

February 13, 2023

**RE: Business Roundtable Comments on EPA Supplemental Notice of Proposed Rulemaking
“Standards of Performance for New, Reconstructed, and Modified Sources and Emissions
Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review”
Docket ID No. EPA-HQ-OAR-2021-0317¹**

Introduction/Summary of Comments

Business Roundtable is an association of more than 200 chief executive officers (CEOs) of America’s leading companies who are working to promote a thriving U.S. economy and expanded opportunity for all Americans through sound public policy. As major employers in every state, Business Roundtable CEOs lead companies that support 37 million American jobs and almost a quarter of U.S. GDP.

Business Roundtable recognizes that human activities are contributing to climate change and that climate change poses significant environmental, economic, public health and security threats around the world, including the United States. We also believe corporations should lead by example to reduce GHG emissions where possible and help mitigate the risks associated with a changing climate.²

Regulating methane emissions is an important component of a comprehensive climate strategy because of the role methane emissions play in contributing to a warming climate. As noted in the preamble to the proposed rule, “methane is a potent greenhouse gas; over a 100-year timeframe, it is nearly 30 times more powerful at trapping climate warming heat than CO₂, and over a 20-year timeframe, it is 83 times more powerful. Because methane is a powerful greenhouse gas ... reductions in methane emissions provide a significant benefit in reducing near-term warming. Indeed, one third of the warming due to GHGs that we are experiencing today is due to human emissions of methane.”³ Significantly reducing methane emissions from all key emitting sectors of the economy, including oil and gas (32 percent of U.S. methane emissions) and other sectors (68 percent of U.S. methane emissions)⁴ provides opportunities for mitigating climate change in the near-term.

Business Roundtable supports the objectives of EPA’s Supplemental Notice and appreciates EPA’s early and continuing engagement with stakeholders on this issue. EPA’s proposal has improved in some ways from these efforts, which have been essential given the complexity of the

¹ 87 Fed. Reg. 74702 (Dec. 06, 2022).

² See Business Roundtable, *Addressing Climate Change: Principles and Policies* (Sept. 2020) available at: [Business-RoundtableAddressingClimateChangeReport.September2020.pdf](#).

³ Supplemental Notice, *supra* note 1, at 74720.

⁴ [Overview of Greenhouse Gases](#), U.S. EPA

proposed regulations. We encourage EPA to continue this engagement to address several outstanding issues.

While the Supplemental Notice makes important clarifications and additions to the initial November 2021 notice, we believe certain aspects of the proposed regulations should be improved. Specifically, we encourage EPA to make the following modifications:

- Improve the Super-Emitter Response Program, which as proposed is significantly flawed and lacks legal basis, by modifying its procedures;
- Provide greater regulatory certainty for the introduction of new, more effective monitoring technologies; and
- Base the applicability date for new sources on the date of publication of the Supplemental Notice when regulatory text was first made available.

I. The Super-Emitter Response Program Should be Modified to Comply with the Clean Air Act

EPA has proposed a Super-Emitter Response Program that would empower EPA-qualified third parties to identify super-emitter emissions events and notify potentially responsible owners or operators of the event. After notification, potentially responsible parties would be obligated to investigate and initiate corrective action if the event is validated. A report regarding the root cause and corrective action taken would then have to be filed with EPA and EPA would make this report publicly available.

Responsible owners and operators want to know if their equipment is responsible for an emissions event so they can quickly take corrective action to fix the problem. While the Super-Emitter Response Program could hold promise as a method of identifying large emission events, as currently proposed, it raises serious workability concerns and legal questions as to whether EPA is authorized under the Clean Air Act to empower third parties to ensure compliance with EPA regulations.

In major oil and gas producing areas, it is not uncommon for hundreds of individual sources to exist within a relatively small geographic area. In these areas, these hundreds of individual sources may be owned or operated by dozens of different companies. Accurately identifying a specific source of emissions and/or the owner or operator responsible for the equipment in these dense producing areas likely will be challenging with the remote observation technology in use today. While good data exists as to the location of individual oil and gas well sites, easily accessible and precise public data does not exist for processing facilities, tank batteries and other oil and gas field infrastructure subject to regulation under this proposed rule. As a result, a super-emitter event triggering a required response can be misdirected to the incorrect owner or operator. This will waste resources that could better be used in ensuring compliance with the new regulations.

Moreover, the Super-Emitter threshold is not well defined. EPA is proposing to apply the super-emitter definition to a large emission event at an individual well site, centralized production facility, compressor station or natural gas processing plant. It is unclear if the threshold is for all

combined emissions, specific emission unit or other grouping, so it will be difficult to determine what emissions would be considered under the super-emitter definition and therefore who might be the responsible party. This raises additional complications regarding third party notifications and whether notifications are valid.

In addition to potential unintentional identification errors, EPA proposes to “promptly make such reports available to the public online ...”. EPA states it will not verify or authenticate the information in third party reports prior to posting.⁵ This provision is problematic, given the likelihood of inaccurate or incomplete information regarding the source of emissions and the party responsible for them. This raises real concern about inadvertent reputational damage to a company that may not be the responsible party.

Setting aside the workability problems, the Clean Air Act does not give EPA clear authority to impose this type of third-party enforcement mechanism. EPA’s proposal essentially places third parties in the position of creating regulatory obligations for an operator without explaining the legal basis for this framework. While federal agencies routinely rely on third-party technical standards when prescribing regulations, outsourcing monitoring that then triggers the initiation of corrective action raises fundamental legal and policy concerns regarding improper delegation of governmental authority.⁶

A better approach might be for a qualified third-party to notify EPA and the relevant state regulatory authority of the emissions.⁷ EPA or the state would then decide whether and how to notify potentially responsible owners or operators to initiate required investigation and corrective action. This approach would reduce the risk of inadvertently notifying a non-responsible party and would provide a level of governmental oversight we think is appropriate for the program, assuming any such program is authorized by the Clean Air Act.

II. The Final Regulations Should Encourage the Development and Deployment of New Technologies

EPA has recognized that technology to detect methane emissions is rapidly advancing.⁸ This success has been the result of timely Department of Energy and ARPA-E research funding, EPA

⁵ 87 Fed Reg. at 74750.

⁶ See, e.g., Administrative Conference of the United States, Recommendation 2012-7, *Agency Use of Third Party Programs to Assess Regulatory Compliance* (December 6, 2012), available at: [Agency Use of Third-Party Programs to Assess Regulatory Compliance | Administrative Conference of the United States \(acus.gov\)](#); “Regulatory third-party programs raise a host of important questions. Because third-party programs represent a partial privatization of the public function of implementing and enforcing regulatory law, they are a form of ‘public-private governance,’ in which private actors play roles that are traditionally viewed as governmental in nature. While third-party programs may increase regulatory compliance or otherwise improve the performance of regulated entities and products, these programs also pose risks.” *Id.* at 2 (footnotes omitted). See also *id.* at 3-4: “Agencies that establish third-party programs generally cannot or do not delegate their regulatory authority to conformity assessment bodies. Rather, agencies authorize conformity assessment bodies to perform certain technical tasks to assess conformity, and regulatory agencies rely on these assessments in their own enforcement of regulatory requirements. The goal is to leverage private expertise and resources to serve regulatory objectives. **Because the regulatory agency must remain ultimately responsible for achieving regulatory objectives, it is vital to provide public oversight of third-party assessment activities.**” (emphasis added)

⁷ See, for example [Gathering and Preserving Information and Evidence Showing a Violation - Texas Commission on Environmental Quality](#).

⁸ 86 Fed. Reg. 63147.

voluntary programs in which many Roundtable members have participated, private-public research partnerships involving the oil and gas industry and the federal government, and U.S. businesses marshalling talent and resources to address the challenge of climate change. The result is that the U.S. leads the way in developing new technology to identify and reduce fugitive methane emissions. This technology is improving every day.

Business Roundtable has long advocated for regulatory flexibility to encourage innovation and the development of cost-effective solutions to meet regulatory objectives.⁹ Overly prescriptive, inflexible regulations discourage the development of innovative technologies that can generate greater emissions reductions and reduce compliance costs.

While EPA is to be commended for building in and clarifying regulatory flexibility to incentivize the introduction of newer, more effective and potentially less expensive technologies, the significantly elevated frequency required for utilizing alternative technologies and the process for approving these technologies is still more cumbersome and less predictable than it should be. The requirement to resubmit technology approval applications that require additional information following EPA's 270-day window for testing new technologies,¹⁰ thereby resetting the 270-day clock, for example, will unnecessarily lengthen the approval process for new technologies. While we appreciate the essential role EPA plays in ensuring only effective technologies are approved for use, more flexibility is needed if the objective is to accelerate the use of effective and efficient new technologies. If EPA decides additional information is required to support an application, a better approach would be to stay the 270-day clock until the information is provided rather than require applicants to submit a new application and restart the review period.

We urge EPA to provide a clearer, more expeditious and more certain pathway for the approval of innovative technologies that can be credibly verified to be as effective as those prescribed for leak detection and monitoring and consider technology needs for additional related rulemakings.

III. The Applicability Date for New Sources Should be Based on the Publication Date of the Supplemental Notice of Proposed Rulemaking

EPA has requested comment on whether it has the discretion to define "new sources" based on the publication date of a supplemental proposal and, if so, whether there are any unique circumstances that would warrant the exercise of such discretion.¹¹

We believe EPA may define "new sources" based on the publication date of the Supplemental Notice, (i.e., December 6, 2022). Indeed, we believe EPA is required to do so by the text of Clean Air Act Section 111(a)(2). That section provides that new sources are those that were constructed, reconstructed or modified "after the publication of *regulations* (or, if earlier,

⁹ Business Roundtable, *Achieving Smarter Regulation* (September 2011), available at: [2011_09_BRT_Achieving_Smarter_Regulation.pdf](#).

¹⁰ Proposed regulatory text, §60.5398b(d), "Alternative Test Method."

¹¹ Supplemental Notice, *supra* note 1, at 74716.

proposed *regulations*) prescribing a standard of performance under this section that will be applicable to such source.”¹² The Initial Notice in this rulemaking contained no proposed “regulations” – i.e., proposed regulatory text – it was simply a preamble.¹³

It is well-established in administrative law that “regulations” are the regulatory text that will appear in the Code of Federal Regulations (CFR). In *Perez v. Mortgage Bankers Ass’n*, for example, the Supreme Court declared that an interpretive rule cannot “amend” a “regulation” because a regulation is “text” in the CFR that can only be amended by notice and comment rulemaking.¹⁴ “Regulations” are “agency statement[s] of general applicability and future effect, which the agency intends to have the force and effect of law.”¹⁵ As Justice Kavanaugh recently explained, “[by] the 1980s, the words ‘regulation’ and ‘substantive’ ... carried a special meaning in the context of administrative law ... A ‘substantive rule,’ often promulgated pursuant to specific statutory authority, is a rule that ‘bind[s]’ the public or has ‘the force and effect of law.’”¹⁶

By contrast, regulatory preambles do not appear in the CFR, and ordinarily are not legally binding.

Because Section 111(a)(2) specifically refers to proposed “regulations,” the Initial Notice did not trigger it, and the applicability date for this rulemaking is therefore December 6, 2022, the date of publication of the Supplemental Notice, which does include proposed CFR text, albeit still not in the Federal Register.¹⁷

EPA contends that Section 307(d)(3) enumerates all the required elements of a notice of proposed rulemaking (e.g., factual data), and that these do not include proposed regulatory text.¹⁸ In fact, this statutory enumeration spells out what belongs in the statement of basis and purpose, which is to “accompan[y]” the notice of proposed rulemaking.¹⁹ Section 307(d)(6)(A) sets almost exactly the same requirement for final rules, too,²⁰ which obviously must contain the

¹² 42 U.S.C. § 7411(a)(2) (emphasis added).

¹³ See 86 Fed. Reg. 63110 (Nov. 15, 2021), referring repeatedly to “this preamble” (e.g., at 63115, 63116).

¹⁴ *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 103-105 (2015).

¹⁵ See E.O. 12866 (Sept. 30, 1993) at § 3(d).

¹⁶ *Azar v. Allina Health Services*, 139 S.Ct. 1804, 1818 (2019) (Kavanaugh, J., concurring).

¹⁷ The Agency argues that neither Section 307(d) of the Clean Air Act nor Section 553 of the Administrative Procedure Act (APA) requires EPA to publish the proposed C.F.R. text in a notice of proposed rulemaking. In fact, the D.C. Circuit has held that Section 307(d) *does* require EPA to publish proposed regulatory text. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F. 2d 506 (D.C. Cir. 1983) involved a Clean Air Act rulemaking where, as here, EPA did not include the proposed regulatory text in its notice of proposed rulemaking. The court began by noting that, “[i]n 1977, Congress—concerned that the [APA] did not provide procedures adequate for the complex scientific issues involved in EPA rulemaking—created new procedures for most rulemaking under the Clean Air Act, [ones that] require[] a much more detailed notice of rulemaking.” *Id.* at 518. The court explained that one of the two major differences between APA § 553(b) and Clean Air Act § 307(d)(3) [is that] the Clean Air Act, unlike the APA, requires EPA to issue a “proposed rule.” Although § 307(d)(3) does not *explicitly* require EPA to issue a proposed rule, it refers to the agency’s duty to explain “the factual data on which the proposed rule is based” and “the major legal interpretations and policy considerations underlying the proposed rule.” *Id.* at 519.

¹⁸ 87 Fed. Reg. 74716.

¹⁹ 42 U.S.C. § 7607(d)(3) (emphasis added).

²⁰ *Id.* § 7607(d)(6)(A).

CFR text of the final rule. The most obvious conclusion from the fact that neither provision says “text” is that Congress assumed EPA would publish the text in both cases.

Based on this analysis, we believe Sections 111(a)(2) and 307(d) require EPA to set December 6, 2022, as the applicability date for this rulemaking. In addition to the statutory basis that establishes the applicability date on December 6, 2022, the Agency has good reasons, rooted in the purpose of Section 307(d), to exercise its discretion to do so. The proposed regulatory text EPA unveiled in connection with the Supplemental Notice is extremely complex and covers a myriad of individual sources, many with separate requirements, within the oil and natural gas sector category.

EPA has recognized the sheer number of facilities to which the proposed regulations will apply and the complexity of the regulations.²¹ Unnecessary complexity and regulatory confusion not only waste resources but also make it more difficult to comply with regulations designed to reduce methane emissions. By applying the definition of “new source” consistent with the Clean Air Act and setting the applicability date for Subpart OOOOb as December 6, 2022, EPA would clarify regulatory applicability to the benefit of both sources and the Agency.

Additionally, sources affected by applying the correct applicability date (new, modified or reconstructed sources between November 21, 2021, and December 6, 2022) would still be regulated. They would first be subject to existing OOOOa New Source Performance Standards, and then in a few years, EPA’s proposed Emission Guidelines for existing sources under OOOOc, thus eliminating any potential regulatory gap.

We believe regulations should be no more complex than necessary to accomplish their objectives and that overlap and redundancy should be eliminated where possible. By clarifying and making consistent definitions of what constitutes “new sources,” compliance is likely to improve by reducing inadvertent errors due to regulatory confusion.

Finally, many thousands of wells and other equipment will become subject to the new source performance standards. While EPA has proposed a range of compliance dates for the various aspects of the proposed rule, the great bulk of them will become effective just 60 days after the final regulations are published in the Federal Register. It will be an enormous challenge for owners and operators to purchase and install the required equipment, establish record-keeping and reporting protocols, and train personnel needed to comply with these regulations. We urge EPA to incorporate extended implementation timelines that phase-in compliance with the standards.

²¹ Supplemental Notice, *supra* note 1, at 74833 (“The EPA understands that EG OOOOc for the Crude Oil and Natural Gas source category will apply to an extraordinary number of designated facilities and for many designated facilities the standards are complex compared to other EG. For example, in the U.S., the EPA has identified over 15,000 oil and gas owners and operators, around 1 million producing onshore oil and gas wells, about 5,000 gathering and boosting facilities, over 650 natural gas processing facilities, and about 1,400 transmission compression facilities.”).

Conclusion

Business Roundtable supports well-designed methane emissions regulations and believes a rule that incentivizes new technologies and provides flexibility can help U.S. resources to be best-in-class on methane performance. The proposed rule represents one of the more complex regulatory programs ever undertaken by EPA. By the agency's own estimates, the final rule likely will apply to over one million wells and individual pieces of equipment owned or operated by over 15,000 entities.²² Implementing EPA's final rule alone will require significant time and resources by EPA, states and industry. Moreover, this rulemaking is not the only federal methane regulatory proposal facing the oil and natural gas sector. The Department of the Interior has proposed regulations regarding venting, flaring and leaks on federal and Indian lands,²³ and the Inflation Reduction Act methane fee provisions to be implemented by EPA will add yet more complexity to the regulatory landscape.²⁴ When state implementation plans for existing sources are written, it is conceivable that different sources at the same site will be subject to regulations under proposed OOOO, OOOOa and OOOOb as well as regulations emanating from the Department of the Interior regarding venting and flaring.

As noted above, we believe regulations should be no more complex than necessary to accomplish their objectives and overlap and redundancy should be eliminated where possible. We urge EPA to reduce complexity where possible, to streamline approvals for alternative technologies and to look for ways to reduce regulatory burdens while meeting the objective of reducing methane emissions consistent with its authority under the Clean Air Act.

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²² Supplemental Notice, *supra* note 1, at 74827, n. 276.

²³ Department of the Interior, Bureau of Land Management, Proposed Rule: *Waste Prevention, Production Subject to Royalties, and Resource Conservation*, 87 Fed. Reg. 73588 (Nov. 30, 2022).

²⁴ Supplemental Notice, *supra* note 1, at 74720.