February 27, 2023

Via electronic submission (http://www.regulations.gov)
Attn: EPA-HQ-OAR-2021-0527
United States Environmental Protection Agency
EPA Docket Center
WJC West Building, Room 3334
1301 Constitution Avenue NW
Washington, DC 20004

Re: EPA-HQ-OAR-2021-0527; Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), 87 Fed. Reg. 79,176 (Dec. 23, 2022)

Dear Sir or Madam:

GPA Midstream Association ("GPA Midstream") appreciates this opportunity to submit comments on the proposed rulemaking, Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), 87 Fed. Reg. 79,176 (Dec. 23, 2022) (the "Proposed Rule"). The Proposed Rule would significantly change how States adopt performance standards for existing sources, including those in the midstream sector. Therefore, GPA Midstream has a significant interest in any final rule that the U.S. Environmental Protection Agency ("EPA") may issue based on the Proposed Rule.

GPA Midstream has served the U.S. energy industry since 1921 and has over 60 corporate members that directly employ more than 56,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products, and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 396,000 jobs across the U.S. economy. GPA Midstream members gather over 77% of the natural gas and recover more than 80% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 380 natural gas processing facilities. In the 2019-2021 period, GPA Midstream members spent over $100 billion in capital improvements to serve the country's needs for reliable and affordable energy.

GPA Midstream members have extensive gas and NGL operations that will be significantly affected by many aspects of the Proposed Rule and the related Supplemental Notice of Proposed Rulemaking for Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector, 87 Fed. Reg. 74,702 (Dec.

6, 2022) ("Supplemental Proposed Rule"), which appears to either simultaneously proposed the same changes to 40 C.F.R., Part 60, Subpart Ba or incorporates the Proposed Rule and presumes it will be finalized without any changes based on public comments. GPA Midstream raised several concerns with the proposed changes to Subpart Ba as expressed in the Supplemental Proposed Rule and incorporates its comments on the Supplemental Proposed Rule by reference herein. These comments are attached for ease of reference as Exhibit A.

Summary

GPA Midstream has serious concerns regarding the overall approach the Proposed Rule takes towards States establishing emission limits for existing sources. As a procedural matter, EPA proposes changes to Subpart Ba through two separate rulemakings at once. The Proposed Supplemental Rule would impose new restrictions on how States may establish existing source emission limits under proposed Subpart OOOOc that may or may not be included in Subpart Ba, while the Proposed Rule would implement some, but not all, of the changes discussed in the Proposed Supplemental Rule into a revised Subpart Ba. This creates significant confusion for commenters that is amplified by the absence of proposed Subpart Ba regulatory text. If EPA is determined to issue a regulation, we urge EPA to publish the regulatory text and allow public comment on that text before issuing a final rule.

As a substantive matter, we urge EPA to reconsider its basic approach, which is inconsistent with the cooperative-federalism provided by Section 111(d). Specifically, the Proposed Rule would strip away virtually all of the discretion that Congress provided to States in establishing emission limits for existing sources. Contrary to the text and structure of Section 111, EPA would make its emission guidelines effectively binding on all States with any attempt to deviate from those guidelines so onerous that it essentially eviscerates the discretion provided to States by Congress. Even if States did attempt to deviate from the emission guidelines, EPA uses the Proposed Rule to provide itself with virtually unfettered discretion to deny the State's emission limitations as "unsatisfactory." This assumption of power by the federal government is not the balanced framework Congress established for existing sources.

Moreover, GPA Midstream questions the rationale for this proposed transfer of powers from the States to EPA. EPA revised the Subpart Ba regulations less than four years ago, but the Proposed Rule provides no record evidence supporting its dramatic change of course. In those intervening four years, no States have submitted a plan to EPA under Section 111(d), much less imposed emission limits less stringent than an emission guideline for any designated facility or class of facilities. Thus, the Proposed Rule offers only various hypothetical scenarios and speculations about what States might do or might find confusing, not factual evidence. The Proposed Rule's legal rationale is also flawed as EPA's interpretation of the terms "satisfactory plan" and "standards of performance" are contradicted by Section 111's text and structure as well as relevant case law. GPA Midstream believes that substantial portions of the Proposed Rule, if finalized, would be vulnerable to a legal challenge. Therefore, we urge EPA to withdraw the Proposed Rule.

I. EPA Must Clarify the Proposed Rule's Relationship with the Supplemental Proposed Rule and Provide Proposed Regulatory Text

As described in GPA Midstream's comments on the Supplemental Proposed Rule, the Supplemental Proposed Rule appears to separately propose changes to Subpart Ba, or propose state equivalency requirements only applicable to Subpart OOOOc (the Supplemental Proposed Rule is not clear), such as proposing five criteria used for a source-by-source equivalency consideration, 87 Fed. Reg. 74,814, that are not discussed in the Proposed Rule's preamble. Both the Proposed Rule and the Supplemental Proposed Rule seem to be proposing major but relatively consistent revisions to how States may consider facilities' remaining useful life or other factors ("RULOF") in establishing less stringent emission limits. However, since the Proposed Rule does not provide any proposed regulatory language, commenters cannot compare draft language to fully understand the differences, if any, between the two proposals.

Further, the absence of draft language generally puts commenters at a disadvantage. A rulemaking preamble may discuss general concepts and intentions but only final regulatory language will bind EPA and the States in how the States regulate existing emission sources.[1] Proposed regulatory language frequently requires revisions after agencies consider public comments pointing out, among other things, where that language may deviate from the proposed rule preamble's discussion of concepts and intentions, where language is confusing, contradictory, or disorganized, or where key terms require definition. Here, EPA is not only proposing significant changes to the existing regulatory scheme but making it significantly more complicated. Commenters, including GPA Midstream, would be able to provide more constructive comments if EPA provided the public with draft regulatory language.

II. Section 111(d) Does not Authorize EPA to Impose "Threshold Requirements" on the States' Use of RULOF

Fundamentally, we urge EPA to rethink its overall approach to its role under Section 111(d). Nothing in Section 111 provides EPA with the authority to impose what the Proposed Rule calls "threshold requirements for considering" Remaining Useful Life and Other Factors." 87 Fed. Reg. at 79,198-99. These "threshold requirements" are impermissible restrictive substantive conditions on when or how States may exercise their discretion in considering RULOF to establish existing source emission standards under Section 111(d). In fact, the text and cooperative-federalism structure of Section 111(d) relegates the Agency to an appropriately limited role. EPA cannot re-define the respective roles that Congress assigned to the Agency and the States through unreasonable and unsupported interpretations of the terms "satisfactory plan" and "standards of performance." Further, the proposed multitude of conditions and requirements that States would have to satisfy are based on speculation, lack a record basis, and are collectively so onerous that EPA would effectively deprive States of an option that Congress provided under the statute. For

[1] *See, e.g.*, *Nat'l Wildlife Fed'n v. EPA*, 296 F.3d 554, 569 (D.C. Cir. 2002) (*per curium*) ("The preamble to a rule is not more binding than a preamble to a statute"); *El Comite Para El Bienestar v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008) (preamble can be used to interpret ambiguous regulations but does not impose binding obligations by itself).

all of these reasons, we urge EPA not to adopt its proposed conditions on the States' use of RULOF.

A. EPA's Role Under Section 111(d) is Limited to Establishing Procedural Regulations While States Establish Standards of Performance

Under Section 111(d), Congress directed EPA to provide guidelines while States, using their discretion, impose the substantive emission limitations for existing sources. The Proposed Rule would alter these respective roles established by the Act, rewriting the statute to demand equivalency across state plans and foreclosing the States' flexibility. GPA Midstream urges EPA to reconsider this flawed reading of its authority.

Section 111(d)(1) only permits the Administrator to "prescribe regulations which 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" for existing sources. 42 U.S.C. § 7411(d)(1). Those procedural regulations will differ from Section 7410 in that they "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." *Id.* However, Section 111(d)(1) does not authorize the Administrator to impose substantive conditions on the approval of a State plan for existing sources. Therefore, if such authority exists, it must come from Section 110. But, in the Proposed Rule, EPA has not looked to Section 110 to support its proposed approach.

In fact, Section 110 does support the wholesale rebalancing of power EPA is proposing. Section 110(k) governs EPA's review of State plans and actions on them. Of relevance, EPA must make a completeness find within 60 days indicating whether or not the state plan meets minimum statutory criteria, 42 U.S.C. § 7410(k)(1)(B), and either approve, partially approve, conditionally approve, or disapprove a state plan depending upon whether "it meets all of the applicable requirements of this chapter." *Id.* § 7410(k)(3). Thus, Section 7410, as incorporated by 7411(d), only authorizes EPA to create a procedural framework for the submission, review, and approval (or disapproval) of a state plan. Approval or disapproval is based on statutory criteria only (*i.e.*, "applicable requirements of this chapter"). Nothing in either Section 7410 or 7411(d) authorizes EPA to impose additional substantive requirements on when States may use RULOF and the Proposed Rule has not identified any statutory ambiguity requiring interpretation.[2]

Further, the D.C. Circuit very recently held that the Proposed Rule's view of Section 111(d) responsibilities is impermissible. In *American Lung Association v. EPA*, 985 F.3d 914 (D.C. Cir. 2021), the court explained the different roles that EPA and the States serve under Section 111(d). "Once the EPA identifies a best system that meets" the requirements of Section 111(a) "and calculates the degree of emission limitation it allows, the Clean Air Act leaves it to the States to set their own standards of performance for their existing pollution sources." 985 F.3d at 962

[2] *See*, *e.g.*, *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (agencies cannot re-write unambiguous statutory terms as they only have discretion to interpret ambiguous language); *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) ("Mere ambiguity in a statute is not evidence of congressional delegation of authority.").

(emphasis added). "The cooperative-federalism design of Section 7411(d) gives the States broad discretion in achieving those limitations." *Id.* In fact, "under Section 7411(d), the EPA does not impose the 'best system of emission reduction' on anyone. Instead, each State decides for itself what measures to employ to meet the emission limits, and in so doing may elect to consider the 'remaining useful life' of its plants and 'other factors.'" *Id.* Notably, this was not merely a concurrence with an agency interpretation that EPA would be free to change in the future; this was the court's explanation of Section 111's unambiguous "statutory design." *Id.* Thus, both the text of Section 111, and a recent D.C. Circuit interpretation of that text, make it clear that Congress did not provide EPA with any authority to regulate how States establish existing source emission limits under Section 111(d) or to cabin the "broad discretion" provided to States under that statute.

B. The Proposed Rule's "Satisfactory Plan" Interpretation is Inconsistent with the Statute, is Unreasonable, and Ignores EPA's Prior Interpretation

EPA's attempt to circumvent the clear direction of Section 111(d)(1) through its reading of Section 111(d)(2)(A) is unsound and we urge the Agency to reconsider it. That sub-section governs federal implementation plans promulgated where a "State fails to submit a satisfactory plan" as the Administrator "would have under section 7410(c) of this title in the case of failure to submit an implementation plan." 42 U.S.C. § 7411(d)(2)(A). This sub-section is straightforward. It provides EPA with the authority to issue federal emission standards for existing sources, if a State either fails to submit a plan or the plan is disapproved. That is what the referenced Section 7410(c) provides for regarding general state implementation plans and how EPA has long applied it. We urge EPA to return to that straightforward reading of the plain language of the Act.

The Proposed Rule would turn this straightforward provision on its head to read the term "satisfactory plan" as granting EPA vast power to restrict how States establish existing source emission limitations. According to the Proposed Rule, "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." 87 Fed. Reg. at 79,197. This interpretation violates several basic rules of statutory construction and is, therefore, not a reasonable (or even permissible) reading of Section 111.

To begin, although EPA may assess whether a State plan meets the Section 110 requirements that are incorporated by reference into Section 111(d), nothing in either Sections 110 or 111 authorize EPA to impose additional requirements to ensure State plans "support[ ] the statutory purpose" as EPA sees it. Thus, the Proposed Rule seems to presuppose an authority to impose substantive conditions on State plans without actually locating that authority in either Sections 110 or 111. Further, EPA's attempt to grant itself new powers over State plans conflicts with Section 111's text and structure, as discussed above and discussed by the D.C. Circuit in *American Lung Association*.

Further, because EPA's "satisfactory plan" interpretation violates basic principles of statutory construction, it is not a reasonable construction of Section 111(d)(1). *See Chevron USA*

Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984) (courts will only defer to "a reasonable interpretation made by the administrator of an agency"). Nothing about the term "satisfactory plan" can be viewed as grant of authority from Congress, much less a grant of authority that renders other portions of Section 111 superfluous. For instance, EPA's interpretation reads the following statutory terms out of the text:

- Under Section 111(d)(1), the Administrator is limited to "prescrib[ing] regulations which shall establish a procedure similar to that provided by Section 7410 of this title." Under the "satisfactory plan" interpretation, the Administrator would have unlimited power to establish existing source standards of performance by prohibiting States from exercising their own discretion, not the mere power to "establish a procedure."

- Under Section 111(d)(1), "each State," not EPA, "establishes standards of performance for any existing source for any air pollutant." Under the "satisfactory plan" interpretation, EPA would dictate how standards of performance for existing sources would be established, not States.

- Under Section 111(d)(1),"the State," not EPA, "take[s] into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." Under the "satisfactory plan" interpretation, the States' "consideration" of RULOF would be so circumscribed by EPA as to become a mere mechanical exercise of endorsing EPA's emission guidelines.

- Under Section 111(d)(2), EPA only has the authority described in Section 7410(c). That section allows for a Federal Implementation Plan when a State Implementation Plan is disapproved for a failure to comply with the statutory requirements of Section 7410(k)(1)(A). Nothing in Section 7410(c) provides EPA with authority to create new standards with which a State plan must comply. Under the "satisfactory plan" interpretation, Congress' cross-reference to Section 7410(c) would be meaningless and the sub-section's language would effectively terminate after the phrase "fails to submit a satisfactory plan."

In short, EPA's "satisfactory plan" interpretation improperly re-writes Section 111(d) as to render the majority of Section 111(d)(1)'s text, and half of Section 111(d)(2)(A)'s text, superfluous. *See*, *e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (internal quotations omitted). The Proposed Rule's "satisfactory plan" approach is not a permissible interpretation of the statute, much less a reasonable one.

Nor does the "satisfactory plan" interpretation consider the overall context and structure of Section 111. A "reasonable statutory interpretation must account for both 'the specific context in which … language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (alterations in original); *see also Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) (interpretations cannot be "inconsisten[t] with the design and

structure of the statute as a whole"). The "satisfactory plan" interpretation would make Congress' clear decision to split the responsibility for establishing standards of performance between EPA (new sources) and the States (existing sources) illusory as, despite the text and structure, EPA would dictate standards of performance under both subsections.

And, finally, the "satisfactory plan" interpretation is one that the U.S. Supreme Court has strongly and repeatedly disfavored. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. Amer. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). Courts are especially skeptical of such interpretations where, as here, an agency appeals to "vague terms or ancillary provisions" to overcome specific statutory delegations of authority. *Cf. Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021) ("Appellees would have us hold that after having gone to this trouble with specificity to state exactly what it meant, Congress *sub silentio* created a further exception to its clear meaning … we are not going to hold that Congress enumerated the mice and then unleashed an invisible elephant to trample the field."). Here, the Proposed Rule uses the ancillary term "satisfactory plan" – residing in Section 111(d)(2)(A) – to wrench away the authority that Congress expressly provided to States in Section 111(d)(1). Nothing in the term "satisfactory plan," or its surrounding context, indicates that Congress intended to modify Section 111(d)(1), much less provide EPA with the power to almost entirely constrain the States' "broad discretion" under that subsection. *Amer. Lung Ass'n*, 985 F.3d at 962.

Importantly, EPA's proposed reliance on the phrase "satisfactory plan" is directly contrary to EPA's prior, long established reading of the provision. EPA's 2019 Response to Comment Document rejected any notion that a State's submission of a "satisfactory plan" involved either an expansion of EPA's authority or an unworkably vague standard. Just four years ago, EPA viewed the "satisfactory plan" term as merely requiring that "the state must explain its application of the BSER to the source" and "demonstrate the reasonable application of the remaining useful life factor or other factors." EPA's Responses to Public Comments on the EPA's Proposed Revisions to Emission Guideline Implementing Regulations, EPA-HQ-OAR-2017-0355-26740 (June 2019) ("2019 RTC") at 55; *see also* 84 Fed. Reg. 32,520, 32,558 ("Generally, the plans submitted by states must adequately document and demonstrate the process and underlying data used to establish standards of performance" including "enough detail for the EPA to be able to reproduce the state's methods and calculations"). In fact, the existing standard – the need for States to provide reasoned explanations for their decisions backed by verifiable documentation and data – has been the definition of a "satisfactory plan" since 1975. 2019 RTC at 17-18 (rejecting the notion that approval criteria are "impermissibly vague" as EPA has been reviewing the state's "description of how it assessed the applicability to particular existing sources of the BSER measures" and its explanation of "its basis for applying the remaining useful life factor or other factors" since 1975 without a problem); *see also*, 40 Fed. Reg. 53,340, 53,344 (Nov. 17, 1975) (EPA will disapprove State plans imposing less than "stringent control without some reasoned explanation"). The Proposed Rule, however, never confronts EPA's current interpretation of the term "satisfactory plan" in considering what is "the most reasonable" interpretation of it. 87 Fed. Reg. at 79,197. Instead, the Proposed Rule acts as if EPA is interpreting the 48 year old standard for approving or disapproving state plans on a blank slate. EPA needs to confront its existing and long-standing

interpretation of "satisfactory plan" and provide some explanation of why it supports such a dramatic change in interpretation.

C. The Proposed Rule's "Standards of Performance" Interpretation is Unreasonable and Impermissible

The Proposed Rule separately argues that "there is a fundamental obligation under CAA section 111(d)" that existing source emission limits "reflect the degree of emission limitation achievable through the application of the BSER, as determined by the EPA." 87 Fed. Reg. 79,196. This argument claims that, because Section 111(d) uses the term "standard of performance," then Congress silently intended for EPA to establish existing source emission limits (as opposed to mere guidelines) under Section 111(d)(1), not the States. *Id.* For the same reasons as the "satisfactory plan" interpretation, the "standard of performance" interpretation is an impermissible and unreasonable one that lacks a statutory basis, contradicts Section 111(d)'s text and structure, and violates basic principles of statutory construction.

III. The Proposed Rule Provides no Reason Why the RULOF Revisions are Needed

Even if EPA had the authority to impose these extraordinary new conditions on States' use of RULOF, the Proposed Rule fails to provide a rational, record-based reasoning for those conditions. Instead, it bases EPA's proposed revisions on a series of hypothetical scenarios that do not withstand serious scrutiny.

For one, there is no data or any other information in the administrative record to support changing from the current rules governing how states factor in the remaining useful life of an existing source. 40 C.F.R. § 60.24a(e). The Proposed Rule asserts the regulations regarding RULOF, which were revised only four years ago, now lack "clear parameters for states on how and when to apply a standard less stringent than the presumptive level of stringency." 87 Fed. Reg. at 79,196.[3] Yet, EPA offers no support for this assertion. Currently, States evaluate whether applying the presumptive standard (1) involves unreasonable costs due to a plant's age, location, or process design, (2) is physically impossible, or (3) involves other factors "that make application of a less stringent standard or final compliance time significantly more reasonable." 40 C.F.R. § 60.24a(e). The existing regulation employs a rule of reason – a very commonly used standard under the Administrative Procedure Act and one used for purposes of Section 111(d) since 1975. Moreover, factor (3) is appropriately flexible, as it must be, given Congress' direction that EPA regulations "shall" allow States to consider unenumerated "other factors" instead of creating a definitive list of considerations. EPA just recently determined that such an open-ended approach to "other factors" was a necessity. *See* 2019 RTC at 52 (EPA should not "diminish state discretion and flexibility" as "EPA cannot foresee each and every circumstance that would be properly invoked as an 'other factor' when setting standards of performance").

[3] GPA Midstream agrees with the Proposed Rule's statement that, while the 2019 revisions to Subpart Ba were challenged, that challenge did not encompass 40 C.F.R. § 60.24a(e) and the court in *American Lung Association v. EPA* did not vacate that regulation. 87 Fed. Reg. at 79,196, n. 37.

According to the Proposed Rule, however, Section 60.24a(e) "does not provide clear parameters for states on how and when to apply" RULOF. 87 Fed. Reg. at 79,196. More specifically, EPA worries that "the reference 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" that "could effectively undermine the overall presumptive level of stringency envisioned by the EPA's BSER determination and render it meaningless." *Id.* There are multiple problems with this rationale.

First, it is entirely speculative. The Proposed Rule has not identified any questions that have arisen from the actual application of Section 60.24a(e) or, before that, the general operation of State plan use of RULOF since 1975. In fact, the Supplemental Proposed Rule "did not identify any provision in any of the state oil and natural gas regulations that included a less stringent standard for equipment or operations with a shortened lifespan." 87 Fed. Reg. at 74,818. In other words, neither the Proposed Rule nor the Supplemental Proposed Rule provide any information showing that EPA's desired revisions are necessary or helpful.

Second, the concern that States "may" apply RULOF in a way that "could effectively undermine the overall presumptive level of stringency envisioned by the EPA's BSER determination and render it meaningless," 87 Fed. Reg. at 79,197, is not only speculative, but is contrary to Section 111(d)'s purpose. EPA's BSER determination in its emission guidelines is always a starting point for States under Section 111(d), and therefore, it could never be "meaningless" as the Proposed Rule fears. But most importantly, Congress did not intend for BSER to be the floor on every State's rules. Rather, Congress intended that States, under certain circumstances, be free to implement standards less stringent than EPA's BSER determination. As one court explained, "[a]s with most legislation, the Clean Air Act amendments reflected a congressional compromise … As one legislative compromise, the Clean Air Act has less stringent regulations regarding existing power plants as compared to newly constructed sources of electricity. In other words, existing plants were 'grandfathered' in recognition of the expense of retrofitting pollution-control equipment." *United States v. EME Homer City Generation LP*, 823 F. Supp. 2d 274, 279 (W.D. Pa. 2011) (citing Section 111(d)); *see also WEPCO v. Reilly*, 893 F.2d 901, 909 (7th Cir. 1990) (citing legislative history justifying more lenient emission standards for existing sources). Thus, the entire purpose of Section 111(d)'s RULOF provision is to allow States to implement less stringent emission limitations where the States believe that the remaining useful life – and unenumerated "other factors" – warrant it.

Revising the implementing regulations to prohibit, or severely restrict, a State's ability to implement less stringent emission standards when considering "among other factors, the remaining useful life of the existing source," 42 U.S.C. § 7411(d), is contrary to the statutory purpose and the legislative compromise embodied in Section 111's split structure. EPA's current assertion that existing source emission limits must hew to "the overall presumptive level of stringency envisioned by the EPA's BSER determination," is contrary to the statute's text and structure, which provide the States' with "broad discretion" in establishing existing source limits. *Amer. Lung Ass'n*, 985 F.3d at 962. Thus, ensuring consistency between 111(b) new source standards and 111(d) existing source standards is not a legitimate rationale under the statute. EPA has acknowledged this for nearly 50 years. *See*, *e.g.*, 40 Fed. Reg. at 53,341 ("States may apply less

stringent standards to particular sources (or classes of sources) when economic factors or physical limitations … make such application significantly more reasonable"); *id.* ("the degrees of control represented by EPA's emission guidelines will ordinarily be less stringent than those required by standards of performance for new sources because the costs of controlling existing facilities will ordinarily be greater than those for control of new sources"); *id.* at 53,353 ("In most if not all cases, the result is likely to be substantial variation in the decree of control required for particular sources, rather than identical standards for all sources").

Third, Section 111(d) does not indicate that Congress believed that consistency between or among State existing source standards was either necessary or desirable. As the D.C. Circuit explained, "each State decides for itself what measures to employ to meet the emission limits, and in so doing may elected to consider the 'remaining useful life' of its plants and 'other factors.'" *Amer. Lung Ass'n*, 985 F.3d at 962 (emphasis added). The Proposed Rule does not identify anything in Section 111(d) that justifies a contrary interpretation. This means that its concern that "the references to reasonableness in" 40 C.F.R. § 60.24a(e) "are potentially subject to widely differing interpretations and inconsistent application among the states," 87 Fed. Reg. at 79,196-97, is contrary to the broad discretion afforded to individual States.[4]

Fourth, EPA and States have been implementing air emission standards that incorporate the "remaining useful life" of regulated facilities under the Regional Haze program for decades without any concern for "widely differing interpretations and inconsistent application among states developing plans." 87 Fed. Reg. at 74,9196-97. As with Section 111(d), the Regional Haze program gives States primary authority to establish air pollutant emission limitations that consider "the remaining useful life of the source" and other factors. 42 U.S.C. § 7491(g)(2); *see also* 40 C.F.R. §§ 51.301 ("remaining useful life" included in the definition of Best Available Retrofit Technology); 51.308(d)(1)(i)(A) (States consider "remaining useful life" in establishing Reasonable Progress Goals); 51.308(e)(1)(ii)(A) (determining Best Available Retrofit Technology); 308(f)(2)(i) (emission reduction measures that consider the "remaining useful life"). EPA and the States have collectively handled several dozen Regional Haze plans since 1999 without any indication that the methodology for State consideration of "remaining useful life" was confusing, inappropriately inconsistent, or frustrating the underlying goals of the Regional Haze program. Thus, the Proposed Rule's claim that Section 111(d)'s implementing regulations require significant changes to resolve confusion or improper inconsistency surrounding RULOF is contradicted by the absence of such problems under either Subpart Ba itself or the comparable Regional Haze program.

[4] In addition, the Proposed Rule's claim that the Section 60.24a(e)(1) reasonableness standard ("Unreasonable cost of control") is so vague that it necessitates clarification, 87 Fed. Reg. at 79,198-99, is contradicted by its simultaneous proposal to retain the "unreasonable cost of control" standard. *Id.* at 79,196. GPA Midstream supports retaining the "unreasonable cost of control" standard, but EPA's argument that a standard it proposes to retain justifies revisions to other aspects of the regulations is arbitrary and capricious.

IV. The Proposed RULOF Criteria are Fundamentally Flawed

If EPA proceeds with a rule to revise the subpart Ba regulations, we urge the Agency to reconsider the remaining useful life criteria it has outlined. The proposed revisions are, individually, contrary to the language and design Congress provided in Section 111 and thus are arbitrary and capricious. Collectively, the proposed criteria would make a State's consideration of RULOF in establishing existing source emission standards so onerous and burdensome that EPA would effectively foreclose an option that Congress specifically provided to States. Indeed, by their very design, the proposed criteria would effectively force States to implement EPA's presumptive standards, surrendering to EPA the "broad discretion" that Congress intended the States to exercise. EPA should instead retain the existing framework that embraces and protects the discretion that Congress granted.

A. The Proposed "Fundamentally Different" Criterion is Fundamentally Flawed

GPA Midstream urges EPA to remove its proposed "fundamentally different" criteria, which is flawed in at least two ways. 87 Fed. Reg. at 79196 (proposing that States "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.").

First, "fundamentally different" is far more vague and ambiguous than "reasonable," the word that EPA claims requires additional definition. 87 Fed. Reg. at 79,196. Indeed, "reasonable" is commonly used across numerous laws and rules, including EPA regulations, and its use is a prudent way to provide guidance and flexibility. Second, by imposing this higher burden on States it practically requires that a State demonstrate that EPA's emission guidelines are arbitrary and capricious in a specific application. Nothing in Section 111(d) indicates that Congress intended for States to consider RULOF only in extreme, outlier scenarios such as those that are "fundamentally different."

In fact, we urge EPA to consider fully how its own preamble illustrates just how impractical RULOF would become under this "fundamentally different" criterion. There, EPA, claims that States must demonstrate that BSER costs "would be exorbitant, greater than the industry could bear and survive, excessive, or unreasonable." 87 Fed. Reg. at 79,197 (internal quotations omitted); *see also id.* at 79,198 ("RULOF will be applicable 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."). There is nothing in the statute that support such a stark standard.

Moreover, the Supplemental Proposed Rule provides a more specific example that highlights the extremity of this standard. There, the Agency stated that where EPA estimated that the cost-effectiveness of the wet seal centrifugal compressor emission standard to be $711 per ton of methane removed, to demonstrate unreasonable cost, a State would have to determine that for an "affective facility in their state, the cost effectiveness was $71,000 per ton of methane

removed." 87 Fed. Reg. at 74,820 (emphasis added). The notion that States can only justify unreasonable costs by demonstrating, to EPA's satisfaction, that cost-effectiveness will be two orders of magnitude higher than the BSER estimate has no basis in the statute, is patently arbitrary and capricious, and would effectively preclude any State from ever establishing emission limitations based on the methods that Congress authorized under Section 111(d). The Supplemental Proposed Rule protests that it only provided the example "for illustrative purposes" and that States do not necessarily need to demonstrate that costs will "be two orders of magnitude higher than the presumptive standard to be considered unreasonable." *Id.* at 74,820. If that is in fact the case, and EPA proceeds, it should provide reasonable guidance here.

B. The Proposed Standard for How States Account for Remaining Useful Life Misunderstands Section 111(d) and Lacks a Record Basis

We further urge EPA to rethink its premise that States, in establishing existing source performance standards under Section 111(d), must mimic the process EPA uses in establishing emission guidelines. Specifically, the Proposed Rule would compel each State to include "a source-specific BSER for the designated facility" that considers the same five factors used by EPA, and "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" emission guidelines and the resulting "standard must be in the same form (*e.g.*, numerical rate-based emission standard) as required by the specific EG." *Id.*

EPA should reconsider this approach, because it lacks either a legal or record basis. EPA simply assumes, without any statutory analysis, record evidence, or explanation, that consistency in both process and results is not merely desirable, but demanded by Section 111(d). Indeed, as proposed, EPA ignores the "cooperative-federalism design of Section 7411(d)" that "gives the States broad discretion," *American Lung Association*, 985 F.3d at 962, that is found in the current regulations. Instead, EPA would reduce States to mere clerks performing paperwork exercises dictated by the Agency. These paperwork exercises, however, especially in the case of a State's analysis of a facility's remaining useful life, are so onerous, time-consuming, and burdensome that few, if any States, would have the resources to comply.

Further, EPA has not proffered any record evidence to support its assertion that its proposed process "generally address[es] all relevant information that states would reasonably consider in evaluating the emission reductions reasonably achievable for a designated facility." 87 Fed. Reg. at 79,200. In fact, there is no discussion of the processes that States actually have used in setting existing source standards for any source categories. Thus, the Proposed Rule declares that greater regulation of State analytical processes is required without any evidence of what States have done in the past, whether States have actually arrived at inconsistent results, or evidence showing that inconsistencies (if they have ever actually occurred) are undesirable in some way. Instead, the Proposed Rule seeks to establish standards based upon hypothetical scenarios and unsupported presumptions. We ask EPA to reconsider such an arbitrary and capricious approach.

C. The Proposed "Contingency Requirements" Lack a Legal or Record Basis

EPA should likewise revisit its proposed "contingency requirements," which would effectively convert a State's determination that applying emission guidelines to a facility is not reasonably cost-effective into a binding permit term. *See* 87 Fed. Reg. at 79,200 ("operational conditions, such as the source's remaining useful life or restricted capacity" would require a permit amendment to become binding on the facility); *id.* at 79,201 ("the EPA is proposing to require that the state plan must include the retirement date for the designated facility as an enforceable commitment"). The Proposed Rule does not cite any legal authority for such requirements. Nor does it identify any record basis that such conditions are be needed. For instance, the Proposed Rule fears that "it is possible that the source's utilization could increase in the future without any other legal constraint," *id.*, but does not identify any instance since 1975 where this has actually occurred. As with so many other provisions of the Proposed Rule, these "contingency requirements" address purely hypothetical scenarios without any consideration of what States actually have done in setting emission limits under Section 111(d).

In addition, EPA previously rejected the requirement to make a facility's retirement date a federally enforceable permit condition, 87 Fed. Reg. at 74,823, in a similar circumstance. Under the 2005 Regional Haze Rule, EPA rejected a commenter's request that, "to the extent that assertions regarding a plant's remaining useful life influences the BART decision, there must be an enforceable requirement for the plant to shut down by that date." 70 Fed. Reg. 39,104, 39,127 (July 6, 2005). EPA rejected the request, explaining that the Clean Air Act would require such a plant to either shut down at the retirement date, face an enforcement action, or install BART controls. In other words, the facility would have an opportunity to adapt to any changes in condition. The Proposed Rule not only changes EPA's position on this issue, but does so without explanation or even a recognition that it is changing its position.

D. The Proposed Health and Welfare Components of State Emission Limitations Have no Legal or Record Basis and are Impermissibly Vague

Lastly, GPA Midstream certainly understands appropriate consideration of impacts to certain communities when our federal government establishes laws, including environmental laws. That, however, is the type of policy determination reserved to the legislature that writes the laws, not federal agencies, who need a clear direction from the Congress for this type of regulation that purports to demand greater than equal protection for all communities. Nonetheless, in the Proposed Rule, EPA has ignored the limits of its authority and would expand the Clean Air Act by imposing special considerations for what EPA describes as "impacted communities." We urge EPA to withdraw these requirements from any final rule.

Specifically, EPA should not require States "to consider the potential health and environmental impacts on communities most affected by and vulnerable to the impacts from the designated facility considered in a state plan for RULOF provisions," implement "meaningful engagement requirements," and "describe the health and environmental impacts anticipated … along with any feedback the state received during meaning engagement." *Id.* Even assuming the rule would pass a constitutional challenge, these types of broad policy determinations should only

be implemented by the federal government after clear Congressional direction. Yet, nothing in the Clean Air Act authorizes this expansion of EPA's authority – that it, in turn, seeks to impose on the States charged with regulating existing sources.

We recognize that EPA claims its interpretation of the terms "satisfactory plan" and "standard of performance" give it broad leeway to impose these, and virtually any manner of conditions, upon States "consistent with section 111(d)'s overall health and welfare objectives." 87 Fed. Reg. at 79,203. Yet, neither EPA's interpretation of "satisfactory plan" nor "standard of performance" provide it with the authority to condition a State's consideration of RULOF on these expansive conditions. *See* discussion *supra.*

On the contrary, Section 111(d)(1) speaks only of a State's "consideration" of "the existing source to which such standard applies." Congress did not authorize any other considerations, such as impacts to health or welfare – impacts that Congress frequently included in multiple Clean Air Act analyses when it saw fit to do so. *See*, *e.g.*, 42 U.S.C. §§ 7408(a)(1)(A) (identifying air pollutants "anticipated to endanger public health and welfare"); 7409(b)(1) (establishing air quality standards "requisite to protect the public health"); 7411(b)(1)(A) (Administrator will publish list of air pollutant emission sources "which may reasonably be anticipated to endanger public health or welfare"). Section 111(d) is specific as to what States may consider ("among other factors, the remaining useful life of the existing source") and never compels States – through words like "shall" or "must" – to include these factors. Thus, the Proposed Rule's appeal to generalized "overall health and welfare objectives" that are not in Section 111(d)'s actual text violates the "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

In addition, EPA based its policy choice on supposition and speculation the Proposed Rule declares that these new requirements are necessary "[i]n order to address the potential exacerbation of health and environmental impacts to vulnerable communities as a result of applying a less stringent standard." 87 Fed. Reg. at 79,203 (emphasis added); *id.* ("such standards have the potential to result in disparate health and environmental impacts"); *id.* ("communities could be put in the position of bearing the brunt of the greater health and environmental impacts"). The Proposed Rule provides no data or analysis regarding the likelihood of any designated facility, or group of designated facilities, impacting the health of any "vulnerable community" (which the Proposed Rule does not define), or the extent of any such potential impacts. Therefore, there is no record basis supporting the proposal.

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GPA Midstream appreciates the opportunity to submit these comments and is standing by to answer any questions you may have.

Respectfully submitted,

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