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Submitted via Email to: *a-and-r-docket@epa.gov* on December 1, 2014.

Re: ODEQ comments on EPA's proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Docket ID No. EPA-HQ-OAR-2013-0602)

I. Introduction

These comments are submitted in response to the U.S. Environmental Protection Agency's ("EPA") proposed: *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units* ("Proposed Rule"), signed by EPA Administrator, Gina McCarthy, on June 2, 2014, and published in the Federal Register on June 18, 2014 (79 Fed. Reg. 34,830). The original 120-day comment period ended on October 16, 2014; however, on September 25, 2014, EPA extended the comment period by 45 days until December 1, 2014 (79 Fed. Reg. 57,492).

For numerous reasons, it is the position of the Oklahoma Department of Environmental Quality ("ODEQ") that EPA's Proposed Rule is fundamentally flawed and unworkable. As the Supreme Court of the United States recently stated in regard to EPA's efforts to regulate greenhouse gas ("GHGs") in the Tailoring Rule, "[w]e are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery." *Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2446, 189 L. Ed. 2d 372 (2014). Although the issues are not identical, there are some serious legal and practical issues regarding the approaches set forth in EPA's Proposed Rule, and prudence requires that the rule not be finalized or implemented until

such issues are resolved. Consequently, ODEQ requests that EPA withdraw the Proposed Rule, and work with the states, the stakeholders, and the general public to develop an approach that is both practical and consistent with the structure and legal authority provided in the Federal Clean Air Act. Additional consideration should be given to providing options using a broader approach to help address concerns of reliability of service and the impact on utility rate payers.

In the event that EPA proceeds with the current rulemaking, ODEQ submits the comments contained herein. After consideration and evaluation of the Proposed Rule, these comments represent only a portion of the areas of concern identified by the agency. Limited resources and expertise hinder ODEQ's ability to fully comment on all aspects of the Proposed Rule and associated documents during the comment period provided. These comments are generally organized in a manner similar to the organization of the Proposed Rule.

II. Policy and Implementation Comments

ODEQ Comment No. 1: Additional Notice and Opportunity for Comment is required.

In numerous places throughout the Proposed Rule, EPA solicits comments from the states and the general public. In many instances, EPA only solicits comments and makes no proposal. The topic areas upon which EPA has solicited response are extensive and constitute significant portions of the rule. EPA has not simply requested that commenters express support for one of two clear and developed options; rather, key structural elements of the rule have been left undecided or have not been proposed. Some examples of these key areas include, *inter alia*: deadlines; state-specific emission reduction goals; the possibility of combining EGUs into one category; what will constitute the best system of emission reduction ("BSER"); building blocks; the criteria for state plan approvability; and the state plan approval process. Absent a subsequent

comment period or re-proposal, this approach denies states the opportunity to comment on approaches considered by EPA. Instead, it appears that EPA is attempting to shift the burden onto the states to propose a rule, and allow EPA to comment and decide on the state proposals. Most states want and need flexibility in developing and implementing a plan that takes into account local concerns and impacts. However, this needed flexibility should not be used to take away the states' and the public's right to comment on the approach ultimately implemented by EPA.

The Administrative Procedure Act requires an agency to provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *See* 5 U.S.C. § 553(b)(3). Because this proposal is extremely broad and requests a vast amount of specific input and information from the public and the states, it is impossible for anyone to know the form that EPA's final proposal will take, much less the benefits and requirements that will result. A proposed rule must "provide sufficient detail and rationale for the rule to permit interested parties to comment meaningfully." *See Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988). The sheer number of topics upon which comments are requested and the depth in detail of each topic demonstrates that substantial changes should be made to the proposed version of the rule after the comments are received; therefore, the states and the public must be afforded an additional notice and comment period in order to make meaningful comments on the rule when it is closer to its final proposed form. "A final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commenters with 'their first occasion to offer new and different criticisms which the agency might find convincing.'" *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311

(D.C. Cir. 1991) (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1225 (D.C. Cir. 1980) and *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)).

The rule that emerges after changes are made based on the comments received will likely differ so vastly that the rule will be essentially new. In fact, EPA leadership and staff have recognized on numerous occasions that this rule will likely change substantially from the proposed version. An additional notice and comment period will be necessary in order for the states, stakeholders, and general public to have an opportunity to evaluate and comment on a proposal that reflects the majority of the concepts that EPA intends to finalize. In addition to denying the states and the public an opportunity to express concerns regarding the proposed rulemaking, failing to provide an additional comment period may deny EPA the opportunity to consider important viewpoints in this critical rulemaking endeavor.[1]

If the states and/or members of the public are not provided a sufficient amount of detail regarding the approaches and potential consequences of the actions that EPA is considering, then commenters may not be able to provide meaningful comment on the approach or options that EPA ultimately decides to implement. Consequently, the states and public may fail to comment on a particular aspect of what becomes the final rule, and may possibly be denied an opportunity to administratively or judicially challenge these aspects since standing to challenge a final rule is in many instances predicated upon first having filed relevant comments during the comment period. Once this preliminary round of comments and solicited information are received and the resulting modifications to EPA's proposal are completed, the states and the general public are entitled to an opportunity to once more review and comment on the rule.

[1] Based on the agreement recently announced with China, it appears that the administration may have already committed itself to many aspects of the Proposed Rule without consideration of comments from the states or the general public.

Again, any revision to state goals or other significant revisions to the Proposed Rule will require an opportunity for public and state review and comment before becoming final. Consequently, after EPA completes its analysis and consideration of the comments received during this initial comment period, EPA must provide an additional notice and comment period to the states and the general public. Moreover, EPA should provide a comment period that provides enough time for all of the Regional Transmission Organizations ("RTOs") and Independent Service Operators ("ISOs") to model their proposal to assess the grid reliability issues.

ODEQ Comment No. 2: Extended initial implementation period is justified.

Prudence requires that the development and implementation deadlines in any version of the rule promulgated set forth implementation deadlines extended beyond those contained in the Proposed Rule. A reasonable extension of these deadlines is necessary for several reasons: the legal vulnerability of the rule; the certainty that it will be reviewed by the courts; the far-reaching impacts of the Proposed Rule; and the extreme burden that the development and implementation of such a plan would cause to the states, the impacted facilities, and the general public. An extension is all the more reasonable considering the manner in which carbon emissions react in the atmosphere and the relatively insignificant impact that any emissions occurring during an extended implementation period will have on global CO_2 levels and the environment.

The EPA currently proposes that states must begin meeting interim goals by 2020. *See* 79 Fed. Reg. 34,837. In order to achieve these goals, states and industry would have to begin preparation for implementing state plans prior to the finalization of EPA's Proposed Rule. States may have to work with neighboring states and RTOs/ISOs, due to the interconnected nature of

the electrical grid. Additionally, multiple intrastate agencies will be required to coordinate in order to develop and implement a state plan. States will be heavily burdened to coordinate with other states, develop the necessary state plan, and if necessary, promulgate state regulations and enact state statutes to begin meeting interim goals by 2020. Meanwhile, industry will be attempting to develop business models and strategies to meet the emission goals. In order to achieve compliance with previous EPA rules, industry has already dedicated large amounts of resources in order to keep existing sources operating in compliance. To meet the proposed interim goals by 2020, some of these same sources may well find it necessary to significantly scale back the operation of these units and/or may potentially find it necessary to retire these existing units earlier than intended. Furthermore, in order to assist with re-dispatching energy, industry will be required to expend a vast amount of additional resources in updating transmission lines, as well as securing new sources of natural gas if they choose to fuel switch. This will heavily impact industry, as it will be required to expend substantial resources within a short timeframe, which in turn may transfer the financial burden to the rate payers and the general public. Additionally, industry will have only a short time to identify, apply for, and obtain the appropriate authorizations, such as permits, from the various appropriate state agencies. Finally, the general public, rate payers, and taxpayers will be burdened because of the vast amount of resources spent in preparing, developing, and implementing state plans by the deadlines set forth in the Proposed Rule.

Undoubtedly, lengthy litigation over the validity of the Proposed Rule will occur. There have already been several legal challenges made to the Proposed Rule and it is almost certain that there will be additional challenges filed if the rule is finalized. An extended development

and implementation period would allow the courts to issue an ultimate decision on the legality of the rule. Absent such an extended development and implementation period, the states, the federal government, and industry will have to dedicate large amounts of limited resources to comply with the extremely complex requirements of this rule (which may or may not be upheld in a form that resembles the final version ultimately issued by EPA). A deadline that contains an additional five years (*i.e.*, until 2025) for the development and implementation of a plan would help avoid a great deal of uncertainty regarding the ultimate requirements of the rule and would likely have a diminutive overall impact on the purported goal of the Proposed Rule related to atmospheric CO_2 levels. In fact, the environment may actually suffer if the vast amount of state and industry resources necessary to develop and implement a plan consistent with the Proposed Rule are focused on this effort and the rule is ultimately stricken by the courts. Resources are limited and redirecting those resources to comply with an approach that may likely be determined to be inconsistent with the Clean Air Act will divert those resources from other necessary environmental protection efforts.

III. Procedural Comments

ODEQ Comment No. 3: An appropriate process governing submission and approval of § 111(d) plans should be finalized before rules governing substantive content of the plans are promulgated.

Section 111(d)(1) of the Clean Air Act provides that EPA "shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan . . . ." 42 U.S.C. § 7411(d)(1). The Act appears to require that EPA shall establish a specific procedure "similar to that provided by section 7410." The Act does not

appear to allow EPA to merely substitute the § 7410 process instead of establishing a specific process governing the submission of § 111(d) plans.

It does not appear that EPA has sufficiently established procedures that will adequately and appropriately govern this process considering the inter-relatedness of the different aspects likely to be contained in a § 111(d) plan. EPA has requested comment on the appropriate mechanism for approval of state plans, proposing two different options. Many aspects of the proposed process may be appropriate for certain state implementation plan submittals; however, they are not applicable to § 111(d) plans of this nature, because of the manner in which these plans are likely to be woven and developed. As one example, partial approvals/partial disapprovals may not be appropriate even though certain approvable portions of a plan may be considered severable by EPA. The development of these plans will likely take much negotiation at the state level, and although a portion may be considered severable by EPA standards it may have been a key consideration in the state-level process that resulted in the plan being submitted.

Also, the mere fact that the approval process has not been finalized provides challenges to the states' efforts to comment on other parts of the proposal. EPA has proposed two processes for the submittal and approval of state plans, which makes it difficult to provide meaningful comments without knowing the specific process that will apply. Further, EPA must bear in mind when choosing a plan approval mechanism that preparing and compiling this plan will require the cooperation and negotiation of several different government agencies and, therefore, subsequent plan modifications will similarly require a challenging process that includes negotiations amongst different state agencies. Unlike many state implementation plans, this plan will not be easily severable if parts are disapproved, and the alteration of one part could have a

negative impact on the viability of another portion of the plan. Assuring that there are no unintended consequences and coordinating the various interests will be an arduous process; thus, EPA's approval process will need to be accommodating.

Since there is uncertainty related to the appropriateness of the procedure that states are required to follow in submitting the mandated plan, states are being denied the opportunity to consider that process as they develop substantive comments on the Proposed Rule. EPA should finalize the requisite procedure for submission and approval of a § 111(d) plan in sufficient detail to allow for the meaningful evaluation of the process while the states and the public have an opportunity to comment on the Proposed Rule. In other words, an additional comment period on the Proposed Rule may be necessary once the submittal and approval process is finalized.

IV. Comments related to Enforceability

ODEQ Comment No. 4: **Many aspects of proposed approach would be difficult to enforce.**

Numerous aspects of the Proposed Rule would be difficult to enforce. For example, in many states it is difficult to determine the entity responsible for enforcing the requirements as well as the entity responsible for complying with the requirements. Demand-side management, energy efficiency, and other outside the fence-line emission reduction options, as well as any renewable energy requirements, may be very difficult to enforce. In addition, there appears to be a question as to the legality of enforcing requirements in a plan developed and promulgated under § 111(d) on facilities or other entities that are not subject to the underlying § 111(b) standard. Moreover, the subject facilities have multiple state and federal agencies that regulate their activities and are required to obtain approvals and/or permits before taking certain actions that would be necessary to comply with a § 111(d) plan that conforms with the Proposed Rule.

The enforceability of a § 111(d) plan, particularly with respect to certain aspects of the building blocks, is problematic in Oklahoma and many other states due to this fragmentation of jurisdictional authority. In Oklahoma, regulatory jurisdiction over elements of the building blocks is divided between ODEQ and the Oklahoma Corporation Commission (Oklahoma's public utility commission). Also, jurisdiction or authority over specific elements contained in the Proposed Rule may be considered by some to be uncertain based on existing legislation.

The Oklahoma Supreme Court has stated with respect to determining the legislative and statutory limitations on delegation of authority to Oklahoma administrative agencies, "[c]learly the legislative body must declare the Policy of the law and fix some kind of Legal principles which are to control in given cases. It must provide an adequate Yardstick for the guidance of the executive or administrative body or officer empowered to execute the law, *because regulations made by executive officers are valid only as subordinate to a legislative policy sufficiently defined by statute, and must, moreover, be within the framework of such policy*." *State ex rel. Hart v. Parham*, 412 P.2d 142, 151 (Okla. 1966) (emphasis added) (citing *Oliver v. Okla. Alcoholic Beverage Control Bd.*, 359 P.2d 183, 188 (Okla. 1961), 11 Am.Jur.Const.Law § 240).

The Oklahoma legislature delegated sole and exclusive regulatory jurisdiction over all air quality matters under the federal and state Clean Air Acts to the ODEQ, and there are no exceptions carved out for other state agencies. *See* 27A O.S. § 1-3-101(B)(8). Thus, it appears that ODEQ is uniquely positioned as the state agency with the authority and responsibility of developing and preparing a § 111(d) plan, but does not have the authority or expertise to develop and implement a plan that satisfies all aspects of the Proposed Rule. Many elements of the

building blocks which may be included in a state plan fall outside the scope of ODEQ's jurisdiction, and fall explicitly within the jurisdiction of the Oklahoma Corporation Commission. There may also be some uncertainty as to whether the elements of the building blocks falling directly within the Oklahoma Corporation Commission's jurisdiction may be considered enforceable for purposes of § 111(d) due to the Oklahoma Corporation Commission's apparent lack of air quality regulatory authority. Therefore, there is a question as to whether any regulatory agency in Oklahoma currently has the ability and/or the authority to implement all elements of the Proposed Rule. Resolving this issue may take more time than proposed.

Building Block 1 is essentially the only building block which ODEQ has explicit authority to enforce under both the federal and state Clean Air Acts, as it deals with enforceable CO_2 emission limits. Falling within the Oklahoma Corporation Commission's jurisdiction (and arguably outside ODEQ's jurisdiction) are aspects of Building Blocks 2, 3, and 4, including all elements requiring the approval of rates (*i.e.*, resource planning, energy efficiency measures, ratemaking for new renewable or nuclear plants, the retirement of existing fossil plants, and recovery of any associated stranded costs). *See* Okla. Const. art. 9, § 18, 17 O.S. § 152.

It is worth noting that ODEQ's ability under Oklahoma law to establish and implement a carbon trading program is also currently uncertain. Furthermore, ODEQ has no regulatory authority over the state's renewable portfolio standard ("RPS"). Regardless, Oklahoma's RPS is not mandatory, and administrative rulemaking, or more likely legislative action, would be necessary to create and enforce a mandatory RPS if Oklahoma were to decide to include such a measure in its plan. Overall, it is unclear how state environmental agencies will develop enforceable plans satisfying EPA approval criteria without full regulatory authority over the

contents of such plans, especially if no other state agency appears to have authority to enforce those other portions of the plans under the Clean Air Act.

ODEQ Comment No. 5: **Corrective Measures**

The EPA proposed that non-self-correcting state plans be required to have program implementation milestones to ensure progress during the 2020–2030 interim period. The EPA would require states to annually submit their performance data, and starting in 2022 to include a comparison of emission performance achieved for the preceding two years. The EPA also proposes to require that a report be submitted and corrective measures taken if an interim emission check indicates that actual emission performance of affected entities is not within ten percent of the performance projected in the state plan. *See* 79 Fed .Reg. 34,907.

If the goal is met by 2030, the requirement to undertake corrective measures if interim milestones are not met is unnecessary. Establishing and enforcing milestones with too short of a compliance period creates an unnecessary burden on the states. Rather than working towards the final 2030 emission goal, EPA is creating multiple goals set throughout the interim period, and imposing the consequence of corrective measures should the goals not be met.

Furthermore, the EPA's ten percent trigger seems arbitrarily low. Failing to meet a milestone within ten percent seems highly likely, which according to the EPA, will require the state to take corrective measures. If a trigger is determined to be necessary, a twenty-five percent trigger for corrective measures is more reasonable than the ten percent trigger, and would allow for unforeseen considerations and fluctuations in emissions. A trigger for corrective measures should only be required if it is highly likely that the final 2030 goal will not be met.

Having emissions not within ten percent of the milestone is not indicative that a state will fail to achieve its 2030 goal. Thus, corrective measures are not warranted at that point.

The EPA proposes that states could elect to wait to adopt into regulation corrective measures identified in the plan until after a plan performance deficiency is discovered. *See* 79 Fed. Reg. 34,907. Utilizing a plan revision approach versus implementation of predetermined corrective measures would allow the states to take advantage of the latest technological developments and to take into account the current circumstances facing the individual state. However, in choosing to adopt this method, EPA proposes that the trigger for corrective measures be based on actual emission performance that is "inferior to projected performance by eight percent." *See* 79 Fed. Reg. 34,907. EPA provides that an eight percent trigger is justified to identify a gradually developing deficiency earlier in time, and account for the lengthy period for states to adopt legislative and/or regulatory action. A trigger based on actual emissions is preferred over the alternative; however, ODEQ believes an eight percent threshold is too low. The ability to develop measures necessary to address specific issues that arise would be more effective than binding a state to corrective measures designed in advance and may not truly address the issue causing a state to not achieve its emission targets. Additionally, even with the option to tailor corrective measures after an issue is identified, an eight percent trigger is not indicative that a state will fail to meet its 2030 goal and warrant corrective actions.

Instead of corrective measures that automatically take effect, ODEQ supports an approach that includes plan revision requirements that are triggered if a state fails to achieve its interim goal (within a reasonable margin) and after a reasonable time for implementation. Any determination that a plan revision is necessary should include consideration of emission reducing

activities or actions that are in the works or that are imminent so as to not require an unnecessary revision or implementation of unnecessary corrective measures. Any such plan revision requirements should allow a reasonable amount of time for the development and implementation of the revision.

In addition, EPA's authority to require corrective measures in a § 111(d) plan is questionable. EPA has the ability to require a contingency plan in accordance with § 172(c)(9) of the Clean Air Act. According to § 172(c)(9) of the Clean Air Act, EPA shall require nonattainment plans to include "implementation of specific measures to be undertaken if the area fails to make reasonable further progress [in obtaining a NAAQS]." ODEQ respectfully requests EPA to identify the specific authority that allows EPA to require a contingency plan under § 111(d) of the Clean Air Act. Although EPA does not describe this measure as a "contingency plan," it appears that "corrective measures" are functionally identical to the contingency plans provided under § 172(c)(9) of the Clean Air Act, which is inapplicable to plans under § 111(d).

ODEQ Comment No. 6: Legal Uncertainties with the "Beyond the Fence-Line" Approach

In the Proposed Rule, EPA requests comment on whether measures involving actions by entities or at locations other than the facilities directly subject to the Proposed Rule may (or should) be included in a state § 111(d) plan. *See* 79 Fed. Reg. 34,892. In other words, EPA solicits comment on whether beyond the fence-line approaches are legally permissible. Clearly, there is more legal uncertainty related to the more flexible, beyond the fence-line approaches discussed in the Proposed Rule compared to a straight forward unit-by-unit approach. The question appears to be whether BSER allows a plan to be implemented which does not require the subject units themselves to directly achieve specific levels of emission reductions, but instead

allows a § 111(d) plan that permits the state or the subject facilities to indirectly achieve emission reductions through requiring actions off-site.

Arguments in favor of using beyond the fence-line flexibility under § 111(d) appear to rely on a broad definition of "system" in the BSER context that includes almost any technique available for reducing carbon emissions related to power plants at a reasonable cost. Additionally, proponents argue that the 1990 Amendments to the Clean Air Act expanded the range of compliance options by changing the term to BSER from best system of *continuous* emission reductions. Lastly, proponents also argue that § 111(d) provides for an approach similar to that used in § 110(a)(2)(A), which allows for the use of "economic incentives such as fees, marketable permits, and auctions of emission rights." Arguments opposed to the use of beyond the fence-line flexibility under § 111(d) state that the question is not how to define "system" as included in the term BSER; but instead, the question is how the "system" is to be applied (*i.e.*, to what must BSER apply?). Opponents argue BSER must apply to the facility being regulated under the § 111(d), rather than to the electric system as a whole.

ODEQ does not comment on whether the use of beyond the fence-line approaches is permissible under § 111(d). However, ODEQ does recognize that absent such an approach, most existing subject facilities located in Oklahoma will not be able to achieve the proposed CO_2 emission limitations. If outside the fence-line reductions are determined to be impermissible, then the proposed goals would need to be adjusted drastically in order for the state or the subject facilities to have any reasonable chance to comply with EPA's requirements. Consequently, to the extent that such an approach is determined to be within the legal confines of the Clean Air Act, ODEQ supports the ability to consider such reductions in developing and implementing a

state § 111(d) plan. However, if outside the fence-line reductions are determined to be impermissible, then EPA's Proposed Rule should be withdrawn.

Standards for existing sources set under § 111(d) are supposed to be similar to those for new, modified, or reconstructed sources set under § 111(b). It appears that the corresponding emission rates for existing sources that would result from implementation of the Proposed Rule would actually be significantly more stringent than those contained in the related rule proposed for new sources. The question is whether § 111(d) allows for indirect or direct regulation of sources that are not regulated under the corresponding § 111(b) standard. If existing sources are not allowed to include reductions obtained outside of the fence-line (i.e., EE, DSM, etc…), then it will be difficult (if not impossible) for many existing sources to comply.

V. Comments related to Scope of 111(d) Plan

ODEQ Comment No. 7: Rate to Mass-Based Approach

The Proposed Rule allows states the flexibility to choose between a rate-based approach and a mass-based approach. *See* 79 Fed. Reg. 34,837. In EPA's Technical Support Document ("TSD") entitled "*Translation of the Clean Power Plan Emission Rate-Based CO_2 Goals to Mass-Based Equivalent*" (Nov. 2014), the EPA describes two calculation-based approaches in translating the rate-based approach to the mass-based approach. One approach utilizes the emissions from existing affected and new fossil fuel-fired sources. The other approach produces mass-based equivalents that apply only to existing affected fossil fuel-fired sources.

ODEQ believes that if a state opts to take the mass-based approach and submits a state plan to EPA in 2016, the states should be afforded a technically justified reprieve in the future, should it be obvious that the original mass-based goal is no longer reasonable. ODEQ is

concerned that continued economic development in the State could result in unanticipated demand growth and related emissions, making it difficult to meet mass-based goals. This holds true should a state utilize the calculation which relies upon the emissions from both affected existing and new sources. In essence, states will be pigeon-holed by a mass-based goal developed prior to such unforeseen state growth. Increased generation makes it more difficult to comply with mass-based limits verses rate-based limits. The rule should not become just a test of a state's ability to prognosticate future economic conditions. Therefore, states should be afforded the opportunity to provide to the EPA an alternative/corrected mass-based goal.

Additionally, ODEQ believes that the calculation which utilizes emissions from both affected existing and new sources is inconsistent with the text of § 111(d). Emissions from new fossil fuel-fired sources are regulated under § 111(b). By factoring in these sources, the EPA is essentially taking a second bite at the apple in regulating new sources. Additionally, the EPA is effectively capping all CO_2 emissions from EGUs. Section 111(d) provides that "States shall submit to the Administrator a plan which . . . establishes standards of performance for any existing source . . . ." *See* 42 U.S.C. § 7411(d). Therefore, ODEQ is concerned that any approach which accounts for new sources under § 111(d) may be vulnerable to legal challenge.

ODEQ Comment No. 8: Leakage/Potential for Increase in Emissions

The rate-based approach that forms the basis for the rule presents a number of concerns. ODEQ believes that the approach would likely slow the increase in CO_2 emissions, but may not produce significant emission reductions. While providing flexibility to the states in meeting the goals is necessary and appropriate, the Proposed Rule may allow the system to be manipulated. The wide disparity among the states' goals may, for instance, give some states an incentive to

"redispatch" load from a lower-performing oil/gas or natural gas facility to a coal facility in a coal-dominated state that has a higher lb/MWh CO_2 goal. In addition, the rule does not distinguish between cleaner and dirtier plants of the same type and fuel source. All of this would, for instance, allow a state with excess coal capacity and little NG capacity to actually increase CO_2 emissions while complying with the goal. The interaction between states that follow different approaches (*i.e.*, mass-based vs. rate-based) will likely prove problematic. Uniformity may resolve this and actually lead to the purported goal of the Proposed Rule.

As another unintended consequence of the Proposed Rule, the resulting increased power cost for large users may encourage such facilities to turn to alternative sources, or to the development of on-site capabilities to meet their power requirements. If these needs are met through renewable energy sources and/or end use energy efficiency improvements, it would help a state in meeting its goal. However, facilities may move to on-site generation (*i.e.*, go "off-grid") that is not subject to the CO_2 standards, would likely be less efficient, and ultimately result in greater CO_2 emissions. An example of this movement to decentralized generation of power is the growth in the number of well-sites that need quick deployment of a large, short-term power supply. As this is a developing movement, it is unclear how this will impact the rate goals for the states. If the demand for this sector is included in calculating state goals, but the sector opts to go off-grid, the goal will include the demand. However, the Proposed Rule does not provide for a means of accounting for those that move off-grid. Essentially, the state plan would be attempting to account for demand of a sector that may not be controllable. Overall, these and other opportunities for "leakage" reinforce the possibility that the Proposed Rule as written is

arbitrary – at a minimum in perception, if not in reality. The Proposed Rule creates a significant regulatory burden with the possibility of insignificant reductions in overall CO_2 emissions.

ODEQ Comment No. 9: Grid Line Capacity and Reliability

Currently, in the State of Oklahoma "renewable energy" as it is affected by the Proposed Rule, essentially means wind energy, which is a variable "must-run" load that can only be used when the proper amount of wind is available. The latest data available for wind energy in Oklahoma shows that it has a capacity factor of 0.4, meaning the wind turbines are not generating electricity roughly 60% of the time. Unfortunately, in Oklahoma much of that 60% downtime coincides with periods of peak demand. Thus, although Oklahoma has renewable energy available at off-peak times, it must have enough conventional peaking capacity to provide power when the wind is not blowing during peak hours. Given this circumstance, electric providers must also have peaking generation capacity that is able to be taken on- and off-line quickly and easily. This necessitates the inclusion of simple-cycle natural gas combustion units among generator fleets.

A major consideration when siting any energy production facility is the transmission availability from the area of generation to the area of consumption. Most wind farms in Oklahoma have been located in the western part of the State where wind generation potential is highest, but their remote locations are far from the primary areas of distribution and consumption. Thus, miles of lines must be added to the grid and/or capacity of existing lines must be increased. Potential impediments and uncertainties exist regarding the feasibility of adding this transmission capacity. Recent estimates of the cost of expanding grid lines are in the range of $1,000,000 per mile, and such projects could take several years to complete. An

adequate timeframe must be provided to allow such large-scale infrastructure additions to come to fruition, and to avoid adversely impacting grid reliability and states' economies.

Furthermore, ODEQ supports the Federal Energy Regulatory Commission ("FERC") commissioners' proposal that a "relief valve" be included in EPA's final rule, allowing for relaxation of the compliance requirements in the event of grid reliability issues. This would provide electric generators and transmission operators the necessary time to correct the situation and ensure continued safe operation of the grid.

ODEQ Comment No. 10: Regional and Interstate Issues

The nation's electric infrastructure, or the manner in which electricity is generated and transmitted in many areas of the United States, may favor — or even necessitate — a multi-state or regional approach. The Proposed Rule contains very little guidance on the types of multi-state or regional plans that EPA will consider appropriate. Instead, the Proposed Rule solicits comment from the states on such approaches. An understanding of EPA's intent as to the content and structure of an approvable multi-state or regional approach is an important consideration for states in determining how to comment effectively and how to develop a § 111(d) plan. States need more guidance regarding the requirements of such plans, especially in light of the Dormant Commerce Clause doctrine under the U.S. Constitution.

Given the interstate nature of the grid, ODEQ stresses that it is important to avoid state-to-state inequities within any potential multi-state or regional plans. First, states must be held responsible only for actions taken within their own borders and jurisdictional authority. Second, there is the potential problem of a double-strike against states with diversified energy portfolios that export generated energy across state lines. If "dirty" or fossil energy is generated in one

state and exported to another, ultimately the generator may be responsible for the emissions. However, if "clean" renewable energy is generated in one state and exported to another, the generator may lose credit for the emission reductions. ODEQ emphasizes that, in either case, both credits and charges must accrue to the same state — either the state of generation or the state of consumption. There must be a consistent and clear bright-line rule indicating exported dirty and clean energy will be charged and credited to either the generating state or the state where it is consumed. This approach must be equitable and consistent, at least within the regional grid, if not across all fifty states, tribal lands, and U.S. territories.

Additionally, the way the grid functions with respect to the operations and governance of RTOs creates a potential problem with the enforceability of a multi-state or regional plan. Similar to other RTOs, the Southwest Power Pool ("SPP"), which serves the State of Oklahoma, has a day-ahead bid process requiring members to bid their price for generation for each of their units. The SPP uses economic factors to decide which units are used every day. Any input into this process may be outside the scope of ODEQ's regulatory authority, and even states' authority in general. RTOs cover multiple states, and some states are served by two or more RTOs. It is clear RTOs' operations would be integral to the implementation of any final rule and any multi-state § 111(d) plan, but it is not clear where the authority lies to integrate them into state and multi-state plans.

Ultimately, the public and the states should have the benefit of reviewing and commenting on the approach EPA intends to take in a final rule. Requesting ideas from the states, and then issuing a final rule based on those ideas without providing the public and states with the opportunity to review and comment on the approaches considered would be wholly

inappropriate. ODEQ respectfully urges EPA to re-propose a rule, particularly with respect to a multi-state or regional approach, and provide a sufficient opportunity for adequate public and state review and comment.

ODEQ Comment No. 11: **Unofficial Standby Units should be removed from data set.**

EPA has proposed state-specific CO_2 emission performance goals, and requirements for each state to develop a plan to achieve its goal by the year 2030. The proposed emission rates are based on each state's fossil-fired EGUs. Not unlike many states in its region, Oklahoma can experience extreme weather conditions in any season. The electric generators in Oklahoma keep a significant number of older and less cost effective units in reserve capacity, a condition where the unit only operates enough to ensure it could be used if needed in case of extreme weather or natural disaster. Generators are hesitant to decommission such units, despite limited use, due to the need to be responsive to extraordinary conditions when peak power is needed in a specific location. Oklahoma generators maintain thirteen units in reserve capacity. These units should not be considered in calculating Oklahoma's performance goal, since the units are each 40+ years old, and/or have a capacity utilization factor of less than 0.10. The units and their associated information are provided in the table below. *See also* ODEQ Comment No. 20.

Unit Name	Type	Nameplate Capacity	Capacity Factor	Year Online
Ponca City Unit 1 ORIS 7546	Natural Gas Combined Cycle	19.8 MW	0.0717	1966
Ponca City Unit 3 ORIS 7546	Natural Gas Combined Cycle	54.0 MW	0.0717	1995
Ponca City Unit 2 ORIS 762	Oil/Gas Steam	48 MW	0.0001	1977

Mustang Unit 1 ORIS 2953	Oil/Gas Steam	82 MW	0.0197	1950
Mustang Unit 2 ORIS 2953	Oil/Gas Steam	63 MW	0.0361	1951
Southwestern unit 2 ORIS 2964	Oil/Gas Steam	84 MW	0.0248	1954
Tulsa unit 2 ORIS 2965	Oil/Gas Steam	170 MW	0.0770	1956
Tulsa unit 3 ORIS 2965 (Unit is retired)	Oil/Gas Steam	95 MW	0.0000	1948
Tulsa unit 4 ORIS 2965	Oil/Gas Steam	170 MW	0.0814	1958
Anadarko plant unit 3 ORIS 3006 (standby status)	Oil/Gas Steam	50 MW	0.0269	1959
Moreland unit 1 ORIS 3008	Oil/Gas Steam	45 MW	0.0624	1964
Horseshoe Lake unit GT7 ORIS 2951	Natural Gas Combined Cycle	27 MW	0.1522	1963
Horseshoe Lake unit ST7 ORIS 2951	Natural Gas Combined Cycle	220 MW	0.1522	1963

<u>ODEQ Comment No. 12</u>: **Acceptable Data Sources**

On page 17 of EPA's TSD entitled "*Projecting EGU CO_2 Emission Performance in State Plans*" (June 2014), EPA provides seven key variables that may drive EGU CO_2 emission projections; however, EPA has not explained where the data for each of the variables will or should come from. ODEQ respectfully requests that the following sources be considered:

- Electricity load growth projections (energy peak and demand)
  - State PUCs, EIA's AEO
- Fuel supply, delivery, and pricing assumptions
  - RTO/ISO, EIA

- Cost and performance of electric generating technologies
  - EIA
- EGU firm builds and retirements (e.g., those scheduled with a RTO/ISO)
  - RTO/ISO
- Transmission capability and RTO/ISO transmission expansion plans
  - RTO/ISO
- Applicable federal regulations (other than the EPA emission guidelines)
  - RTO/ISO, NERC, FERC
- Applicable state regulations and programs (other than those that are included in the state plan)
  - State where generation occurs or state where demand occurs

ODEQ Comment No. 13: **Modified or Reconstructed Sources should not be simultaneously subject to the requirements of both a § 111(b) standard and a § 111(d) Plan.**

It appears that EPA is proposing that an existing source that becomes subject to § 111(d) will continue to be subject to those requirements even after the source undertakes a modification or reconstruction that triggers applicability of a standard promulgated under § 111(b). Consequently, the source could potentially be simultaneously subject to different requirements under §§ 111(b) and 111(d). The Preamble of the Proposed Rule specifically provides, "[t]his proposal applies to any existing source subject to any CAA section 111(d) plan, and not only existing sources subject to the CAA section 111(d) plans promulgated under this rulemaking." 79 Fed. Reg. 34,903. Moreover, the Preamble to the Proposed Rule states:

> Because CAA section 111(d) does not address whether an existing source that is subject to a CAA section 111(d) program remains subject to that program even after it modifies or reconstructs, the EPA has authority to provide a reasonable interpretation, under the Supreme Court's decision in Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-844 (1984). The EPA's interpretation is that under these circumstances, the source remains subject to the CAA section 111(d) plan, for two reasons. The first is to assure the integrity of the CAA section 111(d) plan. The EPA believes that many states will develop integrated plans that include all of their EGUs, such as rate- or mass-based trading programs. Uncertainty about whether units would remain in the program could be very disruptive to the operation of the program. The second reason is to avoid creating incentives for

> sources to seek to avoid their obligations under a CAA section 111(d) plan by undertaking modifications. The EPA is concerned that owners or operators of units might have incentives to modify purely because of potential discrepancies in the stringency of the two programs, which would undermine the emission reduction goals of CAA section 111(d).

79 Fed. Reg. 34,903-04. This interpretation is not reasonable. Historically, a modification resulting in the applicability of a standard promulgated pursuant to § 111(b) would automatically satisfy any corresponding standard promulgated for existing sources under § 111(d) (as such standards are intended to be less stringent since existing sources were not designed with the future standard in mind). It appears obvious that the intent of the Clean Air Act was not to subject the same source to different standards under both §§ 111(b) and 111(d).

EPA's interpretation only becomes necessary if the "beyond the fence-line" approach is permissible, since it is incongruous to require existing sources to meet a standard more stringent than the corresponding standard for new sources without consideration of beyond the fence-line reductions. In fact, the mere thought that such an interpretation by EPA is necessary actually appears to support the position that the beyond the fence-line approach is impermissible and should have alerted EPA that it had taken "a wrong interpretive turn." *See Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2446, 189 L. Ed. 2d 372 (2014) ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. . . . [T]he need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn.").

VI. Comments related to Goals

ODEQ Comment No. 14: Interim Goals Achievability and Reasonableness

In calculating Oklahoma's goals, EPA data begins with a 2012 baseline level of 1,562 lbs CO_2/MWh, and proposes an interim goal of 931 lbs CO_2/MWh and final rate-based goal of 895 lbs CO_2/MWh. *See* 79 Fed. Reg. 34,895. The EPA calculation assumes that by 2020, the six percent average heat rate efficiency improvements at existing coal facilities, the full projected redispatch of coal and oil/gas steam generation to natural gas combined cycle units ("NGCC"), and 2020 existing and incremental renewable energy will have been achieved. Thus, the EPA assumes Oklahoma will reach a de facto limit of 996 lbs. CO_2/MWh by 2020. In determining Oklahoma's interim goal, the EPA then assumes that varying anticipated yearly renewable energy and energy efficiency improvements during the 2020 through 2029 period will achieve the interim goal.[2] *See also* ODEQ Comment No. 21.

In addition to Oklahoma's 10-year interim goal rate set by the Proposed Rule, the proposed 40 C.F.R. § 60.5740(a)(3)(iii) requires that state plans specify a separate performance level for each year beginning in 2020 through 2029, and increments of emissions performance for every 2 rolling calendar years during the interim period, unless other periods are approved.

[2]

Year-by-Year Reductions Anticipated Under EPA's Goal Calculation for Oklahoma							
Year	Rate	Reductions		Year	Rate	Reductions	
2012	1562	lbs/MWh	%			lbs/MWh	%
2020	996	566	36.24%	2025	915	7	0.76%
2021	977	19	1.91%	2026	909	6	0.66%
2022	957	20	2.05%	2027	904	5	0.55%
2023	937	20	2.09%	2028	899	5	0.55%
2024	922	15	1.60%	2029	895	4	0.44%
2020-2029 Average					931		

Therefore, states are not only required to meet an interim goal and final goal, but also yearly goals beginning in 2020. The burden of meeting these numerous goals is both extensive, and unreasonable. *See also* ODEQ Comment No. 5.

ODEQ questions the inclusion of the interim goal in the Proposed Rule. The purpose of any interim goal should be to encourage stakeholders to make reasonable progress towards the final goal. It should not, as presented in the Proposed Rule, drive the entire program. As stated previously, the EPA assumes that for Oklahoma, approximately a 36 percent reduction from the existing affected sources is achievable within the short timeframe between the promulgation of the rule and 2020. Currently, the Proposed Rule requires states to submit their state plan by June 30, 2016, and allows for the possibility of a one or two-year extension. Since implementing and achieving the expected reductions within the prescribed timeframe is not practically achievable, the Proposed Rule will force states to begin implementing rule requirements years prior to the finalization of the rule, or implement reductions far below the final rate in order to meet the interim goal. A concept including reasonable, non-punitive milestones is preferable and would likely be more effective in the end than enforceable interim goals. In the alternative, the interim goals should be reformulated based on realistic and reasonable expectations of implementation.

Aside from the lack of reasonableness of the interim goals, it is unclear whether the state would be required to specify an average rate-based or mass-based goal for each year of the interim goal period for each affected facility. In the proposed language for 40 C.F.R. § 60.5815, states are required to annually report on the progress of all affected sources, and then compare the average emission performance of the affected entities with that of the state plan for the previous two years. ODEQ respectfully requests clarification on whether the proposed

requirements of 40 C.F.R. § 60.5815(b) are intended to apply to state-wide emission performance versus, that of individual affected sources.

ODEQ Comment No. 15: Goal Setting Based on Generation/Compliance Based on Consumption

EPA has proposed to base the CO_2 reduction goals on generation, while determining whether the goal has been met based only on consumption. This approach is essentially "comparing apples to oranges" – it is inconsistent and will create inaccurate results, because the inputs upon which the goal is calculated are fundamentally different from the inputs used to measure goal attainment. EPA's proposed approach has the potential to result in goals for some states that are unachievable, and goals that are too easily achievable for other states. In order to minimize this imbalance, a state would have to find willing partner states to engage in regional or even national planning efforts or trading, so that its goal is averaged across many other states' goals. The notion that some states would be required to engage in extensive national or regional planning efforts to achieve compliance (*i.e.*, states which export energy and therefore have steeper goals), while other states would have little incentive to coordinate (*i.e.*, states which primarily purchase energy) is inconsistent and unfair.

Under EPA's proposal, a state that exports a large amount of its electric generation, particularly a large amount of its low-carbon electric generation, will be more heavily impacted by this rule's requirements than states that do not. In its goal calculation, the fact that a state already has a large amount of low-carbon generation is used as the basis for setting a goal that assumes likewise. However, when calculating whether the state has achieved its goal, the state will not receive credit for the exported low-carbon electricity. Further, for those states which are given more easily achievable goals, there is a disincentive to participate in a regional/multi-state

effort because that goal will be averaged out across the states, making their own goals more stringent than they would have been otherwise. However, the states with more difficult-to-achieve goals will only fully benefit from regional/multi-state planning if the states with easier-to-achieve goals are also involved.

For example, consider a state that has 15% wind generation today and half of that generation (7.5%) is exported. Under the proposal, the goal would be set with an assumption that the state has 15% generation and could increase to 20% generation by 2030 (a 5% increase), and would be the basis for the state's carbon reduction goal. If the state were to demonstrate compliance today, it would only receive credit for 7.5% wind consumption, which would require an increase of 12.5% in order to reach that same 20% generation goal. Therefore, without taking any actions whatsoever, the state would have moved further from its goal just because the metrics for the goals are different than the metrics for compliance.

Both goals and compliance should be based on the same metric. If the goals are based upon generation, compliance should also be based on generation. Alternatively, if compliance is based on consumption, the goals should also be based on consumption. This will make compliance more achievable within state boundaries and will not discourage states from engaging in regional planning. Due to the relative ease and certainty in calculating generation compared to calculating consumption, the use of a generation approach may be preferable in the final rule as a basis for both goal-setting and measuring compliance.

ODEQ Comment No. 16: Alternative Base Year

EPA has offered states the opportunity to request an alternative base year in calculating the goal. However, for Oklahoma, data for the years 2010 and 2011 do not appear to provide any significant advantage over the year 2012. Therefore, ODEQ requests that the year 2012 be retained as the base year for the state.

VII. Comments related to Building Blocks

ODEQ Comment No. 17: Best System of Emission Reduction ("BSER")

EPA has not clearly or adequately established a set of limits that represents BSER for existing fossil fuel-fired EGUs (*e.g.*, the standard that EPA would apply to a facility under a Federal Implementation Plan or FIP). Once such limits are established, nothing should/would prevent EPA from allowing the states the flexibility in achieving comparable emission reductions by applying the strategies contemplated under the building blocks.

If EPA believes that the rule must set a goal rate based on a set of building blocks, it is critical that both the national/regional basis and the state-by-state application of each separate building block goal calculation be reasonably attainable, while assuring continued reliability of the power sector. ODEQ understands that, as EPA has stated numerous times, states do not have to achieve the per-block goals, and that the states may use any combination of measures to achieve the overall (and interim) goal by the end of the compliance period. This does not diminish the importance of EPA's basis, assumptions, data, and calculations for each building block used to determine the states' goals. If any one part of the calculation is inappropriate, the goal is likely unachievable and does not represent BSER, either nationally or for a particular state.

ODEQ Comment No. 18: Comments related to Building Block 1 - Increased Heat Efficiency

ODEQ does not believe that the technical documentation provided adequately justifies EPA's assumption that an average 6% heat efficiency increase is reasonably achievable for coal-fired EGUs on either a state-wide or nation-wide basis. EPA's own analysis indicates that a 6% efficiency increase is on the upper bound of achievability for most facilities. Different facilities are starting (as of 2012) at different efficiency levels, depending on unit age, condition, and design. Given the limited available opportunities for efficiency improvements, a more reasonable state-based or facility-based factor should be used for Building Block 1.

ODEQ Comment No. 19: Comments related to Building Block 2 - Redispatch

ODEQ has significant concerns over EPA's concept, formulation, and application of Building Block 2 in determining each state's goal rate. The first question this approach raises is whether redispatch of power production from one type/group of facilities to a potentially unrelated group of facilities may be considered BSER. Putting aside both that fundamental question and the disparate effect of Building Block 2 on the goal rate among different states, ODEQ believes that EPA has underestimated the challenges that the redispatch approach presents. Few, if any, states have an actual excess of clean, reliable natural gas combined cycle ("NGCC") unit capacity that is sitting idle and simply awaiting this redispatch. Increased utilization of modern NGCC production to replace older power sources is likely to continue. However, EPA grossly underestimates the complexity of the power system in assuming that redispatch represents an opportunity for states to quickly (*i.e.*, by 2020) and easily achieve significant CO_2 emission reductions. ODEQ shares many of the concerns expressed by other stakeholders regarding building block 2, such as the limitations of existing infrastructure, which

are discussed in the Notice of Data Availability. Many of the "underutilized" natural gas-fired units in Oklahoma were operated at a unit capacity factor of 0.25 or less during 2012, because they are older, less efficient, and less reliable. Several of these units have been kept available for use only in extraordinary circumstances. In addition, state producers maintain reserve units to stabilize grid current when renewable energy generation is unavailable. These Combined Cycle units, along with any that are more than 30 years old and/or have a 2012 CO_2 emission rate of greater than 1,000 lbs/MWh should not be included in the Building Block 2 portion of the goal calculation.

ODEQ Comment No. 20: Comments related to Building Block 3 - Renewable Energy

Oklahoma is and will continue to be a leader in wind power development and generation. In addition to federal wind generation tax credits, Oklahoma has offered generous tax reductions/credits[3] to companies as an incentive to develop wind generation in the state. However, ODEQ has significant concerns regarding EPA's concept, formulation, and application of Building Block 3 in determining each state's goal rate. There are additional concerns over how the Proposed Rule addresses incorporating, tracking, and crediting renewable energy ("RE") into and through a state plan. The proposal would require each state to develop and implement a

[3] Oklahoma has provided three separate tax reductions/credits to companies as an incentive to build and operate wind farms and other renewable energy facilities in the state:

1. Wind turbines are exempt from ad valorem tax for five years, with a current cost to the state of about $32 million per year.
2. Oklahoma wind farms and certain other renewable energy facilities qualify for Zero Emission Tax Credits tied to kilowatt-hour production. In 2013, wind farms generated 10.8 mKW-hrs of power, which translated into $54 million in tax credits. The tax credits will grow as renewable energy generation grows.
3. Oklahoma wind farms qualify for an investment tax credit equal to 1 percent of investment for up to five years.

complex plan based in part on conjecture as to future technical development, policy decisions, and economic conditions that will determine the future of RE.

The Building Block 3 component used in setting each state's goal rate should better reflect these considerations. Step 4b (renewables) should provide for adjustments to the 2020 – 2029 existing and Incremental RE values for each state, to account for the likely significant differences between EPA's 6- to 15-year projections and actual conditions. Unless and until Congress renews the wind generation tax credits that were in effect in 2012, the renewable energy goals that assumed high levels of wind growth for the years 2014 through 2030 should be greatly reduced.

The Proposed Rule requested comments regarding alternative RE approaches (*see* 79 Fed. Reg. 34,869 *and Alternative RE Approach Technical Support Document*, Table 1.2, p. 10), which are based on technical and market potential, and are more aggressive than the Proposed Rule's Renewable Portfolio Standard ("RPS") approach.

An alternative that bases the projected RE growth rate on a state's existing RE development as of 2012 exhibits many flaws. The existing development in 2012 may have taken years to accrue and may represent the lowest hanging fruit. It is not appropriate to assume that the quantity of development at any given point in time represents a reasonable annual growth rate. For example, Oklahoma wind development grew quickly over the past 5-7 years, and continued growth is assured. However, the near-term growth rate may be slower due to an increase in legal, zoning, and transmission capacity issues. Further, a quantity achieved in 5-7 years cannot be assumed to be repeated on an annual basis. Since it is based only on potential

and does not take into consideration cost and other real-world effects, this alternative is too general to represent a realistic scenario for all states.

ODEQ agrees with the comment filed by the Kansas Department of Health and Environment ("KDHE") to Docket ID No. EPA-HQ-OAR-2013-0602, regarding the corrected Renewable Energy Standard. See KDHE Comment Letter dated November 17, 2014, pp. 4-6. The comment recommends correcting the RE Goal for the South-Central Region to 12% by including the Texas RPS in the region's goal calculation, and correcting a numerical error in the Kansas RPS goal. ODEQ believes that a Renewable Energy Goal for the South-Central Region of 12% is a more accurate representation of an achievable goal.

The original option described in the Proposed Rule, *i.e.*, using the average of states' RPS to set a goal, is more realistic, as it represents the expertise of states and is based on a more real-world scenario with diverse factors impacting development. Therefore, the original option with an RE Goal based upon existing RPS is preferred, and ODEQ respectfully requests that EPA correct the South-Central Region RE Goal to 12% as specified in the KDHE comment.

ODEQ Comment No. 21: Comments related to Crediting of Renewable Energy in State Plans

In one of the early calls with EPA, it was stated that a state cannot get credit for emissions reductions caused by renewable energy if the Renewable Energy Credits ("RECs") produced from that generation are sold out-of-state. However, EPA lays out six different options on how to account for the interstate effects of EE/RE programs in § VIII of the TSD for *State Plan Considerations* (June 2014). Option 2 (§ VIII, p. 92) conflicts with the statement, because it allows the possibility that the emissions be credited to the state where the electric generation occurs.

Because a state's emissions reduction goal is calculated based solely upon generation within the state, it makes good sense that compliance with that goal also be based upon generation within the state, as is done in Option 2. However, it appears that electricity produced by a wind farm in State A that is either transmitted directly to State B, or if RECs are sold to State B, Option 2 would also requires that State A reach an agreement with State B ensuring that State B will not also receive credit for the emission reductions. Option 2 appears to further require that State A model the emissions reductions being achieved in State B and incorporate those reductions into State A's § 111d Plan. This cumbersome process requiring the quantification and demonstration of out-of-state reductions would be hard for many states to meet due to limitations on funding, staff, and/or other technical limitations. ODEQ requests that EPA:

a) Provide clear guidance on the crediting for emissions reductions generated by renewables, paying extra attention and detail to renewable energy that is exported (whether that exportation happens within the power pool through dispatch or via overhead Direct Current lines that tap into a separate power pool).

b) Provide guidance on affordable methods by which any state may quantify emissions occurring outside of state boundaries when electricity or credits are being imported or exported – if the final § 111(d) rule requires such quantification be included in State § 111(d) Plans.

c) Use the same metric to calculate both the required goals and whether or not those goals were achieved. For example, if the state goals are calculated based on electric generation, compliance should also be calculated based on electric generation. *See* ODEQ Comment No. 15.

d) Allow a state that maintains the reserve backup units in order to stabilize the grid current when less renewable energy generation is available to count the renewable energy in the denominator of their 111(d) equation for compliance purposes.

VIII. Comments related to Monitoring, Reporting & Recordkeeping

ODEQ Comment No. 22: **Monitoring, Reporting, and Recordkeeping**

In the proposed rule, the EPA proposes state monitoring, reporting and recordkeeping requirements for affected EGUs, which would be codified in 40 C.F.R. §§ 60.5805, 60.5810, and 60.5815. ODEQ believes the rule should require all affected EGUs to monitor CO_2 emissions and net hourly electric output under 40 C.F.R. Part 75, and report the data using the EPA's Emission Collection and Monitoring Plan System ("ECMPS"). This would assure a more uniform monitoring and reporting process for all affected sources. Currently, some sources located in Oklahoma are not subject to 40 C.F.R. Part 75, and ODEQ does not possess the resources to develop and maintain a separate reporting system for these sources.

The proposed 40 C.F.R. § 60.5810(d) will require states to maintain records for a minimum of 20 years. ODEQ respectfully requests that EPA justify and provide the rationale for requiring states to maintain records for such a lengthy period of time. States will be heavily burdened by the expenditure of resources and man-power to maintain records for at least 20 years. Additionally, the cost that ODEQ incurs in maintaining and retaining electronic records is rising, and the requirement to maintain additional records for 20 years will be financially burdensome.

The EPA proposes both annual and biennial reporting requirements for the states under proposed 40 C.F.R. § 60.5815. ODEQ believes that frequency of reporting is burdensome, and

that a July 1st deadline for state reporting does not provide states sufficient time to gather information and prepare reports. Also, some state environmental agencies may not possess the legal authority to require the reporting of information to assess renewable generation, demand-side management, or energy efficiency information that is needed for the biennial reports. Furthermore, under proposed 40 C.F.R. § 60.5815(b), the EPA proposes a 10 percent trigger for corrective actions, based on the biennial reports. ODEQ believes that these biennial reports would provide too small of a sample size and would not warrant the automatic triggering of corrective measures. *See* ODEQ Comment No. 5. Moreover, while the EPA proposes the plan requirements under § 111(d), the Proposed Rule includes public participation requirements that are modeled after state implementation plan requirements under 40 C.F.R. § 51.120. It is unclear whether the proposed annual and biennial reports will similarly be subject to both public review and comment prior to submission to the EPA.

Finally, in regards to monitoring, recordkeeping and reporting, ODEQ questions the relationship between the Proposed Rule and the annual GHG emissions reporting provisions under 40 C.F.R. Part 98. Currently, most affected sources report GHG emissions to the EPA quarterly pursuant to 40 C.F.R. Part 75 and annually via 40 C.F.R. Part 98. ODEQ respectfully inquires as to whether EPA is considering streamlining the apparently duplicative reporting requirements for the same emissions.