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Environmental Protection Agency  
EPA Docket Center (EPA/DC)  
Attn: Docket ID No. EPA-HQ-OAR-2015-0199

**RE: Ohio EPA Comments on U.S. EPA's October 23, 2015 Proposed Rule "Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations" [80 FR 64966]**

Dear Ms. McCarthy:

The Ohio Environmental Protection Agency (Ohio EPA) is providing comment on the above referenced U.S. EPA proposed rule regarding the federal plan, model trading rules, and changes to the framework regulations regarding greenhouse gas emissions from existing fossil fuel-fired electric generating units (EGUs) under section 111(d) of the Clean Air Act (CAA). Ohio EPA appreciates the opportunity to comment on this proposal.

Ohio EPA provided extensive technical and legal comments on the proposed Clean Power Plan (CPP) [79 FR 34830] and we are still concerned that implementing the CPP is not within U.S. EPA's authority under the stationary source control program of section 111(d) of the CAA.

Ohio utilities have significantly reduced carbon dioxide emissions from electric generation from 2005. Since 2005, Ohio has reduced carbon dioxide emissions from coal-based electricity generation from roughly 136 million tons to 95 million tons in 2014. These reductions were accomplished without a federal mandate to reduce emissions of carbon dioxide.

As with our comments on the original proposed CPP, our comments on the proposed Federal Plan shall in no way be interpreted as Ohio concurring with the CPP or federal plan and we urge U.S. EPA not to move forward with this proposal.

Sincerely,

Craig W. Butler  
Director

Cc: Robert Hodanbosi, Chief, Ohio EPA Division of Air Pollution Control

## **Attachment**

**Ohio EPA Comments on Proposed Rule “Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations” [80 FR 64966]**

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## **Timing**

U.S. EPA is proposing both mass-based and rate-based trading model rules (MR). U.S. EPA intends to finalize only one as the federal plan (FP). U.S. EPA is anticipating finalizing one or both of the MRs in the summer of 2016 while finalizing FPs on a state-by-state basis as action is taken on state plans (SP) (or lack thereof). [80 FR 64966, 64975]

If U.S. EPA chooses to go forward with this unlawful section 111(d) plan, the timing of this proposal is already too late to assist states. Ohio EPA notes that, considering SPs or SP extension requests are due in September of 2016, finalizing the MRs and choice of FP in the summer of 2016 provides insufficient time for states to prepare their SP or formulate initial plans and concepts for inclusions in an extension request. U.S. EPA continues to impose deadlines on states yet doesn't provide timely rulemaking and guidance to assist the states in preparing meaningful plans to submit by those deadlines.

## **Applicability**

U.S. EPA has proposed unit-level allocations for a list of likely affected electric generating units (EGU) in each state based upon a proposed historical generation allocation method. [80 FR 65016] This list was provided as a supplement to the docket. Ohio EPA has reviewed the list and allocations.

Ohio EPA has concerns with how U.S. EPA will finalize a list and the ability to correct errors. As noted in the preamble, U.S. EPA is proposing the allocation will be a one-time determination that is not updated. [80 FR 65018] The regulatory text (40 CFR 62.16240) states U.S. EPA will issue a NODA but gives no process or timing for that NODA. U.S. EPA must provide sufficient time for affected EGUs and states to review this list and provide comments to ensure necessary corrections are made.

The list of likely affected EGUs and allocations provided in the docket is not accurate, in particular for combined heat and power (CHP) and similar type units. Ohio EPA noted the list of affected EGUs in Ohio provided under the proposed CPP included the Haverhill North Cogeneration Facility. Under the final rule, this unit was excluded, but U.S. EPA included the Middletown Coke Company, a previously excluded unit. Ohio EPA interprets the definition of a CHP unit as a stationary combustion turbine that uses waste or residual heat for other useful purposes. The definition of a combustion turbine in the rule requires that a turbine be driven by energy released from combustion. Even under this interpretation, the Middletown Coke Company facility does not include any combustion turbines because the turbines at this facility are driven by pressurized steam, not combustion. Moreover, even if the turbines at the Middletown Coke Company were considered stationary combustion turbines, 40 CFR 60.5850(d) provides

that “EGUs that are excluded from being affected EGUs are: . . . Stationary combustion turbines not capable of combusting natural gas (e.g., not connected to a natural gas pipeline) [.]” The turbines at the facility are not capable of combusting natural gas and are not connected to a natural gas pipeline. Consequently, they are not subject to the rule even if they otherwise would meet the definition’s requirements for a “stationary combustion turbine.” Lastly, the Middletown Coke Company and the Haverhill North Facility utilize waste heat to produce electricity in the process of creating a product itself, metallurgical coke. This is exactly the type of process that U.S. EPA is promoting through the combined heat and power initiative. To subject either of these plants to this rule would mean compliance could only be achieved by the reduced production of its main product. Again, U.S. EPA has strayed far afield from the basic tenants of the Clean Air Act (CAA). U.S. EPA’s inclusion of units of this type is in error, and would subject low-carbon sources of electricity to overly-stringent requirements of the CPP. Because of errors and inconsistencies like this, it is imperative U.S. EPA provides a mechanism for correcting errors and does not finalize an approach that is a one-time determination not to be updated.

### **Legal Authority**

U.S. EPA proposes to use a rarely-used subsection of the CAA to revamp the entire generation and distribution electric system. As we explained in our comments to the proposed rule, Congress could not have meant for section 111(d) of the CAA to be used in such an expansive way.

To begin with, U.S. EPA does not have the authority to proceed with this rulemaking under section 111(d) because the plain language of the statute prohibits U.S. EPA’s regulation of air pollutants emitted from source categories that are otherwise regulated under CAA section 112, which addresses the emission of hazardous air pollutants. Specifically, 111(d)(1) provides, in part:

“The Administrator shall prescribe regulations which shall establish a procedure similar to that 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 [CAA section 112] of this title . . . .”

In 2012, U.S. EPA promulgated the Mercury and Air Toxics Standards (MATS) to regulate coal-fired power plants under section 112. [77 FR 9303 (Feb. 16, 2012)]. The MATS rule was appealed and the U.S. Supreme Court instructed U.S. EPA to consider cost before promulgating the rule, *Michigan v. EPA*, 135 S.Ct. 2699 (2015). On remand, U.S. EPA has proposed to continue to regulate coal-fired power plants under section 112, [80 FR 75025 (December 1, 2015)], and the D.C. Circuit Court of Appeals

has allowed the MATS rule to stay in place while U.S. EPA completes the rulemaking process. *White Stallion Energy Center v. EPA* (D.C. Cir. Case No. 12-1100 Order, December 15, 2015). U.S. EPA is still regulating EGUs under section 112 and thus is prohibited from regulating carbon dioxide (CO<sub>2</sub>) emissions from power plants under section 111(d). For further discussion of this issue, please refer to comments we submitted to the proposed rule.

Even if section 111(d) could be interpreted to grant U.S. EPA the authority to proceed now to regulate existing power plants, U.S. EPA has clearly exceeded any reasonable bounds set forth in statute. The statute plainly focuses on particular sources, not the entire electrical system. Section 111(d)(1) specifically requires a SP which “establishes standards of performance for any existing source” and goes on to state that “[r]egulations by 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 in which such a standard applies.” “Existing source” is defined as “any stationary source other than a new source,” CAA section 111(a)(6), and “stationary source” is “any building, structure, facility, or installation which emits or may emit any air pollutant.” CAA section 111(a)(3). The statute directs a state to establish and apply a standard of performance only to particular existing sources and to take into account the remaining useful life of those particular existing sources. A plain reading of this provision can only lead one to conclude that Congress meant for the provision to apply to specific individual sources, and cannot be reasonably read to have left the sort of gap in the statute that an agency must fill with its own interpretation. “[Court decisions] establish a simple and sensible rule: EPA cannot rely on its gap-filling authority to supplement the Clean Air Act’s provisions when Congress has not left the agency a gap to fill.” *NRDC v. EPA*, 749 F.3d 1055, 1064 (D.C. Cir. 2014). So it is here.

Furthermore, a 111(d) plan “establishes standards of performance for any existing source.” The plain language construction of the phrase “for any existing source” can only mean that the emissions standard must be set at a level that a source itself can achieve. Finding that a reduction of utilization for an EGU which directly threatens its viability could satisfy a standard of performance for a source would set U.S. EPA up in the role as an environmental super-regulator who could require any industry subject to an NSPS to produce less, or shutdown, and its associated customers to consume less, thereby substituting the agency’s judgment on investment and production decisions for that of the company’s owners and operators, undermining commercial needs and expectations. Congress could not have given U.S. EPA the authority to micro-manage and redesign the nation’s energy sector and economy through the CAA.<sup>1</sup>

After ignoring one clear statutory provision, U.S. EPA goes on to justify a vast new regulatory program because of Congressional silence, which the U.S. Supreme Court

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<sup>1</sup> U.S. EPA’s desire to micro-manage the U.S. economy does not end with the power sector. On November 24, 2015, it was reported that U.S. EPA Administrator Gina McCarthy stated U.S. EPA’s intent to examine other industries under section 111(d) including refineries.

has consistently not allowed. “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 468 (2001) (citations omitted) (concluding that there was no textual commitment of authority to the EPA to consider costs in setting National Ambient Air Quality Standards (NAAQS) under CAA section 109(b)(1)).

The legal principle that Congressional intent must be clear before a federal agency can embark on a wide-ranging, comprehensive regulatory scheme was well developed in the recent U.S. Supreme Court case that addressed U.S. EPA’s authority under the CAA to require major source permits for GHG emissions. Considering U.S. EPA’s interpretation to allow PSD and Title V to be triggered by GHG emissions, the Court found that:

EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”

*Utility Air Regulatory Group v EPA*, 573 U.S. \_\_\_ (2014) (citations omitted).<sup>2</sup>

In the present rulemaking, U.S. EPA interprets little-used section 111(d) broadly to go well beyond the plain meaning of the source-oriented statute in order to bring under 111(d) rulemaking any entity or person that produces or distributes electricity. Such an extremely broad reading was not clearly intended by Congress.

The desire of U.S. EPA to expand their authority under section 111(d) to further a much broader regulatory scheme is clearly demonstrated by their view that they can exercise the full panoply of authority to issue a FP under section 111(d) as they have to issue a federal implementation plan under section 110. Section 111(d)(2)(A) does grant U.S. EPA the “same authority to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under [CAA section 110(c)] in the case of failure to submit an implementation plan.” U.S. EPA uses this grant of authority as *carte blanche* to open the regulatory floodgates. “The phrase ‘same authority to prescribe’ indicates that Congress viewed the EPA’s authority to issue a federal plan for

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<sup>2</sup> In *UARG*, the U.S. Supreme Court held that U.S. EPA may not treat greenhouse gases (GHG) as an air pollutant for purposes of determining whether a source is a major source required to obtain a Title V operating permit under the CAA. U.S. EPA claims that requiring new applicable requirements in a new Title V permit if the affected EGU does not already have one is not prohibited by the *UARG* case. [80 FR 64984] U.S. EPA is mistaken. The requirement to get a Title V permit only to incorporate an applicable requirement to control CO<sub>2</sub>, a GHG, is exactly what the Court did not allow. Furthermore, Ohio EPA cannot impose substantive new requirements for the first time in a Title V permit. [cite GE case]

designated pollutants under CAA section 111(d) as, in some sense, co-extensive with its authority to issue a FIP for [NAAQS] pollutants under CAA section 110.” [80 FR 64986] The language “same authority to prescribe a plan” as under section 110(c), however, only refers to U.S. EPA’s authority to issue a FP in place of the SP. It does not grant the authority to U.S. EPA to enforce all the measures that a state might have the authority to enforce or the authority to impose an emission limitation that can only be met through measures that U.S. EPA does not have the authority to enforce.

U.S. EPA misconstrues how its authority under section 111(d) is informed by its authority under section 110. The fundamental differences between sections 110 and 111 illustrate this well. Section 110 provides for the actions that a state has to take to implement a plan that demonstrates how a state will achieve and maintain the NAAQS. The state implementation plan (SIP) is an extensive and comprehensive program of emission limitations and other control measures to protect public health; ambient air quality monitoring requirements; provisions to address interstate air quality impacts; enforcement provisions; and monitoring, recordkeeping and reporting requirements. CAA section 110(a)(2). The state has to ensure that it has the adequate authority under state law to carry out all the provisions of the SIP. CAA section 110(a)(2)(E). When U.S. EPA develops a federal implementation plan (FIP) under CAA section 110(c) because a state fails to submit a plan or submits an inadequate plan, the FIP must contain the same requirements, each of which U.S. EPA must have the authority to implement just as a state does under a SIP. “The term ‘federal implementation plan’ means a plan (or portion thereof) promulgated by the Administrator . . . which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emission allowances), and provides for attainment of the relevant [NAAQS].” CAA section 302(y). U.S. EPA admits as much: “The scope of the EPA’s action to undertake a FIP under CAA section 110 is informed by the scope of the state’s action to undertake a SIP; likewise, the scope of the EPA’s action to undertake a federal plan under CAA section 111(d) is informed by the scope of the state’s action to undertake a state plan.” [80 FR 64987]

U.S. EPA then misunderstands the point when it states that “the question whether the EPA would have the authority to directly order the implementation of the measures in the building blocks in this proposed federal plan is not only not relevant but represents a categorical misunderstanding of the nature of the BSER in relation to the imposition of standards of performance under a CAA section 111(d) plan.” [80 FR 64987] U.S. EPA understands that it does not have the authority to impose the building blocks on affected EGUs, but still somehow asserts that it has the authority to impose emission standards that can only be achieved by the EGU going well beyond its fence line to, in essence, implement the building blocks anyway. U.S. EPA admits that this is the ultimate goal:

The EPA here does not, and need not, propose an implementation approach of directly intervening to re-dispatch certain units, construct new RE projects, or take other measures, either included in the BSER or not. The

agency determined the BSER and emission performance levels in the EGs on a reasonable assumption that all of those things can actually happen. In providing for the implementation of federally enforceable standards of performance in the federal plan proposed in this action, the agency is ensuring that these things will happen. [80 FR 64987]

On the one hand, they say that they do not need to have the authority to implement the building blocks. They just “set emission standards for each of the affected EGUs in the federal plan state, provide mechanisms for their implementation and enforcement, and otherwise leave to the owners and operators of the affected EGUs the decisions about what measures they want to take to comply with the emission standard.” [80 FR 64987] On the other hand, U.S. EPA acknowledges that an affected EGU cannot comply without implementing measures contemplated in the building blocks.

Further illustration of how U.S. EPA uses the grant of authority in section 110 to expand its authority under section 111(d) is found in how U.S. EPA sets up allowance set-asides to address leakage to new sources. U.S. EPA grounds their authority to establish these set-asides as “essentially a type of ‘economic incentive’ authorized by the CAA. . . .” [80 F R 65019] U.S. EPA draws on its authority under section 110 to develop this far-reaching regulatory program. “In designing a federal plan under CAA section 111(d), the EPA recognizes its authority as being, in some sense, the same as that available under CAA section 110(c), where the use of economic incentives is authorized.” [80 FR 65019, n.99] Anything U.S. EPA has the authority to do in a federal implementation plan under section 110, apparently, they have the authority to do under a FP under section 111(d).

Another example of U.S. EPA inappropriately extending the tools available to it under section 110 to expand its authority under section 111(d) is the use of a procedure “consistent with CAA section 110(k)(5)” to address a SP that is “substantially inadequate.” [80 FR 65036] U.S. EPA proposes to issue the equivalent of a SIP-call if a state is not sufficiently implementing its approved SP and to issue a FP if the SP is not adequately cured. “If the state does not submit a plan revision in response to the call to cure the failure to provide for implementation, the EPA would have the authority to promulgate the FP being proposed.” [80 FR 65036] Once again, U.S. EPA’s proposal to apply a section 110 mechanism to section 111(d) reveals the inherent difficulty in using section 111(d) to restructure the power system. After revamping the entire power system on a state-by-state basis through SPs, U.S. EPA now asserts that it can call a SP and ultimately replace the SP with a FP if implementation of the SP is deemed “inadequate.” After years of planning, extensive technical review, numerous stakeholder meetings and comment, the promulgation of state rules subject to full notice-and-comment rulemaking, and maybe the passage of state law, U.S. EPA can replace a SP with its own. The section 110 procedure is meant to allow a SIP to be replaced partially or entirely with a FIP because the end goal, attainment and maintenance of the NAAQS, is a central feature of the CAA with full Congressional buy-

in. A SP under section 111(d), on the other hand, cannot be so easily replaced, and maybe cannot be replaced at all once in place, and should have carefully thought-out and measured sanctions for a state that does not adequately implement its fully-approved plan.

When coupling the broad construction of the best system of emission reduction (BSER) with the far-reaching authority under section 110, U.S. EPA has established a regulatory scheme under a rarely used section of the CAA to assert its authority over the entire energy industry with no real means to contain that authority.

Furthermore, in coming up with a wide-ranging approach to a FP under section 111(d), U.S. EPA ignores the one clear directive from Congress to consider the remaining useful life of the sources being regulated: “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.” CAA section 111(d)(2). Congress did not want older facilities with relatively short useful lives to have to prematurely cease operations in order to comply with a new standard of performance. U.S. EPA claims that the “federal plan adequately considers ‘remaining useful lives’” of affected EGUs by providing for trading and other flexibilities authorized in the EGs.” [80 F R 64983] How can the requirement to adequately consider the remaining useful lives of sources subject to the standard of performance be satisfied by “flexible” programs that were not even considered when promulgating the BSER and that do not specifically address older facilities? In fact, the efficiency standard of building block one, the one building block that directly regulates inside the fence line and so was consistent with the way a standard of performance was meant to be developed, is probably the one appropriate place to consider the remaining useful life of a source. By not considering it there, U.S. EPA is undermining the clear policy choice of Congress because no owner of an older plant will invest the capital to run it more efficiently, thus making older plants less competitive and placing the burden on other sources of fossil fuel energy to comply with the emission standard. Further comments on the requirement to consider the useful remaining life of a facility are discussed later in these comments.

In addition to U.S. EPA’s lack of authority to promulgate the Clean Power Plan (CPP) under section 111(d), and U.S. EPA’s overreach with regard to the proposed FP under section 111(d), U.S. EPA’s action is unconstitutional as it violates the Separation of Powers doctrine by exceeding the powers conferred upon it by the CAA, or violates the Tenth Amendment to the U.S Constitution by coercing States to implement laws and rules dictated by U.S. EPA to achieve its desired regulatory program. For further discussion of how U.S. EPA’s action violates the U.S. Constitution, please refer to comments submitted on the proposed FP by the Ohio Attorney General. Ohio EPA concurs with and supports those comments.

## Reliability

U.S. EPA is proposing to not include a reliability safety valve in the FP or MRs. As stated in the proposal, in the final CPP emission guidelines (EG), U.S. EPA makes available a reliability safety valve that could be used if an unanticipated catastrophic emergency caused a conflict between “*inflexible requirements*” that a SP might impose on an affected EGU or EGUs. [80 FR 64982] In reality, U.S. EPA incorporated a reliability safety valve in the CPP EGs due to significant concerns raised as a part of the comment process by stakeholders regarding reliability. In fact, the reliability safety valve is not being created to address when an “*inflexible requirement*” imposed by a state may interfere with reliability but rather because of concerns raised that the inflexible nature of the CPP itself, whether through a SP or FP, could lead to a reliability concern.

U.S. EPA “agree[s] with many commenters that it is prudent to provide an electric system reliability safety valve as a precaution.” [80 FR 64671] Further, this safety valve is an “additional assurance.... for use where the built-in flexibilities are not sufficient to address an immediate, unexpected reliability situation.” [80 FR 64827]

However, under the FP, U.S. EPA states “inflexible requirements are not imposed on specific plants.... the very nature of the federal plan, in which affected EGUs can obtain allowances or credits if needed, supports reliability. Therefore, a reliability safety valve for the federal plan is not needed.” [80 FR 64982]

In reality the reliability safety valve is needed in all the plan options, including the FP and MRs. It is designed for unseen circumstances that can arise when an emergency situation occurs and the design of the FP does not provide an escape from those unforeseen circumstances. Under the final EGs, the reliability safety valve is available to all plan types, regardless of how flexible (or potentially inflexible) a state may design its plan. U.S. EPA should propose a reliability safety valve as part of the FP and MRs.

Ohio EPA also urges U.S. EPA to revise the provisions for the reliability safety valve. Even U.S. EPA acknowledges they do “not anticipate that EGUs operating under a plan that permitted emissions trading would meet these criteria.” [80 FR 64878] This is because one of the qualifying criteria is the EGU(s) in question would be subject to a requirement in the plan that imposes emission constraints such that their operation in response to the emergency would result in emissions that violate the constraints. U.S. EPA interprets this to mean EGUs operating under a plan that permitted emissions trading would not meet this criterion. U.S. EPA never provided an opportunity for comment on these criteria and this element must be revised and stakeholders must be provided an opportunity to comment.

To address the reliability, in lieu of a safety valve, U.S. EPA is taking comment on including an allowance set-aside, or similar mechanism, under the mass-based FP approach. The idea is to make allowances available in emergency circumstances in which an affected EGU was compelled to provide reliability critical generation and demonstrated that a supply of allowances needed to offset its emissions was not

available. If there were unused allowances remaining in the set-aside, U.S. EPA would distribute them to affected EGUs pro rata. [80 FR 64982] U.S. EPA states they are not proposing to include an allowance set-aside, or similar mechanism in a rate-based approach, to address reliability issues in the FP but they again request comment on how such an approach could be implemented.

Ohio EPA does not agree that an EGU(s) called upon in an emergency situation to operate in a manner not planned as a part of its compliance path should be required to first secure allowances/ERCs from the trading program before it could invoke the reliability safety valve. Ohio EPA does not believe another set-aside of allowances/ERCs should be created to address unforeseen emergency situations. It is envisioned there may be situations where an unforeseen emergency occurs that would mean the overall state budget or EGU emissions rates could just not be complied with. For example, what if a nuclear plant was forced to shutdown? In June of 1998, Davis Bessie in Oak Harbor, Ohio was required to shutdown when a tornado damaged the plant's switchyard and disabled the plant's ability to receive off-site power. It is imperative U.S. EPA incorporates a reliability safety valve in all plan types (including the FP and MRs) that, when properly justified, is available to EGUs without the need to create set-asides or require the purchases of allowances/ERCs.

The lack of inclusion of a reliability safety valve indicates U.S. EPA's lack of understanding regarding the electric generation, transmission and distribution system and reinforces the basic premise that the CAA was not designed nor intended to regulate the electric generation, transmission and distribution system.

### **Alternative Compliance Option**

U.S. EPA is requesting comment on an alternative compliance option for affected EGUs that commit to retiring by December 31, 2029. [80 FR 64980] U.S. EPA is proposing a framework in the August 2015 "Alternative Compliance Option Technical Support Document (TSD)." Affected EGUs that would be under a rate-based or mass-based program would be required to comply with a unit-specific mass-based emissions limitation and would be removed from the SP or FP that it otherwise would have been subject to (except for the monitoring and reporting requirements of the FP would remain applicable). U.S. EPA expects the federally enforceable limitation and commitment would be memorialized in the facility's Title V permit. U.S. EPA is proposing to require an initial showing of interest by March 1, 2020 and the enforceable commitments to be in place by March 1, 2021. For EGUs that would have been subject to a mass-based plan, the mass limit is proposed to be based on the amount of emissions equal to the sum of the allowances the unit would have been allocated for the interim period (2022-2029). For EGUs that would have been subject to a rate-based plan, the mass limit is proposed to be based on 2012 generation multiplied by the corresponding rate-based standard for the unit in the compliance period. This provides a mass value for the year that would be multiplied by the number of years in the compliance period. Since the

EGU(s) would be complying with this mass limit it would be removed from all applicable trading programs and the state budgets/rates would be adjusted down accordingly.

Ohio EPA has concern with this alternative. First, as U.S. EPA acknowledges in the TSD, this option could affect allowance/ERC-market liquidity and/or prices.

When a unit retires under the model mass-based program, those allocations are retained in the state allowance pool. Eventually, as proposed, they are incorporated into the RE set-aside where unused allowances would be re-distributed back to existing EGUs. The proposed alternative compliance option unfairly removes those allowances from the state allowance pool. If this alternative compliance path option is finalized, U.S. EPA must ensure that any allowances that remain unused by a shutdown EGU be returned to the state's pool. Furthermore, the allowances that an EGU would have received in 2030 and beyond should also be added to the state allowance pool just as it would if the EGU shutdown under the MR.

Likewise, under the model rate-based program there is an opportunity for an EGU to earn ERCs if they operate below the rate-based standard. Because U.S. EPA is proposing to use the rate-based standard to convert a rate-based EGU under this alternative to a mass-based compliance path, any remaining "credits" should be returned to the state's ERC pool. This is especially important because typically when a unit is planning a shutdown they reduce operations as they near the shutdown date.

Under the mass-based approach, U.S. EPA is requesting comment on whether there should be an alternative that would allow the EGU to increase its unit-level emission limit by purchasing allowances and surrendering them. This element of the proposal is perplexing. U.S. EPA is proposing an alternative compliance mechanism to remove units from the SP or FP that it otherwise would have been subject to, yet then is soliciting comments on allowing them to purchase allowances so they may increase emissions. Ohio EPA is concerned U.S. EPA is creating complexity and inequity. Why not allow this under the rate-based approach also? If U.S. EPA moves forward with this option, it should apply to either mass or rate-based approaches and stakeholders should have an opportunity to comment on the U.S. EPA framework for allowing these EGUs that would no longer be subject to an FP or SP to purchase allowances/ERCs.

U.S. EPA is also requesting comment on whether this option should be available to all, limited to certain small units, or not implemented at all. Again, this is another example of federal government overreach. U.S. EPA has provided little information on the framework for the alternative considering the additional variations for which U.S. EPA is requesting comment. In addition, U.S. EPA must ensure the excess allowances/ERCs must be returned to the state pool, as discussed above. And finally, if U.S. EPA decides to move forward with this option, Ohio EPA urges U.S. EPA to not limit the availability of this option.

## **Compliance Extension Alternative**

U.S. EPA is requesting comment on whether it would be possible to grant, on a case-by-case basis, certain affected EGUs, particularly small entities, additional time to come into compliance. [80 FR 64981] The CPP essentially is restructuring the entire energy sector in a very short period of time under the CAA. In reality, there is no way to effectively predict issues that may arise as the CPP is implemented. Notwithstanding U.S. EPA's lack of legal foundation to adopt this rule and the CPP, U.S. EPA should incorporate a provision in the rule allowing for case-by-case extensions for compliance upon approval by the state and U.S. EPA. Further, there is no need to limit this provision to particular entities (small). Extensions should be granted based on merit and not the size of the source without financial penalty. Lastly, this provision should also be extended to SPs under the final CPP EGs.

## **Rate-Based Model Rule and Federal Plan**

U.S. EPA is proposing to apply the subcategorized emission performance rates established under the CPP EGs, rather than individual state rate-based goals, in the MR and FP (if a rate-based is finalized). [80 FR 64990] The same glide paths (compliance periods) from the CPP EGs would also apply.

Ohio EPA must reiterate our comments on the proposed CPP. In those comments, we presented numerous technical and cost-related issues that U.S. EPA did not take into consideration at the state-specific level based upon what U.S. EPA believes is the BSER. U.S. EPA proposed a goal that was not practically achievable in Ohio. Ohio EPA raised serious concerns with the achievability of each individual component of BSER, or the combination of, in the State of Ohio. As a result of consideration of comments and further analysis, U.S. EPA set a new goal, which is lower than the goal proposed. Ohio EPA reiterates our disagreement with this BSER and reaffirms that implementing this fundamentally flawed, and illegal, section 111(d) regulation will burden Ohio industry, manufacturing and citizens with more expensive and less reliable power.

Further, at a minimum, U.S. EPA should be considering individual state circumstances and analyzing the feasibility of the glide paths on a state-by-state basis. U.S. EPA should make adjustments to the glide paths as necessary based upon state-specific circumstances to ensure reliability is considered and provide states with the best opportunity for achievability.

## **Scope of ERC Eligibility**

U.S. EPA is proposing a different eligibility scope of proposed "ERC resources" for the FP compared to the MR. Only designated categories of affected EGUs, certain metered renewable energy (RE), and applicable nuclear are eligible under the FP. [80 FR 64973,

64989] Specifically, the FP would be limited to on-shore utility scale wind, utility scale solar photovoltaics, concentrated solar power, geothermal power, nuclear energy, and utility scale hydropower. This is another example of the federal government picking “winners and losers” in the development of electric generation supply. Not only has this been an area traditionally left for state regulation, this type of specificity has not been attempted under the CAA, nor should it.

In comparison, the MR also allows technologies such as qualified biomass, waste-to-energy, non-affected combined heat and power (including waste heat power) along with demand-side EE. By limiting the scope of available technologies under the FP, U.S. EPA is adding additional practical concerns on BSER achievability. U.S. EPA is taking away the ability to consider remaining useful life and stranded assets, which U.S. EPA believes states can consider because of the multiple design choices that are available. We disagree that U.S. EPA is addressing remaining useful life under the FP, in part, because it is affording EGUs the flexibility of participating in a trading program where they can acquire credits or allowances to comply with their emission standard, thereby avoiding the need for installation of costly pollution controls at sources with a short remaining life. [80 FR 64983] U.S. EPA is attempting to limit the scope of the FP, in what appears to be an attempt to minimize the administrative burden on U.S. EPA.

U.S. EPA is proposing that affected EGUs that perform at a rate below the applicable emissions rate are eligible to be issued ERCs. [80 FR 64990] This raises the question as to how affected EGUs that permanently shutdown are addressed in a rate-based plan. Under mass-based plans, allocations are based upon the mass goal which is derived from the technology specific performance rates taking into consideration generation. It is proposed that retired units, under the mass-based plan, continue to receive allowances for a defined period and then the allowances go to the RE set-aside. When not fully used, they are then redistributed to other affected EGUs. Likewise, under a rate-based plan, affected EGUs that retire, and therefore, “emit below their applicable emission standard” [80 FR 65903] should qualify to continue to generate ERCs based upon the specific technology performance rate. However, U.S. EPA’s required equation for calculating the number of ERCs to be generated requires multiplication by generation. This is a flawed system since emissions units that retire under a rate-based plan are not able to receive credit for such retirement based upon some degree of historical generation.

U.S. EPA is proposing to recognize the “gas shift” (GS) component of Building Block 2 of the BSER by allowing GS-ERCs to be generated by NGCC units with incremental generation at 75% capacity. [80 FR 64991] U.S. EPA is requesting comment on two of the three factors used in the calculation of GS-ERCs.

First, the “GS-ERC emission factor” represents how much better an individual NGCC’s emission rate is compared against the fossil steam standard. U.S. EPA is proposing to base this calculation on the individual unit level so that better performing NGCC units are rewarded. Comment is being requested on whether using the least stringent

region's baseline 2012 average emission rate would provide for simplification. U.S. EPA is attempting to pick a favored technology over other existing sources.

Second, the "incremental generation factor" represents the distribution of increased NGCC generation across all NGCC generation. U.S. EPA proposes, for each compliance period, to calculate each region's incremental generation and apply the least stringent region's generation to the individual units. U.S. EPA is requesting comment on whether a single "least stringent" region should be used throughout all compliance periods, even if it's not the "least stringent" in all compliance periods, or if the "least stringent" should be re-selected every compliance period (or possibly every year). U.S. EPA is selecting the "least stringent" method for this factor because it is consistent with the method for applying the least stringent region nationally in computing the BSER. However U.S. EPA is also requesting comment on applying each region's own regional generation rate in the calculation. U.S. EPA should maintain flexibility by providing the option that GS-ERCs could be based on either a unit or region specific "GS-ERC emission factor" and U.S. EPA should promulgate regulations for applying either a unit specific or regional "incremental generation factor." Better performing units should be rewarded accurately and appropriately.

#### Responsibility for ERC Validity

U.S. EPA states "Because the goal of this rulemaking is the actual reduction of CO2 emissions, it is fundamental that ERCs represent the MWh of energy generation or savings they purport to represent. To this end, only valid ERCs that actually meet the standards articulated in this rule may be used to satisfy any aspect of compliance by an affected EGU with emission standards. The responsibility for the validity of the ERC rests with the affected EGU. Despite safeguards included in the structure of ERC issuance and tracking systems, such as the review of eligibility applications and M&V reports, and EPA issuance of ERCs, ERCs may be issued that do not, in fact, represent eligible zero-emission MWh as required in the EGs. A variety of situations may result in such improper ERC issuance, ranging from simple paperwork errors to outright fraud. The EPA requests comment on ways that the EPA could safeguard the validity of an ERC." [80 FR 64991]

Ohio EPA has serious concerns with the statement "The responsibility for the validity of the ERC rests with the affected EGU." U.S. EPA has proposed several mechanisms through the EM&V and M&V framework to safeguard the validity of an ERC. In the end, EM&V and M&V are approved by either the U.S. EPA or a state (with an approved SP) and ERCs are issued. Once approved, the responsibility of validity is no longer relevant. From that point forward, there should be no legal repercussions to affected EGUs. U.S. EPA cannot finalize any mechanism that would devalue an ERC or place legal repercussions on an affected EGU that received or purchased a federal or state approved ERC. Ultimately, it is the responsibility of U.S. EPA or state agencies to

ensure validity of the ERC prior to issuance and affected EGUs should not be held responsible for what could be a very limited occurrence of erroneous approval of ERCs.

Ohio EPA has proven that without this federal interaction, CO2 emissions in the state have decreased. The concerns raised by U.S. EPA are only a result of the interjection of the federal government in an area historically controlled by the state.

### *ERC Issuance for ERCs Used to Adjust a Rate*

U.S. EPA is proposing a two-step process for ERC issuance for ERCs that are used to adjust a rate. [80 FR 64999-65000] Under the first step, providers submit an eligibility application, with an EM&V plan, for approval. The eligibility application must demonstrate the generation is an eligible project and is credited under only one plan. The second step is the requirement for an M&V plan including quantification of the MWh of generation to be credited.

If a provider is located in a state with a mass-based plan, special requirements are proposed. The provider must demonstrate the measure is implemented to meet electricity load in a rate-based state. U.S. EPA proposes this demonstration would be through a power purchase agreement or other delivery contract. The preamble states incremental nuclear providers in a mass-based state are excluded from this ability to generate ERCs in a rate-based FP state. It is not clear from the preamble text if incremental nuclear providers in a mass-based state are also excluded from the ability to generate ERCs in a rate-based state that is not under the FP. Under 40 CFR 62.1645(a), “nuclear energy” is eligible for generation of ERCs under the FP and SP. Under 40 CFR 62.1645(a)(3), requirements for mass-based state ERC generators is identified but there is no restriction on incremental nuclear. Therefore, it is assumed from the regulatory text that incremental nuclear ERCs are eligible regardless of whether the rate-based state is under a FP or SP. Regardless, Ohio EPA does not believe there should be any limitation on the ability of incremental nuclear located in a mass-based state to generate ERCs provided it can be demonstrated it is generated to meet load in a rate-based state.

U.S. EPA states the reason for its exclusion is associated with interstate effects (references section III.A. of the preamble and VIII.K.1 and VIII.L of the preamble of the final EGs). However, after reviewing those sections, there is no discussion of incremental nuclear and how generating ERCs under this scenario is associated with interstate effects. In fact, the preamble of the EG states under footnote 984 [80 FR 64906] “qualifying measures that can be used to adjust the CO2 emission rate of an affected EGU are discussed at section VIII.K.1, and include.... incremental nuclear generation.”

Section VIII.K.1 explains how commenters also recommended that the U.S. EPA consider nuclear generating units and RE generating units in a consistent manner for

CO2 emission rate adjustments in state plans. U.S. EPA agreed with comments that nuclear generation and RE should be treated consistently when it comes to CO2 emission rate adjustments. U.S. EPA determined that generation from new nuclear units and capacity uprates at existing nuclear units will be eligible for use in adjusting a CO2 emission rate, just like new and uprated capacity RE. However, U.S. EPA further states, consistent with the reasons discussed for not including the preservation of existing nuclear capacity in the BSER— namely, that such preservation does not actually reduce existing levels of CO2 emissions from affected EGUs— preserving generation from existing nuclear capacity is not eligible for use in adjusting a CO2 emission rate. In contrast, U.S. EPA explains, any incremental zero-emitting generation from new nuclear capacity would be expected to replace generation from affected EGUs and, thereby, reduce CO2 emissions; and the continued commitment of the owner/operators to completion of the new units and improving the efficiency of existing units through uprates can play a key role in state plans. Therefore, U.S. EPA determined, consistent with treatment of other low- and zero-emitting generation, new nuclear power generating capacity installed after 2012 and incremental generation resulting from nuclear uprates after 2012 are measures eligible for adjusting a CO2 emission rate.” [80 FR 64902]

However, existing nuclear units (*i.e.*, those that originally commenced operation in 2012 or earlier years) that receive operating license extensions are not eligible for use in adjusting a CO2 emission rate, except where such units receive a capacity uprate as a result of the relicensing process. Only the incremental capacity from the uprate is eligible for use to adjust a CO2 emission rate. Applicable generation (in MWh) from incremental nuclear power is determined in the same manner as that described for incremental RE above.” [80 FR 64902] Therefore, Ohio EPA believes U.S. EPA should not be placing any limitations on incremental nuclear under this option, other than that it is generated to meet load in a rate-based state.

U.S. EPA is proposing project eligibility applications would be accepted after the finalization of the FP and prior to the first compliance period, as soon as the agency is able to establish an application process, and that applications would be accepted on an annual basis. [80 FR 64999] Comments are being requested on whether a quarterly or biannual application process is more appropriate. Ohio EPA believes project eligibility applications should be accepted at any point up to a deadline. The proposal seems to imply applications would only be accepted at designated periods. Some entities may wish to plan for, and prepare, applications earlier than other entities. There is no reason not to accept applications at any point in time provided they are submitted by the deadline for processing by U.S. EPA.

Nothing in this comment should suggest that Ohio EPA in some way validates or approves of U.S. EPA’s overall approach. These comments are being provided to minimize the overall economic and reliability damage to the state in the event that U.S. EPA completes this unlawful rulemaking.

## True-Up

ERCs could be acquired/traded throughout the compliance period but affected EGUs must hold sufficient ERCs that qualify for compliance in its account by November 1 at midnight of the year following the conclusion of the compliance period. [80 FR 65009] U.S. EPA is requesting comment on a shorter deadline, such as March 1 or June 1. Shortening the deadline would provide access to less ERCs considering non-EGU ERC generators submit for ERCs by June 1 of the year after generation. Furthermore, U.S. EPA's NODA process must be expedient enough to ensure that those ERCs are available to be traded for compliance by November 1. It should also be noted, and corrected, that under 40 CFR 62.16420 it states sufficient allowances must be held in a compliance account by July 1.

U.S. EPA is proposing ERCs can be "banked" into future years with no "shelf-life", consistent with other trading programs. [80 FR 65010] U.S. EPA is taking comment on whether there should be restrictions on banking. For example, if there should be a quantitative limit or cap on the number of ERCs that can be banked or whether an ERC should be eligible to be banked between the interim and final compliance periods. Ohio EPA does not believe there should be any restrictions on banking or the shelf-life of ERCs under the CPP just as there has not been under previous trading programs, such as CAIR and CSAPR. There is no justification, especially considering the nature of CO<sub>2</sub>.

## **EM&V and M&V**

U.S. EPA is proposing EM&V and M&V requirements for several potentially creditable ERC resources although only a subset would apply under the FP due to the FP limiting the options for ERC resources (as discussed above in our comments). [80 FR 65002] U.S. EPA's proposed approach includes three submittal requirements: EM&V reports, M&V reports, and verification reports. [80 FR 65003] U.S. EPA is also proposing requirements for independent verifiers. [80 FR 65001] In addition to the detailed requirements under the proposed rule, U.S. EPA is accepting comment on a draft EM&V guidance which provides additional details along with examples that apply in specific circumstances and would be presumptively approvable.

Ohio EPA has reviewed the EM&V and M&V proposal and draft guidance. Unfortunately, Ohio EPA is unable to provide meaningful comment on these elements due to the complexity of EM&V and M&V and the specific technical knowledge that would be required to provide meaningful feedback. It is not feasible given Ohio's limited resources, and considering the short time-frame for comments, to develop the level of expertise that would be needed to provide comment on these aspects of the proposal. This further demonstrates how the manner in which U.S. EPA has developed this CPP is not within the regulatory realm of the CAA. Ohio EPA is an agency tasked with the role of implementing the CAA requirements. U.S. EPA has taken a rarely-used section

of the CAA, section 111(d), that has always been applied on a source-oriented “inside-the-fence” basis as justification to expand their regulatory reach and exert authority over the national power generation, transmission and distribution system.

Regardless of the above, Ohio EPA wishes to provide a few general comments on the elements of the EM&V and M&V proposal. With respect to the proposed requirements for independent verifiers [80 FR 65001], Ohio EPA urges U.S. EPA to be mindful in implementing the criteria for approving an independent verifier. The proposed criteria is somewhat vague in only requiring independent verifiers have a code of conduct and have the necessary technical qualifications to provide verification services for the subject in question, including sufficient knowledge of the emission trading program rules and knowledge of auditing, accounting, and information management practices. The federal government should not be certifying individuals that perform certain energy savings functions, potentially on an individual home basis. U.S. EPA has no legislative authority to adopt such a program and the concept should be abandoned.

The Public Utility Commission of Ohio will be providing additional detailed comments on EM&V and M&V. Ohio EPA supports the concerns and suggestions raised by PUCO and urges U.S. EPA to amend the EM&V and M&V requirements to address these concerns.

### **Mass-Based Model Rule and Federal Plan**

U.S. EPA is proposing a mass-based trading program MR and FP where the aggregate emissions limit for a state is its statewide mass-based emission goal, in short tons, finalized in the EGs with the same compliance periods and interim step goals as the EGs. [80 FR 65012] As noted above, Ohio EPA must reiterate our comments on the proposed CPP. In those comments, we presented numerous technical and cost-related issues that U.S. EPA obviously did not take into consideration at the state-specific level based upon what U.S. EPA believes is the BSER. U.S. EPA proposed a goal that was not practically achievable in Ohio. Ohio EPA raised serious concerns with the achievability of each individual component of BSER, or the combination of, in the State of Ohio. As a result of consideration of comments and further analysis, U.S. EPA set a new goal, which is lower than the goal proposed. Ohio EPA reiterates our disagreement with this BSER and affirms that implementing this fundamentally flawed, and illegal, section 111(d) regulation will burden Ohio industry, manufacturing and citizens with more expensive and less reliable power.

Further, at a minimum, U.S. EPA should be considering individual state circumstances and analyzing the feasibility of the glide paths on a state-by-state basis. U.S. EPA should make adjustments to the glide paths as necessary based upon state-specific circumstances to ensure reliability is considered and provide states with the best opportunity for achievability.

### Allowance Distribution and Recordation

U.S. EPA is requesting comment on numerous alternative approaches for allocation methods. One suggestion U.S. EPA offers is to conduct an auction of all or some of the allowances. [80 FR 65018] U.S. EPA notes that if it conducted allowance auctions, any revenue from such auctions must be deposited in the U.S. Treasury under federal law. Ohio EPA believes U.S. EPA does not have the authority to auction allowances. Clearly, U.S. EPA is completely overstepping its legislative authority and imposing a tax on generators. There was a provisions proposal for a BTO tax that failed. Similar to a tax, the auctioning of allowances would produce significant revenue. There is no factual, historical or legal basis to suggest that Congress authorized U.S. EPA to auction “allowances” that must be paid to allow fossil-fuel fired EGUs to continue to operate. This concept, along with the expansion of authority to issue allowances for CO<sub>2</sub>, goes beyond the scope of CAA section 111(d) requirements.

U.S. EPA proposes to record allowances for one compliance period at a time. [80 FR 65019] U.S. EPA believes recording allowances for one compliance period at a time provides flexibility for a state to replace the FP with its own plan in a timely way as U.S. EPA is proposing to allow a state to replace the FP (or allocations) with its own approved SP (or allocations) only for a compliance period for which allowances have not yet been recorded. [80 FR 65029] U.S. EPA should finalize a method that does not limit the opportunities for states to take over implementation through a SP (or allocations). States could propose a methodology for addressing allocations that have already been distributed to ensure the integrity of the program. It is simple accounting and well within the capabilities of U.S. EPA and states to implement.

### State Allocation Methodology Option

U.S. EPA recognizes that states may prefer different approaches to distribute allowances and is proposing a state may choose to replace (for any or all compliance periods) the FP allowance-distribution provisions with its own allowance-distribution provisions, provided that the state’s approach addresses emissions leakage and includes the CEIP. [80 FR 65015, 65027] Ohio EPA believes it is imperative states are provided an opportunity to determine allocations, similar to how states are afforded that opportunity under the CSAPR federal implementation plan that was also forced upon states. States are in the best position to determine, based on state-specific circumstances, how allowances should be distributed. U.S. EPA must adopt this flexibility. As discussed in the preamble [80 FR 65028], states should have complete flexibility to distribute allowances to affected EGUs or other entities (such as RE facilities) or to auction some or all of the allowances.

As part of the state allowance-distribution methodology, U.S. EPA is proposing it must address leakage by providing incentive to counteract leakage, e.g., by including allowance set-asides like the output-based allocation and RE set-asides, or other allocation approaches designed to counteract leakage. U.S. EPA is also taking comment on an option to allow states to make a demonstration leakage would not occur (similar to the final EGs). [80 FR 65027] Ohio EPA believes states should have complete flexibility to address leakage in methods other than those proposed by U.S. EPA including the ability to demonstrate that leakage would not occur. This is a flexibility that must be afforded under the FP and MR.

### True-Up

U.S. EPA is proposing to require sources to demonstrate compliance (true-up) on May 1 of the year after the last year in the compliance period. [80 FR 65014, 65031] This provides four months for affected EGUs to evaluate reported emissions and obtain any allowances needed for compliance. U.S. EPA is requesting comment on an earlier or shorter deadline. Ohio EPA does not support shortening the deadline. True-up under the mass-based MR/FP should fall within the same timing as the rate-based MR/FP, November 1. Sufficient time for acquiring allowances for compliance, including those allowances that would be generated from set-asides is necessary. States that elect to do their own allowance distribution methodologies to perform any activities that may be required of them during the true-up process also need an appropriate amount of time. Further, U.S. EPA must recognize there will likely be a mix of states operating under rate and mass-based plans. In this mix of states there will likely be affected EGUs under the same ownership operating under both plan types. Alignment of timing between rate-based and mass-based plans would reduce the complexity of having different true-up periods for these owners.

Like the rate-based MR/FP, U.S. EPA is proposing that allowances may be banked for use in any future compliance period, with no restriction on the use of banked allowances, including from the interim periods into the final periods. [80 FR 65014] U.S. EPA is again taking comment on whether there should be restrictions on banking. Again, Ohio EPA does not believe there should be any restrictions on banking or the shelf-life of allowances under the CPP just as there has not been under previous trading programs, such as CAIR and CSAPR.

### Allowance Set-Asides to Address Leakage

U.S. EPA's inclusion of set-asides further demonstrates the illegal nature of this proposal and the CPP. U.S. EPA claims the CPP to be a source specific regulation that applies to existing EGUs, yet plans must account for leakage through influencing new unit optimization. These new units are already regulated through CAA section 111(b),

yet allowance set-asides seek to indirectly regulate these same units or impose limitations on their use.

U.S. EPA is proposing two allowance set-asides to address leakage to new sources. [80 FR 65019-65020] Specifically, U.S. EPA proposes a set-aside for allowances distributed to existing NGCC units based on output to mitigate emission leakage to new sources. Second, U.S. EPA proposes a set-aside for electricity generation from qualifying RE to address the potential for leakage to new sources, as increased RE capacity can serve electricity demand in place of new sources. In general, Ohio EPA does not support the concept of leakage (further comments regarding the concept of leakage are discussed under the Leakage section of our comments). U.S. EPA has once again imposed a regulatory requirement with limited legal justification without providing an opportunity for stakeholders to be engaged and comment on the requirement. If U.S. EPA continues with this illegal rulemaking effort, Ohio EPA has significant concerns with elements of U.S. EPA's proposed approach to address leakage.

For the output-based allocation (OBA) set-aside, U.S. EPA's intent is to incentivize each eligible EGU to generate more as they would get a larger allowance allocation from this set-aside. [80 FR 65020] U.S. EPA believes new combustion turbines (*i.e.*, NGCC units and simple cycle combustion turbines) would be expected to generate more absent this set-aside. U.S. EPA is requesting comment on which EGUs should be eligible to receive OBA from the set-aside. U.S. EPA is proposing that it only apply to NGCC units subject to the final EGs but is taking comment on extending it to affected steam generating units (SGU). [80 FR 65020] Although U.S. EPA acknowledges OBA for SGUs may increase generation from units subject to the mass limit, leading to reduced generation and emissions from new emitting sources, but is not proposing this approach because they believe it is not as effective as OBA to NGCC units. U.S. EPA's basis for this belief is that this would incentivize generation from relatively high-emitting EGUs, which would likely increase allowance prices as other emission reductions are made to respect the overarching mass limit. This approach would thus strongly counteract the intended effect of lowering the production cost from sources subject to the proposed FP (compared to emitting sources not subject to the plan). U.S. EPA is obviously continuing to bias towards natural gas. Ohio EPA does not entirely agree with the assumption that allowing SGUs to also receive OBAs would increase allowance prices because they would invest in other emissions reduction methods in order to acquire these allowances. Regardless, the purpose of this set-aside is to address leakage and incentivizing any existing affected EGU to operate more achieves correction of the perceived threat that absent this incentive new natural gas sources will undermine the integrity of U.S. EPA's BSER. This is a set-aside of the mass goal and the overall mass goal will remain the same regardless of whether the increased generation comes from SGUs or NGCC. If U.S. EPA intends to finalize this OBA set-aside, it should apply to both SGUs and NGCC.

U.S. EPA is requesting comment on extending the OBA from this set-aside to zero-emitting generators (including both renewable and nuclear generation). [80 FR 65021]

Ohio EPA is unsure why U.S. EPA would consider extending the OBA to zero-emitting generators. First, nuclear generators typically run at 90 to 95% capacity and increasing generation from these sources would be negligible. Second, U.S. EPA is also proposing an RE set-aside to address leakage and is proposing to grow that set-aside to a significant degree, which will be discussed in our comments later. It appears that at every turn U.S. EPA is attempting to reduce the amount of allowances available to existing affected EGUs. Ohio EPA does not support extending the proposed OBA to zero-emitting generators.

If the allowances allocated are less than set-aside, U.S. EPA is proposing to distribute the remaining OBAs to affected EGUs using the historic-generation-based approach. [80 FR 65022] If U.S. EPA moves forward with the OBA set-aside, they must ensure remaining OBAs are distributed to all affected EGUs (including SGUs).

U.S. EPA proposes allowances in the RE set-aside would be reserved from the vintage of the state's assigned mass goal prior to allocation of allowances to sources. U.S. EPA is proposing that 5% of allowances will be reserved and is requesting comment on a range of 1 to 10%. U.S. EPA is proposing 5% based upon determining an appropriate volume of set-aside resources that, at a range of possible allowance prices, are projected to incent the development of additional RE projects. [80 FR 65022] If U.S. EPA's own analysis shows a 5% set-aside is sufficient to incent development of RE projects why would it be necessary to increase the percentage? Again, it appears at every turn U.S. EPA is attempting to reduce the amount of allowances available to existing affected EGUs. Ohio EPA does not support increasing this set-aside.

U.S. EPA is proposing to be eligible to receive the RE set-aside allowances, an entity must meet the eligibility requirements for rate-based ERC issuance. However, this set-aside is limited to on-shore wind, solar, geothermal power, and hydropower that have the capacity to provide data quantified by a revenue quality meter. U.S. EPA proposes new nuclear units and capacity uprates at existing nuclear units are not eligible because they do not think a set-aside used as an incentive for incremental nuclear capacity is a useful way to address leakage to new sources during the performance period, due to unique costs and development timelines for incremental nuclear power. [80 FR 65023] As discussed above, Ohio EPA believes there is no reason to limit the scope of resources under the FP, and likewise, under the RE set-aside. The RE set-aside, whether under a FP, SP or MR, should encourage maximization of all of these technologies and EE. U.S. EPA is requesting comment on whether DS-EE and CHP should also be eligible for this set-aside. [80 FR 65022] The RE set-aside, whether under a FP, SP or MR, should encourage maximization of all eligible RE technologies including, nuclear, CHP, biomass, WHP and EE. Again, by limiting the scope of available technologies under the MR/FP, U.S. EPA is removing compliance flexibility advertised by U.S. EPA as making the BSER achievable. U.S. EPA is taking away the ability to consider remaining useful life and stranded assets. This is another example of U.S. EPA attempting to limit the scope of the MR and FP.

For both the FP and MR, U.S. EPA is proposing that eligible RE capacity must be located in the mass-based state for which the set-aside has been designated [80 FR 65023] and that the generation for which an entity receives allowances from the set-aside would not be eligible for ERC issuance in rate-based states. [80 FR 65023] U.S. EPA is requesting comment on whether capacity outside the state should be recognized, and how that could be implemented. Yet under the CEIP, U.S. EPA is proposing the RE/EE must be located in *or benefit* the state that is under the FP (and assumed any SP). [80 FR 65000] In addition, under the proposed rate-based approach, ERCs can be issued for RE measures located in a mass-based state, if it can be demonstrated that load-serving entities in the rate-based state have contracted for the delivery of the RE generation that occurs in a mass-based state to meet load in a rate-based state. [80 FR 64978] There is no reason not to implement similar flexibility under the RE set-aside.

U.S. EPA is proposing the project proponent must submit documentation for eligibility projecting the expected annual MWh generation for the RE project before distribution of allowances from the set-aside so that distribution can occur prior to the year generation occurs. [80 FR 65023-65024] Further, the projections will be the basis for distribution. U.S. EPA states the EM&V requirements for the set-aside differ from those for rate-based ERC issuance, particularly because it is based upon projections provided prior to generation rather than metered data provided after the generation occurs (though they are proposing that the projections will be checked against ex-post metered data).

U.S. EPA believes this still provides sufficient rigor because the set-aside does not directly affect program stringency; these allowances don't affect the CO2 emissions outcome because it is a set-aside of the total number of allowances initially created. In contrast U.S. EPA believes the rigor of the EM&V and necessity to determine ERC issuance after generation occurs is because each decision to issue an ERC based on a quantification of RE generation affects the ultimate amount of allowable CO2 emissions, because the number of ERCs is determined by the amount of MWhs approved as eligible for ERC issuance and the ERC does not exist until the issuance decision is made. U.S. EPA goes on to say they do not believe the overall integrity of mass-based implementation is significantly affected by the robustness of whatever eligibility requirements U.S. EPA ultimately sets for RE recognition through allocation from the set-asides. However, then U.S. EPA proposes to require "robust demonstrations" of the eligibility and EM&V projections for RE generation submitted for the set-aside, demonstrations that are based on the best practices of existing programs; stating, this is necessary to assure the delivery of RE as a result of the set-aside.

U.S. EPA is also proposing to require, after each generation year, an M&V report (approved by a third party verifier) with the MWhs from metering of RE generation actually produced, to assure that they have met the projected level of generation. [80 FR 65024] U.S. EPA proposes if the project or program does not reach the MWhs projected in a particular generation year, the unfulfilled MWhs will be subtracted from that RE provider's MWhs eligible for the set-aside in the next generation year, or

multiple years if the deficit exceeds the MWhs projected for the upcoming year. Further, if the deficit is greater than 10% in a particular year, the provider will need to provide an explanation of the deficit and will be required to reevaluate their projections for future years. If such deficits continue through all years of the relevant compliance period, the provider will be disqualified from receiving future set-asides for the following compliance period.

While Ohio EPA concurs there are fundamental differences between ERC allowance issuance for RE and allowance issuance for the RE set-aside, we do not agree with the necessity of still requiring as robust a demonstration of eligibility and EM&V under the RE set-aside. As U.S. EPA noted, the overall integrity of mass-based implementation is not significantly affected by the robustness of whatever eligibility requirements U.S. EPA ultimately sets for RE recognition through allocation from the set-asides. Therefore, the same plan elements, administrative burden, eligibility and EM&V requirements should not be necessary. Wherever possible, U.S. EPA should be minimizing the complexity and resource burden on states and entities affected by the CPP and this is an area where that complexity can be reduced. U.S. EPA is proposing safeguards to ensure generation is confirmed after it occurs. U.S. EPA is proposing a method to make up for deficits. Requiring these safeguards should offset the requirement for robust demonstrations for RE set-aside applicants.

With respect to U.S. EPA's belief the set-aside does not directly affect program stringency, Ohio EPA disagrees. By taking a percentage of the allowances from the mass goal determined to be the BSER and setting them aside for RE only, there is no guarantee those allowances will return to the affected EGUs or even the state from which they were set-aside. Ultimately, a set-aside may actually increase the stringency of BSER.

U.S. EPA is requesting comment on whether a provider with continuing deficits should also be disqualified from receiving ERCs for the generation in question from states with rate-based plans. [80 FR 65024] There is no reason to disqualify a provider from generating ERCs under rate-based plans. Those ERCs are distributed after metered generation occurs.

U.S. EPA is seeking comment on whether a portion of this set-aside should be targeted to RE projects that benefit low-income communities [80 FR 65024] or if they should limit eligibility to project providers that are also the owners or operators of affected EGUs. [80 FR 65023] The purpose of this set-aside is for addressing leakage and states/RE providers should not be limited in the scope of eligible RE or eligible RE providers.

U.S. EPA is proposing to accept RE set-aside project applications up to a deadline of June 1 in the year prior to the year during which the RE generation occurs. [80 FR 65024] After review and approval, the project will be entered into the pool of projects that will receive set-asides in any compliance period. U.S. EPA is proposing to afford providers an opportunity to update projections for future generation years by June 1 of

the year prior to the generation year in question. Finally, on December 1 of the year prior to each year of the compliance period in question, U.S. EPA proposes to distribute allowances from the set-aside pro-rata. U.S. EPA is requesting comment on whether to restrict projects to a maximum number of allowances they can receive per MWh of generation, such as 1 allowance per MWh. Again, there is no need to place unnecessary restriction on the RE set-aside program.

Although Ohio EPA has provided comments to U.S. EPA to minimize the overall economic and reliability damage to the state from this unlawful action, nothing in these comments should be construed as an approval or endorsement of the overall approach. The FP proposal unreasonably demands the states' coal-fired EGUs to reduce generation and should be abandoned.

### *Shutdown, Modified or Reconstructed Units*

U.S. EPA is proposing if an affected EGU does not operate for two consecutive calendar years, the unit would continue to receive allocations for a limited number of years after it ceases operation, after which the allowances that would otherwise have been allocated to that unit would be allocated to the RE set-aside for the state in which the retired unit is located. [80 FR 65026] U.S. EPA believes continuing allocations to non-operating units for a period of time reduces the incentive to keep a unit operating simply to avoid losing the allowance allocations for that unit. Specifically, U.S. EPA is proposing if an affected EGU does not operate for 2 full calendar years, then starting with the next compliance period for which allowances have not yet been recorded, the allowances would be allocated to the RE set-aside. [80 FR 65027] Therefore, the number of years of non-operation for which a retired unit would receive allocations would vary depending on when a unit retires.

Similarly, U.S. EPA is also proposing that, if a unit is modified or reconstructed such that it is no longer an affected EGU, then starting with the next compliance period for which allowances have not yet been recorded, the allowances that would otherwise have been allocated to the unit would be allocated to the RE set-aside. [80 FR 65027] U.S. EPA is requesting comment on the number of years for which a unit would continue to receive allocations. However, in the proposed regulations it begins with the next compliance period after modifying or reconstructing.

Ohio EPA does not agree with U.S. EPA's proposed approach to address retired, modified or reconstructed units. We note that U.S. EPA takes a slightly different approach in CSAPR where the affected unit does not receive allowances after two calendar years of retirement/modification/reconstruction. This would eliminate any inequities in the number of years these units could receive allocations under the proposed approach simply based on the date of shutdown relative to the subsequent compliance period. U.S. EPA's issues are self-created having ventured into this regulatory area without legislative authority.

With respect to the allocations going to the RE-set aside, U.S. EPA is attempting to reduce the amount of allowances available to existing affected EGUs. Specifically, U.S. EPA's proposal would mean that units given allocations based on 2012 generation but shutdown prior to January 1, 2020 or modified/reconstructed prior to January 1, 2022 would never see their initial allocations. Rather they would automatically go to the RE set-aside. Currently there are numerous tons of CO2 emitting affected EGUs in Ohio that will be shutdown by 2020 and a few other affected EGUs with obligations to shutdown or convert to natural gas by 2030. Accounting for these allocations going into the RE set-aside represents 14% of Ohio's total allocations for 2022 to 2024 period, 15% for the 2025 to 2027 period, 18% for the 2028-2029 period, and 20% for the final period.

If you add in the proposed 5% RE-set aside, the total RE set-aside would be 19% of the state budget for the 2022 to 2024 period, 20% for the 2025 to 2027 period, 23% for the 2028-2029 period, and 25% for the final period.

If you add in the OBA and CEIP, Ohio's allocations to affected EGUs would be reduced by 25% for the 2022 to 2024 period, 22% for the 2025 to 2027 period, 25% for the 2028-2029 period, and 27% for the final period.

This drastically reduces Ohio's allocations to existing and operating affected EGU's and will drive down availability of allowances.

Lastly, U.S. EPA is requesting comment on whether they should even continue allocations to the retired/modified/reconstructed units. [80 FR 65027] Obviously U.S. EPA could see how continuing the allowances to modified/reconstructed units would create an incentive to modify/reconstruct. Such units would not only receive higher rates under the modify/reconstruct 111(b) requirements but they would also have the benefit of selling allowances to existing units. Ohio EPA believes that any allocation scheme developed under this proposal must reduce the unreasonable economic burden on the existing coal-fired fleet.

### **Affected EGU Monitoring**

U.S. EPA is proposing affected EGUs under the FP (and it appears MR also) would monitor and report CO2 emissions in accordance with 40 CFR part 75 by January 1, 2022. U.S. EPA is requesting comment on whether the required monitoring should start the year before. Ohio EPA does not agree with requiring earlier monitoring. There is no basis for requiring monitoring to be initiated prior to the period when compliance is required.

## **Trading, Ready-for-Interstate-Trading, U.S. EPA Administered Trading Programs**

Ohio EPA has provided comments above regarding specific provisions of the trading programs under the rate-based and mass-based MR/FPs. Ohio EPA wishes to provide broader comment regarding the proposed trading programs.

U.S. EPA acknowledges that a broad trading region provides greater opportunities for cost-effective implementation of controls compared to a smaller region. [80 FR 65011] As we have commented above, this is all the more reason it is important for U.S. EPA to finalize both MRs and the choice of a FP at the same time. This will greatly assist states in determining an appropriate, cost-effective, path for implementation within their state taking into consideration the options for trading with states subject to a FP.

U.S. EPA is proposing that affected EGUs in any state covered by a FP could trade compliance instruments with affected EGUs in any other state covered by a FP or a SP meeting the conditions for linkage to the FP. [80 FR 64976-64978] One condition includes that the SP must use the identical compliance instrument as the FP. For example, mass plans must be in short tons; however, U.S. EPA is taking comment on extending linking states to include those in metric tons. There is no reason to include this as a criterion. The conversion between metric tons and short tons is a simple calculation and should not be a reason to exclude a state from trading with another. U.S. EPA must maximize the ability for trading.

U.S. EPA proposes the SP must use a U.S. EPA administered tracking system; however U.S. EPA is also requesting comment on expanding this to include a SP that uses a U.S. EPA-designated tracking system that is interoperable with the U.S. EPA-administered system. U.S. EPA should ensure states have the flexibility to use their own tracking system if they so choose. U.S. EPA should require these systems be interoperable with U.S. EPA's system and provide assistance to states. It is imperative to provide states with the maximum ability to be able to easily trade with another state, regardless of the tracking system used.

U.S. EPA is proposing under both the mass and rate-based MRs/FPs that ATCS would be used for generation, trading and compliance [80 FR 64999, 65029] Tracking should be done as has been in the past for programs such as the NOx SIP Call, CAIR and CSAPR. States should not be burdened to administer a trading system and potentially not even an "interoperable" system. The CPP should be designed in a manner that any state, whether under the FP or a SP (MR or not) has the choice to have all generation, trading and compliance tracked through the U.S. EPA administered tracking system without charge to the state. The U.S. EPA proposal to take over the electric generation, transmission and distribution system in this country is being done without the consent of the State of Ohio. The funds utilized to develop the tracking system for ERCs or allowances must be derived from U.S. EPA's budget and not from state grant dollars. U.S. EPA does not have Congressional approval to redirect the state grant dollars for its own purposes.

## **Entering and Exiting Trading Programs**

U.S. EPA is proposing the FP can be replaced with a SP for future compliance periods and the transition would occur at the conclusion of a FP compliance period. [80 FR 65011, 65033] U.S. EPA is requesting comment on whether this transition should be allowed to occur in the middle of a compliance period and how the integrity of the program maintained. As discussed elsewhere, U.S. EPA should finalize a method that does not limit the opportunities for states to take over implementation through a SP. States proposing a methodology for addressing allocations that have already been distributed that ensures the integrity of the program should be a reasonable option.

## **CEIP**

U.S. EPA is proposing to implement CEIP for States' under the FP and provides draft provisions for the MRs. CEIP is limited to metered RE and EE in low-income communities that commences construction or implementation after submitting a final SP or after September 6, 2018. [80 FR 64978, 65000, 65025] However, U.S. EPA is allowing states under the final EGs to implement this program by allowing projects to count as early as September 6, 2016 if a final SP is submitted at that time. Ohio EPA believes any project that meets the criteria and constructed or implemented after 2012 (the CPP baseline for determining BSER) should be eligible for the CEIP if it creates zero-emitting generation or savings in 2020 or 2021. There is no reason to base the qualification on when a final plan is submitted or when a FP is implemented. Especially, when as designed, it would create inequity for states that submit final SPs at different dates. U.S. EPA should be designing this program to encourage more activities to qualify. In this manner, some activities that could be very beneficial may postpone implementation in order to qualify under the program.

In addition, U.S. EPA is proposing the RE/EE must be located in or benefit the state that is under the FP (and assumed any SP). [80 FR 65000, 65025] It is imperative that U.S. EPA ensure the flexibility for RE/EE programs implemented in another state can be used to generate ERCs for a state that receives the benefit of that RE/EE.

U.S. EPA is proposing to design a mechanism to ensure the aggregate emission performance of sources required to meet the standard will not be impacted during the future performance periods. Specifically, for the rate-based plans, U.S. EPA is taking comment on the structure for adjusting the stringency of the emission standards during the compliance periods, for example, retiring the same number of ERCs as issued under the CEIP or adjusting the rates. [80 FR 65000] This is an extremely important aspect of how the CEIP plan will function in a rate-based state. U.S. EPA must provide stakeholders with an opportunity to comment on an actual proposed approach once U.S. EPA provides that approach.

U.S. EPA proposes that initial allowance allocations for the first compliance period would be the mass goal, minus the CEIP set-aside and RE set-aside. [80 FR 65016]

One hundred million early action allowances from each of the 3 years in the first compliance period (2022, 2023, and 2024) for a total of 300 million allowances would be set aside for the CEIP. [80 FR 65025] Ohio EPA has significant concern that removing all of the CEIP set-aside from the first compliance period could strain compliance for entities.

Of equal concern is how the CEIP set-aside required of participating states (the state's portion) will be redistributed if unused. U.S. EPA proposes unused matching ERCs/allowances that remain in the accounts of states participating in the CEIP on January 1, 2023, will be retired. [80 FR 65001, 65025] The proposal does not appear to elaborate on how any unused allowances from the state's portion is addressed. All ERCs/allowances from the states' portion should be redistributed back to the state and only retire once they have been used for compliance

The proposal states that unused ERCs/allowances from the matching pool that are undistributed after September 6, 2018 would be redistributed to participating states. [80 FR 65001, 65025] U.S. EPA is requesting comment on how to redistribute, for example pro rata (like the initial distribution) or placing them back in a federal pool and distributing to project providers on a first come first served basis. Ohio EPA has concerns that distributing based on a first come first serve basis could create inequity. Providers or states with more experience or greater RE/EE capabilities could receive a greater proportion of any unused allowances. U.S. EPA should either redistribute to states pro rata, or if placed in a federal pool, distribute pro rata to all eligible applicants after all requests are received.

U.S. EPA is proposing to reserve a portion for RE and a portion for EE and requests comment on the relative sizes. [80 FR 65001, 65025] Ohio EPA does not support apportioning between RE and EE. There is no basis for this limitation. U.S. EPA should create a single pool of allowances where RE or EE are eligible in order to maximize participation in the program. This will allow states that may have limited capabilities to achieve RE or EE to maximize participation in the program area for which there is greater potential in their state.

Lastly, U.S. EPA made a request for input and ideas regarding the proposed CEIP via a non-regulatory docket at an unspecified time in November, 2015. In our December 15, 2015 letter to U.S. EPA regarding this request, Ohio EPA noted it did not provide the appropriate method or timing for meaningful engagement.

U.S. EPA provided an informal "questions and related issues" document for stakeholder input. Upon review it was apparent that U.S. EPA was requesting input on the fundamental design of CEIP program and asked stakeholders to provide a response by December 15, 2015. Many of these questions are so expansive in nature and would have required comprehensive investigation and thought in order to provide meaningful feedback. Ohio EPA expressed that we would have preferred U.S. EPA formulate a proposal on the design of a plan with various options and questions regarding those options for stakeholders to consider, rather than providing open ended questions.

Due to the short timeframe for the comment period on the “questions and related issues” document and the significant effort, in-depth research, and analysis that Ohio would have needed to conduct in order to provide meaningful input on such far reaching questions, Ohio EPA did not submit detailed responses to those questions regarding how to design a CEIP. But we did note we look forward to providing comments and reviewing a formal CEIP proposal. We reiterate; U.S.EPA must provide states with the opportunity to comment in the future. We encourage U.S. EPA to allow the CEIP to remain a flexible program and to not have the regulatory burden so great that it makes the CEIP undesirable for states or for developers of RE/EE measures to participate. If designed appropriately, the CEIP could be a promising opportunity to achieve early reductions and help vulnerable communities in the State of Ohio.

### **Leakage**

As noted above, U.S. EPA is proposing an opportunity for states to determine their own allowance distributions, provided that the state’s approach addresses emissions leakage and includes the CEIP. [80 FR 65015, 65027]

As discussed above, U.S. EPA is proposing that a state allowance-distribution methodology must address leakage by providing incentive to counteract leakage, *e.g.*, by including allowance set-asides like the OBA and RE set-asides, or other allocation approaches designed to counteract leakage. U.S. EPA is also taking comment on an option to allow states to make a demonstration that leakage would not occur (similar to the final EGs). [80 FR 65027] To reiterate, Ohio EPA does not support the concept of leakage. U.S. EPA has once again imposed an important regulatory requirement without providing an opportunity for stakeholders to be engaged and comment on the requirement. Further, if U.S. EPA must require states to address the concept of leakage, U.S. EPA must provide the same flexibility afforded in the final EG under the FP and MR. There is no reason to restrict the ability for a state to choose alternative methods to address the concept of leakage or make a demonstration the concept of leakage would not occur.

Ohio EPA’s concern is that U.S. EPA has provided little clarity in the final EG, regulations or this proposal as to what is expected in an alternative leakage demonstration or a demonstration leakage would not occur. States need clarity early on regarding what would be approvable under these demonstration types in order to effectively design a CPP.

Section VIII.J. of the final CPP EGs appears to provide the only guidance on how to address leakage. [80 FR 64887] U.S. EPA provides the following options as a sufficient demonstration that potential emission leakage has been addressed [80 FR 64888]:

1. Regulate new non-affected fossil EGUs as a matter of state law in conjunction with emission standards for affected EGUs in a mass-based plan. If a state adopts an EPA provided mass budget that includes the state mass-based CO2

goal for affected EGUs plus a new source CO2 emission complement, this option could be presumptively approvable.

Ohio EPA notes, as does U.S. EPA, that this would not be an option under the FP. However, if U.S. EPA delegates authority to the state to implement the allocation portion of the FP, and therefore, leakage, prohibiting a state from exercising this option is not appropriate.

2. Use allocation methods in the state plan that counteract incentives to shift generation from affected EGUs to unaffected fossil-fired sources. If a state adopts allowance set-aside provisions exactly as they are outlined in the finalized MR, this option could be presumptively approvable.

In the final EGs, U.S. EPA references the proposed set-aside approaches under the FP/MR proposal. U.S. EPA then states that if a state is submitting a plan with an allocations approach that differs from that of the finalized MR, the state should also provide a demonstration of how the specified allocation method will provide sufficient incentive to counteract potential emission leakage. Clarity and guidance on this demonstration is severely deficient. Only very limited guidance is provided in this proposed MR/FP:

U.S. EPA states the purpose of these provisions is to inhibit the potential for leakage to new sources. For example, the RE set-aside provides for increased RE capacity that can serve electricity demand in place of new sources. [80 FR 65019-65020] Further, U.S. EPA states, the RE set-aside is proposed to address leakage by lowering the marginal cost of production of clean RE technology. [80 FR 65022]

With respect to the OBA, U.S. EPA states this approach can most effectively address emission leakage if targeted to those affected EGUs subject to a mass goal that face the greatest difference in their incentive to generate relative to otherwise similar EGUs that are not subject to a mass goal. [80 FR 65020] U.S. EPA believes new combustion turbines (*i.e.*, NGCC units and simple cycle combustion turbines) would be expected to generate more absent this set-aside. Therefore, the difference in generation incentives between affected stationary combustion turbines subject to a mass goal and otherwise similar new stationary combustion turbines that are not subject to a mass goal is likely one of the most salient deviations in production incentives to address.

However, then U.S. EPA requests comment on extending OBA from this set-aside to affected SGUs, acknowledging OBA for SGUs may increase generation from units subject to the mass limit, leading to reduced generation and emissions from new

emitting sources. [80 FR 65020] Then, U.S. EPA states they are not proposing this approach because they believe it is not as effective as OBA to NGCC units. U.S. EPA's basis for this belief is that OBAs to SGUs would incentivize generation from relatively high-emitting EGUs, which would likely increase allowance prices as other emission reductions are made to respect the overarching mass limit. This approach would thus strongly counteract the intended effect of lowering the production cost from sources subject to the proposed FP (compared to emitting sources not subject to the plan).

We addressed our concerns with these concepts in our comments above, but wish to reiterate that U.S. EPA's purpose of the proposed set-asides is to address leakage to new sources, maintaining the BSER for existing sources, and not to reduce CO2 emissions. U.S. EPA must be mindful of this purpose when states' request alternatives to address leakage, or the lack thereof.

3. Provide a demonstration in the state plan, supported by analysis, that emission leakage is unlikely to occur due to unique state characteristics or state plan design elements that address and mitigate the potential for emission leakage.

Under this option, U.S. EPA's only guidance is that unique factors could be the presence of existing state policies addressing emission leakage or unique characteristics of the state and its power sector that will mitigate the potential for emission leakage. [80 FR 64890] Further, U.S. EPA requires the demonstration must be supported by credible analysis. No further clarity or guidance is provided in the proposed FP/MR.

Possibly the only meaningful example of what type of analysis may be needed is in the final EGs where U.S. EPA refers to an analysis they conducted where the mass-based goals were coupled with measures to address leakage that produces utility power sector emissions performance that is similar to emissions performance under the rate goals. U.S. EPA refers commenters to Chapter 3 of the Regulatory Impact Analysis (RIA) for more information on this analysis. [80 FR 64823]

The only discussion of leakage appears in a footnote on Page 3-19 of the RIA:

U.S. EPA also analyzed a mass-based scenario without any set-asides using IPM, which produced a 2030 emission reduction estimate of 31 percent, relative to 2005 levels (approximately a 1 percent erosion of emission reductions due to leakage to new sources of emissions, relative to both the mass-based scenario that includes the RE set-aside, and the rate-based scenario. This equates to approximately 24 million short tons of CO2.). The scenario can be found in the docket for the final rule, and is called "Mass-based without set-aside."

It appears the set-asides to address leakage are intended to ensure the same percent reduction in 2030 levels would be achieved under both the mass-based and rate-based programs, 32%. U.S. EPA's modeling showed only a 31% reduction in 2030 for the mass-based goals and then incorporated the proposed set-asides to achieve 32%. Would U.S. EPA then be looking to states to provide an analysis that ensures a 32% reduction in state CO<sub>2</sub> emissions by 2030 or leakage is not addressed? Based on the limited guidance, Ohio EPA must assume U.S. EPA would point to this type of demonstration as necessary. Ohio EPA would find a projected difference of 1% well within the accuracy of these models. Given the accuracy of modeling, especially U.S. EPA's Integrated Planning Model, U.S. EPA must accept alternative demonstrations that do not require, or rely on, modeling to ensure a 32% reduction in state CO<sub>2</sub> emissions by 2030.

Obviously, U.S. EPA has not provided sufficient information on the concept of leakage and how states could address leakage under the final EG rule or in this proposal. As expressed before, leakage was never included in U.S. EPA's original CPP proposal. U.S. EPA finalized this requirement without providing stakeholders an opportunity to comment. U.S. EPA has remained unable to provide any clarity when an explanation or guidance was repeatedly requested during U.S. EPA's outreach efforts (state calls, webinars, etc.). U.S. EPA must provide evidence of this concept of leakage and sufficient detail on expectations to address leakage to stakeholders prior to imposing this regulatory requirement on states. Stakeholders must be provided an opportunity to engage and provide comments on the record.

Further, the need to address the concept of leakage demonstrates a significant separation from a source specific emission standard. Ohio EPA reinforces that a discussion of "leakage" is only necessary because U.S. EPA promulgated a standard containing emissions targets for existing units that are more stringent than that of new units. Technological advances traditionally justify more stringent source specific standards for new units compared to existing units. Historically, U.S. EPA regulations have relied on this concept. However, the CPP will drive up the cost of carbon emissions from existing units making new generation more economical. Yet when new, efficient and compliant generation is developed, leakage seeks to prevent its full market-driven utilization. U.S. EPA tries to address this convoluted "problem" through an unnecessary and burdensome "leakage" demonstration.

### **Remaining Useful Life**

U.S. EPA states they do not allow for states to deviate from state goals in the final CPP EGs based on remaining useful life and that such goal adjustments are not necessary or appropriate in the FP either. [80 FR 64982] However, U.S. EPA acknowledges that the final EGs permit states in applying a standard of performance in their SPs to take into account facility-specific factors such as the remaining useful life of a facility.

“A state could select a form of standards (e.g., marketable credits or permits, retirements of certain older facilities after their useful life, etc.) that avoids or diminishes concerns about facility-specific factors such as remaining useful life. . . . In addition to providing states with flexibility on the form of the standards of performance in their plans, the guidelines leave to each state the design of the specific requirements that fall on each affected EGU in applying those standards. To the extent that an emission standard that a state may wish to adopt for affected EGUs raises facility-specific issues, the state may make adjustments to a particular facility’s requirements on facility specific grounds, so long as any such adjustments are reflected (along with any necessary compensating emission reductions to meet the state goal) in the state’s CAA section 111(d) plan submission. Finally, we note that these guidelines permit states to use a rate or mass CO<sub>2</sub> emission goal, and that each of these pathways allow states multiple design choices. Under either pathway states can take into consideration remaining useful life and seek to avoid stranded assets.” [80 FR 64871]

In contrast, the FP does not afford the same flexibility in considering remaining useful life as U.S. EPA is affording to states in designing their plans. U.S. EPA acknowledges they are not obviated from the “requirement that the EPA itself, in the design of its federal plan, consider, among other factors, the remaining useful lives of the affected facilities.” [80 FR 64982] U.S. EPA’s consideration relies upon an analysis based on an interpretation that the intent of Congress in enacting the provision was to allow for older facilities with short remaining useful lives to not be required to install capital-intensive pollution control devices to meet emission standards that would only be used for a short period of time before a plant ceased operation. U.S. EPA states they are “confident the proposed federal plan will not force costly pollution control investments at older plants with short remaining useful lives.” [80 FR 64983] The basis of this confidence lies in the fact U.S. EPA believes it has provided a sufficiently long compliance period and is affording EGUs the flexibility of participating in a trading program. [80 FR 64983] U.S. EPA states these tools will create economic incentives that reward over-performance of some affected EGUs, and allow others to simply acquire credits or allowances to comply with their emission standard, thereby avoiding the need for installation of costly pollution controls at sources with a short remaining life. Effectively, U.S. EPA claims to be addressing remaining useful life by requiring what could be costly acquisition of credits or allowances in lieu of costly control devices. At least with costly control devices, EGUs would be investing in future operation. U.S. EPA must take into account the remaining useful life of a facility as a facility-specific concern in the FP just as they acknowledge states must when developing a SP.

## **New Source Review**

U.S. EPA continues to assert implications for new source review (NSR) would be few because it would only be in cases where a physical or operational change increased another pollutant (like HRI). [80 FR 64985] However, U.S. EPA is requesting comment on potential scenarios that could trigger NSR, especially for small entities, and how the permitting process could be streamlined consistent with judicial precedent.

To reiterate our comments on the proposed CPP, Ohio EPA believes U.S. EPA is under-estimating how NSR may impact sources under this proposal and over-estimating the ability of states to offer flexibility in a manner that would allow sources to avoid NSR. U.S. EPA acknowledges HRI changes could cause the triggering of NSR but they “expect those situations to be few” as “states have considerable flexibility in selecting varied measures” [79 FR 34928] U.S. EPA is incorrect in its assumptions. Ohio EPA provided U.S. EPA with an appendix containing a listing of HRIs which U.S. EPA identified as violating either PSD or NSR rules. Furthermore, the October 15, 2014 Sargent & Lundy letter states “many of the options for HRI listed in our 2009 Report have triggered New Source Review actions by EPA and others.”

U.S. EPA contemplates states could adjust EE/RE as a way of reducing the future emissions of an affected source initially predicted (without such alterations) to increase its emissions as a result of a plan requirement....due to reduced demand for their operations”, or “develop conditions for a source expected to trigger NSR that would limit the unit’s ability to move up in the dispatch enough to result in a significant net emissions increase...(effectively establishing a synthetic minor limit)” [79 FR 34928] Ohio EPA did not agree with these options. This is another example of U.S. EPA negating the perceived flexibility they are affording states. Now in the process of developing our plans we must add in another complex layer of eliminating measures that could trigger NSR for our sources.

In the proposed CPP, U.S. EPA requested comment on whether, with adequate record support, the state plan could include a provision, based on underlying analysis, stating that an affected source that complies with its applicable standard would be treated as not increasing its emissions, and if so, whether such a provision would mean that, as a matter of law, the source’s actions to comply with its standard would not subject the source to NSR. States should not have to provide any analysis to avoid subjecting sources to NSR under the FP. Ohio EPA firmly believes U.S. EPA should exempt any source from NSR that undertakes a change required under the SP or a FP, not just for CO2 but for an increase in any other pollutant.

### **Framework Regulations**

U.S. EPA is proposing to amend the framework regulations in a manner to make the section 111(d) program function more like the section 110 program and U.S. EPA proposes these changes will be applicable to all section 111(d) plans going forward. [80 FR 65034] As reiterated in our legal comments above and our comments on the proposed CPP, U.S. EPA does not have the authority to impose SIP-like CAA

requirements of section 110 on states under section 111. U.S. EPA must drop all of the extraneous section 110 requirements that are being proposed for inclusion into the section 111(d) plan requirements.

Specifically, U.S. EPA is proposing six changes to the section 111(d) process in the framework regulations: (1) Partial approval/disapproval mechanisms similar to CAA section 110(k)(3); (2) a conditional approval mechanism similar to CAA section 110(k)(4); (3) a mechanism for U.S. EPA to make calls for plan revisions similar to the “SIP-call” provisions of CAA section 110(k)(5); (4) an error correction mechanism similar to CAA section 110(k)(6); (5) completeness criteria and a process for determining completeness of state plans and submittals similar to CAA section 110(k)(1) and (2); and (6) updates to the deadlines for U.S. EPA action. [80 FR 65034] Ohio EPA reiterates its comments on the proposed CPP:

#### *Partial and Conditional Approval*

Although U.S. EPA’s regulations do not explicitly provide for different forms of approval similar to the section 110 SIP program, U.S. EPA is requesting comment on incorporating two approval mechanisms provided for in sections 110(k)(3) and (4), 42 U.S.C. 7410(k)(3) and (4); partial and conditional approval. [79 FR 34916] The basis U.S. EPA cites is found in section 111(d)(1) which provides that U.S. EPA “shall prescribe regulations which shall establish a procedure similar to that provided under section 110 under which each state shall submit...” Ohio EPA continues to believe the provisions regarding U.S. EPA’s requirement to “establish a procedure similar to that provided under section 110” is with respect to providing procedures for each state to “submit...a plan which establishes standards of performance.” Section 111(d)(2) is clear on U.S. EPA’s authority to prescribe a plan when a state fails to submit or to enforce a plan where states fail to enforce. Unlike section 110, U.S. EPA is given no explicit authority to provide for different types of approvals. Once again U.S. EPA is attempting to fit this proposal into a section 110 SIP type proposal due to its overly complex nature, which is not the intent of a section 111(d) requirement. Ohio EPA does not agree with this expansion of U.S. EPA’s authority.

#### *SIP Call*

U.S. EPA is additionally requesting comment on whether the agency should promulgate a mechanism under section 111(d) similar to the SIP call mechanism in section 110. [79 FR 34908] U.S. EPA states this would allow them to require the state to cure a deficiency with a new plan after the agency makes a finding of the plan’s failure to achieve the state goal during a performance period. U.S. EPA only has the authority under section 111(d)(2) to develop a plan where the state fails to submit an approvable plan or to enforce the state’s plan where the state fails to do so. Once again it appears U.S. EPA is attempting to turn this section 111(d) regulation into a section 110 SIP-like plan in order to address the

complexities of this proposal. U.S. EPA lacks the basic authority to modify the section 111(d) program into a SIP program.

Likewise, U.S. EPA lacks the basic authority to modify the section 111(d) program into a SIP program with respect to an error correction mechanism similar to CAA section 110(k)(6) and the completeness criteria and a process for determining completeness of state plans and submittals similar to CAA section 110(k)(1) and (2).

And lastly, under this proposal, U.S. EPA intends to update the deadlines for acting on state submittals and promulgating a FP under 40 CFR 60.27(b), (c), and (d) to more closely track the current versions of CAA sections 110(c) and 110(k) adopted in 1990. [80 FR 65038] Under the proposed CPP, U.S. EPA stated its authority to extend deadlines is afforded under 40 CFR 60.27(a) and (b). U.S. EPA states “The implementing regulations also establish timetables for state and EPA action: States must submit state plans within 9 months of the EPA’s issuance of the guidelines<sup>3</sup>, and the EPA must take final action on the state plans within 4 months of the due date for those plans<sup>4</sup>, although the EPA has authority to extend those deadlines<sup>5</sup>. [79 FR 34844] 40 CFR 60.27 states:

- (a) The Administrator may, whenever he determines necessary, extend the period for submission of any plan or plan revision or portion thereof.
- (b) After receipt of a plan or plan revision, the Administrator will propose the plan or revision for approval or disapproval. The Administrator will, within four months after the date required for submission of a plan or plan revision, approve or disapprove such plan or revision or each portion thereof.
- (c) The Administrator will, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth a plan, or portion thereof, for a State if:
  - (1) The State fails to submit a plan within the time prescribed;
  - (2) The State fails to submit a plan revision required by § 60.23(a)(2) within the time prescribed; or
  - (3) The Administrator disapproves the State plan or plan revision or any portion thereof, as unsatisfactory because the requirements of this subpart have not been met.
  - (d) The Administrator will, within six months after the date required for submission of a plan or plan revision, promulgate the regulations proposed under paragraph (c) of this section with such modifications as may be appropriate unless, prior to such promulgation, the State has adopted and submitted a plan or plan revision which the Administrator determines to be approvable.

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<sup>3</sup> 40 CFR 60.23(a)(1)

<sup>4</sup> 40 CFR 60.27(b).

<sup>5</sup> See 40 CFR 60.27(a).

Nowhere in 40 CFR 60.27 is U.S. EPA granted the ability to extend their deadline for approval or disapproval. U.S. EPA cites 40 CFR 60.27(a) as granting authority to extend the deadline for approval/disapproval; however, that provision clearly only grants U.S. EPA the authority to extend the period for submission of any plan or plan revision. Again, U.S. EPA lacks the basic authority to modify the section 111(d) program into a SIP program.

### **Future Revisions of Section 111**

It is possible that U.S. EPA may revise the section 111 requirements for this category of sources in the future. Unlike other section 111 plans, the complicated nature of the CPP and myriad of options could create issues that are not conceivable at this time. For example, how would such a revision affect a state choosing to do the new source compliment provided for in the final EGs? What new sources would become existing sources? These are considerations a state must analyze in order to determine an appropriate state plan path. U.S. EPA should not consider any revisions prior to 2030 to provide some sort of regulatory stability over this very complex scheme.

### **Evaluation of Federal Plan for Conformance with CAA Section 131**

CAA section 131, Land Use Authority, states “nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in the chapter provides or transfers authority over such land use.”

U.S. EPA’s FP will require additional RE generation sources to meet the targets identified in the proposal. The addition of these RE generation sources, in order to meet the FP goals, may not be possible without conflicting with local government land use requirements and state siting provisions. For example, U.S. EPA must evaluate the proposal to determine whether the targets are achievable considering the siting requirements of Ohio Revised Code sections 4906.20 and 4906.201. Without consideration of the requirements of Ohio local and state law, either the provisions in the proposal will be a significant challenge or the FP will need to override state and local law in conflict with the cooperative federalism structure of the CAA, the Tenth Amendment of the U.S. Constitution, and CAA section 131.