No. 19-17480

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, et al.,
Plaintiffs/Appellees,

and

ENVIRONMENTAL DEFENSE FUND,
Plaintiff-Intervenor/Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants/Appellants.

Appeal from the United States District Court
for the Northern District of California
No. 4:18-cv-03237 (Hon. Haywood S. Gilliam, Jr.)

APPELLANTS' OPENING BRIEF

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
DAVID GUNTER
LESLIE M. HILL
JOAN M. PEPIN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-4626
joan.pepin@usdoj.gov

Of Counsel:

MATTHEW C. MARKS
KAREN J. PALMER
Attorneys
EPA Office of General Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

INTRODUCTION

Plaintiffs sued the Environmental Protection Agency (EPA) for violating its then-existing regulations by failing to timely promulgate a "federal plan" setting timelines with respect to certain air emissions standards. Those *regulatory* timeframes were significantly shorter than the *statutory* timeframes imposed by Congress when it amended a parallel provision in the Clean Air Act (CAA) in 1990. While this litigation was pending, EPA was engaged in notice-and-comment rulemakings to amend the relevant regulations to conform to the longer timeframes in the amended CAA. The district court refused to stay the litigation pending the outcome of those rulemakings and entered a judgment for Plaintiffs (later stayed) enjoining EPA to promulgate a federal plan.

After that judgment issued, EPA finalized its amendment of the relevant regulations, and they are now law. Therefore, EPA is in violation of no legal duty or deadline. EPA accordingly moved for relief under Federal Rule of Civil Procedure 60(b)(5), which provides for relief from a judgment if "applying it prospectively is no longer equitable." Because it is inequitable to compel a party to continue to comply with a judgment enforcing a legal duty that no longer exists, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law. The district court nonetheless denied EPA's motion for relief. That denial was an abuse of discretion and should be reversed.

STATEMENT OF JURISDICTION

(a) The district court had jurisdiction to consider EPA's Rule 60(b)(5) motion by virtue of its equitable power to supervise its injunction. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *Railway Employees v. Wright*, 364 U.S. 642, 646–47 (1961); *Safe Flight Instrument Corp. v. United Control Corp.*, 576 F.2d 1340, 1343 (9th Cir. 1978).

(b) This Court has jurisdiction under 28 U.S.C. § 1291 over a district court's decision denying a Rule 60(b)(5) motion for relief from judgment. *Deocampo v. Potts*, 836 F.3d 1134, 1140 (9th Cir. 2016).

(c) The district court denied EPA's motion under Rule 60(b)(5) on November 5, 2019. 1 Excerpts of Record (E.R.) 1. EPA filed its notice of appeal on December 10, 2019, or 35 days later. 2 E.R. 32. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUE

The district court held that EPA's failure to promulgate a federal plan violated the agency's now-superseded regulations, and it enjoined EPA to issue such a plan. EPA has since amended the relevant regulations, and so EPA is not in violation of any governing legal duty. Supreme Court and Circuit precedent hold that a change in the law that removes the legal basis for the continuing application of an injunction entitles the movant to relief from judgment.

Did the district court abuse its discretion in denying EPA's Rule 60(b)(5) motion for relief from judgment?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes, rules, and regulations are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. CAA Section 111 and its implementing regulations

Section 111 of the CAA, which regulates stationary sources of air pollutants, sets forth distinct approaches to the regulation of new and existing sources. 42 U.S.C. § 7411. For *new* sources, the CAA gives the default role as regulator to EPA. It requires the agency to establish, by regulation, "Federal standards of performance," *id.* § 7411(b)(1), and it provides that states "may" submit procedures pursuant to which EPA would delegate to the state authority to implement and enforce those performance standards, *id.* § 7411(c).

But for *existing* sources, the CAA contemplates that states will take the leading role. The CAA directs EPA to establish by regulation a procedure under which "each state *shall* submit" a plan to implement and enforce standards for certain existing sources. *Id.* § 7411(d)(1) (emphasis added). The CAA further directs that the procedure for state submissions established by the section 111(d)

implementing regulations shall be "similar to that provided by section [110] of this title." *Id.*[1]

a. The old implementing regulations

EPA issued implementing regulations for section 111(d) in 1975. The timelines set forth in those regulations mirrored the timelines in section 110 as it then existed. Under the 1975 regulations, states had to submit plans within 9 months after EPA published new emission guidelines for existing sources. 40 C.F.R. § 60.23(a)(1). EPA was then required to approve or disapprove submitted plans within four months of the submission deadline, *id.* § 60.27(b), and to promulgate a federal plan within six months of the submission deadline for those states without an approved plan, *id*. § 60.27(d). In 1990, Congress amended section 110 to lengthen those impractically short timelines, but EPA did not amend the corresponding section 111(d) regulations at that time.

b. The new implementing regulations

In August 2018, EPA began a comprehensive reassessment of its section 111 regulations. 83 Fed. Reg. 44,746 (Aug. 31, 2018). The revised implementing regulations, which were finalized in July 2019 after a thorough notice-and-comment rulemaking process, mirror the statutory timelines set forth

[1] Section 110 governs the "State Implementation Plan" process, under which states develop and submit for EPA's approval plans implementing the National Ambient Air Quality Standards program. 42 U.S.C. § 7410.

in the amended section 110. 84 Fed. Reg. 32,520 (July 8, 2019). Under the revised regulations, states have three years after EPA promulgates new emission guidelines to submit a state plan. 40 C.F.R. § 60.23a; *cf.* 42 U.S.C. § 7410(a)(1). Within 60 days of receipt of a state plan, EPA must determine whether it is complete. 40 C.F.R. § 60.27a(g)(1); *cf.* 42 U.S.C. § 7410(k)(1)(B). If EPA fails to make such a finding, the state plan will be deemed complete by operation of law. *Id.* Once a state plan is determined to be complete, EPA must take action to approve or disapprove the plan within one year. 40 C.F.R. § 60.27a(b); *cf.* 42 U.S.C. § 7410(k)(2). If EPA finds that a state failed to submit a required plan, determines a plan to be incomplete, or disapproves a plan in whole or in part, then EPA must promulgate a federal plan within two years. 40 C.F.R. § 60.27a(c); *cf.* 42 U.S.C. § 7410(c)(1).

2. EPA's emission guidelines for municipal solid waste landfills

In 1996, EPA promulgated regulations establishing emission guidelines for municipal solid waste landfills. 61 Fed. Reg. 9905 (Mar. 12, 1996). Those original landfill emission guidelines generally required any landfill emitting more than 50 megagrams annually of certain air pollutants to install control technology. The landfill emission guidelines, as amended in 2016 and 2019, are codified at 40 C.F.R. Subpart Cf, §§ 60.30f–60.41f.

a. The 2016 amendment

In 2016, EPA amended the landfill emission guidelines by, among other things, lowering the emissions threshold to 34 megagrams per year. 81 Fed. Reg. 59,276 (Aug. 29, 2016) ("2016 amendment"). At that time, EPA estimated that the change would bring an additional 93 landfills nationwide within the regulation's scope and would, by 2025, reduce greenhouse gas emissions nationwide by 0.1%. *Id.* at 59,305 (Table 2); 2 E.R. 56.

b. The 2019 amendment

At the time that the 2016 amendment to the landfill emission guidelines was promulgated, the old implementing regulations were still in effect. After the updated implementing regulations were finalized in July 2019, EPA undertook notice-and-comment rulemaking to amend the landfill emission guidelines again to cross-reference the new implementing regulations and make them applicable. 84 Fed. Reg. 44,547 (Aug. 26, 2019) ("2019 amendment").

Under the new regulations as applied to the landfill emission guidelines, state submissions were due three years after the 2016 emission guidelines went into effect, or August 29, 2019. The earliest date by which EPA must promulgate a federal plan for those states without approved state plans is two years after the deadline for submission has passed, or August 30, 2021.

3. Federal Rule of Civil Procedure 60(b)

Federal Rule of Civil Procedure 60(b) provides that on "motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" for certain enumerated reasons. Addendum 1a. One such reason is when "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Relief from judgment under Rule 60(b)(5) "is appropriate" when the movant "can show a significant change in either factual conditions or in law." *Agostini v. Felton*, 521 U.S. 203, 216 (1997) (internal quotation marks omitted).

B. Factual background and proceedings below

The 2016 amendments to the landfill emission guidelines went into effect on August 29, 2016. Under the 1975 implementing regulations in effect at that time, states had only 9 months—until May 30, 2017—to submit plans. Only two states were able to comply with that deadline, and another three states submitted plans later in 2017 and 2018. 2 E.R. 60. EPA did not take action on those plans within the timelines set forth in the 1975 implementing regulations, nor did it promulgate a federal plan.

On May 31, 2018, the eight Plaintiff states sued EPA under the CAA's citizen-suit provision, 42 U.S.C. § 7604(a)(2), alleging that EPA had failed to perform a nondiscretionary duty to act on the handful of submitted state plans

and to promulgate a federal plan by the deadlines flowing from the 1975 implementing regulations. Plaintiffs requested declaratory judgment and "a mandatory injunction compelling EPA to implement and enforce the Emission Guidelines." 2 E.R. 101. The Environmental Defense Fund later intervened as a Plaintiff.

EPA moved to dismiss the complaint for lack of jurisdiction, arguing that EPA's regulations do not establish any "act or duty under [the CAA] which is not discretionary with [EPA]," 42 U.S.C. § 7604(a)(2), and therefore are not enforceable through the citizen-suit provision. The district court denied EPA's motion to dismiss, holding that duties under the implementing regulations are duties under the CAA. 2 E.R. 71, 78.[2]

EPA also moved to stay the proceedings, explaining that the agency was actively engaged in legislative rulemakings to conform the 1975 implementing regulations to the amended section 110 of the CAA and to apply those new implementing regulations to the landfill emission guidelines. EPA sought that relief because its proposed rulemaking would, and ultimately did, alter the legal duties at issue. Plaintiffs opposed that motion, however, and the district court

---

[2] EPA's motion to dismiss, and the district court's rejection of it, both predated this Court's decision in *Natural Resources Defense Council v. Perry*, 940 F.3d 1072 (9th Cir. 2019), which supports the district court's ruling. The jurisdictional ruling is not at issue in this appeal.

refused to stay the proceedings despite the pending rulemaking process. 2 E.R. 80-81. To the contrary, the court appeared to be in a race to issue judgment before EPA could complete its rulemaking. For example, the court denied EPA's motion for an extension of time for its summary judgment brief due to the 2019 government shutdown, stating: "Given the pending rulemaking, a continuance of these proceedings is not feasible." 2 E.R. 117.

The parties then filed cross-motions for summary judgment. EPA did not dispute that it had not complied with the then-existing regulatory deadlines, and the district court granted summary judgment for the Plaintiffs on May 6, 2019. 1 E.R. 8. The court granted declaratory and injunctive relief, ordering EPA to approve or disapprove submitted state plans by September 6, 2019, which EPA timely did. 1 E.R. 22. The court also entered an injunction requiring EPA to promulgate, by November 6, 2019, regulations setting forth a federal plan to implement the landfill emission guidelines for those states without approved state plans. 1 E.R. 23.

On July 8, 2019, a little more than two months after the judgment, EPA finalized the new implementing regulations. 84 Fed. Reg. 32,520. On August 26, 2019, EPA finalized the 2019 amendment to the landfill emission guidelines, cross-referencing the new implementing regulations and making them applicable to the landfill emission guidelines. 84 Fed. Reg. 44,547.

Plaintiffs petitioned for review in the D.C. Circuit of those two rulemakings, and those challenges are pending. *See New York v. EPA*, D.C. Cir. No. 19-1165, and *Appalachian Mountain Club et al. v. EPA*, D.C. Cir. No. 19-1166 (challenging amendment of section 111(d) implementing regulations); *Environmental Defense Fund v. EPA*, D.C. Cir. No. 19-1222, and *California v. EPA*, D.C. Cir. 19-1227 (challenging amendment to landfill emission guidelines to cross-reference and apply updated implementing regulations). No petitioner has moved to stay implementation of the new regulations pending judicial review. Consequently, those regulations are undisputedly now in effect.

Those two new regulations, combined, materially modified the legal duty that the district court's judgment had enforced. Under the new implementing regulations, state plans are not due to be submitted until three years after new emission guidelines are published, 40 C.F.R. § 60.23a(a)(1), and no federal plan is required (at the earliest) until two years after state plans were due, *id.* § 60.27a(c). Because the 2016 amendment to the landfill emission guidelines was promulgated on August 29, 2016, state plans were due under the new regulations on August 29, 2019. Addendum 5a. Thus, EPA is not required to promulgate a federal plan until August 30, 2021 at the earliest. Under the current regulations, therefore, EPA was not—and is not—in violation of any legal duty to promulgate a federal plan.

Accordingly, on August 26, 2019, EPA filed a motion to amend the judgment, seeking relief from its injunction to promulgate regulations establishing a federal plan by November 6, 2019. The district court denied the motion to amend the judgment on November 5, 2019 but stayed the injunction until January 7, 2020 (later extended to January 14, 2020). 1 E.R. 6.

EPA appealed and moved the district court for a stay pending appeal. 2 E.R. 32. While conceding that "EPA's appeal raises a serious legal question," the district court denied a stay pending appeal. 2 E.R. 31. EPA renewed its motion in this Court, and the motions panel (Paez and N.R. Smith, JJ.) granted EPA's motion for stay pending appeal on January 10, 2020. 2 E.R. 24.

SUMMARY OF ARGUMENT

1. Binding Supreme Court and Circuit precedent establishes that when a change in the law authorizes what a judgment forbids, it is an abuse of discretion to refuse to modify an injunction founded on the superseded law. The district court committed precisely that abuse of discretion in denying EPA's motion for relief from judgment. The law on which the judgment solely rested has changed, such that EPA is in violation of no duty to issue a federal plan. Under current law, EPA need not promulgate a plan until August 30, 2021, at the earliest. The judgment prospectively enforces superseded law by compelling EPA to promulgate a regulation establishing a plan sooner than legally required.

a. The district court erred in holding that relief from judgment due to a change in the law is appropriate only when the change was effected by a third party such as Congress. That novel exception to the established rule is supported by no precedent, and the weight of persuasive authority is against it. The court's "third-party actor" exception is also inconsistent with its prior holding that EPA's regulations created duties under the CAA that the court had the power to enforce (and did enforce). The court's refusal to recognize that EPA's subsequent amendment of those same regulations changed the law on which the judgment rests is irreconcilable with its prior holding. Either EPA's regulations create enforceable legal duties in this case, or they do not. Having held that they do, the district court was bound to acknowledge that the legal duties were changed by the amendments.

b. The district court's speculative concern that EPA could "perpetually" postpone the deadline for issuance of a federal plan does not justify its refusal to grant relief from judgment. The amendments conformed EPA's section 111 implementing regulations to section 110 of the CAA, as amended by Congress. It is extraordinarily unlikely that EPA will amend its implementing regulations again to extend them *beyond* the timelines provided by section 110. Moreover, if EPA were to repeatedly amend its rules to extend its deadlines, the proper remedy would be a challenge to those hypothetical rules,

not a preemptive injunction to comply with the superseded deadlines. The district court abused its discretion by denying warranted relief from judgment based on pure and unrealistic speculation.

c. The fact that EPA *could* comply with the judgment is not a legally sufficient reason to deny relief from an injunction compelling compliance with a legal duty that has ceased to exist. A party moving for relief under Rule 60(b)(5) need not show that performance of the judgment is impossible in order to show that it is inequitable. The district court erred in holding that prospective enforcement of the judgment remains equitable merely because it is possible.

2. The district court suggested that EPA, by amending the law that the judgment enforced and then seeking relief from judgment on the basis of that change in the law, trespassed on the province of the judicial branch. But the Supreme Court has made clear since 1855 that an injunction may not be enforced if the law has been modified by a "competent authority," and that such a change in the law (though it renders a court judgment unenforceable) does not offend the separation of powers. EPA has acted entirely within its proper sphere. The district court, however, did not. Its refusal to recognize EPA's amendment of its regulations as a change in the law requiring modification of the injunction was a usurpation of EPA's lawful rulemaking role and an abuse of discretion.

The district court's order denying relief from judgment should be reversed.

STANDARD OF REVIEW

This Court reviews "for an abuse of discretion the district court's decision to deny a Rule 60(b) motion, and review[s] de novo any questions of law underlying the decision to deny the motion." *Deocampo v. Potts*, 836 F.3d 1134, 1140 (9th Cir. 2016).

ARGUMENT

I. The district court abused its discretion in refusing to modify the injunction.

Rule 60(b)(5) provides that a district court may grant relief from an order or judgment when "applying it prospectively is no longer equitable." It "is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'" *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)).

A district court has "wide discretion" in deciding motions under Rule 60(b)(5) in certain circumstances not present here. *Railway Employees*, 364 U.S. at 648. When the motion is based on a change of *factual* circumstances, for example, relief may be granted "when changed factual conditions make compliance with the decree substantially more onerous"; but relief should not be granted based on "events that actually were anticipated at the time" the judgment was entered. *Rufo*, 502 U.S. at 384-85. When the judgment is a *consent*

decree, founded on the consent of the parties as well as on the law, the court must enquire whether the consent decree's terms were shaped by a law that has since been changed (in which case relief should be granted), or by an agreement independent of the law's requirements (in which case prospective application of the decree may remain equitable). *See, e.g., id.* (vacating denial of Rule 60(b)(5) motion and remanding for determination whether consent decree's terms were based on superseded interpretation of constitutional requirements); *Railway Employees*, 364 U.S. at 652 (reversing denial of Rule 60(b)(5) motion where the record showed that the parties "attempted to conform the consent decree to the dictates of the Railway Labor Act as it then read").

"But discretion is never without limits, and these limits are often far clearer to the reviewing court when the new circumstances involve a change in law rather than facts." *Railway Employees*, 364 U.S. at 648. When a judgment is founded on the law alone, and the law changes to permit what had previously been forbidden, then "it is an abuse of discretion for a court to refuse to modify an injunction founded on the superseded law." *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986) (quoting *American Horse Protection Ass'n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) (R.B. Ginsburg, J.)); *Agostini*, 521 U.S. at 237 (holding that change in law "entitles petitioners to relief under Rule 60(b)(5)"); *Railway Employees*, 364 U.S. at 650 (reversing denial of Rule 60(b)(5) motion

where law had changed to permit what consent decree forbade). That sound rule reflects that a court's power is to enforce the *law,* and when the law no longer requires what the judgment commands, then it is inequitable to require prospective compliance with that judgment. As both this Court and the Supreme Court have acknowledged, a change in the law that "remove[s] the legal basis for the continuing application of the court's Order . . . 'entitles petitioners to relief under Rule 60(b)(5).'" *California Dep't of Social Services v. Leavitt*, 523 F.3d 1025, 1032 (9th Cir. 2008) (quoting *Agostini*, 521 U.S. at 237).

The district court's judgment and subsequent orders, enjoining EPA to promulgate a federal plan by January 14, 2020, were premised *solely* on the legal conclusion that EPA's failure to promulgate a federal plan violated a legal duty set forth in EPA's section 111(d) implementing regulations and the landfill emission guidelines. But after the 2019 amendments to those regulations, it is indisputable—and undisputed—that EPA now has no legal duty to issue a federal plan until August 30, 2021, at the earliest. Indeed, Plaintiffs have admitted that "no current regulation requires promulgation to occur by January 14, 2020." 2 E.R. 27. The 2019 amendments "removed the legal basis for the continuing application of the court's Order," and a "change in law of this type entitles [the movant] to relief under Rule 60(b)(5)." *Leavitt*, 523 F.3d at 1032.

The district court nevertheless denied the motion for relief from judgment, citing three reasons. As elaborated below, these reasons lack merit.

A. There is no "third-party actor" exception to the rule that a material change in the law warrants relief from judgment.

Although the district court acknowledged the line of cases holding that it is an abuse of discretion to deny relief from judgment when the law has changed to allow what the judgment forbids, it declined to follow them. The court found those cases "plainly distinguishable" because in "each case, the change in law was made by a non-party." 1 E.R. 4. Without explaining why that factual distinction should make a legal difference, the court held that "EPA's voluntary action here makes this case unlike those where subsequent changes in law were enacted by third parties, as opposed to by the very party subject to the Court's order." *Id.* at 4-5.

The district court erred in deviating from existing binding precedent to create a new, entirely unsupported "third-party actor" exception to the well-established rule that a change in law that "remove[s] the legal basis for the continuing application of the court's Order . . . entitles [the movant] to relief under Rule 60(b)(5)." *Leavitt*, 523 F.3d at 1032 (quoting *Agostini*, 521 U.S. at 237). The district court cited no case supporting such a departure from this Court's and the Supreme Court's precedent, and we are aware of none.

The district court's refusal to recognize the change in law effected by the regulations is inconsistent with its holding that those same regulations created nondiscretionary duties that the court has the power to enforce against the agency. If, as the court held, the regulations create an enforceable "duty under [the CAA] which is not discretionary with [EPA]," 42 U.S.C. § 7604(a)(2), then those same regulations, after amendment, may not be disregarded as the mere unilateral act of a party. Either the timelines in the implementing regulations and emission guidelines supply the substantive, enforceable law determining EPA's duties—or they do not.

The district court held that those regulations *do* create enforceable duties, a holding EPA does not here challenge. But it follows that the amendment of those same regulations altered those enforceable duties and thus constituted "a change in the law [that] authorizes what had previously been forbidden," warranting relief from judgment. *Toussaint*, 801 F.2d at 1090. The court's reasoning, treating EPA's regulations as binding law for the purposes of creating a duty, but not for the purposes of modifying that duty, is logically inconsistent and legally baseless.

In *Agostini*, the Supreme Court rejected an argument similar to the district court's novel holding that relief from a judgment enforcing superseded law is warranted only "where subsequent changes in law were enacted by third

parties." 1 E.R. 4. The petitioners in *Agostini* moved for relief from judgment under Rule 60(b)(5), arguing that subsequent Supreme Court decisions had undermined the 12-year old precedent giving rise to the injunction, such that although that precedent had not yet been formally overruled, it was no longer good law. The Supreme Court agreed and overruled the precedent. The Court then turned to the question of whether the injunction should be lifted. 521 U.S. at 237. The respondents argued that the Court "should not grant Rule 60(b)(5) relief here" because "petitioners have used Rule 60(b)(5) in an unprecedented way—not as a means of *recognizing* changes in the law, but as a vehicle for *effecting* them." *Id.* at 238 (emphasis in original).

The Supreme Court rejected that argument, holding that the "change in law *entitles* petitioners to relief under Rule 60(b)(5)." *Id.* at 237 (emphasis added). Although the Court itself, not the petitioners, ultimately changed the law in *Agostini*, the petitioners were active participants in bringing about that change. The Supreme Court's rejection of the respondents' argument at the very least suggests that a party's active involvement in creating a change in the law does not disentitle it to relief under Rule 60(b)(5), and that the district court erred in creating a "third-party actor" requirement.

The D.C. Circuit's decision in the analogous case of *NAACP v. Donovan*, 737 F.2d 67 (D.C. Cir. 1984), also supports EPA's position. In that case, the

district court had entered summary judgment against the Department of Labor (DOL), holding that it had violated its own regulations governing the calculation of minimum piece-work wages, and ordering DOL to comply with those regulations. After judgment was entered, DOL amended the regulation that it had been held to have violated, and it proceeded to apply the new regulation in calculating wages. The plaintiffs moved for an injunction against enforcement of the amended regulation on the ground that it violated the district court's order. The court granted the motion, enjoining DOL from implementing its new regulation and revoking certifications issued thereunder.

On appeal by DOL, the D.C. Circuit reversed, holding that the district court's prior order holding that DOL had violated its own regulation did not prevent the agency from later amending that regulation: "Where an injunction is based on an interpretation of a prior regulation, the agency need not seek modification of that injunction before it initiates new rulemaking to change the regulation." 737 F.2d at 72. Thus, the D.C. Circuit held, "the district court could not enjoin implementation of the amended regulation on the ground that it violated the court's earlier order." *Id*.

The district court in this case purported to distinguish *Donovan*, misreading it as holding merely that an agency may "correct a prior rule which a court has found defective," and noting that it had "never found the Old Rule

defective." 1 E.R. 5. But the district court in *Donovan* never found DOL's old rule to be defective either. To the contrary, in both that case and this one, the district court's original judgment *enforced* the prior rule. And in both cases, the court's post-judgment order compelled the agency to continue to comply with the prior rule even after it had been amended and superseded. The D.C. Circuit's reversal of the district court's injunction recognized that agencies have the lawful authority to change their own regulations, and that it is improper for a district court to compel continued compliance with a judgment premised on a superseded regulatory duty.

Plaintiffs argue that *Donovan* is distinguishable because it is "not even a Rule 60(b) case." 2 E.R. 27. But a motion for injunction to *enforce* a judgment (as in *Donovan*) and a motion for *relief* from judgment (as here) are mirror images of each other, the only relevant difference being whether the defendant continues to comply with the judgment and consequently which party moves for relief. Surely, a defendant (like EPA) who continues to obey a judgment premised on superseded law until granted relief from judgment is not *less* entitled to that relief than a defendant who does not obey the judgment after the change in the law, leaving the plaintiff to move to enforce the judgment. In both cases, the question is whether a court, having found an agency in violation of its own regulations, may continue to enforce a judgment compelling the agency to comply with its

old regulations even after those regulations have been amended such that the agency is no longer in violation. *Donovan* teaches that the answer is *no*.

The district court suggested at oral argument that its "third-party actor" exception is "hinted at" in this Court's decision in *Chemical Producers v. Helliker*, 871 F.3d 871 (9th Cir. 2006). But that case concerned mootness and vacatur, not relief under Rule 60(b)(5), and does not support what the district court did here. In *Helliker*, a state legislature amended the relevant statute while a state agency's appeal from an adverse judgment was pending. In assessing whether the judgment should be vacated due to mootness, this Court properly relied on the fact that the legislature, not the defendant agency, had effected the change in the law *because that fact was legally relevant to the issues of mootness and vacatur.*

It is well-established in both this Court's and the Supreme Court's precedents that an appellant is entitled to vacatur of a district court decision when a case becomes moot on appeal through happenstance or through the unilateral action of the party that prevailed below, but not when "the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 878 (quoting *U.S. Bancorp v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994)). Thus, in *Helliker*, this Court's consideration of whether the defendant agency had voluntarily caused the case to become moot *followed* this Court's and the Supreme Court's precedent. In this case, by contrast, the district court's

creation of a new, unprecedented "third-party actor" exception *flouted* this Court's holdings in *Toussaint* and *Leavitt* and the Supreme Court's holdings in *Agostini* and *Railway Employees.*

EPA has not moved for vacatur of the district court's judgment. It does not dispute that it was in violation of its old regulations, and it does not seek to modify in any way the district court's grant of declaratory relief so holding. Nor does EPA seek any relief from the district court's injunction directing EPA to approve or disapprove state plans by September 6, 2019. The new regulations did not alter EPA's legal duties with respect to previously submitted state plans, and EPA has satisfied that part of the judgment. But the new regulations did supersede EPA's legal duty under the old regulations to promulgate a federal plan. EPA seeks relief *only* from that aspect of the judgment enjoining EPA to promulgate a federal plan. Prospective enforcement of that injunction is inequitable because it compels EPA to perform future actions that are no longer required by law.

The fact that EPA is both the defendant in this case and the entity with the legal authority to amend the regulations indicates no improper overreaching on EPA's part. It is simply the consequence of Plaintiffs' choice to base this lawsuit solely on violations of regulations that EPA has the lawful authority to change. Even assuming arguendo that the court had the power to enter judgment

enforcing compliance with the regulations while they remained law, it certainly abused its discretion in denying relief from an injunction that continues to require compliance with the regulations now that they have been superseded.

B. The district court abused its discretion by withholding relief based on a speculative and unrealistic concern that EPA might "perpetually" extend the deadline.

The district court's second reason for denying relief from judgment was its concern that "there is no guarantee that this precise situation will not occur again in two years' time," and its fear that EPA could "perpetually evade judicial review through amendment." 1 E.R. 5. The court abused its discretion by relying on pure speculation, and an examination of the regulations proves the court's speculation to be unrealistic.

EPA's express purpose in amending the section 111(d) implementing regulations was to bring them into conformity with section 110 of the CAA, in compliance with section 111(d)'s directive that EPA establish a procedure "similar" to the one set forth in section 110. 84 Fed. Reg. at 32,564; 42 U.S.C. § 7411(d). It is far-fetched to imagine that EPA, having just completed a major legislative rulemaking amending the implementing regulations to adopt the timelines set forth in section 110, will amend them again in the next few years to depart from those timelines. Because it is vanishingly unlikely that "this precise situation" will "occur again in two years' time," the district court abused

its discretion in denying relief from judgment on that unrealistic and speculative basis. 1 E.R. 5.

Even if such future regulatory changes were likely, it would still have been error for the district court to deny relief from the injunction on that basis. As the district court recognized in its Order granting partial summary judgment for the Plaintiffs, it lacks authority to order relief in anticipation of speculative future events. The court denied Plaintiffs' request to order EPA to respond to any future state plan submissions within two months, rightly holding that it "does not yet have jurisdiction to order EPA to act based on as-yet-unmissed deadlines." 1 E.R. 22. For the same reason, the court erred in denying relief based on speculative future regulatory changes that have not even been proposed, much less promulgated.

The district court's reliance on the specter of future regulatory changes to justify its denial of relief from judgment stands in stark contrast to its refusal to stay this case in light of *actual, pending rulemaking* to materially amend the rules whose violation formed the basis of the complaint. The court justified its decision to forge ahead, notwithstanding the ongoing amendment process, by reasoning that the proposed amendments might never become law. 1 E.R. 4 n.4 ("The amendment was subject to the ordinary uncertainty of the rulemaking process"); 2 E.R. 81 (same). If the publication of a proposed rule in the Federal

Register and an ongoing notice-and-comment rulemaking is too "uncertain" to warrant staying a suit brought to enforce the rule under amendment, then it is difficult to see how a hypothetical future rule change that has not even been proposed could warrant denial of relief simply because there is "no guarantee that [it] will not occur." 1 E.R. 5.

If the imagined problem of "perpetual" rulemakings to extend the timelines were ever to become a reality, a remedy would be available: Plaintiffs could petition for review of those hypothetical future regulations, as they have done with the actual new regulations applicable here. *See supra* p. 10. But mere speculation about improbable future amendments that have never been proposed provides no rational basis to deny relief from an injunction prospectively enforcing superseded law.

C. The district court erred as a matter of law in holding that "other circumstances" make prospective enforcement of that judgment equitable

The district court's third reason for denying relief from judgment was that, aside from the fact that the law had changed, "all other circumstances indicate that enforcement of the judgment is still equitable." 1 E.R. 5. The court reasoned that because EPA made "significant progress" and had "limited work remaining on the federal plan," it was not inequitable to enforce the injunction directing EPA to promulgate a federal plan. 1 E.R. 6. Or, as the court more plainly

expressed it at oral argument: "It sounds like you actually did put together a plan that could be implemented in line with the schedule that I imposed. Why can't that be done?" 2 E.R. 40.

That is the wrong question. If this were a case where EPA sought relief from judgment due to a change in *facts or circumstances*, then the feasibility of performance might be relevant. But this is not such a case. EPA did not seek relief on the ground that compliance with the judgment was impossible; it sought relief on the ground that prospective enforcement of the injunction to promulgate a federal plan is *inequitable* because it was premised on a legal duty that no longer exists. That performance of the superseded legal duty may be *possible* is irrelevant. The problem is that it is inequitable to compel a party to perform an action not required by any law.

The district court appears to reason that, because this Court reviews Rule 60(b) rulings for abuse of discretion, it enjoyed broad latitude to deny relief based on any "circumstances" that, in its view, favor continued enforcement of the judgment. "I gathered the Government to be arguing that at some level, I don't have the power to enforce the judgment under the circumstances," the court stated at oral argument, "but it seems to me that all of the case law under Rule 60 makes it clear that it's an abuse-of-discretion review on appeal, which means I've got the discretion to make the decision." 2 E.R. 36.

A deferential standard of review does not confer carte blanche on the district court to enforce its policy preferences notwithstanding the absence of a corresponding legal duty. District courts do indeed have discretion in deciding Rule 60(b) motions, but "discretion is never without limits." *Railway Employees*, 364 U.S. at 648; *see also Agostini*, 521 U.S. at 238 ("It is true that the trial court has discretion, but the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained."). One of those limits was enunciated by this Court in *Toussaint*: "When a change in the law authorizes what had previously been forbidden, it is an *abuse of discretion* for a court to refuse to modify an injunction founded on the superseded law." 801 F.2d at 1090 (emphasis added). The district court's denial of relief transgresses that limit on its discretion, and should be reversed.

II. The district court, not EPA, violated separation-of-powers principles.

In its order denying stay pending appeal, the district court stated that "this case implicates serious legal questions regarding the division of authority between our branches of government," citing its own "third-party actor" holding. 2 E.R. 30. The court appears to have been suggesting that EPA encroached on the prerogatives of the judicial branch by amending the regulations that the judgment enforced and by moving for relief from the injunction on the basis of that change in the law. That suggestion is wrong: it

has been recognized for 165 years that an injunction may not be enforced if the law has been "modified by the competent authority," and that such a change in the law (though it renders a court judgment unenforceable) does not offend the separation of powers. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855).

Wheeling Bridge concerned the enforceability of an injunction issued in an earlier case in which the Supreme Court had held that a bridge unlawfully obstructed navigation and ordered that it be raised or removed. Shortly afterwards, Congress enacted legislation declaring the bridge to be a lawful structure and establishing it as a "post-road" for the passage of the U.S. Mail. The bridge was then destroyed by a storm, and the bridge company began to rebuild it. The State of Pennsylvania moved for enforcement of the injunction, arguing that the post-judgment statute was unconstitutional "because congress has no judicial authority to review or reverse the judgment of the supreme court." *Id.* at 427 (so in original).

The Supreme Court rejected Pennsylvania's separation-of-powers argument and denied enforcement. It explained that, because the intervening statute changed the law such that the bridge was no longer an *unlawful* obstruction of public navigational rights, the injunction could no longer be enforced. "If, in the mean time, since the decree, this right has been modified by

the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law." *Id.* at 431-32 (so in original).

"The principles of the *Wheeling Bridge* case have repeatedly been followed by lower federal and state courts," and its holding is still good law. *Railway Employees*, 364 U.S. at 650; *accord Miller v. French*, 530 U.S. 327, 346-48 (2000); *see also Alliance for Wild Rockies v. Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2012) (explaining that statutory amendment that "changed the environmental laws applicable to a specific case" does "not violate the constitutional prerogative of the courts."). It makes no difference, for separation-of-powers purposes, whether the "competent authority" that modified the law is Congress or an Executive Branch agency. The consistent teaching of *Wheeling Bridge* and its progeny is that a parallel branch of government may, consistently with the separation of powers, change the law on which the judgment of an Article III court rests. And that change in law, if it authorizes what the judgment forbids, entitles a movant to relief from prospective enforcement of that judgment. In such situations, the coordinate branch does not impermissibly change the judgment; it permissibly changes the law. It is then the court's role and responsibility to modify its judgment so that it does not compel compliance with superseded law.

It is the district court, not EPA, that has violated separation-of-powers principles in this case. EPA indisputably has the lawful authority to make and amend its own regulations, and it has exercised that authority here. By refusing to acknowledge the amendment of the regulations as a change in the law warranting relief from prospective application of the judgment, and by ordering EPA to continue complying with its old regulations instead, the district court exceeded its constitutional authority and usurped EPA's rulemaking authority. As cases since *Wheeling Bridge* have held, the power of an Article III court does not include the power to continue to enforce a judgment after a "competent authority" has amended the law on which the judgment rests.

It is no answer to say, as the district court did, that EPA is free to apply its amended regulations in the future as long as it promulgates a federal plan first. 1 E.R. 6. The problem with the court's judgment is not that it prevents EPA from applying its current regulations in future cases; it is that the injunction requires EPA to continue to comply with prior regulations that are no longer in effect. The federal plan, if EPA is compelled to promulgate it, will impose a series of ongoing duties and obligations, extending over three years, on landfill owners and operators and on EPA. *See Proposed Plan*, 84 Fed. Reg. 43,745, 43,752 (Aug. 22, 2019). And *none* of those duties or obligations is presently required under current law.

EPA has the lawful authority to establish its own regulations implementing the CAA. The district court held that it has the power to enforce those regulations against EPA, and it did so through the issuance of an injunction. But the court does not have the lawful power to compel future compliance with superseded law. Now that the regulations have been amended, and EPA is in violation of no legal duty to promulgate a federal plan, it was an abuse of discretion for the district court to refuse to modify an injunction founded on superseded law. Its decision should be reversed.

CONCLUSION

For the foregoing reasons, the district court's order denying relief from judgment should be reversed.

Respectfully submitted,

s/ Joan M. Pepin

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
DAVID GUNTER
LESLIE M. HILL
JOAN M. PEPIN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

MATTHEW C. MARKS
KAREN J. PALMER
Attorneys
Office of General Counsel
Environmental Protection Agency

February 14, 2020
90-5-2-4-21320

ADDENDUM

Federal Rule of Civil Procedure 60: Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Clean Air Act § 111(d), 42 U.S.C. § 7411(d)

p(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall 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 which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph 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.

(2) The Administrator shall have the same authority--

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 25, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 24, 2019.

Deborah Jordan,

Acting Regional Administrator, Region IX.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(490)(i)(A)(*2*) and (c)(522) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(490) * * *

(i) * * *

(A) * * *

(*2*) Previously approved on September 5, 2017 in paragraph (c)(490)(i)(A)(*1*) of this section and now deleted with replacement in paragraph (c)(522)(i)(A)(*1*) of this section, Rule 207 revised on April 24, 2014.

* * * * *

(522) The following amended regulations were submitted on October 5, 2018 by the Governor's designee.

(i) *Incorporation by reference.* (A) Imperial County Air Pollution Control District.

(*1*) Rule 207, ''New and Modified Stationary Source Review,'' except subsections C.1.c, C.2.a, C.2.b, D.1.g, and D.3.b, revised on September 11, 2018.

(*2*) [Reserved]

(B) [Reserved]

(ii) [Reserved]

[FR Doc. 2019–18135 Filed 8–23–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2018–0696: FRL–9998–82–OAR]

RIN 2060–AU33

Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, the U.S. Environmental Protection Agency (EPA) is amending the 2016 Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills (''MSW Landfills EG''). The general requirements for state and federal plans implementing emission guidelines (EG) are referred to as implementing regulations, which are cross-referenced in the MSW Landfills EG. In a separate regulatory action titled ''Revisions to Emission Guidelines Implementing Regulations,'' the EPA finalized changes to modernize the implementing regulations governing EG under a new subpart. This action updates the cross-references to the implementing regulations in the MSW Landfills EG to harmonize with the new requirements for state and federal plans.

DATES: *Effective date:* The final rule is effective on September 6, 2019.

Compliance date: States must submit state plans by August 29, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2018–0696. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed, some information is not publicly available, *e.g.,* Confidential Business Information 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 form. Publicly available docket materials are available electronically through *https://www.regulations.gov/,* or in hard copy at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA's Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday. 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.

FOR FURTHER INFORMATION CONTACT: For questions about this final action, contact Allison Costa, Sector Policies and Programs Division (Mail Code E143–03), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–1322; fax number: (919) 541–0516; and email address: *costa.allison@epa.gov.*

SUPPLEMENTARY INFORMATION:

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:

CAA Clean Air Act
CRA Congressional Review Act
EG Emission Guidelines
EPA Environmental Protection Agency
MSW Municipal Solid Waste
NAICS North American Industry Classification System
NTTAA National Technology Transfer and Advancement Act of 1995
OMB Office of Management and Budget
PRA Paperwork Reduction Act
RIA Regulatory Impact Analysis
RFA Regulatory Flexibility Act
SIP State 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:

I. General Information

A. Does this action apply to me?

Regulated entities. Categories and entities potentially regulated by this action are shown in Table 1 of this preamble.

TABLE 1—INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS FINAL ACTION

Source category	Name of action	NAICS code [1]
State, local, and tribal government agencies.	Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills.	924119

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but, rather provides a guide for readers regarding entities likely to be regulated by this final action for the source category listed. This table lists the types of entities that the EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be regulated. To determine whether your source category is regulated by this action, you should carefully examine the applicability criteria found in the final rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble, your delegated authority, or your EPA Regional representative listed in 40 CFR 60.4 (General Provisions).

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 final action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this final action at *https://www.epa.gov/stationary-sources-air-pollution/municipal-solid-waste-landfills-new-source-performance-standards.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the final document at this same website.

C. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by October 25, 2019. Moreover, under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements. Section 307(d)(7)(B) of the CAA further provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment, (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, WJC South Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

II. Background

On August 29, 2016, the EPA promulgated a new EG at 40 CFR part 60, subpart Cf, titled ''Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills'' (''MSW Landfills EG''), under CAA section 111(d) (81 FR 59276). The MSW Landfills EG updated the control requirements and monitoring, reporting, and recordkeeping provisions for existing municipal solid waste (MSW) landfill sources. The MSW Landfills EG incorporated by cross-reference or direct adoption of certain requirements for state and federal plans as specified in 40 CFR part 60, subpart B (the ''old implementing regulations''). Under the old implementing regulations at 40 CFR 60.23(a), as incorporated by the MSW Landfills EG, state plans were due 9 months after the MSW Landfills EG final rule was published. Because the MSW Landfills EG was published on

August 29, 2016, states were required to submit their plans to the EPA by May 30, 2017. *See* 40 CFR 60.30f(b). Under the old implementing regulations as incorporated by the MSW Landfills EG, the EPA had 4 months to approve or disapprove a state plan after receipt of a plan or plan revision, 40 CFR 60.27(b), and 6 months to issue federal plans for states that failed to submit approved plans after the due date for state plans, 40 CFR 60.27(c)–(d).

In the recent ''Revisions to Emission Guidelines Implementing Regulations,'' the EPA finalized revisions to the old implementing regulations for EG (84 FR 32520, July 8, 2019). Specifically relevant to this action, the new implementing regulations at 40 CFR part 60, subpart Ba amended the timing requirements in 40 CFR 60.23 and 60.27 for the submission of state plans, the EPA's review of state plans, and the issuance of federal plans. *See* 40 CFR 60.23a and 60.27a. In addition, the new implementing regulations include completeness criteria to be used for the review of state plans, which are modeled after the criteria that apply to state implementation plans (SIPs) submitted under CAA section 110. *See* 40 CFR 60.27a(g).

On October 30, 2018, the EPA published a proposed rule in the **Federal Register** that proposed to adopt the timing requirements of the proposed new implementing regulations in the MSW Landfills EG (83 FR 54527–32). On November 9, 2018, the EPA published a notice correcting the docket number listed for the proposed rule (83 FR 56015). On November 15, 2019, the EPA gave notice of an upcoming public hearing for the action and extended the comment period for the proposed rule until January 3, 2019 (83 FR 57387–88).

III. What is included in the final rule?

A. What are the final rule amendments?

As noted in section IV of the preamble to the ''Revisions to Emission Guidelines Implementing Regulations,'' the EPA is aware of cases where state plan submittal and review processes are still ongoing for existing CAA section 111(d) EG and the EPA is applying the new timing requirements not just to EG published after the new implementing regulations are finalized, but also to ongoing EG already published under CAA section 111(d) (84 FR 32564–65 and 32575, July 8, 2019). In this action, the EPA is promulgating amendments to apply the timing requirements in the new implementing regulations to the MSW Landfills EG, an ongoing CAA section 111(d) action that was published under 40 CFR 60.22(a). Specifically, the EPA is amending the cross-reference within the MSW Landfills EG to refer to the new implementing regulations in 40 CFR 60.30f for the provisions related to the ''Adoption and submittal of State plans; public hearings'' (40 CFR 60.23a, replacing 40 CFR 60.23) and ''Actions by the Administrator'' (40 CFR 60.27a, replacing 40 CFR 60.27).

The old implementing regulations included specific requirements detailing the states' responsibilities to provide adequate notice of, hold, and document a public hearing on the state plan or plan revision. The old implementing regulations further allowed the Administrator to extend the period of submission of any plan. Additionally, the old implementing regulations allowed the Administrator 4 months after submission of a state plan to approve or disapprove the plan and required the promulgation of a federal plan within 6 months after the date required for state plan submissions that will apply to any state that has not adopted and submitted an approved plan within that time frame.

The new implementing regulations require states to submit a plan within 3 years of the publication of an EG or to submit a plan revision at any time necessary to meet the requirements of an applicable subpart. The new implementing regulations allow some flexibility to the requirements for public hearings, specifically allowing relevant materials to be made available to the public via the internet and allowing a state to cancel a public hearing if the state includes information in the notice that the hearing will be cancelled if no one requests a hearing within 30 days of the notice. Other requirements regarding the hearing remain unchanged between the old and new implementing regulations. The new implementing regulations allow the Administrator to shorten, but not to extend, the period for submission of any state plan. Additionally, the new implementing regulations require the Administrator to evaluate submitted state plans for completeness according to certain criteria within 60 days of receipt of submission, but no later than 6 months after the deadline by which states were required to submit their plans. The new implementing regulations establish that a state plan shall automatically be deemed complete if no determination has been made within 6 months of the state's submission. The Administrator will approve or disapprove state plans within 12 months of the completeness determination. Additionally, the Administrator will promulgate a federal plan within 2 years after either a state fails to submit a plan, a state submits a plan that is deemed incomplete and the deficiency is not corrected, or a state plan is disapproved.

For the MSW Landfills EG, which was published on August 29, 2016, the application of the new implementing regulations results in the following timetable for states: State plans are due to be submitted to the Administrator by August 29, 2019. The Administrator shall determine completeness within 6 months of the state submission. The Administrator will approve or disapprove plans deemed complete within 12 months of the completeness determination.

The EPA also is finalizing two clerical amendments to correctly incorporate the provisions of the new implementing regulations in the MSW Landfills EG. Within the new implementing regulations, provisions in 40 CFR 60.23a(a)(1) and 60.27a(e)(1) refer to the final guideline documents published under 40 CFR 60.22a(a). The text in 40 CFR 60.22(a) and 40 CFR 60.22a(a) refer to the implementing regulations that apply to a particular EG, depending on when the EG was published. The provisions in 40 CFR part 60, subpart Ba were published in the **Federal Register** on July 8, 2019. Therefore, EG published prior to that date are considered guideline documents published under 40 CFR 60.22(a) and EG published on or after that date are considered guideline documents published under 40 CFR 60.22a(a). Since the MSW Landfills EG was published prior to the new implementing regulations, the EPA is clarifying that these provisions (40 CFR 60.23a(a)(1) and 60.27a(e)(1)) will refer to a guideline document that was published under the old implementing regulations in 40 CFR 60.22(a).

Finally, the EPA is amending the specific deadline for the submission of state plans that is listed in 40 CFR 60.30f(b). The specific deadline is now August 29, 2019, instead of May 29, 2017. The specific date that was included in the MSW Landfills EG was based on the timing requirements of the old implementing regulations, which only allowed states 9 months to adopt and submit a state plan to the Administrator. The date is now revised to match the timing requirements of the new implementing regulations, which have replaced the old timing requirements referenced in 40 CFR 60.30f(a).

The EPA also took comment on the provisions that would apply to states that submitted state plans prior to the promulgation of these amendments. Specifically, the EPA questioned whether to amend the MSW Landfills EG regulatory text to require those states

to resubmit their plans in accordance with the provisions of the proposed new implementing regulations. Additionally, the EPA questioned, if resubmission was not required, whether the EPA should still evaluate the already-submitted plans for compliance with the new completeness criteria. The EPA is not finalizing any additional requirements for states that have already submitted plans. Therefore, state plans submitted prior to promulgation of these amendments will continue to be reviewed according to the provisions of the old implementing regulations.

On May 6, 2019, the U.S. District Court for the Northern District of California issued a decision in the case, *State of California* v. *EPA,* No. 4:18–cv–03237 (N.D. Cal. 2019). In that case, a coalition of eight states and an intervenor, Environmental Defense Fund (EDF), claimed that the EPA had failed to perform nondiscretionary duties to approve or disapprove existing state plans and to issue a federal plan in accordance with the EPA's old implementing regulations at 40 CFR part 60, subpart B, which were cross-referenced in the MSW Landfills EG. The Court ordered the EPA to take action on existing state plans by September 6, 2019, and to promulgate a federal plan by November 6, 2019.[1] As noted in section II of this preamble, the EPA recently finalized new implementing regulations that amend the timing requirements for the submission of state plans, the EPA's review of state plans, and the issuance of federal plans. This final rule, together with the new implementing regulations, change certain deadlines applicable to the MSW Landfills EG, including the deadline for a federal plan. The EPA acknowledges that, with respect to the deadline for a federal plan, there is now a conflict between the EPA's regulations and the Court's order. If the EPA determines that it should no longer have to comply with the deadline for a federal plan in the Court's order due to the promulgation of this final rule, the EPA will seek appropriate relief from the Court. State plans submitted prior to promulgation of this final rule, however, will continue to be reviewed in accordance with the provisions of the old implementing regulations and finalized in accordance with the Court's order. States that have not yet submitted a state plan have until August 29, 2019, to do so.

B. What is the rationale for our final decisions and amendments?

After considering public comments and further analyzing the available data, the EPA did not make any major substantive changes to the final rule relative to what we proposed. A complete list of public comments received on the proposed rule and the corresponding responses can be viewed in the document, ''Responses to Public Comments on EPA's Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills: Proposed Rule'' (hereafter ''Response to Comments document''), which is available in the docket for this action. This section of the preamble summarizes the minor changes made since the proposal, key comments with our responses, and the rationale for our final approach.

1. Application of and Rationale for Timing Requirements in New Implementing Regulations to the MSW Landfills EG

The EPA proposed to amend 40 CFR 60.30f(a) to refer to 40 CFR 60.23a and 40 CFR 60.27a in lieu of 40 CFR 60.23 and 40 CFR 60.27, respectively, and to change the corresponding date for submission of state plans in 40 CFR 60.30f(b). We are finalizing the amendments as proposed, except we are removing the proposed amendment that stated that the requirements of 40 CFR 60.27a(e)(2) would continue to refer to 40 CFR 60.24(f) instead of 60.24a(f). The amendment is no longer necessary, as the reference to 40 CR 60.24a(f) was a typographical error in the proposed implementing regulations. The final amendments promulgated for 40 CFR 60.27a(e)(2) in the new implementing regulations now refer to 40 CFR 60.24a(e) (instead of 40 CFR 60.24a(f) as proposed) for the factors that states may consider when adopting less stringent emission standards or compliance times than the EG. These factors are substantively similar to those listed in 40 CFR 60.24(f). Therefore, there is no longer a need to clarify this requirement in the MSW Landfills EG.

Comment: Two commenters supported the EPA's proposal to amend the MSW Landfills EG to align the timing requirements for submitting and acting on CAA section 111(d) plans with the proposed timing requirements in 40 CFR part 60, subpart Ba on the basis that the existing timing requirements were insufficient. The commenters stated that 9 months is not a realistic time frame for states to develop and submit a plan under CAA section 111(d) because the plans have to include rules to make the state standards adopted pursuant to the CAA section 111(d) guidelines enforceable. The commenters noted that regardless of the substantive content of any particular state plan, such rulemaking commonly takes a year, not including technical work and outreach to stakeholders beforehand. One commenter described many steps that are part of a state rulemaking process, including initial public outreach, drafting a proposed plan, taking public comment on that proposal, evaluating and responding to comments, seeking final approval of other state governmental entities, and codification into the state administrative code. The commenter believed that the current 9-month deadline can constrain the process and either diminish opportunities for public involvement or limit the ability of state governmental officials to fully evaluate the policies underlying the plan. The commenters further explained that the deadlines in the current implementing regulations were adopted in 1975 and do not reflect the increased complexity and procedural demands of emission standard development and rulemaking under current state and federal law. One of the commenters noted that the current deadline for EPA approval of state plans is too short and further explained that the EPA frequently takes longer than 1 year to approve SIPs under CAA section 110. The commenter claimed that inconsistencies between state rules, approved state plans, and the EPA's regulations can cause significant confusion, citing *United States* v. *Cinergy,* 623 F.3d 455, 457–59 (7th Cir. 2010). The commenter pointed out that the EPA's approval or disapproval of state plans requires multiple steps, including developing and publishing a proposal to approve or disapprove the plan, evaluating and responding to comments received from the public, and then issuing a final decision, all of which require involvement of various levels within the U.S. government (*e.g.,* approval of the U.S. Office of Management and Budget (OMB)). The commenter contended that the deadlines in the new implementing regulations will ensure sufficient time for the rulemaking process and increase the amount of time allowed for states and the EPA to work together to resolve any differences of opinion they may have on the plan submitted. The commenter further asserted that such coordination could avoid the need to disapprove a plan, and, thus, avoid the need to devote resources toward a

[1] One of the existing state plans, submitted by Maricopa County, Arizona, was withdrawn after the Court's original order on May 6, 2019. The Court issued a subsequent order on July 19, 2019, to exclude the Maricopa County plan from the original order.

federal plan or a revised state plan. Therefore, the commenters concluded that the EPA's proposed deadlines are much more reasonable and realistic.

Another commenter generally supported the proposed new implementing regulations for any future EG issued under CAA section 111(d). However, the commenter believed that it is only appropriate to apply the new implementing regulations prospectively to new CAA section 111(d) EG, not retroactively to the MSW Landfills EG. The commenter requested that the EPA consider finalizing revisions to incorporate the new implementing regulations in the MSW Landfills EG during the ongoing reconsideration of the MSW Landfills EG.

Meanwhile, two commenters found the EPA's proposal to be unreasonable and inadequately supported. One commenter emphasized that the proposed amendments add several years to a state plan development and approval process that should already be well underway. The commenter claimed that the proposal is arbitrary and capricious because neither the justifications in the proposal or the proposal for the new implementing regulations were adequate. The second commenter contended that the proposal should already have been implemented. The commenter stated that the EPA can give states more time to complete plans for a particular EG, as in the Clean Power Plan (80 FR 64855, October 23, 2015), or extend the deadline on an individual basis for a state that presents a factual record to demonstrate its need for more time to submit its state plan according to 40 CFR 60.27(a).

Response: Given the EPA's experience working with states to develop SIPs under CAA section 110, we agree with the commenters that adopting the timing requirements in the new implementing regulations for the MSW Landfills EG is a reasonable way to provide realistic deadlines for the process of submitting, reviewing, and approving state plans, and promulgating a federal plan. As stated in the preamble to the proposed rule, states have considerable flexibility in implementing CAA section 111(d) and the development of state plans requires a significant amount of work, effort, and time. Adoption of these amendments allows states more time to interact and work with the EPA in the development of state plans and minimize the chance of unexpected issues arising that could slow down eventual approval of state plans. Congressional intent, strengthened by the reference to CAA section 110, is clear that implementation of CAA section 111(d) is intended to be primarily a state-driven process, and the existence of federal backstop authority is not a sufficient reason to decline to provide a sufficient period of time for states to develop and submit their plans (83 FR 54530, October 30, 2018).

The EPA reiterates the justification provided in the proposal for this action and emphasizes the number of states who failed to meet the original deadline supports the need to adopt more reasonable timing requirements. As stated in the preceding paragraph, the EPA's prior experience on reviewing and acting on SIPs under CAA section 110 illustrates that it is appropriate to extend the period for the EPA's review and approval or disapproval of plans to a 12-month period (after a determination of completeness, either affirmatively by the EPA or by operation of law). This timeline would provide adequate time for the EPA to review plans and follow notice-and-comment rulemaking procedures to ensure an opportunity for public comment on the EPA's proposed action on a state plan (83 FR 54530, October 30, 2018). Given that most states did not meet the prescribed 9-month period to submit a state plan by May 30, 2017, the EPA determined that it would be more efficient to adopt the new implementing regulations rather than grant extensions to individual states according to the provisions of 40 CFR 60.27(a), as one commenter suggested.

Finally, as stated in the preamble to the proposed rule, the EPA determined that it is appropriate to extend the timing for the EPA to promulgate a federal plan for states that fail to submit an approvable state plan, consistent with the federal implementation plan deadline under CAA section 110(c). Whenever the EPA promulgates a federal plan, it must follow the rulemaking requirements in CAA section 307(d). This involves a number of potentially time-consuming steps, including coordination with many offices, developing a comprehensive record, and considering comments submitted on a proposed plan. In addition, when states fail to submit a plan as required under the MSW Landfills EG, we typically promulgate a single federal plan that applies to a number of states. Unlike a federal plan developed for a single state, the federal plan developed here may be more complex and time-intensive since it must be tailored to meet the needs of many states (83 FR 54530–31, October 30, 2018).

Comment: Five commenters objected to the EPA's justification that states need more time to submit their plans. The commenter noted that the extended deadlines that some stakeholders requested when the EPA promulgated the MSW Landfills EG (at least 12 to 24 months) have passed and that the EPA's time period is 36 months—longer than commenters requested. One commenter also alleged that the EPA actively encouraged states to flout the March 30, 2017, deadline and pointed to various pieces of email correspondence from Regional offices, primarily during the pendency of the stay from May 31, 2017, through August 29, 2017. The commenter cited a desk statement that the EPA issued in October 2017, stating that the EPA did not plan to prioritize review of state plans submitted or issue a federal plan for states that failed to submit a state plan. The commenter maintained that the correspondence makes the EPA's justification regarding the small number of plans submitted ''at the very least disingenuous.''

Response: The EPA disagrees with the commenter's assessment and characterization of the EPA's actions. The correspondence the commenter cites shows that there appeared to be some confusion about the impact of the EPA's statement on May 5, 2017, regarding the grant of reconsideration and a promise to stay the MSW Landfills EG. In particular, it appears that some states and Regional offices did not recognize that the date the stay was ultimately issued (May 31, 2017) did not change the fact that the deadline of May 30, 2017 (one day prior to the start of the stay period), remained valid to submit state plans. Contrary to the commenter's assertions, the desk statement made it clear that state plans were due May 30, 2017. *See* Commenter's Appx. at 418 (''Under the emissions guidelines, CAA section 111(d) state plans for addressing existing landfills were due May 30, 2017''), which is available in the docket for this action (Docket ID Item No. EPA–HQ–OAR–2018–0696–0029, Attachment 4). The desk statement also made it clear that, consistent with the expiration of the stay on August 29, 2017, ''the 2016 rules are currently in effect.'' *Id.* The EPA's explanations in the desk statement regarding its priorities and reassurance about potential sanctions for failure to submit state plans does not change the clear message that the plans were due on May 30, 2017. Even if some states were confused from correspondence before or during the stay regarding their compliance obligations, the desk statement put them on notice that the May 30, 2017, due date remained valid. The commenter cites no correspondence from a state

maintaining they were not submitting their state plan due to the October 2017 desk statement. Indeed, three states and two counties submitted their plans after the desk statement was issued—Maricopa County, Arizona, on May 4, 2018 (which was subsequently withdrawn); Pinal County, Arizona, on March 4, 2019; the remainder of Arizona on July 24, 2018; Delaware on October 13, 2017; and West Virginia on September 19, 2018. California, New Mexico, and Albuquerque–Bernalillo County, New Mexico, submitted their plans on or before the May 30, 2017, deadline. The commenter provides no evidence, only speculation, that other states failed to submit a plan due to the October 2017 desk statement. Although some commenters requested at least 12 to 24 months when commenting on the original guidelines, the fact that the majority of states did not submit a state plan within that time frame supports the EPA's contention that states need more time to submit their state plans. As the EPA explains in the prior response, and as supported by other commenters, the 36-month period is a reasonable period of time for states to submit their plans.

Comment: One commenter stated that this action is invalid under *Air Alliance Houston* v. *EPA,* 906 F.3d 1049, 1065 (D.C. Cir. 2018), and similar cases because the rule is an attempt to stay the MSW Landfills EG while the EPA reconsiders the guidelines, contrary to the Court's holding in *Air Alliance* and similar cases.

Response: The EPA disagrees with the commenter that *Air Alliance* and similar cases cited are applicable to this action. All the cases the commenter cited involve the EPA invoking its stay authority under CAA section 307(d)(7)(B) or extending the effective date of a rule pending reconsideration. That is not the case with the current action. In this final rule, the EPA is not invoking its stay authority or extending the effective date of a rule pending reconsideration.

As the Court in *Air Alliance* noted, the EPA ''retains authority . . . to substantively amend the programmatic requirements of [a rule], and pursuant to that authority, revise its effective and compliance dates, subject to arbitrary and capricious review.'' *Air Alliance Houston* v. *EPA,* at 1066. The EPA is doing precisely what the Court in *Air Alliance* said is the proper course of action. The EPA is substantively amending the programmatic requirements of the MSW Landfills EG and, pursuant to its authority to amend those requirements, is revising the compliance dates of the rule. As explained elsewhere in the Response to Comments document, available in the docket for this rulemaking, the EPA's revisions to the compliance deadlines meet the arbitrary and capricious standard of review because the revised compliance deadlines are consistent with CAA requirements, are supported by the record, and are rationally explained. Additionally, see the Response to Comments document for more detailed discussion of the specific cases cited.

What is the rationale for our final approach? For the reasons explained in the preamble to the proposed rule (83 FR 54530–54531, October 30, 2018) and in the comment responses in this section of this preamble, we are finalizing the requirements in 40 CFR 60.30f(a) and (b) to refer to the timing and completeness requirements in 40 CFR 60.23a and 60.27a.

2. Addition of New Completeness Criteria for Evaluation of State Plans; Resubmittal of Already-Submitted State Plans

The EPA is finalizing, as proposed, the requirement for state plans to be evaluated according to the criteria in 40 CFR 60.27a(g). The EPA did not receive any comments in favor of requiring states to resubmit their plans or in favor of evaluating the already-submitted plans for compliance with the new completeness criteria.

Comment: Two commenters opposed applying completeness criteria to previously submitted state plans. One commenter contended that the Arizona Department of Environmental Quality's submittal already meets the proposed new completeness criteria and believed it could remedy any inconsistencies between its currently submitted plan and the new proposed completeness requirements through a supplemental submittal. The other commenter pointed out that the EPA should have already completed its review of these state plans. Thus, the commenter contended that applying completeness criteria to previously submitted plans would result in unlawful retroactive application of new, more burdensome criteria. The commenter stated all plans should be held to the same regulatory standard, regardless of when they were submitted.

Response: The EPA has reviewed the comments and determined that it is not necessary to require states who have already submitted state plans prior to the promulgation of these amendments to resubmit those plans to demonstrate compliance with the new completeness criteria in 40 CFR 60.27a(g). The EPA is in the process of reviewing the state plans that have already been submitted prior to the promulgation of these amendments and will evaluate these plans in accordance with the old implementing regulations (40 CFR 60.27(b)). Therefore, it is not necessary to consider whether a supplemental proposal is needed from states that have already submitted state plans. Similarly, because the EPA is not changing any requirements for these states, there is no need for the states to review the submitted plans or the completeness criteria and there will be no additional burden for these states.

Regarding the commenter's statement that all plans should be reviewed according to the same criteria, the EPA maintains, as stated in the preamble to the proposed rule, that the new completeness criteria for states are based on the criteria outlined in the old implementing regulations and in 40 CFR part 51, appendix V, that states already follow when developing SIPs under CAA section 110. The criteria in 40 CFR part 51, appendix V apply to the majority of state plans submitted to the EPA, and, therefore, many states likely already comply with these completeness criteria when developing their CAA section 111(d) state plans. Thus, the EPA has determined that state plans submitted prior to the promulgation of this rule are not subject to substantively different review criteria than plans submitted after promulgation of this rule.

What is the rationale for our final approach? In response to comments as described within this section of this preamble, we are not making any changes to the requirements that we proposed. The EPA is not requiring that state plans that were already submitted prior to the promulgation of these amendments be evaluated according to the completeness criteria in the new implementing regulations and, therefore, we are not requiring resubmission of those state plans.

3. Impacts of This Action

In the preamble to the proposed rule (83 FR 54531, October 30, 2018), we explained that although the costs and benefits of harmonizing the timing requirements of state plans cannot be quantified due to inherent uncertainties, the EPA believes that they will be minimal. This includes impacts of the costs for landfills to install gas collection systems, the amount of landfill gas captured over the life of the project, and the costs for states to comply with the new timing and completeness criteria. The EPA requested comments on this determination.

Comment: Commenters disagreed in their views of the EPA's assessment of

the environmental impacts, with some commenters agreeing that impacts would be minimal, and others contending that the rule would have significant impacts on human health and welfare.

One commenter disputed any claims that the EPA's proposal to extend the process for implementing the MSW Landfills EG would have a detrimental impact on the environment. To the contrary, the commenter believed that the proposal to adopt new deadlines into the MSW Landfills EG will not have any real impact on emissions or the environment. The commenter pointed out that the revisions to the EG that the EPA adopted in 2016 would further reduce emissions by only 3 percent, which may be overstated. The commenter claimed that landfills are already well controlled, and that the EPA's 2016 analysis showed impacts for 2025, which is still 6 years away. The commenter claimed that extending the deadlines merely reflects the current reality of the rule—most states have not yet submitted state plans and maintaining the current deadlines would not change that fact.

Two commenters claimed the action is unlawful because the EPA has a statutory responsibility to reduce air emissions from pollutants that endanger human health and the environment. One of the commenters disagreed that the proposal represents a procedural change and claims it is a substantial revision of the MSW Landfills EG, which will result in significant additional emissions of dangerous air pollution with adverse effects on human health and welfare. The commenter said that the EPA has not explained how this proposal will not forego those benefits. This commenter asserted that the EPA does not provide justification for the statement that impacts are minimal. The commenter also claimed the EPA does not acknowledge its prior analyses of the public health, environmental, or energy impacts, which the commenter says are required statutory considerations when establishing EG under CAA section 111. Another commenter explained that the EPA did not provide information about surveying affected facilities to see which ones may or may not have already installed controls, so the conclusions in the preamble are insufficient.

One commenter asserted that the rule would have significant adverse impacts on human health and welfare. The commenter cited the preamble to the MSW Landfills EG (81 FR 59276, August 29, 2016) and noted that the EPA estimated that the EG would reduce 1,810 megagrams per year of nonmethane organic compound emissions and 285,000 metric tons of methane per year (over 7.1 million metric tons of carbon dioxide equivalent) plus displace fossil fuel-generated electricity. In that preamble, the EPA estimated that, by 2025, the annual net benefits of the EG would be $390 million. Therefore, the commenter claimed that by delaying implementation, the EPA is forfeiting reductions of tens of millions of metric tons of greenhouse gas emissions and at least $1.5 billion in net benefits.

Multiple commenters believe that delaying implementation of the EG would have a net cost. Two of these commenters claim that the EPA failed to conduct a Regulatory Impact Analysis (RIA) or analyze the foregone benefits and argues that the costs are substantial, not minimal. One commenter claims that human health and welfare is at stake due to climate change, so the action cannot be reasonable regardless of economic impact. One commenter, thus, cited the EPA's ''Regulatory Impact Analysis for the Final Revisions to the Emission Guidelines for Existing Sources and the Final New Source Performance Standards in the Municipal Solid Waste Landfills Sector,'' EPA–452/R–16–003 (2016 RIA) (Docket ID Item No. EPA–HQ–OAR–2003–0215–0235) to demonstrate that delaying implementation of the EG has a net cost. The commenter claimed that according to the 2016 RIA, 92 landfills would reduce 330,000 metric tons of methane in 2019 due to the EG. The commenter asserted that is an average of an additional 3,580 tons of methane emitted from each landfill in 2019. The commenter also asserted that the social cost of methane for 2019 emissions is approximately $1,200 in 2007 dollars ($1,490 in 2018 dollars), which would mean that each landfill that postponed installation has over $5 million in forgone climate benefits/monetized climate damages, plus unmonetized impacts to health and environment. Because the social costs are not zero, the commenter stated the EPA can and should assess how many landfills could postpone installation of controls before the delay is not cost-benefit justified.

A second commenter estimated that, using the values from the MSW Landfills EG preamble (81 FR 59280, August 29, 2016), this action would lead to forfeiture of $397 million in annual net benefits from 2019 through 2025. Another commenter stated that the proposed amendment would result in adverse climate impacts totaling $400 million to $4.8 billion, based on the 2016 RIA, saying that methane emission reduction benefits of the proposed rule are approximately $200 million to $1.2 billion per year and assuming that this rule will delay these reductions by 2 to 4 years.

Another commenter cited the 2016 RIA to state that methane emissions would be reduced by 330,000 metric tons per year and nonmethane organic compounds by 281 metric tons per year. The commenter included data from the 2016 RIA Tables 3–13, 3–14, and 6–7 to show the number of affected landfills, annual emission reductions, and annual net benefits of the EG over each year from 2019 to 2030. To calculate the foregone emission reductions and net benefits from the current proposal, the commenter assumed that states and the EPA would take the maximum amount of time allowed by the new deadlines. Then the commenter added 36 months (instead of 30 months) for the initial monitoring and installation lead time allowed in the rules, which resulted in approximately 11,000 tons nonmethane organic compounds emissions, 1.75 million tons methane emissions, and over $2 billion cumulatively, depending on how many states prepare individual plans. The commenter estimated that, even if the EPA promulgated a federal plan in July 2019, the proposal would still result in foregone benefits of 3,000 to 5,000 tons nonmethane organic compounds emissions; 500,000 to 800,000 tons methane emissions, and net benefits of nearly $1 billion.

Response: The EPA disagrees that this final action will result in significant foregone economic and climate benefits. As one commenter cited, many MSW landfills are already well controlled, due in part to some MSW landfills that install landfill gas collection systems prior to the dates required by the MSW Landfills EG to capitalize on incentives (*e.g.,* revenue from recovered energy) or in order to comply with state rules that have more stringent regulatory requirements. For example, a web search of two major carbon offset registries, the American Carbon Registry and Climate Action Reserve, returned over 100 U.S. landfill gas capture/combustion projects that have registered credits. To be eligible to produce offset credits, the landfill gas capture/combustion projects cannot be required due to regulation. Therefore, these lists are one example of the prevalence of voluntary installation of landfill gas collection systems.[2] A copy of the results obtained from a search on June 13, 2019, is available in the docket for this action. In comparison, the MSW

[2] *See https://americancarbonregistry.org/how-it-works/registry-reports* and *https://www.climateactionreserve.org/how/projects/.*

Landfills EG estimated that 93 landfills would need to install controls due to the change in emissions threshold (81 FR 59305, August 29, 2016).

Multiple commenters cited the 2016 RIA. However, the commenters failed to provide any new information or refute the EPA's assessment that some landfills would install controls earlier than required by federal regulations. Similarly, all except one of these commenters assumed the ''worst-case'' scenario, *i.e.,* that states would wait to submit their state plans until the deadline (or not at all) and that each subsequent step (completeness review, approval, and promulgation of a federal plan for states without approved state plans) would take the maximum amount of time allowed under the new implementing regulations. Additionally, these commenters failed to analyze or acknowledge the effects of the states who have already submitted state plans (California; Delaware; West Virginia; Pinal County, Arizona; the rest of Arizona; Albuquerque-Bernalillo County, New Mexico; and the rest of New Mexico) or who may be developing state plans. For an approvable state plan, these states should already have adopted laws incorporating the requirements of the MSW Landfills EG. As the delegated authority, the state should have revised MSW landfill permits in these states to include the new requirements. Therefore, the emission reductions and associated benefits attributed to the MSW Landfills EG in the 2016 RIA are already occurring in these locations and are not affected by this action.

The EPA emphasizes that this action does not change the stringency of the emission reduction requirements promulgated in the MSW Landfills EG. As noted in the preamble to the proposed rule adopting the 40 CFR part 60, subpart Ba requirements in the MSW Landfills EG, the costs and benefits of harmonizing the timing requirements of state plans cannot be quantified due to inherent uncertainties regarding when affected landfills actually install controls to reduce emissions (84 FR 54531, October 30, 2018). These uncertainties can arise at the state level, based on the timing of the promulgation of state regulations (as discussed above), or at the facility level, as individual landfills evaluate site-specific factors to determine the timing of emissions controls. For example, some facilities may have an incentive to install landfill gas collection systems, such as to recover and use landfill gas as an energy source to offset existing energy costs or to provide a source of revenue prior to regulatory requirement dates. This offers financial advantages for some facilities to install landfill gas collection systems early in the development of the project (*i.e.,* prior to the regulatory requirement date resulting from a state or federal plan implementing the MSW Landfills EG). Additionally, landfill gas collection systems are a common method of reducing odors from landfills. Therefore, other facilities install landfill gas collection systems prior to regulatory requirement dates to reduce odors either voluntarily, as mandated by state odor requirements, or as part of a consent decree/court order. If facilities have already installed controls, then shifting the date by which states must submit plans would not have any impact on the actual collection and control of landfill gas from those facilities. On the other hand, some sources may choose to wait until requirements are enacted prior to installing controls. While this would not impact the cost of installing controls, it could impact the amount of landfill gas captured over the life of the project and increase the net cost (83 FR 54531, October 30, 2018).

In terms of direct costs, as noted in the preamble to the MSW Landfills EG, EG established under CAA section 111(d) do not impose any requirements on regulated entities directly; rather, the EG require states and U.S. territories to establish comparable standards for existing sources. It is those state requirements that impact regulated entities. However, the EG do impose costs on state or local governments, as these governments must establish plans to implement the EG according to the criteria in the implementing regulations (84 FR 59309–10, October 30, 2018). The requirements for states to develop state plans remain substantively the same between the old implementing regulations and the new implementing regulations. While there could be a small increase in burden for administrative hours to ensure the plan specifically meets the new completeness criteria, we expect that burden to be offset by updated provisions that increase flexibility for states, such as the ability to provide information related to public hearings on the internet or the ability to cancel the public hearings in certain situations. Overall, we expect the amendments to provide consistency and streamline procedures for states as they develop plans to meet CAA section 110 and 111 regulations.

What is the rationale for our final approach? For the reasons explained in the preamble to the proposed rule (83 FR 54531, October 30, 2018) and within this section of this preamble, the EPA maintains that the adoption of the new implementing regulations is a procedural change whose impacts cannot be characterized due to inherent uncertainties and are likely to be minimal. Therefore, we have not made any substantive changes to the description of this regulation or the characterization of the impacts within the Statutory and Executive Order Reviews section of this preamble (section IV).

IV. Statutory and Executive Order Reviews

Additional information about these statutes 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 action that was submitted to OMB for review. Any changes made in response to OMB recommendations have been documented in the docket.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is considered an Executive Order 13771 deregulatory action. As noted earlier in the preamble, this rule is an administrative action to update the underlying implementing regulations for CAA Section 111(d), as applied to the MSW Landfills EG. While the impact of harmonizing the timing requirements of state plans on the costs and benefits analyzed for Executive Order 12866 of the MSW Landfills EG cannot be quantified due to inherent uncertainties described in section III.B of this preamble, the MSW Landfills EG also impose direct costs on state and local governments, which must develop state plans to meet the requirements of the rule. By adopting the new implementing regulations in the MSW Landfills EG, states will have a consistent set of requirements for all new and ongoing CAA section 110 and 111 plans. We expect the streamlining of these requirements could reduce net costs and provide some burden reduction for states.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0720. Because the burden to prepare and submit a state plan have been fully incorporated into the MSW

Landfills EG, and this action does not change any of the requirements associated with the stringency of the rule, there are no changes to the previously estimated information collection burden.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. This action proposes a technical amendment to the MSW Landfills EG promulgated in 2016, which was determined not to impose any requirements on small entities due to the fact that EG established under CAA section 111(d) do not impose any requirements on regulated entities and, thus, will not have a significant economic impact upon a substantial number of small entities. *See* 81 FR 59309–9310 (August 29, 2016) for additional discussion. We have, therefore, concluded that this action similarly will have no net regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments.

The action implements mandate(s) specifically and explicitly set forth in 40 CFR part 60, subpart Ba without the exercise of any policy discretion by the EPA.

F. 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.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175. The MSW Landfills EG recognized that one tribe had three landfills that may potentially be subject to the EG; however, these landfills have already met requirements under the previous new source performance standards/EG framework as promulgated in 1996 (*See* 81 FR 59311, August 29, 2016). Moreover, this action does not establish an environmental health or safety standard. Therefore, the action does not have a substantial direct effect on that tribe since it is merely a procedural change amending timing requirements for states to submit plans to the EPA and for the EPA to promulgate a federal plan. Thus, Executive Order 13175 does not apply to this action.

H. 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 is a procedural change and does not concern an environmental health risk or safety risk.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this action is not likely to have any adverse energy effects because it is a procedural change and does not have any impact on energy supply, distribution, or use.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This regulatory action is a procedural change and the EPA does not anticipate that it will have any material impact on human health or the environment.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedures, Emission guidelines, Landfills, Reporting and recordkeeping requirements, State plan.

Dated: August 16, 2019.

Andrew R. Wheeler,

Administrator.

For the reasons set forth in the preamble, the EPA amends 40 CFR part 60 as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart Cf—Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills

■ 2. Amend § 60.30f by revising paragraphs (a) and (b) to read as follows:

§ 60.30f Scope and delegated authorities.

* * * * *

(a) If you are the Administrator of an air quality program in a state or United States protectorate with one or more existing MSW landfills that commenced construction, modification, or reconstruction on or before July 17, 2014, you must submit a state plan to the U.S. Environmental Protection Agency (EPA) that implements the Emission Guidelines contained in this subpart. The requirements for state and federal plans are specified in subpart B of this part with the exception that §§ 60.23 and 60.27 will not apply. Notwithstanding the provisions of § 60.20a(a) in subpart Ba of this part, the requirements of §§ 60.23a and 60.27a will apply for state plans submitted after September 6, 2019, and federal plans, except that the requirements of § 60.23a(a)(1) will apply to a notice of availability of a final guideline document that was published under § 60.22(a). Likewise, the requirements of § 60.27a(e)(1) will refer to a final guideline document that was published under § 60.22(a).

(b) You must submit a state plan to the EPA by August 29, 2019.

* * * * *

[FR Doc. 2019–18233 Filed 8–23–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2017–0355; FRL–9995–70–OAR]

RIN 2060–AT67

Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is finalizing three separate and distinct rulemakings. First, the EPA is repealing the Clean Power Plan (CPP) because the Agency has determined that the CPP exceeded the EPA's statutory authority under the Clean Air Act (CAA). Second, the EPA is finalizing the Affordable Clean Energy rule (ACE), consisting of Emission Guidelines for Greenhouse Gas (GHG) Emissions from Existing Electric Utility Generating Units (EGUs) under CAA section 111(d), that will inform states on the development, submittal, and implementation of state plans to establish performance standards for GHG emissions from certain fossil fuel-fired EGUs. In ACE, the Agency is finalizing its determination that heat rate improvement (HRI) is the best system of emission reduction (BSER) for reducing GHG—specifically carbon dioxide (CO_2)—emissions from existing coal-fired EGUs. Third, the EPA is finalizing new regulations for the EPA and state implementation of ACE and any future emission guidelines issued under CAA section 111(d).

DATES: Effective September 6, 2019.

ADDRESSES: The EPA has established a docket for these actions under Docket ID No. EPA–HQ–OAR–2017–0355. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed, 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 form. Publicly available docket materials are available electronically through *https://www.regulations.gov/* or in hard copy at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA's Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday. 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.

FOR FURTHER INFORMATION CONTACT: For questions about these final actions, contact Mr. Nicholas Swanson, 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) 541–4080; fax number: (919) 541–4991; and email address: *swanson.nicholas@epa.gov.*

SUPPLEMENTARY INFORMATION:

Preamble acronyms and abbreviations. The EPA uses 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:

ACE Affordable Clean Energy Rule
AEO Annual Energy Outlook
ANPRM Advance Notice of Proposed Rulemaking
BACT Best Available Control Technology
BSER Best System of Emission Reduction
Btu British Thermal Unit
CAA Clean Air Act
CCS Carbon Capture and Storage (or Sequestration)
CFR Code of Federal Regulation
CO_2 Carbon Dioxide
CPP Clean Power Plan
EGU Electric Utility Generating Unit
EIA Energy Information Administration
EPA Environmental Protection Agency
FIP Federal Implementation Plan
GHG Greenhouse Gas
HRI Heat Rate Improvement
IGCC Integrated Gasification Combined Cycle
kW Kilowatt
kWh Kilowatt-hour
MW Megawatt
MWh Megawatt-hour
NAAQS National Ambient Air Quality Standards
NGCC Natural Gas Combined Cycle
NO_X Nitrogen Oxides
NSPS New Source Performance Standards
NSR New Source Review
OMB Office of Management and Budget
$PM_{2.5}$ Fine Particulate Matter
PRA Paperwork Reduction Act
PSD Prevention of Significant Deterioration
RIA Regulatory Impact Analysis
RTC Response to Comments
SIP State Implementation Plan
SO_2 Sulfur Dioxide
UMRA Unfunded Mandates Reform Act
U.S. United States
VFD Variable Frequency Drive

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

I. General Information

A. Executive Summary

With this document, the EPA is, after review and consideration of public comments, finalizing three separate and distinct rulemakings. First, the EPA is finalizing the repeal of the CPP which was proposed at 82 FR 48035 (Oct. 16, 2017) (''Proposed Repeal''). Second, the EPA is promulgating ACE, which consists of emission guidelines for states to develop and submit to the EPA plans that establish standards of performance for CO_2 emissions from certain existing coal-fired EGUs within their jurisdictions. Third, the EPA is finalizing implementing regulations that provide direction to both the EPA and states on the implementation of ACE and any future emission guidelines issued under CAA section 111(d). This document does not include any final action concerning the New Source Review (NSR) reforms the EPA proposed in conjunction with the ACE proposal; the EPA intends to take final action on the proposed NSR reforms in a separate final action at a later date.

First, the EPA is repealing the CPP. In proposing to repeal the CPP, the Agency proposed a change in the legal interpretation of CAA section 111, on which the CPP was based, to an interpretation of the CAA that ''is consistent with the CAA's text, context, structure, purpose, and legislative history, as well as with the Agency's historical understanding and exercise of its statutory authority.'' [1] After further review of the EPA's statutory authority under CAA section 111 and in consideration of public comments, the Agency is finalizing the repeal of the CPP. The discussion of the repeal action, along with the EPA's explanation that it intends the repeal of the CPP to be independent from the other final actions in this document, can be found in section II below.

Second, the EPA is finalizing ACE, which consists of emission guidelines to inform states in the development, submittal, and implementation of state plans that establish standards of performance for CO_2 from certain existing coal-fired EGUs within their jurisdictions. In these emission guidelines, the EPA has determined that the BSER for existing EGUs is based on HRI measures that can be applied to a designated facility. ACE also clarifies the roles of the EPA and the states under CAA section 111(d). With the promulgation of this action, it is the states' responsibility to use the information and direction herein to develop standards of performance that reflect the application of the BSER. Per the CAA, states may also consider source-specific factors—including, among other factors, the remaining useful life of an existing source—in applying a standard of performance to that source. In this way, the state and federal roles complement each other as the EPA has the authority and responsibility to determine BSER at the national level, while the states have the authority and responsibility to establish and apply standards of performance for their existing sources, taking into consideration source-specific factors where appropriate. A full discussion of ACE can be found in section III of this preamble.

Third, the EPA is finalizing new implementing regulations that apply to ACE and any future emission guidelines promulgated under CAA section 111(d). The purpose of the new implementing regulations is to harmonize aspects of our existing regulations with the statute, in a new 40 CFR part 60, subpart Ba, by making it clear that states have broad discretion in establishing and applying emissions standards consistent with the BSER. The new implementing regulations also provide changes to the timing requirements for the EPA and states to take action to more closely align with the CAA section 110 state implementation plan (SIP) and federal implementation plan (FIP) deadlines. The discussion of the final revisions to the implementing regulations is found in section IV below.

The implementing regulations (and ACE which is promulgated consistent with those regulations) make clear that the EPA, states, and sources all have distinct roles, responsibilities, and flexibilities under CAA section 111(d). Specifically, the EPA identifies the BSER; states establish standards of performance for existing sources within their jurisdiction consistent with that BSER and also with the flexibility to consider source-specific factors, including remaining useful life; and sources then meet those standards using the technologies or techniques they believe is most appropriate. As this preamble explains, in the case of ACE, the EPA has identified the BSER as a set of heat rate improvement measures. States will establish standards of performance for existing sources based on application of those heat rate improvement measures (considering source-specific factors, including remaining useful life). Each regulated source then must meet those standards using the measures they believe is appropriate (*e.g.,* via the heat rate improvement measures identified by the EPA as the BSER, other heat rate improvement measures, or other approaches such as CCS or natural gas co-firing).

These three rules have been informed by more than 1.5 million public comments on the Proposed Repeal and 500,000 public comments on the proposals for ACE and the new implementing regulations. Per CAA section 307(d)(6)(B), the EPA is providing a response to the significant comments received for each of these actions in the docket. After careful consideration of the comments, the EPA is finalizing these three rules, with revisions to what it proposed where appropriate, to provide states guidance on how to address CO_2 emissions from coal-fired power plants in a way that is consistent with the EPA's authority under the CAA.

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 document is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this document at *https://www.epa.gov/stationary-sources-air-pollution/electric-utility-generating-units-emission-guidelines-greenhouse.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of these final rules and key technical documents at this same website.

C. Judicial Review and Administrative Reconsideration

Under CAA section 307(b)(1), judicial review of these final actions is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) by September 6, 2019. Under CAA section 307(b)(2), the requirements established by these final rules may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

Section 307(d)(7)(B) of the CAA further provides that only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. This section also provides a mechanism for the EPA to reconsider a rule if the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within the period for public comment or if the grounds for such objection arose after the period for public comment (but within the time

[1] Proposed Repeal, 82 FR 48036.

specified for judicial review) and if such objection is of central relevance to the outcome of the rule. Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, WJC South Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

II. Repeal of the Clean Power Plan

A. Background for the Repeal of the Clean Power Plan

1. The Clean Power Plan

The EPA promulgated the CPP under section 111 of the CAA.[2] Section 111(b) authorizes the EPA to issue nationally applicable new source performance standards (NSPS) limiting air pollution from ''new sources'' in source categories that cause or significantly contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.[3] In 2015, the EPA issued such a rule for GHG emissions—in particular, CO_2—from certain new fossil fuel-fired power plants [4] in light of the Agency's assessment ''that GHGs endanger public health, now and in the future.'' [5] CAA section 111(d) provides that, under certain circumstances, when the EPA issues a CAA section 111(b) standard, the EPA must develop procedures requiring each state to submit a plan to the EPA that establishes performance standards for *existing* sources in the same category.[6] The EPA relied on CAA section 111(d) to issue the CPP, which, for the first time, required states to submit plans specifically designed to limit CO_2 emissions from certain existing fossil fuel-fired power plants.

The CPP established emission guidelines for states to follow in limiting CO_2 emissions from those existing fossil fuel-fired power plants. Those emission guidelines included both state-specific ''goals'' and alternative, nationally uniform CO_2 emission performance rates for two types of existing fossil fuel-fired power plants: Electric utility steam generating units and stationary combustion turbines.[7]

In the CPP, the EPA determined that the BSER for CO_2 emissions from existing fossil fuel-fired power plants was the combination of: (1) Heat rate (*e.g.,* efficiency) improvements to be conducted at individual power plants, in combination with (2, 3) two other sets of measures based on the shifting of generation at the fleet-wide level from one type of energy source to another. The EPA referred to these three sets of measures as ''building blocks'': [8]

1. Improving heat rate at affected coal-fired steam generating units;

2. Substituting increased generation from lower-emitting existing natural gas combined cycle units for decreased generation from higher-emitting affected steam generating units; and

3. Substituting increased generation from new zero-emitting renewable energy generating capacity for decreased generation from affected fossil fuel-fired generating units.

While building block 1 relied on measures that could be applied directly to individual sources, building blocks 2 and 3 employed measures that were expressly designed to shift the balance of coal-, gas-, and renewable-generated power across the power grid.

2. Legal Challenges to the CPP, Executive Order 13783, and the EPA's Review of the CPP

On October 23, 2015, 27 states and a number of other parties sought judicial review of the CPP in the U.S. Court of Appeals for the D.C. Circuit.[9] After some preliminary briefing, the Supreme Court stayed implementation of the CPP, pending judicial review.[10] The case was then referred to an *en banc* panel of the D.C. Circuit, which held oral argument on September 27, 2016.

On March 28, 2017, President Trump issued Executive Order 13783, which affirms the ''national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.'' [11] The Executive Order directs all executive departments and agencies, including the EPA, to ''immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.'' [12] The Executive Order further affirms that it is ''the policy of the United States that necessary and appropriate environmental regulations comply with the law.'' [13] Moreover, the Executive Order specifically directs the EPA to review and initiate reconsideration proceedings to ''suspend, revise, or rescind'' the CPP ''as appropriate and consistent with law.'' [14]

In a document signed the same day as Executive Order 13783 and published in the **Federal Register** at 82 FR 16329 (April 4, 2017), the EPA announced that, consistent with the Executive Order, it was initiating its review of the CPP and providing notice of forthcoming proposed rulemakings consistent with the Executive Order.

In light of Executive Order 13783, the EPA's initiation of a review of the CPP, and notice of the EPA's forthcoming rulemakings, the EPA asked the D.C. Circuit to hold the CPP litigation in abeyance, and, on April 28, 2017, the court (still sitting en banc) granted motions to hold the cases in abeyance for 60 days and directed the parties to file briefs addressing whether the cases should be remanded to the Agency rather than held in abeyance.[15] Since then, the D.C. Circuit has issued a series of orders holding the cases in abeyance. While the case has been in abeyance, the EPA has been reviewing the CPP and providing status reports to the court describing the progress of its rulemaking.

In the course of the EPA's review of the CPP, the Agency also reevaluated its interpretation of CAA section 111, and, on that basis, the Agency proposed to repeal the CPP.[16]

3. Public Comment and Hearings on the Proposed Repeal

Publication of the Proposed Repeal in the **Federal Register** opened comment on the proposal for an initial 60-day

---

[2] 42 U.S.C. 7411.

[3] *Id.* 7411(b)(1).

[4] The CPP identified ''[f]ossil fuel-fired EGUs'' as ''by far the largest emitters of GHGs among stationary sources in the U.S., primarily in the form of CO_2.'' 80 FR 64510, 64522 (October 23, 2015).

[5] Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 80 FR 64510, 64518 (October 23, 2015); *see also* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under section 202(a) of the CAA, 74 FR 66496 (December 15, 2009) (2009 Endangerment Finding). The substance of the 2009 Endangerment Finding, which addressed GHG emissions from mobile sources, is not at issue in this action.

[6] 42 U.S.C. 7411(d)(1) (emphasis added).

[7] *See* 80 FR 64707.

[8] *Id.*

[9] *See West Virginia* v. *EPA,* No. 15–1363 (and consolidated cases) (D.C. Cir. October 23, 2015).

[10] *West Virginia* v. *EPA,* 136 S. Ct. 1000 (2016).

[11] *See* Executive Order 13783, section 1(a).

[12] *Id.* section 1(c).

[13] *Id.* section 1(e).

[14] *Id.* section 4(a)–(c).

[15] Order, Document No. 1673071 (per curiam).

[16] *See* Proposed Repeal, 82 FR 48035 (October 16, 2017).

In general, the EPA is more confident in the size of the risks estimated from simulated $PM_{2.5}$ concentrations that coincide with the bulk of the observed PM concentrations in the epidemiological studies that are used to estimate the benefits. Likewise, the EPA is less confident in the risk the EPA estimates from simulated $PM_{2.5}$ concentrations that fall below the bulk of the observed data in these studies.[267] Furthermore, when setting the 2012 PM NAAQS, the Administrator also acknowledged greater uncertainty in specifying the ''magnitude and significance'' of PM-related health risks at PM concentrations below the NAAQS. As noted in the preamble to the 2012 PM NAAQS final rule, ''EPA concludes that it is not appropriate to place as much confidence in the magnitude and significance of the associations over the lower percentiles of the distribution in each study as at and around the long-term mean concentration.'' [268]

Monetized co-benefits estimates shown here do not include several important benefit categories, such as direct exposure to SO_2, NO_X, and HAP including mercury and hydrogen chloride. Although the EPA does not have sufficient information or modeling available to provide monetized estimates of changes in exposure to these pollutants for this rule, the EPA includes a qualitative assessment of these unquantified benefits in the RIA. For more information on the benefits analysis, please refer to the RIA for these rules, which is available in the rulemaking docket.

IV. Changes to the Implementing Regulations for CAA Section 111(d) Emission Guidelines

The EPA is finalizing new regulations to implement CAA section 111(d) (implementing regulations) which will be codified at 40 CFR part 60, subpart Ba. The current implementing regulations at 40 CFR part 60, subpart B, were originally promulgated in 1975.[269] Section 111(d)(1) of the CAA explicitly requires that the EPA prescribe regulations establishing a procedure similar to that under section 110 of the CAA for states to submit plans to the EPA establishing standards of performance for existing sources within their jurisdiction. The implementing regulations have not been significantly revised since their original promulgation in 1975. Notably, the implementing regulations do not reflect CAA section 111(d) in its current form as amended by Congress in 1977, and do not reflect CAA section 110 in its current form as amended by Congress in 1990. Accordingly, the EPA believes that certain portions of the implementing regulations do not appropriately align with CAA section 111(d), contrary to that provision's mandate that the EPA's regulations be ''similar'' in procedure to the provisions of section 110. Therefore, the EPA proposed to promulgate new implementing regulations that are in accordance with the statute in its current form (*See* 83 FR 44746–44813). Agencies have the ability to revisit prior decisions, and the EPA believes it is appropriate to do so here in light of the potential mismatch between certain provisions of the implementing regulations and the statute.[270] While the preamble for the final new implementing regulations are part of the same **Federal Register** document as certain other Agency rules (specifically, the repeal of the CPP and the promulgation of the ACE rule), these new implementing regulations are a separate and distinct rulemaking with its own regulatory text and response to comments. The implementing regulations are not dependent on the other final actions contained in this **Federal Register** document.

The EPA proposed to largely carry over the current implementing regulations in 40 CFR part 60, subpart B to a new subpart that will be applicable to emission guidelines that are finalized either concurrently with or subsequently to final promulgation of the new implementing regulations, as well as to state plans or federal plans associated with such emission guidelines. For purposes of regulatory certainty, the EPA believes it is appropriate to apply these new implementing regulations prospectively and retain the existing implementing regulations as applicable to CAA section 111(d) emission guidelines and associated state plans or federal plans that were promulgated previously. Additionally, because the original implementing regulations also applied to regulations promulgated under CAA section 129 (a provision enacted in the 1990 Amendments that builds on CAA section 111 but provides specific authority to address facilities that combust waste), which has its own statutory requirements distinct from those of CAA section 111(d), the original implementing regulations under 40 CFR part 60, subpart B continue to apply to EPA-regulations promulgated under CAA section 129, and any associated state plans and federal plans. The new implementing regulations are thus applicable only to CAA section 111(d) regulations and associated state plans issued solely under the authority of CAA section 111(d).

The EPA is aware that there are a number of cases where state plan submittal and review processes are still ongoing for existing CAA section 111(d) emission guidelines. Because the EPA is finalizing new state plan and federal plan timing requirements under the implementing regulations to more closely align CAA section 111(d) with both general CAA section 110 state implementation plan (SIP) and federal implementation plan (FIP) timing requirements, and because of the EPA's understanding from experience of the realities of how long these actions typically take, the EPA is applying the new timing requirements to both emission guidelines published after the new implementing regulations are finalized and to all ongoing emission guidelines already published under CAA section 111(d). The EPA is finalizing applicability of the timing changes to all ongoing 111(d) regulations for the same reasons that the EPA is changing the timing requirements prospectively. Based on years of experience working with states to develop SIPs under CAA section 110, the EPA believes that given the comparable amount of work, effort, coordination with sources, and the time required to develop state plans, more time is necessary for the process. Giving states three years to develop state plans is more appropriate than the nine months provided for under the existing implementing regulations, considering the workload required for state plan development. These practical considerations regarding the time needed for state plan development are also applicable and true for recent emission guidelines where the state

[267] The **Federal Register** notice for the 2012 PM NAAQS indicates that ''[i]n considering this additional population level information, the Administrator recognizes that, in general, the confidence in the magnitude and significance of an association identified in a study is strongest at and around the long-term mean concentration for the air quality distribution, as this represents the part of the distribution in which the data in any given study are generally most concentrated. She also recognizes that the degree of confidence decreases as one moves towards the lower part of the distribution.'' *See* 78 FR 3159 (January 15, 2013).

[268] *See* 78 FR 3154, January 15, 2013.

[269] *See* 40 FR 53346.

[270] The authority to reconsider prior decisions exists in part because the EPA's interpretations of statutes it administers ''[are not] instantly carved in stone,'' but must be evaluated ''on a continuing basis.'' *Chevron U.S.A. Inc.* v. *NRDC, Inc.,* 467 U.S. 837, 863–64 (1984). Indeed, ''[a]gencies obviously have broad discretion to reconsider a regulation at any time.'' *Clean Air Council* v. *Pruitt,* 862 F.3d 1, 8–9 (D.C. Cir. 2017).

plan submittal and review process are still ongoing.

For those provisions that are being carried over from the existing implementing regulations into the new implementing regulations, the EPA is not intending to substantively change those provisions from their original promulgation and continues to rely on the record under which they were promulgated. Therefore, the following provisions remain substantively the same from their original promulgation: 40 CFR 60.21a(a)–(d), (g)–(j) (Definitions); 60.22a(a), 60.22a(b)(1)–(3), (b)(5), (c) (Publication of emission guidelines); 60.23a(a)–(c), (d)(3)–(5), (e)–(h) (Adoption and submittal of state plans; public hearings); 60.24a(a)–(d), (f) (Standards of performance and compliance schedules); 60.25a (Emission inventories, source surveillance, reports); 60.26a (Legal authority); 60.27a(a), (e)–(f) (Actions by the Administrator); 60.28a(b) (Plan revisions by the state); and 60.29a (Plan revisions by the Administrator).

As noted at proposal, the EPA is also sensitive to potential confusion over whether these new implementing regulations would apply to emission guidelines previously promulgated or to state plans associated with prior emission guidelines, so the EPA proposed that the new implementing regulations are applicable only to emission guidelines and associated plans developed after promulgation of this regulation, including the emission guidelines being proposed as part of this action for GHGs and existing designated facilities. The EPA is finalizing this proposed applicability of the new implementing regulations.

While the EPA is carrying over a number of requirements from the existing implementing regulations to the new implementing regulations, the EPA is finalizing specific changes to better align the implementing regulations with the statute. These changes are reflected in the regulatory text for the new implementing regulations, and include:

- An explicit provision allowing specific emission guidelines to supersede the requirements of the new implementing regulations;
- Changes to the definition of ''emission guidelines'';
- Updated timing requirements for the submission of state plans;
- Updated timing requirements for the EPA's action on state plans;
- Updated timing requirements for the EPA's promulgation of a federal plan;
- Updated timing requirement for when increments of progress must be included as part of a state plan;
- Completeness criteria and a process for determining completeness of state plan submissions similar to CAA section 110(k)(1) and (2);
- Updated definition replacing ''emission standard'' with ''standard of performance'';
- Usage of the internet to satisfy certain public hearing requirements;
- Elimination of the distinction between public health-based and welfare-based pollutants in emission guidelines; and
- Updated provision allowing for consideration of remaining useful life and other factors to be consistent with CAA section 111(d)(1)(B).

Because the EPA is updating the implementing regulations and many of the provisions from the existing implementing regulations are being carried over, the EPA wants to be clear and transparent with regard to the changes that are being made to the implementing regulations. As such, the EPA is providing Table 8 that summarizes the changes being made.

TABLE 8—SUMMARY OF CHANGES TO THE IMPLEMENTING REGULATIONS

New implementing regulations—Subpart Ba for all future and ongoing CAA section 111(d) emission guidelines	Existing implementing regulations—Subpart B for all previously promulgated CAA section 111(d) emission guidelines
Explicit authority for a new 111(d) emission guidelines requirement to supersede these implementing regulations.	No explicit authority.
Use of term ''standard of performance''	Use of term ''emission standard''.
''Standard of performance'' allows states to include design, equipment, work practice, or operational standards when the EPA determines it is not feasible to prescribe or enforce a standard of performance, consistent with the requirements of CAA section 111(h).	''Emission standard'' allows states to prescribe equipment specifications when the EPA determines it is clearly impracticable to establish an emission standard.
State submission timing: 3 years from promulgation of final emission guidelines.	State submission timing: 9 months from promulgation of final emission guidelines.
EPA action on state plan submission timing: 12 months after determination of completeness.	EPA action on state plan submission timing: 4 months after submittal deadline.
Timing for EPA promulgation of a federal plan, as appropriate: 2 years after finding of plan submission to be incomplete, finding of failure to submit a plan, or disapproval of state plan.	Timing for EPA promulgation of a federal plan, as appropriate: 6 months after submittal deadline.
Increments of progress are required if compliance schedule for a state plan is longer than 24 months after the plan is due.	Increments of progress are required if compliance schedule for a state plan is longer than 12 months after the plan is due.
Completeness criteria and process for state plan submittals	No analogous requirement.
Usage of the internet to satisfy certain public hearing requirements	No analogous requirement.
No distinction made in treatment between health-based and welfare-based pollutants; states may consider remaining useful life and other factors regardless of type of pollutant.	Different provisions for health-based and welfare-based pollutants; state plans must be as stringent as the EPA's emission guidelines for health-based pollutants unless variance provision is invoked.

A. Regulatory Background

The Agency also is, in this action, clarifying the respective roles of the states and the EPA under section 111(d), including by finalizing revisions to the regulations implementing that section in 40 CFR part 60 subpart B. CAA section 111(d)(1) states that the EPA ''Administrator shall prescribe regulations which shall establish a procedure . . . under which each state shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.'' [271] CAA section 111(d)(1) also requires the Administrator to ''permit the State in applying a standard of performance to any particular source

[271] *See* 42 U.S.C. 7411(d).

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.''[272]

As the statute provides, the EPA's authorized role under CAA section 111(d)(1) is to develop a procedure for states to establish standards of performance for existing sources. Indeed, the Supreme Court has acknowledged the role and authority of states under CAA section 111(d): This provision allows ''each State to take the first cut at determining how best to achieve EPA emissions standards within its domain.'' [273] The Court addressed the statutory framework as implemented through regulation, under which the EPA promulgates emission guidelines and the states establish performance standards: ''For existing sources, EPA issues emissions guidelines; in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, [42 U.S.C.] 7411(d)(1).'' [274]

As contemplated by CAA section 111(d)(1), states possess the authority and discretion to establish appropriate standards of performance for existing sources. CAA section 111(a)(1) defines ''standard of performance'' as ''a standard of emissions of air pollutants which reflects'' what is commonly referred to as the ''Best System of Emission Reduction'' or ''BSER''—*i.e.,* ''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.''[275]

In order to effectuate the Agency's role under CAA section 111(d)(1), the EPA promulgated implementing regulations in 1975 to provide a framework for subsequent EPA rules and state plans under CAA section 111(d).[276] The implementing regulations reflect the EPA's principal task under CAA section 111(d)(1), which is to develop a procedure for states to establish standards of performance for existing sources through state plans. The EPA is promulgating an updated version of the implementing regulations. Under the revised implementing regulations, the EPA effectuates its role by publishing ''emission guidelines'' [277] that, among other things, contain the EPA's determination of the BSER for the category of existing sources being regulated.[278] In undertaking this task, the EPA ''will specify different emissions guidelines . . . for different sizes, types and classes of . . . facilities when costs of control, physical limitations, geographic location, or similar factors make subcategorization appropriate.'' [279]

In short, under the EPA's revised regulations implementing CAA section 111(d), which tracks with the existing implementing regulations in this regard, the guideline documents serve to ''provide information for the development of state plans.'' [280] The ''emission guidelines,'' reflecting the degree of emission limitation achievable through application of the BSER determined by the Administrator to be adequately demonstrated, are the principal piece of information states rely on to develop their plans that establish standards of performance for existing sources. Additionally, the Act requires that the EPA permit states to consider, ''among other factors, the remaining useful life'' of an existing source in applying a standard of performance to such sources.[281]

Additionally, while CAA section 111(d)(1) clearly authorizes states to develop state plans that establish performance standards and provides states with certain discretion in determining appropriate standards, CAA section 111(d)(2) provides the EPA specifically a role with respect to such state plans. This provision authorizes the EPA to prescribe a plan for a state ''in cases where the State fails to submit a satisfactory plan.'' [282] The EPA therefore is charged with determining whether state plans developed and submitted under CAA section 111(d)(1) are ''satisfactory,'' and the new implementing regulations at 40 CFR 60.27a accordingly provide timing and procedural requirements for the EPA to make such a determination. Just as guideline documents may provide information for states in developing plans that establish standards of performance, they may also provide information for the EPA to consider when reviewing and taking action on a submitted state plan, as the new implementing regulations at 40 CFR 60.27a(c) reference the ability of the EPA to find a state plan as ''unsatisfactory because the requirements of (the implementing regulations) have not been met.'' [283]

B. Provision for Superseding Implementing Regulations

The EPA proposed to include a provision in the new implementing regulations that expressly allows for any emission guidelines to supersede the applicability of the implementing regulations as appropriate, parallel to a provision contained in the 40 CFR part 63 General Provisions implementing section 112 of the CAA. The EPA cannot foresee all of the unique circumstances and factors associated with particular future emission guidelines, and therefore different requirements may be necessary for a particular 111(d) rulemaking that the EPA cannot envision at this time. The EPA is finalizing this provision as proposed.

C. Changes to the Definition of ''Emission Guidelines''

The existing implementation regulations under 40 CFR 60.21(e) contain a definition of ''emission guidelines,'' defining them as guidelines which reflect the degree of emission reduction achievable through the application of the BSER which (taking into account the cost of such reduction) the Administrator has determined has been adequately demonstrated for designated facilities. This definition additionally references that emission guidelines may be set forth in 40 CFR part 60, subpart C, or a ''final guideline document'' published under 40 CFR 60.22(a). While the implementing regulations do not define the term ''final guideline document,'' 40 CFR 60.22 generally contains a number of requirements pertaining to the contents of guideline documents, which are intended to provide information for the development of state plans.[284] The preambles for both the proposed and final existing implementing regulations suggest that ''emission guidelines''

[272] *Id.*

[273] *Am. Elec. Power Co.* v. *Connecticut,* 131 S. Ct. 2527, 2539 (2011).

[274] *Id.* at 2537–38.

[275] 42 U.S.C. 7411(a)(1) (emphasis added).

[276] *See* 40 CFR part 60, subpart B (hereafter referred to as the ''implementing regulations'').

[277] *See* section IV.B. for the changes to the definition of ''emission guidelines'' as part of the EPA's new implementing regulations.

[278] *See* 40 CFR 60.22a(b) (''Guideline documents published under this section will provide information for the development of State plans, such as: . . . (4) An emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated.'').

[279] 40 CFR 60.22(b)(5).

[280] 40 CFR 60.22a(b).

[281] 42 U.S.C. 7411(d)(1).

[282] *Id.* 7411(d)(2)(A).

[283] *See also* 40 FR 53343 (''If there is to be substantive review, there must be criteria for the review, and EPA believes it is desirable (if not legally required) that the criteria be made known in advance to the States, to industry, and to the general public. The emission guidelines, each of which will be subjected to public comment before final adoption, will serve this function.'').

[284] *See* 40 CFR 60.22(b).

would be guidelines provided by the EPA that reflect the degree of emission limitation achievable by the BSER. In the proposal for this action, the EPA described that it is important to provide information on such degree of emission limitation in order to guide states in their establishment of standards of performance as required under CAA section 111(d). However, the EPA also explained that it did not believe anything in CAA section 111(a)(1) or 111(d) compels the EPA to provide a presumptive emission standard that reflects the degree of emission limitation achievable by application of the BSER. Accordingly, as part of the proposed new implementing regulations, the EPA proposed to re-define ''emission guidelines'' as final guideline documents published under 40 CFR 60.22a(a) that include information on the degree of emission reduction achievable through the application of the BSER which (taking into account the cost of such reduction and any non-air quality health and environmental impact and energy requirements) the EPA has determined has been adequately demonstrated for designated facilities.

The EPA received substantial comments regarding this proposed change to the implementing regulations. Commenters contend that because CAA section 111(a)(1) requires the EPA to identify the BSER, it is also the EPA's statutory responsibility to identify the degree of emission limitation achievable through application of the BSER. According to commenters, the identification of a BSER without an accompanying emission limitation reflecting its application is an incomplete identification of the system of emission reduction itself, as it is the manner and degree of application of a system that often determines the quantity and cost of the emission reductions achieved, as well as any implications for energy requirements—factors that are statutorily a component of the BSER analysis delegated to the EPA.

The EPA has considered carefully these comments and is not finalizing the proposed changes to the definition of ''emission guidelines'' regarding the aspect of such guidelines reflecting the degree of emission limitation achievable through application of the BSER. The EPA is finalizing a definition of ''emission guidelines'' that requires them to reflect the degree of emission limitation of emission achievable through application of the BSER, as well as updates to the definition consistent with CAA section 111(a)(1) (*e.g.,* including a reference to ''energy requirements'' which was not present in the original definition). Relatedly, the EPA is not finalizing changes to proposed 40 CFR 60.21a(e) requiring the EPA in emission guidelines to provide *information* on the degree of emission limitation achievable through application of the BSER rather than such degree of emission limitation itself. While the statute is ambiguous as to whose role (*i.e.,* the EPA's or the states') it is to determine the degree of emission limitation achievable through application of the BSER in the context of standards of performance for existing sources, the EPA believes it is reasonable to construe this aspect of CAA section 111 as included within the EPA's obligation to determine the BSER. While states are better positioned to evaluate source-specific factors and circumstances in establishing standards of performance, the EPA agrees with commenters that because the EPA evaluates components such as cost of emission reductions and environmental impacts on a broader, systemwide scale when determining the BSER, if a state instead were to determine the degree of emission limitation achievable for the sources within its borders, these factors will naturally be re-balanced on a smaller scale than the EPA's calculation and likely re-define the BSER in the process. Under the cooperative federalism structure of CAA section 111, the EPA determines the BSER and the associated level of stringency (*i.e.,* the degree of emission limitation achievable through application of the BSER), but states may where appropriate relax this level of stringency when establishing standards of performance by accounting for source-specific factors such as remaining useful life. Accordingly, given the EPA's role in determining the BSER, the EPA is retaining the requirement from the original implementing regulations that emission guidelines reflect the degree of emission limitation achievable through application of the BSER, rather than finalizing the proposed change that emission guidelines provide information on such degree of emission limitation achievable.

D. Updates to Timing Requirements

The timing requirements in the existing implementing regulations for state plan submissions, the EPA's action on state plan submissions, and the EPA's promulgation of federal plans generally track the timing requirements for SIPs and federal implementation plans (FIPs) under the 1970 version of the CAA. The existing implementing regulations at 60.23(a)(1) require state plans to be submitted to the EPA within nine months after publication of final emission guidelines, unless otherwise specified in emission guidelines. Congress subsequently revised the SIP and FIP timing requirements in section 110 as part of the 1990 CAA Amendments. The EPA proposed to update accordingly the timing requirements regarding state and federal plans under CAA section 111(d) to be consistent with the current timing requirements for SIPs and FIPs under section 110.[285]

Commenters contend that premising the proposed longer timelines for state plans based on the timelines for SIPs and FIPs is inappropriate because CAA section 111(d) state plans are narrower in scope and less complex than section 110 SIPs for a number of reasons. According to commenters, these reasons include: (1) Because state plans cover one source category, whereas SIPs cover the different types of sources whose emissions must be reduced to meet an ambient air quality standard; (2) because sources under state plans are required to meet an emission standard expressed as a rate or mass limitation, whereas SIPs are required to assure that ambient air within a state stay below the NAAQS, which requires monitoring, modeling, and other complicated considerations; and (3) EPA already does a substantial percentage of the work for states in the first instance by determining the BSER and the degree of emission limitation achievable through application of the BSER.

While it is correct that the main requirement under CAA section 111(d) is for state plans to establish standards of performance for designated facilities, and that these existing-source performance standards are informed by the degree of emission limitation achievable through application of the BSER that EPA identifies, CAA section 111(d)(1)(B) also requires state plans to include measures that provide for the implementation and enforcement of such standards. The implementing regulations further clarify what those measures may be, such as monitoring, reporting, and recordkeeping requirements, but the regulations do not specify the types of measures that may satisfy those requirements (*e.g.,* what type of monitoring is adequate to measure compliance for a particular source category). Nor do the implementing regulations contain an exhaustive list of implementation and enforcement measures given that the nature of a specific state plan, or individual source subject to a state plan, may necessitate tailored implementation

[285] *See* 84 FR 44746–813.

and enforcement measures that the EPA has not, or cannot, prescribe.

Establishment of standards of performance under CAA section 111(d) state plans also may not be as straightforward as commenters suggest, as states have the authority to consider remaining useful life and other factors in applying a standard to a designated facility. While the EPA defines the degree of emission limitation achievable through application of the BSER, it is the state that must evaluate whether there are source-specific considerations which necessitate development of a different standard than the degree of emission limitation that the EPA identifies. Commenters do not provide any information suggesting development of such standards, or development of appropriate implementation and enforcement measures generally, would take some shorter period of time to formulate and adopt for submission of a state plan than the three years the EPA proposed. Therefore, for these reasons, commenters fail to recognize that while CAA section 111(d) is not the same as CAA section 110 in the scope of its requirements, state plans under CAA section 111(d) have their own complexities and realities that take time to address in the development of state plans.

To the contrary, it has been the EPA's experience over decades in the SIP context that states often do need and take much, if not all, of the three-year period under section 110 for the process of developing and adopting SIPs, even if a required SIP submission is relatively narrow in scope and nature. To the extent the EPA determines a shorter timeline is appropriate for the submission of state plans under CAA section 111(d), for example based on the nature of the pollution problem involved, the EPA has authority under the implementing regulations to impose a shorter deadline in specific emission guidelines. Relatedly, the EPA also proposed that it would be required to propose a federal plan ''within'' two years, and nothing in this provision precludes the EPA from promulgating a federal plan at any period within that span of two years if it deems appropriate.

For all of these reasons and based on its experience, the EPA believes it is at least reasonable to construe Congress's direction that it establish a procedure ''similar'' under that of CAA section 110 to authorize it to provide the same timing requirements for state and federal plans under CAA section 111(d) as Congress provided under CAA section 110, and indeed that this direction may indicate Congress's specific intention that the EPA adopt those same timing requirements. The EPA is finalizing, as part of new implementing regulations, a requirement that states adopt and submit a state plan to the EPA within three years after the notice of the availability of the final emission guidelines. Because of the amount of work, effort, and time required for developing state plans that include unit-specific standards, and implementation and enforcement measures for such standards, the EPA believes that extending the submission date of state plans from nine months to three years is appropriate. Because states have considerable flexibility in implementing CAA section 111(d), this timing also allows states to interact and work with the Agency in the development of their state plans and to minimize the chances of unexpected issues arising that could slow down eventual approval of state plans. The EPA notes that nothing in CAA section 111(d) or the implementing regulations preclude states from submitting state plans earlier than the applicable deadline. The EPA also is finalizing to give itself discretion to determine, in specific emission guidelines, that a shorter time period for the submission of state plans particular to that emission guidelines is appropriate. Such authority is consistent with CAA section 110(a)(1)'s grant of authority to the Administrator to determine that a period shorter than three years is appropriate for the submission of particular SIPs implementing the NAAQS.

Following submission of state plans, the EPA will review plan submittals to determine whether they are ''satisfactory'' pursuant to CAA section 111(d)(2)(A). Given the flexibilities CAA section 111(d) and emission guidelines generally accord to states, and the EPA's prior experience on reviewing and acting on SIPs under section 110, the EPA is extending the period for EPA review and approval or disapproval of plans from the four-month period provided in the 1975 implementing regulations to a twelve-month period after a determination of completeness (either affirmatively by the EPA or by operation of law, see section IV.F. for the new implementing regulations' treatment of completeness) as part of the new implanting regulations. This timeline will provide adequate time for the EPA to review plans and follow notice-and-comment rulemaking procedures to ensure an opportunity for public comment on the EPA's proposed action on a state plan.

The EPA additionally is extending the timing for the EPA to promulgate a federal plan from six months in the existing implementing regulations to two years, as part of the new implementing regulations. This two-year timeline is consistent with the FIP deadline under section 110(c) of the CAA. The EPA is finalizing provisions in the new implementing regulations [286] that provide that it has the authority to promulgate a federal plan within two years if it:

- Finds that a state failed to submit a plan required by emission guidelines and CAA section 111(d);
- Makes a finding that a state plan submission is incomplete, as described under the new completeness requirements and criteria in 40 CFR 60.27a(g); or
- Disapproves a state plan submission.

E. Compliance Deadlines

The previous implementing regulations required that any compliance schedule for state plans 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.[287] However, as described in section IV.D, the EPA is finalizing updates to the timing requirements for the submission of, and action on, state plans. Consequently, it follows that the requirement for increments of progress also should be updated in order to align with the new timelines. Given that the EPA is finalizing a period of up to 18 months for its action on state plans (*i.e.,* 12 months from the determination that a state plan submission is complete, which could occur up to six months after receipt of the state plan), the EPA believes it is appropriate that the requirement for increments of progress should attach to plans that contain compliance periods that are longer than the period provided for the EPA's review of such plans. This way, sources subject to a plan will have more certainty that their regulatory compliance obligations would not change between the period when a state plan is due and when the EPA acts on a plan. Accordingly, the EPA is requiring that states include provisions for increments of progress where their state plans contain compliance schedules longer than 24 months from

[286] 40 CFR 60.27a(c).

[287] 40 CFR 60.24(e)(1).

the date when state plans are due for particular emission guidelines.

F. Completeness Criteria

Similar to requirements regarding determinations of completeness under CAA section 110(k)(1), the EPA is finalizing completeness criteria that provide the Agency with a means to determine whether a state plan submission includes the minimum elements necessary for the EPA to act on the submission. The EPA determines completeness simply by comparing the state's submission against these completeness criteria. In the case of SIPs under CAA section 110(k)(1), the EPA promulgated completeness criteria in 1990 at appendix V to 40 CFR part 51.[288] The EPA is adopting criteria similar to the criteria set out at section 2.0 of appendix V for determining the completeness of submissions under CAA section 111(d).

The EPA notes that the addition of completeness criteria in the framework regulations does not alter any of the submission requirements states already have under any applicable emission guidelines. The completeness criteria in this action are those that would generally apply to all plan submissions under CAA section 111(d), but specific emission guidelines may supplement these general criteria with additional requirements.

The completeness criteria that the EPA is finalizing in this action can be grouped into administrative materials and technical support. For administrative materials, the completeness criteria mirror criteria for SIP submissions because the two programs have similar administrative processes. Under these criteria, the submittal must include the following:

(1) A formal letter of submittal from the Governor or the Governor's designee requesting EPA approval of the plan or revision thereof;

(2) Evidence that the state has adopted the plan in the state code or body of regulations; or issued the permit, order, or consent agreement (hereafter ''document'') in final form. That evidence must include the date of adoption or final issuance as well as the effective date of the plan, if different from the adoption/issuance date;

(3) Evidence that the state has the necessary legal authority under state law to adopt and implement the plan;

(4) A copy of the official state regulation(s) or document(s) submitted for approval and incorporated by reference into the plan, signed, stamped, and dated by the appropriate state official indicating that they are fully adopted and enforceable by the state. The effective date of the regulation or document must, whenever possible, be indicated in the document itself. The state's electronic copy must be an exact duplicate of the hard copy. For revisions to the approved plan, the submission must indicate the changes made to the approved plan by redline/strikethrough;

(5) Evidence that the state followed all applicable procedural requirements of the state's regulations, laws, and constitution in conducting and completing the adoption/issuance of the plan;

(6) Evidence that public notice was given of the plan or plan revisions with procedures consistent with the requirements of 40 CFR 60.23, including the date of publication of such notice;

(7) Certification that public hearing(s) were held in accordance with the information provided in the public notice and the state's laws and constitution, if applicable and consistent with the public hearing requirements in 40 CFR 60.23.; and

(8) Compilation of public comments and the state's response thereto.

In addition, the technical support required for all plans must include each of the following:

(1) Description of the plan approach and geographic scope;

(2) Identification of each designated facility; identification of emission standards for each designated facility; and monitoring, recordkeeping, and reporting requirements that will determine compliance by each designated facility;

(3) Identification of compliance schedules and/or increments of progress;

(4) Demonstration that the state plan submission is projected to achieve emissions performance under the applicable emission guidelines;

(5) Documentation of state recordkeeping and reporting requirements to determine the performance of the plan as a whole; and

(6) Demonstration that each emission standard is quantifiable, permanent, verifiable, and enforceable.

The EPA intends that these criteria generally be applicable to all CAA section 111(d) plans submitted on or after the date on which final new implementing regulations are promulgated, with the proviso that specific emission guidelines may provide otherwise.

Consistent with the requirements of CAA section 110(k)(1)(B) for SIPs, the EPA is finalizing that the EPA will determine whether a state plan is complete (*i.e.,* meets the completeness criteria) by no later than 6 months after the date, if any, by which a state is required to submit the plan. The EPA requires that any plan or plan revision that a state submits to the EPA, and that has not been determined by the EPA by the date 6 months after receipt of the submission to have failed to meet the minimum completeness criteria, shall on that date be deemed by operation of law to be a complete state plan. Then, as previously discussed, the EPA relatedly is finalizing that the EPA will act on a state plan submission through notice-and-comment rulemaking within 12 months after determining a plan is complete either through an affirmative determination or by operation of law.

When plan submissions do not contain the minimum elements, the EPA will find that a state has failed to submit a complete plan through the same process as finding a state has made no submission at all. Specifically, the EPA will notify the state that its submission is incomplete and that it therefore has not submitted a required plan, and the EPA will also publish a finding of failure to submit in the **Federal Register**, which triggers the EPA's obligation to promulgate a federal plan for the state. This 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, nor does it reflect a judgment on the eventual approvability of the submitted portions of the plan.

G. Standard of Performance

As previously described, the implementing regulations were promulgated in 1975 and effectuated the 1970 version of the CAA as it existed at that time. The 1970 version of CAA section 111(d) required state plans to include ''emission standards'' for existing sources, and consequently the implementing regulations refer to this term. However, as part of the 1977 amendments to the CAA, Congress replaced the term ''emission standard'' in section 111(d) with ''standard of performance.'' The EPA has not since revised the implementing regulations to reflect this change in terminology. For clarity's sake and to better track with statutory requirements, the EPA is determining to include a definition of ''standard of performance'' as part of the new implementing regulations, and to consistently refer to this term as appropriate within those regulations in lieu of referring to an ''emission standard.'' In any event, the current definition of ''emission standard'' in the implementing regulations is incomplete and would need to be revised. For

[288] 55 FR 5830; February 16, 1990.

example, the definition encompasses equipment standards, which is an alternative form of standard provided for in CAA section 111(h) under certain circumstances. However, CAA section 111(h) provides for other forms of alternative standards, such as work practice standards, which are not covered by the existing regulatory definition of ''emission standard.'' Furthermore, the definition of ''emission standard'' encompasses allowance systems, a reference that was added as part of the EPA's CAMR.[289] This rule was vacated by the D.C. Circuit, and therefore this added component to the definition of ''emission standard'' had no legal effect because of the Court's vacatur. Consistent with the Court's opinion, the EPA signaled its intent to remove this reference as part of its MATS rule.[290] However, in the final regulatory text of that rulemaking, the EPA did not take action removing this reference, and it remains as a vestigial artifact.

For these reasons, the EPA is replacing the existing definition of ''emission standard'' with a definition of ''standard of performance'' that tracks with the definition provided for under CAA section 111(a)(1). This means a standard of performance for existing sources would be defined as a standard for emissions of air pollutants that reflects the degree of emission limitation achievable through the application by the state of the BSER 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. Several commenters expressed concern that the proposed definition of ''standard of performance'' in conjunction with the proposal to strike the reference to allowance-based systems precluded states from including mass-based standards of performance. Commenters misunderstand the EPA's proposal, which did not propose that the new definition of ''standard of performance'' itself would specify either rate-based or mass-based standards. As explained at proposal, the new definition is intended to track the definition of the same term in CAA section 111(a)(1), which does not specify that standards of performance must be rate or mass-based. Rather, the EPA may determine in particular emission guidelines the appropriate form of the standard that a state plan must include, based on considerations specific to those emission guidelines, such as the BSER determination, the nature of the pollutant and affected source-category being regulated, and other relevant factors. The EPA believes the term ''standard of performance'' alone does not require or preclude that the standard be in rate or mass-based form, whereas the prior definition of ''emission standard'' was actually more restrictive in that it specified rate-based standards and allowance-based systems, but it did not identify other mass-based standards (such as limits) as permissible.

Similarly, other commenters stated that the definition in the implementing regulations should be clarified to encompass unambiguously rates of any kind (*e.g.,* input-based or output-based), quantities, concentrations, or percentage reductions, consistent with statutory language. However, as previously described, the term ''standard of performance'' alone does not specify which form the standard must take, and such specification is appropriately made in a particular emission guideline depending on considerations such as the nature of the BSER, source category, and pollutant for that rule. Therefore, the EPA is finalizing the definition of ''standard of performance'' as proposed and clarifying that the definition alone does not preclude any form of rate or mass-based standards, but particular emission guidelines may specify the appropriate form of standards that a state plan under such guidelines can or cannot include.

The EPA is further finalizing a definition of standard of performance that incorporates CAA section 111(h)'s allowance for design, equipment, work practice, or operational standards as alternative standards of performance under the statutorily prescribed circumstances. The previous implementing regulations allowed for state plans to prescribe equipment specifications when emission rates are ''clearly impracticable'' as determined by the EPA. CAA section 111(h)(1), by contrast, allows for alternative standards such as equipment standards to be promulgated when standards of performance are ''not feasible to prescribe or enforce,'' as those terms are defined under CAA section 111(h)(2). Given the potential discrepancy between the conditions under which alternative standards may be established based on the different terminology used by the statute and existing implementing regulations, the EPA is establishing in the new implementing regulations the ''not feasible to prescribe or enforce'' language as the condition under which alternative standards may be established.

H. Remaining Useful Life and Other Factors Provisions

The EPA believes that the previous implementing regulations' distinction between public health-based and welfare-based pollutants is not a distinction unambiguously required under CAA section 111(d) or any other applicable provision of the statute. The EPA does not believe the nature of the pollutant in terms of its impacts on health and/or welfare impact the manner in which it is regulated under this provision. Particularly, 60.24(c) requires that for health-based pollutants, a state's standards of performance must be of equivalent stringency to the EPA's emission guidelines. However, CAA section 111(d)(1)(B) states that the EPA's regulations ''shall'' permit states to take into account, among other factors, a designated facility's remaining useful life when establishing an appropriate standard of performance. In other words, Congress explicitly envisioned under CAA section 111(d)(1)(B) that states could implement standards of performance that vary from the EPA's emission guidelines under appropriate circumstances. Notably, the pre-existing implementing regulations at § 60.24(f) contain a provision that allows for states to also apply less stringent standards on sources under certain circumstances.[291] However, this provision attaches to the distinction between health-based and welfare-based pollutants and is available to the states only under the EPA's discretion. This provision was also promulgated prior to Congress's addition of the requirement in CAA section 111(d)(1)(B) that the EPA permit states to take into account remaining useful life and other factors, and the terms of the regulatory provision and statutory provision do not match one another, meaning that this provision may not account for all of the factors envisioned under CAA section 111(d)(1)(B). Given all of these considerations, the EPA is finalizing in the new implanting regulations provisions that remove the distinction between health-based and welfare-based pollutants and associated requirements contingent upon this distinction. The EPA is also finalizing a new provision to permit states to take into account remaining useful life, among other

[289] 70 FR 28605.

[290] 77 FR 9304.

[291] The EPA is hereafter no longer referring to 40 CFR 60.24(f) or its corollary under the new implementing regulations as the ''variance provision.'' The EPA is instead using the phrase ''remaining useful life and other factors'' when referring to this provision, as this phrase is consistent with the terminology used in CAA section 111(d)(1) and better reflects the states' role and authority in establishing standards of performance under CAA section 111(d) generally.

factors, in establishing a standard of performance for a particular designated facility, consistent with CAA section 111(d)(1)(B).

Under this new ''remaining useful life and other factors'' provision, these following factors may be considered, among others:

- 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.

Given that there are unique attributes and aspects of each designated facility, it is not possible for the EPA to define each and every circumstance that states may consider when applying a standard of performance under CAA section 111(d); accordingly, this list is not intended to be exclusive of other source-specific factors that a state may permissibly take into account in developing a satisfactory plan establishing standards of performance for existing sources within its jurisdiction. Such ''other factors'' referred to under the remaining useful life and other factors provision may be ones that influence decisions to invest in technologies to meet a potential performance standard. Such other factors may include timing considerations like payback period for investments, the timing of regulatory requirements, and other unit-specific criteria. A state may account for remaining useful life and other factors as it determines appropriate for a specific source, so long as the state adopts a reasonable approach and adequately explains that approach in its submission to the EPA.

V. 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 final action is an economically significant action that was submitted to the OMB for review. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an analysis of the compliance cost, benefit, and net benefit impacts associated with this action in the analytical timeframe of 2023 to 2037. This analysis, which is contained in the Regulatory Impact Analysis (RIA) for this final action, is consistent with Executive Order 12866 and is available in the docket for this action.

In the RIA for this final action, the Agency provides a full benefit-cost analysis of an illustrative policy scenario representing ACE, which models HRI at coal-fired EGUs. This illustrative policy scenario, described in greater detail in section III.F above, represents potential outcomes of state determinations of standards of performance, and compliance with those standards by affected coal-fired EGUs. Throughout the RIA, the illustrative policy scenario is compared against a single baseline. As described in Chapter 2 of the RIA, the EPA believes that a single baseline without the CPP represents a reasonable future against which to assess the potential impacts of the ACE rule. The EPA also provides analysis in Chapter 2 of the RIA that satisfies any need for regulatory impact analysis that may be required by statute or executive order for the repeal of the CPP.

The EPA evaluates the potential regulatory impacts of the illustrative policy scenario using the present value (PV) of costs, benefits, and net benefits, calculated for the timeframe of 2023–2037 from the perspective of 2016, using both a three percent and seven percent end-of-period discount rate. In addition, the EPA presents the assessment of costs, benefits, and net benefits for specific snapshot years, consistent with historic practice. These specific snapshot years are 2025, 2030, and 2035.

The power industry's ''compliance costs'' are represented in this analysis as the change in electric power generation costs between the baseline and illustrative policy scenario, including the cost of monitoring, reporting, and recordkeeping. The EPA also reports the impact on climate benefits from changes in CO_2 and the impact on health benefits attributable to changes in SO_2, NO_X, and $PM_{2.5}$ emissions. More detailed descriptions of the cost and benefit impacts of these rulemakings are presented in section III.F above.

Table 9 presents the PV and equivalent annualized value (EAV) of the estimated costs, domestic climate benefits, ancillary health co-benefits, and net benefits of the illustrative policy scenario for the timeframe of 2023–2037, relative to the baseline. The EAV represents an even-flow of figures over the timeframe of 2023–2037 that would yield an equivalent present value. The EAV is identical for each year of the analysis, in contrast to the year-specific estimates presented earlier for the snapshot years of 2025, 2030, and 2035. Table 10 presents the estimates for the specific snapshot years of 2025, 2030, and 2035.

TABLE 9—PRESENT VALUE AND EQUIVALENT ANNUALIZED VALUE OF COMPLIANCE COSTS, DOMESTIC CLIMATE BENEFITS, ANCILLARY HEALTH CO-BENEFITS, AND NET BENEFITS, ILLUSTRATIVE POLICY SCENARIO, 3 AND 7 PERCENT DISCOUNT RATES, 2023–2037

[Millions of 2016$]

	Costs		Domestic climate benefits		Ancillary health co-benefits		Net benefits	
	3%	7%	3%	7%	3%	7%	3%	7%
Present Value	1,600	970	640	62	4,000 to 9,800	2,000 to 5,000	3,000 to 8,800	1,100 to 4,100.
Equivalent Annualized Value	140	110	53	6.9	330 to 820	220 to 550	250 to 730	120 to 450.

Notes: All estimates are rounded to two significant figures, so figures may not sum due to independent rounding. Climate benefits reflect the value of domestic impacts from CO_2 emissions changes. The ancillary health co-benefits reflect the sum of the $PM_{2.5}$ and ozone benefits from changes in electricity sector SO_2 and NO_X emissions and reflect the range based on adult mortality functions (*e.g.,* from Krewski et al. (2009) with Smith et al. (2009)[292] to Lepeule et al. (2012) with Jerrett et al. (2009)).[293]

[292] Smith, R.L., Xu, B., Switzer, P., 2009. Reassessing the relationship between ozone and short-term mortality in U.S. urban communities. Inhal. Toxicol. 21 Suppl 2, 37–61. *https://doi.org/10.1080/08958370903161612.*

[293] Jerrett, M., Burnett, R.T., Pope, C.A., Ito, K., Thurston, G., Krewski, D., Shi, Y., Calle, E., Thun, M., 2009. Long-term ozone exposure and mortality. N. Engl. J. Med. 360, 1085–95. *https://doi.org/10.1056/NEJMoa0803894.*

TABLE 10—COMPLIANCE COSTS, DOMESTIC CLIMATE BENEFITS, ANCILLARY HEALTH CO-BENEFITS, AND NET BENEFITS IN 2025, 2030, AND 2035, ILLUSTRATIVE POLICY SCENARIO, 3 AND 7 PERCENT DISCOUNT RATES

[Millions of 2016$]

	Costs		Domestic climate benefits		Ancillary health co-benefits		Net benefits	
	3%	7%	3%	7%	3%	7%	3%	7%
2025	290	290	81	13	390 to 970	360 to 900	180 to 760	84 to 630.
2030	280	280	81	14	490 to 1,200	460 to 1,100	300 to 1,000	200 to 860.
2035	25	25	72	13	550 to 1,400	510 to 1,300	600 to 1,400	500 to 1,200.

Notes: All estimates are rounded to two significant figures, so figures may not sum due to independent rounding. Climate benefits reflect the value of domestic impacts from CO_2 emissions changes. The ancillary health co-benefits reflect the sum of the $PM_{2.5}$ and ozone benefits from changes in electricity sector SO_2 and NO_X emissions and reflect the range based on adult mortality functions (*e.g.,* from Krewski et al. (2009) with Smith et al. (2009) to Lepeule et al. (2012) with Jerrett et al. (2009)).

In the decision-making process it is useful to consider the change in benefits due to the targeted pollutant relative to the costs. Therefore, in Chapter 6 of the RIA for this final action the Agency presents a comparison of the benefits from the targeted pollutant—CO_2—with the compliance costs. Excluded from this comparison are the benefits from changes in $PM_{2.5}$ and ozone concentrations from changes in SO_2, NO_X, and $PM_{2.5}$ emissions that are projected to accompany changes in CO_2 emissions.

Table 11 presents the PV and EAV of the estimated costs, benefits, and net benefits associated with the targeted pollutant, CO_2, for the timeframe of 2023–2037, relative to the baseline. In Table 11 and Table 12, negative net benefits are indicated with parenthesis.

TABLE 11—PRESENT VALUE AND EQUIVALENT ANNUALIZED VALUE OF COMPLIANCE COSTS, CLIMATE BENEFITS, AND NET BENEFITS ASSOCIATED WITH TARGETED POLLUTANT (CO_2), ILLUSTRATIVE POLICY SCENARIO, 3 AND 7 PERCENT DISCOUNT RATES, 2023–2037

[Millions of 2016$]

	Costs		Domestic climate benefits		Net benefits associated with the targeted pollutant (CO_2)	
	3%	7%	3%	7%	3%	7%
Present Value	1,600	970	640	62	(980)	(910)
Equivalent Annualized Value	140	110	53	6.9	(82)	(100)

Notes: Negative net benefits indicate forgone net benefits. All estimates are rounded to two significant figures, so figures may not sum due to independent rounding. Climate benefits reflect the value of domestic impacts from CO_2 emissions changes. This table does not include estimates of ancillary health co-benefits from changes in electricity sector SO_2 and NO_X emissions.

Table 12 presents the costs, benefits, and net benefits associated with the targeted pollutant for specific years, rather than as a PV or EAV as found in Table 11.

TABLE 12—COMPLIANCE COSTS, CLIMATE BENEFITS, AND NET BENEFITS ASSOCIATED WITH TARGETED POLLUTANT (CO_2) IN 2025, 2030, AND 2035, ILLUSTRATIVE POLICY SCENARIO, 3 AND 7 PERCENT DISCOUNT RATES

[Millions of 2016$]

	Costs		Domestic climate benefits		Net benefits associated with the targeted pollutant (CO_2)	
	3%	7%	3%	7%	3%	7%
2025	290	290	81	13	(210)	(280)
2030	280	280	81	14	(200)	(260)
2035	25	25	72	13	47	(11)

Notes: Negative net benefits indicate forgone net benefits. All estimates are rounded to two significant figures, so figures may not sum due to independent rounding. Climate benefits reflect the value of domestic impacts from CO_2 emissions changes. This table does not include estimates of ancillary health co-benefits from changes in electricity sector SO_2 and NO_X emissions.

Throughout the RIA for this action, the EPA considers a number of sources of uncertainty, both quantitatively and qualitatively. The RIA also summarizes other potential sources of benefits and costs that may result from these rules that have not been quantified or monetized.

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This action is expected to be an Executive Order 13771 regulatory action. Details on the estimated costs of this final rule can be found in the EPA's analysis of the potential costs and benefits associated with this action.

C. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned the EPA ICR number 2503.04. A copy of the ICR can be found in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The information collection requirements are based on the recordkeeping and reporting burden associated with developing, implementing, and enforcing a state plan to limit CO_2 emissions from existing sources in the power sector. These recordkeeping and reporting requirements are specifically authorized by CAA section 114 (42 U.S.C. 7414). All information submitted to the EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to Agency policies set forth in 40 CFR part 2, subpart Ba.

Respondents/affected entities: 48—the 48 contiguous states;

Respondent's obligation to respond: The EPA expects state plan submissions from 43 of the 48 contiguous states and negative declarations from Vermont, California, Maine, Idaho, and Rhode Island.

Frequency of response: Yearly.

Total estimated burden: 192,640 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $21,500 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce the approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

D. Regulatory Flexibility Act (RFA)

After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. Specifically, emission guidelines established under CAA section 111(d) do not impose any requirements on regulated entities and, thus, will not have a significant economic impact upon a substantial number of small entities. After emission guidelines are promulgated, states develop and submit to the EPA plans that establish performance standards for existing sources within their jurisdiction, and it is those state requirements that could potentially impact small entities. Our analysis in the accompanying RIA is consistent with the analysis of the analogous situation arising when the EPA establishes NAAQS, which do not impose any requirements on regulated entities. As with the description in the RIA, any impact of a NAAQS on small entities would only arise when states take subsequent action to maintain and/or achieve the NAAQS through their state implementation plans.[294]

E. 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 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 one year. Specifically, the emission guidelines proposed under CAA section 111(d) do not impose any direct compliance requirements on regulated entities, apart from the requirement for states to develop state plans. The burden for states to develop state plans in the three-year period following promulgation of the rule was estimated and is listed in section IV.A. above, but this burden is estimated to be below $100 million in any one year. Thus, this rule is not subject to the requirements of section 203 or section 205 of the Unfunded Mandates Reform Act (UMRA).

This rule 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 state, local, or tribal governments or the private sector.

F. Executive Order 13132: Federalism

The EPA has concluded that this action may have federalism implications because it might impose substantial direct compliance costs on state or local governments, and the federal government will not provide the funds necessary to pay those costs. The development of state plans will entail many hours of staff time to develop and coordinate programs for compliance with the proposed rule, as well as time to work with state legislatures as appropriate, and develop a plan submittal. The Agency understands the burden that these actions will have on states and is committing to providing aid and guidance to states through the plan development process. The EPA will be available at the states initiative to provide clarity for developing plans, including standard of performance setting and compliance initiatives.

G. 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. The EPA notes that this final rule does not directly impose specific requirements on EGU sources, including those located in Indian country; before developing any standards of performance for existing sources on tribal land, the EPA would consult with leaders from affected tribes. 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

[294] *See American Trucking Ass'n* v. *EPA,* 175 F.3d 1029, 1043–45 (D.C. Cir. 1999) (NAAQS do not have significant impacts upon small entities because NAAQS themselves impose no regulations upon small entities).

specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to the action.

Executive Order 13175 requires the EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The EPA has concluded that this action does not have tribal implications as specified in E.O. 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 cost 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.

Consistent with EPA Policy on Consultation and Coordination with Indian Tribes, the EPA consulted with tribal officials during the development of this action to provide an opportunity to have meaningful and timely input. On August 24, 2018, consultation letters were sent to 584 tribal leaders that provided information and offered consultation regarding the EPA's development of this rule. On August 30, 2018, the EPA provided a presentation overview on the Proposal: Affordable Clean Energy (Rule) on the monthly National Tribal Air Association/EPA Air Policy call. At the request of the tribes, two consultation meetings were held: One with the Navajo Nation on October 11, 2018, and one with the Samish Indian Nation on October 16, 2018. The Samish Indian Nation opened their consultation to other tribes—also participating in this meeting for informational purposes only were seven tribes (Blue Lake Rancheria, Cherokee Nation Environmental Program, La Jolla Band of Luiseño Indians, Leech Lake Band of Ojibwe, Muscogee (Creek) Nation Office of Environmental Services, Nez Perce Tribe, The Quapaw Tribe) and the National Tribal Air Association. In the meetings, the tribes were presented information from the proposal. The tribes asked general clarifying questions and indicated that they would submit formal comments. Comments on the proposal were received from the Navajo Nation, the Samish Indian Nation, Blue Lake Rancheria, Leech Lake Band of Ojibwe, Nez Perce Tribe, and the National Tribal Air Association, in addition to the Keweenaw Bay Indian Community, the Fond du Lac Band, the 1854 Treaty Authority, and the Sac and Fox Nation. Tribal commenters insisted on meaningful government-to-government consultation with potentially impacted tribes, and that the final rule require states to consult with indigenous and vulnerable communities as they develop state plans. More specific comments can be found in the docket.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is subject to Executive Order 13045 because it is an economically significant regulatory action as defined by Executive Order 12866. The EPA believes that this action will achieve CO_2 emission reductions resulting from implementation of these emission guidelines, as well as ozone and $PM_{2.5}$ emission reductions as a co-benefit, and will further improve children's health.

Moreover, this action does not affect the level of public health and environmental protection already being provided by existing NAAQS, including ozone and $PM_{2.5}$, and other mechanisms in the CAA. This action does not affect applicable local, state, or federal permitting or air quality management programs that will continue to address areas with degraded air quality and maintain the air quality in areas meeting current standards. Areas that need to reduce criteria air pollution to meet the NAAQS will still need to rely on control strategies to reduce emissions.

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

This action, which is a significant regulatory energy action under Executive Order 12866, is likely to have a significant effect on the supply, distribution, or use of energy. Specifically, the EPA estimated in the RIA that the rule could result in more than a one percent decrease in coal production in 2025 (or a reduction of more than a 5 million tons per year) and less than a one percent reduction in natural gas use in the power sector (or more than a 25 million MCF reduction in production on an annual basis). The energy impacts the EPA estimates from these rules may be under- or over-estimates of the true energy impacts associated with this action. For more information on the estimated energy effects, please refer to the RIA for these rulemakings, which is in the public docket.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action is unlikely to 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 achieve CO_2 emission reductions resulting from implementation of these final guidelines, as well as ozone and $PM_{2.5}$ emission reductions as a co-benefit, and will further improve environmental justice communities' health as discussed in the RIA.

With regards to the repeal, Chapter 2 of the RIA explains why the EPA believes that the power sector is already on path to achieve the CO_2 reductions required by the CPP, therefore the EPA does not believe it would have any significant impact on EJ effected communities.

With regards to ACE, as described in Chapter 4 of the RIA, the EPA finds that most of the eastern U.S. will experience PM and ozone-related benefits as a result of this action. While the EPA expects areas in the southeastern U.S. to experience a modest increase in fine particle levels, areas including the Midwest will experience reduced levels of PM, yielding significant benefits in the form of fewer premature deaths and illnesses. On balance, the positive benefits of this action significantly outweigh the estimated disbenefits.

Moreover, this action does not affect the level of public health and environmental protection already being provided by existing NAAQS, including ozone and $PM_{2.5}$, and other mechanisms in the CAA.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a ''major rule'' as defined by 5 U.S.C. 804(2).

VI. Statutory Authority

The statutory authority for this action is provided by sections 111, 301, and 307(d)(1)(V) of the CAA, as amended (42 U.S.C. 7411, 7601, 7607(d)(1)(V)). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7607(d)).

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: June 19, 2019.

Andrew R. Wheeler,

Administrator.

Therefore, 40 CFR chapter I is amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. Add subpart Ba to read as follows:

Subpart Ba—Adoption and Submittal of State Plans for Designated Facilities

Sec.

§ 60.20a Applicability.

(a) The provisions of this subpart apply upon publication of a final emission guideline under § 60.22a(a) if implementation of such final guideline is ongoing as of July 8, 2019 or if the final guideline is published after July 8, 2019.

(1) Each emission guideline promulgated under this part is subject to the requirements of this subpart, except that each emission guideline may include specific provisions in addition to or that supersede requirements of this subpart. Each emission guideline must identify explicitly any provision of this subpart that is superseded.

(2) Terms used throughout this part are defined in § 60.21a or in the Clean Air Act (Act) as amended in 1990, except that emission guidelines promulgated as individual subparts of this part may include specific definitions in addition to or that supersede definitions in § 60.21a.

(b) No standard of performance or other requirement established under this part shall be interpreted, construed, or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established by the Administrator pursuant to other authority of the Act (section 112, Part C or D, or any other authority of this Act), or a standard issued under State authority.

§ 60.21a Definitions.

Terms used but not defined in this subpart shall have the meaning given them in the Act and in subpart A of this part:

(a) *Designated pollutant* means any air pollutant, the emissions of which are subject to a standard of performance for new stationary sources, but for which air quality criteria have not been issued and that is not included on a list published under section 108(a) or section 112(b)(1)(A) of the Act.

(b) *Designated facility* means any existing facility (see § 60.2) 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 § 60.2).

(c) *Plan* means a plan under section 111(d) of the Act which establishes standards of performance for designated pollutants from designated facilities and provides for the implementation and enforcement of such standards of performance.

(d) *Applicable plan* means the plan, or most recent revision thereof, which has been approved under § 60.27a(b) or promulgated under § 60.27a(d).

(e) *Emission guideline* means a guideline set forth in subpart C of this part, or in a final guideline document published under § 60.22a(a), 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 such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator has determined has been adequately demonstrated for designated facilities.

(f) *Standard of performance* means 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 nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated, including, but 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.

(g) *Compliance schedule* means a legally enforceable schedule specifying a date or dates by which a source or category of sources must comply with specific standards of performance contained in a plan or with any increments of progress to achieve such compliance.

(h) *Increments of progress* means steps to achieve compliance which must be taken by an owner or operator of a designated facility, including:

(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.

(i) *Region* means an air quality control region designated under section 107 of the Act and described in part 81 of this chapter.

(j) *Local agency* means any local governmental agency.

§ 60.22a Publication of emission guidelines.

(a) Concurrently upon or after proposal of standards of performance for the control of a designated pollutant from affected facilities, the Administrator will publish a draft emission guideline containing information pertinent to control of the designated pollutant from designated facilities. Notice of the availability of the draft emission guideline will be published in the **Federal Register** and public comments on its contents will be invited. After consideration of public comments and upon or after promulgation of standards of performance for control of a designated pollutant from affected facilities, a final emission guideline will be published and notice of its availability will be published in the **Federal Register**.

(b) Emission guidelines published under this section will provide information for the development of State plans, such as:

(1) Information concerning known or suspected endangerment of public health or welfare caused, or contributed to, by the designated pollutant.

(2) A description of systems of emission reduction which, in the

judgment of the Administrator, have been adequately demonstrated.

(3) Information on the degree of emission limitation which is achievable with each system, together with information on the costs, nonair quality health environmental effects, and energy requirements of applying each system to designated facilities.

(4) Incremental periods of time normally expected to be necessary for the design, installation, and startup of identified control systems.

(5) The degree of emission limitation achievable through the application of the best system of emission reduction (considering the cost of such achieving reduction and any nonair quality health and environmental impact and energy requirements) that has been adequately demonstrated for designated facilities, and the time within which compliance with standards of performance can be achieved. The Administrator may specify different degrees of emission limitation or compliance times or both for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, or similar factors make subcategorization appropriate.

(6) Such other available information as the Administrator determines may contribute to the formulation of State plans.

(c) The emission guidelines and compliance times referred to in paragraph (b)(5) of this section will be proposed for comment upon publication of the draft guideline document, and after consideration of comments will be promulgated in subpart C of this part with such modifications as may be appropriate.

§ 60.23a Adoption and submittal of State plans; public hearings.

(a)(1) Unless otherwise specified in the applicable subpart, within three years after notice of the availability of a final emission guideline is published under § 60.22a(a), each State shall adopt and submit to the Administrator, in accordance with § 60.4, a plan for the control of the designated pollutant to which the emission guideline applies.

(2) At any time, each State may adopt and submit to the Administrator any plan revision necessary to meet the requirements of this subpart or an applicable subpart of this part.

(b) If no designated facility is located within a State, the State shall submit a letter of certification to that effect to the Administrator within the time specified in paragraph (a) of this section. Such certification shall exempt the State from the requirements of this subpart for that designated pollutant.

(c) The State shall, prior to the adoption of any plan or revision thereof, conduct one or more public hearings within the State on such plan or plan revision in accordance with the provisions under this section.

(d) Any hearing required by paragraph (c) of this section shall be held only after reasonable notice. Notice shall be given at least 30 days prior to the date of such hearing and shall include:

(1) Notification to the public by prominently advertising the date, time, and place of such hearing in each region affected. This requirement may be satisfied by advertisement on the internet;

(2) Availability, at the time of public announcement, of each proposed plan or revision thereof for public inspection in at least one location in each region to which it will apply. This requirement may be satisfied by posting each proposed plan or revision on the internet;

(3) Notification to the Administrator;

(4) Notification to each local air pollution control agency in each region to which the plan or revision will apply; and

(5) In the case of an interstate region, notification to any other State included in the region.

(e) The State may cancel the public hearing through a method it identifies if no request for a public hearing is received during the 30 day notification period under paragraph (d) of this section and the original notice announcing the 30 day notification period states that if no request for a public hearing is received the hearing will be cancelled; identifies the method and time for announcing that the hearing has been cancelled; and provides a contact phone number for the public to call to find out if the hearing has been cancelled.

(f) The State shall prepare and retain, for a minimum of 2 years, a record of each hearing for inspection by any interested party. The record shall contain, as a minimum, a list of witnesses together with the text of each presentation.

(g) The State shall submit with the plan or revision:

(1) Certification that each hearing required by paragraph (c) of this section was held in accordance with the notice required by paragraph (d) of this section; and

(2) A list of witnesses and their organizational affiliations, if any, appearing at the hearing and a brief written summary of each presentation or written submission.

(h) Upon written application by a State agency (through the appropriate Regional Office), the Administrator may approve State procedures designed to insure public participation in the matters for which hearings are required and public notification of the opportunity to participate if, in the judgment of the Administrator, the procedures, although different from the requirements of this subpart, in fact provide for adequate notice to and participation of the public. The Administrator may impose such conditions on his approval as he deems necessary. Procedures approved under this section shall be deemed to satisfy the requirements of this subpart regarding procedures for public hearings.

§ 60.24a Standards of performance and compliance schedules.

(a) Each plan shall include standards of performance and compliance schedules.

(b) Standards of performance shall either be based on allowable rate or limit of emissions, except when it is not feasible to prescribe or enforce a standard of performance. The EPA shall identify such cases in the emission guidelines issued under § 60.22a. Where standards of performance prescribing design, equipment, work practice, or operational standard, or combination thereof are established, the plan shall, to the degree possible, set forth the emission reductions achievable by implementation of such standards, and may permit compliance by the use of equipment determined by the State to be equivalent to that prescribed.

(1) Test methods and procedures for determining compliance with the standards of performance shall be specified in the plan. Methods other than those specified in appendix A to this part or an applicable subpart of this part may be specified in the plan if shown to be equivalent or alternative methods as defined in § 60.2.

(2) Standards of performance shall apply to all designated facilities within the State. A plan may contain standards of performance adopted by local jurisdictions provided that the standards are enforceable by the State.

(c) Except as provided in paragraph (e) of this section, standards of performance shall be no less stringent than the corresponding emission guideline(s) specified in subpart C of this part, and final compliance shall be required as expeditiously as practicable, but no later than the compliance times specified in an applicable subpart of this part.

(d) Any compliance schedule extending more than 24 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. Unless otherwise specified in the applicable subpart, increments of progress must include, where practicable, each increment of progress specified in § 60.21a(h) and must include such additional increments of progress as may be necessary to permit close and effective supervision of progress toward final compliance.

(e) In applying a standard of performance to a particular source, the State may take into consideration factors, such as the remaining useful life of such source, provided that the State demonstrates with respect to each such facility (or class of such facilities):

(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.

(f) Nothing in this subpart shall be construed to preclude any State or political subdivision thereof from adopting or enforcing:

(1) Standards of performance more stringent than emission guidelines specified in subpart C of this part or in applicable emission guidelines; or

(2) Compliance schedules requiring final compliance at earlier times than those specified in subpart C of this part or in applicable emission guidelines.

§ 60.25a Emission inventories, source surveillance, reports.

(a) Each plan shall include an inventory of all designated facilities, including emission data for the designated pollutants and information related to emissions as specified in appendix D to this part. Such data shall be summarized in the plan, and emission rates of designated pollutants from designated facilities shall be correlated with applicable standards of performance. As used in this subpart, ''correlated'' means presented in such a manner as to show the relationship between measured or estimated amounts of emissions and the amounts of such emissions allowable under applicable standards of performance.

(b) Each plan shall provide for monitoring the status of compliance with applicable standards of performance. Each plan shall, as a minimum, provide for:

(1) Legally enforceable procedures for requiring owners or operators of designated facilities to maintain records and periodically report to the State information on the nature and amount of emissions from such facilities, and/or such other information as may be necessary to enable the State to determine whether such facilities are in compliance with applicable portions of the plan. Submission of electronic documents shall comply with the requirements of 40 CFR part 3 (Electronic reporting).

(2) Periodic inspection and, when applicable, testing of designated facilities.

(c) Each plan shall provide that information obtained by the State under paragraph (b) of this section shall be correlated with applicable standards of performance (see § 60.25a(a)) and made available to the general public.

(d) The provisions referred to in paragraphs (b) and (c) of this section shall be specifically identified. Copies of such provisions shall be submitted with the plan unless:

(1) They have been approved as portions of a preceding plan submitted under this subpart or as portions of an implementation plan submitted under section 110 of the Act; and

(2) The State demonstrates:

(i) That the provisions are applicable to the designated pollutant(s) for which the plan is submitted, and

(ii) That the requirements of § 60.26a are met.

(e) The State shall submit reports on progress in plan enforcement to the Administrator on an annual (calendar year) basis, commencing with the first full report period after approval of a plan or after promulgation of a plan by the Administrator. Information required under this paragraph must be included in the annual report required by § 51.321 of this chapter.

(f) Each progress report shall include:

(1) Enforcement actions initiated against designated facilities during the reporting period, under any standard of performance or compliance schedule of the plan.

(2) Identification of the achievement of any increment of progress required by the applicable plan during the reporting period.

(3) Identification of designated facilities that have ceased operation during the reporting period.

(4) Submission of emission inventory data as described in paragraph (a) of this section for designated facilities that were not in operation at the time of plan development but began operation during the reporting period.

(5) Submission of additional data as necessary to update the information submitted under paragraph (a) of this section or in previous progress reports.

(6) Submission of copies of technical reports on all performance testing on designated facilities conducted under paragraph (b)(2) of this section, complete with concurrently recorded process data.

§ 60.26a Legal authority.

(a) Each plan or plan revision shall show that the State has legal authority to carry out the plan or plan revision, including authority to:

(1) Adopt standards of performance and compliance schedules applicable to designated facilities.

(2) Enforce applicable laws, regulations, standards, and compliance schedules, and seek injunctive relief.

(3) Obtain information necessary to determine whether designated facilities are in compliance with applicable laws, regulations, standards, and compliance schedules, including authority to require recordkeeping and to make inspections and conduct tests of designated facilities.

(4) Require owners or operators of designated facilities to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such facilities; also authority for the State to make such data available to the public as reported and as correlated with applicable standards of performance.

(b) The provisions of law or regulations which the State determines provide the authorities required by this section shall be specifically identified. Copies of such laws or regulations shall be submitted with the plan unless:

(1) They have been approved as portions of a preceding plan submitted under this subpart or as portions of an implementation plan submitted under section 110 of the Act; and

(2) The State demonstrates that the laws or regulations are applicable to the designated pollutant(s) for which the plan is submitted.

(c) The plan shall show that the legal authorities specified in this section are available to the State at the time of submission of the plan. Legal authority adequate to meet the requirements of paragraphs (a)(3) and (4) of this section may be delegated to the State under section 114 of the Act.

(d) A State governmental agency other than the State air pollution control agency may be assigned responsibility for carrying out a portion of a plan if the plan demonstrates to the Administrator's satisfaction that the State governmental agency has the legal

authority necessary to carry out that portion of the plan.

(e) The State may authorize a local agency to carry out a plan, or portion thereof, within the local agency's jurisdiction if the plan demonstrates to the Administrator's satisfaction that the local agency has the legal authority necessary to implement the plan or portion thereof, and that the authorization does not relieve the State of responsibility under the Act for carrying out the plan or portion thereof.

§ 60.27a Actions by the Administrator.

(a) The Administrator may, whenever he determines necessary, shorten the period for submission of any plan or plan revision or portion thereof.

(b) After determination that a plan or plan revision is complete per the requirements of § 60.27a(g), the Administrator will take action on the plan or revision. The Administrator will, within twelve months of finding that a plan or plan revision is complete, approve or disapprove such plan or revision or each portion thereof.

(c) The Administrator will promulgate, through notice-and-comment rulemaking, a federal plan, or portion thereof, at any time within two years after the Administrator:

(1) 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 minimum criteria under paragraph (g) of this section; or

(2) Disapproves the required State plan or plan revision or any portion thereof, as unsatisfactory because the applicable requirements of this subpart or an applicable subpart under this part have not been met.

(d) The Administrator will promulgate a final federal plan as described in paragraph (c) of this section unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such federal plan.

(e)(1) Except as provided in paragraph (e)(2) of this section, a federal plan promulgated by the Administrator under this section will prescribe standards of performance of the same stringency as the corresponding emission guideline(s) specified in the final emission guideline published under § 60.22a(a) and will require compliance with such standards as expeditiously as practicable but no later than the times specified in the emission guideline.

(2) Upon application by the owner or operator of a designated facility to which regulations proposed and promulgated under this section will apply, the Administrator may provide for the application of less stringent standards of performance or longer compliance schedules than those otherwise required by this section in accordance with the criteria specified in § 60.24a(e).

(f) Prior to promulgation of a federal plan under paragraph (d) of this section, the Administrator will provide the opportunity for at least one public hearing in either:

(1) Each State that failed to submit a required complete plan or plan revision, or whose required plan or plan revision is disapproved by the Administrator; or

(2) Washington, DC or an alternate location specified in the **Federal Register**.

(g) Each plan or plan revision that is submitted to the Administrator shall be reviewed for completeness as described in paragraphs (g)(1) through (3) of this section.

(1) *General.* Within 60 days of the Administrator's receipt of a state submission, 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. Any plan or plan revision that a State submits to the EPA, and that has not been determined by the EPA by the date 6 months after receipt of the submission to have failed to meet the minimum criteria, shall on that date be deemed by operation of law to meet such minimum criteria. Where the Administrator determines that a plan submission does not meet the minimum criteria of this paragraph, the State will be treated as not having made the submission and the requirements of § 60.27a regarding promulgation of a federal plan shall apply.

(2) *Administrative criteria.* In order to be deemed complete, a State plan must contain each of the following administrative criteria:

(i) A formal letter of submittal from the Governor or her designee requesting EPA approval of the plan or revision thereof;

(ii) Evidence that the State has adopted the plan in the state code or body of regulations; or issued the permit, order, consent agreement (hereafter ''document'') in final form. That evidence must include the date of adoption or final issuance as well as the effective date of the plan, if different from the adoption/issuance date;

(iii) Evidence that the State has the necessary legal authority under state law to adopt and implement the plan;

(iv) A copy of the actual regulation, or document submitted for approval and incorporation by reference into the plan, including indication of the changes made (such as redline/strikethrough) to the existing approved plan, where applicable. The submittal must be a copy of the official state regulation or document signed, stamped and dated by the appropriate state official indicating that it is fully enforceable by the State. The effective date of the regulation or document must, whenever possible, be indicated in the document itself. The State's electronic copy must be an exact duplicate of the hard copy. If the regulation/document provided by the State for approval and incorporation by reference into the plan is a copy of an existing publication, the State submission should, whenever possible, include a copy of the publication cover page and table of contents;

(v) Evidence that the State followed all of the procedural requirements of the state's laws and constitution in conducting and completing the adoption and issuance of the plan;

(vi) Evidence that public notice was given of the proposed change with procedures consistent with the requirements of § 60.23a, including the date of publication of such notice;

(vii) Certification that public hearing(s) were held in accordance with the information provided in the public notice and the State's laws and constitution, if applicable and consistent with the public hearing requirements in § 60.23a;

(viii) Compilation of public comments and the State's response thereto; and

(ix) Such other criteria for completeness as may be specified by the Administrator under the applicable emission guidelines.

(3) *Technical criteria.* In order to be deemed complete, a State plan must contain each of the following technical criteria:

(i) Description of the plan approach and geographic scope;

(ii) Identification of each designated facility, identification of standards of performance for the designated facilities, and monitoring, recordkeeping and reporting requirements that will determine compliance by each designated facility;

(iii) Identification of compliance schedules and/or increments of progress;

(iv) Demonstration that the State plan submittal is projected to achieve emissions performance under the applicable emission guidelines;

(v) Documentation of state recordkeeping and reporting requirements to determine the performance of the plan as a whole; and

(vi) Demonstration that each emission standard is quantifiable, non-duplicative, permanent, verifiable, and enforceable.

§ 60.28a Plan revisions by the State.

(a) Any revision to a state plan shall be adopted by such State after reasonable notice and public hearing. For plan revisions required in response to a revised emission guideline, such plan revisions shall be submitted to the Administrator within three years, or shorter if required by the Administrator, after notice of the availability of a final revised emission guideline is published under § 60.22a. All plan revisions must be submitted in accordance with the procedures and requirements applicable to development and submission of the original plan.

(b) A revision of a plan, or any portion thereof, shall not be considered part of an applicable plan until approved by the Administrator in accordance with this subpart.

§ 60.29a Plan revisions by the Administrator.

After notice and opportunity for public hearing in each affected State, the Administrator may revise any provision of an applicable federal plan if:

(a) The provision was promulgated by the Administrator; and

(b) The plan, as revised, will be consistent with the Act and with the requirements of this subpart.

Subpart UUUU [Removed]

■ 3. Remove subpart UUUU.

■ 4. Add subpart UUUUa to read as follows:

Subpart UUUUa—Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units

Introduction

Sec.

Introduction

§ 60.5700a What is the purpose of this subpart?

This subpart establishes emission guidelines and approval criteria for State plans that establish standards of performance limiting greenhouse gas (GHG) emissions from an affected steam generating unit. An affected steam generating unit for the purposes of this subpart, is referred to as a designated facility. These emission guidelines are developed in accordance with section 111(d) of the Clean Air Act and subpart Ba of this part. To the extent any requirement of this subpart is inconsistent with the requirements of subpart A or Ba of this part, the requirements of this subpart will apply.

§ 60.5705a Which pollutants are regulated by this subpart?

(a) The pollutants regulated by this subpart are greenhouse gases. The emission guidelines for greenhouse gases established in this subpart are heat rate improvements which target achieving lower carbon dioxide (CO_2) emission rates at designated facilities.

(b) PSD and Title V Thresholds for Greenhouse Gases.

(1) For the purposes of § 51.166(b)(49)(ii) of this chapter, with respect to GHG emissions from facilities, the ''pollutant that is subject to the standard promulgated under section 111 of the Act'' shall be considered to be the pollutant that otherwise is subject to regulation under the Act as defined in § 51.166(b)(48) of this chapter and in any State Implementation Plan (SIP) approved by the EPA that is interpreted to incorporate, or specifically incorporates, § 51.166(b)(48) of this chapter.

(2) For the purposes of § 52.21(b)(50)(ii) of this chapter, with respect to GHG emissions from facilities regulated in the plan, the ''pollutant that is subject to the standard promulgated under section 111 of the Act'' shall be considered to be the pollutant that otherwise is subject to regulation under the Act as defined in § 52.21(b)(49) of this chapter.

(3) For the purposes of § 70.2 of this chapter, with respect to greenhouse gas emissions from facilities regulated in the plan, the ''pollutant that is subject to any standard promulgated under section 111 of the Act'' shall be considered to be the pollutant that otherwise is ''subject to regulation'' as defined in § 70.2 of this chapter.

(4) For the purposes of § 71.2 of this chapter, with respect to greenhouse gas emissions from facilities regulated in the plan, the ''pollutant that is subject to any standard promulgated under section 111 of the Act'' shall be considered to be the pollutant that otherwise is ''subject to regulation'' as defined in § 71.2 of this chapter.

§ 60.5710a Am I affected by this subpart?

If you are the Governor of a State in the contiguous United States with one or more designated facilities that commenced construction on or before January 8, 2014, you are subject to this action and you must submit a State plan to the U.S. Environmental Protection Agency (EPA) that implements the emission guidelines contained in this subpart. If you are the Governor of a State in the contiguous United States with no designated facilities for which construction commenced on or before January 8, 2014, in your State, you must submit a negative declaration letter in place of the State plan.

§ 60.5715a What is the review and approval process for my plan?

The EPA will review your plan according to § 60.27a to approve or disapprove such plan or revision or each portion thereof.

§ 60.5720a What if I do not submit a plan, my plan is incomplete, or my plan is not approvable?

(a) If you do not submit a complete or an approvable plan the EPA will

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 19-17480

I am the attorney or self-represented party.

This brief contains 7,391 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Joan M. Pepin

Date February 14, 2020