

National Consumer Law Center, Boston, MA.

National Community Action Foundation, Washington, DC

Ohio Partners for Affordable Energy, Findlay, OH.

Re: Docket ID No. EPA-HQ-OAR-2013-0602-0001

Dear Administrator McCarthy:

Thank you for the opportunity to provide comments on the EPA's Clean Power Plan (CPP), **Docket ID No. EPA-HQ-OAR-2013-0602-0001**. The detailed material in this comment focuses on elements of the Rule which our organizations believe need enhancing in order to ensure state plans are fair to all consumers and disadvantaged communities and are consistent with national environmental justice policies set out in Executive Order 12898 as further defined and implemented by the EPA itself.¹

I. The Organizations:

The National Consumer Law Center (NCLC) has, since 1969, used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income people. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; and training and advice for advocates.²

The National Community Action Foundation (NCAF) is the Washington, DC based non-profit organization representing 960 local community action and weatherization assistance delivery organizations in federal affairs. Our member organizations collectively serve more than 7 million low-income households annually by providing with multiple services to promote their economic security and improve their communities. Among those are the HHS-funded Low-Income Home Energy Assistance Program and related state and rate-payer bill-assistance services, Department of Energy and HHS-funded Weatherization Assistance retrofits and 32 states' ratepayer-funded efficiency programs for low-income households.³

¹ Plan Environmental Justice 2014, EPA September 2011. <http://www.epa.gov/environmentaljustice/plan-ej/rulemaking.html>.

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Ohio Partners for Affordable Energy (OPAE) is a 501(c) (3) nonprofit membership organization created to advocate for affordable energy policies for moderate and low-income Ohioans. Sixty-four OPAE member agencies provide essential energy services, including bill payment assistance, weatherization and energy efficiency, and housing services to over 440,000 households statewide annually. OPAE members operate numerous programs supporting children and families including Head Start, job training, financial literacy, child nutrition, medical and dental clinics, affordable housing, and promote community development.⁴

II. Summary of the Low-Income Consumer Advocates' Comments

1. We are in strong support of the goal and ultimate result of the proposed 111(d) rule. We strongly support the Clean Power Plan. Our organizations believe wise implementation of the policy can achieve the proposed significant reduction in GHG emissions and also achieve improvements in the health and well-being of our citizens, our communities and our global environment. We believe the costs and benefits of the implementation of the rule could be allocated fairly through well-designed state policies and that the costs could be affordable to households and the economy. We believe the proposed rule should be modified to include the necessary elements to assure this result. The Environmental Justice analysis performed connection with the proposed rule in summarized in section XI. J of the preamble must be broadened in order to apply EPA's own principles for verifying that a federal action meets the tests of Executive Order 12898.
2. The proposed rule should be modified to apply federal Environmental Justice policy to the state plans that will implement this Clean Air mandate;
3. We propose three additions to the state plans and to the analysis states offer in support of their plans to ensure that
 - a. disadvantaged and minority individuals and communities are assured affordable access to a fair share of the benefits of the state's policy and investments,
 - b. the costs of the plan are fairly applied so that consumers' access to electric service is not threatened and new clean energy and efficiency investments are accessible to all communities, and
 - c. there is meaningful participation of low-income and disadvantaged groups in the state planning and implementation process.

These additional requirements should be included in the second required part of the list of elements that is needed to determine a state plan is complete, the State Approach section. We also recommend a stronger federal position with respect to encouraging least-cost strategies.

⁴ Dave Rinebolt, Executive Director & Counsel, Ohio Partners for Affordable Energy. 614-975-8692. drinebolt@ohiopartners.org

III. The Limitations of the EPA's Environmental Justice Review of the Rule's Impact

The proposed rule's preamble summarizes the limited inquiry conducted to conclude no adverse Environmental Justice effects could be expected [at XI. J]; this review is a disappointing gloss over of the variety of potential negative Environmental Justice effects that are possible if the proposed rule is unfairly implemented by states.

- a. The preamble asserts that the effects of the rule, as measured in 2030, will be positive with respect to improved health and lower energy costs nationwide. It reiterates the findings of the national impact studies cited in preamble section X which include the monetized effects of alternative compliance strategies nationwide and some global effects. No analyses of the range of cost and benefits to states or sub-state areas, vulnerable consumers or communities are reported.

We respectfully submit that EPA's obligation to ensure Environmental Justice is the result of its activities and policies cannot be satisfied by ratifying a predicted average national outcome in fifteen years. In fact, the agency's own policy on implementing the Environmental Justice Executive Order EO. 12898 is fully developed in the framework known as Plan Environmental Justice 2014.⁵ It lays out how the agency will think beyond average or aggregated nation-wide impacts of environmental rules and will, instead, ensure that low-income and minority individuals and communities are not excluded from the general benefit of an action nor burdened disproportionately with the costs of securing the result.

Plan Environmental Justice 2014 is clear on this point:

"EPA defines "environmental justice" as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair Treatment means that no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies... In the Agency's implementation of environmental justice, EPA has expanded the concept of fair treatment to include not only the consideration of how burdens are distributed across all populations, but also how benefits are distributed."⁶

- b. The Environmental Justice analysis of all potential risks that would deprive groups or communities of the predicted benefits or impose disproportionate costs was limited to a single risk: exposure to additional pollutants. In fact, just one specific instance of such exposure was considered – exposure as a consequence of pollution in the residential area proximate to an EGU powered by fossil fuel which increases its electricity output to implement the state plan.

⁵ EPA Plan Environmental Justice 2014, September 2011. <http://www.epa.gov/environmentaljustice/plan-ej/rulemaking.html>.

⁶ *Ibid* at p. 17.

EPA failed to include any analysis of other significant risks to fairness that could well become elements of state implementation policy but that should be considered and neutralized by all states as they design their plans instead. Below we list additional risks that should be considered by states.

- c. There is a further problem with the limited review that was conducted; the EPA reasonably concludes communities impacted by the single risk that was considered, increased pollution from a nearby EGU, cannot be identified until specific state and industry plans are set.⁷ However, EPA proposes no procedural safeguards to identify and mitigate the potential risks when they ARE identified in specific areas. Rather, the preamble refers to standard Clean Air Act data-sharing processes that would form the basis for future determination of a problematic, i.e. unjust, situation.⁸ No process for review, study and community engagement in the event of localized pollution increases is included in the elements states incorporate in their plan; we believe EPA, in relying on state-federal government dialogue, has not met its responsibility for ensuring the proposed rule guarantees the fair treatment and the public participation that ensures it required by federal policy.

We list risks omitted from the analysis described in the preamble below, followed by the elements we believe should be included in a complete state plan to integrate federal Environmental Justice policy into the implantation of the expanded 111(d) rule with respect to these risks.

Risks to Consumer Access to Utility Service, Including Growing Utility Costs, are Health Risks and a Proper Focus of Environmental Justice Policy

Today's energy bills are already high enough to pose a threat to the health and safety of many low-income energy consumers and to low-income communities. Currently, lower-income consumers must devote such a high percent of their income to household energy costs, largely electricity, that their ability to afford adequate nutrition and medical services is dangerously limited.

The Oak Ridge National Laboratory issues periodic reports on the energy usage and household energy expenditures of low- and moderate-income households [defined as households with income no higher than 200% of the Federal Poverty Guidelines. This population is income-eligible for federal

⁷ “there likely would also be some locations with more times during the year of relatively higher concentrations of pollutants with potential for effects on localized communities”, and [EPA] “concluded that it is not practical to determine whether there would be disproportionately high and adverse human health or environmental effects on minority, low income, or indigenous populations from this proposed rule.” **Federal Register** / Vol. 79, No. 117 / Wednesday, June 18, 2014 / p 34950.

⁸ “existing tracking systems will allow states and the EPA to be aware of the EGUs whose utilization has increased most significantly, and thus to be able to prioritize our efforts to assess whether air quality has changed in the communities in the vicinity ...” *ibid*.

Weatherization Assistance Program services. The most recent estimate⁹ shows that, on average, 2014 energy bills of lower-income consumers will equal 16.5 percent of their total income. By contrast households that are not low- or moderate-income were predicted to spend 3.5 percent of their total income on energy bills in 2014. The term for the percent of income spent on energy is ‘energy burden’. Energy burden is a rough indicator of the availability of household income to afford basic needs, both the utility bill and the amount available for other essential goods – shelter, food, medical care, and transportation.

Electricity bills make up just over two-thirds of energy expenditures for both lower-income and other households.¹⁰ That means that the electricity bill burden on low-income consumers today is more than 11% of their limited resources, while others will pay 2.3% of income for their power. The impact of relatively small bill increases is different on those who have current bills that they cannot afford [in the sense that paying the bill means sacrifice of another basic need] than it is on those who have affordable bills now and disposable income to re-allocate among necessities.

A survey of households that received federal home energy assistance found that 37 percent went without medical care, 34 percent did not fill a prescription or took less than their full dose of prescribed medication, 29% did not make a house payment, and 24 percent went without food for at least one day as a result of high home energy costs.¹¹ Unaffordable energy¹² leads to a cascade of health risks from poor nutrition, erratic medication purchases and the threat of eviction, in addition to the dangerous possibility of disconnection from electricity.

Few households are disconnected from electric services, but most that do experience loss of service are low-and moderate income.¹³ The concentration of disconnections in disadvantaged neighborhoods means increased risk of home fires, of deterioration of housing, of frequent tenant turnover which is associated with multiple forms of community deterioration and social costs.

⁹Eisenberg, Joel F. *Weatherization Assistance Program Technical Memorandum Background Data and Statistics* ORNL/TM-2010/66, Oak Ridge National Laboratory Technical paper www.weatherization.ornl.gov

¹⁰ US Department of Energy Residential Energy Consumption Survey, 2009. Table CE-6 displays the amounts households in different income groups spent for each home energy source and in total for the year.

¹¹ www.neada.org 2011 survey

¹² Affordability and the consequences of unaffordable bills can be measured with a universal methodology often referenced by the LIHEAP program of the US DHHS. Find the templates at the Home Energy Affordability Gap site of the expert Fisher, Colton, Sheehan law firm. http://www.homeenergyaffordabilitygap.com/01_whatIsHEAG2.html#.

¹³ Several systematic long-term studies document the risks to health, specially the health of low-income children that are associated with unaffordable energy and other shelter costs. These include: John T. Cook, PhD, MAEd; Ingrid Weiss, MS [The Impacts of Increasing Household Energy Prices on Health and Health Care Costs in New York State](#), June 25, 2014 Children's HealthWatch www.childrenshealthwatch.org and Elizabeth March, MCP; John T. Cook, PhD; Stephanie Ettinger de Cuba, MPH; Annie Gayman, AB; Deborah A. Frank, MD, **Healthy Families in Hard Times: Solutions to Multiple Family Hardships** June 1, 2010 Children's Health Watch Policy Report,

Deborah A. Frank, MD; Patrick H. Casey, MD; Maureen M. Black, PhD; Ruth Rose-Jacobs, ScD; Mariana Chilton, PhD, MPH; Diana Cutts, MD; Elizabeth March, MCP; Timothy Heeren, PhD; Sharon Coleman, MS, MPH; Stephanie Ettinger de Cuba, MPH; John T. Cook, PhD, [Cumulative Hardship and Wellness of Low-Income, Young Children: Multisite Surveillance Study](#) .

Consideration of the energy burden of households is part of rate decisions today in many states, including Ohio, which have structured programs such as discount, maximum payments and billing practices to reduce the bills of vulnerable consumers. Models of energy affordability policies are readily available for states to incorporate in their Clean Power policies should the predicted costs increases warrant it. ¹⁴ State Clean Power plans should demonstrate the impact of expected bills on the most vulnerable consumers has been evaluated and, as needed, remediated in the implementation plan.

While EPA's long-run analysis of the electricity cost impact of the rule predicts lower costs in 2030, the change in bills in the fifteen years before full implementation, which could endanger vulnerable households and communities is not considered in the models; it will depend on states' method of allocating costs. The price of units of power supplied is not an adequate measure of the costs households bear because utility bills are only partly based upon usage; the share of bill that represents fixed costs regardless of how much power is used depends on rate design. Many state regulators have recently added the costs of utility operations and new programs as a fixed charged on every consumer bill, including the costs of efficiency investments, grid and other distribution system upgrades, and construction. Consumer advocates are deeply concerned about the design ¹⁵ as it is regressive by definition.

These effects, like the localized proximate pollution increases which were reviewed, are only predictable after the state determination of the costs to ratepayer and the method of allocating those costs. EPA must require states to consider Environmental Justice effects when establishing those policies so that the entire initiative is designed to be consistent with federal Environmental Justice policy.

Low-wage workers, retirees and single-parent households often carry large arrears on their utility bills and the fees, payment schedules and other penalties state regulators impose can dramatically increase their energy burdens. States should adopt and EPA should review rules for allocating costs and mitigating increases to ensure access to electricity for all should be reviewed through the Environmental Justice policy 'filter'.

Unequal Access to the Benefits of Federal Policy is also an Environmental Justice Risk

As we quoted above, EPA's Plan Environmental Justice 2014 says, *"In the Agency's implementation of environmental justice, EPA has expanded the concept of fair treatment to include not only the consideration of how burdens are distributed across all populations, but also how benefits are distributed."*

¹⁴ A well-maintained program information clearinghouse is found at the HHS-supported LIHEAP Clearinghouse www.ncat.org/liheap.

¹⁵ **'Utility Surcharges, Fees Frustrate Consumers and Short Cut Consumer Protections'**. AARP, Washington, DC June 2012, Washington DC. http://www.aarp.org/content/dam/aarp/aarp_foundation/2012-06/increasing-use-of-surcharges-on-consumer-utility-bills-aarp.pdf.

The distribution of the benefits of 111(d) state implementation strategies should be subject to analysis from the Environmental Justice perspective. The heart of the issue is whether the cost of compliance and of the implementation of the Plan will be balanced by the benefits received by low-income and disadvantaged consumers and communities. Because equivalent costs pose greater burdens on the economic security and health of vulnerable populations, state plans must include policies that protect at-risk groups from new hardships and assure their inclusion in the benefits of the transition.

Today, most utility efficiency and renewable energy program incentives are financed by all ratepayers but are primarily designed for consumers who can pay a large share of the total upgrade costs themselves. Analyses of the impact of such policies highlight the need for thoughtful state evaluation of the incidence of costs v. benefits.¹⁶ Lower income consumers use substantially less household energy than others and make up a large share of the low-usage population. As the review of the draft rule by Synapse Inc. for the National Association of State Utility Consumer Advocates points out:

“Efficiency also presents unique challenges, as care must be taken to ensure that programs are well run in order to be effective and low-cost, and the number of customers who participate in such programs should be maximized to ensure that as many customers benefit as possible. Although energy efficiency may lower costs in the long run, customers are likely to experience higher rates. These higher rates will be offset by lower usage (and thus lower net bills) for participants, but non-participants may be adversely impacted. Expanding the percentage of customers who participate in energy efficiency programs, particularly low-income and hard to reach groups, is therefore critical for ensuring equity across rate classes.”¹⁷

Inequitable sharing in the costs and benefits will disproportionately burden those with lower incomes. The societal benefits from energy efficiency and renewable investments can and should be structured so that they accrue to all in the form of healthier surroundings, improved air quality, reduced risk of environmental contamination, improved investment in local economies and increased job opportunities.

The rule, when applied in a manner consistent with the federal policy on assuring environmentally just outcomes, will be especially valuable to low-income communities and communities of color.

Meaningful participation in the state planning process by low-income and minority groups is a fundamental Environmental Justice requirement

¹⁶ AARP, National Consumer Law Center, National Association of State Utility Consumer Advocates, Consumers Union, and Public Citizen, ‘The Need for Essential Consumer Protections: SMART METERING PROPOSALS AND THE MOVE TO TIME-BASED PRICING, August 2010.

http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/NASUCA_Smart_Meter_White_Paper.pdf.

¹⁷ Elizabeth A. Stanton, PhD, Sarah Jackson, Bruce Biewald, Melissa Whited, “Final Report: Implications of EPA’s Proposed “Clean Power Plan”: Analyzing consumer impacts of the draft rule’. Synapse, Inc. Cambridge MA. Report prepared for NASUCA, November 14, 2014 www.nasuca.org

Meaningful participation in the state planning process by low-income and minority groups is a fundamental Environmental Justice requirement. EPA's Plan Environmental Justice 2014 state places meaningful participation in the definition of Environmental Justice:

"Meaningful Involvement means that: (1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected. ..."

We were disappointed that EPA's review of Environmental Justice concerns in the preamble addressed the agency's own considerable record in consulting with such groups and advisors but ignored application of the requirement to the states' procedures.

The CPP contains no requirements or guidance for states to ensure adequate low-income and minority participation in the development of state plans. Under the heading of 'public participation', EPA requires the state to conduct a public hearing when the plan is made public, prior to submission to EPA. This is certainly a necessary procedural step, and EPA should commit to careful consideration of the public hearing record. However, the requirement to hold a public hearing does not mean that low-income and minority communities will have an adequate opportunity to participate, nor that the state plan process will be sufficiently transparent.

Few changes will be possible once a state's year-long planning process results in the release of a draft state plan prior to final submission to EPA. An innovation on the scale of EPA's CPP requires far more active engagement by a wide range of parties.

Strong consumer participation and oversight is both in the national interest and in the interest of sound climate policy. Providing low-income consumer representation in the state implementation process makes it more likely that states will produce sound, reliable and low-cost plans.

Low Income and Minority Communities Face Challenges Participating In the Development of State Plans. Our experience as we have advocated on state and federal low-income energy policy is that the groups and communities that should be protected by the Environmental Justice policy are least likely to be able to participate in a meaningful manner unless additional resources and guaranteed access are provided. The capacity to engage experts, present analysis and research and, for regulatory proceedings the capacity to afford legal representation are significant barriers to community groups and other low income advocates. As part of a state's demonstration that it has provided for meaningful participation, EPA should stipulate that providing financial support for planning and regulatory participation will be the best evidence the mandate has been carried out effectively.

IV. We Recommend That Three Additions To State Plan Requirement #2, The Description Of State Plan Approach, Become Part Of The Final Rule.

We believe the EPA must modify the draft rule to ensure environmental justice principles are part of the states' clean power plan policy framework. We believe EPA has failed to apply fully the principles of

federal Environmental Justice policy to the Clean Power Plan framework. While the agency has the authority to include all federal policies, including the mandates of EO 12898, in its delegation of authority to states and other regarding implementation of a federal law or regulation,¹⁸ it has inexplicably failed to do so in any meaningful way with respect to including environmental justice standards in the state clean power plans.¹⁹

A state's approach to meeting the three criteria must include a demonstration to EPA that the implementation policies meet these Environmental Justice tests through providing a valid and sophisticated analysis of how populations and communities will experience the plan's cost impacts, face health risks and benefits broadly construed to include affordability of energy, share in the policy's benefits and be represented in a meaningful way in the process of state plan development and implementation.

When assessing a completed state plan, EPA review of the quality of the analysis should include whether both the methodology and the final analysis is peer-reviewed and achieves an examination of the differential impacts of policies and costs on vulnerable populations and communities. EPA should inform states that plans which cannot demonstrate they meet Environmental Justice standards based on a valid analysis will be subject to greater scrutiny, including possible re-analysis by experts of EPA's choice. However, we do not believe it is necessary for the agency to establish a single methodology nor to provide a single data source. The test that should be applied to state plans are essentially procedural: does the state's analysis of EJ issues listed qualify as a valid, methodologically sound study overseen by peer reviewers? Were representatives of disadvantaged groups and communities engaged at all planning stages and provided with adequate resources to contribute expert input?²⁰

The Plan for the State's approach to achieving its 111(d) goals should be required to meet a broader and more specific EPA's definition of the elements of an environmentally just policy and should include the following validating its assertion:

1. **An Analysis by the State Demonstrating the Fairness of the Consumer Utility Rate and Bill Impacts**

A rate and bill impact analysis should make transparent the burden of any predicted increases to consumer rates and bills. State plans should include a summary of any low-income discount

¹⁸ Environmental Law Institute report to EPA 2001, Opportunities for Advancing Environmental Justice: An Analysis of EPA's Statutory Authorities. <http://epa.gov/oecaerth/environmentaljustice/resources/reports/annual-project-reports/eli-opportunities4ej.pdf>.

¹⁹ Note: Since the failure of a state to submit an acceptable plan would trigger federal establishment and enforcement of Clean Power Plan for that state, there is even a remote possibility the agency would find itself establishing and enforcing a state framework that omitted essential Environmental Justice goals and strategies as they are not articulated thoroughly for all states in the proposed rule.

²⁰ Numerous alternatives are available for producing relevant household and community data. Regulators routinely request and sometimes independently conduct analyses of the impact of proposed rates on consumer classes and groups. Our

rates or other programs that will mitigate any rate or bill impacts on low-income and minority communities.

2. **A Plan Section Demonstrating of The Fairness of The Distribution of Efficiency and Clean Energy Benefits Among Communities and Consumers**

The states must provide analyses that: 1) demonstrate that emissions reductions of pollutants other than GHG will equitably benefit disadvantaged low-income and minority communities; and, 2) demonstrate that investments in and benefits from renewable energy and energy efficiency are distributed so as to equalize access to utility service, including improving current disparities, for disadvantaged communities and consumers.

3. **A Demonstration That the State Has Conducted An Inclusive Planning Process During CPP Development**

States must demonstrate that they have engaged representatives of low-income energy consumers and disadvantaged communities at all periods and levels of plan development. EPA should accept as evidence of a sound process the following three elements, and provide a far more deliberate review and analysis of plans that were not developed under such a process:

- a. The legitimacy, expertise and constituencies of the participating groups;
- b. The state resources provided for the participation of disadvantaged groups - such as intervenor funding at state commissions, and grants and/or in kind support for planning, analysis and participation; and,
- c. Inclusive rules for participation in planning at each phase of plan development.

V. Least-Cost Strategies and Consumer Protection

We support the expert testimony and comments submitted by many of our partners which urge EPA to make adoption of a least-cost strategy for implementing the rule a plan condition, provided that Environmental Justice criteria are applied to the design of the state strategy. We applaud the agency's flexibility with regard to recognizing a portfolio of responses and existing state initiatives. The preamble's expressed concern about measurement and verification of demand reduction or management is well-placed; our partners and member organizations have experience firsthand of the great differences among the standards and reported savings from different utility programs or state rate frameworks. In response to the request for comment on this specific matter: we encourage EPA to establish federal M & V standards, identify state systems which conform to those and use federal enforcement tools to assure valid emission reductions as a result of applying the Building Bloc 4 strategies.

organizations can provide the agency and its Environmental Justice advisory group with multiple examples of valid approaches. EPA may be interested in sharing best examples on its forthcoming state tools website.

VI. Conclusion

We urge the EPA to take note of the connection between protecting consumer interests, ensuring equitable distribution of costs and benefits within the state policy and the ultimate success of the policy. There is substantial overlap between the policies that are best for reducing emissions and those that are fair to consumers and communities. Consumer participation will substantially increase the likelihood that states will adopt sound, least-cost plans that are likely to yield their projected carbon-reduction goals. In short, consumer representation and oversight of a least-cost and fair Clean Power Plan and its implementation can be thought of as important features of effective carbon-reduction strategies.

We look forward to working with the agency to develop a framework that will achieve important emissions reductions while protecting the health of low-income and vulnerable communities through application of the strong federal Environmental Justice tests.