Introduction

On September 23, 2013, the U.S. Environmental Protection Agency ("EPA" or "Agency") released a document entitled "Considerations in the Design of a Program to Reduce Carbon Pollution from Existing Power Plants" ("Considerations Document"), which contains several questions regarding the design of emission guidelines and performance standards for existing electric generating units ("EGUs") under section 111(d) of the Clean Air Act ("CAA" or "Act"). This is the response of the Utility Air Regulatory Group ("UARG") to the Considerations Document. UARG is a voluntary, ad hoc, not-for-profit association of electric generating companies and organizations and national trade associations. UARG’s purpose is to participate on behalf of its members collectively in EPA’s rulemakings and other CAA proceedings that affect the interests of electric generators and in litigation arising from those proceedings.

As a preliminary matter, UARG believes that not only is EPA not obligated to undertake section 111(d) emission guidelines for existing power plants, but that it is not authorized to do so. Section 111(d) of the CAA was amended by Congress in 1990, and somewhat conflicting amendments passed by the House and the Senate were never reconciled in conference committee before the president signed the amendments into law. UARG believes that the proper reading of those conflicting amendments (in the context of their legislative history and principles of statutory construction) is that EPA does not possess the authority to regulate source categories that are already regulated under section 112 of the Act. Because EGUs are a regulated source category under section 112 pursuant to the Mercury and Air Toxics Standards, EPA may not regulate EGUs under section 111(d).

If EPA nevertheless proceeds despite this lack of authority to propose emission guidelines for existing EGUs, EPA must acknowledge that its authority under section 111(d) to regulate existing EGUs is narrowly tailored and that Congress intended for section 111(d) regulation to employ the same cooperative federalism framework that exists in section 110 of the CAA. In section 111(d), Congress directs EPA merely to "establish a procedure similar to that under [CAA § 110] under which each State shall submit to [EPA] a plan which ... establishes standards of performance" for existing sources within the state. CAA § 111(d)(1). EPA established this procedure, fully recognizing the cooperative federalism framework intended by Congress, when it promulgated regulations in 1975 interpreting and implementing section 111(d). See 40 Fed. Reg. 53,340 (Nov. 17, 1975). EPA’s section 111(d) regulations are codified at 40 C.F.R. Part 60, Subpart B, §§ 60.20-60.29 ("Subpart B rules").

In addition to the questions EPA asked in the Considerations Document, the Agency should also consider and address the following questions as it proceeds:
Does EPA have authority in the first place to propose and finalize emission guidelines for EGUs under section 111(d) of the CAA?

What is the relative scope of EPA’s authority versus state authority under section 111(d)?

How much insight does section 110 precedent and case law provide to the section 111(d) process?

UARG addresses these questions in this response.

**Question One:** What is state and stakeholder experience with programs that reduce CO₂ emissions in the electric power sector?

EPA has identified the main carbon dioxide (“CO₂”) reducing programs with which UARG members are familiar: renewable portfolio standards (“RPS”), energy efficiency programs, demand-side management programs, and state and regional cap-and-trade programs. At the outset, however, it must be made clear that most – if not all – of these programs are the quintessential purview of state electricity regulators – not state environmental agencies. These programs have been developed pursuant to well-established state sovereign powers over matters relating to electricity regulation, including determining the appropriate mix of generating resources within a state. EPA is barred by U.S. Supreme Court precedent from infringing upon a traditional state sovereign function unless Congress has adopted clear statutory language expressly authorizing the Agency to do so. Nothing in the CAA expressly authorizes EPA to regulate the generation of electricity or other such energy regulatory matters traditionally reserved to states. EPA must be careful, therefore, not to rely on any of the existing programs noted above to adopt a fuel-discriminatory emission guideline or otherwise to manipulate fuel markets or favor winners and losers among alternative electric generation technologies.

In addition, section 111(d) requires that state-established performance standards reflect what is achievable at each existing unit. Congress, however, has provided states with flexibility and discretion regarding how to implement section 111(d) within their borders. Once standards are established that are achievable at each existing unit, states have the authority to grant individual sources flexible options (perhaps including one or more of the programs listed above) to comply with such standards. The CO₂ reducing programs that some states may have cannot be the basis, however, for the establishment of the standard itself. As EPA recognized when it created the Clean Air Mercury Rule (“CAMR”) trading program under section 111(d), the standard must first be achievable by each unit. Once a state sets a standard or multiple standards that sources of different types and sizes can achieve pursuant to section 111(d), the state has the flexibility for regulated sources to demonstrate compliance through a trading program, an RPS, or an energy efficiency program.

**Question Two:** How should EPA set the performance standard for state plans?

Section 111(d), like section 110 of the Act, operates through a cooperative federalism framework. EPA should not – and cannot – “set the performance standard for state plans.” First, performance standards apply to sources, not state plans. Second, Congress did not give EPA the
authority to devise any federally enforceable standards of performance for existing sources, except when a state fails to submit a “satisfactory” plan. CAA § 111(d)(2)(A). Thus, unlike the very different language in section 111(b) governing the standards of performance for new sources, section 111(d) gives EPA no direct regulatory authority over existing sources, and instead gives states broad discretion to develop such plans subject to a general requirement that the state’s exercise of discretion be “satisfactory.” Section 111(d)(1) limits EPA’s authority to setting up procedures – the states are given the authority and responsibility to establish the actual, substantive standards of performance.

Under section 111(a)(1) and EPA’s Subpart B rules, the Agency is authorized only to set “emission guidelines” addressing factors relevant to the states’ determination of the “best system of emission reduction” (“BSER”) that has been “adequately demonstrated” and is “achievable” for each source type. Importantly, EPA’s guidelines are not legally binding or directly enforceable on sources – they simply set out considerations for states to address in adopting their own standards for existing sources. Accordingly, EPA’s approach to determining BSER for limiting CO₂ emissions from EGUs may inform the content of EPA’s emissions guidelines and the considerations states need to take into account in setting standards achievable by each source, but does not determine the resulting standards established by the state. What the Administrator determines to be BSER is merely one of the many factors states must consider in determining the level and form of any existing source performance standard as applied to a specific EGU.

In accordance with its Subpart B rules, EPA must address in its guideline document subcategories of “different sizes, types and classes” of existing sources where factors like “costs of control, physical limitations [or] geographical location” warrant the application of different guidelines. 40 C.F.R. § 60.22(b)(5). EPA has previously emphasized that where it adopts a single standard for new sources, it is conceivable it may issue “several emission guidelines . . . based on plant configuration, size, and other factors peculiar to existing facilities.” 40 Fed. Reg. at 53,341. Indeed, the Agency underscored as early as 1975 that “emission guidelines will reflect subcategorization within source categories where appropriate,” and the guidelines “will in effect be tailored to what is reasonably achievable by particular classes of existing sources . . .” Id. at 53,343. Because a standard of performance must be “adequately demonstrated” for each source, EPA has an obligation to establish highly subcategorized emission guidelines within a broad source category like existing fossil fuel-fired EGUs.

On the first page of the Considerations Document, EPA states that, “[m]oving forward, there are different options available for addressing carbon pollution from existing power plants such as a ‘source-based approach’ and a ‘system-based approach.’” As a matter of law, UARG disagrees with this statement. Any existing source performance standard must be based on a system of emission reduction that has been adequately demonstrated for sources within a category and must be achievable by the individual sources to which the standard applies. The plain language of section 111(d) limits the BSER determination to on-site controls, activities, or work practices. Because no post-combustion CO₂ emission reduction control technology exists that has been “adequately demonstrated” at existing EGUs, EPA will likely be limited to reviewing efficiency improvements as potential BSER determinations. Proposals that adopt trading programs as BSER themselves are not authorized under the Act, which requires standards that are achievable at each existing source.
Section 111 concerns the performance of “sources” in a “source category” – it does not call for “system” standards, market-based trading programs, or standards for sources in other categories. Section 111 focuses on what techniques are demonstrated for a source and what levels of control are achievable by sources in the source category. Stated another way, “source performance standards” are about source performance, not system performance. An approach that relies on emission reductions that occur outside of a regulated unit is inconsistent with past precedent and with section 111, which limits the applicability of standards to individual sources within the regulated category.

Although some have suggested that CAMR adopted a system approach, that rule in fact was consistent with the statutory requirement that source performance standards must be based on source performance. At the time EPA promulgated CAMR, activated carbon injection systems were proven technology to reduce mercury emissions from coal-fired power plants and had been installed at several plants. Although EPA determined in CAMR that a trading system was BSER, importantly, the emission rates achievable by individual sources (subcategorized by coal rank) were set based on adequately demonstrated technology for sources within each subcategory. States were then given the option of implementing these achievable performance standards through a trading system, in order to reduce compliance costs. The trading system was not the basis, however, for the standards themselves.

A “beyond the fence” or “system” approach that requires a level of emission reduction that does not reflect source performance and that is unachievable by the source, and instead requires sources subject to the standard to obtain emission reductions offsite in order to comply with the unachievable performance standards, unambiguously would contravene the plain text of the CAA. The Act focuses on emission reductions that are achievable by “any existing source,” not a category of sources and not by just some sources. CAA § 111(d)(1). By contrast, a market-based system would not require individual facilities to achieve a specified level of emission reductions. In such a system, a collection of facilities must meet an aggregate standard applicable to the entire group, creating some of the same problems that led the D.C. Circuit to overturn a section 111 facility-level bubbling rule in ASARCo v. EPA, 578 F.2d 319, 328 (D.C. Cir. 1978).

Of course, as discussed below, once an achievable performance standard is set, states may indeed have the authority under the Act to allow sources to comply with the standard by purchasing allowances or credits representing emission reductions achieved outside their boundaries, or by introducing demand-side management programs. See National Lime Ass’n v. EPA, 627 F.2d 416, 431-33 & n.46 (D.C. Cir. 1980) (“but the flexibility appropriate to enforcement will not render ‘achievable’ a standard which cannot be achieved on a regular basis”).

**Question Three:** What requirements should state plans meet, and what flexibility should be provided to states in developing their plans?

The Act requires states to “submit . . . a plan . . . which establishes standards of performance,” and requires EPA to “permit the State in applying a standard of performance to
any particular source . . . to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” Id. § 111(d)(1) (emphasis added). State plans under section 111(d) must be approved by EPA if they are “satisfactory.” CAA § 111(d)(2)(A). The CAA provides criteria for establishing whether a state plan is “satisfactory,” including the definition of “performance standard,” and a direction to consider remaining useful life, “among other factors.” In other words, the Act leaves to the states substantial discretion as to the factors to be considered in formulating a state plan and how those factors are to be weighed, and it does not dictate any particular outcome for the state. States thus have significant discretion to adopt state plans that vary from EPA’s emission guidelines.

When it adopted its section 111(d) regulations, EPA took pains to emphasize that, in contrast to the “emission standards” that states adopt under their section 111(d) plans, EPA’s emission guidelines are not “legally enforceable.” 40 Fed. Reg. at 53,341 (“to emphasize that a legally enforceable standard is not intended, the term ‘emission limitation’ has been replaced with the term ‘emission guideline’”); see also 40 C.F.R. 60.21(f) (“Emission standard means a legally enforceable regulation . . . .”).

Section 111(d) states that EPA’s guidelines must reflect the approach taken under section 110 of the Act. To that end, EPA should look to extensive case law on section 110 state implementation plans to examine how to determine when a plan is “satisfactory.” Because Congress envisioned this system to be like the state implementation plan system under section 110, as long as a state considers relevant factors, the statute would seem to prohibit EPA from second-guessing the state’s judgment. This conclusion is well-established in case law governing section 110 and arguably applies in this context as well. This case law states that EPA’s role is “confine[d] . . . to the ministerial function of reviewing [state plans] for consistency with the Act’s requirements” and little more. Luminant Generation Co. v. EPA, 675 F.3d 917 (5th Cir. 2012). EPA cannot disagree with a state plan merely because it would exercise its judgment differently. Anything in EPA’s 1975 Subpart B rules that requires EPA “approval” must be read consistently with the CAA and case law indicating that as long as the state considers relevant factors, its plan must be deemed “satisfactory.”

Under the Subpart B rules, states have considerable flexibility to deviate from EPA’s emission guidelines in adopting plans and emission standards. For example, states may apply “less stringent emission standards or longer compliance schedules” to particular facilities or classes of facilities if the costs of adopting the standards suggested by the emission guidelines would be unreasonably costly, physically impossible, or for other reasons. 40 C.F.R. § 60.24(f)(1)-(3). States have significant discretion in designing their own plans and determining how individual sources or classes of sources may demonstrate compliance, including taking into account the “remaining useful life of the existing source.” Applying this criterion, states may grant individual sources or types of sources longer periods of time to comply, or may apply less stringent standards than set forth in EPA’s emission guidelines. EPA has also stated that “[s]trates will be free to vary from the levels of control represented by the emission guidelines . . . . In most if not all cases, the result is likely to be substantial variation in the degree of control required for particular sources, rather than identical standards for all sources.” 40 Fed. Reg. at 53,343. Thus, EPA may publish several emission guidelines for existing fossil fuel-fired EGUs, and states have further flexibility to implement such guidelines as they deem
"reasonable" where costs are determined to be "unreasonable," where they would be "physically impossible," or otherwise "unreasonable." EPA also made clear that “[s]tates will be free to set more lenient standards [than those set out in EPA’s emission guidelines], subject to EPA review . . . in cases of economic hardship.” Id.

States thus have great flexibility and discretion in designing their own plans and determining how individual sources or classes of sources may demonstrate compliance, including taking into account the “remaining useful life of the existing source.” CAA § 111(d)(1). States may grant individual sources or types of sources longer periods of time to comply, or may apply less stringent standards than those set forth in EPA’s emission guidelines. Standards of performance must, among other things, be “adequately demonstrated” for each source type, and be cost-effective. A work practice approach or best management practices may be justifiable instead of a specific, numerical standard in a state plan. Furthermore, once a standard is set that is achievable by each existing unit, states have discretion to allow sources to comply with such a standard through a range of flexible mechanisms.

In short, unless a state fails to submit a satisfactory plan, EPA has no authority under the CAA to impose substantive requirements on existing EGUs – that is the responsibility of states.

Question Four: What can EPA do to facilitate state plan development and implementation?

Section 111(d) imposes no rulemaking schedules or deadlines on the Agency or states. The statute provides no timetable by when state plans must be proposed, finalized, or implemented. Because this is likely to be a significant endeavor, EPA should afford states and regulated entities adequate time to study, consider, comment on, and implement guidelines and state plans. It is worth pointing out that CAA provisions governing the submission of section 110 state implementation plans originally incorporated deadlines similar to those adopted by EPA in 1975 in its Subpart B rules (e.g., nine months for states to submit plans to EPA). In 1990, Congress amended the deadlines for state implementation plans to give states three years instead of nine months to submit plans. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(d), 104 Stat. 2399, 2409 (1990); see also CAA § 110(a)(1), reprinted in 1 Comm. on Env’t & Public Works, A Legislative History of the Clean Air Act Amendments of 1990 at 32 (1993). Thus, EPA should consider extending the deadline for the submission of state plans under section 111(d) to three years so as to parallel the requirements for state implementation plans and comport with Congress’s intent that section 111(d) mirror section 110.

On the information front, EPA’s Subpart B regulations stipulate that EPA’s “guideline document” contain not only an “emission guideline” that provides “criteria for judging the adequacy” of state plans, but also must “provide information for the development of State plans.” 40 C.F.R. § 60.22(b)(2), (5). EPA must recognize the diversity of the existing fossil fuel-fired EGU fleet in providing “information” including its determination of BSER that has been adequately demonstrated at each type and sub-category of existing EGU.