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Docket ID No. EPA-HQ-OAR-2013-0602

Environmental Protection Agency
EPA/DC Mail code 28221T
Attn: Docket ID No. EPA-HQ-OAR-2013-0602
1200 Pennsylvania Ave NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OAR-2013-0602

Dear Sir/Madam:

This document is being submitted to the United States Environmental Protection Agency (EPA) on behalf of the State of Mississippi (Mississippi) by the Mississippi Department of Environmental Quality (MDEQ) in its role as the environmental regulatory agency.

The purpose of this document is to provide comment on the proposed *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, also known as the Clean Power Plan (CPP), which was published in the Federal Register on June 18, 2014. This document is not intended to address all of the many concepts for which EPA requested specific comment in the CPP. Rather, MDEQ is choosing to comment on those areas which most significantly impact Mississippi in the development of a § 111(d) State Implementation Plan (SIP) under this proposal. MDEQ's approach does not address each specific comment request in the proposal nor does it indicate concurrence with EPA's concepts, and MDEQ reserves the right to address those concepts on a case-by-case basis as they become relevant to the SIP development. MDEQ may also join in comments submitted by other commenters to the docket or may incorporate by reference comments submitted to the docket with our concurrence.

I. MDEQ Comment Summary

In general, MDEQ does not support EPA's approach in the CPP to regulate carbon emissions from electric generating units (EGU's) using the "Four Building Blocks" to establish a Best System of Emissions Reduction (BSER). The proposed BSER approach attempts to

regulate entities and programs that are not existing sources¹ defined under § 111(d) of the Clean Air Act (the Act). This approach extends beyond EPA's authority and through § 111(d) would force state environmental regulatory agencies to do the same. However, if MDEQ's assessment is determined to be inaccurate, we are providing comment on those items that are most concerning to the development of a SIP based on the CPP proposal.

EPA's proposed final goal for Mississippi of 692 lbs CO₂/MWh² is overly aggressive and unachievable. The approach to use regional and national averages with regard to the building blocks, without following through with any sort of feasibility analysis at the state level, resulted in unrealistic goal projections for some states. For Mississippi, the goal path is riddled with unrealistic expectations (some of which will be discussed in detail in the following comments). EPA continuously indicates that the goal path is not the only compliance path, and while that may be true, it is impossible to ignore the fact that the unrealistic goal path provided an unrealistic goal for Mississippi. Before Mississippi can begin to move forward with the concept of developing a SIP under this proposal, the State must be allowed the opportunity to establish a realistic goal.

II. Legal Discussion

The proposed rule has significant legal defects, which serves as a basis to invalidate the rule in its entirety.

To start with the proposed rule is unlawful because EPA on its own initiative chose to regulate coal-fired power plants under § 112 of the Act, 42 U.S.C. § 7412. In fact Section 111(d) specifically prohibits EPA from invoking § 111(d) where the "source category ... is regulated under section [112]" 42 U.S.C. § 7411(d)(1)(A)(i).

Further the proposed rule completely eviscerates the rights granted to states under the Tenth Amendment of the United States Constitution, thereby without legal authority expands EPA's authority into the management of states' energy generation and usage. Through this rulemaking, EPA is attempting to federalize this nation's energy policy resulting in forcing the states to abandon their constitutionally derived sovereign rights.

Unlike the performance standards attempted under the proposed rule, the states are limited to emission standards that can actually be achieved by existing industrial sources through source-level, inside-the-fenceline measures. Section §111(d) plainly requires that the

¹ 42 U.S.C. § 7411(d) is titled "Standards of performance for existing sources; remaining useful life of source." *Id.* § 7411(d). "Existing source" is defined as "any stationary source other than a new source." *Id.* § 7411(a)(6). A "stationary source" is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." *Id.* § 7411(a)(3).

² *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule* published in the Federal Register on June 18, 2014; Table 8 – Proposed State Goals.

performance standards established for existing sources by the states must be limited to measures that apply at existing power plants themselves.

Given the significant legal deficiencies as noted above in the proposed rule, Mississippi requests that EPA revise the proposed rule to be consistent with the authorities granted it in the Act, limiting its authority as prescribed in the Act and adhering to the rights granted the states under the Tenth Amendment. Should EPA finalize the proposed § 111(d) standards for fossil fuel-fired power plants, Mississippi requests that those emission guidelines be based on the best system of emission reduction that is actually achievable at individual facilities, which the MDEQ could consider in establishing performance standards to individual power plants within our jurisdiction.

A. Regulation of EGU's under § 111(d) is obviated because EGUs are already regulated under § 112.

Section 111(d) as codified in the U.S. Code provides EPA authority to require states to establish standards of performance “for any existing source for any air pollutant for which air quality criteria have not been issued or which is not included on a list published under § 108(a) [for criteria air pollutants] or emitted from a source category which is regulated under section 112 of this title...” 42 U.S.C. § 7411(d). EPA listed coal- and oil-fired EGUs as a “source category” under § 112 in 2000, 65 Fed. Reg. 79,825, 79,826, 79,831 (Dec. 20, 2000), and regulated emissions from these sources in 2012 under the Mercury and Air Toxics Standards (“MATS”), 77 Fed. Reg. 9,204 (Feb. 16, 2012). Because EPA has already promulgated emission standards for existing coal-fired power plants under § 112, it cannot promulgate the emission guidelines it now proposes.

The proposed rule, which seeks to regulate source categories already subject to EPA regulation and determined to be a double regulation, is untenable and strictly prohibited by the Act itself. The Act prohibits EPA from regulating any emissions from a “source category” under § 111(d) where the “source category ... is regulated under section [112]....” 42 U.S.C. § 7411(d)(1)(A)(i). The prohibition is so clear that even EPA acknowledges that the “literal” meaning of this language is that it “c[an] not regulate any air pollutant from a source category regulated under section 112.” EPA, *Legal Memorandum for Proposed Carbon Pollution Emissions Guidelines for Existing Electric Utility Generating Units* at 26 (hereinafter “*Legal Memorandum*”). Even the Supreme Court noted that “EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under ... the ‘hazardous air pollutants’ program, [Section 112].” *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, n. 7 (2011). Imposing double regulation as EPA intends to do with the proposed rule is unacceptable and prohibited by Congress and the country’s highest court.

B. EPA’s proposal clearly violates the Tenth Amendment.

The Tenth Amendment defines the respective roles of the federal government and the states. The Tenth Amendment makes it abundantly clear that the federal government has only

those powers provided by the U.S. Constitution and all other powers are reserved to the states. *U.S. Const. Amend. X*; *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quoting U. S. Const. Amend. X. (“Residual state sovereignty ... was rendered express by the Tenth Amendment’s assertion that ‘[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the ‘States, are reserved to the States respectively, or to the people.’”)). Thus, while Congress has authority to regulate interstate commerce via U.S. Const. Art. I, § 8, the states retain authority over intrastate commerce and general police powers, including the power to regulate electric utilities. *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (citing *United States v. Lopez*, 514 U.S. 549, 567 (1995)). Consistent with the Tenth Amendment, Congress recognizes in § 101 of the Act that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of the States and local governments.” 42 U.S.C. §7401(a)(3). Section 111(d) establishes a clear division of authority between EPA and the states in setting performance standards for existing sources, and is thus consistent with the principles of cooperative federalism under the Tenth Amendment. Accordingly, MDEQ is clearly vested with the authority to set performance standards for existing sources.

If EPA’s interpretation of § 111(d) and its proposed standards are promulgated, they would violate the Tenth Amendment and well recognized federalism doctrines. EPA not only strips state environmental agency authority in setting binding performance standards under § 111(d), but it also mandates that state legislatures and public service commissioners set energy policy according to these new EPA standards. Mississippi elects, rather than appoints, its public service commissioners. EPA cannot, in the guise of CO₂ standards, effectively require any elected officials, including our PSC Commissioners, to revise long-range energy policies and resource plans to accommodate EPA’s vision of what a 2030 electric sector should look like. This type of commandeering of elected state officials by a federal agency that is not accountable to the electorate significantly undermines the accountability of those elected officials to the voters in our states. *See New York*, 505 U.S. at 169 (stating that “when due to federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate,” “[a]ccountability is thus diminished”).

The Act establishes a clear division of authority between EPA and the states in setting standards under § 111. Mississippi does not question that EPA has authority to establish standards of performance for new sources under § 111(b), however Congress clearly reserved for the states the authority to set binding standards for existing sources under § 111(d). In fact Section 111(b) provides that “the Administrator shall publish proposed regulations establishing Federal standards of performance for new sources...” 42 U.S.C. § 7411(b)(1)(B). Section 111(d), however, only authorizes EPA to issue regulations that “establish a procedure similar to that provided by section [110 of the Act] under which each state shall submit to the Administrator a plan which ... establishes standards of performance”. 42 U.S.C. § 7411(d)(1)(A). The statute is clear on its face that Mississippi and thus MDEQ, not EPA, has the authority for individual facilities within its jurisdiction to “establish” standards of performance. Congress also provided flexibility to the states in terms of how those standards are applied to

individual sources within their borders. Section 111(d)(1) provides that “the Administrator shall permit the State in applying standards of performance to any particular source to take into consideration, among other factors, the remaining useful life of existing source to which the standard applies.” 42 U.S.C. § 7411(d)(1)(B). Congress authorized “EPA to set binding existing source standards only if and when a “state fails to submit a satisfactory plan....” 42 U.S.C. § 7411(d)(2)(A).

Just as the Act itself confirms states’ primary role, EPA’s own implementing regulations confirm its role under §111(d). Those regulations provide that EPA will establish “guidelines,” not emission standards for existing sources. 40 C.F.R. §60.22. EPA itself defines an “emission guideline” as “a guideline ...which reflects the degree of emission reduction achievable through application of the best system of emission reduction...” 40 C.F.R. § 60.21(e). Yet notwithstanding clear language to the contrary and by EPA’s own admission, its proposal would establish legally enforceable (“binding”) allowable emissions rates for existing sources on a state-wide basis for each state. 79 Fed. Reg. 34,892 (“As promulgated in the final rule following consideration of comments received, the interim and final goals will be binding emission guidelines for state plans.”). Thus, the proposal establishes “emission standards,” not guidelines, which clearly violates EPA’s own role under 40 C.F.R. § 60.22. In no regulation has EPA ever set binding state-wide emission rates under § 111(d). As a result, there is no legal authority or precedent that EPA can point to for the approach it proposes to take in this rule.

C. Section 111(d) is limited to source-level, inside-the-fenceline, unit-by-unit emission reduction measures.

Section 111(d) unambiguously mandates that, where other statutory prerequisites are satisfied, states must establish standards of performance applicable to individual sources of pollutants. *See, e.g.*, 42 U.S.C. § 7411(d)(1)(A) (state plans “establish[] standards of performance for any existing source . . . to which a standard of performance under this section would apply if such existing source were a new source”) (emphasis added). EPA’s proposal radically departs from this approach. The Agency proposes to determine that the “best system of emission reduction” for power plants is composed of four “building blocks.” *See, e.g.*, Proposal, 79 Fed. Reg. at 34,835. Only the first “building block”—efficiency gains from heat-rate improvements achieved “inside the fenceline” of particular coal plants—is arguably authorized under § 111(d). *See id.* at 34,859-62; *but cf. UARG*, 134 S. Ct. at 2448 (“assuming without deciding” that another provision of the Act “may be used to force some improvements in energy efficiency” while stressing that “important limitations” must be observed to guard against “‘unbounded’ regulatory authority,” even where EPA regulates only *inside-the-fenceline* energy efficiency).

The other three “building blocks” envision the reshaping of state resource-planning and energy policy, in the form of shifting generation from coal to gas-fired plants, shifting generation from fossil fuels altogether to renewable resources, and end-use efficiency measures. *See* Proposal, 79 Fed. Reg. at 34,862-75. And while EPA does not formally require states to employ

a precise mixture of these “outside-the-fenceline” measures, the state “goals” are stringent enough that they cannot be met by the first “building block” alone. (Indeed, the Agency does not suggest that they can be.) Many state “goals” are set well below the rate achievable by even a state-of-the-art gas-fired plant, let alone a coal-fired one. *See id.* at 34,895 (Table 8—Proposed State Goals). These “goals” can only be met by substantial revision of a state’s sector-wide approach. The “best system of emission reduction” proposed here is therefore a *de facto* national energy policy.

This type of regulatory adventurism contradicts the Supreme Court’s recent decision in *UARG*. There, the Court considered limitations on the scope of EPA’s authority in requiring sources to apply “best available control technology” for greenhouse gases under the prevention of significant deterioration preconstruction permitting program. The Court observed that such “control technology” cannot require “fundamental redesign” of facilities, is “required only for pollutants that the source itself emits,” and “should not require every conceivable change that could result in” improvements. *UARG*, 134 S. Ct. at 2448. Notably, “performance standards” under § 111 are closely linked to “best available control technology” by express definition and by statutory context.

EPA’s § 111(d) proposal exceeds those limitations by requiring “fundamental redesign” not only of individual facilities but of a state’s entire energy sector and by proposing measures far removed from at-the-source emissions, for the reasons as follows:

First, the program-specific definitions of “best available control technology” and “performance standards”—found, respectively, in the prevention of significant deterioration program and in the new- and existing-source performance standards program (i.e., § 111)—are highly similar. “Best available control technology” is defined as “*an emission limitation based on the maximum degree of reduction . . . achievable for [a] facility.*” CAA § 169(3), 42 U.S.C. § 7479(3) (emphasis added). A “standard of performance” is defined as “a standard for emissions of air pollutants which reflects the *degree of emission limitation achievable* through the application of the best system of emission reduction which . . . has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1) (emphasis added). In other words, both terms are defined by reference to “emission limitation”; the primary difference is that “best available control technology” represents the most stringent limitation achievable, whereas “performance standards” are not defined by maximum possible stringency, but by the “best system . . . adequately demonstrated.” This relationship is confirmed by the fact that the definition of “best available control technology” explicitly links the two phrases: “best available control technology” must be at least as stringent as § 111 standards. 42 U.S.C. § 7479(3) (“In no event shall application of ‘best available control technology’ result in emissions . . . which will exceed the emissions allowed by any applicable standard established pursuant to” 111). The former is simply intended to be a stricter version of the latter.

Second, the Act’s general definitions of “emission limitation” and “performance standards” are also closely related. “Emission limitation” is defined at CAA § 302(k), 42 U.S.C.

§ 7602(k) as “a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement related to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.” And “performance standards” are defined, in the subsection immediately following, as “a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.” CAA § 302(l), 42 U.S.C. § 7602(l). Both terms refer to requirements that cut emissions on a continuous basis, and both are illustrated by the same “including any requirement . . .” phrase. The major difference is that “emission limitation” is given another “including” phrase (“any design, equipment . . .”). In other words, “emission limitations” arguably encompass a broader range of measures than do “performance standards.” And because the definition of “performance standards” only contains the “including” phrase that expressly refers to “the operation or maintenance of a source,” any confining of “emission limitation”—and therefore of “best available control technology,” which, recall, is expressly defined at § 7479(3) as an “emission limitation”—to inside-the-fenceline measures should apply with equal or greater force to “performance standards.”

Third, certain provisions of the 2005 Energy Policy Act confirm that “best available control technology” and § 111 “performance standards” are linked concepts. Congress restricted EPA’s ability to rely on data from facilities receiving assistance under that Act when it sets either of these types of standards under the Act, see 42 U.S.C. § 15962(i). Even when drafting legislation that primarily addressed another subject area (energy policy as opposed to pollution control), Congress was mindful of the close relationship between these two terms.

Fourth, at oral argument in *UARG*, the Solicitor General made this argument in an attempt to prevail: “Section 7411 and the PSD program are not aimed at different problems. They are aimed at the same problem, and you can see that from the statutory text. . . . Congress specifically linked the operation of the Section 7411 standards and the Best Available Control Technology under the PSD program. . . . [O]nce Congress has set a standard under Section 7411 . . . that becomes a floor for the evaluation of Best Available Control Technology.” *UARG*, No. 12-1146, Transcript of Oral Argument at 46-48 (Solicitor General Verrilli, Feb. 24, 2014). On this point, the government was entirely correct. The two address the same problem and take the same form—how else could one set a “floor” for the other?—and should therefore be subject to the same limitations. EPA’s justifications for not stopping at the fenceline are specious and contrary to the statutory text. See Proposal, 70 Fed. Reg. at 34,856. EPA argues that the word “system” in the statutory phrase “best system of emission reduction” is broad enough to encompass these “outside-the-fenceline” measures. See *id.* at 34,885-86 (relying on dictionary definition of “system” as “[a] set of things working together as parts of a mechanism or interconnecting network”).

Significantly, Section § 111 does not actually grant EPA authority to regulate a “system.” Rather, the statute provides that EPA and the states may set standards for emissions based on

“the application of the best system of emission reduction.” 42 U.S.C. § 7411(a)(1) (emphasis added). This statutory phrase directs the agency (in the new-source, 111(b) context) or the state (in the existing-source, 111(d) context) to establish standards of performance by applying the “system of emission reduction” to the individual sources with the source category being regulated. (In keeping with this, the 111(a) definition section defines “new source” and “stationary source” immediately after defining “standard of performance.” *Id.* § 7411(a)(2), (3).)

The term “standard of performance” itself can only be understood in context of a source-specific limit, as it is defined as “a requirement of continuous emission reduction, including any requirement relating to the operation or *maintenance of a source* to assure continuous emission reduction.” *See* CAA § 302(l), 42 U.S.C. § 7602(l) (emphasis added). Indeed, the meaning of the term “application” in the context of a standard for emissions recurs throughout the Act and can only be understood in the context of an individual source. Considering again § 169(3) of the Act, defining the “best available control technology” (“BACT”) that must be applied to new or modified sources under the prevention of significant deterioration program, the Act provides that “[i]n no event shall application of [BACT] result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to” Sections 111 or 112. 42 U.S.C. § 7479(3) (emphasis added).

Similarly, the definition of lowest achievable emission rate (“LAER”) for the nonattainment new source review program provides that “in no event shall the application of [LAER] permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.” CAA § 171(3), 42 U.S.C. § 7501(3) (emphasis added). In other words, whatever the “best system” is, it must be a system that reduces emissions from a particular source “to which a standard of performance under this section would apply if such existing source were a new source.” 42 U.S.C. § 7411(d)(1)(A)(ii).

Even if EPA did have authority to regulate a “system,” its proposed regulation here would fail. “The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

In the context of emission control, the Act displays a consistent and clear pattern of referring to “systems” as source-specific measures.³ “Best system of emission reduction” as

³ *See, e.g.*, CAA § 110(j), 42 U.S.C. § 7410(j) (conditioning issuance of all permits required under Title I on a showing by the owner or operator of each new or modified stationary source “that the technological *system* of continuous emission reduction *which is to be used at such source* will enable it to comply with the standards of performance which are to apply to such source . . .”) (emphases added); CAA § 111(b)(5), 42 U.S.C. § 7411(b)(5) (providing that, except as authorized under subsection (h), the Administrator may not require “any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance”) (emphases added); CAA § 112(r)(7)(A), 42 U.S.C. § 7412(r)(7)(A)

used in § 111 falls within the statute's norm, rather than the exception: "systems" limiting emissions are source-specific unless indicated otherwise. The Section governs the issuance of performance standards, and "standard of performance" is defined at § 7602(l) to mean "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." The *only* example given in this definition is expressly source-specific. In the few instances where the Act intends the term "system" to refer to a geographically dispersed "set of things," it does so expressly, as in § 319(a) of the Act, directing the Administrator to "promulgate regulations establishing an air quality monitoring system throughout the United States." 42 U.S.C. § 7619(a).

In this regard, EPA's attempt to take the term "system" out of context is akin to the situation that the Supreme Court faced in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994). There, the Supreme Court rejected the Agency's position that its decision to make tariff filing optional for all non-dominant long-distance carriers was within its statutory authority to "modify any requirement" under 47 U.S.C. § 203. *Id.* at 225. Despite the seeming breadth of the term "modify," the Court determined that the word's plain meaning is to make a *moderate* change, whereas the challenged order made a "radical or fundamental change." *Id.* at 228-29. Instead, by "eliminat[ing a] crucial provision of the statute for 40% of a major sector of the industry," the Agency had engaged in "a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934." *Id.*

(providing that accidental-release-prevention regulations may "make distinctions between various types, classes, and kinds of facilities, devices and *systems* taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present *at any stationary source*") (emphases added); CAA § 169(3), 42 U.S.C. § 7479(3) (defining best available control technology, or BACT, as an "emission limitation based on maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable *for such facility* through application of production processes and available methods, *systems*, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant") (emphasis added); CAA § 206(a)(2), 42 U.S.C. § 7525(a)(2) ("The Administrator shall test any emission control *system incorporated in a motor vehicle or motor vehicle engine* submitted to him by any person . . .") (emphasis added); CAA § 206(a)(3)(A), 42 U.S.C. § 7525(a)(3)(A) (Administrator may issue a certificate of conformity only if the manufacturer establishes "that any emission control device, *system*, or element of design *installed on, or incorporated in*, such vehicle or engine conforms to applicable requirements . . .") (emphases added); CAA § 207(c)(3)(A), 42 U.S.C. § 7541(c)(3)(A) ("The manufacturer shall provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and *systems* may be performed by any automotive repair establishment or individual . . .") (emphasis added); CAA § 402, 42 U.S.C. § 7651a(7) (defining "continuous emission monitoring *system*" as "the *equipment* as required by section 7651k of this title . . .") (emphases added); CAA § 415, 42 U.S.C. § 7651n(c) (providing that a coal-fired utility's physical or operational changes will not trigger Section 111 applicability where, among other conditions, the unit was inactive for 2 years prior to the 1990 Amendments and "*was equipped* prior to shutdown with a continuous *system* of emissions control" that met certain technical standards) (emphases added).

at 231-32. The order “is effectively the introduction of a whole new regime of regulation,” *id.* at 234. By going beyond source-level, inside-the-fenceline measures, EPA’s proposal would expand § 111(d), and specifically the underlying statutory term “best system of emission reduction,” into “a whole new regime of regulation”: one that regulates not only pollutant emission by sources, but a state’s entire resources and energy sectors.

Notably, courts have in the past rejected similar attempts by EPA to re-define the fundamental level at which § 111’s “best system of emission reduction” applies by disaggregating that concept from the concept of an individual source as defined by statute. In *ASARCO Inc. v. EPA*, 578 F.2d 319, 326-27 (D.C. Cir. 1978), the D.C. Circuit invalidated EPA regulations interpreting § 111(a)(3)’s definition of “stationary source” to “allow a plant operator who alters an existing facility in a way that increases its emissions to avoid application of the NSPSs by decreasing emissions from other facilities within the plant.” *Id.* at 325. EPA argued that the broad statutory definition gave it “‘discretion’ to define a stationary source as either a single facility or a combination of facilities.” *Id.* at 326. (This type of aggregation is known as the “bubble concept,” *e.g.*, *id.* at 321.) The court disagreed, holding that the “regulations plainly indicate that *EPA has attempted to change the basic unit to which the NSPSs apply . . .*” *Id.* at 326-27 (emphasis added); *see id.* at 322: “The basic controversy in the cases before us concerns the determination of the units to which the NSPSs apply.”⁴

⁴ *ASARCO* does not conflict with the Supreme Court’s decision six years later in *Chevron*, holding that the “bubble concept” was appropriate in the context of the nonattainment new source review program. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Whereas *ASARCO* considered the definition of “stationary source” provided in and for Section 111, *Chevron* construed the *undefined* use of the term “major stationary sources” in § 172(b)(6) of the Act (then codified at 42 U.S.C. § 7502(b)(6), with its post-1990 equivalent now found at § 7502(c)(5)). Section 172(b)(6), added in the 1977 Amendments as part of a new program addressing areas that failed to attain national ambient air quality standards, required state implementation plans under the NAAQS program to “require permits for the construction and operation of new or modified major stationary sources.” *See Chevron*, 467 U.S. at 849 & n.22 (“The focal point of this controversy is one phrase in that portion of the [1977] Amendments. . . . Specifically, the controversy in these cases involves the meaning of the term ‘major stationary sources’ in § 172(b)(6) of the Act . . .”). The Supreme Court acknowledged the *ASARCO* ruling in three footnotes with no suggestion of disapproval; the two opinions simply construe different terms in different statutory programs. *See id.* at 841 & n.6, 847 n.17, 857 n.29. The Supreme Court has long maintained that the NSPS and new source review programs have different purposes, with the NSPS program being technology-forcing, and the new source review program being ambient-air-quality focused. *See generally Env’tl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 565 (2007) (holding court of appeals erred in requiring EPA to conform its regulations under prevention of significant deterioration program, which is closely linked to new source review program, with “their NSPS counterparts”). Those different purposes apply directly when considering the unit at which state-of-the-art control technology must be employed, the question decided for the NSPS program in *ASARCO*.

Moreover, the decisional criteria applied in *ASARCO* are consistent with those that the Supreme Court later employed in *Chevron*: the *ASARCO* court expressly noted that EPA is entitled to deference when interpreting the Act, *ASARCO*, 578 F.2d at 325, and described the court’s role as determining whether an interpretation is “sufficiently reasonable,” *id.* at 326 (internal quotation marks omitted). Indeed, *ASARCO* recites as controlling precedent on this point the very same cases which *Chevron* would later follow. *Compare id.* at 326 nn.21, 22 (citing, *inter alia*, *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976), *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975)), with *Chevron*, 467 U.S. at 843 nn.11, 14 (same).

In the current § 111(d) proposal, EPA takes the even more egregious action of changing the field of regulation from sources to a *state's entire power sector*. Given that EPA lacks the authority to expand “performance standards” to apply collectively to all regulated facilities at a *single industrial site*, it is not credible to suggest that the “best system of emission reduction” underlying such standards can encompass measures adopted throughout the *state's entire power sector*.

EPA also argues that it bases its proposed “building blocks” on measures that states are already undertaking. Proposal, 79 Fed. Reg. at 34,856. A state's exercise of its own policy discretion cannot confer regulatory authority on a federal agency. And EPA expresses concern that, if it limited its proposal to heat-rate improvements achieved inside the fence at individual coal-fired plants, a “rebound effect” would increase operations at these plants and lead to smaller overall reductions. *Id.* at 34,856 & n.93. But the “rebound effect” is nothing new in environmental law. *See, e.g.*, 75 Fed. Reg. 74,152, 74,316-20 (Nov. 30, 2010) (providing detailed discussion of “rebound effect” in fuel-efficiency context). It has never been used as a justification to set state energy policy or otherwise enlarge EPA's authority, and it cannot bear that weight here.

EPA also asserts that its additional, beyond-the-fenceline “building blocks” promise additional emission reductions “by significant amounts and at lower costs” than some strategies within the first, inside-the-fenceline “building block.” Proposal, 79 Fed. Reg. at 34,856. But even assuming this is true, it is only a reason to propose these measures *if* they are within the agency's power to propose. EPA hides behind a fig leaf of federalism and flexibility while in effect forcing major changes to the states' administration of electricity generation and consumption.

Here, the radical nature of its proposal becomes all the more evident when one considers what will occur if a state does not submit an implementation plan, or if EPA finds a submitted plan unsatisfactory. The Agency will then prescribe a *federal* implementation plan for that state, as authorized by 42 U.S.C. § 7411(d)(2). This plan would apply the range of “building blocks” to the state. That is to say, it would set binding emission limits for coal- and gas-fired power plants that would switch the way that sources are allowed to dispatch, set renewable portfolio requirements that would force electric utilities and others to develop renewable resources against their will in order to be allowed to continue operating existing coal-fired assets, and set the same type of efficiency standards for consumers of electricity that the D.C. Circuit recently invalidated when FERC attempted to do so. This total federal invasion of a state power sector would remove all pretexts and expose the true extent of this proposal's violation of state authority. While this would provide clarity, such a catastrophe for federalism is antithetical to the Constitution and cannot be justified under any provision of federal law.

D. Conclusion

MDEQ objects to this rulemaking for the legal reasons set forth above.

III. Technical Comments

A. Correction to the Baseline Rate

MDEQ identified an error in the data used to calculate Mississippi's 2012 baseline emission rate. EPA identified a 150 MW NGCC believed to be under construction and included its projected emissions in the goal computation table⁵. MDEQ has been unable to identify this unit and is unsure of its existence; therefore, we believe its inclusion to be in error. Also, EPA included emissions from the Kemper Integrated Gasification Combined Cycle (IGCC) plant as "other emissions" and "other generation" in the goal computation table. Although this plant satisfies the definition of an existing affected source⁶, the plant was not operational in the proposed 2012 baseline period; therefore, this plant provides no credible emissions or operational data towards establishing standards for existing units. We recommend these units be removed from the goal computation table.

B. Building Block 1 – Heat Rate Improvement

EPA acknowledged in its rationale that it "is simply suggesting that BSER assumptions (e.g., 6% heat rate improvement for the coal fleet) can be achieved at the state level"⁷. With only seven units making up Mississippi's coal fleet, Mississippi does not have the unit variability necessary to achieve 6% heat rate improvements. EPA acknowledges that unique characteristics at the unit level may prevent some units from achieving the average applied to the state goal, and also indicates that individual unit assessment is not part of the goal setting exercise. Mississippi contends it is exactly that exercise that must occur, especially when dealing with a limited universe of facilities, to establish responsible regulations. Preliminary discussions with our stakeholders indicate a maximum potential heat rate improvement of only 2% may still be available on some units. They also indicate these improvements would come at an extreme cost since those improvements that were most feasible and cost effective have already occurred. With Building Block 2 calling for early closure of these units, requiring the implementation of costly measures for heat rate improvements is unreasonable. MDEQ suggests that a state-level assessment of the state's coal fleet be performed with regard to feasibility and unit-life expectancy before a final heat rate improvement goal is set for Mississippi.

C. Building Block 2 – Redispatch

The application of Building Block 2, redispatching to NGCC capacity, provides the most negative impact on Mississippi. Under the proposed approach, Mississippi would completely

⁵ See *Goal Computation Technical Support Document*, June 2014; Appendix 1 - Proposed Goals.

⁶ See Federal Register Proposed Rule Published June 18, 2014; 40 CFR 60.5795

⁷ See *Goal Computation Technical Support Document*, June 2014; 2.C. State-Level Rationale and Significance.

lose its fuel diversity with a projected zero coal and oil/gas steam power generation by 2020⁸. This is an unacceptable result. Removing fuel diversity jeopardizes power reliability and removes the ability to control power costs for consumers. Mississippi requests that the impact of Building Block 2 on Mississippi's proposed goal align with the stated intent of the proposed rule, which is to reduce carbon emissions "while maintaining an affordable, reliable, and diverse energy mix"⁹.

Due to Mississippi's strong natural gas infrastructure and high NGCC capacity, Mississippi believes that redispatching to NGCC capacity is what caused the unacceptable outcome in EPA's Goal determination. In order to remedy this, Mississippi suggests EPA consider evaluating the state's fuel usage profile for an acceptable level of natural gas usage prior to determining whether redispatching is even necessary. In 2012, Mississippi achieved and even exceeded what should be required under Building Block 2 with regard to natural gas usage. Mississippi's NGCC generation provided for 73% of the total generation from its affected fossil-fuel-fired EGU's¹⁰. This percentage rate is more than sufficient to satisfy an acceptable NGCC generation requirement while still affording the state the opportunity to utilize a diverse energy mix.

Redispatching to NGCC capacity for the Mississippi fleet does not consider the intended utilization of the units. By focusing simply on NGCC capacity when considering redispatch, the proposed rule does not take into account whether the units were designed or intended for long-term use. Many of Mississippi's units were not designed or included in the power system to provide extended power generation. Many of these units were designed to chase peak demand. A detailed assessment of unit utilization would need to occur before many of the units could be committed to a high-use redispatch plan.

Additionally, implementation of the proposed redispatching would require premature closure of Mississippi's remaining coal fleet. Many of these units have taken recent steps to comply with the MATS rule by spending millions of dollars in control retrofits. Full implementation of Building Block 2 would cause these upgrades to become stranded assets to the rate payers of Mississippi. Therefore, premature closure is not an option for these units.

⁸ See *Goal Computation Technical Support Document*, June 2014; Appendix 1 - Proposed Goals.

⁹ See Federal Register Proposed Rule Published June 18, 2014; Preamble; I. General Information; A. Executive Summary.

¹⁰ See 2012 Unit-Level Data using cGRID Methodology. (Note: The assessment here based on 2012 unit data reflects the approach in the proposal of using a single year's data to establish the baseline. Mississippi does not support the use of a single year to establish baseline. Additional analysis of the State's generation to determine a period of operation that is more representative of the existing fleet's normal operating nature should occur in order to establish an appropriate baseline).

D. Building Block 3 – Renewable and Nuclear Energy

We reiterate that Building Block 3 is outside the intent and precedence of Section 111 of the Act and should not be part of setting the performance standard for this rule. It would involve developing NEW generation facilities rather than measures to control emissions from existing units. However, we are providing comment on some of the most concerning details of the building block.

Preserving Nuclear Capacity

Building Block 3 includes 5.8% of the generation capacity for the Grand Gulf Power plant in Mississippi, which equals 631,874 MWh, to be included in the denominator of the goal calculations. This is to account for at risk generation and to encourage continued utilization of the nuclear generation facilities. To our knowledge this facility is not at risk and the inclusion of the output in this manner will have no effect on the future operation of the plant. The inclusion of the “at risk” nuclear generation should be dropped from the goal setting.

Renewable Energy Goals

The proposal requested comment on the proposed and alternative renewable energy goals. In assessing the two methods, Mississippi prefers the alternative method as it attempts to set the goal by analyzing the State’s potential renewable energy resources rather than setting a goal based on resources in other states. However, we do have comments on the assumptions in both goal setting methods.

The proposed final goal has Mississippi with 5,458,430 MWh of renewable generation by 2029 determined by applying a regional goal of 10% to the State’s generation. This amount of renewable energy is not practically achievable for Mississippi. The proposed regional goal was established using North Carolina’s RPS goal. It is our understanding that EPA misapplied the North Carolina RPS goal. The net renewable energy goal for North Carolina would be less than 5% rather than the 10% that was used to set the goal for the region. Comments from the North Carolina Department of Environment and Natural Resources should elaborate on this point.

Looking at the particulars of the proposed goal, the 2012 baseline renewable energy for Mississippi is 1,509,000 MWh, which is almost all from biomass energy generation from pulp and paper mills. Assuming that this can be counted towards compliance (the rule is not clear that biomass can be counted as zero carbon), it would result in the State having to develop over 4,000,000 MWh of additional renewable energy generation. Mississippi has no wind potential and does not have the solar capacity that western states have. In fact, the future year Integrated Planning Model (IPM) runs that EPA performed did not indicate any additional renewable energy generation for Mississippi because the results showed renewable generation was too costly. Therefore, there is no basis to require an increase of new renewable generation to this magnitude due to Mississippi’s current generating capacity. Mandating this new renewable energy generation is simply an excessive and unnecessary cost for the rate payers of Mississippi.

The alternative renewable generation goal for Mississippi is 5% of the total generation for 2030 which equals 2,506,000 MWh. The alternative goal approach did not project any solar or wind generation because they were not considered cost effective and included only a small amount of biomass. Most of the projected renewable energy generation is from hydroelectric generation based on a feasibility study¹¹, not proven technology. Hydroelectric generation is not an available resource for Mississippi. Based on the alternative approach and ruling out hydroelectricity and biomass (due to its uncertainty in accounting), it appears that the future renewable energy goal for Mississippi should be zero.

E. Building Block 4 - Energy Efficiency

Building Block 4 and the utilization of energy efficiency measures should not be part of establishing the performance standards for this rule. It would involve requiring the EGU's to control their product downstream of the facility. While energy efficiency measures are a very cost effective way to reduce energy consumption, they are not pollution control measures and are outside the intent and precedence of Section 111 of the Act. Currently, these measures are under the authority of the Mississippi Public Service Commission and the Mississippi Development Authority. Including energy efficiency measures in the CPP creates intrastate authority issues, in addition to creating burdens and increased cost to resources without any benefit to the State since these measures would have been implemented regardless of the CPP. Energy Efficiency measures should be left to the State Public Service Commissions and Energy Offices and not included as part of a pollution control standard.

F. Timeline to submit and implement

The overall timeline provided for the states to develop, submit, and comply with the SIP is too restrictive. Section 111(d)(1)¹² says that a procedure similar to that of § 110 should be developed for SIP submittals. Section 110(a)(1) provides for up to three years for the states to develop and submit a SIP. Given the complexity of the SIP necessary to implement these guidelines, the states should be given the full three years to submit the SIP.

The states should also be given more time to implement the SIP. The proposal calls for compliance assessments to begin in 2020, which would require significant implementation measures to be put in place prior to 2020. Also, under the proposed timelines, affected entities would need to begin compliance measures even before the SIP would become final. Compliance activities should never be required to occur until after a SIP is final. Mississippi advises, at a minimum, an extension to the interim period to allow states and affected entities the time needed to implement the complex compliance plans that will be required to comply with the rule.

¹¹ Feasibility Assessment of the Water Energy Resources of the United States for New Low Power and Small Hydro Classes of Hydroelectric Plants (DOE-ID-11263, January 2006)

¹² 42 U.S.C. § 7411(d)(1).

G. Interim Goal

Mississippi's interim goal is 732 lb/MWh and the final Goal is 692 lb/MWh. This means that in achieving the interim goal, Mississippi will account for over 90% of its reductions toward the final goal. This is achieved based on the assumption that all of the measures proposed in Building Block 2 can be accomplished in a short period of time. This is not the case. Several of the utilities in Mississippi have long-term power and fuel contracts requiring continued operation and utilization of fuel. In addition, facilities such as Mississippi Power's Plant Daniel and South Mississippi Electric Power Association's Plant Morrow, have recently installed new or upgraded pollution control equipment to meet the requirements of the MATS rule. Shutting these units down in such a short time period and switching to other generators would result in stranded assets and increased cost to consumers. Mississippi urges the removal of the interim goal.

IV. Recommendations**A. Withdrawal of the Clean Power Plan Proposal**

Mississippi advises that EPA withdraw the CPP based on the following observations, in addition to comments previously stated. First, states and stakeholders have made tremendous strides in reducing carbon emissions from the power industry without regulation. EPA has indicated that this proposal "would continue progress already underway to lower the carbon intensity of power generation in the United States"¹³. Therefore, this proposal is unnecessary to continue the progress established to this point. EPA should consider entering into a true partnership with states and stakeholders instead of one contrived by mandate and driven by regulation. EPA should look to spearhead these collaborations and encourage information sharing to assist states in developing state-level energy policies that could be tailored to each state's unique resources. Second, EPA has called this proposal an "unprecedented effort"¹⁴, yet EPA attempts to accomplish implementation through the very restrictive mechanism of § 111(d). Section 111(d) is extremely prescriptive requiring implementation to occur inside the fenceline, using a carbon control technology that is established and feasible for existing units. The CPP is too "unprecedented" for § 111(d).

B. Goals should be determined by the States

As indicated in the comments above, EPA, while using state-specific emissions and generation values to establish baseline conditions, applied regional and national proposed BSER determinations in calculating the state goals. Mississippi has identified, in several cases, where additional state-specific evaluations of the proposed BSER applications need to occur in order to

¹³ See Federal Register Proposed Rule Published June 18, 2014; Preamble; I. General Information; A. Executive Summary.

¹⁴ See Federal Register Proposed Rule Published June 18, 2014; Preamble; I. General Information; A. Executive Summary.

establish a realistic goal. EPA, in failing to conduct these state-specific evaluations for impacts from the proposed BSER, failed to establish the proposed measures as actual BSER for each state. Furthermore, EPA's goal calculation should not be part of the final rule. The framework of § 111(d) confines EPA to establishing the guidelines for development of the SIP and provides for the states to assess and apply those guidelines to determine the state's goal.

Thank you for this opportunity to comment on the proposed rule.

Sincerely,



Gary C. Rikard
Executive Director
Mississippi Department of Environmental Quality