



ECOS

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December 1, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via email to: A-and-R-Docket@epa.gov

Re: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule: Docket ID No. EPA-HQ-OAR-2013-0602

Dear Administrator McCarthy:

On behalf of the Environmental Council of the States (ECOS), I submit this letter to the U.S. Environmental Protection Agency (EPA or Agency) on the proposed national rulemaking “*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule*” Under the Clean Air Act (79 Fed. Reg. 34830, June 18, 2014). This letter provides comments to EPA on this proposed rule (hereinafter, “proposed rule”, “proposal”, “§ 111(d)”, or “guidelines”).

States, territories, and tribes (hereinafter, “states”) are co-regulators with EPA as we jointly seek to deliver the nation’s environmental protection system. States have many laws that address and influence air pollution, and implementing the Clean Air Act (CAA) is a fundamental responsibility of states.

The following comments from ECOS make broad suggestions that should be addressed by EPA in any final rule. Importantly:

- these comments do not supersede or alter the comments or opinions of any individual state; and
- states’ positions vary significantly on many aspects of this proposal.

As such, these comments do not take a position on stringency, legality, or need for the proposed rule. Instead, given the above limitations, these comments offer shared state perspectives which are relevant to EPA’s further consideration and finalization of the proposed rule, or to any other related next steps in this field of activity. Over the years, ECOS has adopted Resolutions in response to various federal climate policy proposals under consideration at the time. Today’s comments raise principles and priorities consistent with prior policy statements.¹ ECOS does not have a Resolution on the CAA § 111(d) proposal.

¹ See, e.g., [ECOS Resolution 07-2, Revised March 2013, Reducing Greenhouse Gas Emissions](#); [ECOS Resolution 12-1, Approved March 2012, Challenges of Achieving Significant Greenhouse Gas \(GHG\) Emissions Reductions](#); and [ECOS Resolution 09-3, Revised March 2012, Preserving States’ Rights to Regulate Greenhouse Gas Emissions](#).

Engage with States

States have long supported early, meaningful, and substantial state involvement in the development and implementation of environmental statutes and related rules.² EPA must engage states as co-regulators prior to and during the rulemaking process, and ECOS recognizes EPA's extensive efforts to do so for this proposed rule. The Agency's time and effort spent on calls, meetings, and outreach to states, individually and through ECOS and other associations, regarding the proposed rule has been almost unprecedented. Many states and other stakeholders commend EPA for this significant outreach on the proposal, and suggest that this type of engagement represents a model for future engagement on Agency matters of national significance and import such as this one.

The Agency's efforts have addressed many state inquiries about the proposal, but questions remain. Significant engagement and outreach will remain as important as EPA prepares to finalize the proposal and as states then formulate, submit, and implement the resulting plans. EPA must maintain regular forums and contact with states prior to finalization, and then during implementation, of the rule.

Provide Adequate Resources

The CAA § 111(d) planning process will place a significant administrative burden on state agencies and on EPA. CAA § 111(d) work should not come at the expense of state agencies' core programs. EPA and the states must work efficiently together. As the CAA provides, EPA must exercise flexibility in reviewing and approving state § 111(d) plans. ECOS also requests that EPA seek to secure additional federal funding for the states to cover the customary portion of costs associated with any new rule, and consider the availability of funding support in planning for new obligations.

We understand that the Administration is seeking Congressional reallocation of funds from state air quality planning budgets for FY2015. It is important for EPA to provide states with *additional* assistance, not reallocated funding, wherever possible, to help states meet the deadlines and obligations proposed under § 111(d). In recognition of the significant and wide range of activities necessary to implement new requirements and regulatory obligations, ECOS requests EPA include in its support of any final rule estimates of both state administrative costs and state direct implementation costs.³

As an example, we understand that environmental justice concerns have been raised concerning the proposal and that some will advocate requiring states to take such concerns into consideration in drafting and administering § 111(d) plans, such as adding criteria for considering impacts on underprivileged communities to generation distribution decisions. For any such requirement included in the proposal, EPA should provide needed assistance and resources to states for their fulfillment.

Acknowledge State Differences

While some states predict they will achieve necessary reductions with modest efforts and anticipate net economic benefits, others are very concerned about their ability to meet the proposed (especially interim) targets and about grid reliability and the cost of the rule. Uncertainty about the effects of the proposal exists among states largely due to state-specific regional, geographic, economic, and power generation and regulation differences and due to the wide range of options proposed by EPA. Cost, timing, and energy generation impacts will likely differ from state to state depending on legislative and

² See [ECOS Resolution 11-1, Renewed April 2014](#).

³ See [ECOS Resolution 14-3, Approved September 2014](#).

administrative factors and differences in each state's energy portfolio and connections, or lack thereof, to the larger grid. EPA must:

- consider variations in states' ability to implement the various proposed options;
- account for variations in state implementation costs as appropriate; and
- structure any final guidelines to "provide the maximum flexibility possible that is still consistent with underlying statutory objectives".⁴

EPA sought comment on the use of a baseline approach, which will present advantages and disadvantages that will vary among states. If EPA establishes state baselines, they must be representative of actual performance related to the goals of the rule and must not, for example, work against states or entities that took early action contributing to that goal. EPA also must consider significant year-to-year variations that have occurred, and will continue to occur. Many states have observed, for instance, anomalies in hydropower and plant outages had an undue influence on their baseline in the proposal. EPA should work with those specific states, and others with concerns, to make needed adjustments in any final rule to show how such an approach works over time.

Maximize State Flexibility

EPA must develop CAA § 111(d) guidelines that foster both regional coordination and the option for states to submit individual plans. The Agency also must provide states multiple options for capturing the benefits of state energy efficiency and renewable energy programs. EPA must provide a workable mechanism for states to adopt either a rate-based or mass-based approach to achieving state goals, as well as to modify their plans – such as to continue achieving reductions cost-effectively by incorporating new technologies that become available. The rule and EPA's manner of implementation and approval must recognize that regional plans could appropriately take many different forms. EPA must allow states flexibility to allocate credit for zero-carbon resources and to reach agreements allocating carbon liabilities.

EPA also should support the dialogue and standardization needed to promote state flexibility. For example, EPA should work with states to ensure states receive proper credit for energy efficiency programs. The guidelines must account for the need for both accountability and flexibility in developing Estimation, Measurement and Verification (EM&V) protocols that work across states and will meet federal standards.

Acknowledge State Institutional Realities

EPA must acknowledge and accommodate legal, administrative, and technical realities states face implementing such an expansive rule. Several states may need additional legislative authorization before finalizing and implementing § 111(d) plans. The timing of legislative sessions dictates when they can seek such authority and may affect a state's pace for developing, proposing, and finalizing § 111(d) plans. In terms of practicality and the speed at which markets and infrastructure can be changed, many states will need latitude for establishing their path to the 2030 targets. State utility commission docket timelines also must be considered.

Timely Plan Review

EPA must also ensure that it dedicates sufficient resources to review state § 111(d) plans and to continue approving other state air quality plans. EPA and the states recently agreed on an approach to reduce the

⁴ See [ECOS Resolution 12-2, Approved March 2012](#).

backlog of State Implementation Plan approvals; ECOS recommends EPA apply these principles to the process for approving § 111(d) plans.

Issue Clear Rule and Concurrent Guidance Developed with States

Any final rule should be clear and comprehensive enough that the need for implementation guidance is minimized. If such guidance is needed, EPA should develop any guidance with state involvement and publish it concurrently with any final rule, especially given the very short timelines proposed for states to submit plans and begin implementation.

To maintain a level playing field while achieving meaningful reductions, the rule should be written to encourage accountability. Monitoring, verification, and backstop provisions should be reasonable and clear, developed in consultation with states. EPA should work with states to ensure that contingency measures are available, recognizing the importance of states maintaining control over their programs and advancing a system of flexible and iterative implementation.

Practicable Enforcement and Oversight

To maintain and build upon the time tested cooperative federalism upon which the Clean Air Act is founded, EPA must preserve the states' role as primary implementers of the § 111(d) performance standards, as envisioned by the Act. EPA must balance its need for enforceability with the states' need for flexibility as they deliver emission reductions under § 111(d). EPA must also provide options, such as the state commitment option approach described in the proposal's preamble, under which states with solid records of performance and established approaches can implement or expand energy efficiency and renewable energy programs for § 111(d) compliance.

Given the significant resources that have been, and will continue to be, needed to respond to this proposal and any final rule, there is significant risk to states should this rule be overturned in whole or in part by the courts. While the Agency cannot ensure against this, the rule's legal foundation must be as clear and compelling as possible to prevent possible years of uncertainty.

Conclusion

Again, this letter, though submitted on behalf of states, in no way overrides individual comments and concerns made through the rulemaking process by states - our members and your co-regulators. We appreciate the opportunity to offer these comments. If you have any questions, please contact Alexandra Dunn, ECOS Executive Director and General Counsel, adunn@ecos.org or 202-266-4929.

Sincerely,

A handwritten signature in blue ink that reads "Robert J. Martineau, Jr." with a stylized flourish at the end.

Robert J. Martineau, Jr.
ECOS President
Commissioner, Tennessee Department of Environment and Conservation

cc:

Janet McCabe, Acting Assistant Administrator, EPA Office of Air and Radiation

Mark W. Rupp, Deputy Associate Administrator for Intergovernmental Relations, EPA Office of
Congressional and Intergovernmental Relations

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