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Air and Radiation Docket and Information Center
U.S. Environmental Protection Agency
Mailcode: 6102T
1200 Pennsylvania Ave., NW
Washington, DC 20460

**Re: Comments of the Coalition for Emission Reduction Policy on
EPA's Forthcoming Proposal to Establish New Source Performance
Standards for GHG Emissions from Electric Generating Units and
Refineries**

The Coalition for Emission Reduction Policy (CERP)¹ appreciates the opportunity to submit the following advance comments on the Environmental Protection Agency's (EPA) forthcoming proposals to establish New Source Performance Standards (NSPS) for greenhouse gas (GHG) emissions from electric generating units (EGUs) and refineries under Section 111(b) and (d) of the Clean Air Act (CAA).

I. Introduction to CERP

CERP is a coalition of companies that support market-based approaches to the regulation of GHG emissions. Our diverse membership includes companies that develop or finance projects that reduce or sequester GHG emissions, as well as companies potentially subject to GHG regulation (including the forthcoming NSPS for which EPA has requested comment) and want the ability to use market-based approaches to meet their compliance obligations. Many of our members have years of experience with systems of emission reduction that provide for trading of GHG allowances and offset credits, and are currently participating in environmental markets for sulfur dioxide (SO₂), nitrogen oxides (NO_x), and renewable energy certificates. Our history with market-based mechanisms has shown that they are a cost-effective and administratively efficient means of achieving environmental

¹ For more information about CERP, see www.uscerp.org.

goals, and far preferable to “command-and-control” regulation of emissions from individual sources.

II. Market-Based Approaches Represent Optimal Policy for GHGs and are Consistent With Section 111 of the CAA.

CERP has consistently maintained that climate change is best addressed through market-based legislation designed by Congress, not through EPA regulation under the existing Clean Air Act. Should EPA proceed to use section 111 of the CAA to regulate GHG emissions, CERP urges EPA to take the time necessary to develop technically sound, legally defensible rules. In addition, we urge the Agency to consider designing regulations that incorporate or permit a variety of market-based approaches. We believe that market-based mechanisms are particularly advantageous for GHG emissions and that the language of section 111 is flexible enough to accommodate their use.

GHGs have distinct characteristics that make them uniquely suited to market-based approaches. First, GHGs are globally dispersed pollutants that have approximately equivalent impacts on the climate regardless of where they are emitted. Likewise, reductions in GHG emissions also have equivalent benefits regardless of where those reductions take place. Second, there are currently few add-on controls—apart from energy efficiency measures—that can be installed to reduce direct GHG emissions from existing industrial sources such as EGUs. Third, efforts to control GHG emissions are particularly susceptible to “leakage,” in that GHG abatement at a particular source can sometimes cause emissions to increase outside the facility boundary (or vice versa). All three characteristics suggest that effective GHG regulation should encourage GHG emission reductions to occur wherever they are most cost-effective to implement. Market-based approaches meet this need by allowing regulated sources the flexibility to comply with emission limitations by achieving emission reductions beyond the boundaries of a single facility. EPA itself explicitly acknowledged the advantages of market-based approaches in its 2008 Advance Notice of Proposed Rulemaking on GHG regulation.²

The language of section 111 of the CAA is flexible enough to permit a market-based approach to NSPS. Section 111(b) and (d) require EPA (and in the case of existing sources, the states) to establish “standards of performance” for regulated facilities—but nothing in the definition of a “standard of performance” requires NSPS to exclusively limit direct emissions from individual regulated sources. Instead, section 111 is expansive enough to

² Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,409-410 (proposed July 30, 2008) (to be codified at 40 C.F.R. Chapter 1) (“Market-oriented approaches are relatively well-suited to controlling GHG emissions. Since emissions of the major GHGs are globally well-mixed, a unit of GHG emissions generally has the same effect on global climate regardless of where it occurs. . . . Providing flexibility on the method, location and precise timing of GHG reduction would not significantly affect the global climate protection benefits of a GHG control program (assuming effective enforcement mechanisms), but could substantially reduce the cost and encourage technology innovation”).

allow facilities to comply with NSPS by reducing, avoiding, or sequestering emissions outside the facility boundary—an interpretation that, as we argue above, is especially appropriate for GHGs.

CERP is not proposing, and EPA is not limited to, a federally imposed cap-and-trade approach in implementing market-based approaches under section 111. We believe section 111 is sufficiently flexible to accommodate a variety of market-based approaches, including:

- Cap-and-trade programs initiated by and coordinated among the states, including existing and developing state and regional programs such as California’s A.B. 32, the Western Climate Initiative, and the Regional Greenhouse Gas Initiative;
- Emissions trading among multiple sectors covered by section 111(b) and (d) standards;
- Rate-based performance standards, with trading among EGUs that over- or under-perform the standard;
- “Fleetwide” performance standards that apply to all generating units (including non-fossil fuel units) under common ownership; and
- Offset credits issued for additional and verifiable reductions, avoidance, or sequestration of GHG emissions in sectors not subject to section 111 regulation.

III. EPA Should Give Careful Consideration to its Section 111(d) “Emission Guidelines.”

For the following reasons, CERP urges EPA to give careful consideration to the “guidelines” it develops for state programs under section 111(d) of the CAA:

- Because section 111(d) provides a pathway for regulation of existing sources, its potential coverage and impact on the U.S. economy is substantial.
- Because section 111(d) contemplates significant state discretion in designing programs, EGUs face some uncertainty about their requirements from state-to-state.
- Because, as even EPA has recognized, abatement options reasonably available to existing EGUs are very limited outside energy efficiency,³ any poorly-designed standards implemented under section 111(d) could have significant adverse impacts on the economy and the reliability of the electricity grid.

³ Environmental Protection Agency, “PSD and Title V Permitting Guidance for Greenhouse Gases,” at p. 30.

IV. At Least Some Harmonization of State Market-based Section 111(d) Programs is Important.

Given what is at stake with the section 111(d) guidelines, CERP is encouraged that the CAA provides states with broad authority to adopt market-based approaches in their section 111(d) plans.⁴ Furthermore, we recognize and appreciate that a number of states have already adopted or are developing market-based programs.

However, we have concerns that a failure to harmonize at least some elements of the various market-based state programs could diminish the benefits of such flexibility very substantially. If each state market-based program were a self-contained island, the compliance flexibility available to regulated sources would be limited to what is available within the state only. Indeed, certain types of market-based approaches—such as fleet-wide performance standards—would not be possible at all without some harmonization among state programs. Discontinuities among state programs would lead to unnecessarily high administrative and transactional burdens, and foreclose cost-effective emission reductions.

For the foregoing reasons, CERP encourages EPA, in developing its section 111(d) guidelines, to give full consideration to approaches that respect state prerogatives but provide guidance on and encourage harmonization. Such harmonization could extend at a minimum to the following issues:

- State programs should allow regulated sources to take into account emission reductions achieved at sources in other states, whether through multi-state trading programs, averaging, or fleetwide approaches.
- State programs that allow offsets should permit transferability of offset credits from state to state.
- Each ton should be regulated only once. States should not impose overlapping obligations on the same emissions.

CERP recognizes that there may be a number of approaches EPA might use to promote harmonization. These include:

⁴ Section 111(d) directs that states develop plans for regulation of existing sources through a process similar to the process of developing State Implementation Plans under section 110. *See* 42 U.S.C. § 7411(d)(1). Section 110 explicitly allows states to include market-based approaches in their SIPs; it authorizes inclusion of “economic incentives such as fees, marketable permits, and auctions of emission rights.” *See* 42 U.S.C. § 7410(a)(2)(A). In addition, EPA has already authorized states to use emissions trading mechanisms in implementing section 111(d) standards for municipal waste combustors. *See* 40 C.F.R. § 60.30b *et seq.*

- Encouraging states to cooperate and coordinate in drafting section 111(d) plans through structured, transparent, and participatory processes;
- Allowing and encourage states to submit “joint” SIPs or coordinated SIPs⁵; and
- Promulgating a model rule that states could voluntarily adopt.

At this time, CERP does not have detailed recommendations on the minimum requirements for harmonization or on policy instruments for promoting such harmonization. However, we encourage EPA to consider the full range of approaches.

V. EPA Can and Should Give Full Consideration to Comprehensive, Multi-Sector Market-Based Approaches.

In its NSPS rulemakings, EPA should give full consideration to approaches that would allow affected sources to meet their NSPS obligations through a broad range of verifiable emissions abatement activities, including at sites or facilities not otherwise subject to direct NSPS obligations and through offsets.

In CERP’s view, section 111 provide EPA with expansive authority to allow regulated sources to meet their obligations through a mix of on-facility and off-site abatement activities. Section 111(a)(1) defines “standard of performance” as:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.⁶

⁵ Note that joint or multi-state programs aimed at fulfilling section 111 obligations would not be subject to the same legal constraints as programs aimed at fulfilling obligations to address interstate pollutant transport under section 110(a)(2)(D)(i). Programs submitted pursuant to the latter must ensure elimination of *each state’s* “significant contribution,” which may circumscribe the flexibility of multi-state approaches. See *North Carolina v. EPA*, 531 F.3d 896, 907 (D.C. Cir. 2008); Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45210, 45215 (August 2, 2010). By contrast, the objective of section 111 is to address emissions from a *source category*. Accordingly, section 111(d) plans contemplating multi-state efforts need not ensure a particular amount of emissions abatement from within each state if they are otherwise effective in limiting emissions from the sources in the relevant source category. Furthermore, as discussed above, because emissions of GHGs are globally-mixed, there is no need for policies ensuring that particular states achieve particular amounts of reductions.

⁶ 42 U.S.C. § 7411(a)(1). Section 302(l) also defines a “standard of performance” as a “requirement of continuous emission reduction.” Market-based approaches provide a “requirement of continuous emission reduction” by imposing a mass or rate-based standard on a source or group of sources which must be

The term “system of emission reduction” is sufficiently broad to encompass a comprehensive market-based program. Nothing in the section 111(a)(1) definition confines a “system of emission reduction” exclusively to activities implemented at the regulated sources themselves. Indeed, section 111(a)(5) expressly states that a “standard of performance” may *not* mandate the installation of a particular “technological system of continuous emission reduction.” Prior to 1990, section 111(a) explicitly required NSPS to reflect the best “technological system of continuous emission reduction,” but the 1990 Clean Air Act amendments struck that language and inserted the current and more general reference to “best system of emission reduction.”⁷ Accordingly, when Congress altered the language of section 111, it acted to broaden the meaning of a performance standard, and to move away from the narrow conception of a performance standard as specific technology installed on-site. For these reasons, a policy that provides for multi-sector flexibility falls well within the concept of an NSPS “system of reduction.”

This interpretation is further supported by the mandate in section 111(d) that state programs utilize processes outlined in section 110. As discussed above, section 110(a)(2)(A) grants the states with broad authority to use market-based approaches.⁸

Finally, such multi-sector and offset-based “systems” meet the test of systems that are “adequately demonstrated.” Such systems have been operating for many years under the Clean Air Act. For example, the NO_x SIP call trading program—established by EPA in 1998—covers the electric power sector, but allows facilities in other sectors that have boilers to “opt in” to the program.⁹ In addition, since 1977, the Clean Air Act’s New Source Review (NSR) provisions for nonattainment areas have *required* sources to obtain emission offsets under certain circumstances—and have allowed sources to obtain these offsets from activities in *other* sectors.¹⁰

For the foregoing reasons, CERP believes EPA may reasonably section 111 to allow, in the context of NSPS for GHGs, mechanisms that permit regulated sources to meet their obligations through a mix of on-facility and off-site abatement activities, including through offsets. CERP urges the Agency to give full consideration to such policies in the NSPS rulemakings.

continuously satisfied at all times, either through direct emission controls or through usage of tradable instruments.

⁷ Clean Air Act Amendments of 1990, Publ. L. 101-549, § 403(a) (amending section 111(a)(1) of the Clean Air Act).

⁸ See note 4 *supra*.

⁹ Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356, 57,438 (Oct. 27, 1998).

¹⁰ 42 U.S.C. § 7503(a)(1)(A), (c) (requiring sources subject to New Source Review to obtain offsetting emission reductions from other sources in the same nonattainment area, and authorizing the use of offsets from other nonattainment areas under certain circumstances).

VI. Step-Wide Rulemaking Strategies Entail Special Considerations.

CERP recognizes that there are a number of different rulemaking approaches the Agency could use in integrating market-based mechanisms to account for the technical and legal issues associated with such mechanisms. Under one rulemaking strategy, EPA first would promulgate conventional NSPS regulations and then promulgate market-based regulation in a supplemental but otherwise legally severable rule.

If the Agency adopts such a step-wise approach, it should avoid taking steps that inadvertently foreclose future use of market-based approaches in its initial rulemaking. In addition, EPA should not use the possible but legally contingent future inclusion of market-based mechanisms as a basis for imposing unreasonably stringent performance standards.

In any event, CERP again urges the Agency to take the time needed to promulgate regulations that have a sound technical and legal basis.

VII. Conclusion

CERP appreciates EPA's careful consideration of these comments and is ready to provide further information and analysis if the Agency so requests. Please direct any inquiries regarding these comments to CERP's counsel, Kyle Danish.

Respectfully submitted,

Kyle Danish
Van Ness Feldman, P.C.
1050 Thomas Jefferson St., NW
Seventh Floor
Washington, DC 20007
Tel: (202) 298-1876
Fax: (202) 338-2416
kwd@vnf.com

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