

National Association of Clean Air Agencies

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To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) (formerly known as STAPPA and ALAPCO) is pleased to submit these comments on EPA's notice of reconsideration of Phase 2 of the Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) (71 *Federal Register* 75902 (Dec. 19, 2006)). In this notice, the agency announced its decision to reconsider and take additional comment on three provisions in the final Phase 2 8-hour ozone implementation rule: (1) the determination that electric generating units (EGUs) that comply with rules implementing the Clean Air Interstate Rule (CAIR) and that are located in states where all required CAIR emissions reductions are achieved from EGUs meet the 8-hour ozone State implementation plan (SIP) requirement for application of reasonably available control technology (RACT) for nitrogen oxide (NO_x) emissions; (2) a new source review (NSR) requirement allowing sources to use certain emission reductions as offsets under certain circumstances; and (3) an NSR provision addressing when requirements for the lowest achievable emission rate (LAER) and emission offsets may be waived. NACAA is the national association of air pollution control agencies in 54 states and territories and over 165 metropolitan areas across the country.

NACAA Opposes Exempting EGUs in the CAIR Region from RACT Requirements for 8-Hour Ozone

EPA states in its notice of reconsideration: "In the Phase 2 rulemaking to implement the 8-hour ozone NAAQS, EPA determined that EGU sources complying with rules implementing the CAIR requirements meet ozone NO_x RACT requirements in States where all required CAIR emissions reductions are achieved from EGUs only."¹ 71 *Federal Register* 75905. NACAA strongly opposed a similar provision in EPA's proposed rule for implementing the fine particulate matter (PM_{2.5}) standard and, for similar reasons, opposes this provision. A

¹ In a footnote, EPA adds "However, a State that elects to bring its NO_x SIP Call non-EGU sources into the CAIR ozone season trading program may continue to rely on EPA's determination that RACT is met for EGU sources covered by the CAIR trading program. It may rely on this determination if and only if the State retains a summer season EGU budget under the CAIR that is at least restrictive as the EGU budget that was set in the State's NO_x SIP call SIP." Id.

cap-and-trade program like CAIR that is designed to deal with transported pollution on a regional basis does not (1) meet the express requirements for RACT provided in the Clean Air Act nor (2) satisfy the policy goals underlying RACT because it does not ensure that sufficient reductions are obtained from EGUs in nonattainment areas.

Equating CAIR With RACT is Not Permitted by the Express Terms of the Clean Air Act

Section 172(c)(1) of Clean Air Act (CAA) provides that nonattainment SIPs “shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology [RACT]).”

CAIR fails to satisfy the express requirements for RACT in section 172(c)(1). This section requires that emissions reductions be achieved *in* the nonattainment area, and not elsewhere, and that the emission reductions must be from existing *sources* in the nonattainment area, and not other sources elsewhere.

EPA’s Attempt to Reinterpret RACT to Encompass CAIR Is Not Supportable

EPA’s attempt to redefine “reasonable” is also not supported by the statute or even by EPA’s own reasoning. EPA states that the agency

believes that the term “reasonable” in RACT may be construed to allow consideration of the air quality impact of required emissions reductions from a region-wide cap and trade program such as the CAIR. As stated earlier, the region-wide CAIR NO_x emissions cap for 2009 was established based on the maximum total capacity on which it was possible to install controls by that date. So by design, the 2009 CAIR region-wide NO_x emissions cap for EGUs represents the most reductions that are reasonable to achieve. (71 *Federal Register* 75909.)

In other words, EPA is proposing to redefine RACT so that as long as a source is participating in a cap-and-trade program, and the reductions achieved *region-wide* are the most that are reasonable to achieve, the source does not need to put on control technology in order to comply with RACT. Such an interpretation is not supported by the text of section 172(c)(1), which requires that emissions reductions occur from sources *in* the nonattainment area (as opposed to from sources participating in a region-wide cap-and-trade program). The issue is not the amount of reductions achieved in the region, but the reductions achieved in a nonattainment area. Furthermore, as we note below, EPA’s contention that the CAIR 2009 reductions are based on the maximum amount of controls that are possible to install region-wide is contradicted by an analysis performed by the Institute for Clean Air Companies (ICAC).

In addition, EPA’s reasoning elsewhere in the *Federal Register* notice does not support the agency’s interpretation. In arguing that overlaying CAIR with RACT requirements will not affect total emissions in the CAIR region, the agency concedes that a RACT requirement overlaid with CAIR “may affect . . . the spatial distribution of emissions (by moving them

around from one place to another).” 71 *Federal Register* 75907. Therefore, even if one accepts that the 2009 region-wide NO_x emissions cap for EGUs “represents the most reductions that are reasonable to achieve” on a regional basis (which we do not accept), a requirement that EGUs in nonattainment areas put on control technology would affect *which* EGUs decide to put on controls within that region. In other words, a RACT requirement (interpreting RACT as it is meant to be interpreted – adoption of a control technology) will ensure that emissions are reduced in a nonattainment area, an assurance not provided by a regional cap-and-trade program.

CAIR Was Designed to Achieve Different Goals Than RACT and CAIR Does Not Ensure Sufficient Reductions are Obtained From EGUs in Nonattainment Areas

EPA designed CAIR to achieve different goals than those accomplished by RACT.

- The *purpose* of RACT is not the same as the purpose served by CAIR. EPA designed CAIR to reduce emissions transported across state lines. RACT is designed to reduce emissions from sources in a nonattainment area. From the inception of EPA’s plans to create a regional transport rule, EPA was clear that CAIR was only designed to deal with transported pollution and was not designed as a nonattainment strategy. For example, EPA made presentations to NACAA and states and localities in 2003 that the agency was pursuing three mechanisms to deal with *transported* pollution: Clear Skies, the Regional Transport Rule and perhaps a combination of these two strategies.²
- The *economic test* for CAIR controls is different from RACT. For CAIR, controls needed to be “highly cost-effective” while RACT only requires that they be “economically feasible.” Thus more controls are feasible on an economic basis under RACT.
- The *timeframe* of the two programs is different. Implementation of RACT is “as expeditiously as practicable but no later than the first ozone season or portion thereof which occurs 30 months after the RACT SIP is due.”³ Since RACT SIPs are due in September 2006, the deadline for putting on RACT controls is spring 2009. For CAIR, sources have until 2010 and 2015 to put on controls or purchase emission allowances.
- EPA’s *modeling* for CAIR did not include or account for in-state emissions. The agency’s modeling for CAIR looked at the impacts of emissions from one state affecting another state, and not at the impact of emissions within a state on that state’s nonattainment area or areas.⁴

With respect to EPA’s technical support document concluding that CAIR achieves more emissions reductions than RACT alone, we have the following concerns:

- We do not think this is a fair comparison because we do not believe RACT should be adopted in lieu of CAIR. The comparison should be between the effectiveness of CAIR alone and the effectiveness of CAIR plus RACT.

² Lydia Wegman, EPA Office of Air Quality Planning and Standards, “8-Hour Ozone and PM2.5 Implementation and the Regional Transport Rule: STAPPA ALAPCO Board of Directors Winter Meeting” (Feb. 1, 2003). On file with NACAA.

³ 40 CFR 51.912(a)(3), published in 70 *Federal Register* 71612 (Nov. 29, 2005) at 71701.

⁴ See, for example, EPA, “The Interstate Transport Rule: Update for Government Partners,” (July 29, 2003) (presentation on regional transport rule describing zero-out modeling runs to assess the impact of emissions from upwind states on downwind states but not any assessment of the impact of intrastate emissions).

- EPA assumed that RACT for EGUs is “state-of-the-art combustion controls” based on a *Federal Register* notice issued 14 years ago.⁵ RACT is an evolving requirement and thus we question EPA’s conclusion that RACT for EGUs has not changed in 14 years. As EPA has stated, “RACT requirements can, in some cases, be more stringent than the lowest achievable emission rate (LAER) or BACT.”⁶ For example, New Hampshire has required, as part of RACT determinations, EGUs to install selective catalytic reduction (SCR) and selective non-catalytic reduction (SNCR) technology and to complete a partial conversion to natural gas.
- EPA’s contention that CAIR 2010 reductions are as fast as achievable because of an insufficient supply of boilermaker labor to install additional emissions controls by 2010 is contradicted by an analysis conducted by ICAC.⁷ ICAC concluded that boilermaker labor is available to install controls to achieve 2015 CAIR reductions by 2010. Therefore, EPA’s implication that RACT requirements on EGUs in the CAIR regions wouldn’t achieve any more reductions than those achieved by CAIR by 2010 is incorrect.
- EPA’s analysis of which EGUs would be subject to RACT requirements does not reflect the December 2006 decision by the U.S. Court of Appeals for the D.C. Circuit, *South Coast AQMD v. EPA*. The court clearly held that EPA incorrectly classified areas with design values of 0.09 parts per million (ppm) and above as subpart 1 areas rather than subpart 2. These areas, under subpart 2, would be classified as moderate areas and thus subject to RACT, whereas under subpart 1, they would only have been subject to RACT if they requested an extension in their attainment dates or if they are located in the Ozone Transport Region (OTR). According to EPA’s “Green Book,”⁸ about a dozen areas that are not in the OTR would qualify as subpart 2 moderate areas with EGUs subject to RACT.

In short, we believe an effective attainment strategy requires both regional rules like CAIR that are designed to deal with transported pollution and requirements to reduce emissions locally, such as RACT on EGUs. EPA states:

“It is our belief that, due to the nature of regional emissions transport, local nonattainment area emissions reductions alone will not achieve the most effective or economically efficient impact on ozone air quality in nonattainment areas. We believe a combination of local and broader regional reductions, such as those driven by the CAIR requirements for EGUs, will achieve a more effective and economically efficient air quality improvement in nonattainment areas than application of source-by-source RACT.” (71 *Federal Register* 75909.)

We agree in general with this statement. However, we believe source-by-source RACT is part and parcel of an effective attainment strategy.

⁵ 57 *Federal Register* at 55626 (November 25, 1992).

⁶ Memorandum of Tom Helms, Chief, EPA Ozone/Carbon Monoxide Programs Branch to Air Enforcement Branch and Region 5, “Nitrogen Oxide (NO_x) Questions from Ohio EPA,” (Aug. 24, 1995) at p. 2 (available at www.epa.gov/ttn/oarpg/t1/memoranda/ohio.pdf)

⁷ ICAC, “IAQR Projected 2015 Control Technologies Can Be Installed by 2010,” (Mar. 30, 2004).

⁸ Available at www.epa.gov/oar/oaqps/greenbk/o8index.html.

Equating CAIR with RACT for EGUs Limits the Ability of Certain States to Further Control EGUs

EPA's statement that states are free to require more of EGUs as RACT ignores the law or policy in many states and localities that prohibit clean air agencies from being more stringent than federal law. A survey conducted of NACAA's members in 2002 found that 26 state agencies (of 50 respondents) and 9 local agencies (of 42 respondents) reported being precluded from adopting more stringent requirements than the federal government.⁹ Therefore, in these states and localities, EPA's determination that CAIR equals RACT for EGUs ties the hands of clean air agencies.

The Provision Allowing Exemption of Sources from Nonattainment New Source Review Requirements Is Not Allowed by the Clean Air Act

EPA's notice of reconsideration (Reconsideration) states that the requirements of Appendix S are intended to fill the gap in Part D major NSR permitting during the SIP development period. 71 *Federal Register* 75912. Section VI of Appendix S exempts sources from LAER and offsets requirements if the date for attainment has not yet passed provided two conditions are met: the new source must not interfere with an area's ability to meet an attainment deadline and the source must meet applicable SIP emission limitations. As a result of comments received during the Reconsideration, EPA has added to these eligibility requirements a third, procedural requirement that an exemption from NSR not be granted unless the Administrator determines that the two conditions have in fact been met.

NACAA opposes the Section VI exemption. Nothing in the Clean Air Act (CAA) provides for waivers or exemptions from NSR requirements. (CAA sec. 110(a)(2)(C), 173, 182(a)(2)(C).) EPA's only attempt to justify this exemption appears to be the suggestion that CAA section 110 requires the secondary NAAQS to be achieved "within a reasonable time." (40 CFR Part 51, Appendix S (VI).) This language, however, provides no rationale for an exemption from the statutory and regulatory provisions for NSR permitting. Interpreting the phrase to support an exemption from NSR is misguided.

Furthermore, it is highly likely that this proposed NSR exemption would be considered to be impermissible backsliding under the recent decision, *South Coast Air Quality Management District vs. EPA*. In that case, the Court of Appeals for the D.C. Circuit struck down EPA's changes to NSR applicability cut-offs and offset ratios on the grounds that such changes constituted backsliding under CAA section 172(e). The Court stated: "Something designed to constrain ozone levels is a 'control' and this would include NSR. To conclude otherwise would mean that Congress considered its carefully-crafted and well-calibrated graduated restrictions on new and modified sources less important than other provisions. If anything, the Act and its legislative history reflect the opposite position." (*South Coast*, D.C. Circuit No. 04-100, December 22, 2006 at 34.)

⁹ And of the 24 state agencies that reported being able to adopt more stringent programs, ten reported that they never or infrequently did so. STAPPA/ALAPCO, "Restrictions on the Stringency of State and Local Programs," (December 2002), available at www.4cleanair.org/PublicationDetails.asp. Some states (such as Missouri) with "no more stringent than federal" restrictions are able to adopt more stringent requirements if these are needed to attain or maintain the National Ambient Air Quality Standards.

The NSR Exemption Provision Will Create a New Obstacle for States to Surmount as They Work to Attain the 8-Hour Ozone Standard

Apart from the legality of the NSR exemption, it will create new difficulties for states attempting to meet attainment deadlines. New and existing modifying sources will not achieve the level of emissions reductions that would be possible with installation of LAER—even if SIP emissions limitations are met. Moreover, relieving sources of the requirement to obtain offsets will increase ozone emissions in a particular area—without the usual NSR benefit of comparable or greater decreases in emissions.

Furthermore, EPA itself states that it is impossible for states and localities to demonstrate that a nonattainment area would continue to meet its attainment date if a source or sources did not apply LAER and obtain offsets. 71 *Federal Register* 75911. The condition that “the new source will not *interfere with* the attainment date” simply cannot be ascertained by an air agency as a practical matter, rendering it meaningless. Attainment dates are, in fact, highly likely to be affected by this exemption from LAER and offsets for new and modifying sources. In sum, the increased emissions resulting from the NSR exemption will jeopardize state and local attainment plans and put the public at increased risk of breathing unhealthy air beyond the deadlines for attainment.

We appreciate this opportunity to provide comments. If you have any questions or desire further information, please do not hesitate to contact us or Amy Royden-Bloom or Mary Stewart Douglas of NACAA.

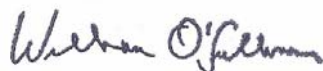
Sincerely,



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