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Clean Air Act Forum:
State, Local and Federal Cooperation under the Clean Air Act

Written Remarks of
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Introduction

Mr. Chairman, thank you and the members of the Subcommittee on Energy and Power for the invitation to participate in this Clean Air Act Forum. It is an honor to be part of this panel with such distinguished colleagues. I am also grateful for your interest in the role of cooperative federalism and the Clean Air Act (CAA) to protect public health and the environment in a growing, prosperous national economy. The CAA has not been significantly amended since 1990 and while many aspects of the statute are sound and still serve us well today, there are opportunities for positive change and I appreciate your willingness to explore those in the series of CAA Forums you have put together.

I have had the privilege to spend my professional career practicing environmental law with experience in both the public and private sector, including seven years at U.S. Environmental Protection Agency (EPA). Throughout my career, a particular specialty of my practice has been the CAA. While my prior work prepared me for my new appointment as TDEC commissioner, I was also fortunate to come into an agency where our state air program of more than 100 professionals is led by two individuals with a combined 75 years of air pollution control experience. There is no question our state and our environment are well served by the air pollution control professionals we have on staff at TDEC.

I am also proud of the constructive working relationship we have built with EPA. Even on difficult air issues – where we may have disagreements over process and outcome – we have been able to keep an open dialogue between Tennessee and the EPA, especially those in EPA's Region IV office in Atlanta.

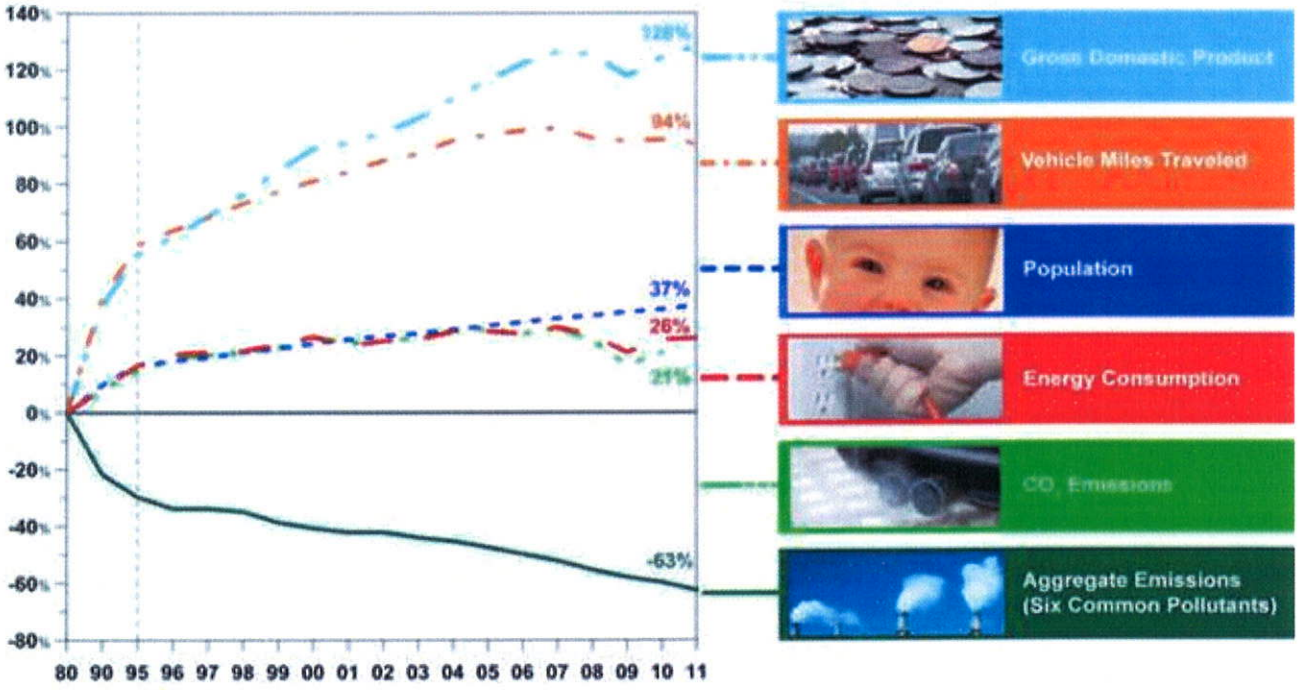
Participant Questions and Responses

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

The CAA has been very successful in improving air quality since its enactment in 1963 and through amendments in 1970 and 1990. Although there are isolated air quality problems that remain today, there has been a dramatic reduction or elimination of issues that were significant in

early days. In 2011, EPA issued a Second Prospective Report which estimated the anticipated results of the CAA from 1990 to 2020. EPA found the direct benefits from the 1990 CAA Amendments are estimated to reach almost $2 trillion for the year 2020, a figure that surpasses the direct costs of implementation ($65 billion).[1] Most of the $2 trillion in economic benefits (about 85 percent) are attributable to reductions in premature mortality associated with reductions in ambient particulate matter. EPA projected that for the year 2020, the CAA Amendments will prevent over 230,000 early deaths.[2] While one may debate exactly how EPA calculates costs and benefits of its rulemaking actions, there is generally a strong consensus that the basic provisions of the CAA have worked to protect public health and the environment in a growing U.S. economy.

The graph below demonstrates that between 1980 and 2011, gross domestic product increased 128 percent, vehicle miles traveled increased 94 percent, energy consumption increased 26 percent, and the U.S. population grew by 37 percent.[3] **During the same time period; however, total emissions of the six criteria air pollutants dropped by 63 percent.**[4]



In 2010, about 90 million tons of pollution were emitted into the atmosphere in the U.S., representing a significant decline in emissions of common air pollutants from 1980 levels. By pollutant, we have seen a

[1] The U.S. Environmental Protection Agency, Benefits and Costs of the Clean Air Act, Second Perspective Study-1990 to 2020, http://www.epa.gov/air/sect812/prospective2.html (last visited Nov. 20, 2012).
[2] *Id.*
[3] The U.S. Environmental Protection Agency, Air Trends, Air Quality Trends, Comparison of Growth Areas and Trends (1980-2011) http://www.epa.gov/airtrends/aqtrends.html (last visited Nov. 26, 2012).
[4] *Id.*

- 71 percent reduction in carbon monoxide;
- 97 percent reduction on lead;
- 52 percent reduction in nitrogen oxides;
- 63 percent reduction in volatile organic compounds;
- 69 percent reduction in sulfur dioxide; and an
- 83 percent reduction in particulate matter (PM_{10}).[5]

Additionally, air toxics emissions declined by about 42 percent from 1990 to 2005.[6] The CAA's structure of setting vehicle emissions standards and fuel standards primarily at the federal level has been a sound and successful approach. It recognizes the potential adverse impact in interstate commerce and the inherent difficulties that would have been created if we had tried to enact state-based vehicle and fuel standards. While we still face challenges that must be addressed, the simple fact is that our air today is cleaner, which benefits human health and the environment and fosters economic development. Our overarching task today is to identify the elements of the CAA (i.e., the statute itself) or aspects of its implementation that are not working or are too cumbersome to achieve intended benefits in a timely fashion. It is my hope that these opportunities for change and improvement will allow EPA and states to work in tandem and achieve additional and available incremental improvements in air quality while continuing to foster long-term, sustainable economic development.

The setting of standards and the design and implementation of measures to meet the National Ambient Air Quality Standards (NAAQS) is accomplished through cooperative federalism whereby the federal government (EPA) and states work together. Today, despite the significant reduction in air pollution as a result of the CAA, millions of Americans still live in areas that are not meeting one or more NAAQS, predominately ozone.[7]

While the programs under the CAA have been very effective in addressing primary pollutants (i.e., pollutants that are emitted directly), we are much more challenged and the CAA and its implementation have been less effective in addressing secondary pollutants such as ozone and fine particulate matter. The pollutants are not created directly but are formed by other precursor pollutants. For example, ozone is formed from emissions of nitrogen oxides and volatile organic compounds (VOCs). The complexity of adequately addressing and reducing precursor pollutants is complicated further by transport and certain types of meteorological conditions. Additionally, effective regulation of secondary pollutants while still allowing for growth and development is particularly challenging when a rigid and prescriptive structure is applied with little room for flexibility. My comments today will identify opportunities to improve the structure and implementation of the CAA to give states the flexibility they need to

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[5] The U.S. Environmental Protection Agency, Air Trends, Air Quality Trends, Percent Change in Emissions, http://www.epa.gov/airtrends/aqtrends.html (last visited Nov. 26, 2012). There was a 55% reduction in $PM_{2.5}$ emissions over 1990 levels. *Id.*

[6] The U.S. Environmental Protection Agency, Air Trends, Air Quality Trends, http://www.epa.gov/airtrends/aqtrends.html (last visited Nov. 26, 2012).

[7] *Id.*

improve air quality and meet the NAAQS as well as decrease the protracted positioning that has become commonplace between EPA and the states.

Under the cooperative federalism approach, EPA's job is to promulgate the NAAQS for certain pollutants that must be met in all states and to provide some level of oversight such that minimum requirements for state air pollution control programs are met. The states are, in theory, given the primary responsibility for determining how to achieve the NAAQS and meet the requirements in the state, including the promulgation and enforcement of State Implementation Plans (SIPs) that reflect choices of emission limitations unique to the state's particular circumstances.[8] Although the overall structure of the NAAQS program is sound, there are opportunities for improvement in its specific requirements, timeframes and implementation that could achieve significant efficiencies and introduce elements of flexibility states need to effectively implement and achieve the NAAQS.

Setting and Revising the NAAQS, Implementation Scheduling

EPA determined, and many years ago the Supreme Court agreed, that under the CAA costs are not considered in establishing a national ambient air quality standard for a criteria pollutant. However, EPA can consider cost in setting requirements for implementing the standards and states bear cost in mind when considering what available emissions limitations are necessary for incorporation in SIPs. While we support EPA's setting of the NAAQS as a health-based standard founded on sound science, we are concerned that some NAAQS are nearing the point of natural background levels in certain areas, particularly ozone and fine particulate matter. This is a concern for states because there are fewer and fewer, and at some point there may be no, available measures (emission limitations) for the states to use to achieve anticipated lower ozone and fine particulate standards ($PM_{2.5}$). For example, Sections 209 and 211 of the CAA reserve control of engines and fuels for federal regulation and while this is appropriate, states still have the burden of developing a SIP that achieves the NAAQS when emissions from transportation (in some cases, mobile sources that are simply "passing through an area") may be driving nonattainment in particular areas. As the NAAQS get lower and lower, but the available limitations applicable to sources that are regulated by states get scarcer, states are hard pressed to find options for reductions in the SIP. The NAAQS are importantly health-based standards, but they must also be achievable—not just technically achievable in a vacuum, but realistically achievable within the implementation framework established in the CAA, with recognition for the inherit limitation of state regulatory authority over certain sources of air pollutants that contribute to nonattainment and with a realistic understanding of the world in which we live. We must protect public health and welfare, but we cannot eliminate all risk from air contaminants any more than we can eliminate all risk from traveling on airplanes or on our nation's roadways.

States also experience challenges due to the cyclic schedule associated with reviewing and revising the NAAQS and implementation scheduling. Through prior experience, we believe

[8] Robert A. Wyman, Jr., Dean M. Kato, & Jeffrey S. Alexander, Meeting Ambient Air Standards, Development of the State Implementation Plans, THE CLEAN AIR ACT HANDBOOK (Robert J. Martineau, Jr. and David P. Novello eds., 2nd ed., ABA Publishing) (2004).

that these cycles and the implementation schedules for attaining the NAAQS and other CAA programs could be better synchronized to great effect. As a starter, the review period for the NAAQS needs to be lengthened from the current five (5) year cycle. A ten (10) year cycle should be considered. Better synchronization would also allow the planning and realization of co-benefits from controls for multiple pollutants. For example, currently a major Tennessee company is facing a set of requirements for BART, the sulfur dioxide NAAQS, and the "boiler MACT." Conversion of a coal-fired boiler to natural gas appears to be the better option to address all three programs. However, we had to negotiate a special regional haze SIP revision in order to allow time for the company to make the necessary meteorological study, and conduct the modeling and the planning to allow an informed business decision on the apparent better option. Getting the extra time entailed extraordinary effort and such effort would not have been necessary if the schedules were better synchronized in the first place. We believe a statutory revision to the CAA that explicitly allows EPA to synchronize these multiple requirement programs should be considered as it would help to control program costs and increase expediency of implementation.

Implementing the NAAQS

Once the NAAQS have been established and/or revised, Tennessee has experienced particular challenges with EPA's designation of nonattainment areas. We have sited monitors in rural counties in an attempt to yield "background" data and the concentrations measured would sometimes exceed a NAAQS. Under EPA's policy for designations, a rural and very economically undeveloped county could be designated nonattainment, yet the county, itself, would have no control measures available to it to utilize in implementation. From the state's perspective, this apparent inflexibility in designating nonattainment areas when a monitor measures a violation is particularly burdensome for a rural county with little to no measures available to implement and discourages the desire or willingness to measure the ambient air for background data or other useful information for planning purposes.

Due to the recent ozone nonattainment designations, Tennessee has brought a challenge in federal court and has petitioned for administrative reconsideration of EPA's designation for Shelby County, Tennessee as a nonattainment area. While this matter is still pending and an extensive discussion would be inappropriate, it is already a matter of public record that the most recent monitoring data available in 2011 showed that there was no measured nonattainment in Shelby County.[9] Recent data for Arkansas in 2011 showed that its monitor in Crittenden County measured nonattainment. In determining the boundaries for the nonattainment area, EPA included the county in which there was a measured violation (Crittenden) of the ozone standard and additional areas (Shelby and part of DeSoto) based on contribution. Again, while an extensive discussion of EPA's decision in this circumstance is not appropriate, we believe that contribution determinations should be made cooperatively by EPA and the relevant states, particularly given the state's knowledge of likely successful design control measures (if any), the

[9] Shelby County, Tennessee, which contains Memphis, is situated in southwest Tennessee along the Mississippi River and is part of a multi-state metropolitan area. In addition to having three states in the metropolitan area (Tennessee, Mississippi and Arkansas), there are two EPA regions, IV (Tennessee and Mississippi) and VI (Arkansas) involved.

stigma associated with a nonattainment designation and the limitations placed upon opportunities for economic development.

In implementing the NAAQS through the development of measures to incorporate into a SIP, Tennessee has particularly struggled with the CAA's prescriptive requirements for ozone. Scientific study has repeatedly shown that the formation of ozone in the southeastern United States is predominantly influenced by the presence of nitrogen oxides (NO_x) rather than VOCs. Yet, there are required measures mandated by Section 182 of the CAA, particularly the 15% "Reasonable Further Progress" goal, which requires at least a 15% reduction in VOCs for moderate areas regardless of whether the reduction will actually inhibit the formation of ozone. This mandatory requirement may be beneficial in other areas of the U.S., but it makes less sense in the southeast with its abundance of biogenic emissions from natural vegetation. Meeting prescriptive requirements of the statute is not only difficult but often less effective than pursuing other measures, such as the controlling sources of NO_x. Our experience in Tennessee is where we have offered substitution reductions of NO_x, EPA would not allow those substitutions, indicating that although the science in the southeast may indicate the area is NO_x limited, the CAA's statutory prescription does not allow for any flexibility. This and other "one size fits all" prescriptive statutory measures should be revised to allow a state or group of states the flexibility to tailor control measures to the particularities of the area. It is hard to justify requiring sources to spend millions of dollars to reduce VOC emissions by 15 percent where the scientific data shows that those reductions will not help achieve the ozone standard.

Tennessee's successful experience with regional planning in the area of regional haze and visibility demonstrates that regional planning in implementation of the NAAQS could be highly beneficial. Tennessee worked in cooperation with neighbor states for many years and developed its SIP for Regional Haze based on research done through the Southern Appalachian Mountains Initiative and later the Visibility Improvement State and Tribal Association (VISTAS) regional planning organization. This model should be duplicated in other areas where regional issues predominate. In particular, the southeast has had less success in dealing with ozone, a secondary pollutant. The lack of a regional organization and approach does not facilitate cooperation and may have contributed to the use of litigation and a section 126 petition from North Carolina directed toward TVA sources in Tennessee. We believe that states with regional issues should work cooperatively in implementing the NAAQS in order to identify and institute the most effective control measures to ensure all areas achieve the NAAQS. Opportunities for regional planning and collaboration during the implementation period should be explored and incentivized by EPA. The section 126 process and litigation by downwind states is not the way to address this issue.

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

In many cases, the answer is no. In addition to the need for state flexibility noted above, EPA's SIP review and approval process evidences a clear lack of state autonomy and flexibility in identifying measures for incorporation into SIPs when implementing the NAAQS. In exercising its authority to approve SIP revisions under Section 110 of the CAA, EPA has

recently confounded states by either second guessing measures previously approved or failing to address SIP revisions in a timely matter.

For example, in October 2008, EPA accepted Alabama's SIP revision related to its opacity provisions and, specifically, allowed an exemption from compliance with the state's opacity limit during periods constituting no more than 2 percent of operational time for utility steam boilers serving electrical generation units (EGUs) that have Continuous Opacity Monitoring Systems (COMS).[10]

Just a few months later, EPA reversed its approval.[11] In making this reversal, EPA made a drastic shift in its policy and interpretation of its oversight authority under Section 110 of the CAA.[12] EPA re-interpreted its authority and shifted the burden of proof in demonstration to support a SIP revision to the proponent of the change (i.e., the state).[13] EPA has not shown flexibility on this type of SIP revision and has directly interfered with state autonomy by shifting the burden of proof regarding demonstration whether a revision would interfere with an applicable requirement concerning attainment. In the SIP system, where states are supposed to have the flexibility to design its own approach to meeting the NAAQS, EPA should have the burden of showing why a state's plan cannot achieve the ultimate goal of the plan.

The correlation between opacity and particulate emissions can vary from plant to plant. Tennessee has long recognized that the correlation of an exceedance of its 20 percent opacity standard to an exceedance of its SIP approved particulate matter mass emissions at any plant is not sufficient to demonstrate a violation of the EPA approved control strategy for achieving the particulate matter NAAQS. Even with best maintenance and operational practices at larger sources, there will be a small percentage of time in which COMS data would show six-minute interval violations of the 20 percent standard, but not jeopardize the underlying mass emission standard upon which the particulate matter NAAQS control strategy is based. This is an opinion formed by over 20 years of study in review of COMS reporting in Tennessee. States should be given the flexibility and autonomy to utilize their many years of expertise to recommend and seek SIP revisions without having to make burdensome demonstration to EPA, particularly where there is relatively clear statutory direction on where the burden of proof for such demonstrations lies.

Tennessee has other examples of inherent process variability and concern over its opacity standard that EPA has failed to address in a SIP revision. A large industry in Tennessee manufactures titanium dioxide which is used for, among other things, a white pigment for paint. Opacity in visible emissions readings from this plant are high because of the titanium dioxide's

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[10] *See* 73 FR 60957-60963 (Oct. 15, 2008).
[11] *See* 76 FR 18870-18893 (April 6, 2011).
[12] Specifically, Section 110(l) of the CAA provides that EPA *should* approve state revisions to a SIP *unless* it finds that the revisions would interfere with any applicable requirement concerning attainment.
[13] *See generally*, McKinney, Steven G. and Stephen Gidiere, "A (Mostly) Civil War Over Clean Air Act SIPs," Natural Resources & Environment, Vol. 27, No. 1, Summer 2012, http://www.americanbar.org/content/dam/aba/publications/natural_resources_environment/summer2012/nre_sum12_mckinney_gidiere.authcheckdam.pdf (last visited November 20, 2012).

reflective property. The high opacity is not an indication of a problem with attaining and maintaining the particulate matter NAAQS. However, our attempt to revise the SIP to address this very specific situation has been delayed many years by lack of EPA approval even though there is no ambient particulate issue and no basis for health concern.

Additionally, we understand EPA is also reversing course from its historic allowance for SIP exemptions for periods of start-up, shut-down and malfunctions based on commitments EPA may have made to resolve litigation. This reversal in historic practice will be problematic for Tennessee to the extent EPA chooses to apply it to future SIP revisions. Normal operating conditions at facilities necessitate some de minimis level of exemption and requiring application of controls 100 percent of the time simply may not be feasible, let alone practicable. This may be an area where clarification in the statute is warranted.

The cooperative federalism structure of the NAAQS program in the CAA allows for state autonomy and flexibility in implementing the NAAQS through the development of a SIP. EPA's recent actions and inactions on SIP revisions, often inconsistent with its own past practice, have encroached upon a state's ability to draw upon its significant expertise and address local conditions and needs through the flexible design and application of SIP measures. In our opinion, a legislative revision should not be needed to address this particular problem as we believe EPA is over-stepping its authority or not complying with statutorily-mandated timeframes in which to review and approve SIPs. EPA should adjust its SIP review and approval process and decisions to better align with its limited oversight authority in this portion of the NAAQS program. If EPA refuses to do so; however, perhaps a legislative change should then be considered to more proscriptively place the burden of proof on EPA and allow for the automatic approval of SIP revisions if EPA does not act in a timely manner.

A particular example of the real world benefits associated with more state autonomy and flexibility was demonstrated through the Early Action Compacts (EACs) EPA permitted to meet the 1997 8-hour ozone standard. In December 2002, 33 states submitted compact agreements pledging to meet the 1997 8-hour ozone standard earlier than required. The states had to meet a number of criteria, and had to agree to meet certain milestones. The voluntary program provided a flexible approach to reducing air pollution in order to meet the standard and required such reductions earlier than what would have been necessitated by the prescriptive requirements of the CAA. In exchange, EPA deferred the effective date of the nonattainment designation thereby allowing those areas to not have to require offsets and nonattainment New Source Review for new sources. This particularly helped those communities continue to compete for new businesses and jobs.

In Tennessee, Nashville and Chattanooga participated in the EACs and actually achieved reductions faster and came into attainment earlier. The nonattaining areas in Tennessee that did not participate in the EACs did not achieve attainment earlier. This is a prime example of how allowing for flexible approaches to meeting the NAAQS actually achieved cleaner air, faster without the negative consequences to a community of a nonattainment designation. Unfortunately, EPA later determined that clear statutory authority to allow the EACs was lacking and this flexible approach has not been offered again.

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?***

Although aspects of the current system work well in balancing federal, state and tribal roles, the New Source Review (NSR)[14] program is particularly challenging for states due to the uncertainty that has resulted from years of litigation spurned by EPA's enforcement initiative. The litigation has focused allegations of "illegal modifications" that allegedly triggered the provisions and requirements of NSR. While there are examples of great success in terms of pollutant reductions in major settlements and court wins, there is also a perverse effect on the NSR program caused by uncertainty over the meaning of "routine maintenance." In Tennessee, we are challenged by the uncertainty as to what is and what is not a "routine maintenance" project and we believe this has resulted in projects that could have decreased emissions being avoided. One historical example is that a Tennessee paper mill raised concerns about a boiler safety project getting caught in the confusion and uncertainty over what is allowable in the NSR program. We want to encourage projects that would be beneficial in terms of efficiency improvement at boilers and other types of sources, but continued uncertainty in the NSR program does not often allow us to provide the clear guidance businesses need to make investment decisions.

Having worked for EPA, then representing clients in private practice, and now managing a state program, I have looked at this from many different perspectives. I can say without qualification that uncertainty in the NSR program resulting from years of litigation is bad for all parties. State agencies, including TDEC, are bombarded with requests from the regulated community to make early determinations so that businesses can make investment decisions and seek the appropriate permits. Although the revised prevention of significant deterioration (PSD) rules and the WEPCO test provide certain factors to be considered, not all factors are required and only EPA knows the weight that should be assigned to each of the factors. This makes it incredibility difficult for states to run a program and advise the regulated community. It requires that we utilize limited state resources to have a back and forth with EPA on individual determinations before a permit application is even considered or developed. Indeed, EPA's answers to what constitutes an "emissions increase" or what is "routine maintenance" are ever-changing depending on the current litigation position EPA is trying to defend.

Most importantly, this uncertainty encourages the regulated community to avoid projects that would have produced an equivalent or greater benefit had the law and regulatory requirements been clear. For as many projects that were identified in the NSR enforcement initiative for having not undergone NSR review, there are likely as many or more projects that have been or will be foregone that would be cost-effective and environmentally beneficial. These projects would produce efficiency or increase productive capacity. This would contribute to economic growth. Because of the uncertainty associated with the NSR program, a lot of work

[14] "NSR" here refers to collectively the prevention of significant deterioration (PSD) pre-construction permitting program under Part C of Title I of the CAA and the nonattainment NSR program under Part D of Title I of the CAA.

does not get done. No doubt these are un-intended consequences but these are real consequences, nonetheless, for a broken regulatory program – a program that does not draw clear lines. We must find a way to provide clarity and direction to the regulated community such that highly unproductive state and federal oversight (often, many years after the fact) can be eliminated.

We believe NSR reform should be considered and legislative changes should be explored. To increase certainty and consistency for states and the regulated community, various options are available, such as limiting the program to new sources only. If the program will continue to apply to modified sources, a clear codified test that better defines when NSR is triggered (such as a simple hourly emissions increase test) could be designed or a set schedule for reviewing existing control strategies could be considered. Regardless of the particular solution chosen, a clear and consistent approach that is not litigation driven would better allow EPA and the states to implement the program and provide the necessary guidance and support to the regulated community to ensure actual results are achieved.

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?***

Tennessee has enjoyed, for the most part, a good working relationship with EPA, particularly the staff in EPA's region IV office in Atlanta. However, as noted above, there is a level of uncertainty and delay in the SIP approval process that should be corrected. The current process is inefficient and utilizes limited state and federal resources in a way that does not benefit human health or the environment or work to achieve the purpose and goals of the CAA. We would prefer clear regulatory requirements derived from the CAA and a consistent process with timeframes that are compiled with such that states can ensure the process by which they must abide and the consistent substantive requirements that apply. We have been particularly challenged when EPA, through litigation resolution, makes specific commitments on behalf of states without providing the states prior notice or the opportunity to intervene. The very notions of cooperative federalism and state sovereignty are disregarded completely when EPA, in a litigation context, commits states to take specific, prescribed actions such as issuing permits or making SIP revisions in time frames without having even notified the state or considered the various state rulemaking processes and their respective timeframes. EPA should not be permitted to commit states to deadlines in lawsuits. EPA should be required to notify states of litigation that would require state action and states should be permitted to intervene by right in such circumstances. A bill to this effect (Title III of HR 4078) passed the House in July of this year to make that legislative change.

As noted above, Tennessee, like many other states, has experienced long delays in EPA's cumbersome SIP review and approval process. EPA's backlog in SIP revision approvals has become exceptionally delinquent. Currently, Tennessee has 21 SIP submittals that have been awaiting EPA action for 2 years or longer and 10 of the 21 SIP submittals have gone more than 5 years without EPA approval or denial. That is simply unacceptable. This lengthy process is being further complicated by the fact that those wanting to participate and influence state SIPs can currently skip the state SIP approval process (i.e., state rulemaking) and then raise objections

and comments during EPA's review and approval process. Likewise, EPA gets two opportunities as well--once during the process at the state level and then it can revisit any part of the SIP it chooses during its own SIP review and approval process. This redundancy has created an inefficient process that could not have been intended by Congress and directly results in the delayed implementation of SIPs.

Again, these are process and policy changes that EPA should undertake on its own. However, given the significant backlog in EPA's review and approval of SIP revisions, a legislative change that would establish a clear deadline by which EPA must act to approve or deny a SIP or such SIP would otherwise be automatically approved should be considered. Such a deadline is reasonable considering EPA has the early opportunity to participate in state SIP changes during the state rulemaking process.

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

The Cross-State Air Pollution Rule (CSAPR) and the Clean Air Interstate Rule (CAIR) court challenges demonstrate some serious issues in the area of long-range pollutant transport and the "good neighbor" provision in section 110 (a) (2)(D)(i) of the CAA. However, we believe a properly crafted "cap and trade" approach can produce real results in an economically efficient manner. Our experience with the NO_x SIP call and CAIR show positive results are possible. While there is a concern about uneven requirements for upwind sources to do more than eliminate the downwind contribution deemed as "significant" to include a state within the two "cap and trade" regions, the use of the trading mechanism would allow the burden of the program to be shifted and allocated with economic efficiency. While the locations for greater control would not necessarily correspond to the need for greater reductions, EPA modeling shows great air quality improvement within the CSAPR regions. CSAPR improves upon CAIR because it limits the use of trading allowances to require more actual, in-state reductions as opposed to reliance on trading. The real-world effect of the reversal of the CSAPR program is being muted somewhat due to the extensive requirements for the Mercury and Air Toxics Standards (MATS) controls. However, the MATS controls demonstrate how economically inefficient and expensive a program is that applies at the plant level as opposed to a "cap-and-trade" system that will identify the most economically beneficial changes that provide significant environmental benefits as well. If the courts continue to require a greater precision to match control requirements with level of emissions contribution downwind, it may be worth exploring a statutory revision that would expressly authorize regional trading to address interstate transport. The court challenges have raised concerns over efficacy and equity in using a "cap and trade" approach. However, the power of "cap and trade" based on economic efficiency has been so great that the statute should be amended to allow use of a trading program in the context of section 110 (a)(2)(D)(i) and section 126.

In Tennessee, we would also note that our neighbor state of North Carolina pursued TVA using various tools such as the section 126 petition and litigation using a common law nuisance action in federal court. While North Carolina ultimately failed in its nuisance action in the 4th Circuit, because of the implied pre-emption of the CAA, there should be no more allowance for

this type of litigation.[15] The statute should be amended to provide an express pre-emption for these types of nuisance actions. Also, given the actions of the D.C. Circuit in 2008 regarding the reversal, stay, then remand of CAIR and then the subsequent reversal of CSAPR earlier this year, the CAA should be amended to expressly state that participation by states in regional trading programs will satisfy the "good neighbor" provision in section 110 of the CAA.[16]

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

States implement the CAA through the utilization of federal funding provided by section 105 of the CAA. Funds are allocated to states and local air programs based on a formula. Several years ago, there was general consensus that the formula was outdated and a new, more equitable formula was developed. However, EPA initially chose not to implement the new formula until more money was available so that some states would not lose money. More recently, EPA agreed to a five (5) year phase-in of the new funding allocation formula. While not a statutory change to the CAA itself, a rider was inserted in EPA's appropriation bill precluding EPA from applying the new, revised formula.

This appropriation's rider has a very real and disproportionate impact on southeastern states, including Tennessee. If the new, revised formula were implemented with a 5-year phase-in, EPA Region IV would increase its allocation in year one (1) by approximately $1,064,147.00. The increase in annual allocation for the full phase-in would be about $5,320,733.00. For every year the new, revised formula is not implemented, Tennessee works to implement its CAA responsibilities with approximately 20 percent less in annual monetary allocations than states in other regions. Yet, we are held to the same obligations and requirements of other states in meeting our program implementation requirements. We realize that in these difficult fiscal times additional section 105 funding may not be realistic, but Congress should ensure the funds appropriated are allocated in a fair and equitable manner. Today, the allocation does not meet that test. Some have suggested that they do not want some states to lose funds as a justification for delaying implementation. Well, many states, such as Tennessee, are losing their fair share each and every year the new funding formula is not implemented. EPA must be directed to immediately implement the new equitable funding formula with no more than a two (2) year phase-in. An annual monetary allocation of federal funds that seeks equality and application of a formula all stakeholders have agreed upon is a long time overdue.

Conclusion

Thank you for hosting this important CAA Forum. I hope this session and the earlier sessions have been helpful to the committee. Please feel free to contact me if you have questions or would like additional information.

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[15] *See North Carolina ex. rel. Cooper v. TVA*, 615 F 3d 291 (4th Cir. July 26, 2010).

[16] See *North Carolina v. EPA 531 F. 3d 896 (D.C. Cir. July 23, 2008) (reversing CAIR); North Carolina v. EPA 550 F. 3d 1176 (D.C. Cir. Dec. 23, 2008) (stay of CAIR reversal, then remand to EPA on partial rehearing); EME Homer City Generation, L.P. v. EPA* , 696 F. 3d 7 (D.C. Cir. August 21, 2012) (reversal of CSAPR).

Commissioner Martineau's Background

Bob Martineau was selected seventh Commissioner of the Tennessee Department of Environment and Conservation (TDEC) by Tennessee Governor Bill Haslam in January 2011. Commissioner Martineau has more than 25 years of experience in the environmental field as an environmental attorney. This includes seven years of service in the Office of General Counsel for the U.S. Environmental Protection Agency (EPA) in Washington, D.C. (1987-1994) and 16 years as a partner in private practice at the Waller Lansden law firm in Nashville, Tennessee. He was recognized in Best Lawyers in America and Chambers USA for his expertise in environmental law. He was co-editor of American Bar Association's The Clean Air Act Handbook and has authored a variety of substantive articles on critical environmental topics. He also co-authored a newly published book "Plain English for Drafting Statutes and Rules." In private practice, Martineau helped clients, including business and local government, anticipate issues, navigate permit processes, solve problems and establish effective environmental management programs, particularly in relation to issues under the Clean Air Act.

Over the last 22 months, Commissioner Martineau has guided TDEC through its comprehensive Top to Bottom Review, and the results from this department assessment produced a Customer Focused Government implementation plan currently under way emphasizing outstanding customer service, outreach and proactive education and effective partnerships to strengthen environmental protection in Tennessee.

In August 2012, he was elected as Secretary-Treasurer of the Environmental Council of the States, the national association of state environmental officers. Commissioner Martineau utilizes his broad and varied experiences at EPA, in private practice and now in state government to provide solution-oriented advice and leadership for many of the issues facing state environmental agencies today.