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Air and Radiation Docket and Information Center
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Washington, DC 20460

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) – the organization of air pollution control agencies in 53 states and territories and over 165 major metropolitan areas across the U.S. – submits the following comments in response to the U.S. Environmental Protection Agency’s (EPA’s) proposed revisions to the federal general conformity rules (the initial version of which was promulgated in 1993), 40 CFR parts 51 and 93, published in the *Federal Register* January 8, 2008 (73 FR 1402).

NACAA recommends that EPA withdraw the January 8, 2008 proposal, and work with state and local agencies, and other stakeholders, to develop a general conformity rule that is consistent with the intent and the spirit of the Clean Air Act. This effort could also provide an appropriate forum to discuss EPA’s goals to incorporate innovative ideas into general conformity, and agree on mechanisms to accomplish such goals, while also meeting the Act’s public health and environmental requirements. We base our recommendation on the following points, each of which will be elaborated upon in more detail:

- EPA has not provided a clear rationale or justification for why such sweeping changes, that have the effect of completely nullifying the rule, are necessary;
- The conformity rule should align thresholds for review consistent with those that trigger review for stationary sources in nonattainment areas;
- The Clean Air Act requires air quality management areas to track, stabilize and reduce emissions to attain standards;
- The basis for importing provisions from transportation conformity and New Source Review (NSR) are not established, supported or allowed by the Clean Air Act;
- The proposed bifurcation of activities by nonattainment area is not protective of air quality;

- The proposed exemption from offset requirements is not provided for in the Clean Air Act and EPA offers no explanation of the rationale on which the proposed exemption is based; and
- Ignoring mobile source emissions from a project is inconsistent with other provisions required for general conformity.

The proposed revisions, for which no rationale or basis is provided, are inconsistent with the intent of the Clean Air Act and would eliminate what little effectiveness there is in an already weak rule

The intent of the Clean Air Act's general conformity provision is to encourage a process where federal agencies work with their state and local counterparts to coordinate review of projects whose air quality impacts are real, but which do not fit neatly into the stationary source "box," where applicable processes and requirements are more well defined. Given the potential for a well-crafted general conformity program to play a meaningful role in future efforts by states, localities and federal agencies to address emissions from federal projects, developing a workable revision to the 1993 rule would facilitate the goals of innovation (as expressed in the rule's preamble), while at the same time help states and local areas meet and maintain the federally mandated, health-based air quality standards.

Although EPA bills its proposed rule revisions as providing "innovative and flexible approaches" and "streamlining and burden reduction measures," upon closer review of the actual revisions, it appears these words are used to distract from the true effect of the proposed changes, which is the virtual elimination of what little effectiveness there is in this already very weak rule. Understanding the real impacts requires burrowing into the text of the proposed changes to definitions, which EPA describes in the preamble as "minor." For example, one of these so-called "minor" changes would allow project applicants to segregate project emissions among two different air quality management areas, to avoid triggering state review. Another change, also labeled "minor" by EPA, would allow the definition of "temporary" to apply to activities that may go on for as long as five years. NACAA strongly objects not only to both of these proposed definition changes, as well as others, but also to EPA's characterization of them as "minor."

It also appears that EPA is attempting in the proposed rule to replicate and recycle several NSR concepts, including some that have not been adopted. These provisions include voluntary development of a facility-wide emissions limit for general conformity purposes, the use of offsets – allowing both "inter-precursor" offsets (i.e., NO_x reductions to offset VOC reductions) and obtaining emission offsets from another nearby nonattainment or maintenance area of equal or higher classification – and permission for temporary activities without requiring agency review. The facility-wide emissions limit, or PAL (plant-wide applicability limit), was part of EPA's NSR reform package proposed in the late 1990s. At that time, NACAA supported PALs if and only if PALs were part of a package that required on-site pollution prevention measures to occur contemporaneously with any proposed emissions changes at the plant site. However, EPA has not included any such a contingency in the general conformity proposal.

Further, by EPA's own admission, the 10-percent significance threshold for general conformity has very rarely, if ever, been triggered over the past 15 years. NACAA believes that rather than eliminating this clearly ineffective threshold entirely, as EPA proposes, the agency should strengthen it to a more meaningful level.

Finally, EPA's proposed exemption of aircraft emissions that occur at altitudes of greater than 3,000 feet has no scientific basis. Extensive air quality modeling conducted for the Ozone Transport Assessment Group, modeling completed by the University of Maryland and air quality sampling conducted by the University of Maryland all confirm the presence and transport of pollutants at middle and high altitudes over long distances. On September 12, 2001, several areas in Pennsylvania were predicted to experience potentially unhealthy ozone levels. However, due to the total absence of aircraft emissions on that day, ozone concentrations remained below applicable National Ambient Air Quality Standards (NAAQS). Aircraft emissions have both local and long-distance impacts, and NACAA believes that such emissions should continue to be among those that undergo general conformity review.

Triggers for general conformity should be aligned with triggers for review in nonattainment areas

Several years ago, when EPA adopted rules to transition from the 1-hour ozone standard to the more protective 8-hour ozone standard, the general conformity rule was not updated to prevent backsliding under the Clean Air Act. For example, areas previously classified as "Serious" nonattainment areas under the 1-hour standard that were classified as "Moderate" nonattainment under the 8-hour standard realized a more lenient threshold for conformity review for oxides of nitrogen (NO_x) – 100 tons per year (tpy) versus 50 tpy – despite the need of these areas to further reduce emissions to meet the more protective ozone standard. NACAA believes this backsliding issue must be addressed.

For example, in Massachusetts, the proposed Weaver's Cove liquefied natural gas terminal project in Fall River, Somerset, Swansea and Freetown triggered a general conformity review under the 1-hour ozone standard. The project was estimated to generate 74.9 tpy of NO_x, exceeding the 50-tpy review threshold. However, under the 8-hour ozone standard, the project is not subject to general conformity review as the estimated emissions are below the increased review threshold of 100 tpy of NO_x. Had a stationary source of this magnitude been proposed, it would have been subject to BACT and LAER review, including a requirement to obtain offsets equal to or greater than the amount of the proposed project's increase.

In drafting Section 176(c) of the Clean Air Act Amendments of 1990, Congress clearly sought to ensure that the federal government be subject to and comply with the same federal, state, interstate and local requirements, administrative authority and sanctions with respect to the control and abatement of air pollution, in the same manner and to the same extent, as any nongovernmental entity. Federal agencies are to be afforded no special privileges and may do no less than nongovernmental entities. NACAA believes it is imperative that this tenet be preserved and, moreover, that the general conformity rule be amended to embody it rather than evade it. The federal government should be a leader,

setting an example for others to follow. At a minimum, the threshold for general conformity should be the same as the major source threshold that applies in a given area (based on the nonattainment designation).

The Clean Air Act requires areas to track, stabilize and reduce emissions to attain standards

Under the Clean Air Act, states are required to develop plans to demonstrate how air quality standards can be attained and maintained. Part of these requirements for states with nonattainment areas has been to develop emissions inventories and permitting programs for minor sources. Such requirements were supposed to provide an alternative to sources whose emissions exceeded major source thresholds on a potential emissions basis, but did not exceed them based on actual emissions. The minor source program provides an avenue to develop enforceable restrictions on emissions, and allows sources subject to Title V to avoid paying annual emissions fees, and other requirements, if they choose to take advantage of what is now referred to as a “synthetic minor permit”. New sources can also avail themselves of these same minor source permits.

EPA is supposed to require states to maintain an accurate inventory – one that can track emissions changes that occur at both major and minor sources. To the extent changes in minor source emissions over time have not been accounted for in state inventories in some air quality areas, the validity of conformity determinations in these areas could be significantly affected. Such an impact would not be a direct result of this conformity proposal. But, nevertheless, there is anecdotal evidence of emissions “creep” over time, driven in part by growth and by sources that agree to take a synthetic minor permit restriction and then go “under the radar” of the primary, major source focus of state programs. The logic behind the synthetic minor program, and how it has been implemented, has important implications for general conformity. Therefore, NACAA believes that increased attention to the minor source programs and improved precision in the total inventory (including minor, area and mobile sources) would enable more valid conformity determinations to be completed. We welcome the opportunity to discuss these issues with EPA.

The bases for importing provisions from transportation conformity and NSR are not established, supported or allowed by the Clean Air Act

Why is the discussion of minor stationary sources relevant to general conformity? First, EPA has indicated both overtly and by reference that its proposed revisions to the general conformity rule seek to apply relevant program experience from stationary sources, including those for minor sources. Second, the concerns expressed above regarding emissions “creep” have already been manifested in transportation-related projects. EPA has also proposed to apply certain transportation conformity provisions, such as the five-year “temporary” exemption for construction equipment, to general conformity.

Many of the concerns we have regarding stationary sources are also relevant to transportation-related projects, including segmenting projects such that the potential impacts are evaluated piecemeal, rather than for the project as a whole. With respect to

transportation projects, if a project is divided into several pieces, each of which is below *de minimis* requirements, then the entire project can avoid review, ignoring the fact that the cumulative emissions from the activity – the real-world impacts – exceed *de minimis* levels, cause or contribute to increased violations of air quality standards and delay timely attainment of those standards.

EPA applies the same “synthetic minor” logic to the proposed changes to the general conformity rules. Clean Air Act Section 176(c)(1)(B) requires that activities will not cause or contribute to any new violations of any standard in any area, increase the frequency or severity of any existing standard, or delay timely attainment of any standard. The 1993 general conformity regulations were intended to, but did not, satisfy this statutory provision. If EPA intends to pursue exemptions from review for minor sources, the agency must first clearly demonstrate that such exemptions will not impede states’ ability to attain any standard.

The proposed application of the five-year “temporary” exemption from general conformity for construction equipment, and the associated provision that would allow mitigation measures to occur in different time periods than that of the covered activity, directly conflict with the requirements of Section 176(c). Existing construction equipment does not typically have the same degree of emissions control as regulated mobile sources (this will improve once EPA’s new nonroad rule is fully implemented, but existing equipment will continue to be used for many more years), and the activity often occurs in a concentrated area for several hours each day. Project activities that occur in ozone and/or fine particulate nonattainment areas will exacerbate air quality problems, increase the likelihood of additional violations and impede attainment. Allowing such emissions to potentially be offset in later time periods, even if the later offsets accumulate to greater overall reductions, does not address the emissions from or the impacts of the associated project. People will breathe the excess pollution from the project at the time it is occurring. The promise of reductions two or five years later is not an acceptable response, nor does it comply with the Clean Air Act. Further, the proposed provision for mitigation activities to occur elsewhere, even if at the same time, is also inconsistent with the intent of the Act. Activities associated with general conformity have discrete local impacts that need to be addressed locally. The intent and requirements of the Act clearly anticipated that activities from projects would be accounted for, would not cause additional air quality violations and would be addressed contemporaneously. EPA’s proposal runs counter to this.

Bifurcation of activities by nonattainment area is not protective of air quality

Another proposed revision to the general conformity rules would permit emissions that occur over more than one nonattainment area to be allocated according to where such emissions physically occur. If, as a result of this apportionment, emissions per air quality management area are less than the *de minimis* threshold, the entire activity would be exempt from review under general conformity. This proposal is a variation of the “synthetic minor” scenario discussed above, and would have the same inappropriate effect of allowing significant activities to escape review.

For example, in New Jersey, Fort Dix Air Force Base is situated, geographically, in two different ozone nonattainment areas – Philadelphia and New York. Under EPA’s proposed rule change, emissions from sorties conducted there would be apportioned among the two nonattainment areas in accordance with which runway was used, where takeoff occurred and where the return flight landed. Then, added to that complex analysis, another proposed change would exempt aircraft emissions that occur above 3,000 feet. So, the agency would have to determine over which nonattainment area the aircraft is located once the flight climbs above this altitude.

This appears to be a very elaborate means of avoiding compliance with Section 176(c) of the Act. Notwithstanding the absolute complexity of the variables that would have to be assessed both by the applicable federal agencies and the state environmental agency, the plain facts are that all of these activities cause or contribute emissions in an area that already experiences some of the highest concentrations of ozone in the nation. By ignoring the cumulative emissions impacts of these activities, EPA’s proposal will add to the already overwhelming responsibility of attaining air quality standards by delaying or impeding progress and, further, require states to impose more costly controls on other sources, many of which are already doing their fair share, in order to reduce total emissions.

Exemption from offset requirements is not provided for under the Clean Air Act and EPA provides no explanation of its rationale for proposing such exemptions

The proposed changes to the general conformity rule rest on the statutory thresholds for triggering major source permits based on an implied assumption that the NAAQS will be protected if new emissions are below these triggers. But this implied assumption suffers from two serious flaws.

First, Congress used the major source cut points for the purpose of triggering offsets under Section 173, and not as a presumption that sources emitting less than the major source trigger are insignificant for NAAQS compliance purposes.

Second, if general conformity is to be built around principles drawn from the model established by the NSR program, then EPA's general permit program rules in Part 51, Section 160 are particularly relevant. This rule requires that a permit program must establish procedures for determining whether any new source will interfere with attainment or maintenance of the NAAQS. It does not presumptively exclude minor sources that are exempted from the offset program under Section 173. Some finding is required even for smaller sources that emissions will NOT interfere with attainment or maintenance. This necessarily implies the need to keep track of the cumulative air quality impact of emissions from all sources added since the SIP inventory was developed, and to account for those impacts when yet another minor source is added to the airshed.

Ignoring mobile source emissions from a project is inconsistent with other provisions required for general conformity

Another concern is that conformity accounts only for the emissions from the activity directly permitted by the federal agency, and not the emissions that occur from the activities that are made possible by the approved activity. An important example is the failure to account for the increased port emissions from ship traffic that occurs as a result of dredging new channels to provide access to new docks and cargo transfer facilities. EPA's proposal requires the project sponsor to account only for emissions from the dredges that it approves when issuing dredge-and-fill permits, but not the emissions from the ships that will use the channel created by the dredging. There is a fundamental contradiction between ignoring ship emissions when issuing a permit to dredge a channel, and counting aircraft emissions when approving an airport runway. Transportation conformity is predicated entirely on preventing the construction of new highways unless emissions from the mobile sources using the highways conform to the State Implementation Plan. There is no logical basis for not requiring emissions from ships using the channels to conform before permitting the channels to be dredged.

This issue is especially important in areas with large seaports, such as the West Coast, where ship traffic represents a large share of the mobile source inventory, and where global trade expansion and port expansion projects are expected to result in significant increases in ship traffic and emissions.

Conclusion

NACAA's interest in general conformity spans the 18 years since the Clean Air Act Amendments of 1990 were adopted. The statutory requirements for general conformity have tremendous potential to facilitate the efforts of state and federal agencies to work cooperatively to coordinate planning of activities so that they are adequately protective of public health and the environment, while also enabling innovative approaches. We believe firmly, however, that EPA's proposed revisions would accomplish neither objective and, instead, conflict with the intent of the statutory requirements, to the detriment of air quality and public health.

Therefore, NACAA recommends that EPA withdraw the proposed general conformity rule revisions and engage in a process by which NACAA and other interested parties can work together with the agency to develop a viable solution to the issues we have presented. Thank you for this opportunity to comment.

Sincerely,



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