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Via federal eRulemaking portal (regulations.gov)
Via E-mail (fellner.christian@epa.gov, thompson.lisa@epa.gov)
Docket No. EPA-HQ-OAR-2023-0072

Mr. Christian Fellner and Ms. Lisa Thompson
Sector Policies and Programs Division (D243-02)
Office of Air Quality Planning and Standards
U.S. Environmental Protection Agency
Research Triangle Park, NC 27711

Re: Class of '85 Regulatory Response Group's Request for Extension of the Comment Period on EPA's CAA Section 111 Proposal

Dear Mr. Fellner and Ms. Thompson:

On behalf of the Class of '85 Regulatory Response Group ("Class of '85" or Group"), I am writing to request at least a 60-day extension of the comment period for the proposed revisions to the new source performance standards ("NSPS") for greenhouse gas ("GHG") emissions from new, modified, and reconstructed fossil fuel-fired electric generating units ("EGUs"); the proposed emission guidelines for GHG emissions from existing fossil fuel-fired EGUs; and repeal of the Affordable Clean Energy rule ("Proposal"). The Proposal was published in the *Federal Register* on May 23, 2023, at 88 Fed. Reg. 33,240. The Group requests that EPA extend the deadline for submitting comments on the Proposal from July 24, 2023, to at least September 22, 2023.

The Class of '85 is a voluntary, ad hoc coalition of over 40 electric generating companies from across the country that has been actively involved in the development of regulations to implement the Clean Air Act ("CAA") for more than 30 years, including the regulation of GHG emissions from new and existing EGUs. The Proposal has wide-ranging implications for EGUs across the country, including those owned and/or operated by Group members.

The Proposal addresses five separate actions under Section 111 of the CAA. EPA is proposing to: (i) revise the NSPS under Section 111(b) for GHG emissions from new fossil fuel-fired stationary combustion turbine EGUs; (ii) revise the NSPS for GHG emissions from fossil fuel-fired steam generating units that undertake a large modification; (iii) establish emission guidelines pursuant to Section 111(d) for GHG emissions from existing fossil fuel-fired steam generating EGUs, including coal-fired and oil/gas-fired steam generating EGUs; (iv) establish emission guidelines pursuant to Section 111(d) for GHG emissions from the largest, most

frequently operated stationary combustion turbines; and (v) repeal the Affordable Clean Energy Rule.

The current comment period is not adequate to allow companies with potentially affected EGUs to fully analyze the impacts of the Proposal and submit comprehensive comments to EPA. The Proposal alone, without the proposed regulatory text, is 181 pages long in the *Federal Register*, along with 62 supporting documents available in the docket that are highly technical in nature. The Proposal is one of several key rulemakings affecting Group members that the Agency is simultaneously undertaking and, given the back-to-back comment deadlines, it is difficult to respond meaningfully to each of these rulemakings and fully evaluate the potential impacts on electric generating unit operations. For instance, the Group is simultaneously preparing comments on the proposed rule amending the National Emissions Standards for Hazardous Air Pollutants for the Coal- and Oil-fired Electric Utility Steam EGUs (*i.e.*, Mercury and Air Toxics Standards ("MATS")), which was published in the *Federal Register* on April 24, 2023, at 88 Fed. Reg. 24,854 ("MATS Proposal").[1] The Agency also recently issued other proposals affecting the electric generating industry on which members of the Group prepared or are preparing comments, including : (i) the proposed rule on Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 88 Fed. Reg. 18,824 (Mar. 29, 2023) (comments submitted May 30, 2023); and (ii) the proposed rule on the Hazardous Solid Waste Management System: Disposal of Coal Combustion Residuals ("CCR") from Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31,982 (May 18, 2023) (comments due on July 17, 2023). Similar to the Proposal, these other rulemakings have wide-ranging implications for EGUs across the country, including those owned and/or operated by Group members, and they each have hundreds of supporting documents that are highly technical in nature.

The Group needs to be able to holistically analyze these proposed rulemakings, particularly as to how they impact existing EGUs' short- and long-term operating plans and how electric generating companies should structure replacement generation. More time is required to provide accurate and meaningful feedback on the Proposal, as well as respond to the specific questions posed by EPA. Members need to undertake thorough analyses as to what options are available and feasible to achieve compliance with the proposed standards, which could require retaining consultants to conduct such analyses. Members also need to engage with their respective public utility commissions to determine what course of action would have the least impact on grid reliability and electricity costs to customers, including whether to install controls, which could require extended outages for installation, or whether to seek early retirement and the development or purchase of replacement generation.

[1] The Group also filed a request for extension of the comment period for the MATS Proposal, which the Agency denied on June 14, 2023, which significantly compresses the time available for Group members to focus on the development of comments in response to the Proposal.

Furthermore, EPA failed to publish the proposed regulatory text in the *Federal Register* notice for the Proposal. Only in one passing reference did the Agency note the availability of the proposed regulatory text.[2] By posting the proposed regulatory text as a separate document, EPA runs the risk of creating discrepancies between the description of the proposed text in the *Federal Register* and the proposed regulatory text available in the docket. Such discrepancies prevent EGUs and other stakeholders, including members of the general public who may not have sufficient familiarity with online dockets, from receiving adequate notice of EPA's proposed action, thus impairing their ability to provide informed comments. EPA also runs the risk of running afoul of its statutory duty under the Administrative Procedure Act ("APA") to provide the public with adequate notice, particularly if the description of the proposed text in the *Federal Register* notice fails to accurately capture "either the terms or substance of the proposed rule or description of the subjects and issues involved." 5 U.S.C. § 553(b).

More importantly, it is essential in this particular instance that EPA publish the proposed regulatory text in the *Federal Register* because consequences flow from the date of publication of the proposed NSPS. Specifically, under CAA Section 111(a)(2), a source is considered a "new source" subject to the proposed NSPS if "the construction or modification of which is commenced after the *publication of regulations (or, if earlier, proposed regulations)*" prescribing the proposed NSPS.[3] Placing a redline strikeout of the proposed regulation in the docket does not appear to meet the definition of "publication" as Congress used it in the Clean Air Act.[4] Nor is describing the proposed standards in the preamble equivalent to the "proposed regulation."[5]

For these reasons, the comment period is inconsistent with Executive Order 13563, which requires EPA to "afford the public a *meaningful* opportunity to comment" on proposed rules. 76 Fed. Reg. 3821 (Jan. 21, 2011) (emphasis added). To ensure that interested parties can provide EPA with critical data and information pursuant to the CAA and APA, the Group requests that EPA extend the deadline for submitting comments on the Proposed Rule by at least 60 days, from July 24, 2023, to at least September 22, 2023.[6]

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[2] 88 Fed. Reg. 33,240, 33,334 (May 23, 2023) (describing the text as "the redline strikeout version of the rule showing the proposed amendments," rather than as the proposed regulatory text).

[3] 42 U.S.C. § 7411(a)(2) (emphases added).

[4] Merely placing the proposed regulatory text in the docket cannot mean "publication," as that would mean that all supporting documents, which are also placed in the docket, are considered to be "published" as well.

[5] Congress chose to be very specific in this instance by using the term "proposed *regulations*."

[6] The deadline for submitting comments should not be triggered until EPA has included the proposed regulatory text in the *Federal Register* notice. To ensure that the public is afforded a meaningful opportunity to comment on proposed rules, the minimum 60-day comment period should not run until the public has received *fair and adequate notice* of the regulatory language — not merely a passing reference in the *Federal Register* notice to the availability of the text in the docket.

If you have any questions regarding the Class of '85 Regulatory Response Group's request for an extension of the comment period, please contact me at debra.jezouit@bakerbotts.com or 202.639.7728, or Tiffany Cheung at tiffany.cheung@bakerbotts.com or 202.714.5886.

Sincerely,



Debra J. Jezouit
Tiffany W. Cheung