

Arkansas Department of Environmental Quality
Responses to Questions Posed for the Clean Air Act Forum

July 31, 2012

1. In your agency's experience implementing the CAA, what is working well? What is not working well?

Working well:

There is no doubt that the CAA has resulted in dramatic improvement in air quality, and it contains the authority to address future challenges. The CAA provides EPA with the authority to develop sound science related to air pollution and air pollution controls. The technology mandating aspect of the CAA, whether it is the BACT, NSPS, MACT, or mobile source standards, plays a vital role in improving air quality and protecting public health.

Not working well:

Timing and implementation. Too often "standards" are promulgated without the technical implementation rules in place. This places States in an extremely difficult position – that is to assert that the infrastructure will be in place timely and revise the SIP or other program requirements without the real tools to implement the new requirements. For example, the PM NAAQS was revised in 2006 to address PM_{2.5}. The science necessary to adequately and accurately measure and monitor emissions was not reliable at the time the Standard was promulgated leading to the necessity of implementing the use of a "surrogate policy" for several years. It wasn't until 2011 that the technical implementation regulations were finally issued for states (and industry) to understand what would be needed to implement this "new" standard.

Meeting deadlines to submit SIP revisions. One of the most challenging aspects of implementing the CAA is meeting the deadlines by which States have to submit SIP revisions. These deadlines, or the failure to meet them, can result in a delay of the implementation of air pollution control programs in the State. As many of the NAAQS standards are intertwined, it is not reasonable to expect the states to have their state regulations in place quickly enough to provide EPA the revised SIPs by the proposed deadline, which further complicates the ability to meet deadlines in related SIPs. Furthermore, EPA has limited resources and their review of state SIPs can take months or years. Depending on the regulation, if Arkansas misses a deadline, it can be subject to a FIP, even if the state is waiting on EPA to finalize implementation rules and guidelines.

Another example of this “timing” issue relates to the revision of the NO₂ NAAQS. The NAAQS revision was promulgated in January 2010 and became effective in April 2010. The CAA recognizes that states need time to incorporate changes to federal regulations into state authority and make any necessary adjustments or changes to their programs to implement a new or revised standard. The CAA provides a State up to three years to revise its regulations and SIP (in this case, an infrastructure SIP is due April 2013). However, EPA issued a memorandum that required states to address the new standard in certain types of federally enforceable permits issued after the (federal) effective date of the standard (April 2010). In most cases it is impossible for States to complete rulemaking in this time frame. This places States and industry in the precarious position of issuing permits in accordance with state regulations and their current SIP, while being at risk of challenge from EPA or third parties.

Meet a deadline for a decision based on a court order. Working under a court order to meet a stringent deadline does not necessarily produce the “best” standard. Since many of EPA’s directives are legally challenged, a well-planned and more complete proposed rule would be more effective, even if more time is required to develop it. Five years may not allow for enough time for new technology or science to be fully developed. Therefore, to avoid a short deadline to comply with a federal rule, a less frequent review of the NAAQS could help to give EPA more time to conduct thorough research, with the participation of the States and public, while still protecting public health and welfare. With more time between review processes, the States could have adequate time to develop proper SIPs and meet federal deadlines.

State Implementation Plan review and approval action and timing. Action on SIPs (and the speed of such actions) vary widely between Regions. Extended timeframes between State revision of regulation and SIP submittal, and EPA action on the SIP submittals are becoming of increasing concern and frustration. It is not uncommon for there to be multiple state SIP submittals (often several years old) pending review by EPA.

Use of EPA guidance in lieu of rulemaking. Guidance documents are not subject to the same review requirements and due process procedures as formal rules, yet EPA will sometimes give guidance documents the same enforceability standards as formal rules by conditioning permit approval on the implementation of the guidance. In addition, guidance is sometimes not finalized in a manner that is timely for States to submit SIPs. This is especially true for guidance pertaining to 110 (Infrastructure) SIP requirements.

2. Do state and local governments have sufficient autonomy and flexibility to address local conditions and needs?

It is advisable, if not necessary, for EPA to set minimum federal standards and regulations applicable to all states to ensure the public health across the nation. Certainly all citizens are entitled to that level of protection. However, there should be adequate flexibility in the CAA and EPA policy to allow states to adopt more stringent regulations, or to take implementation

measures that may differ from those recommended by EPA, if such measures or regulations are determined to be in the best interests of their citizens and adequate to achieve the pollution reductions mandated.

3. Does the current system balance federal, state, and tribal roles to provide timely, accurate permitting for business activities, balancing environment protection and economic growth?

The permitting system can be overly burdensome, complicated and lengthy; in some cases, without an observable value-added benefit to public health or the environment. With higher demand and fewer resources at both the state and EPA level, streamlined or flexible approaches to permitting situations should be encouraged. EPA appears to have recognized this dilemma also as they have promoted Kaizen or Lean programs to address the efficiency of their regulatory relationships with the states. Although EPA recognizes the need to appropriately balance permitting matters with economic growth issues, it is our belief that states are more sensitive to these matters in local permitting efforts.

4. Does the CAA support a reasonable and effective mechanism for federal, state, tribal and local cooperation through State Implementation Plans? How could the mechanism be improved?

The SIP process is badly in need of reform. The present process is overly cumbersome, slow and bureaucratic. EPA has at times engaged in "overreach" into state authority using the SIP approval process as a mechanism to attempt to dictate state policy. Recent EPA decisions in regard to regional Haze SIPs are an example of this federal overreach. In addition, untimely review and approval of SIP revisions create increasing uncertainty between the State and the regulated community. It is not uncommon to have multiple "SIP revisions" pending for years without EPA action. In some cases one SIP revision revises components of a SIP submittal that is still pending review and action. There is not a mechanism to combine or supplement a previously submitted Revision. Hence, state regulations can be amended and effective (with permitting and enforcement actions being taken) on regulations contained in a pending SIP revision(s) that has not been approved by EPA.

5. Are cross-state air pollution issues coordinated well under the existing framework?

The problems regarding how EPA has addressed cross-state air pollution issues appear to be best illustrated by the recent actions regarding CAIR and CASPR. EPA first put forth CAIR which enabled states a reasonable degree of flexibility for states to implement. When the Court struck down the rule, EPA issued a replacement rule that was based on the old ozone NAAQS. Not only is the new rule based on old standards, it reduced flexibility at the state level and imposed a FIP before many affected states, including Arkansas, had time to implement a SIP.

6. Are there other issues, ideas or concerns relating to the role of federalism under the CAA that you would like to discuss?

As NAAQS standards get lower and lower, traditional stationary source regulation becomes less and less effective. The EPA and/or states will need to develop effective and timely ways to achieve emission reductions from area, off-road, and mobile sources.