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Environmental Protection Agency  
EPA Docket Center, Mail Code 28221T  
Attn: Docket ID No. EPA-HQ-OAR-2013-0602  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Re: Technical Comments of NMED on EPA's Proposed Clean Power Plan

The New Mexico Environment Department appreciates the extended opportunity to comment on the EPA's Clean Power Plan Proposed Rule. We also appreciate EPA's ongoing outreach effort for this very complicated rulemaking. It is gratifying to see EPA's obvious concern for state flexibility as well as attempts to give credit for early action. These are both vital to the success of the eventual Final Rule.

Enclosed are the technical comments of the Department. Despite the extension of the comment period, the complexity and preliminary nature of the proposed Rule have made it extremely difficult to conduct thorough and comprehensive analyses. Accordingly, these comments are not exhaustive, and silence on a given issue does not imply concurrence with EPA's proposed position. Additionally, these comments do not necessarily reflect the position of other agencies or offices of the State of New Mexico. As explained in more detail within the comments, the Department believes that it is critical that EPA offer additional opportunity to comment, preferably on a re-proposed rule that significantly narrows the range of issues under consideration.

Thank you for this opportunity to comment.

Ryan Flynn  
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Enclosures: Technical comments from New Mexico Environment Department

**New Mexico Environment Department**  
**Technical Comments to the U.S. Environmental Protection Agency**  
**“Clean Power Plan”**  
**December 1, 2014**

Docket #EPA-HQ-OAR-2013-0602  
79 Federal Register 34829  
Carbon Pollution Emission Guidelines for Existing Stationary Sources:  
Electric Utility Generating Units – Proposed Rule

**1. Overarching Concerns**

- a. The U.S. Environmental Protection Agency (EPA) should reconsider the unprecedented reach of the Proposed Rule by recognizing the appropriate limits of federal authority under the Clean Air Act (CAA).** While EPA has the authority to regulate emissions from specific sources, this authority does not extend outside the physical boundaries of such sources (i.e., “outside the fence”). Likewise, EPA fails to recognize that State agencies charged with enforcing the Proposed Rule have no authority to enforce outside the fence reductions. By proposing to regulate outside the fence, the Proposed Rule exceeds the scope of EPA’s authority under the CAA.
- b. EPA should consider additional opportunities for stakeholder comment, considering the myriad ways the Final Rule could change from the Proposed Rule.** In the original Proposed Rule, EPA expressly requested comment on 194 distinct issues. The Notice of Data Availability (NODA), released on October 28, 2014 provided new information and requested additional comment. In addition, during various conference calls, EPA’s answers to States’ questions were often not definitive, with EPA inviting comment on how the questions should be resolved. Further, the NODA’s late release date allows insufficient time for states to analyze the information presented and to respond appropriately. Finally, EPA did not release the rate-to-mass translation methodology and presumptive mass-based state goals (critical elements of the Proposed Rule) until November 6, 2014, less than one month from the end of the comment period.

Considering the numerous requests for comment from EPA (indicating that EPA has not resolved many fundamental issues) and the late release of additional information, the Final Rule will look very different from the Proposed Rule. This is especially concerning to states, since goals and compliance options may change significantly without opportunity for further comment unless EPA provides an additional comment period.

One option is for EPA to release a revised Proposed Rule with an appropriate comment period before releasing the Final Rule. An alternative is to continue ongoing outreach and afford stakeholders an additional comment period focusing on mass-based goals and the rate-to-mass translation methodology. The New Mexico Environment Department

(NMED) also recommends an additional comment period should EPA alter the goal setting methodology or limit the compliance options available to states. If the Final Rule is significantly different from the Proposed Rule, NMED recommends the first option – releasing a revised Proposed Rule with an appropriate comment period to allow states and other stakeholders to analyze the changes.

The ambiguity in the Proposed Rule, the current data gaps, and the lack of time to fully analyze the data create uncertainty. This uncertainty may lead to unintended consequences.

- c. EPA should adjust the time frames for submitting state plans and compliance periods in consideration of the forthcoming revised ozone standards.** Many electric generating units (EGUs), including those affected by the proposed Clean Power Plan (CPP), will have new compliance burdens for ozone precursors [oxides of nitrogen (NO<sub>x</sub>) and volatile organic compounds (VOCs)] once the revised National Ambient Air Quality Standards (NAAQS) for ozone are final. Integrated planning for the CPP and state implementation plans (SIPs) for new ozone standards will be very difficult. Strategies that work for ozone may conflict with those that work for the CPP (and vice versa). The revised ozone standards and the CPP will lead to increased regulatory costs and additional permitting burdens for industry, as well as increasing the resources required by air agencies for planning. EPA should consider parallel rulemaking to allow states to integrate requirements for affected facilities in both state plans under CAA Section 111(d) and SIPs for ozone nonattainment areas.
- d. EPA should analyze and publish revised cost estimates that account for cost estimates from all components of the “best system of emissions reduction” (BSER).** EPA’s technical memo on cost considers only Building Blocks 1 and 2. To be accurate and realistic, EPA should consider costs for all four Building Blocks and include an estimate of the costs associated with stranded assets due to this rulemaking. The 2.7 – 4.4% electricity cost increases included in the technical memo as a result of 111(d) implementation are highly uncertain due to the complexity of the plan and length of implementation. Maintaining affordable electricity and minimizing costs to ratepayers should be a priority.

## **2. Affected Facilities**

**EPA should re-evaluate and clarify the list of affected sources in the Final Rule.** New Mexico is concerned that EPA’s list of affected sources in the spreadsheet accompanying the State Goal Computation Technical Support Document does not include all applicable sources, and may include sources that do not meet EPA’s applicability criteria.

### **3. Goal Setting and the Four Building Blocks as BSER**

- a. EPA should use a multi-year average as the baseline in its goal setting methodology.** The choice of an individual year may be administratively expedient; however, it may not be representative of emissions and generation over an extended period of time. Given that the compliance period extends to 2030, it is more prudent to use a multi-year historical average emissions and generation timeframe to mitigate bias any one year may have in establishing baselines and state goals. This is especially relevant due to the effect that the recent recession had on general economic activity and subsequent emissions from the power sector. Furthermore, it is not without precedent for EPA to consider a broader look-back period to determine actual emissions from the electric generating sector.

An analysis of EPA's Clean Air Markets Division power sector carbon dioxide emissions data for New Mexico reveals that 2012 coal-fired emission levels were the lowest for any one year between 2001 and 2012. NMED requests the use of a 3-year average to more closely approximate historical fossil fuel generation patterns and accompanying emissions in New Mexico.

- b. EPA should not include additional Building Blocks as BSER. This would make the goals more stringent while simultaneously reducing state compliance flexibility.** One of the strongest aspects of the CPP Proposed Rule is that it offers states flexibility in meeting their goals. While not every element of the proposed BSER is reasonable for a given state, the amount of flexibility offered in compliance plans may allow states to meet the overall goals by either over-achieving on other Building Blocks or adding new elements not considered as BSER. If EPA considers additional elements in defining the BSER, significant new analysis would be required regarding costs and benefits. While it may be appropriate for a state to substitute one of the suggested additional components for one of the original Building Blocks, it would not be appropriate for EPA to do so if the result is a more stringent goal than states had the opportunity to comment upon. EPA correctly noted that carbon capture and storage is too costly to consider on a retrofit basis and should not be considered as BSER for existing facilities, as control cost must be considered when determining BSER, in accordance with CAA §111(a).
- c. EPA should not consider changing the goal setting formula as suggested in the NODA.** The suggested changes make the goal calculations more complicated by allocating emission reductions to particular generators but do not address the effect of where emissions will actually be reduced.
- d. Building Block 1 – Heat Rate Improvements**
- i. EPA should determine heat rate improvement on a state-by-state basis that accounts for the technical and economic feasibility of improvement for each affected unit (bottom-up approach) rather than assuming a percentage based on national averages.** Heat rates are dependent on parameters such as

humidity, elevation and temperature. The same type of unit operating in the Northeast will have a very different heat rate from one operating in the Southwest due to the differences in elevation and climate, even if operation and maintenance are similar. Further, a lack of available water can reduce heat rate in that dry cooling is less efficient than wet cooling. Some coal-fired steam generators in New Mexico have water restrictions imposed by the federal government due to international compacts.

Second, using a national average heat rate improvement penalizes early action by not recognizing and taking into account those improvements that have already been made at individual facilities. For example, the operators of the San Juan Generating Station have already made improvements to their generators, resulting in an approximately 3% heat rate improvement. The retrofits included replacement of pulverizer classifiers, boiler tube sections, burners, piping and headers, Venturi throats, air heaters and feedwater heater tubes. In addition, new heater seals have been installed, as have baghouses to replace the electrostatic precipitators. This facility has undergone boiler cleaning and turbine overhaul as well. These improvements were made before 2010 and were not considered when EPA looked at national average heat rate improvement opportunities.

- ii. **EPA should not use the alternative 10% heat rate improvement as BSER under Building Block 1.** A 6% heat rate improvement as BSER is an overestimation of what is feasible for many EGUs; therefore, the alternative suggestion of 10% is even more infeasible. The costs associated with the assumptions for this higher rate make this unreasonable and likely technically impossible for New Mexico's facilities.

**e. Building Block 2 – Re-dispatch**

- i. **EPA should use operational capacity for all fossil fuel-powered EGUs for consistency and accuracy when determining the amount of re-dispatch available.** Nameplate capacity is not appropriate to use for this purpose. Nameplate capacity is rarely the amount of generation that is actually possible when taking into account site conditions such as elevation, temperature, and humidity. These factors are considered when permitting these sources in New Mexico. Using nameplate capacity overestimates the generating capabilities of NGCC facilities.
- ii. **EPA should evaluate the increase in emissions caused by the increased use of natural gas under the Proposed Rule.** An increase in natural gas usage from re-dispatch may increase NO<sub>x</sub>, VOC and methane emissions from upstream oil and gas operations in areas that are at risk for ozone nonattainment. Should these areas become designated as nonattainment, new constraints would be necessary regarding production. In addition, all of New Mexico's NGCC facilities are

located in areas at risk for ozone nonattainment. Increased usage of both oil and gas facilities and NGCC facilities will increase emissions, leading to additional permitting requirements. This could lead to additional economic burdens and additional costs for controls. Further, the timing for this rulemaking will be inappropriate for integrated planning regarding ozone, as discussed in section 1.b of these comments.

- iii. Re-dispatch considerations in goal setting should consider whether out-of-state utilities and balancing authorities make dispatch decisions that affect states' ability to accomplish full re-dispatch.** Many of New Mexico's dispatch decisions are not controlled by in-state authorities. New Mexico is connected to two different grids and exports between 30 and 40% of its power annually, making it dependent on other states' dispatch authorities to make appropriate dispatch decisions. Further, many of the state's rural electric cooperatives purchase power from the Southwest Power Pool, for which dispatch decisions are made in their Corporate Center in Little Rock, Arkansas. The final rule should evaluate and adjust Building Block 2 where necessary to account for dispatch decision-making capabilities.
- iv. Unless NGCC facilities are already permitted at 70% capacity or more, re-dispatching could cause a facility's increased usage to trigger new source review (NSR), making this option either infeasible or very costly.** One of New Mexico's affected facilities (Afton Generating Station) is permitted to operate only 1,920 hours per year with its duct burner, yet EPA assumed full nameplate capacity using duct burners to determine the amount of re-dispatch to this facility under Building Block 2. For this assumption to be a possibility, the facility would need to undergo NSR permitting in order to fully utilize the duct burners. NSR permitting would require the evaluation of additional impacts to the air shed, additional emission controls which lower the unit's efficiency, and increased operating costs. Since NSR permitting may limit a unit's operation, the EPA estimate of re-dispatch to this facility is greatly overestimated.
- v. EPA should consider that natural gas usage will increase as a result of re-dispatch.** While re-dispatch will ultimately reduce greenhouse gas emissions, reliance on this Building Block will increase the usage of natural gas. If this Building Block remains a component of BSER, options for mitigating this increased natural gas usage should be considered. (See section 4.g in these comments.)
- vi. Costs of this Building Block may be higher than anticipated, considering transmission issues, the increased price of natural gas due to increased demand, and the forced closure of coal plants.** Although NGCCs are not transmission-constrained in New Mexico, capacity of natural gas transmission pipelines and location of NGCC plants relative to electricity demand must be

given careful consideration, requiring further technical analysis. Further, simple economics indicates that, as natural gas demand increases, so will its price, especially in light of additional EPA rules expected in the near future addressing methane from oil and gas operations. Finally, reducing usage of coal-fired EGUs lowers their efficiency and thus their cost-effectiveness, while potentially increasing emissions of ozone precursors. This creates pressure for early retirements, raising the risk of stranded assets and higher costs for electricity consumers.

**f. Building Block 3 – Renewable Energy**

- i. EPA should address the fundamental inconsistency between goal setting and state plan compliance options regarding renewable energy (RE).** In the proposed rule, goal setting is based on net generation within a state’s boundaries. All of a state’s RE generation (except hydropower) was used to determine the starting point, ramp-up rate, and final RE goal for Building Block 3, regardless of whether that energy is exported and used for compliance with a Renewable Portfolio Standard (RPS) in another state. For states that are net exporters of RE, this creates a more stringent goal than would exist if the methodology relied on consumer sales. In addition, compliance options for state plans seem to favor giving credit for RE to consuming states through the use of renewable energy certificates (RECs) or other purchases. Importing states are allowed to claim the credit for RE without a downward adjustment to their goals (related to in-state RE generation) while exporting states would not be allowed to claim credit, even though their goals were made more stringent. This favors consuming states at the expense of producing states. The exporting state is, in effect, paying for the RE credit options of importing states.

Two options exist for addressing this fundamental inconsistency. Each option offers both advantages and disadvantages while addressing the disparity between goal setting and plan compliance options.

- **Option 1** – Adjust the goal setting methodology to be based on consumption rather than production. This aligns more closely with Renewable Portfolio Standards (RPSs), which are also based on consumption. This has the disadvantage of ignoring the other drivers of RE, such as tax incentives. Currently, tax incentives are important for attracting development of RE resources, but those incentives will become less attractive to states if they are not considered in the CPP.

The Final Rule should recognize that exporting states may have made a significant investment in RE development (e.g., Production Tax Credits and other tax incentives) and that importing states are only making an investment to the extent that the purchase price exceeds the

cost of other available electricity generation. If so, an allocation agreement may be necessary to give CPP credit to both the exporting and the importing states. This allocation could be based on dollars spent or it could be based on other criteria agreed to by participating states. This eventuality should be stated explicitly in the Final Rule language. As it currently reads, the importing state is favored.

- **Option 2** – Change the requirements for claiming credit for RE generation to align with the goal setting methodology by allowing producing states to claim credit for all in-state RE generation. This has the advantage of being simpler and reducing the possibilities of double counting. However, it has the disadvantage of overlooking the contribution that RPSs have historically made as significant drivers for RE development. (Note, however, that as RE resources reach cost parity with fossil fuel resources, the RPSs will have less significance.) It may also have the unintended consequence of dis-incentivizing RE development in states where consumption is low.
- ii. EPA should not include existing hydropower in calculating state goals, as proposed.** Hydropower is highly variable as it depends significantly on seasonal and annual precipitation, as well as usage allocations. Ongoing drought due to climate change puts reliance on hydropower at risk in many states, including New Mexico.
- iii. EPA should clarify in the Final Rule that credit for off-the-grid renewable generation will be allowed in plan compliance.** Some states, such as New Mexico, have many rural areas where costs for connection to the grid make distributed generation with storage capacity (off-the-grid) the most economic option for both residential and some commercial facilities. New Mexico offers tax incentives for such applications. These resources, while small, still reduce the usage of fossil generation that otherwise would have been necessary without the installations. With proper evaluation, monitoring and verification, these should be valid resources for crediting in a state plan.
- iv. Recognizing that RPSs have historically been significant drivers for RE development, the proposed RE approach (based on a region’s average RPS) is more appropriate than any of the alternative approaches as described in the “Alternate RE Approach” technical support document and the NODA. An adjustment to the proposed approach should also take into account the secondary (and even tertiary) standards which many states have.** Using technical RE potential does not take into account economic constraints or projected needs for new capacity. The fact that a few states have a high development rate compared to technical potential does not mean that the same level of development is feasible in all states. The conditions surrounding the



development in those leading states may be very different from the conditions in other states. The technical potential basis described in Option 1 of this technical support document creates tremendous burdens for some states, including New Mexico, while barely affecting other states. For example, using Option 1 would require that by 2030 New Mexico's RE goal would represent 73% of total electricity sales. This is not remotely possible for New Mexico.

Technical potential is also based on including in a state's territory both tribal and federal lands, each of which adds constraints and additional technical challenges. In fact, tribal lands should not be included in assessing a state's RE potential at all, considering that tribes are not subject to the Proposed Rule. These drawbacks must be addressed before considering any option related to technical potential.

EPA should be aware that states such as New Mexico with a large rural population and many rural electric cooperatives often have secondary and even tertiary standards. These standards are necessarily lower than those for the investor owned utilities (IOUs) due to the demographics of the rural population as well as transmission constraints of rural areas. A focus only on primary standards in setting a regional "average" RPS ignores the demographics and constraints unique to rural electric cooperatives.

- v. **There is an error in the calculations for the "Alternate RE Approach" Option 1.** Hydropower potential used for the calculation was intended to use the greater of the feasibility determination or 2012 generation, as described in the "Alternate RE Approach" technical support document. However, in the accompanying calculation spreadsheet, EPA used the full technical potential. Although this option should not be finalized, this error should be addressed if EPA does so.

- g. **Building Block 4 – Energy Efficiency**

**EPA should retain energy efficiency (EE) as one of the Building Blocks included as BSER.** Numerous studies show that EE measures are one of the most cost-effective ways to reduce emissions from the electricity-producing sector. Further, those customers who participate in EE programs and measures enjoy lowered electricity bills. As New Mexico has one of the highest poverty rates in the country, especially in rural areas, cost to consumers (as well as industry) is an important consideration.

#### 4. State Plans

- a. **EPA should not limit energy efficiency (EE) measures to those with well-understood savings potential. Instead, EPA should consider a centralized EE registry to facilitate accounting consistency.** Presumably, the purpose of having EE as a compliance measure is to promote its use and spur innovation. Limiting allowable

measures would reduce the incentive for innovation and ultimately reduce possibilities for saved generation. However, NMED recognizes that the principles of consistency, transparency, accuracy, and the avoidance of double counting are very important. An established centralized registry or regional registries for RECs could serve to standardize and verify EE savings across states.

- b. Credit for early action should be expanded for energy efficiency programs already implemented by states.** States that have taken early action in EE are penalized in two ways by the Proposed Rule: (1) Goals are based on a higher starting point, due to the electricity generation savings already accomplished, leading to a higher ramp-up rate than if the state had started at zero; and (2) Electricity generation savings currently being accomplished provide no credit (or very little credit) during the compliance periods. Although the assumption that states with an established EE program can more easily ramp up to the required levels may be true, incremental increases based on previous years' levels create a more difficult path for those states where EE savings have already been accomplished. Further, not allowing credit for savings already occurring creates an incentive to delay implementation of measures until the compliance period in order to obtain credit over the full measure life. Two methods for helping states take credit for early action may be considered:
- Create an accounting system for savings occurring before the compliance period for crediting during the compliance period.
  - Allow existing programs and measures, regardless of implementation date, to be included in state plans. (This would require changing the rule language at §60.5750. See next comment.)
- c. In the Final Rule language, EPA should state explicitly that existing renewable energy generation (and existing EE programs and measures) are allowable credits in state plans.** This concept is alluded to in the preamble and stated explicitly in footnote 292, but is in contradiction to the language at §60.5750.
- d. EPA should allow states to determine their own glide paths, using milestones, for reaching the final goal, rather than setting out interim goals based on national average assumptions.** States, not EPA, are in the best position to determine what is possible for a specific timeframe by working with the facilities under their jurisdictions. States can more easily take into account, for example, planned retirements and new builds, and can determine the timing of other actions that will be required in their state plans. Because of structural and legal considerations, some states will take longer for similar actions than other states. Allowing states to determine their own glide paths will relieve EPA of a burden best left to states. It will be up to states, then, to justify the proposed milestones and their associated timing. Approval of this type of plan could include consideration of planned activities outside of the Building Blocks used for goal setting.

Averaging the emissions rates for the interim compliance period creates a very steep glide path between now and 2020 for most states. Alternatives offered in the NODA to accomplish smoothed glide paths are mainly premised on Building Blocks 1 and 2 without addressing the significant reductions required for Building Blocks 3 and 4. Further, the options offered in the NODA may not accomplish the smoothing that has been requested.

- e. **Although mass-based goals have only recently been released, EPA should preserve this option for state plan compliance. However, administrative adjustments should also be allowed for mass-based plans to the extent that either increases or decreases in demand for electricity from fossil fuel-fired generators create disparity in crediting or double counting.** EPA assumes that no EE or RE adjustments will be required in mass-based plans. Exporting states and importing states will not necessarily realize all of the credited reductions from their EE and RE efforts since demand from outside the state for electricity produced by fossil fuel-fired units could increase. Similarly, demand from outside the state could decrease, leaving the exporting state to take credit for actions from another state. EPA could allow administrative adjustments, both positive and negative, to cover such situations.
  
- f. **EPA should include in the procedures for acting on complete state plans the range of options Congress included in CAA Section 110, including partial approval/partial disapproval and conditional approval.** Since the overall goal is to have approvable state plans which will reduce greenhouse gas emissions, limiting options for approval is counterproductive.
  
- g. **The Final Rule should state explicitly that offsets from outside the electricity generation industry, while allowable for crediting in state plans, must be justified in relation to the Clean Power Plan.** As states implement higher re-dispatch to natural gas and co-firing, use of natural gas will increase. Recent data from 40 CFR Part 98 Subpart W reports indicate large annual emissions of methane emissions in the San Juan Basin area of the Four Corners region (NM, UT, AZ, CO) from natural gas operations. Consistent with a life cycle approach to reducing greenhouse gas emissions, states should have the option of reducing the upstream emissions that will occur as a result of this increased natural gas usage. States should have the flexibility to use emissions reductions of methane in the oil and gas industry to the extent that natural gas use is increased in that state to offset some of the carbon dioxide emissions reductions required in the CPP. Similarly, states that begin to work toward electric transportation options could also be allowed offsets to the extent that overall emissions will be reduced, even though these emissions reductions may not occur in the electricity generation sector. Generic offsets, however, such as tree planting, should not be allowable within the CPP, regardless of the benefits, because they are not related to the CPP. The language in 79 Federal Register 34910 should be made clearer and should specifically allow certain offsets as an option.

- h. EPA should republish guidance concurrent with the Final Rule for incorporating emerging and voluntary measures into state plans, including, but not limited to, energy efficiency and renewable energy.** This guidance may be very similar to the 2004 guidance and the 2012 roadmap intended for SIPs, with minor adjustments for state 111(d) plans. It is noteworthy that the guidance and roadmap for SIPs are focused on nonattainment areas, where the location of actual emissions reductions is important. For carbon dioxide, however, which is mostly of concern due to climate change effects and is well-mixed in the atmosphere, this is less of a concern.
- i. Although re-dispatch feasibility has been greatly overestimated, EPA should retain re-dispatch to existing and new NGCC as a plan compliance option.** For reasons outlined in section 3.e above, 70% re-dispatch to all existing units is impractical and unrealistic. Further, dispatch decisions exceed the authority of NMED and the New Mexico Public Regulation Commission. Nevertheless, partial re-dispatch is possible in New Mexico; it may, therefore, become an important option to include in the New Mexico State Plan.
- j. EPA should adjust the language at §60.5745 and §60.5755 to include multiple jurisdictions and strategic agreements to more fully encompass the range of cooperative possibilities.** EPA gave extra consideration to states working with other states, but failed to address multi-jurisdictional possibilities such as working with tribes or working with intrastate jurisdictions. (NMED intends to work closely with the City of Albuquerque and Bernalillo County, which is recognized by EPA as a separate jurisdiction with its own rules and SIP.) Further, while not every state will choose to develop full multi-state plans, many may wish to seek cooperation on such issues as re-dispatch, RE, and EE. Limiting the language to only include full multi-state plans also limits the incentive for cross-jurisdictional cooperation, further limiting possibilities for emissions reductions.
- k. EPA should allow states to choose a methodology for translating the rate-based goal to a mass-based goal, as long as the rate-based stringency is maintained.** The methodologies shared in the November 6, 2014 technical support document, “Translation of the Clean Power Plan Emission Rate-Based CO<sub>2</sub> Goals to Mass-Based Equivalents,” is illustrative and can serve as a guide for considerations states should account for when converting between rate- and mass-based goals. The first option is based solely on historical generation and does not account for increased demand; it also does not account for the consumption vs. production inconsistencies as discussed in section 3.f.i in these comments. The second option does account for growth, but incompletely accounts for those inconsistencies. Assuming this fundamental inconsistency is addressed in the Final Rule, EPA should clarify that the options presented in all of the technical support documents are not exhaustive of the possibilities for appropriate and approvable plans regarding rate to mass translations. Rather, the rule should explicitly allow states to adopt a methodology that takes into account the various considerations alluded to in those documents, as long as the derivation of the mass-based goals are at least as stringent as

the rate-based goals and uses a methodology that is transparent and consistent with the goal setting methodology.

## 5. Enforceability

**The “state commitment approach” should be preserved as an option in state plans, but EPA should not consider the use of penalties should states not meet milestones, interim goals, or final goals.** NMED does not have (and does not intend to seek) authority for enforcement of items such as renewable portfolio standards and energy efficiency resource standards (EERS). However, the Department will continue to work closely with sister agencies that have such authority. It is not appropriate for the EPA to have federal authority over the actions of other agencies within the state such as the Public Regulation Commission in New Mexico. Instead, it is appropriate for the EPA to enforce upon the State and for the State to work with those agencies in determining how to correct any deficiencies in meeting State goals.

Rather than imposing penalties on states, the EPA should follow a process similar to a “SIP Call” wherein, if a state fails to meet a milestone or goal as outlined in its state plan and corrective measures are not included in the plan, EPA will notify the state that it must revise the plan to make up for the deficiency and to meet the milestone or goal. If the state fails to do so, EPA would then issue a federal implementation plan. These actions are corrective, while penalties are punitive. Corrective actions are more efficacious than punitive ones.

## 6. Reporting and Timing Issues

- a. **EPA should consider reporting options which will reduce the burdens on both air agencies and EPA.** Full annual reporting will be a heavy burden, especially on small air agencies, as well as for EPA. Consider, for example, reducing the amount of data required on annual reports, allowing states to submit checklists or fillable tables with the minimum amount of information needed to show that a deficiency either does or does not exist. If a deficiency does exist, allow extra time to investigate why the deficiency exists and what corrective actions the state intends to take to correct it. Another suggestion is to require full reporting less frequently, perhaps every two to four years, depending on how straightforward or complicated the plan may be. Straightforward plans may require very little interim reporting, while complicated plans may require more. NMED may be able to comply with annual reporting if the requirements are reasonable; however, full annual reporting as suggested in the Proposed Rule would be resource-intensive for both states and EPA.
- b. **EPA should consider allowing states the full two-year extension for inter-jurisdictional cooperation other than joint regional plans.** Many compliance options will require states to seek legislative authority. Since many states do not have full legislative sessions each year, this could become problematic if they are not granted an extension beyond the one-year extension discussed in the Proposed Rule. EPA should also consider that some states, such as New Mexico, will be working within a multiple jurisdiction framework, whether working with other states or not. Similarly, New Mexico may enter into strategic agreements with other jurisdictions which fall short of full

regional plans. (See section 4.j in these comments.) Both multi-jurisdictional and strategic agreements will require significant coordination, for both planning and gaining any needed legislative authority. For these reasons, the full two-year extension period should be allowed for circumstances other than working on full regional plans.

## 7. Conclusion

**EPA should preserve as many options for state compliance as possible and address any inconsistencies leading to disparity.** Flexibility is the strongest aspect of the Proposed Rule, even though it creates many complications. States are best suited for determining what will work for them and what will not. Limiting options may have the effect of producing plans which are not optimized regarding cost and emissions reductions. Further, EPA's efforts at consistency, while laudable, are not complete, leading to unintended disparities. These disparities should be addressed appropriately in the Final Rule.