NACAA
national association of clean air agencies

Change Is in the Air:

Recommendations from the National Association of Clean Air Agencies to President-Elect Obama's Administration on Improving Our Nation's Clean Air Program

December 16, 2008

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Introduction

As President-elect Barack Obama prepares to take office on January 20, 2009, the National Association of Clean Air Agencies[1] (NACAA) is pleased to present the following recommendations for consideration by the transition team and incoming Administration on how to improve our nation's clean air program. As the state and local agencies with primary responsibility for ensuring that all of our nation's citizens breathe clean, healthful air, the members of NACAA are uniquely positioned to identify the air quality issues of highest priority at this time. Toward this end, we offer the following recommendations – each of which can be initiated, and in many cases completed, within the first six months of office – which focus on tackling global warming, pursuing important regulatory and statutory initiatives, rescinding/reversing ill-advised regulatory and policy actions and increasing financial and technical assistance to state and local air agencies.

> The Clean Air Act provides state and local air pollution control agencies with "primary responsibility" for ensuring that all of our nation's citizens breathe clean, healthful air. EPA must reestablish a truly cooperative and functional partnership with these agencies. Such a partnership, based on mutual respect and commonly shared goals, is in the best interest of the national air quality program.

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   16. Improve Regulatory and Technical Assistance to State and Local Air Agencies

[1] NACAA is comprised of air pollution control agencies in 53 states and territories and more than 165 metropolitan areas throughout the country.

Finally, and perhaps most importantly, NACAA urges that the Obama Administration include among its top priorities the reestablishment of a truly cooperative and functional partnership with state and local air pollution control agencies – the co-implementers, with the U.S. Environmental Protection Agency (EPA), of the Clean Air Act. Such a partnership, based on mutual respect and commonly shared goals, is in the best interest of the national air quality program. Consulting with NACAA in the initial stages of rulemaking and policymaking processes, sharing early drafts of rules, policies and guidance documents and seeking input from and engaging NACAA on an ongoing basis will enable us, together, to fulfill our collective mission of protecting public health and welfare.

A. TACKLE GLOBAL WARMING

1. Craft a Proposal for Legislative Action on Global Warming

Background: The accumulation of greenhouse gases (GHGs) in the atmosphere from human activity is causing global warming, which is already affecting the Earth and will have even more profound effects in the future unless action is taken in a very short time to reduce GHG emissions. The Nobel Prize-winning Intergovernmental Panel on Climate Change (IPCC) concluded in February 2007 that the evidence of global warming is "unequivocal" and it is very likely (at least a 90-percent probability) that human activities have contributed to the global warming experienced to date. In its February 2007 report, the IPCC also concluded that global warming is already affecting our planet and is projected to cause severe impacts in the future.

> The Administration should develop a legislative proposal on global warming that requires a mandatory economy-wide GHG-reduction program. It should define the partnership roles of the federal, state and local governments and not preempt states and localities from taking additional and more stringent actions to reduce GHG emissions.

Despite this compelling evidence, the U.S. at the federal level has not taken decisive steps to reduce GHG emissions. The U.S. ratified the UN Framework Convention on Climate Change, which has the ultimate objective of "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." However, the U.S. has not ratified the Kyoto Protocol, which contains binding targets and timetables for reductions of GHG emissions. Nor has the U.S. enacted legislation to comprehensively address global warming. Several bills were introduced in the 110th Congress, but none passed in either house and none was supported by the outgoing Bush Administration. Prompted in part by the lack of action at the federal level, states and localities have exercised leadership in combating global warming through local, state and regional action plans and initiatives. State and local leadership and innovation demonstrate that states and localities must not be preempted, either by statute or regulation, from adopting and enforcing programs to reduce GHG emissions.

NACAA's Recommendation: The Administration should craft a legislative proposal or principles on global warming to guide Congress. The proposal should provide for a mandatory economy-wide GHG-reduction program that is flexible enough to allow for a portfolio of strategies to be adopted in addition to such a program. The proposal should also contain sector-specific strategies for the two largest sources of GHG emissions in the U.S.: electric power and motor vehicles. Further, the proposal should address the partnership roles of the federal, state and local governments in addressing global warming. In particular, federal legislation must not preempt state or local governments from taking additional and more stringent actions to reduce GHG emissions.

2. Use Existing Authorities under the Clean Air Act to Address Global Warming

EPA should promulgate a finding that GHG emissions endanger public health and welfare, and use the Clean Air Act to regulate GHG emissions.

Background: Notwithstanding well-documented, widely accepted and compelling evidence that human activity is causing global warming, there has been a stunning lack of decisive action by the U.S. federal government to reduce greenhouse gas (GHG) emissions. EPA denied a petition to regulate GHG emissions from motor vehicles, claiming, among other things, that it did not have statutory authority to regulate GHGs because they are not air pollutants as defined in the Clean Air Act. In *Massachusetts v. EPA*, the Supreme Court in 2007 held that GHGs do in fact meet the Act's definition of air pollutant and that the agency "can avoid taking further action only if it determines that [GHGs] do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." Under the Act, in order to regulate GHG emissions from motor vehicles, EPA must find that these emissions endanger public health and welfare. Instead of making these findings, EPA, in July 2008, issued an Advance Notice of Proposed Rulemaking cataloguing the various regulatory options under the Act for addressing GHG emissions and soliciting comment on these options. The comment period closed November 28, 2008.

NACAA's Recommendation: EPA should propose and promulgate a finding that GHG emissions endanger public health and welfare and use the authorities under the Clean Air Act to regulate GHG emissions. Existing regulatory tools under the Act allow for the implementation of programs that can serve as a bridge to future climate legislation, will inform Congress as it considers this legislation and will complement the enacted law. There are several Clean Air Act authorities that NACAA believes can and should be usefully, thoughtfully and expeditiously deployed: New Source Performance Standards, mobile source provisions and permitting requirements. In addition, states and localities have exercised leadership in combating global warming through local, state and regional action plans and initiatives. State and local leadership, innovation and success in responding to the threat of global warming make clear that state and local authority to adopt and enforce additional and more stringent GHG emission reduction programs must not be preempted in any way.

B. PURSUE IMPORTANT REGULATORY AND STATUTORY INITIATIVES

3. Promulgate an Interstate Transport Rule

Background: Electric power plants are by far the largest single source of sulfur dioxide (SO_2) emissions in the U.S., accounting for 67 percent of national emissions, and are a significant source of nitrogen oxide (NO_x) emissions, accounting for 19 percent of national emissions. NO_x and SO_2 emissions contribute to ozone and fine particulate matter ($PM_{2.5}$) pollution.

EPA should promulgate, as quickly as possible, a strong interstate transport rule that requires deeper reductions than CAIR, includes other sources, such as industrial boilers, and requires reductions in a timeframe that will assist states and localities in meeting their clean air goals.

EPA promulgated the Clean Air Interstate Rule (CAIR) in 2005 to reduce transported NO_x and SO_2 emissions from electric power plants in 28 states in the eastern U.S. CAIR's NO_x Phase 1 cap would have come into effect beginning in 2009, while the SO_2 Phase 1 cap would be effective beginning in 2010. Phase 2 caps would begin for both pollutants in 2015. When CAIR was proposed, NACAA commended EPA for addressing interstate transport but said the rule did not go far enough. EPA promulgated health-based National Ambient Air Quality Standards (NAAQS) in 1997 for ozone and $PM_{2.5}$. States with areas that exceed these standards must comply by 2010, yet the more stringent cap under CAIR does not go into effect until 2015. In addition, the rule fails to cover other major sources of pollution, such as industrial boilers and cement kilns. Further complicating this issue is the fact that EPA strengthened the $PM_{2.5}$ and ozone NAAQS in 2006 and 2008, respectively.

On July 11, 2008, the U.S. Court of Appeals for the D.C. Circuit vacated CAIR. The court held that the CAIR trading program did not meet the statutory requirements for remedying interstate transport in Section 110(a)(2)(D) (and its reasoning appears to cast doubt on whether any interstate trading program would suffice), in part because the reduction requirements were not tied to attainment deadlines for $PM_{2.5}$ or ozone. The court also held that EPA lacks authority to terminate or limit acid rain SO_2 allowances (EPA structured CAIR so that power plants in states electing to trade would have to give up two acid rain allowances instead of one allowance per SO_2 ton in 2010, and 2.68 allowances per SO_2 ton in 2015). The court is currently considering petitions for rehearing and requested briefs on whether the court should remand the rule without vacatur. While the court may reconsider its ruling, the more likely result is that EPA will need to repromulgate an interstate transport rule to replace CAIR.

NACAA's Recommendation: EPA should expeditiously promulgate a strong interstate transport rule that satisfies the court's dictates and that 1) requires deeper reductions from power plants than CAIR; 2) includes other sources, such as industrial boilers and cement kilns, that significantly contribute to ozone and $PM_{2.5}$ nonattainment; and 3) requires reductions in a timeframe that will assist states and localities in meeting the new ozone and $PM_{2.5}$ NAAQS.

4. Abandon Judicial Appeal of the Clean Air Mercury Rule Vacatur and Develop an Effective Standard

EPA should abandon its appeal of EPA's Clean Air Mercury Rule and develop an effective MACT standard that addresses mercury and other HAPs from coal-fired power plants.

Background: The Clean Air Act calls for EPA to determine whether a standard is necessary to control emissions of hazardous air pollutants from electric utility steam generating units and, if so, to issue a Maximum Achievable Control Technology (MACT) standard pursuant to Section 112 of the Clean Air Act. In December 2000, EPA issued a determination that a standard is necessary. However, instead of issuing a MACT standard, as the Clean Air Act requires, on May 18, 2005, EPA promulgated a cap-and-trade regulation – the Clean Air Mercury Rule (CAMR) – under Section 111. Besides the fact that CAMR was inconsistent with the provisions of the Clean Air Act, it established inadequate emission reduction requirements with deadlines too far in the future and allowed for interstate trading of mercury, among other things.

As required by CAMR, state agencies spent many months after its promulgation developing and submitting state plans to address emissions of mercury from power plants. However, many states were concerned about the deficiencies of CAMR and developed programs that were more stringent, by calling for earlier deadlines, requiring greater emission reductions, limiting trading or employing a combination of these more protective measures.

Because CAMR was inconsistent with the requirements of the Clean Air Act, a host of states and environmental groups challenged it in court. It was vacated on February 8, 2008. Among the provisions vacated were requirements for sources to install continuous emission monitors (CEMs), an important component of state mercury control programs. In fact, plans were in place to have 900 CEMs fully operational by January 2009. EPA is now required to issue a new standard that will control emissions of HAPs from power plants, consistent with the provisions of Section 112. In October 2008, EPA appealed to the Supreme Court, requesting a review of the vacatur decision. The Supreme Court's decision on whether or not to hear the case is pending.

NACAA's Recommendation: EPA should abandon its Supreme Court appeal of CAMR and, as soon as possible, develop an effective MACT standard that addresses mercury and other HAPs from coal-fired power plants. The standard should effectively limit the emissions of mercury and other HAPs from the source category and should be developed pursuant to the provisions of Section 112 of the Clean Air Act. Since several state agencies that had developed their own programs to limit mercury emissions from power plants were relying on the continuous emission monitoring provisions, they are having difficulties proceeding with some of the important monitoring elements of their programs. Because the development of a utility MACT may take some time, it would be useful, in the meantime, if EPA assisted states that need the monitoring provisions by either repromulgating those elements of the rule or employing another mechanism (e.g., guidance) that will reinstate those provisions.

5. Regulate Emissions from Ocean-Going Vessels through International Designation of U.S. Coastlines as Emission Control Areas and Federal Rulemaking

Emissions from ocean-going vessels, which are virtually uncontrolled, adversely affect air quality in port cities around the nation. International standards to reduce these emissions have been adopted. In order to reap the full benefits of these standards, the Administration must seek designation of U.S. coastal areas as "Emission Control Areas."

Background: Ocean-going vessels (OGVs) emit large quantities of nitrogen oxides (NO_x) and sulfur oxides (SO_x) – which are precursors to the formation of ambient particulate matter (PM) and ozone – as well as toxic particulates. All of these adversely affect air quality in port cities across the nation, as well as areas downwind of those cities. In fact, more than 40 major U.S. ports are located in ozone and/or $PM_{2.5}$ nonattainment areas. Notwithstanding these serious impacts, emissions from OGVs are virtually uncontrolled. Moreover, without additional regulatory action, by 2030, the contribution of OGV emissions to pollution levels are expected to increase dramatically, accounting for one-third of the NO_x coming from all mobile sources in the U.S., nearly half of the PM and over 90 percent of the SO_x, with much higher relative contributions in some port cities.

In October 2008, the International Maritime Organization (IMO), of which the U.S. is a member, adopted a comprehensive set of new standards to reduce emissions from OGVs. In addition to including global engine and fuel standards, the IMO's action serves as the foundation upon which individual nations can build in order to reap the full measure of potential benefits from this program. Critical to the success of the IMO program will be the efforts of nations to establish designated Emission Control Areas (ECAs). Beyond meeting the program's global standards, ships operating in an ECA will be required, beginning January 2016, to meet new engine standards that will reduce NO_x emissions by 80 percent (based on the use of advanced catalytic aftertreatment systems) and to use cleaner-burning low-sulfur fuel – 10,000 parts per million (ppm) sulfur beginning March 2010 and 1,000 ppm beginning January 2015; the overall result will be very substantial reductions in NO_x, PM and SO_x. The U.S. has indicated its intent to seek a joint U.S./Canadian ECA designation as soon as possible.

EPA has also committed to proposing a rulemaking by spring 2009, and finalizing it by December 2009, to harmonize U.S. OGV standards with the IMO standards and to enact a federal program for addressing OGVs as major sources of air pollution.

NACAA's Recommendation: The Administration must avail itself of the first opportunity to seek designation of U.S. coastal areas as an ECA. Accordingly, the Administration should prepare and submit to the IMO, by March 2009, an application for a U.S./Canadian ECA so that the application can be presented at the next IMO meeting, in July 2009, voted on in spring 2010 and entered into force in August 2012. In addition, the Administration should follow through on the commitment to issue a Notice of Proposed Rulemaking by April 2009 and a Final Rulemaking by December 2009 for a federal program for addressing OGVs as major sources of air pollution.

6. Develop Revised Standards to Replace Vacated Air Toxics Rules and Issue Guidance for the MACT Hammer

Background: The Clean Air Act calls for EPA to establish Maximum Achievable Control Technology (MACT) standards to control emissions of hazardous air pollutants from source categories. Section 112(j) of the Act stipulates that if EPA has not established a MACT standard within 18 months of the statutory deadline, state and local air agencies are required to issue permits that include limitations, determined on a case-by-case basis, equivalent to what the MACT standard should have been. This is known as the Section 112(j) MACT "hammer" provision. During the last few years, the court has vacated several MACT standards related to hazardous air pollutants, including rules regulating emissions from industrial boilers, solid-waste incinerators, plywood manufacturing and brick and clay production. Since the rules have been vacated, it is as if they had never been written. Because the deadlines for the promulgation of the standards have long since passed, the hammer provisions are in effect and state and local air agencies are now required to determine MACT on a case-by-case basis. While the courts were correct to vacate the flawed regulations, the requirement to establish case-by-case MACT is burdensome and difficult for state and local air agencies, as well as for the regulated community. This is particularly true for the industrial boiler source category because there are thousands of affected sources that must be addressed.

> During the last few years, the court has vacated several MACT standards aimed at controlling hazardous air pollutants, thus triggering the "hammer" provisions under Section 112(j). State and local air agencies are now required to determine MACT on a case-by-case basis. EPA should quickly issue guidance to assist these agencies.

Since the Section 112(j) hammer has rarely been used, state and local agencies are unfamiliar with its provisions and many are wary of proceeding without guidance from EPA. EPA has indicated that it cannot issue guidance until the Office of Management and Budget approves the application forms that sources will be asked to complete as part of the Section 112(j) process.

According to Section 112(j), it is actually the facility's responsibility to submit a completed application within 18 months of the missed deadline, whether or not the state or local agency has taken any action. As a result, many facilities may soon be vulnerable to citizen suits for operating without having submitted a completed permit application by the deadline. Many of them are turning to state and local air agencies for information and advice. In response to these concerns, NACAA developed model permit guidance for state and local air agencies to use in addressing industrial boilers.

NACAA's Recommendation: EPA should quickly issue clear guidance for state and local air agencies regarding the correct procedures and timelines for issuing permits pursuant to the requirements and intent of Section 112(j). Additionally, the agency should develop expeditiously new MACT standards that are consistent with the Clean Air Act to replace those that the court vacated. These standards should correct the deficiencies contained in the vacated standards and result in meaningful emission reductions.

7. Protect and Improve Air Quality-Related Programs during Reauthorization of Surface Transportation Legislation

Background: Transportation is a dominant source of air pollution in our nation, posing a significant threat to public health and welfare. In 2009, Congress will debate reauthorization of federal surface transportation legislation, the Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU). There are several key issues related to this debate that are of substantial importance to state and local clean air agencies.

In 2009, Congress will debate reauthorization of federal surface transportation legislation. The Administration should advocate for aligned transportation, energy and air quality priorities, increased funding for the CMAQ program and preservation of EPA's authority over the federal transportation conformity program.

First, reauthorization of surface transportation legislation offers a prime opportunity to reevaluate the overall funding formula for transportation projects and institute changes that align with the Administration's focus on the sustainable use of energy, increased mobility and action on climate change. Examples include examining alternative approaches for integrating transportation and land-use planning and increasing strategies to reduce vehicle miles traveled (VMT), which hold great promise for reducing greenhouse (GHG) emissions.

Second, the Congestion Mitigation and Air Quality Improvement (CMAQ) program appropriately reinforces the interrelationship between the transportation and air quality planning processes by specifically recognizing and seeking to ameliorate the transportation sector's impact on air quality. Over the past two decades, it has been demonstrated that CMAQ – which provides a discrete source of funding explicitly set aside for transportation projects that meet air quality objectives and for projects that result in sustainable air quality improvement – can play a significant role in helping states and localities address transportation-related air pollution. While state and local clean air agencies are uniquely qualified to evaluate the air quality impacts of CMAQ-funded projects and to assess which projects are best suited to address the air quality needs of the area, these agencies have no formal role in the selection of projects for which CMAQ funds are allocated, thus diminishing significantly the "air quality improvement" aspect of the "congestion mitigation *and* air quality improvement" program.

Third, transportation conformity is an important regulatory tool under the Clean Air Act for ensuring that 1) emissions from transportation-related projects are reduced sufficiently to protect public health and welfare and 2) as the statue expressly requires, short-term Transportation Improvement Programs and long-term Regional Transportation Plans contribute to the timely attainment of healthful air quality and are consistent with – "conform" to – the motor vehicle emissions budgets contained in the State Implementation Plan for air quality. Each time Congress debates reauthorization of federal surface transportation legislation, the issue of transportation conformity arises and amendments to weaken the program are offered (and often passed).

NACAA notes with concern a July 2008 proposed plan for reauthorizing SAFETEA-LU from the U.S. Department of Transportation (DOT) that would severely undermine state and local clean air efforts. In *Refocus. Reform. Renew. A New Transportation Approach for America*, DOT outlined numerous programmatic, regulatory and financial "reforms." Two of the most egregious proposals are to 1) abolish the CMAQ program and 2) take Clean Air Act authority away from EPA and allow DOT to unilaterally exempt 30 percent of the country from the federal transportation conformity program.

NACAA's Recommendation: As the debate over reauthorization of SAFETEA-LU ensues, NACAA urges that the Administration engage by advocating for 1) aligning transportation, energy and air quality priorities, including greenhouse gas emission reduction strategies, and VMT reduction measures, increased funding and incentives for mobility options and the evaluation of the GHG impacts of new transportation projects; 2) preservation of, and increased funding for, the CMAQ program, and an enhanced role for state and local clean air agencies, including requiring the *concurrence* of state and local air agencies in the identification of projects to be considered and in project evaluation and selection; and 3) preservation of EPA's authority over the federal transportation conformity program and against any attempts to further weaken this important Clean Air Act program.

C. RESCIND / REVERSE ILL-ADVISED REGULATORY AND POLICY ACTIONS

8. Reverse the Denial and Grant the Waiver of Federal Preemption to California for Enforcement of the State's Motor Vehicle Greenhouse Gas Emission Standards

The Bush Administration's denial of California's waiver request left California and over a dozen states with limited means to reduce motor vehicles' contributions to climate change. The Administration should immediately overturn the decision denying California's waiver application.

Background: On December 19, 2007, EPA Administrator Stephen L. Johnson announced his decision to deny California's request (submitted to the agency in December 2005) for a waiver of federal preemption to enforce the state's motor vehicle greenhouse gas (GHG) emission standards. This decision was published in the *Federal Register* on March 6, 2008 (73 FR 12156).

Under Section 209(b) of the Clean Air Act, Congress granted California the authority to seek a waiver of federal preemption from EPA to enforce emission standards for motor vehicles; the Act, in Section 177, also provides that once such a waiver is granted, other states may enforce those standards as well. The language and legislative history of the waiver provision make clear that EPA is not to substitute its judgment as to the wisdom and efficacy of California's regulatory scheme for Congress' considered judgment to leave such decisions to the state's regulators and legislators. Instead, the EPA Administrator has only very limited discretion in making a decision to deny a waiver. Pursuant to the criteria established in the Clean Air Act, EPA must grant California a waiver unless the agency determines that California meets one of a narrow set of exceptions. In this instance, none of the exceptions was met.

Administrator Johnson's denial of California's waiver request left California and the more than 15 states that have adopted, or intend to adopt, California's GHG standards with limited means to reduce motor vehicles' contributions to climate change. Moreover, in crafting the Section 209 waiver and Section 177 opt-in provisions of the Clean Air Act, Congress sought to embody vital states' rights. State and local clean air agencies need to preserve those rights to set the optimal mix of regulations to respond to the public health and welfare effects associated with climate change. EPA's denial of California's waiver request frustrates the balance of federal and state power that Congress intended.

NACAA's Recommendation: The Administration should immediately overturn the March 2008 decision denying California's application for a Clean Air Act Section 209(b) waiver of federal preemption and grant the waiver in full, thus allowing California and other states to enforce vehicle GHG emission standards.

9. Rescind a Series of Harmful NSR Rules and Proposals

The Bush Administration has severely eroded the New Source Review program, one of the most important regulatory tools in the Clean Air Act. These actions have seriously undermined state and local clean air efforts. EPA should rescind these deficient rules and proposals.

Background: The New Source Review (NSR) program under the Clean Air Act is a preconstruction air quality permitting program for new stationary sources of pollution and existing sources making major modifications that result in emissions that exceed a "significance level," (which varies by pollutant and nonattainment classification). The NSR program includes three key components. First, affected sources are required to use modern emission control technologies and techniques. In nonattainment areas – those with air quality that fails to meet the health-based National Ambient Air Quality Standards (NAAQS) – sources must employ controls or techniques such that they emit at the Lowest Achievable Emission Rate. In attainment areas – those with air quality that meets the NAAQS – sources must install the Best Available Control Technology. Second, affected sources must conduct air quality analyses to determine the air quality impacts of the project. Finally, sources in a nonattainment area must offset any proposed emissions increase by an equal or greater reduction from other sources in the nonattainment area.

NSR is a critical tool for state and local air quality agencies as they seek to achieve and sustain clean, healthful air. The Bush Administration, however, through a series of imprudent final and proposed rules, has severely eroded the NSR program, vastly reducing the number of sources to which NSR applies – especially for modifications of existing sources – and, in doing so, has seriously undermined state and local clean air efforts.

- Debottlenecking, Aggregation and Project Netting – EPA has proposed to allow modifying sources to avoid NSR by changing, in three ways, the current method of calculating emissions increases so that resulting totals are below the specified significance level.
- Fugitive Emissions – EPA has issued a final rule allowing sources of pollution to exclude "fugitive" emissions from calculations that determine whether NSR requirements apply.
- Reasonable Possibility in Recordkeeping – EPA has issued a final rule that allows sources making modifications to avoid NSR and recordkeeping requirements if they claim that emissions increases will not exceed 50 percent of the significance level. Estimates of emission increases are made unilaterally by sources, without the oversight of permitting authorities and the lack of records makes enforcement difficult, if not impossible.
- Ethanol Plants – EPA has issued a final rule that changes the classification of new and modifying ethanol production plants from chemical processing plants to corn milling facilities, thus increasing to 250 tons per year (tpy), from 100 tpy, the emissions threshold for determining whether NSR applies.

NACAA's Recommendation: EPA should rescind all these rules and proposals: the Debottlenecking, Aggregation and Project Netting proposal; the rule excluding fugitive emissions when determining NSR applicability; the Reasonable Possibility in Recordkeeping rule; and the rule increasing the NSR applicability emissions threshold for ethanol production plants.

10. Reinstitute a Science-Based Process for Promulgating National Ambient Air Quality Standards

Background: EPA is required every five years under the Clean Air Act to review and, if necessary, revise the National Ambient Air Quality Standards (NAAQS). The NAAQS indicate what level of air pollution should not be exceeded in order to protect public health with an adequate margin of safety. The Clean Air Scientific Advisory Committee (CASAC), comprised of scientific experts and at least one state/local air quality official, is directed under the Act to recommend to the EPA Administrator any new NAAQS or revisions of existing NAAQS as may be appropriate.

In recent years, EPA has ignored the recommendations of its independent science advisors when revising the health-based air quality standards (NAAQS) for ozone and fine particulate. In addition, EPA has weakened the NAAQS review process. EPA should reinstitute a science-based process for revising the NAAQS.

EPA in its recent decisions regarding the ozone and fine particulate matter ($PM_{2.5}$) NAAQS has strayed from CASAC's recommendations. EPA did not lower the annual $PM_{2.5}$ NAAQS to within the levels recommended by CASAC – 13 or 14 micrograms per cubic meter ($\mu g/m^3$) – and instead retained the existing standard of 15 $\mu g/m^3$. With respect to ozone, EPA lowered the primary 8-hour ozone NAAQS to 0.075 parts per million (ppm) even though CASAC recommended that it be lowered to within a range of 0.060 to 0.070 ppm. In addition, while CASAC recommended a distinct, cumulative seasonal secondary 8-hour ozone standard to protect welfare, EPA set the secondary standard identical to the primary standard.

Furthermore, EPA has weakened the NAAQS review process. Unlike in the past, EPA does not now seek CASAC's recommendations until after the Administrator has proposed his options. EPA has also eliminated the EPA staff paper, which put science in a policy-relevant context and delineated concrete options for revising the standards. Instead, under EPA's new process, EPA issues a notice that lists all possible options for revising the standard and discusses the science without putting it into a policy-relevant context or making any judgments about which scientific studies are more relevant. EPA has also weakened the NAAQS process by consistently failing to meet the five-year statutory deadline for reviewing the NAAQS. For example, EPA took nine years to review and revise the 1997 $PM_{2.5}$ NAAQS and 11 years to review and revise the 1997 ozone NAAQS.

NACAA Recommendation: EPA should reinstitute a science-based process for revising the NAAQS. CASAC's views should be accorded more deference by EPA – EPA's revisions to the NAAQS should be at least as stringent as CASAC's recommendations. In addition, EPA should seek CASAC's recommendations for revising the standard prior to its proposing a standard, rather than afterwards. EPA should reinstate the staff paper, since it provided policy context and concrete options for revising the standard, allowing for meaningful input into the NAAQS review process. Since EPA failed to accept CASAC's recommendations for revising the $PM_{2.5}$ and ozone NAAQS, EPA should expedite the next review of these NAAQS to ensure their prompt revision to accord with the scientific and public health evidence showing the need for more stringent standards. Finally, EPA should devote more resources to reviewing the NAAQS so it can meet the five-year deadline for review.

11. Reverse EPA's Policy of Exempting Air Emissions from Animal Feeding Operations

Air pollution emissions from animal feeding operations (AFOs) endanger public health and the environment. The AFOs industry has been consistently exempted from important environmental compliance regulations. The Administration should reverse the strategy of exempting air emissions from AFOs.

Background: Air emissions from animal feeding operations (AFOs) harm public health and the environment. These pollutants include ammonia, hydrogen sulfide and fine particulate matter ($PM_{2.5}$). Human exposure to ammonia triggers respiratory problems, causes nasal and eye irritation and in large enough amounts can be fatal. Ammonia also contributes directly to the formation of $PM_{2.5}$, which causes severe health effects in humans, including death, heart attacks and increased severity of asthma attacks. Hydrogen sulfide can cause severe health effects, even death, at high concentrations of exposure. These emissions have not been regulated adequately at the federal level. Rather, the AFO industry has been consistently exempted from important environmental compliance requirements.

- The Bush Administration entered into a consent agreement with AFOs providing a waiver from enforcement of Clean Air Act and Superfund/emergency reporting requirements (under CERCLA/EPCRA) for AFOs that paid a minimal fine and agreed to have their air emissions monitored. Yet there are only 20 monitoring sites on the 6,267 participating AFOs. The AFOs are not required to reduce their air emissions either during or at the end of the term of the agreement.
- The Bush Administration considered defining fugitive emissions to include major sources of air emissions from AFOs (waste lagoons and barns). Fugitive emissions do not count for purposes of determining whether a source is required to apply for a permit or, more importantly, required to put on pollution control technology. Since barns and lagoons are the dominant sources of emissions from the AFO industry, such a policy would exempt most agricultural operations from many provisions of the Clean Air Act.
- The Bush Administration considered exempting agriculture from the particulate matter National Ambient Air Quality Standards. Such a wholesale exemption of an entire industry from the application of a health-based air standard is unprecedented and scientifically unwarranted.

NACAA's Recommendation: The Administration should reverse the strategy of exempting from regulation air emissions from AFOs. In particular, EPA should identify control technologies or practices for air emissions from AFOs so that such technologies can be installed on qualifying AFOs, and work with NACAA to identify other opportunities for reducing air emissions from AFOs.

12. Reissue EPA's Area Source Standards and Provide Necessary Resources to State and Local Air Agencies

Hazardous air pollution emissions from small sources, typically known as "area sources," can be significant in the aggregate. Yet, EPA's standards for these sources do not generally result in meaningful emission reductions. EPA should revise the most deficient of these standards.

Background: The Clean Air Act calls upon EPA to establish standards to reduce emissions from smaller sources of hazardous air pollutants (known as area sources, such as hospital sterilizers) because the adverse effects of the emissions from these smaller sources in the aggregate are significant. To date, EPA has developed or proposed area source standards for nearly 60 source categories.

Unfortunately, the area source standards that EPA has already developed will, in many cases, not result in meaningful emission reductions. For example, some of the rules do not call for any additional action and others merely codify what state and local agencies already require. Even EPA has acknowledged in some of the proposals that emission reductions will not result from the rule. Additionally, some of the area source standards have not been clear, diminishing the ability of state and local agencies to implement and enforce them.

Finally, many state and local air agencies do not have the resources necessary to take delegation of the area source standards, since there are many affected small sources. In response, EPA has threatened to withhold much needed federal grants from these agencies unless they accept delegation, even though the grants are not currently used for the area source programs in question.

Even for state and local agencies that do not adopt the rules, it is likely that implementation of the area source standards will increase their workload and resource needs. For example, permits for smaller sources may need to incorporate all applicable requirements, which would include the area source standards. These requirements also must be enforced. However, the smaller sources typically do not pay Title V permit fees, so those funds are not available for area source-related efforts and many state and local air agencies do not have sufficient resources for these responsibilities.

NACAA's Recommendation: EPA should revisit the area source standards for hazardous air pollutants that have been established in the last eight years and revise the most deficient ones so that they will result in real reductions in emissions and the associated risks. For future rules, EPA should ensure that the regulations also result in meaningful reductions. These rules should be stringent, clearly written and enforceable. Additionally, EPA should provide implementation assistance and adequate funding for state and local air agencies. Further, EPA should not penalize those agencies that do not wish to accept delegation by withholding federal grants.

13. Reissue EPA's Residual Risk and Technology Review Standards

Background: The Clean Air Act calls for EPA to establish technology-based standards to control emissions of 188 listed hazardous air pollutants. The standards that are intended to control emissions primarily from major sources are known as Maximum Achievable Control Technology (MACT) standards. The Clean Air Act also requires that eight years later EPA evaluate the risk to human health and the environment that remains after the implementation of MACT and, if needed, issue additional standards to address the "residual risk." Further, EPA is required to reexamine the MACT standards every eight years to determine if developments in control technologies and practices warrant revision of any MACT standard.

EPA has combined the residual risk and technology review processes of Section 112 of the CAA into a Risk and Technology Review program that has resulted in very disappointing regulations. EPA should correct the risk assessment methodology that serves as the foundation of the residual Risk and Technology Review program.

EPA has combined the residual risk and technology review processes into a Risk and Technology Review (RTR) program that has resulted in very disappointing regulations. To date, EPA has proposed and/or issued RTR rules covering approximately 25 source categories, many of which will not result in additional or meaningful reductions of emissions of hazardous air pollutants.

One of the most significant problems with EPA's RTR program is that the risk assessment methodology on which residual risk determinations are based has significant flaws. For example, in assessing the cancer risks related to the source category, EPA used long-term concentrations as they affect the center of the census block in which the facility is located, rather than at the property line of the facility. This approach may dilute the effect of the emissions. Census blocks can be large geographically, so the maximum impact can be far from the center. This strategy can underestimate risks at property lines, where people may live or work. EPA also estimated risk using actual, rather than potential, emissions, which does not account for the fact that emissions could increase over time. Further, EPA did not consider the risks from the facility as a whole but, rather, examined one source category at a time. This does not account for the cumulative effects of numerous source categories on the population living near the facility. These and other flaws in the risk assessment methodology resulted in residual risk standards that are not adequately protective and do not satisfy the intent of the Clean Air Act's residual risk program.

NACAA's Recommendation: EPA should correct the risk assessment methodology that serves as the foundation of the Residual Risk and Technology Review program. The agency should reexamine the most significant and/or egregious of the rules that have been promulgated, considering the improved methodology, and revise those that are inadequate. Additionally, EPA should apply the revised methodology to the RTR rules that will be promulgated in the future.

14. Rescind the Startup/Shutdown/Malfunction Rule

Background: Excess emissions caused by malfunctions are a significant problem for public health and welfare. Generally these emissions occur at refineries, chemical plants, and other industrial sectors, and can pose genuine and immediate threats to communities. In addition, emissions from malfunction (which occurs most often, although such emissions may also result from startup and shutdown), release toxic and carcinogenic chemicals, are open and notorious, are usually "off the books" and thus hidden for compliance and emissions inventory purposes, can exceed the total annual emissions for a facility and are largely avoidable. Moreover, data about malfunction events are not easily accessible to the public.

Excess emissions caused by malfunctions are a significant problem for public health and welfare. EPA should rescind its rule eliminating the requirement for facilities to comply with their Startup, Shutdown and Malfunction Plans.

In a final rule promulgated in 2006, "Reconsideration of the National Emission Standards for Hazardous Air Pollutants for the General Provisions Regarding the Startup, Shutdown and Malfunction Provisions," EPA eliminated the requirement that facilities must implement, or carry out the specific provisions of their emergency plans, such as minimizing hazardous releases of emissions. The agency stated in its reconsideration that facilities have a general duty to minimize emissions and are not bound by the specifics of their Startup/Shutdown/Malfunction (SSM) plans. One practical effect of the change is that, because the SSM plans are no longer enforceable, they are no longer available to the public under the Freedom of Information Act. Further, eliminating the requirement to comply with SSM plans eviscerated one of the few regulatory mechanisms available for minimizing them and preventing their recurrence.

NACAA's Recommendation: EPA should rescind its rule eliminating the requirement for facilities to comply with their SSM plans. The former rule requiring compliance by facilities with the terms of their SSM plans should be reinstated, and, additionally, the SSM plans should be available to the public if the permitting authority has requested them from the source. Moreover, the permitting authority should not be required to obtain the SSM plans through requests made under Section 114 of the Clean Air Act (as is required under the reconsideration), but should be able to obtain them on request. These actions should be part of a comprehensive effort by EPA to review and revise its policy on SSM and excess emissions, which should also include the issuance of guidance on reporting excess emissions, minimizing such emissions during emergencies and undertaking a targeted, rigorous enforcement effort against facilities that emit them.

D. INCREASE FINANCIAL AND TECHNICAL ASSISTANCE TO STATE AND LOCAL AIR AGENCIES

15. Increase Significantly Federal Grants for State and Local Clean Air Agencies

Background: State and local air pollution control programs receive funding from several sources, including state and local appropriations, the federal permit fee program under Title V of the Clean Air Act, state and local permit and emissions fees and federal grants under Sections 103 and 105 of the Clean Air Act. Section 105 grants support the foundation of state and local air quality programs, including efforts to develop and implement State Implementation Plans. In particular, agencies monitor emissions, develop emissions inventories, conduct sophisticated modeling of emissions impacts, inspect sources of pollution, conduct oversight and enforcement, provide technical assistance to regulated sources and respond to citizens' complaints. Section 103 grants have typically funded specific monitoring efforts, such as the fine particulate matter monitoring network.

Unless state and local air quality programs receive substantial increases in federal funding, they will continue to face a serious financial shortfall, and their ability to protect and improve air quality will be further compromised.

The Clean Air Act authorizes the federal government to provide grants of up to 60 percent of the cost of state and local air quality programs, while state and local agencies must provide a 40-percent match (matching requirements pertain to Section 105 only; Section 103 grants do not require matching funds). In reality, the federal government provides approximately 25 percent of the total state/local air budget, while states and localities supply 75 percent (not including income from Title V permit fees, which state and local agencies collect from major sources and can fund *only* activities related to the Title V permit program). Although states and localities supply significant resources to their air quality programs, they also rely heavily on the federal grant contribution.

The estimated amount needed for state and local efforts to implement the Clean Air Act is in excess of $1 billion each year. If EPA supplied 60 percent of that amount, as the Clean Air Act envisions, federal grants would amount to close to $600 million annually. However, recent annual appropriations under Sections 103 and 105 of the Clean Air Act have been approximately $200 million to $220 million – amounts far short of what is needed and, due to inflation, that represent a decreasing budget in terms of purchasing power. State and local air programs are already suffering the adverse impacts of previous cuts. Further, as the demands placed on these programs become greater, the effect of the shortfall will intensify. Unless state and local air quality programs receive substantial increases in federal funding, they will continue to face a serious financial shortfall, and their ability to protect and improve air quality will be further compromised.

Additionally, in recent budgets, EPA has proposed cutting grants for fine particulate monitoring and shifting the funds from Section 103 authority to Section 105 authority, calling upon state and local agencies to provide matching funds to make up the difference.

NACAA's Recommendation: While significant funding increases are warranted, NACAA recognizes not only the many competing priorities for federal assistance, but also the state of the current economic climate, and realizes that full funding (at over $1 billion) is not viable at this time. Therefore, for FY 2010, the Administration should propose a more modest increase in federal grants to state and local clean air agencies under Sections 103 and 105, to $270 million ($53 million above FY 2008 levels). Additionally, NACAA recommends that particulate matter and lead monitoring programs be funded under Section 103 authority. NACAA is currently conducting a study to update the assessment of the funding needs of state and local air quality agencies. The association will share the results when the assessment is complete.

16. Improve Regulatory and Technical Assistance to State and Local Air Agencies

Background: Regulatory and technical assistance from EPA is crucial for states and localities to fulfill their mission to clean up air pollution. However, in recent years EPA has dramatically scaled back such assistance. This is especially apparent in five areas: the scope and timeliness of federal regulations; training for state and local air agency personnel, the Air Quality Index for fine particulate matter ($PM_{2.5}$), the AP-42 emission factors program and the Air Facility System.

Regulatory and technical assistance from EPA is crucial for states and localities to fulfill their mission to clean up air pollution. However, in recent years EPA has dramatically scaled back such assistance. EPA must provide regulatory and technical assistance to state and local air pollution control agencies in a timely manner.

- States and localities rely on strong federal rules to reduce emissions from industrial sources of air pollution. It is most often more expedient, efficient and cost effective for the federal government to issue such rules, rather than requiring each state to engage in duplicative efforts. Moreover, in many cases, states are precluded from adopting rules more stringent than the federal requirements, making the need for strong federal action even more critical.
- EPA is required under the Clean Air Act to provide training to state and local air pollution control agencies (Section 103(a)(5)). EPA funding and staffing for training has been meager at best. In Fiscal Years 2008 and 2009, EPA devoted only $285,000 and one full-time staff person to training. This is insufficient. Several of the core courses for training agency personnel contain outdated, even erroneous, information. Courses to reflect new EPA rules and new topics of interest, like climate change, need to be developed. More training opportunities need to be afforded to train employees so they can perform their jobs.
- The Air Quality Index (AQI) is an important risk communication tool used by state and local air agencies to keep members of the general public informed about their local air quality and to enhance their decisions about their exposure to air pollutants. EPA lowered the daily National Ambient Air Quality Standard for $PM_{2.5}$ significantly in October 2006, but EPA has yet to change the $PM_{2.5}$ AQI to reflect this change. The key public communications tool for alerting the public about exposure to $PM_{2.5}$ is based on the old standard, not the new standard, thereby undermining the AQI's effectiveness. The public deserves the right to know whether the air they breathe is safe.
- Emission factors estimate the amount of pollutant produced per unit of activity. Emission estimates are important for developing emission control strategies, determining the applicability of permitting and control programs, and ascertaining the effects of sources and appropriate mitigation strategies. Except in some very limited instances, EPA has not updated its emission factor database, the AP-42, in several years.
- The Air Facility System (AFS) contains compliance and permit data for stationary sources regulated by EPA and state and local air agencies. States use AFS information to prepare State Implementation Plans and track the compliance status of sources. However, the system, frequently described as "antiquated," has not been renovated since its inception in 1990, and it is time-consuming and difficult to use. A modernized system would improve the accuracy of the data, as it could be more frequently and easily updated, and would also enable inspectors to spend time in the field actually inspecting sources.

- In 2004, EPA commissioned a Title V Task Force to examine ways to improve the Title V permit program. In April 2006, the Task Force issued a report with over 100 recommendations for EPA to consider. The agency reviewed the report and prioritized some of the more important recommendations to be pursued either as guidance or rulemaking.

NACAA's Recommendation: EPA must improve regulatory and technical assistance to state and local air agencies by 1) developing rigorous federal rules, in a timely manner, to help states and localities meet their clean air goals 2) providing additional resources and staff to help train state and local agency personnel; 3) expeditiously issuing a proposal to revise the $PM_{2.5}$ AQI and finalizing its revisions as soon as practicable; 4) providing additional support for the AP-42 emissions factors program, which was essentially dropped for several years; 5) modernizing the AFS; and 6) reviewing the work already completed on the Title V Task Force report and issuing for public comment draft guidance or rulemakings on the priorities that have been identified for improving the operation of the Title V permit program.