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January 21, 2016

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

Via electronic submission to: www.regulations.gov

Re: *Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule: Docket ID No. EPA-HQ-OAR-2015-0199*

Dear Administrator McCarthy:

The Environmental Council of the States (ECOS) is pleased to provide the following comments to the U.S. Environmental Protection Agency (EPA or Agency) on the proposed national rulemaking “*Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule*” Under the Clean Air Act (80 Fed. Reg. 64662, October 23, 2015) (hereinafter, “proposed rule”, “proposal”, “§ 111(d)”, or “guidelines”).

It is critical to acknowledge upfront that over half of the states are challenging the legality of the Clean Power Plan (CPP) promulgated under the Clean Air Act (CAA), which the proposed rule would implement, and that other states are in proceedings in support of the CPP. As such, ECOS’ submission of these comments is in no way an endorsement of, or a statement against, the CPP. Further, these comments do not take a position on the stringency, legality, or need for the CPP or the subject proposed rule.

ECOS recognizes that the Agency may finalize the proposed rule before the litigation outcome is reached; therefore, ECOS is submitting these comments consistent with the organization’s mission to:

- Articulate, advocate, preserve and champion the role of the states in environmental management; and
- Provide for the exchange of ideas, views and experiences among states and with others; and
- Foster cooperation and coordination in environmental management; and
- Articulate state positions to Congress, federal agencies, and the public on environmental issues.

In sum, this letter offers broad suggestions that should be addressed by EPA in any final rule. These comments are offered to EPA independent of the question of the legality of the CPP and this proposed rule. Most significantly, these comments do not supersede or alter the comments, litigation position, or opinions of any state and should not be viewed as representing the perspective of any individual state.

Given the above limitations, these comments provide input that the Agency should consider if it finalizes the proposed rule. These comments touch on key principles embodied in prior ECOS policy statements.

Engage with States

ECOS recognizes the significant time and effort EPA spent engaging with states during the comment process leading up to the promulgation of the Clean Power Plan (CPP). States have long supported early, meaningful, and substantial involvement in the implementation of environmental statutes and related rules.¹ EPA outreach has continued since the CPP rule's finalization and we strongly encourage EPA to continue to meaningfully engage with states.

Maximize State Flexibility

Each state is in the best position to understand the needs of its citizens, the capability of the electric generating units (EGUs) within the state and the broader region, and the requirements that must be met to maintain the integrity of the respective grid. The model rules and federal plan, as well as EPA's manner of implementation and approval, must recognize that state and regional plans will appropriately take many different forms due to factors such as diverse power generation and distribution approaches, and reliability considerations.

Some states are very concerned about their ability to meet the reduction targets, maintain grid reliability, and manage the cost of rule implementation, while others predict they will achieve necessary reductions with modest efforts and anticipate net economic benefits. Cost, timing, and energy generation impacts will differ from state to state depending on legislative and administrative factors and differences in each state's energy portfolio and connections, or lack thereof, to the larger grid. States must be afforded the flexibility to create a final plan that best fits their needs and goals, and EPA must exercise flexibility in reviewing and approving state § 111(d) plans.

In an effort to respect each state's unique circumstances, EPA must provide a workable mechanism for states to adopt either a rate-based or mass-based approach to achieve state goals. Further, States must be afforded multiple options for capturing the benefits of state energy efficiency (EE) and renewable energy (RE) programs, and EPA must work across states to ensure each state is allowed to receive full credit for their EE and RE programs. Additionally, EPA must ensure there is enough flexibility for states to trade broadly with each other. Finally, in order for states to achieve the expected reductions as cost-effectively and efficiently as possible, states must be able to easily modify their plans in order to incorporate new technologies as they become available.

Issue Concurrent Guidance with State Input

In addition to maximizing state flexibility in the final rule, EPA should strive to develop a final rule that is clearly written, understandable, and easy to implement. EPA should involve states in development of implementation guidance and publish it concurrently with any final rule. Any final guidance must "provide the maximum flexibility possible that is still consistent with under-

¹ See [ECOS Resolution 11-1, Renewed April 2014](#), *Objection to U.S. EPA Imposition of Interim Guidance, Interim Rules, Draft Policy, and Reinterpretation Policy*

lying statutory and regulatory objectives”.² The guidance should foster both state and regional coordination and the option for states to submit individual plans.

Guidance also must account for the need for both accountability and flexibility in developing Evaluation, Measurement and Verification (EM&V) protocols that work across states and will meet federal standards. Further, guidance providing clarification on qualifying factors under the Clean Energy Incentive Program (CEIP) must recognize that states are in the best position to assess the needs of local vulnerable communities and afford them the flexibility to do so.

Resources

States are already implementing and enforcing various air program requirements.³ The CAA § 111(d) planning and implementation process will require state agencies to invest human and fiscal capital. This new program cannot be implemented at the expense of core programs.

ECOS requests that EPA seek to secure additional federal funding, not reallocated funding, for the states to cover the customary portion of costs associated with any new programs, and consider the availability of funding support in planning for new obligations. ECOS also requests that EPA include in its support of any final rule estimates of both state administrative costs and state direct implementation costs.⁴

Practicable Enforcement and Oversight

To maintain and build upon the time-tested cooperative federalism upon which the CAA 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 in implementation of § 111(d).

We appreciate the opportunity to offer these comments. If you have any questions, please contact me at adunn@ecos.org or 202-266-4929.

Sincerely,



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Executive Director & General Counsel
Environmental Council of the States

Cc: ECOS Executive Committee

² See [ECOS Resolution 12-2, Approved March 2012](#), *On Innovative Approaches to Protecting Human Health and the Environment*

³ Additionally, there are many recent and upcoming CAA programs updates that states are being required to implement and enforce. This includes, but is not limited to, the new ozone National Air Ambient Quality Standards, the Cross State Air Pollution Rule update, the Exceptional Events Proposal, the New Source Performance Standards, the Green House Gas Reporting Rule revisions, and updates to the National Air Toxics Assessment affecting the Hazardous Air Pollutants list.

⁴ See [ECOS Resolution 14-3, Approved September 2014](#), *Federal Resources for State Environmental Programs*