standards. 84 FR 32556-57, July 8, 2019.

In 2021, the D.C. Circuit vacated the ACE Rule. *American Lung Ass'n v. EPA*, 985 F.3d 914. The Court held, among other things, that CAA section 111(d) does not limit the EPA, in determining the BSER, to inside-the-fenceline measures. The Court explained that contrary to the ACE Rule, the above-noted requirements in CAA section 111 that each state establish a standard of performance "for" any existing "building … [or] facility," mean that the state must establish standards applicable to each regulated stationary source; and the requirements that the degree of emission limitation must be achievable through the "application" of the BSER could be read to mean that the sources must be able to apply the system to reduce emissions across the source category. None of these requirements, the Court further explained, can be read to mandate that the BSER is limited to some measure that each source can apply to its own facility to reduce its own emissions in a specified amount. *Id*. at 944-51. The Court further held that the ACE Rule's premise for viewing compliance measures as limited to inside-the-fenceline, which is that BSER measures are so limited, was invalid for the same reason. The Court indicated that while requiring symmetry between the nature of the BSER and compliance measures "would be reasonable" where necessary to preserve the environmental outcomes a particular BSER was designed to achieve, a universal restriction on compliance measures could not be sustained by policy concerns that were not similarly universal. *Id*. at 957-58.

In 2022, the U.S. Supreme Court reversed the D.C. Circuit's vacatur of the ACE Rule's embedded repeal of the Clean Power Plan. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). The Supreme Court made clear that CAA section 111 authorizes the EPA to determine the BSER and the amount of emission limitation that state plans must achieve. *Id*. at 2601-02. However, the Supreme Court invalidated the CPP's generation-shifting BSER under the major questions doctrine, explaining that the term "system" does not provide the "clear congressional

authorization," *id*. at 2614 (internal quotation marks omitted), needed to support a BSER "of such magnitude and consequence." *Id*. at 2615-16. The Court declined to address the D.C. Circuit's decision that the text of CAA section 111 did not limit the type of "system" the EPA could consider as the BSER to inside-the-fenceline measures. *See id*. at 2615 ("We have no occasion to decide whether the statutory phrase "system of emission reduction" refers exclusively to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER." (emphasis in original)). Nor did the Court rule on the scope of the states' compliance flexibilities.

The EPA Interpretation. As noted above, the EPA has reconsidered the ACE Rule's interpretation of the compliance flexibilities available to States under CAA section 111 and now proposes to disagree that averaging and trading are universally precluded. With respect to compliance measures, the EPA proposes to agree with the D.C. Circuit's reasoning in rejecting the ACE Rule's limitations on those measures. *American Lung Ass'n*, 985 F.3d at 957-58. As noted above, CAA section 111(d)(1) provides, in relevant part, that states "establish[]," "implement[]," and "enforce[]" "standards of performance for any existing source." CAA section 111(d) does not, by its terms, preclude states from having flexibility in determining which measures will best achieve compliance with the EPA's emission guidelines.

Such flexibility is consistent with the framework of cooperative federalism that CAA section 111(d) establishes, which vests states with substantial discretion. As the U.S. Supreme Court has explained, CAA section 111(d) "envisions extensive cooperation between Federal and state authorities, generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain." *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (citations omitted). It should be noted that the flexibility that CAA section 111(d) grants to states in adopting measures for their state plans is by no means unfettered; rather, section 111(d)(2) requires the EPA to review state plans to assure that they are "satisfactory."

For the reasons just noted, the EPA proposes to disagree with the ACE Rule's conclusion that state plan compliance measures must always correspond with the approach the EPA uses to set the BSER, where the environmental outcomes of the emissions guidelines are not compromised by a lack of alignment. Moreover, after reconsideration, the EPA also proposes to reject the ACE Rule's interpretation that various provisions in CAA section 111 limit the type of "system" that may qualify as the BSER to inside-the-fenceline measures. 84 FR 32556, July 8, 2019. Thus, there could be no comparable inside-the-fenceline statutory limitation on states' compliance flexibilities in developing their state plans. The EPA proposes to agree with the part of the D.C. Circuit's decision in *American Lung Ass'n*, 985 F.3d at 944-51, that rejected the ACE Rule's inside-the-fenceline statutory interpretation.

The EPA recognizes, however, that while the U.S. Supreme Court in *West Virginia* expressly declined to address this part of the D.C. Circuit's decision, it did impose limits, through the application of the major questions doctrine, on the type of "system" that may qualify as the BSER. 142 S. Ct. at 2615-16. The EPA does not propose in this action to address the scope of those limits. Thus, the EPA is not proposing in this action to address whether it could include trading or averaging as part of the BSER – nor, for that matter, is it proposing to identify any particular control mechanism that could or could not be part of the BSER – in light of those limits. Instead, the EPA may address further those limits, and their implications for the legality of particular systems of emission reduction and state compliance measures, in future emission guidelines.

Under the EPA's proposed interpretation of CAA section 111, the provision permits each state to adopt measures that allow its sources to meet their emission limits in the aggregate, when the EPA determines, in any particular emission guideline, that it is appropriate to do so, given, inter alia, the pollutant, sources, and standards of performance at issue. Thus, it is the EPA's proposed position that CAA section 111(d) authorizes the EPA to approve state plans, in particular emission guidelines, that achieve the requisite emission limitation through the

aggregate reductions from their sources, including through trading or averaging, where appropriate for a particular emission guideline and consistent with the intended environmental outcomes of the guideline.

We also note that the EPA has authorized trading or averaging as compliance methods in several emission guidelines. In 1995, the EPA authorized emissions trading in emission guidelines for municipal waste combustors. 60 FR 65387, 65402 (December 19, 1995); see 40 CFR 60.33b(d)(2) ("A State plan may establish a program to allow owners or operators of municipal waste combustor plants to engage in trading of nitrogen oxides emission credits."). In 2005, the EPA authorized allowance trading in the Clean Air Mercury Rule, 70 FR 28606, 28617 (May 18, 2005). This rule was vacated by the D.C. Circuit on other grounds. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Moreover, alongside the 2005 Mercury Rule, the EPA amended the CAA section 111 implementing regulations subpart B to provide that a state's "[e]mission standards [may] be based on an allowance system," 70 FR 28649, May 18, 2005 (promulgating 40 CFR 60.24(b)(1) (2005)), provisions that by their terms contemplated trading and that remained in place until rescinded by the ACE Rule. In addition, the 2015 CPP also authorized trading or averaging as a compliance strategy. 80 FR 64662, 64840 (October 23, 2015). Thus, the EPA has long interpreted CAA section 111(d) as permitting, in appropriate circumstances, flexible mechanisms to comply with the EPA's emission guidelines, and the EPA now proposes to return to this interpretation.

In addition, there is no provision in these implementing regulations that precludes state plans from authorizing sources to trade or average to demonstrate compliance with their standards. In particular, the proposed revisions in the definition of "standard of performance" in these regulations, described in section III.G.1.a of this preamble, would not impose that limit. For example, states could authorize their sources to comply with an "allowable quantity … of emissions" by trading allowances or with an "allowable rate … of emissions" by trading or averaging credits. It should be noted that in promulgating particular emission guidelines, the

EPA proposes that it may preclude certain flexibilities, on the grounds, for example, that for the particular source category or pollutant in question, implementation of those flexibilities would undermine the amount of emission reductions that the EPA designed the guidelines to achieve and thus would not achieve equivalent emissions reductions.

2. Minor Amendments or Clarifications

The EPA is proposing the following minor amendments to the regulatory text in subpart Ba to address the following editorial and other minor clarifications.

i. The EPA is proposing to amend the applicability provision for subpart Ba under 40 CFR 60.20a, to clarify that the provisions of subpart Ba are applicable to EGs published after July 8, 2019. The current language in this provision states that subpart Ba also applies to EGs if implementation of such guidelines is ongoing as of July 8, 2019. However, such EGs are a null set[52], therefore the EPA is proposing to remove this text so that it is clear that the provisions in subpart Ba only apply to final EGs published after July 8, 2019. Emission guidelines issued prior to July 8, 2019, are subject to the provisions of subpart B instead of subpart Ba.

ii. The EPA proposes to amend 40 CFR 60.21a(e), 60.22a(c), 60.24a(c), and 60.24a(n)(1) and (2) by deleting subpart C from the provisions because EGs can be codified in other subparts of this part and not only in subpart C of this part.

iii. The EPA proposes to amend 40 CFR 60.27a(a) by replacing the word "shorten" with "amend". The applicability provision at 40 CFR 60.20a(a)(1) states that "each emission guideline may include specific provisions in addition to or that supersede requirements of this subpart." However, the provision in 40 CFR 60.27a(a) only provides for the Administrator to "shorten the period for submission of any plan or plan revision or portion thereof". To make these two provisions consistent in light of the proposed

[52] The Municipal Solid Waste Landfills EG, which is currently being implemented, has its own applicability provisions and is subject to subpart B.

timelines for plan submission included in this action, the EPA is proposing to replace the word "shorten" with "amend."

iv. The EPA is also proposing an editorial amendment to 40 CFR part 60 subpart A at 60.1(a) to add a reference to subpart Ba. The applicability provision in 40 CFR 60.1(a) states that "Except as provided in subparts B and C, the provisions of this part apply to the owner or operator of any stationary source which contains an affected facility, the construction or modification of which is commenced after the date of publication in this part of any standard (or, if earlier, the date of publication of any proposed standard) applicable to that facility". We are proposing to amend this provision to include reference to subpart Ba in addition to subparts B and C.

The EPA solicits comment on the proposed clarifications as described in section III.G.2 of this preamble. (Comment G2-1).

3. Submission of Emissions Data and Related Information

The EPA proposes to amend 40 CFR 60.25a(a) by deleting reference to 40 CFR part 60 appendix D because the system specified for information submittal by the appendix is no longer in use. The proposed amendments clarify that the applicable EG will specify the system for submission of the inventory of designated facilities, including emission data for the designated pollutants and any additional required information.

4. State Permit and Enforcement Authority

Questions have previously arisen as to whether states may establish standards of performance and other plan requirements as part of state permits and administrative orders. The EPA is not proposing a regulatory amendment on this point but confirms that subpart Ba allows for standards of performance and other state plan requirements to be established as part of state permits and administrative orders, which are then incorporated into the state plan. See 40 CFR 60.27a(g)(2)(ii).

However, the EPA notes that the permit or administrative order alone may not be sufficient to meet the requirements of an EG or the implementing regulations, including the completeness criteria under 40 CFR 60.27a(g). For instance, a plan submittal must include supporting material demonstrating the state's legal authority to implement and enforce each component of its plan, including the standards of performance. *Id.* at 40 CFR 60.27a(g)(2)(iii). In addition, the specific EGs may also require demonstrations that may not be satisfied by terms of a permit or administrative order. To the extent that these and other requirements are not met by the terms of the incorporated permits and administrative orders, states will need to include materials in a state plan submission demonstrating how the plan meets those requirements. If a state does choose to use permits or administrative orders to establish standards of performance, it needs to demonstrate that it has the legal authority to do so. The implementing regulations do not themselves provide any independent or additional authority to issue permits and administrative orders under states' EPA approved title I and title V permitting programs. The EPA solicits comment on these proposed clarifications to state permit and enforcement authority (Comment G4-1).

IV. Statutory and Executive Order Reviews

Additional information about these Statutory and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders*.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in the Executive Order. Any changes made in response to OMB recommendations have been documented in the docket.

This action proposes amendments to 40 CFR part 60, subpart Ba, the general provisions that provide a framework for the development, adoption, and submittal of state plans for implementation of CAA section 111(d) EGs. The EGs provide for regulation of emissions of designated pollutants from existing facilities within specific source categories. The proposed amendments will only be applicable to EGs promulgated after July 8, 2019, to the extent the EG does not supersede the requirements of subpart Ba. The proposed amendments will not impact legacy EGs subject to the requirements of 40 CFR part 60, subpart B.

The impacts of the amendments proposed here on the benefits and costs of a potential EG subject to subpart Ba can vary greatly depending on the source category, number and location of designated facilities, and the designated pollutant and potential controls addressed. Additionally, the EPA may propose to supersede these general provisions in a particular EG, as needed and with appropriate justification. Emission guidelines are subject to notice and comment rulemaking, providing the opportunity for stakeholders, including the public, to consider the impacts of implementing or superseding these amendments during those rule making actions.

The EPA expects that the overall impacts of the implementation of the amendments to subpart Ba being proposed in this action will improve the implementation of EGs under CAA section 111(d). In particular, the EPA expects that the timelines proposed in this action both appropriately accommodate the process required by states and the EPA to develop and evaluate plans to effectuate an EG and are consistent with the objective of CAA section 111(d) to ensure that designated facilities expeditiously control emissions of pollutants that the EPA has determined may be reasonably anticipated to endanger public health or welfare. The potential impacts of amendments associated with timelines is addressed in more detail below.

As described in detail in section III.A.1 of this preamble, the EPA is proposing 15 months for state plan submissions after publication of a final EG. The EPA expects the additional time proposed for subpart Ba compared with the 9 months provided in subpart B will better accommodate the process required by states and the EPA to develop plans to effectuate the

applicable EG. Under the proposed state plan submission timeframe, the costs of developing the plans may be spread over 6 additional months. These additional 6 months also provide for the time needed by states to meet the proposed requirements associated with meaningful engagement and RULOF. As discussed in sections III.A.1 and III.A.3 of this preamble, the EPA does not interpret the *ALA* court's direction to require a quantitative measure of impact, but rather consideration of the importance of the public health and welfare goals when determining appropriate deadlines for implementation of regulations under CAA section 111(d). In proposing the state plan submittal timeline, the EPA is allowing states sufficient time to develop feasible implementation plans for their designated facilities that adequately address public health and environmental objectives. By allowing sufficient time for states to develop their state plans, the EPA has considered the importance of the public health and welfare goals as the proposed state planning process timing ultimately helps ensure timelier implementation of an EG, and therefore achievement of actual emission reductions, than would an unattainable deadline that may result in the failure of states to submit plans and require the development and implementation of a Federal plan. In addition, a successful submittal of approvable state plans will avoid an attendant expenditure of Federal resources associated with the development of a Federal plan.

As described in detail in sections III.A.3 and III.A.4 of this preamble, the EPA is proposing 12 months for the EPA to take final action on a state plan after a submission is found to be complete and 12 months for the EPA to promulgate a Federal plan either after the state plan deadline, if a state has failed to submit a complete plan, or after the EPA's disapproval of a state plan submission. The EPA is further proposing to streamline the timeframe for the EPA's determination of completeness on a state plan submission from six months to 60 days from receipt of the state plan submission (see section III.A.2 of this preamble). As described in detail in section III of this preamble, because these proposed timeframes provide for the administrative time reasonably necessary for EPA to accomplish such actions in an expeditious manner, the

EPA expects these timeframes will minimize the impacts on public health and welfare while ensuring that an EG is expeditiously implemented.

As described in detail in section III.A.5 of this preamble, the EPA is proposing to require that state plans include increments of progress if the plan requires final compliance with standards of performance later than 16 months after the plan submission deadline. The EPA expects the additional time of 4 months provided in the proposed amendments, compared to the requirement in subpart B, provides a reasonable time period for owners or operators of designated facilities to initiate actions associated with the increments of progress, thus ensuring a successful implementation of the increments of progress. Any specific requirements associated with increments of progress would be included in the EG, as these are dependent on the source type, pollutant, and control strategy addressed.

The EPA is also proposing amendments to subpart Ba to enhance requirements for reasonable notice and opportunity for public participation. In particular, the EPA is proposing to require that states, as part of the state plan development or revision process or if invoking RULOF provisions, undertake outreach and meaningful engagement with a broad range of pertinent stakeholders. Pertinent stakeholders include communities most affected by and vulnerable to the impacts of the plan or plan revision (see section III.C of this preamble).

Overall, the EPA expects these amendments will benefit the states in the development of approvable state plans. The EPA expects that the proposed requirements associated with meaningful engagement with pertinent stakeholders and RULOF would potentially increase the amount of information the states can use in designing standards, which may increase both the level of resources states will need to employ in the development of an approvable plan, as well as the resulting health and welfare benefits of the standards. At the same time, there are benefits of engaging with stakeholders and receiving pertinent information as a state plan is being developed. Such engagement may improve the record for the state's plan and reduce the amount

of comments received when the state plan is proposed to the public, which would reduce the amount of effort employed after proposal to address issues raised by the public and stakeholders.

There is a lot of variation and uncertainty in determining the magnitude of impacts, both to states and the public, resulting from amendments associated with meaningful engagement in any particular EG. The impacts of conducting meaningful engagement will be highly dependent on the number and location of designated facilities addressed by an EG, as well as on the type of health or environmental impacts of the associated emissions. If stakeholder and public involvement required by the proposed amendments does not generate a large number of specific and unique comments, data, or other considerations, then the level of effort states will employ to review them will be lower in comparison to when meaningful engagement comments are voluminous. Also, to the extent that states already employ significant engagement with pertinent stakeholders, the proposed meaningful engagement amendments would not result in additional costs, while other states that do not have engagement procedures already in place may be required to increase their level of effort to engage with pertinent stakeholders. The burden and benefits of meaningful engagement for the pertinent stakeholders will also be highly dependent on the EG and associated variables such as, but not limited to, the geographical distribution of the facilities and communities impacted, available modes of participation for those areas, the pollutants addressed, and the range of options available to the state and facilities for meeting the EG standards. The burden and benefits to pertinent stakeholders may be difficult to quantify, but overall, their engagement will be voluntary and is anticipated to result in feedback that may improve the resulting health and welfare benefits of the standards as perceived and experienced, particularly by those in communities most affected by and vulnerable to the impacts of the plan.

The EPA is proposing revisions to the RULOF provision in subpart Ba. The amendments included in this proposed action are intended to provide clarity and consistency for states and the EPA in considering RULOF when applying standards of performance to individual sources,

while still fulfilling the statutory purpose of CAA section 111(d) (see section III.E of this preamble).

The magnitude of impacts, both to states and the public, resulting from amendments associated with the proposed RULOF amendments, will vary depending on the particular EG to which the proposed provisions would apply. If a state does not invoke RULOF in their state plan, then the proposed amendments will not result in additional costs. If a state does invoke RULOF in their state plan, then the proposed amendments could result in an increased level of effort to develop standards of performance for certain sources. As such, the EPA expects the RULOF proposed amendments will potentially increase the level of resources states will need to employ in the development of an approvable plan. However, because the proposed amendments clarify what the EPA considers to be a satisfactory plan, the amendments would reduce the uncertainty of states and designated facilities in the development of such standards. This in turn could result in a decrease in the amount of time that a state that wished to invoke RULOF would need, relative to a situation where the requirements were less defined, by avoiding significant back and forth with EPA and the sources in the state during state plan development. Overall, the EPA expects the RULOF amendments will benefit the states in the development of approvable state plans and in the resulting benefits to public health and welfare.

Finally, the EPA expects proposed amendments for electronic submittal and for the availability of optional regulatory mechanisms will improve flexibility and efficiency in the call for and submission, review, approval, and implementation of state plans, and thus will overall result in benefits to the states, EPA, designated facilities, and public health and welfare. In addition, the EPA expects the proposed amendments for electronic submittal will increase the ease and efficiency of data submittal and data accessibility and benefit the states and EPA. Electronic submittal will also improve the Agency’s efficiency and effectiveness in the receipt and review of state plans.

While specific analysis of cost and benefit impacts will be addressed through individual EGs and associated notice and comment rulemaking, we request comments throughout this preamble more generally on the potential impacts associated with the amendments to subpart Ba being proposed in this action.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the Paperwork Reduction Act. The requirements in subpart Ba do not themselves require any reporting and recordkeeping activities, and no Information Collection Request (ICR) was submitted in connection with the original promulgation of the Ba subpart or the amendments we are proposing at this time. Any recordkeeping and reporting requirements are imposed only through the incorporation of specific elements of the Ba in the individual Emission Guidelines, which have their own ICRs.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. Specifically, this action addresses processes related to state plans for implementation of EGs established under CAA section 111(d).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. This proposed action does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate or the private sector in any 1 year.

This proposed action is also not subject to the requirements of section 203 of UMRA because, as described in 2 U.S.C. 1531-38, it contains no regulatory requirements that might significantly or uniquely affect small governments. This action imposes no enforceable duty on any local, or tribal governments or the private sector. However, this action imposes enforceable

duties on states. This action does not meaningfully require additional mandates on states beyond what is already required of them and will not impose a burden in excess of $100 million.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The EPA believes, however, that this action may be of significant interest to state governments.

Subpart Ba requirements apply to states in the development and submittal of state plans pursuant to emission guidelines promulgated under CAA section 111(d) after July 8, 2019, to the extent that an EG does not supersede the requirements of subpart Ba. This action proposes amendments to certain requirements for development, submission, and approval processes of state plans under CAA section 111(d). In particular, the proposed amendments associated to state plan submission deadlines, RULOF provisions, meaningful engagement, and regulatory mechanisms may be of significant interest to state governments. In section IV.A. of this preamble, the EPA describes the potential impacts of the implementation of the amendments to subpart Ba being proposed in this action. Overall, the EPA expects these amendments will benefit the states in the development of approvable state plans.

The EPA notes that notice and comment procedures required for the promulgation of individual EGs will provide opportunity for states to address issues related to federalism based on specific application of subpart Ba requirements to that particular EG.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. It would not impose substantial direct compliance costs on tribal governments that have designated facilities located in their area of Indian country. Tribes are not required to develop plans to implement the guidelines under CAA section 111(d) for designated facilities. This action also will not have substantial direct costs or impacts on the relationship between the Federal

government and Indian tribes or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to the action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" because it will not have a significant adverse effect on the supply, distribution or use of energy. Specifically, this action addresses the submission and adoption of state plans for implementation of EGs established under CAA section 111(d).

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The EPA believes that this action will advance protection for these communities by specifying requirements for balanced stakeholder outreach and meaningful public engagement as described in section III.C and section III.E.8 of this action.

K. Determination Under Section CAA 307(d)

Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this action is subject to the provisions of CAA section 307(d). Section 307(d)(1)(V) of the CAA provides that the provisions of CAA section 307(d) apply to "such other actions as the Administrator may determine."

Michael S. Regan,

Administrator.

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