NACAA
national association of clean air agencies

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EPA Docket Center
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1200 Pennsylvania Ave., NW
Washington, DC 20460

To Whom It May Concern:

On behalf of the National Association of Clean Air Agencies (NACAA), we are submitting the following comments on the U.S. Environmental Protection Agency's (EPA's) proposed rule, "Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d)," which was published in the *Federal Register* on December 23, 2022 (87 Fed. Reg 79176)[1]. NACAA is the national, non-partisan, non-profit association of 157 state and local air pollution control agencies located in 40 states, the District of Columbia and five territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the U.S. These comments are based on that experience. The views expressed do not represent the positions of every state and local air pollution control agency in the country.

If finalized, the proposal would amend the implementing regulations that govern the processes and timelines for state and Federal plans that implement emission guidelines under Clean Air Act (CAA) section 111(d). The currently applicable general implementing regulations were established in 1975 under Subpart B of 40 CFR part 60[2]. The EPA promulgated new implementing regulations under Subpart Ba of 40 CFR part 60 with the finalization of its July 8, 2019 publication of the Affordable Clean Energy (ACE) Rule[3]. However on January 19, 2021, the ACE Rule was vacated by the United States Court of Appeals for the District of Columbia Circuit in

[1] Available online at https://www.federalregister.gov/documents/2022/12/23/2022-27557/adoption-and-submittal-of-state-plans-for-designated-facilities-implementing-regulations-under
[2] Available online at https://www.ecfr.gov/current/title-40/part-60/subpart-B
[3] "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," 84 FR 32520 (July 8, 2019), https://www.federalregister.gov/documents/2019/07/08/2019-13507/repeal-of-the-clean-power-plan-emission-guidelines-for-greenhouse-gas-emissions-from-existing

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American Lung Association et al. v. EPA (*ALA v. EPA*, USCA D.C. Circuit Case no. 19-1140).

This letter addresses EPA's 2023 proposal, which includes amendments revising the timing requirements for state plan submittal for new emission guidelines (EGs) promulgated under Section 111(d), EPA's completeness and approval actions, promulgation of a Federal plan, and for when states must establish increments of progress. EPA is also proposing to add regulatory mechanisms to improve flexibility and efficiency in the submission, review, approval, revision, and implementation of state plans. This action also proposes new requirements for meaningful engagement with pertinent stakeholders as part of state plan development, including, but not limited to, industry, small businesses, and communities most affected by and vulnerable to the impacts of the plan. EPA additionally proposes clarifying requirements for states' consideration of `remaining useful life and other factors' (RULOF) in applying a standard of performance. If finalized, the proposal would amend the definition of standard of performance and provide clarification associated with CAA section 111(d) compliance flexibilities, including trading or averaging. Finally, EPA proposes requirements for the electronic submission of state plans and several other clarifications and minor revisions.

NACAA's letter calls for EPA's engagement with agencies that will be affected by this proposed rule. Given the reasonable number of agencies to coordinate with, and their tremendous hands-on expertise with the real-world implications of programs that would be affected the proposal, NACAA urges EPA to engage with each state and local clean air agency and to consider their input and perspectives with the highest weight and priority. In general, NACAA supports many of the provisions and flexibilities offered by the proposed rule, including those governing regulatory mechanisms for full and conditional plan approval or disapproval; provisions for improving meaningful stakeholder involvement; permissible compliance options; and modernized plan submission provisions. However, EPA's proposed timelines for state plan development will be insurmountably short if the rule is finalized as proposed. In this comment letter, NACAA identifies the basis for this concern and makes recommendations that would affect successful implementation of the rule. Our agencies have a long track record of implementing Section 111(d), and EPA should benefit from our experience.

Revisions to the Timelines for Plan Submittal, Approval, and Action

The ACE Rule's 2019 revisions to 40 C.F.R. part 60 in Subpart Ba extended the period for state plan submission from 9 months to 3 years, reflecting the language in CAA Section 111(d)(1) that EPA should establish a procedure similar to that provided in CAA Section 110. EPA's proposal shortens the time to submit a state plan under Section 111(d) to EPA from 3 years to 15 months. Unless changes are made to accommodate the varied on-the-ground circumstances faced by its member agencies, NACAA opposes this provision, as this timeline will not be reasonably achievable by many states needing to align with administrative and legislative processes that are outside of their control. Moreover, EPA's proposed timeframe will curtail state agency opportunities to develop plans in a way driven by meaningful engagement with affected stakeholders that will deliver public health and environmental benefits, a priority we share with EPA. NACAA recommends either EPA should consider a 3-year timeline for state plan development

with provisions that detail how shorter timeframes can be issued for individual EGs, or a shorter timeline than three years with language that institutionalizes a process for issuing reasonable extensions.

EPA's proposal identifies phases that states would take in rulemaking, including "providing notice that the agency is considering adopting the rule, taking public comment, and approving or adopting the final rule." This sequence of steps does not include the actual development of the state plan itself, including analysis of steps to be taken, administrative actions that are needed (such as rulemaking, permitting, funding and deploying programs), and evaluation of alternatives, as well as coordinating internally with the public sector and externally with the public and the private sector to develop a robust an approvable plan.

The record indicates that 15 months is broadly inadequate for the development of a Section 111(d) state plan. In the supporting documentation for this rule, EPA has posted a spreadsheet of historical submission times for plans under Section 111(d)[4]. This data offers the timeframes under which states were able to file plans for approval to EPA under this section of the CAA for a variety of program types in the past. It catalogues 80 plans in all, including plans that were disapproved or partially disapproved. Timeframes for plan submission range from 9 months (for a plan that was partially disapproved) to 151 months; the average timeframe was 45 months, and only 13% of the plans were submitted in 15 months or fewer. This 45-month average clearly indicates that 15 months has not been adequate for the development of state 111(d) plans.

Some agencies are required to take steps that lead to lengthier rulemaking processes. Although left out of the description of rulemaking steps cited earlier in this letter, EPA notes that "the component that EPA expects to take the most time and have the most variability from state to state is the administrative process (e.g. though legislative process, regulation, or permits) that establishes standards of performance." NACAA concurs and notes the frequency with which legislative actions and decisions taken by elected officials and other government institutions are required to support the development of a plan by a clean air agency. This is particularly true with respect to any action that includes budget provisions, as budget cycles are frequently linked to legislative calendars that are outside the control of a state administrative agency. Furthermore, it is essential that EPA consult with states directly to determine constraints and timeframes that arise from their regulatory and permitting processes, among other administrative procedures. Anecdotally, in addition to public involvement, plan development, and other implementation steps, at least 24 months is the minimum generally required to merely incorporate these legislative, regulatory, and other administrative procedures, with the rest of the rule development (particularly for more complex actions taking longer). However, EPA should engage with states directly to determine what administrative actions are needed and what timeframes these will require, and base its timeframe on a standard that can actually be met rather than one that will routinely missed for unavoidable reasons.

In its proposal, EPA has also included new provisions for meaningful engagement with affected stakeholders, which would also have to be incorporated within the agency's proposed curtailed 15-month timeframe. NACAA supports effective and meaningful

[4] "State Plan Submissions Under CAA 111 and CAA 129 Supporting Document Subpart Ba proposal 2022", https://www.regulations.gov/document/EPA-HQ-OAR-2021-0527-0003

stakeholder engagement, and notes that our agencies have learned from their vast experience in this arena that it is time consuming. Moreover, the time and effort invested in building trust and developing policy with meaningful direction from affected stakeholders is linked directly to the effectiveness with which the plan delivers policy outcomes that improve public health outcomes. Responding to the court's mandate in *ALA v. EPA* to consider public health outcomes is delivered more effectively by allowing for more state engagement with affected constituencies - bringing their insights and needs into the plan - than by curtailing the time available for our agencies to engage with these constituencies. NACAA recommends EPA engage with state agencies individually to determine what timeframe offers sufficient time not only for administrative rulemaking but also, based on their long and deep experience, whether it will allow for the kind of meaningful public engagement that has produced the best outcomes in these states in other programs.

In its decision to vacate timeframes established under Subpart Ba in *ALA v. EPA*, the D.C. Circuit did not specify that the 3-year timeframe was overly long, merely that EPA had not justified why it had set timeframes that aligned with those of Section 110. EPA's proposal asserts that plans filed under Section 110 will always be more technically complex than plans under Section 111(d). This assertion is not supported by the complexity of plans submitted to date, and future power sector regulations are likely to be issued under Section 111(d) that may require some of the most complex plans states have yet developed. More important than the number and diversity of sources considered, however, is the complexity of the actual process of plan development – reflected in EPA's articulation of the steps it considers necessary for itself in developing a federal plan in the proposal, which is agnostic to the landscape of affected sources. The 3-year timeframe for plan development in Section 110 is driven not only by the complexity of the analysis but by the steps that need to be taken under each state's administrative procedures, including legislative, permitting, and regulatory actions. These same steps will need to be taken under a Section 111(d) plan, therefore it is reasonable for EPA to consider mirroring the timeframes of plans developed under Sections 110 and 111(d).

NACAA shares EPA's goal of efficient, effective, and quick plan development and approval. To ensure they are able to meet planning timelines, EPA can articulate a reasonable baseline in its 111(d) Implementing Regulations, but also issue language explaining how it will consider shorter plan timeframes on a case-by-case basis for each EG. An alternative to this mechanism could be an extension request process that allows an agency to identify progress made, impacts of their specific state process on timing, and a commitment to alternative timing with progress checkpoints within the 111(d) Implementing Regulations.

EPA also seeks comment on whether 14 months is a reasonable timeframe for it to determine that a state plan is complete, review the plan, and sign and publish a decision on the plan. NACAA offers no specific feedback on this timeframe, except to juxtapose the 14 months proposed for EPA to review and approve a state plan against the 15 months proposed for the entirety of its development by the state.

<u>Regulatory Mechanisms for State Plan Implementation</u>

EPA is proposing to incorporate five regulatory mechanisms as amendments to the implementing regulations governing how states submit plans and EPA reviews and approves them. These mechanisms include: (1) partial approval and disapproval of state plans by EPA; (2) conditional approval of state plans by EPA; (3) parallel processing of plans by EPA and states; (4) a mechanism for a state plan call by EPA of previously approved state plan revisions; and (5) an error correction mechanism. NACAA supports these mechanisms, as they offer not only procedural improvements long sought by our agencies but reflect the flexibility offered in Section 111 of the CAA, are consistent with the Act's cooperative approach, and will expand state compliance options while conserving state resources.

"Remaining Useful Life and Other Factors" (RULOF) and Other Variance Determinations

The fundamental purpose of Section 111 is to reduce pollution that harms public health and welfare, while acknowledging that real-world conditions, including cost and technical feasibility of control, can create conditions where lower stringency can deliver those public health and welfare benefits. NACAA generally supports the provisions for the issuance of variances for RULOF articulated in the proposal but encourages EPA to communicate with and implement the feedback of state clean air agencies, who have deep, firsthand experience with what works. EPA should address known situations where it is reasonable to deviate from presumptive standards in each EG, easing the burden on agencies developing RULOF demonstrations. NACAA welcomes EPA's attention to the consideration of impacts to vulnerable communities when accounting for RULOF in the stringency of the standard (provided adequate guidance is offered in a timely way to allow state approaches to meet the agency's expectations for approval). NACAA also supports EPA's proposed determination to allow states to apply a more stringent standard than EPA's designated Best System of Emission Reduction (BSER) if they so choose. States may determine that due to early power-plant retirements, the availability of new technology or other factors, a more stringent standard is more beneficial than those required under an emissions guideline promulgated by EPA, and the provision in the proposal accurately captures the cooperative federalism contemplated in CAA Section 111(d).

Meaningful Engagement

EPA's proposal calls for "meaningful engagement with pertinent stakeholders in the development of a state's plan…" NACAA supports robust public engagement, especially with underserved and disproportionately impacted communities. This aligns with NACAA's commitment to environmental justice.[5] EPA should, as it promulgates information about an EG, be specific about what will be approvable and up-front about providing guidance to states that identifies communication objectives and outlines the process and methods of engagement.

[5] NACAA's "Mission & Values" and "Statement & Direction for Racial Justice" are available at http://www.4cleanair.org/sites/default/files/Documents/NACAAMissionValuesGoalsandRacialJusticeStatement-10_19_2020-noQ.pdf.

Some NACAA members are at the cutting edge of achieving meaningful involvement of vulnerable communities in agency decision-making, and EPA can and should draw from and benefit from their experience. State and local agencies have learned that these efforts are very time- and resource-intensive, not just for agencies but for the communities themselves. This re-emphasizes the importance of allowing for adequate time during the plan development phase so that this engagement can be skillfully accomplished. It is essential that EPA consult with states directly about their state-level requirements and the state-specific public engagement procedures that are integral to the development of a state plan.

Electronic Submission

NACAA supports EPA's proposal to require electronic submission of state plans instead of paper copies. EPA asserts that this "aligns with current trends in electronic data management and… will result in less burden on the states. It is the EPA's experience that the electronic submittal of information increases the ease and efficiency of data submittal and data accessibility." NACAA concurs with this assessment. One caution however, is that EPA should be vigilant about updating and supporting its electronic reporting infrastructure, and should fund and technically support new capabilities in this area. State and local agencies have a mixed record with EPA electronic reporting programs. In some cases, it has been beneficial and effective, but in others, it has proven to be burdensome and resource-intensive while delivering little value. Implementing electronic reporting should not come at the expense of resources already allocated for our existing air programs.

Compliance Flexibilities

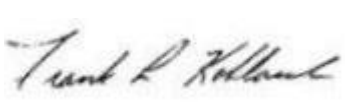
EPA proposes to amend the standard of performance definition to clarify that an "allowable rate or limit of emissions" means an "allowable rate, quantity, or concentration of emissions". It further seeks to offer compliance flexibilities such as trading or averaging that would allow sources to meet their emission limits in the aggregate. We reiterate the request we made in October 31, 2018 comments on the EPA's ACE Proposal[6]: that "EPA take care to ensure that the … rule, if finalized, does not interfere with existing state and local programs including cap-and-trade programs and state-level GHG reduction goals, and that it does not preclude the development of future programs." In general, NACAA supports the proposal's revisions and clarifications as being aligned with a cooperative approach that allows for innovative state programs that efficiently deliver pollution reductions, also allowing state programs to be tailored to the needs and opportunities available to them, while meeting (or exceeding) a national baseline of performance.

Thank you for the opportunity to comment on the EPA's proposal to update the implementing regulations under Section 111(d) of the CAA. If you have any questions

[6] Available online at https://www.4cleanair.org/wp-content/uploads/Documents/NACAAACEComments-10312018.pdf

about these comments, please do not hesitate to contact either of us or Miles Keogh, Executive Director of NACAA.

Sincerely,



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