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U.S. Environmental Protection Agency
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To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) is pleased to provide comments on EPA's March 17, 2023, "Draft Guidance on the Preparation of State Implementation Plan Provisions That Address the Nonattainment Area Contingency Measure Requirements for Ozone and Particulate Matter,"¹ the availability of which was announced in the *Federal Register* on March 23, 2023.² NACAA is the national, non-partisan, non-profit association of air pollution control agencies in 40 states, including 117 local air agencies, 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 upon that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

NACAA reached out to EPA during development of the draft contingency measures (CMs) guidance to identify areas of concern with the agency's approach to CMs in response to the 2021 decision in the AIR case³ and discuss suggestions to address those concerns. NACAA appreciates EPA's engagement with us and consideration of our concerns. However, the manner in which EPA addresses our concerns in the draft guidance falls short in significant ways that will make it difficult, if not impossible, for many state and local air agencies to meet EPA's expectations and, more importantly, to fulfill their statutory responsibilities under the Clean Air Act (CAA) to attain and maintain clean, healthful air. Below we offer comments on several overarching issues relative to the draft guidance as well as on specific elements of it.

Overarching Issues

Federal, State and Local Roles in Fulfilling the Purpose of the Clean Air Act

Under Title I of the CAA,⁴ section 101(a)(2), Congress found that "the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare." In section 101(b)(1), Congress wrote that among the purposes of Title I "is to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Section 109 of Title I includes requirements that EPA establish National Ambient Air Quality Standards (NAAQS) for air pollutants that, in the Administrator's judgment, endanger public

¹ <https://www.epa.gov/system/files/documents/2023-03/CMTF%202022%20guidance%203-17-23.pdf>

² 88 Fed. Reg. 17,571.

³ *Association of Irrigated Residents v. U.S. Environmental Protection Agency*, 10 F. 4th 937 (9th Cir. 2021).

⁴ 42 U.S.C. § 7401 et seq. (1970).

health or welfare. These standards are to protect public health with an adequate margin of safety and public welfare from known or anticipated adverse effects. Among the six pollutants or groups of pollutants for which EPA has promulgated NAAQS are ozone and particulate matter (PM), which are the focus of the draft CM guidance.

In the 1990 amendments to the CAA Congress established a framework for classifying each area of the country that does not attain the health- and welfare-based NAAQS based on the severity of the ambient levels of a pollutant measured within the area's boundaries. For each classification, the Act identifies compliance schedules and procedures state and local air agencies must follow and specific requirements and progress milestones that must be met. As mentioned above, the purpose of every effort required under these provisions is to achieve and sustain clean, healthful air to protect public health and welfare. We emphasize this because in seeking to fulfill each identified task, it is essential that all levels of government – federal, state and local – not lose sight of *why* we are undertaking those tasks in the first place.

Moreover, we highlight the statutory language in sections 101(a)(3) and (4), in which Congress makes these findings: “[A]ir pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments”⁵ and “Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional and local programs to prevent and control air pollution.”⁶

These findings speak directly to federal, state and local roles and responsibilities, including with respect to CMs. First, the text makes clear that EPA and state and local air agencies are co-regulators under the CAA with a shared mission requiring close partnership and collaboration. Together, we must remain mindful of this mission and design strategies, rules and guidance that will effectively move us toward our goals, not force the expenditure of scarce resources on processes that yield no benefit (e.g., spending hundreds/thousands of hours on justifying an action with little to no clean air benefit).

Second, the text calls out the distinct and “essential” role of the federal government in developing programs to prevent and control air pollution. Currently, more than one-third of the U.S. population lives in an area that does not meet the NAAQS for ozone, PM or both. Many of these areas are overburdened communities whose citizens are exposed to a disproportionate share of harmful environmental conditions. Congress recognized in section 101(a)(2) of the CAA the key contribution of motor vehicles to unhealthful air. Decades later, mobile source emissions from federally regulated sources such as heavy-duty trucks, locomotives, oceangoing vessels, aircraft and nonroad heavy-duty engines and equipment, are a primary source of air pollution, contributing substantial emissions of nitrogen oxides (NO_x) – the key pollutant contributing to the formation of ozone and PM_{2.5}. While state and local air agencies have made great strides in reducing emissions from stationary sources, for the most part they lack the authority to regulate mobile sources and never do they have the authority to regulate mobile sources upwind of or across their borders. The regulation of mobile sources is an authority that lies almost entirely within the purview of the federal government. While some air agencies may be able to pursue “California” standards pursuant to CAA sections 209 and 177, most

⁵ 42 U.S.C. § 7401(a)(3).

⁶ 42 U.S.C. § 7401(a)(4).

are precluded from adopting standards more stringent than those of the federal government by state policies or legislation.

The Urgent Need for EPA Action on Mobile Sources

Unfortunately, emission standards for many heavy-duty “federal sources” have not kept pace with standards for the light-duty motor vehicle sector or stationary sources, and fall far short of what is needed to meet clean air, public health protection and environmental justice goals. As large swaths of the country remain mired in, or slip deeper into nonattainment, many state and local air agencies are left with few avenues to achieve the emission reductions sorely needed to demonstrate attainment, let alone for CMs. Failure by EPA to adequately and timely address federal transportation-related sources of pollutants that contribute to ozone and PM nonattainment has a direct and consequential impact on state and local air agencies’ abilities to equitably fulfill their statutory obligations and their responsibilities to all those who reside within their jurisdictions.

As NACAA states in its January 15, 2021, transition paper, “Improving Our Nation’s Clean Air Program: Recommendations from the National Association of Clean Air Agencies to President-Elect Biden’s and Vice President-Elect Harris’ Administration,”⁷ “Despite the technological and regulatory progress made over the past nearly 60 years, mobile sources continue to dominate emission inventories across the U.S. and are the largest contributing sector to GHG emissions. Our nation needs a strong sustainable transportation strategy. Top priority must be placed on new federal programs to continue to reduce emissions from the mobile source sector – light, medium and heavy duty – both from new and rebuilt engines and vehicles. As efforts to reduce GHGs and tackle climate change move forward, the need for further reductions in criteria pollutant emissions, especially NO_x and PM from the mobile source sector, should not be overlooked.”⁸ EPA’s recently announced proposed multi-pollutant light- and medium-duty vehicle rule and Phase 3 GHG heavy-duty truck rule have the potential to result in reduced ozone and PM levels across the country through emission standards for criteria pollutants and precursors and increased deployment of zero-emission vehicles, which can reduce precursor emissions. NACAA is currently reviewing these EPA proposals in this regard. We also call upon EPA, as we have numerous times over the past several years, to address other important source categories within the mobile source sector by commencing further rulemakings to establish more protective public health and environmental standards for locomotives, oceangoing vessels, aircraft and nonroad heavy-duty engines and equipment. In addition, with the exception of California, only EPA has authority to regulate emissions from small spark-ignition engines such as those used in lawn and garden equipment (section 177 authority does not apply to this source category). EPA last set emission standards for these engines 15 years ago and should step up now and strengthen these standards as well.

Other Sources in Need of Improved Federal Control

EPA also has a responsibility to ensure that federal regulatory programs are achieving their intended emission reductions. A prime example is EPA’s new source performance standards (NSPS) for residential wood heaters (RWHs), which contribute significantly to PM_{2.5} levels in many areas. NACAA has long been concerned about EPA’s highly problematic enforcement of the RWH NSPS at

⁷ <https://www.4cleanair.org/wp-content/uploads/NACAA2021PresidentialTransitionDocument-01152021.pdf>

⁸ *Id.* at 6.

the time of certification and at the time of sale. For years, state and local air agencies have raised enforcement lapses with EPA's Office of Enforcement and Compliance Assurance (OECA), but to no avail.⁹ On February 28, 2023, EPA's Office of Inspector General (OIG) corroborated state and local concerns in a report titled, *The EPA's Residential Wood Heater Program Does Not Provide Reasonable Assurance that Heaters Are Properly Tested and Certified Before Reaching Consumers*.¹⁰ NACAA requests a meeting with Administrator Regan's office, OECA and EPA's Office of Air and Radiation, under which the RWH NSPS were developed, to discuss and implement a plan to ensure that this federal program is rigorously enforced so that the intended emission reductions are fully realized in practice.

Specific Elements of the Draft Guidance

Showing That the CMs Achieve Sufficient Reductions

NACAA appreciates that EPA recognizes it is more appropriate to use the attainment year inventory rather than the base year inventory to calculate the recommended level of emission reductions that CMs should provide. However, this change addresses only part of the problem with respect to the calculation of what EPA deems to be sufficient reductions. What EPA does not account for in its new calculation method is the significant contribution to nonattainment by sources outside the nonattainment area's control, including mobile sources, upwind emissions, federally regulated sources such as military bases and poorly enforced (and, therefore, underperforming) RWH NSPS. With respect to upwind emissions, in particular, EPA does not acknowledge or account for the fact that regulations to address interstate transport have not yet been implemented.

In the draft guidance, EPA changes the target for the recommended minimum amount of emission reductions CMs should provide from one year's worth (OYW) of reasonable further progress (RFP) (i.e., tied to the base year inventory) to OYW of progress (i.e., tied to the attainment projected inventory). The agency states it believes this change is appropriate "in light of changed factual circumstances and a current understanding of what remaining controls may be available for states to adopt as CMs" and that its current target of OYW of RFP "may in some cases lead to an amount that is greater than what would be typically needed to make up for a shortfall in RFP for attainment purposes."¹¹

Irrespective of the inventory to which the calculation is tied, if the state or local air agency does not have authority to control the emissions that make up a majority of that inventory, the calculation will result in an EPA-recommended level of emission reductions from CMs that is impossible for the air

⁹ In March 2021, the Northeast States for Coordinated Air Use Management released a [report](#) on a comprehensive assessment of EPA's RWH certification program, in which the organization wrote that the "report finds a systemic failure of the entire certification process" and that the "unavoidable conclusion of this report is that EPA's certification program to ensure new wood heaters meet clean air requirements is dysfunctional. It is easily manipulated by manufacturers and testing laboratories. EPA has done little to no oversight and enforcement. Starting in 1988 when EPA first adopted air pollution standards for new wood stoves, it has never conducted a single audit to verify that a wood heater actually performs consistent with its certification test results, a span of over 30 years."⁹

¹⁰ OIG summarizes the key takeaway of its [report](#) as follows: "The EPA's ineffective residential wood heater program puts human health and the environment at risk for exposure to dangerous fine-particulate-matter pollution by allowing sales of wood heaters that may not meet emission standards."

¹¹ EPA Draft CM Guidance, *supra* note 1, at 21.

agency to achieve. Holding state and local air agencies accountable for reducing such emissions will not improve or protect air quality and public health, which is the purpose of CMs and all other efforts toward attainment.

NACAA recommends that EPA revise its CM calculation to exclude emissions in the attainment year inventory that come from federally regulated and upwind sources, as identified above, that are outside the control of the state or local air agency.

Reasoned Justification for Less Than OYW of Progress

EPA should acknowledge its responsibility and act to reduce emissions from federally regulated sources and provide CMs for those sources of emissions.

In addition, EPA should also allow state and local air agencies that have already analyzed control measures to cite their previous work rather than engage in resource-intensive efforts to conduct new analyses for an infeasibility demonstration. It is unclear why EPA does not believe that building on previous reasonably available control technology or most stringent measures analyses would suffice – such analyses, by definition, constitute an exhaustive examination of an air agency’s rules and their stringency relative to other agencies. Further, as explained above, under “Showing That the CMs Achieve Sufficient Reductions,” EPA should not require that state and local air agencies analyze control measures that do not address the sources that contribute overwhelmingly to nonattainment in the area.

In addition to the infeasibility demonstration approach that involves the evaluation of individual control measures, EPA should allow in the guidance for alternative approaches to demonstrate the infeasibility of a new state measure (or measures) to meet the new CM emission reduction requirements. For example, approaches that use air quality modeling results to quantify impacts of control measures on air quality monitors or approaches that include certifications that state-specific administrative requirements impose timing constraints on the development/implementation of control measures that make them ineligible as CMs should be allowed.

NACAA does not take issue with EPA requiring state and local air agencies to provide some documentation of the infeasibility of CMs. However, the agency’s approach for executing this requirement, by calling for what it refers to as a “reasoned justification” of infeasibility, is flawed in that it requires an unreasonably excessive level of effort for no air quality benefit. This is especially true in regions where the emissions inventory reveals that the bulk of emissions causing nonattainment come from sources beyond the air agency’s control.

When Congress drafted the CM requirement of the CAA Amendments of 1990 there were ample opportunities for most state and local areas to reduce emissions in substantial quantities. Thirty years later, the landscape has changed dramatically. Faced with progressively more protective NAAQS, and efforts to comply with multiple NAAQS simultaneously, state and local agencies now have fully mature air pollution control programs in place, particularly with regard to stationary sources, over which state and local agencies have direct control. As a result, there are simply no opportunities for further emission reductions from these sources in many regions, and certainly not those of the magnitude EPA contemplates in this draft guidance. Most areas required to develop CMs have already regulated most or all of everything for which they have the appropriate authority.

Congress specifically intended that CMs be included in State Implementation Plans (SIPs) as an emission-reduction “bridge” to the next SIP, which must contain even more controls as a consequence of failing to attain. Thus, EPA’s current approach to CMs, which is perpetuated in the draft guidance, sets up an untenable situation compelling some areas to withhold control measures that will provide near-term and ongoing air quality improvements from their attainment strategy to use as CMs, which is contrary to the CAA’s mandate that areas attain the NAAQS as expeditiously as practicable.

Another issue of concern to NACAA is the lack of clarity in the draft guidance relative to EPA’s expectation regarding precursors – specifically, how an infeasibility demonstration for a particular NAAQS should account for precursor pollutants that contribute to nonattainment. We ask that EPA provide an explanation of this in the guidance, and further urge that EPA interpret this requirement with an eye for practicality. It does not make sense to force state and local agencies to chase emission reductions for all precursors instead of targeting those that actually have the potential to lower ozone and PM concentrations.

Finally, EPA should acknowledge that in section 182(e)(5) of the CAA Congress recognized that in order for Extreme ozone nonattainment areas to attain the NAAQS they need measures beyond those that currently exist, and may include in their attainment plans provisions “which anticipate development of new control techniques or improvement of existing control technologies.” However, these areas should not be called upon to demonstrate that each potential measure under section 182(e)(5) is infeasible for the purpose of CMs. Instead, the CM infeasibility demonstration for Extreme nonattainment areas should be limited to measures identified under section 182(e)(5) using currently available technology.

Guidance on Timing of Reductions from CMs

In the draft guidance, EPA retains the 60-day time period before CM implementation and extends the amount of time in which emission reductions from CMs must occur from one year to up to two years. This timing scheme remains highly problematic. Most state and local emission control measures cannot be held in reserve as CMs, ready to be “taken off the shelf” and implemented within 60 days. EPA fails to acknowledge not only this but also the substantial amount of time necessary to develop and adopt CMs before they are ready for implementation. In fact, many states are barred from adopting regulations until there is a need for them. NACAA recognizes that EPA is required to put a triggering mechanism in place, but 60-days is infeasible. Likewise, providing one additional year to achieve emission reductions from CMs is of little help and reflects a lack of understanding of the complexity of this requirement as well as the impact of EPA’s failure to meet its statutory requirements to help air agencies resolve nonattainment issues. In many cases, once CMs are triggered, sources need considerable lead time to prepare before any emission reductions will begin. This may include time required for permitting as well as equipment installation and start up.

Conclusion

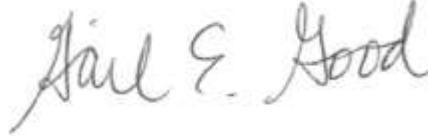
On behalf of NACAA, we thank you for the opportunity to comment on this draft guidance. We look forward to working collaboratively with EPA, as co-regulators, to address and resolve the issues we have raised as the guidance is finalized and implemented in a way that will allow us all to successfully fulfill our responsibilities and achieve our clean air, public health protection and

environmental justice goals. If you have any questions, please contact us or Nancy Kruger, NACAA's Deputy Director.

Sincerely



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