State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

February 27, 2023

Michael S. Regan
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave NW, Suite 1101A
Washington, DC 20460

Submitted Electronically via Regulations.gov

Re: Comments on the Proposed Rulemaking Titled "Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d)" by the Attorneys General of the State of West Virginia, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wyoming (Docket No. EPA-HQ-OAR-2021-0527)

Dear Administrator Regan:

The undersigned States appreciate the opportunity to comment on EPA's proposed revisions to the implementation regulations for state plans under Section 111(d) of the Clean Air Act. *See* 87 Fed. Reg. 79,176 (Dec. 23, 2022) ("Proposed Rule"). We are strongly committed to responsible and efficient state regulation as part of the CAA's cooperative-federalism framework. We also understand the agency's duty to respond to the D.C. Circuit's decision concerning EPA's last rule in this area. But we have four areas of concern with the Proposed Rule that we urge the agency to consider further.

First, like EPA's recent supplemental proposal on methane emissions, the Proposed Rule suggests timelines inadequate for States to effectively develop and submit their plans to EPA. *See* "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review," 87 Fed. Reg. 74,702 (Dec. 6, 2022) ("Supplemental Proposal"). *Second*, the Proposed Rule assumes a new power to issue state plan calls that the text of Section 111(d) does not support. *Third*, the Proposed Rule encroaches on local-level discretion—on the one hand, adding onerous requirements the statute does not contemplate for States wishing to exercise their congressionally conferred discretion over source-specific factors, and on the other, dictating new extra-statutory factors that EPA wishes the States would take into account. *Fourth*, the Proposed Rule's limited promise of

compliance flexibility could be an impermissible step towards the sort of outside-the-fenceline measures that Section 111(d) does *not* permit EPA to use as the basis for emission guidelines.

We respectfully urge EPA to reconsider the Proposed Rule and restore needed time and state discretion to the important process of developing Section 111(d) implementation plans.

BACKGROUND

Section 111 of the Clean Air Act creates a partnership between EPA and the States for establishing emission standards for stationary sources of air pollution. 42 U.S.C. § 7411. The CAA assigns EPA the main regulatory role in specifying standards for new and modified sources, but Section 111(d) adopts a cooperative-federalism approach for existing sources. Specifically, it requires EPA to "establish a procedure similar to that provided by [Section 110]" for States to submit plans that "establish[] standards of performance" for covered existing sources in their borders. *Id.* § 7411(d)(1). The standards of performance the States set, in turn, must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction" that EPA "determines has been adequately demonstrated." *Id.* § 7411(a)(1). So while EPA promulgates emission guidelines based on its assessment of adequately demonstrated technology for source categories, it is up to the States to set requirements for specific sources and submit those plans to EPA under the process the agency sets out.

EPA respected this cooperative-federalism approach for several decades until it enacted the ultimately ill-fated Clean Power Plan rule. 80 Fed. Reg. 64,662 (Oct. 23, 2015). As the Supreme Court confirmed last Term, Congress did not give the agency power under Section 111(d) to effectively force a sector-wide shift in electricity production. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2593 (2022).

In 2019, the agency tried a course correction when it replaced the Clean Power Plan rule with the Affordable Clean Energy rule ("ACE"). 84 Fed. Reg. 32,520 (July 8, 2019). Though the majority of litigation over that rule focused on EPA's emission-guideline-setting authority, part of the lower-court proceedings concerned the ACE rule's implementing regulations for Section 111(d). *Id.* at 32,575-84. That aspect of the rule gave States 36 months to develop and submit their plans for emission reduction and two years to demonstrate compliance progress. *See* 40 C.F.R. §§ 60.23a(a)(1), 60.27a(c). This homeostasis was short-lived, however, as the D.C. Circuit vacated the provisions relating to these timelines and other implementation details. *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021) ("*ALA*"). The court reasoned that EPA failed to meaningfully address why shorter deadlines were unworkable. *Id.* at 992. It also concluded that, despite EPA's statutory duty to use "similar" procedures under Sections 110 and 111(d), EPA could not graft Section 110 deadlines onto Section 111 without comparing the relative scale of effort in developing and evaluating plans under those sections. *Id.* at 992-93.

The Proposed Rule revisits Section 111(d)'s implementing regulations in response to the D.C. Circuit's decision. But once more, EPA does not meaningfully address why it chose the now *much* shorter deadlines for state plans. Nor does it appropriately reconcile them with other deadlines in the same statute. Additionally, EPA suggests "clarifying" requirements for States'

consideration of certain discretionary factors, but the proposal sharply circumscribes the discretion Congress entrusted to the States and replaces it with extra-statutory factors of EPA's choosing.

DISCUSSION

The Proposed Rule does not respect the time States need to develop responsible, complex plans under Section 111(d), nor honor the discretion this portion of the CAA gives the States as EPA's regulatory partners. Though Section 111(d) requires EPA to "prescribe regulations … similar" to Section 110, EPA treats "similar" less as a default in favor of applying the same standards and more as a guideline that adjusts significantly depending on the provision. When dispensing with Section 110's 36-month timeline in favor of a new 15-month one, for instance, the Proposed Rule adjusts the dial too far with too cursory of an explanation. But elsewhere, when it seeks to implement regulatory mechanisms it has never before applied to Section 111(d), EPA adjusts the dial too far the other direction by importing those aspects of Section 110—again, without adequately justifying the change.

And this incongruence with Section 110 isn't the Proposed Rule's only problem lining up with the statutory text. It also effectively sidelines the States. States won't be able to meet the deadlines, especially now that EPA proposes saddling them with new and costly requirements simply for using their discretion—set out in the statute—to apply standards to a specific facility that deviate from EPA's category-wide assessments. And while claiming that parts of the Proposed Rule provide more flexibility to the States, we are concerned that EPA is improperly expanding its power to reject States' plans that don't conform to the agency's policy preferences.

I. States Will Be Unable To Meet EPA's Proposed Timelines.

Most of the Proposed Rule focuses on shortening the timeframe for submitting and enforcing state implementation plans after the D.C. Circuit vacated EPA's prior 36-month submission rule. 87 Fed. Reg. at 79,181-92. But EPA has overcorrected—its proposed 15-month timeline, *id.* at 79,182, does not provide enough room for States to develop appropriate plans.

The stark difference between the 36 months that States have to submit plans under Section 110 and the 15 months that EPA proposes here is the giveaway that something is amiss. Section 111(d) directs EPA to "prescribe regulations which shall establish a procedure similar to" the State-submission procedure set out in Section 110. 42 U.S.C. § 7411(d). EPA acknowledges that the "[proposed Section 111(d)] deadlines are not identical to those for SIPs under CAA section 110," and reasons that "similar" does not mean "identical." 87 Fed. Reg. at 79,182. But that acknowledgment is not an explanation why EPA thinks this approach is needed, much less how so significant a change stays faithful to the statutory text. Two procedures can hardly be called "similar" when one rushes a complex process through in less than half the time of the other. *See, e.g., Duckworth v. Allianz Life Ins. Co. of N. Am.*, 706 F.3d 1338, 1343 (11th Cir. 2013) (providing various definitions of "similar" that reflect a close and corresponding identity between two things).

Yes, the D.C. Circuit struck down the ACE rule because EPA failed to adequately explore the differences between Sections 110 and 111(d) plans and why they might justify different timelines. *ALA*, 985 F.3d at 994-96. But that doesn't mean EPA gets to start from a blank slate

when it comes to how much time is enough: Section 111(d) still requires "similar[ity]" to Section 110's process, and the *statute* sets 36 months as the default. 42 U.S.C. §§ 7410(a)(1), 7411(d). Yet EPA seems to take *ALA* as an instruction to decouple the statutes entirely—and misses even *ALA*'s key point on this issue. Any timeline that EPA chooses needs to balance the harms to the public from exposure to pollutants while allowing States sufficient time to develop appropriately complex plans. *ALA*, 985 F.3d at 994-96. The Proposed Rule does not parse the differences in these statutory schemes beyond a few normative descriptions.

Walking through the Proposed Rule's analysis, EPA apparently settled on 15 months by rough comparisons to other sections of the CAA and its implementing regulations. Jumping right to other parts of the statute instead of starting with Section 110's three-year baseline is questionable as a matter of statutory interpretation. EPA should specifically explain why it is justified in setting a "shorter period." 42 U.S.C. § 7410(a)(1). In other words, Congress intentionally started with a longer period, recognizing the complexity of the task that States must undertake, so EPA must at least explain why Congress's reasoned judgment should supposedly be set aside here. *See, e.g.*, *New York v. EPA*, 964 F.3d 1214, 1228 (D.C. Cir. 2020) (Griffith, J., concurring) (noting that Section 110 "affords three years for states to craft implementation plans" and contrasting this timeframe with "divergent timelines" found in other parts of the CAA).

We have concerns with some of the conclusions EPA draws from those other parts of the statute, too.

EPA starts first with Subpart B, which gives States a nine-month timeframe to submit plans after publication of a final emission guideline. We have no quarrel with the rationale that this period would not be enough for most States to submit Section 111(d) plans: EPA correctly notes that most States either failed to submit plans or were substantially late in submitting them on that schedule. 87 Fed. Reg. at 79,183. So too for EPA's Section 129 discussion. *Id.* EPA justifies relying on Section 129 because it references Section 111(d) "in many instances, creating considerable overlap in the functionality of the programs." *Id.* EPA also fairly recognizes that Section 129's 12-month timeline is inappropriate because Section 111(d) "permits states to take into account remaining useful life and other factors," which "could involve more complicated analyses." *Id.* But beyond that, we also observe that the narrower scope of Section 129—governing only waste-incineration units—means those implementation plans should be generally simpler and easier to develop than the broader plans that will be required under Section 111(d). All together, these factors suggest that the implementation deadlines under Section 111(d) should be substantially longer than the deadlines under Subpart B.

The real problems start, though, when EPA considers Section 189 and its 18-month timeframe—the Proposed Rule subjectively judges that Section 189 plan requirements are more complex than those required under Section 111(d). 87 Fed. Reg. at 79,183. So the Proposed Rule treats its 15-month solution as a Goldilocks-like approach: 9 and 12 months are too short, 18 months is too long, so 15 months is just right. But this is not a "just right" situation.

For one thing, we do not agree that Section 189 plans are necessarily more complex than Section 111(d) plans. The latter requires States to make allowances for remaining useful life and

other factors that the former does not. Even if we were to agree with EPA's premise that these factors are to be *applied* in only "limited" circumstances (and we do not), States are still required to conduct initial assessments to determine when, exactly, those "limited" circumstances might arise. *Id.* And beyond conclusory statements, EPA has not explained why it thinks Section 189 plans are so uniquely complex that other plans can be assumed to require less time.

For another thing, as we noted before, EPA's strategy takes the time that Congress set as the default (36 months) out of its balancing altogether. This approach is particularly concerning because, according to EPA's report of its own experience, the States regularly need closer to three years than 15 months to promulgate sufficient Section 111(d) plans. 84 Fed. Reg. at 32,568. And even assuming that EPA is right to move *somewhat* below three years, giving *under half* that time goes too far in light of the complexity of the States' task, which will only get harder with the additional information EPA plans to require under the new rule.

EPA also fails to consider the significant compliance issues facing the States. Notably, EPA cuts away the States' compliance period even though it does not propose shortening its *own* evaluation time, which suggests that nothing has changed about the complexity of these plans and the time needed to assess them. The fact that CAA emission regulations have been in limbo for quite a while also supports giving States more time, not less, to adapt to the new legal environment. The Proposed Rule acknowledges that there may be significant variability in how States set implementation plans, but then breezily concludes, "15 months should adequately accommodate the differences in state processes necessary for the development of a state plan that meets applicable requirements." 87 Fed. Reg. at 79,183. The Proposed Rule does not explain how EPA reconciled the state variability it acknowledged with the much shorter and nationally applicable timeline it chose. The Proposed Rule also does not acknowledge that EPA is employing its regulatory authority under Section 111(d) on multiple fronts as of late—see the recent efforts on methane—which will expand the number of sources covered and state plans needed. The States will thus likely need to develop multiple complex plans at the same time. This calls for more time, too. And EPA does not appear to have considered State-specific processes—beyond a brief footnote acknowledgement—that require significantly more time than EPA has provided here. For instance, the West Virginia Legislature must approve legislative rules, and it meets only for a few weeks each year. Meeting a fifteen-month timeframe would be next to impossible if the clock begins ticking a few months before an annual legislative session: There would not be enough time to rush a plan before it begins, and 15 months would expire before the next one. And West Virginia is not alone. Texas's legislature, for example, meets for six months every *other* year.

Nor does EPA consider how additional sections in the Proposed Rule render its proposed timeline even more divorced from reality. As explained more below, the Proposed Rule encourages States to set compliance goals and use sources outside the fenceline. 87 Fed. Reg. at 79,207. Setting aside any other concerns with that portion of the Proposed Rule, that undertaking will take more time because it requires the States to consider several additional avenues of emission reduction beyond traditional inside-the-fenceline measures. Also as discussed more below, the Proposed Rule would require extensive justification before States can take remaining useful life and other factors into account in their plans. This, of course, means additional work, too, and in less than half the time from EPA's last rule. EPA notes that the Proposed Rule limits

the temporal reach of remaining useful life and other factors, which in its view supports a shorter timeframe for Section 111(d) plans. *Id.* at 79,183. But relying on time saved from improperly pruning the States' statutory discretion, *see infra* Part III, only turns one error into two.

Throughout the Proposed Rule, EPA also makes plan approval contingent on States' "meaningful engagement" with pertinent stakeholders—those most affected by and vulnerable to pollution's health or environmental effects. 87 Fed. Reg. at 79,203. In the first place, the statute does not set this task before the States or give EPA power to reject a plan if States choose not to take it up. EPA claims its authority is derived from both CAA Sections 111(d) and 301(a)(1), *id.* at 79,191, but we do not see in either of those sections support for the idea that EPA can dictate States' day-to-day administrative processes in this way. Even putting that concern to the side, if EPA will compel engagement with affected stakeholders, then it should allow more time—not less—to do so. And if engagement is needed, then the agency should not arbitrarily limit it to those stakeholders EPA thinks count the most. True engagement would also reach those who are affected economically by new restrictions and plan requirements. *See* State Plans for the Control of Certain Pollutants From Existing Facilities, 40 Fed. Reg. 53,340, 53,343 (Nov. 17, 1975) ("States will also have authority to grant variances in cases of economic hardship."). So even assuming EPA can implement these new requirements, the Proposed Rule does not explain how it can pile them on while shortening the timeline for completing them.

Lastly, a fair timeframe to account for all the relevant factors gives space for cooperation between the States and EPA to hash out disagreements or specific policies collaboratively, in the spirit of the CAA. This point proves crucial. We are deeply concerned that shortened timeframes may be an unlawful effort on EPA's part to seize more control over Section 111(d) implementation. According to EPA, even when a State submits a timely proposed implementation plan, the agency will treat the State as having submitted no plan at all if EPA later determines that the plan is incomplete. 87 Fed. Reg. at 79,185. And if by that point the initial 15-month period has run, EPA will assume immediate "authority to provide a Federal plan," *id*, even before the agency has made a formal finding of failure to submit, *id.* at 79,190. So in this scenario, even though the State has acted in good faith to comply with its Section 111(d) obligations, EPA will nevertheless afford that State no opportunity to correct the perceived deficiencies before invoking the statute's federal failsafe. *Id.* Shortened timeframes make this scenario far more likely. So given that EPA will give itself two months to make a completeness determination, *id.* at 79,182, the only way a State could try to assure itself an opportunity to supplement a plan EPA deems incomplete is to submit it at least two months before the already truncated 15-month deadline. And "at least" is doing considerable work: Even that rush on the State's part is no guarantee if EPA refuses to allow additional time to correct any perceived deficiencies, as the Proposed Rule seems to suggest. *Id.* at 79,185. This process hardly reflects the State-centric approach that Congress intended under Section 111(d). *See* 40 Fed. Reg. at 53,343 (explaining that "States will have primary responsibility for developing and enforcing control plans under section 111(d)").

II. EPA Has No Authority To Issue State Plan Calls Under Section 111(d).

We also urge EPA to reconsider its proposal to implement a state-plan-call process similar to that set out in Section 110(k)(5). EPA intends to provide that a failure to submit a revised plan

in response to such a call constitutes a failure to submit a plan under Section 111(d)(2). 87 Fed. Reg. at 79,194-95. EPA has no authority to create such a process.

EPA apparently believes that Section 111(d) lets it import the substantive plan-revision requirements from Section 110(k) into its Section 111 regulations. In other words, despite dismissing Section 110(a)'s relevance to appropriate timelines, EPA strictly hews to other parts of Section 110 to justify adopting new state plan calls and other regulatory mechanisms in the Proposed Rule. But Section 111(d) does not support that approach. It directs EPA to "prescribe regulations under which States shall establish a *procedure* similar to that provided by section 7410 of this title under which each State shall *submit* to the Administrator a plan." 42 U.S.C. § 7411(d)(1) (emphases added). Regulations about how States submit their plans to EPA are materially different from regulations about how EPA may judge that plan potentially years later. *See* 87 Fed. Reg. at 79,195 (describing changed "legal or technical conditions" and inadequate "implementation" as justifications for a state plan call, both of which could arise long after EPA approves an initial plan). So while EPA must look to Section 110's *state submission* procedures—found in subsection (a)—it does not have authority to co-opt Section 110's "state plan call" provisions from subsection (k). Subsection (k) is a separate provision addressed to EPA's duties, not the State's.

Section 111(d)(2) further confirms this reading because it sets out Section-specific enforcement powers for EPA: It empowers EPA to act when a State "fails to submit a satisfactory plan" or "fails to enforce" plan provisions. 42 U.S.C. § 7411(d)(2)(A)-(B). This same provision references Section 110(c), but not all of Section 110. *Id.* It does not mention Section 110(k) at all, which sets out *different* enforcement and "error correction" powers relevant to Section 110. So EPA's enforcement power is limited to what Congress gave it in Section 111(d). It cannot claim power to assume federal oversight when a State successfully submits one satisfactory plan but then fails to submit a *second* satisfactory plan at EPA's later insistence. Given the lack of legal authority (and the lack of clear standards for when this power would be invoked), these provisions should also be removed from the Proposed Rule.

III. The Proposed Rule Invades States' Statutorily Guaranteed Discretion.

Similar to EPA's related proposals in other CAA contexts, the Proposed Rule also improperly tries to "push States into abandoning their local-level discretion" by erecting significant roadblocks for any States that seek to exercise it. *See* State of W. Va., et al., Comment Letter on Supplemental Notice of Proposed Rule Establishing New Standards of Performance for New and Modified Sources of Methane In the Oil and Natural Gas Sector 6 (Feb. 13, 2023), http://bit.ly/3XK1kb8.

In Section 111(d), Congress expressly reserved States' right to depart from EPA guidelines for particular existing sources based on their assessment of, "among other factors, the remaining useful life of the existing source." 42 U.S.C. § 7411(d). EPA traditionally interpreted this prerogative to apply in three scenarios: (1) when the cost from plant age, location, or process design is unreasonable; (2) when there is a "physical impossibility of installing [the] necessary control

equipment"; and (3) when other factors make a less stringent standard "significantly more reasonable." 87 Fed. Reg. at 79,196.

The Proposed Rule says that it seeks to "clarify" this portion of Section 111(d). 87 Fed. Reg. at 79,199. But when EPA says "clarify," it actually means "restrict." *Id.* EPA wants to revise the third criterion so that it will not approve a State's decision to hold a facility to a standard less stringent than EPA prefers unless the State demonstrates the source's circumstances are "fundamentally different from the information [EPA] considered in the determination of the [best system of emission reduction]." *Id.* States striving to meet this degree of stringency will be saddled with new and unjustified obligations. The Proposed Rule requires States to detail contingencies, restrictive cost considerations, and impacted-communities analyses simply to invoke their statutory ability to factor remaining useful life and other source-specific considerations into their plans. *Id.* at 79,200-01. It is difficult to understand this new requirement other than an attempt to narrow the "range of permissible choices to the States" and to shoehorn States into complying with EPA's category-wide choices for almost every individual source. *Wis. Dep't of Health & Fam. Servs. v. Blumer*, 534 U.S. 473, 495 (2002).

We see no basis in the statute for EPA to restrict the States' congressionally conferred authority in this way. The agency proposes requiring States to go through a new and specific form of analysis that is nowhere to be found in the CAA, 87 Fed. Reg. at 79,200-01, and without accounting for the new costs these requirements will add for States that seek to depart from category-wide standards—as the statute contemplates they may. Worse still, EPA intends to *entirely foreclose* States from considering factors like remaining useful life when a plant's retirement date falls outside a prescribed range. *Id.* at 79,201. The CAA puts no bright-line limits like these on the States' discretion. And though we acknowledge that States must exercise reasonable judgment in this analysis, their judgment is not unreasonable merely because they consider source-specific factors different than EPA might.

Notably, EPA justifies its approach as a way to "fix" the current scheme, which it complains could lead to two States considering "two identically situated designated facilities and apply[ing] completely different standards of performance." 87 Fed. Reg. at 79,197. But that hypothetical difference is a quarrel with the statute. Congress invited this State-by-State variation, recognizing that States may view the collective effects of cost, structure, or other source-specific factors differently. These different views may derive, for instance, from the different composition of a particular State's energy portfolio—and may lead to equally good air quality across the board. In any event, EPA cannot justify a move toward a uniform-standard approach Congress did *not* put down in the Code based on perceived problems flowing from the cooperative-federalism regime that it *did*.

Lastly, EPA proposes to transform a provision giving States discretion to consider various factors into one that empowers the agency to require States to consider factors of EPA's own choosing. *See* 87 Fed. Reg. at 79,203 ("EPA interprets this [statutory provision] as providing discretion for the EPA to identify the appropriate factors and conditions under which the circumstance may be reasonably invoked in establishing a [less stringent] standard ….") This reads Section 111(d) backwards. The provision requires EPA to make space for the *States'*

discretion ("the Administrator … shall permit the State … to take into consideration"), and contemplates that the States will decide what factors may be relevant ("among other factors"). 42 U.S.C. § 7411(d). This State-focused language gives EPA no power to force States to consider "other factors" EPA deems relevant, like "health and environmental impacts." 87 Fed. Reg. at 79,203. And even if it did, EPA would still at least need to explain why it elevated these considerations above all others, such as the economic effects on surrounding communities.

Section 111(d)'s focus on remaining useful life and other source-specific factors protects the States' role in setting standards for the existing sources in their borders. It does not greenlight an EPA-created checklist for the States to show their work or to do other work at EPA's behest.

IV. EPA Promises States Flexibility But Looks To Be Trying To Back-Door Power For Itself.

Finally, we do not object to the limited areas where the Proposed Rule promises States additional compliance flexibility. But we are concerned that this flexibility arises *only* in the context of allowing trading or averaging to meet performance standards in the aggregate. *See* 87 Fed. Reg. at 79,208 (explaining that EPA will approve state plans that use trading or averaging because "[s]uch flexibility is consistent with the framework of cooperative federalism that CAA section 111(d) establishes"). This portion of the Proposed Rule involves the same measures that the Supreme Court made clear last Term that EPA could not designate directly as a best system of emission reduction. We urge the agency not to use this lone concession to state discretion as an indirect way to reach a similar end.

With how many other provisions in the Proposed Rule cut against state discretion, the agency's ready welcome for state creativity when it comes to trading-based state plans caught our eye. We are concerned that the agency may be laying an inappropriate groundwork for "encouraging" States to adopt measures EPA cannot require outright. For one thing, the Proposed Rule states that while EPA is not addressing the type of "system" the statute allows in this rulemaking, it "may address further those limits … in future emission guidelines." 87 Fed. Reg. at 79,208. Yet the Supreme Court invalidated the agency's prior generation-shifting approach, explaining that the term "system" does not provide the "clear congressional authorization" needed to support EPA guidelines "of such magnitude and consequence." *West Virginia*, 142 S. Ct. at 2614-16. While we trust that EPA will abide by the Supreme Court's direction, this language suggests to us that the agency may still be eager to push those limits.

So we also caution against letting any state discretion to implement trading programs as a compliance mechanism become an additional checkpoint when EPA approves state plans. Whatever options States have under Section 111 to consider state-wide averaging, EPA cannot require States to adopt them. The statute would not let EPA require a State to consider these measures, for instance, or to ask why a State did *not* pursue a trading-based route if it submits a traditional technology-and-processes-based plan instead. Whether a State *could have* adopted trading would also be an inappropriate basis for rejecting a State's decision to set a particular performance standard for a given source. Put directly, if a State explains why remaining useful life and similar considerations support deviating from EPA's category-wide guidelines, EPA could

not set aside that judgment because it believes the State should have required trading or similar measures to make up the difference.

In the end, the Proposed Rule is about implementation processes for States to submit plans under Section 111(d). These procedural tools cannot allow EPA to backdoor different or more stringent standards in accordance with its policy preferences. *See Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) ("The statute mandates that the EPA administrator *shall* approve such a state implementation plan as a whole if it meets all the applicable requirements of this chapter" (cleaned up) (emphasis in original)). Especially given that this issue arises in the same context where the Supreme Court has spoken to EPA's limits, we will be watching if the agency takes what the Proposed Rule packages as increased state discretion and uses it to limit the States' actual range of options at the plan-approval stage.

***

We urge EPA to reevaluate the Proposed Rule along these lines and to finalize implementation guidelines that provide adequate time for developing state plans, that stay within Section 111(d)'s bounds, and that respect—not cabin—the discretion Congress safeguarded for the States in this important context. We appreciate the opportunity to provide comments in this rulemaking and are happy to discuss further with the agency as helpful.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Steve Marshall
Alabama Attorney General

Treg Taylor
Alaska Attorney General

Tim Griffin
Arkansas Attorney General

Christopher M. Carr
Georgia Attorney General

Raúl Labrador
Idaho Attorney General

Todd Rokita
Indiana Attorney General

Brenna Bird
Iowa Attorney General

Daniel Cameron
Kentucky Attorney General

Jeff Landry
Louisiana Attorney General

Lynn Fitch
Mississippi Attorney General

Andrew Bailey
Missouri Attorney General

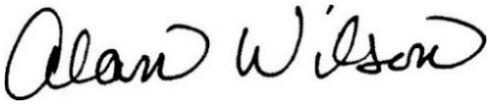
Austin Knudsen
Montana Attorney General

Mike Hilgers
Nebraska Attorney General

Drew Wrigley
North Dakota Attorney General

Dave Yost
Ohio Attorney General

Gentner F. Drummond
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General

Ken Paxton
Texas Attorney General

Sean D. Reyes
Utah Attorney General

Jason S. Miyares
Virginia Attorey General

Bridget Hill
Wyoming Attorney General