

**Response to Questions from the  
House Energy and Power Subcommittee Forum:  
"State, Local, and Federal Cooperation in the Clean Air Act"  
from the South Carolina Department of Health and Environmental Control**

**1. In your agency's experience implementing the Clean Air Act (CAA), what is working well? What is not working well?**

Since the enactment of the Clean Air Act over four decades ago, significant progress has been made in improving air quality across the country. Our mission at the South Carolina Department of Health and Environmental Control (S.C. DHEC) is to protect and promote the health of the public and the environment, and our role in implementing the Clean Air Act in South Carolina furthers that mission. To accomplish the air quality improvements that have occurred to date, strong working relationships between EPA headquarters, the EPA regional offices and the state, local and tribal air quality programs have been critical. Trust and timely communication on the very difficult and technical issues are critical components of implementing successful solutions. I appreciate the excellent working relationships and partnerships that have been formed with EPA, in particular EPA Region 4, with local governments and air coalitions in South Carolina and with other states, tribes and local air programs to help accomplish air quality goals.

However, because the Clean Air Act has not been updated since 1990, many of the scientific and technical advances that have been realized can't be taken advantage of when meeting the specific requirements that have been established. In addition, many of the resulting policies and procedures are burdensome and don't result in air quality improvements.

We are particularly concerned about the state implementation plan (SIP) process and in 2009, southeastern states and community stakeholders held a "SIP Summit." The SIP Summit produced a resolution calling for specific reforms to air quality management and the SIP process,<sup>1</sup> some of which would require amending the Clean Air Act. When challenged with our concerns, EPA formed a SIP Process Improvement Workgroup and has been working on addressing issues and concerns since late 2010. Unfortunately, the current Clean Air Act framework doesn't allow anything but minor changes to these requirements, such as reducing the number of paper copies of SIP submittals that states need to submit to EPA.<sup>2</sup> As EPA's new standards become more and more stringent, meeting these standards will become extremely difficult and minor changes to the EPA requirements and processes are insufficient for the air quality management challenges we face.

The following are challenges with the framework of the Clean Air Act which impair our ability to manage air quality in the most efficient manner:

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<sup>1</sup> Letter and attachment from Southeastern States Air Resource Managers Inc. (SESARM) to Gina McCarthy, Assistant Administrator, Office of Air and Radiation, U.S. EPA (Sept. 9, 2010), Improving the Current Air Quality Management and SIP Processes.

<sup>2</sup> Memorandum from Janet McCabe, U.S. EPA, on Regional Consistency for the Administrative Requirements of State Implementation Plan Submittals and the Use of "Letter Notices," (April 6, 2011).

- The Clean Air Act regulates air quality in a pollutant-by-pollutant manner. A paradigm shift to a comprehensive multi-pollutant air quality management approach is necessary to combine pollution-control efforts and maximize resources.<sup>3</sup>
- The absence of a streamlined and clear approach for developing and approving SIPs leaves states spending time on process for the sake of process.
- Rigidity in SIP deadlines has made it easy for groups to petition EPA and negotiate settlement agreements.<sup>4</sup> Regulation-by-litigation reduces the role of states and EPA and has the result of privileging petitioner's goals over those of other stakeholders, leaving the vital role of policymaking to the courts. Another problem with this approach is that the agreed-upon settlement agreement or consent order deadlines often do not allow EPA enough time to write quality regulations. With abbreviated schedules, EPA has neither the time nor the resources to involve states and other stakeholders in a meaningful way in the rulemaking process, or do the necessary work to develop implementation tools.
- There are insufficient provisions for input from states, which are responsible for implementation of the National Ambient Air Quality Standards (NAAQS), in the development of air quality standards.

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

We appreciate the role of federal rules in providing some measure of uniformity across the nation, but the current Clean Air Act and the EPA established processes stifle flexible local approaches that often go beyond minimum requirements to protect public health and the environment. We continue to work with EPA to approve what makes sense for local areas. Unfortunately, convincing EPA that we shouldn't have to do something just because another state has or because they have a box that has to be checked can be difficult and time-consuming. It is also extremely frustrating when EPA responds that we have to do something because the Clean Air Act requires it.

Our Agency is not limited to implementing federal mandates only, and with proper oversight, and accountability to our Board and Legislature, we can implement effective alternatives. Using this flexibility, we have worked with sources to develop voluntary emission reductions to assure attainment of the NAAQS. To cite one specific example, we negotiated a memorandum of understanding with a coal-fired power plant that reduced its emissions prior to the designations for the 2010 Sulfur Dioxide (SO<sub>2</sub>) NAAQS.<sup>5</sup> In many cases, our experience has been that the Clean Air Act does not readily provide states with the ability to adopt local solutions to local problems, a core value of our Agency. Instead, states are often met with roadblocks and forced to expend limited State resources complying with procedural requirements that lack public health and environmental benefits. The Clean Air Act's prescriptive approach limits local, more efficient strategies.

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<sup>3</sup> National Research Council, *Air Quality Management in the United States* (2004).

<sup>4</sup> EPA required "Infrastructure SIPs" that essentially reaffirm existing SIP content as a result of a March 4, 2004, Notice of Intent to Sue from Earthjustice. See Completeness Findings for Section 110(a) State Implementation Plans Pertaining to the Fine Particulate Matter (PM<sub>2.5</sub>), 73 Fed. Reg. 62902 (October 22, 2008).

<sup>5</sup> June 23, 2011, Memorandum of Agreement between SC DHEC and SCE&G (McMeekin Station).

### **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?**

South Carolina has an excellent working relationship with EPA permitting review staff, which has been beneficial to both agencies. We, however, struggle with the implementation of EPA's rules and guidance. Insufficient or delayed information from EPA has delayed permit issuance in many critical cases. The following recommendations could provide for more timely and accurate permitting.

- EPA must provide more appropriate, timely and **written** guidance and responses to questions. Appropriate guidance must be issued with final rules, with stakeholder involvement from the initial stages of development. Guidance must be applied consistently between EPA headquarters and the regional offices.
- The effect of the NAAQS on permitting is immediate. Upon the effective date of a NAAQS, Prevention of Significant Deterioration (PSD) permit applicants need to show that they will not contribute to a violation of that NAAQS. This often requires technical guidance and air quality modeling protocols that EPA has not yet developed, leading to confusion and uncertainty. EPA often resolves problems as they arise, after issuing the NAAQS. This is due in part to institutional issues at EPA. One group develops the NAAQS, and then another group develops implementation tools. Coordination between these groups seems inadequate. Also, many air rules require communication and coordination across EPA program offices, including other media areas, and across the ten EPA regional offices.

The 2010 SO<sub>2</sub> and NO<sub>2</sub> NAAQS appeared to have been finalized with little internal EPA coordination to address air quality modeling requirements, and EPA has not resolved these issues as of this date. EPA compounded this problem by not providing sufficient public notice on key aspects of the proposed SO<sub>2</sub> NAAQS.<sup>6</sup> If they had, stakeholder comments would have identified problems so they could have been avoided or corrected.

### **4. Does the Clean Air Act support reasonable and effective mechanisms for federal, state, tribal and local cooperation through State Implementation Plans? How could the mechanisms be improved?**

The SIP process required by the Clean Air Act could be improved. Several of many problems with the SIP process are:

- The SIP process focuses on the NAAQS, dealing with one pollutant at a time, mainly in nonattainment areas. In reality, a multitude of pollutants have to be dealt with at one time

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<sup>6</sup> Primary National Ambient Air Quality Standard for Sulfur Dioxide; Final Rule, 75 Fed. Reg. 35520 (June 2, 2010). In this final rule, EPA adopted a "significantly revised approach" that would require states to use modeling "as the principal means of assessing compliance for medium to larger sources."

and their issues are not present only within nonattainment areas (Clean Air Act Section 109).

- SIP requirements are not clearly stated in the Clean Air Act, which means EPA must develop guidance documents that create the requirements. EPA does not typically release SIP guidance in a timely manner, meaning states do not know the rules on which EPA will judge SIP submissions at the time that states are writing the plans. Moreover, EPA over-relies on guidance documents instead of formal rulemaking. Guidance documents often lack a comment period and have ambiguous legal force.
- NAAQS attainment dates and the dates for SIP submission are unaligned, requiring states to address each individually instead of being able to consolidate efforts (Clean Air Act Section 172 (a)(2)).

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

EPA has the resources, such as air quality modeling and policy-making staff, to address air pollution that crosses state lines. In the cooperative federalism relationship we share with EPA, we appreciate EPA's role in addressing these multi-state issues. There is room for improvement, as EPA's record in court on the Clean Air Interstate Rule (CAIR) and Cross State Air Pollution Rule (CSAPR) demonstrates. The Good Neighbor Provision of the Clean Air Act (Section 110(a)(2)(i)(I)), the statutory basis for CAIR and CSAPR, is general and should be clarified.

We also make two points on state implementation of these rules. First, EPA is disapproving SIPs that rely on CAIR to address transport of air pollution.<sup>7</sup> CAIR was remanded more than three years ago, and EPA has not addressed how states can address air pollution transport in SIPs. States are being negatively impacted because the EPA program on which they relied was ruled unlawful. Sources are complying with CAIR as required by Court order, however, and EPA is not allowing states to capture that in SIPs. Though we appreciate that EPA has been sensitive to the fact that these disapprovals come from no fault on the part of states, EPA could provide a more practical solution than simply disapproving SIPs.

Second, EPA's delay on addressing the implementation of CSAPR has hindered state permitting efforts. EPA promised guidance on permitting following the release of CSAPR, but that guidance never came. With the stay of the rule, EPA's efforts on this stopped, even though they continued to work on other CSAPR-related actions, such as changing the budgets for some states. This second issue is related to a larger theme in our dealings with EPA, and that is the importance of timely communication and response by EPA. When we meet with community groups or permit applicants, for example, we often cannot answer questions about federal policy because EPA has not provided timely answers to state questions.

### **6. Are there other issues, ideas or concerns relating to the role of federalism under the Clean Air Act that you would like to discuss?**

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<sup>7</sup> See, e.g., Approval and Promulgation of Implementation Plans; South Carolina; Regional Haze State Implementation Plan, 77 Fed. Reg. 38509 (June 28, 2012).

- A key federalism issue under the Clean Air Act is that there are regional differences in air quality management needs. A case in point is the issue of ozone in the southeast. Studies have shown that in general, the southeastern US is “NO<sub>x</sub>-limited,”<sup>8</sup> meaning that reducing anthropogenic volatile organic compound (VOC) emissions is less important in addressing ozone than reducing NO<sub>x</sub> emissions. Despite this research<sup>9</sup> and evidence presented by South Carolina, EPA has rejected these provisions in SIPs for the State’s only nonattainment area, an area EPA designated based on its contribution to nonattainment in Charlotte, North Carolina.
- More needs to be done to support and allow for innovative, local solutions, like the Early Action Compacts to address the 1997 Ozone NAAQS.<sup>10</sup> With these compacts, we harness grassroots community support via local Clean Air Coalitions to address the NAAQS sooner than statutorily required. While we appreciate EPA’s attempt to further this effort through other programs like Ozone Advance, EPA needs to provide more meaningful incentives for stakeholders to participate in voluntary measures given current economic conditions.
- Another concern is the lack of transparency in decision-making and the need to treat states as co-regulators. EPA doesn’t involve states during the key parts of the designation process, citing the need for confidential internal deliberations. While we respect EPA’s deliberative process, we request more opportunities to meet with EPA during the designation determination process. This will improve the science on which designations are based and enhance implementation, bringing public health and environmental gains sooner. In a similar vein, EPA should use more Advanced Notices of Proposed Rulemaking. By the time that a rule is at the proposal stage, EPA has already made the agenda-setting decisions.

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<sup>8</sup> “NO<sub>x</sub>” stands for oxides of nitrogen.

<sup>9</sup> Duncan, B. et al., 2009, “The Sensitivity Of U.S. Surface Ozone Formation to NO<sub>x</sub> and VOCs as Viewed from Space,” Presented at the 8th Annual CMAS Conference, Chapel Hill, NC, October 19-21, 2009. Available at [http://www.cmascenter.org/conference/2009/abstracts/duncan\\_sensitivity\\_us\\_2009.pdf](http://www.cmascenter.org/conference/2009/abstracts/duncan_sensitivity_us_2009.pdf)

<sup>10</sup> December 12, 2004, SC Early Action Compact State Implementation Plan.