

Testimony of Scott J. Nally
Director of Ohio EPA
on
“State, Local and Federal Cooperation in the Clean Air Act”

August 2, 2012

Thank you for the opportunity to address some of the important issues that you have raised associated with the implementation of the Clean Air Act. My name is Scott J. Nally and I am Director of Ohio EPA. Prior to being appointed Director of Ohio EPA by Governor Kasich, I have held various environmentally related positions in business and government.

In response to your questions, the following information is provided.

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

There are several areas in the implementation of the Clean Air Act where improvements are warranted. One of the most important aspects of the Clean Air Act that needs examination is that each National Ambient Air Quality Standards (NAAQS) must be reviewed every five years and revised if necessary. When the Clean Air Act was first promulgated in 1970, the concept was that there was a bright line for determining whether there were adverse health effects from air pollution. Over the past 40 years, the science has evolved and for some pollutants such as ozone or fine particulates, there may be a level where the reduction doesn't have a measurable health effect. Furthermore, the U.S. Supreme Court has stated that the cost of compliance cannot be considered when setting a NAAQS. This combination sets up a process where the air can never be clean enough and the NAAQS will be revised to be more restrictive and more difficult to achieve. We would recommend a minimum of ten years for the review and possible changes of the ambient air quality standards.

Another problem with the short review schedule under the Clean Air Act is that before the state has fully implemented the controls needed to meet one standard, it has been revised to a new level. This process just leads to regulatory uncertainty and difficulty in trying to develop a stable plan to meet the air quality standard.

Some areas where U.S. EPA is doing a good job include the Clean Air Markets Division (CAMD) and Greenhouse Gas Reporting Rule. CAMD is responsible for operating the system of accounts that allocate emissions of sulfur dioxide and nitrogen oxides under the acid rain requirements of the 1990 Clean Air Act

Amendments and the Clean Air interstate Rule (CAIR) that was followed by the Cross State Air Pollution Rule (CSAPR).

The acid rain requirements of the 1990 CAA amendments set up a market based approach for utilities to obtain emission reduction of sulfur dioxide and nitro oxides. In order to allow for trading under the law, CAMD set up accounts for the regulated entities and managed the emissions allocating. Both from our experience with CAMD and what we know from accounts by the regulated community, the CAMD staff is efficient and helpful in making the allocation system work successfully for all parties. We have found the CAMD staff to be easy to contact and willing to follow up for a smooth operation including in the implementation of the CAIR and CSAPR requirements.

U.S. EPA recently instituted a Greenhouse Gas Reporting Rule as specified by FFY 2008 Consolidated Appropriations Act. As U.S. EPA has moved forward with this new mandate, the agency provided multiple opportunities for training on this all electronic reporting system. There are numerous guidance documents on how the emission estimates can be calculated. U.S. EPA has also extended reporting deadlines when it recognized the system was not fully functional. This type of flexibility is needed if there are practical issues with the facilities being able to report emissions.

Finally, U.S. EPA is responsive to our calls, letters, and emails. Although we may not agree with the manner in which rules are promulgated and the nature of the standards, U.S. EPA is always willing to set up briefings and conference calls to summarize their actions and respond to questions. Our on-going relationship with U.S. EPA management and staff remains good in spite of our differences.

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

No. Although Section 101(a)(3) of the Clean Air Act specifies that “that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments;” in fact the federal government is involved in many detailed aspects of the state air quality control program. For example, in ozone nonattainment areas, states are required to control volatile organic compounds (VOCs) to a “Reasonably Available Control Technology” (RACT) level. U.S. EPA has issued guidance on what is considered RACT control for a variety of source categories. There may be a small employer of 15 or 20 people who manufacturers a specialty coating that cannot comply with the requirements in the U.S. EPA document. Even if the authors of the U.S. EPA documents were not aware of this small volume specialty coating, nevertheless, Ohio cannot just “exempt” this small business from the rules. Instead, Ohio must prove to U.S. EPA staff that there is no practical alternative to meet the RACT rules, that the emissions have small impact, and if not changed, it is likely that this small

company will go out of business. This long and laborious process should not have to be applied to these types of cases. All of the while, the small business owner does not know whether or not they will remain in business. States should have the ability to make small changes to rules without having to obtain approval from the federal government or at least go through the entire participation.

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

No. The current structure requires Ohio EPA to send draft copies of permits for major sources of air pollution to U.S. EPA for review and comment. Although the state has reviewed the application and believes it complies with both state and federal rules, U.S. EPA then has an opportunity to comment on the permit. These can lead to lengthy discussions and delays in holding up the issuance of the permit. Although we work well with our U.S. EPA regional office in Chicago, nevertheless, there are times that differences in interpretations of state and federal rules can hold up permit processing.

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?

Please see answer 2. The State Implementation Plan process has become burdensome and overly complicated. In addition, U.S. EPA is requiring states to prepare "Infrastructure" SIPs.

Infrastructure SIPs

The Clean Air Act requires states to submit state implementation plans (SIPs) that implement, maintain, and enforce a new or revised national ambient air quality standard (NAAQS) within 3 years of EPA issuing the standard. These SIP revisions must address a number of basic requirements, including:

Ambient air quality monitoring and data systems, programs for enforcement of control measures, adequate authority and resources to implement the plan.

The following elements are needed for each infrastructure SIP.

Section 110(a)(2)(A) Emission limits and other control measures

Section 110(a)(2)(B) Ambient air quality monitoring/data system

Section 110(a)(2)(C) Program for enforcement of control measures

Section 110(a)(2)(D)(i) – Interstate transport – significant contribution

Section 110(a)(2)(D)(i) – Interstate transport – interfere with maintenance

Section 110(a)(2)(D)(i) – Interstate transport – prevention of significant deterioration

Section 110(a)(2)(D)(i) - Interstate transport – protect visibility

Section 110(a)(2)(D)(ii) – Interstate and international pollution abatement

Section 110(a)(2)(E) Adequate authority and resources
Section 110(a)(2)(F) Stationary source monitoring system
Section 110(a)(2)(G) Emergency power
Section 110(a)(2)(H) Future SIP revisions
Section 110(a)(2)(J) Consultation with government officials; Public notification; PSD and visibility protection
Section 110(a)(2)(K) Air quality modeling/data
Section 110(a)(2)(L) Permitting fees
Section 110(a)(2)(M) Consultation/participation by affected local entities

The preparation of the infrastructure SIPs have turned into large efforts to document each of these elements. This must be completed every time U.S. EPA publishes a new ambient air quality standard. Although not voluminous, the infrastructure SIP consumes significant staff time in preparation and does not achieve any air quality benefit.

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

Only to a limited degree. The cross-state air pollution issues have been taken over by U.S. EPA and states have little opportunity to influence the outcome of the imposition of federal requirements. Although U.S. EPA does propose the various interstate air pollution rules in the Federal Register, typically, U.S. EPA does not address comments from Ohio in any meaningful way. Ohio EPA appealed the last promulgation of the Cross State Air Pollution Rule because U.S. EPA did not allow Ohio and any other state to develop an alternative plan which resulted in an imposed Federal Implementation Plan.

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

A. Regulation by Consent Decree, "Suit and Settle" – Recently, U.S. EPA has issued a number of regulations that are the result of a consent decree with environmental groups. Two recent examples are the proposed New Source Performance Standards (NSPS) for power plants and the proposed changes to the Natural Ambient Air Quality Standard for Particulate Matter. In both of these examples, U.S. EPA is moving forward with new or more stringent requirements as a result of a court agreement with environmental groups. In the specific case of particulate matter, U.S. EPA is on an expedited schedule for completion, so much so that Ohio is concerned that U.S. EPA will not have the ability to fully evaluate and consider the comments received in response to the proposed changes. Also, as a result of this approach, the Office of Management and Budget cannot have an opportunity to take a comprehensive look at the impact of the rules because of the agency being under a court order to issue the rules by a certain date.

- B. Sulfur Dioxide – U.S. EPA promulgated a more restrictive ambient air quality standard for sulfur dioxide at 75 ppb, 1 hour average. This new standard was promulgated without the implementation requirements being promulgated. U.S. EPA issued draft guidance on the air dispersion modeling methodology that should be issued in attainment areas. Over 20 state and local air agencies expressed concern to U.S. EPA over the proposed methodology. To U.S. EPA's credit, the agency held a series of stakeholder meetings to receive comments on possible revisions to the guidance. We are still awaiting the outcome of the meetings.

One of the important issues raised in the comment period was the application of the AERMOD model to predict one-hour ambient concentrations of sulfur dioxide. The State of Indiana has conducted a study that clearly shows that the use of AERMOD produces predicted concentrations 300 to 400% above actual concentrations. We support the State of Indiana in the effort to improve the accuracy of the AERMOD model. Due to the stringency of this new standard, the accuracy of the tools to develop emission limitations becomes critical.

- C. Demolition/Renovation Projects – For many years, the asbestos NESHAPS contained a provision that an individual house can be demolished without the asbestos sampling/removal needed to occur. If there were multiple demolitions taking place at a location prior to the demolition, sampling is required and any asbestos removed. In 2010, U.S. EPA notified our agency that if a municipality was performing the demolition of more than one house anywhere in the city, then the NESHAPS would apply to all the demolitions would be required to comply with the separation of the home to be demolished. The result of this new interpretation is a significantly increased cost of demolition. There are source dollars for the clearing of the urban blight. The homes to be demolished represent real health threats for these neighborhoods and compliance with the NESHAPS can double or triple the costs of a demolition. In Ohio, there have been a group of land banks set up to help improve the urban environment. Their activities are diminished as a result of U.S. EPA revised interpretation. Instead of the full NESHAPS for all projects, instituting some best management practices on wetting and disposal for isolated projects can be both protective of human health and cost effective. U.S. EPA should allow this additional flexibility under the current rules.
- D. Proposed “Urban Visibility” – U.S. has proposed a more restrictive particulate matter standard. As part of that proposal, U.S. EPA has included the concept of an “urban visibility standard.” Under the Clean Air Act, U.S. EPA is required to protect visibility in the large national parks and wilderness areas. U.S. EPA promulgated the regional large rules to meet this Clean Air Act mandate. U.S. EPA will now extend this concept to all areas of the country. There are several specific concerns with this proposal. First, this action is not necessary under the Clean Air Act. Congress delineated the visibility standards to apply to Class 1 areas and this proposal is a regulatory overreach. Second, although this

proposal is a secondary standard, areas that do not meet this standard and will be designated nonattainment and have all of the nonattainment permitting requirements apply until the standard is met. Finally, since this is a purely aesthetic standard, once finalized, U.S. EPA could decide to keep reducing the standard until background levels. Such a standard would clearly not be attainable.

- E. Application of Greenhouse Gas Rules to Underground Coal Mines – U. S. EPA promulgated requirements that major sources of Greenhouse Gas emissions must apply for Title V permits by July 1, 2012. In many cases, this requirement does not apply to “fugitive” sources that is, sources that do not have a discrete emission point of release. The question has arisen as to whether an underground coal mine shall be treated as a “fugitive” source. U.S. EPA’s initial reaction was that these sources should be treated as “point” sources and subject to Title V permitting requirements. In response, Ohio, along with other states, requested that U.S. EPA revisit this determination since the nature of venting of coal mines is fugitive in nature. Please find attached letter from states to U.S. EPA.