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COUNCIL OF  
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R. Steven Brown  
Executive Director

July 15, 2011

Submitted via <http://www.regulations.gov>

EPA Docket Center (EPA/DC)  
U.S. Environmental Protection Agency  
Mailcode: 2822T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OAR-2011-0044 (NSPS action)  
Docket ID No. EPA-HQ-OAR-2009-0234 (NESHAP action)  
RIN 2060-AP52

To Whom It May Concern:

On behalf of the Environmental Council of the States (ECOS), I am pleased to submit this comment letter to the U.S. Environmental Protection Agency (EPA) on its proposed new rule "National Emission Standards for Hazardous Air Pollutants [NESHAP] from Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial- Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units" [new source performance standards (NSPS)] published in the May 3, 2011 *Federal Register*. This letter provides comments to EPA on this proposed rule for both the NESHAP and NSPS actions, hereafter referred to as "utility MACT rule."

States are co-regulators with EPA as we jointly seek to deliver the nation's environmental protection system.

States have long supported early, meaningful, and substantial state involvement in the development and implementation of environmental statutes and related rules. Further, states have called on EPA to consult integrally with the states' environmental agencies as EPA's offices conduct these efforts in preference to after these efforts have been discussed and drafted.

States appreciate EPA's commitment through its revised 2008 guidance to consult with states if a proposed regulatory action is estimated to have an annual effect on state or local governments of \$25 million or more in aggregate. EPA's commitment exceeds the requirements of the Unfunded Mandates Reform Act of 1995 (UMRA) as well as Executive Order 12866 – Regulatory Planning and Review (1993) and Executive Order 13132 – Federalism (1999) to consult on proposed regulatory actions that are expected to exceed \$100 million or more.

EPA estimates that the proposed utility MACT rule will result in expenditures exceeding \$100 million by state and local governments in aggregate in any one year, and as such, the proposed rule is considered a significant regulatory action.

In the proposed rule under "D. Unfunded Mandates Reform Act of 1995, 5. Consultation With Government," EPA notes that it held a consultation meeting with state, local and tribal governments on October 27, 2010. At this meeting, the proposed rule references that officials at the meeting expressed uncertainty "with regard to the potential burden associated with implementing the rule on state and local entities (i.e., burden to re-permit affected EGUs or update existing permits)."

In the proposed rule under "E. Executive Order 13132, Federalism," EPA notes that in its March 2011 Regulatory Impact Analysis (RIA), that the option may impose annual "direct compliance costs on an estimated 97 state or local governments. Specifically, we estimate that there are 81 municipalities, 5 states, and 11 political subdivisions ... that may be directly impacted by today's proposed rule."

In the proposed rule's RIA, Chapter 10 discusses statutory and executive order impact analyses. Section 10.2 addresses UMRA. EPA notes that it identified state and municipality owned utilities and subdivisions that would be affected by the rule. EPA further notes that "after identifying the potentially affected government entities, EPA estimated the impact of the proposed rule in 2015 based on the following:

- Total impacts of compliance on government entities and
- Ratio of government entity impacts to revenues from electricity generation."

EPA's Table 10-3 summarizes capital costs plus operating costs, fuel costs, and change in revenue to reach a total estimated cost of \$571 million in 2015 to state and local governments and sub-divisions.

Beyond these direct compliance costs to government-owned utilities, no further discussion of costs to states nor any reference to implementation or administrative costs to states can be found in the RIA.

Regarding the October 2010 meeting and the uncertainty expressed by officials regarding potential burden of state administrative costs to implement the rule, no response was found to this potential burden in the May 2011 Federal Register notice of proposed rule-making.

The Unfunded Mandates Reform Act of 1995 directs federal agencies to include a number of statements to accompany significant regulatory actions in a notice of proposed rulemaking.

EPA in its proposed rule seems to have addressed UMRA Section 202 (a)(3)(a), which states that "the agency shall prepare a written statement containing... estimates... of the future compliance costs of the Federal mandate."

However, EPA in its proposed rule does not appear to have addressed the statement in UMRA Section 202 (a)(2) that "the agency shall prepare a written statement containing... a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State... governments."

In Executive Order 12866 for significant regulatory actions (unless prohibited by law), Section 6 (a)(3)(C)(ii) specifies that agencies should have developed "[a]n assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, **the direct cost ... to the government in administering the regulation [emphasis added] ...**" as part of its decision-making process. Section 6(a)(3)(E)(i) directs that this information be made available to the public.

EO 12866 further provides direction in Section 1(a) that "[c]osts and benefits should be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."

UMRA and EO 12866 are clear in directing federal agencies to consider direct state administrative costs and to make this information available to the public. This information does not appear to be included in the proposed rule or in underlying supporting documents made available for this rule.

In Executive Order 13132 on Federalism, Section 6.(b)(2)(B) directs that EPA provide to the Office of Management and Budget a federalism summary impact statement (FSIS) containing a number of elements, including "a statement of the extent to which the concerns of State and local officials have been met." States continue to remain uncertain of the extent to which EPA is considering state administrative costs, including state administrative costs for this proposed utility MACT rule.

ECOS and state environmental agencies have discussed with the EPA Office of Policy a number of categories of state implementation costs as a result of implementing new rules. For each new EPA rule, states may incur slightly different implementation costs. Cost categories may differ from state to state depending on legislative and regulated community differences. States ask that EPA consider as appropriate state costs for a wide range of implementation start-up and recurring activities in its implementation cost estimation for this rule, as well as for other rules, using the attached checklist (see Attachment). ECOS requests that EPA consider this full range of implementation cost items in its estimations for this rule before the final rule takes effect. ECOS also requests that EPA seek to secure federal funding for the states to cover the customary portion of the costs associated with the state implementation of this federal rule and consider the availability of funding support in its planning for new rule adoption schedules and other implementation activities following new rule issuance.

Start-up and recurring implementation costs to the states as a result of this rule are detailed in the attachment to this letter and may include, for example: obtaining additional delegated authority; attending EPA training; developing a system for monitoring affected entities; purchasing new equipment to enforce the new regulation; providing compliance assistance; conducting ongoing public outreach and education programs (to the regulated communities) on how to comply with the state agency's implementation of the rule; collecting and reviewing data from monitoring, recording, and storing data; and conducting enforcement inspections and follow-up actions.

We seek to ensure here that all pertinent costs are included in any estimate the agency produces. Failure to include an accurate assessment of the implementation costs may result in a rule that is not implemented properly or in a timely manner, which may adversely affect human health.

ECOS requests that EPA concurrently publish implementation guidance for this rule to states at the time of new rule issuance. Timely issuance of implementation guidance would facilitate state adoption of the new rule as well as increase state and EPA staff resource efficiency in completing activities related to new rule adoption.

States have shared with EPA on a number of occasions the importance of having information about the costs to implement and administer new federal rules to share with the U.S. Congress and state legislatures and to use for planning resource needs. Costs of implementation of the rule can be covered two ways. The first is through U. S. Congressional appropriations. The other is through increases in permit fees allowed for Title V activities in the Clean Air Act. It may however, not be expedient to

receive state legislative approval for permit fee increases. If EPA estimated state administrative costs along with state direct compliance costs, the estimates might assist both the EPA in justifying their request for appropriations and states in justifying permit fee increases. States continue to request that EPA consider state administrative costs and make this information available as directed in UMRA, EO 12866 and EO 13132.

For the proposed utility MACT action, EPA needs to ensure that the mandate to consider state administrative costs as well as the mandate that this information accompany this significant regulatory action have both been met.

We appreciate the opportunity to offer these comments. If you have any questions, please contact Steve Brown, [sbrown@ecos.org](mailto:sbrown@ecos.org), 202-266-4920.

Sincerely,

A handwritten signature in black ink that reads "Leo M. Drozdoff". The signature is written in a cursive style with a large, looped initial "L".

Leo M. Drozdoff  
Chair, ECOS Planning Committee  
Director, Nevada Department of Conservation and Natural Resources

cc: ECOS Officers  
Steve Brown, ECOS  
Michael Goo, U.S. EPA Office of Policy  
Bicky Corman, U.S. EPA Office of Policy  
Sarah Hospodor-Pallone, U.S. EPA Office of Congressional and Intergovernmental Relations

Attachment

Excerpt from "White Paper Recommendations for Enhancing EPA's State Administrative Cost Analyses, WORKING DRAFT, August 20, 2009"

**Table 3: Revised State Administrative Activity Cost Framework**

Start-Up Activity Categories	Specific Activities
1. Tracking EPA's Rulemaking Progress	<input type="checkbox"/> Review the Federal Register notices and/or other documents in order to decide whether to apply for delegated authority. <input type="checkbox"/> Attend EPA-sponsored meetings/conferences on the rulemaking <input type="checkbox"/> Attend other non-EPA meetings/conferences on the rulemaking <input type="checkbox"/> Provide EPA directly with comments on the proposed rule. <input type="checkbox"/> Provide EPA with comments on the proposed rule through a third party (e.g., ECOS). <input type="checkbox"/> Conducted other start-up activities associated with tracking EPA's rulemaking process.
2. Obtaining Additional Delegated Authority	<input type="checkbox"/> Work with EPA to obtain delegated authority <input type="checkbox"/> Amend state law to incorporate the requirements of the new regulation. <input type="checkbox"/> Issue new regulations in accordance with the requirements of state law <sup>1</sup> <input type="checkbox"/> Incur litigation costs associated with the change in state laws. <input type="checkbox"/> Conduct other start-up activities associated with obtaining additional delegated authority or the decision whether or not to obtain that authority.
3. Designing Implementation Plan	<input type="checkbox"/> Design alternative standards to those in the federal regulation <input type="checkbox"/> Perform activities related to obtaining EPA approval for the state implementation plan <input type="checkbox"/> Meet with stakeholders and respond to concerns <input type="checkbox"/> Conduct other start-up activities associated with designing implementation plans
4. General Start-Up Activities	<input type="checkbox"/> Develop internal guidance and procedures for implementing the new regulation <input type="checkbox"/> Hire additional staff because of this rule <input type="checkbox"/> Attend EPA training or other non-EPA sponsored training for implementing the new regulations <input type="checkbox"/> Conduct internal training <input type="checkbox"/> Conduct other start-up activities
5. Compliance Assistance	<input type="checkbox"/> Conduct outreach programs for affected entities <input type="checkbox"/> Conduct public outreach and education programs to create awareness <input type="checkbox"/> Develop training programs to help affected entities comply with the new regulation <input type="checkbox"/> Conduct other start-up activities associated with compliance assistance
6. Permit Administration	<input type="checkbox"/> Develop additional infrastructure for permit administration because of this rule <input type="checkbox"/> Develop specific permit requirements <input type="checkbox"/> Conduct other start-up activities associated with permit administration
7. Monitoring	<input type="checkbox"/> Develop a system for monitoring affected entities <input type="checkbox"/> Purchase new equipment for monitoring purposes <input type="checkbox"/> Develop new infrastructure for carrying out monitoring <input type="checkbox"/> Conduct other start-up activities associated with monitoring
8. Inspection and Enforcement	<input type="checkbox"/> Establish new procedures for enforcing the new regulation <input type="checkbox"/> Purchase new equipment for enforcing the new regulation <input type="checkbox"/> Conduct other start-up activities associated with enforcement
Recurring Activity Categories	Specific Activities
9. Compliance Assistance	<input type="checkbox"/> Conduct ongoing training (in addition to the initial start-up period) <input type="checkbox"/> Respond regularly to letters, phone calls, emails or other inquiries in order to assist affected entities; respond to inquiries by the media and the public <input type="checkbox"/> Conduct ongoing public outreach and education programs to create awareness <input type="checkbox"/> Conducted other recurring activities associated with compliance assistance
10. Permit Administration	<input type="checkbox"/> Conduct regular reviews of submitted documents and supporting materials <input type="checkbox"/> Verify data sources on a regular basis <input type="checkbox"/> Consult with facilities regularly about permitting process <input type="checkbox"/> Issue notifications to affected entities about permits <input type="checkbox"/> Provide opportunities for the public and/or stakeholders to comment on ongoing permitting processes <input type="checkbox"/> Issue/review permits to affected entities <input type="checkbox"/> Conduct other recurring activities associated with permit administration

**Table 3: Revised State Administrative Activity Cost Framework**

<b>11. Monitoring</b>	<input type="checkbox"/> Collect data from monitoring on a continuous basis <input type="checkbox"/> Review collected data on a regular basis <input type="checkbox"/> Record and store monitoring data <input type="checkbox"/> Report monitoring data <input type="checkbox"/> Provide notifications of monitoring requirements and schedule <input type="checkbox"/> Conducted other recurring activities associated with monitoring.
<b>12. Inspection and Enforcement</b>	<input type="checkbox"/> Conduct and review regular inspections for regulatory enforcement purposes <input type="checkbox"/> If a national inspection priority, conduct additional inspections as per state-region negotiated workplan <input type="checkbox"/> Respond to citizen complaints <input type="checkbox"/> Issue warnings and/or citations for violations <input type="checkbox"/> Take legal action to enforce regulation <input type="checkbox"/> Collect fines for violations <input type="checkbox"/> Provide notifications of enforcement actions <input type="checkbox"/> Keep records for enforcement actions <input type="checkbox"/> Report enforcement activities to EPA <input type="checkbox"/> Conducted other recurring activities associated with enforcement <input type="checkbox"/> Incur additional recurring costs associated with enforcement activities
<b>13. Other</b>	<input type="checkbox"/> Any other types of recurring activities not categorized above

<sup>1</sup>While some states may simply incorporate federal rules by reference, others must undergo an in-depth rulemaking process involving public notice, impact statements, rulemaking hearings, recordkeeping and various other steps