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OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Initial Clean Power Plan Submittals under Section 111(d) of the Clean Air Act

FROM: Stephen D. Page, Director
Office of Air Quality Planning and Standards

TO: Regional Air Directors, Regions 1-10

The purpose of this memorandum is to provide assistance and information to states interested in seeking an extension of time in which to develop and submit a final plan under section 111(d) of the Clean Air Act (CAA). This memorandum and attachment¹ provide information on the requirements of certain provisions of section 111(d) and regulations recently promulgated as part of the August 3, 2015, Clean Power Plan final rulemaking. The memorandum was prepared in response to questions and feedback from states as they move forward to develop plans to meet section 111(d) obligations. Regional offices should distribute the attachment to state, local, and tribal governments, as appropriate.

The Clean Power Plan includes criteria under which such an extension can be sought by a state and granted by the U.S. Environmental Protection Agency (EPA), and a procedure for seeking such an extension. This process is simple and requires only that the state demonstrate it has taken certain preliminary and readily achievable steps towards the development of its plan. This memorandum offers states further information to that end.

Section 111(d) of the CAA directs states to submit to the EPA a plan that provides for the implementation and enforcement of standards of performance for existing sources that achieve emission performance levels determined to be achievable by the EPA. The EPA's final rulemaking titled, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" establishes emission guidelines for certain existing fossil fuel-fired electric generating units (affected EGUs), consistent with section 111(d). Under the final Emission Guidelines (also known as the Clean Power Plan), states with affected EGUs are required to submit to the EPA a final state plan by September 6, 2016, or file an initial submittal requesting an extension to submit a final state plan (to be codified in the Code of Federal Regulations (CFR) at 40 CFR § 60.5765).

¹ This memorandum and the attached information explain the requirements of the Clean Air Act and EPA regulations, describe EPA policies, and recommend procedures for stakeholders to use to meet applicable regulations. These documents are not rules or regulations, and the information they contain may not apply to a particular situation based upon the individual facts and circumstances. This information does not change or substitute for any law, regulation, or other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as "guidance," "recommend," "may," "should," and "can," is intended to describe EPA policies and recommendations. Mandatory terminology such as "must" and "required" are intended to describe controlling requirements under the terms of the CAA and EPA regulations, but this document does not establish legally binding requirements in and of itself.

One purpose of the Clean Power Plan initial submittal is to encourage planning and engagement with the public to facilitate the submission of an approvable and timely final state plan. To the extent that making extensions of time readily available to states serves that purpose, the Clean Power Plan reflects the EPA's intent to place only modest requirements on states seeking extensions. The EPA expects that development of the initial submittal, including the three required components described below and in the attachment, is achievable by September 6, 2016. Upon receiving a state's initial submittal, the request for the extension will be considered granted unless the EPA notifies the state, in writing, within 90 days of submission that the EPA cannot grant the extension.

As set forth in the Clean Power Plan, an extension request must include simply:

1. An identification of the final plan approach or approaches under consideration by the state and a description of progress made to date on the final plan components;
2. An explanation of why the state requires additional time to submit a final plan; and
3. A demonstration or description of the opportunity for public comment the state has provided on the initial submittal and opportunities for meaningful engagement with stakeholders, including vulnerable communities, during preparation of the initial submittal, and plans for public engagement during development of the final plan.

Additionally, as required by the Clean Power Plan, states that seek an extension and wish to participate in the Clean Energy Incentive Program must indicate in the initial submittal a non-binding statement of intent to participate in the program. The EPA expects that states could establish these components in an extension request by undertaking basic actions discussed in more detail in the attachment. The actions enumerated in this memorandum and in the attachment serve to illustrate the wide range of choices states have in meeting the elements on which an extension request would be granted.

The EPA Regional offices play an essential role in assisting states in the development of state plans and initial submittals, as well as in reviewing state plan submittals. States interested in developing an initial submittal for purposes of seeking an extension should contact their EPA Regional office with any questions.

For questions regarding this memorandum or the attachment, please contact Juan Santiago, of my office, at (919) 541-1084 or santiago.juan@epa.gov.

Attachment

Attachment

Information on Clean Power Plan Initial Submittals Under Section 111(d) of the Clean Air Act

October 2015

This attachment provides information for states interested in seeking an extension of time in which to develop and submit a final plan under section 111(d) of the CAA. The EPA recognizes that some states may request additional time to complete a final section 111(d) state plan in response to the Clean Power Plan. For this reason, the Clean Power Plan includes an opportunity for a state to seek an extension to the September 6, 2016, submittal date and explains the process for seeking such an extension.

As discussed in section VIII.E of the preamble to the Clean Power Plan, the opportunity for an extension¹ is intended to support and promote a state's ability to design a plan consistent with and responsive to state-specific circumstances and needs. For example, certain states have indicated they will be unable to submit a final plan by September 6, 2016, due to their own administrative or legislative processes, the time necessary to seek and evaluate public input, and the time necessary to coordinate with other states. The extension process, including the initial submittal components, is intended to accommodate these and similar considerations as states move forward in their efforts to develop plans. The EPA also intends the initial submittal components to be consistent with the overall process that some states may employ to develop their state plans, which is first to consider the various approaches for state plans authorized under the Clean Power Plan, including soliciting public input on those approaches under consideration, and second to select an approach and develop the state plan based on it.

The governor, or the governor's approved delegate, is responsible under the Clean Power Plan for submitting a state's initial submittal. Upon receiving a state's initial submittal, the request for the extension will be considered granted unless the EPA notifies the state, in writing, within 90 days of submission that the EPA cannot grant the extension. Notably, a state receiving an extension is also required under the Clean Power Plan to submit an update by September 6, 2017. This 2017 check-in is only to describe the state's progress and to further enable the EPA to assist the state with development of an approvable final plan.

The Clean Power Plan establishes three required components for initial submittals and a procedure for seeking an extension. The components are intended to be straightforward and achievable preliminary activities. Accordingly, under the terms of the Clean Power Plan, an extension request must address the following components:

1. An identification of the final plan approach or approaches under consideration by the state and a description of progress made to date on the final plan components;
2. An explanation of why the state requires additional time to submit a final plan; and
3. A demonstration or description of the opportunity for public comment the state has provided on the initial submittal and opportunities for meaningful engagement with stakeholders, including vulnerable communities, during preparation of the initial submittal, and plans for public engagement during development of the final plan.

¹ Consistent with the Clean Power Plan, the extension is for a two-year period (to September 6, 2018) although states may provide their final plans in advance of the extended deadline.

This attachment begins with an overview of the required components of the initial submittal, as established in the Clean Power Plan, and further illustrates each component by providing examples. The three components are designed to ensure that the state is making progress towards a final plan submittal. The initial submittal is not expected to include technical information or quantitative analysis, or entail a formal public hearing. The initial submittal is not expected to include a binding description of the state's final plan and the EPA appreciates that the final submittal may include different information from what is submitted as part of the initial submittal. Finally, the Clean Power Plan provides that states that seek an extension and wish to participate in the Clean Energy Incentive Program must indicate in the initial submittal a non-binding statement of intent to participate in the program.

Elements of the Initial Submittal

In order to obtain an extension, the Clean Power Plan requires a state to submit to the EPA an initial submittal that addresses the three required components that are specified in section 60.5765 of the Clean Power Plan regulatory text and identified above. These components are also discussed in section VIII.E of the preamble for the final rulemaking. The actions enumerated in this attachment serve to illustrate the wide range of choices states have in meeting the elements on which an extension request would be granted. States are not required to undertake all actions, and the enumerated actions are not a comprehensive, exclusive list of qualifying state actions.

1. Description of the final plan approaches under consideration

For the first component, the Clean Power Plan calls on a state to describe the final plan approaches it is considering. To meet this requirement, the state is encouraged to explain whether it is considering a single or multi-state plan, a plan that meets the carbon dioxide (CO₂) emission performance rates or state CO₂ rate or mass emission goal, and/or an emission standards or state measures plan type. Because a state may be considering more than one approach while undertaking the process of developing a final plan, they need not commit in their initial submittal to any one plan approach, and they may identify more than one approach. Many states have already taken a number of steps to prepare for state plan development to satisfy this component.

As required by the Clean Power Plan, the initial submittal should also describe the state's progress to date on final plan components. States could identify steps already taken for plan development through a narrative description. States need not include technical data or quantitative analyses of the plan approaches under consideration in order to satisfy this component. Thus, an initial submittal for this aspect of the first component can include, but is not limited to, a description of activities such as:

- Exploring tradeoffs among various state plan approaches
- Understanding the state's requirements and need for further engagement with stakeholders and the EPA
- Considering multi-state coordination or development of a "trading-ready" state plan
- Educating state officials and their staff on existing state CO₂-reducing programs and policies
- Building relationships and lines of communication among key state institutions with environmental agencies, public utilities commissions, and governors' offices

Other activities may include the state's engagement with the EPA through one-on-one calls, group calls organized by Regional offices (i.e., "hub" calls), or other communications in which the state is sharing information with the EPA regarding plan development activities.

2. Appropriate explanation of need for an extension

In accordance with the Clean Power Plan, the second component requires the state to explain the basis for its extension request in order to develop its final plan. This component is intended to be easily achievable by the state, rather than a detailed, in-depth analysis of why the state is unable to complete each final plan component by September 6, 2016. For example, such an explanation could include a discussion of one or more of the following activities the state is planning to or must undertake that cannot be completed by September 2016:

- The evaluation of potential impacts of the different state plan approaches and next steps
- The need to work with other states and stakeholders to address issues related to multi-state cooperation
- The need for new state regulatory actions, including the length of time required for the state's administrative processes
- Legislative approval or consultation, including state-specific dates of legislative sessions
- The need to undertake data analysis or gather information on state programs, including a description of the types of analyses
- The need to fully engage with a wide variety of stakeholders, including a schedule for public outreach

The EPA encourages states to be specific about the timing needs and how that affects the timeline for development and submittal of a final section 111(d) state plan, but understands that these activities could well extend beyond September 2016.

3. Description of opportunities for public comment and meaningful stakeholder engagement

For the third component, the Clean Power Plan includes two requirements: (1) an opportunity for public comment and meaningful stakeholder engagement on the *initial* submittal, including outreach to vulnerable communities; and (2) a description of the state's plans for meaningful public engagement on the *final* state plan, including outreach to vulnerable communities. Each of these requirements is discussed in more detail below.

The public participation requirements of 40 CFR § 60.23 are effectuated for purposes of the Clean Power Plan by requiring states to engage meaningfully with vulnerable communities and other stakeholders during the plan development process. This third component, as a whole, is designed to facilitate successful state plan development by promoting early stakeholder involvement in the planning process regarding potential state plan approaches and to ensure that the public has a meaningful opportunity to comment at key intervals throughout the three-year plan development process, including on the initial submittal. Thus, the third component of the initial submittal may include, but is not limited to, an appropriate combination of activities such as:

- A description of any engagement with stakeholders prior to and during the public comment process on the initial submittal, such as:
 - Identifying public notice methods for disseminating information regarding the initial submittal
 - Identifying dates and times of meetings that have already occurred for planning and engaging with the public on the initial submittal

- A description of plans for engagement opportunities leading up to the final plan submittal, including:
 - Providing information regarding the state’s anticipated next steps on the feedback received during any public process to date
 - Outlining a notional or non-binding schedule for future notice and comment opportunities for the final state plan
- An explanation of how the state identifies vulnerable communities, such as by using EJSCREEN or other methods
- A description of strategies used and planned for outreach to vulnerable communities, such as:
 - Using existing title V mailing lists maintained by the states for affected EGUs
 - Providing direct public notice to affected facilities and requesting that facilities disseminate the notice to employees
 - Providing public notice through different avenues such as the state agency website, public libraries or other public offices near affected EGUs, or other options intended to reach out to vulnerable communities
 - Reaching out to local community organizations and/or organizations that advocate for vulnerable communities
 - Reaching out to residents within a certain distance of the affected EGUs
 - Providing public notice to local governments in areas where affected EGUs are located
 - Providing public notice and consultation to potentially affected Tribal governments
 - Providing public notice to potentially affected low income, minority and indigenous populations

We acknowledge that states have established their own ways to reach out to the public and interested stakeholders, and many are well-versed in engaging with vulnerable communities, as well as in soliciting public comments on proposed state actions. For example, states routinely engage in public notice and comment opportunities associated with permitting and state implementation plan activities. States are encouraged to consider and use their already existing methods for informing the public and soliciting comment on the state’s Clean Power Plan activities, if they feel they will engage vulnerable communities sufficiently. The Clean Power Plan does not prescribe a specific number of hearings, meetings, webinars or outreach for this component. The EPA Regional offices are encouraged to work with states if questions arise regarding the state’s plan to meaningfully engage with stakeholders, including vulnerable communities.

The Clean Power Plan’s two requirements of this component for the initial submittal are further explained and clarified as follows.

Public comment and outreach on initial submittal

As set forth in the Clean Power Plan, states are required to describe the opportunity for public comment and meaningful stakeholder engagement, including outreach to vulnerable communities, they have provided on the ***initial*** submittal. The requirement for public comment on the initial submittal is that states provide for an opportunity for public comment on the information that states intend to submit to the EPA as the initial submittal. This comment period could be a useful opportunity for states to receive input on aspects of the draft initial submittal and overall plan development. The EPA appreciates that some states may not be ready to issue a proposed plan at the time they solicit public comment and the EPA is not requiring that the states have a specific proposal on which comment must be sought. Further, states are not required to develop responses to the comments received at the time of the initial submittal.

Rather, this public comment opportunity is intended to be similar to listening sessions and pre-proposal outreach engagements that the EPA and state agencies may engage in prior to issuing proposed rules.

With regard to meaningful engagement with stakeholders, including vulnerable communities, this may include a description of public participation or stakeholder outreach efforts conducted to date. Public engagement and outreach can take many forms, including a mixture of community meetings, public webinars, public notice and comment opportunities, and other approaches. Although not required by the Clean Power Plan for the initial submittal, a state may consider holding a public hearing on the initial submittal. All of these forms of outreach can be targeted to particular stakeholder groups, including vulnerable communities. States can begin meaningful engagement with vulnerable communities and other stakeholders early in the state's plan development process.

As a first step in satisfying the Clean Power Plan's requirements for this component of the initial submittal, states need to identify vulnerable communities in their state. The EPA did not provide a formal definition of "vulnerable communities" that states must follow. In general, as stated in the final rulemaking, "The agency uses the terms "vulnerable" and "overburdened" in referring to low-income communities, communities of color, and indigenous populations that are most affected by, and least resilient to, the impacts of climate change, and are central to our community and environmental justice considerations." Importantly, stakeholders could include, but are not limited to: the general public; labor unions and workers that may be affected by, or have an interest in, the state plan; communities whose economies are dependent on coal; communities at an increased risk from the effects of climate change; and other vulnerable communities. There are tools available to assist states in identifying vulnerable communities, such as the proximity analysis used for the Clean Power Plan (described in the preamble for the final rulemaking, section IX.A) and other resources, such as EJSCREEN,² the EPA's May 2015 guidance titled, "Guidance on Considering Environmental Justice During the Development of Regulatory Actions,"³ and the EPA document titled, "Considering Environmental Justice in Permitting."⁴ The EPA consulted these documents in developing the Clean Power Plan and states may also find them helpful to assist in identification of vulnerable communities. We stress, however, that states are free to use other approaches—either analytical or more qualitative—to inform identification of vulnerable communities to help target outreach and to ensure those communities have access to public involvement opportunities associated with the state plan development process.

Plan for public comment and outreach on final plan

In addition to providing for public comment and outreach on the initial submittal, the Clean Power Plan requires that the initial submittal itself must also include a description of the meaningful engagement that the state plans to undertake during *final* plan development, including the opportunity for public notice and comment on the final plan prior to its submission to the EPA.

² <http://www2.epa.gov/ejscreen>.

³ <http://www3.epa.gov/environmentaljustice/resources/policy/considering-ej-in-rulemaking-guide-final.pdf>.

⁴ <http://www3.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-permitting-2011-09.pdf>.

EPA Action Regarding the Initial Submittal

The EPA expects that development of the initial submittal including the three required components is achievable by September 6, 2016. Upon receiving a state's initial submittal, the request for the extension will be considered granted unless the EPA notifies the state, in writing, within 90 days of submission that the EPA cannot grant the extension because the submittal does not address the three required components demonstrating that the state is able to undertake the necessary steps and processes to timely submit a final state plan as required by the final rule.

Continued State Assistance

The Regional offices, in close coordination with the EPA Headquarters offices, are available to provide planning assistance to states. Consistent with the EPA's usual lines of communication, the EPA Regional offices are the first point of contact for the states. The EPA Headquarters offices, including the Office of Air and Radiation, are involved in clarifying policy issues and coordinating state implementation of the Clean Power Plan, as well as maintaining regular and coordinated communications with the EPA Regional offices. We expect the high level of engagement with the states to continue throughout the entire planning process, including during this initial period leading up to a request for a plan extension. The EPA Regional offices and states are encouraged to exchange drafts and information well in advance of the September 6, 2016, deadline. We look forward to working with all states on implementation of the Clean Power Plan.