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Comments to the U.S. Environmental Protection Agency on the Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and of Call for Texas State Implementation Plan Revision-Affirmative Defense Provisions

June 28, 2019

Re: **Docket ID No EPA–R06–OAR–2018–0770**

The Environmental Protection Network (EPN) is an organization comprised of over 450 EPA alumni volunteering their time to protect the integrity of the U.S. Environmental Protection Agency (EPA), human health and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide an informed and rigorous defense against current Administration efforts to undermine public health and environmental protections.

On April 29, 2019, the United States Environmental Protection Agency (EPA) Region 6 issued a proposed rule indicating that it is considering an "alternative interpretation regarding affirmative defense provisions" in the State of Texas' State Implementation Plan (SIP). Region 6's interpretation departs from the nationally applicable policy set forth in the final rule EPA issued in 2015 relating to such defenses.[1] Specifically, Region 6 states that it is "proposing to make a finding that the affirmative defense provisions in the SIP for the state of Texas applicable to excess emissions that occur during certain upset events and unplanned maintenance, startup, or shutdown activities are narrowly tailored and limited to ensure protection of the National Ambient Air Quality Standards (NAAQS) and other CAA requirements, and would be consistent with the newly announced alternative interpretation if adopted." Region 6 indicates that it obtained concurrence from the relevant office in the EPA's Office of Air and Radiation to take an alternative interpretation that deviates from the nationally applicable interpretation.

EPN is providing this comment because of our concerns that this proposed action:

- Fails to explain the reason an alternative interpretation is warranted, and in fact one is not in this situation;
- Sets a dangerous precedent for casual approval of situations generally alleged to warrant an exception to national consistency; and
- Provides neither legal nor technical justification that approval of the Texas SIP revision is protective of public health and consistent with the Clean Air Act (CAA).

EPA Region 6 purports to use a Regional guidance to approve a SIP in one state, reversing an EPA national policy developed through a national SIP call using notice and comment rulemaking, that *disapproved* the same SIP provision in Texas and sixteen other SIPs with similar provisions in

[1] https://www.govinfo.gov/content/pkg/FR-2015-06-12/pdf/2015-12905.pdf#page=2

seven EPA Regions. The proposal to approve Texas' SIP revision would sanction emissions of substantial amounts of unhealthy air pollution, which is emitted contrary to legal requirements, but excused from enforcement through the mechanics of an "affirmative defense." If finalized, this rule would open the door to any other EPA Region to seek a similar exception to the national policy. EPN urges EPA not to finalize approval of this element of the Texas SIP.

Background

The Clean Air Act applies throughout the nation. It includes judicial review provisions that specify that national actions are reviewed in the U.S. Court of Appeals for the D.C. Circuit, with other, more local actions reviewed in the Circuit in which they are taken, including individual SIP decisions. This action purports to be an individual Regional SIP decision, based on Regional guidance, but it countermands a national policy and implicitly establishes a new one. The approval will be the first of its kind and, as just noted, will effectively reverse a national policy announced in a national rulemaking that established nationwide criteria for SIP approvability, and that specifically disapproved the Texas SIP provision the Region is now proposing to approve, along with sixteen other SIPs with identical defects.

The Affirmative Defense question

The Region's 2019 action, the previous national action in 2015, and an assortment of earlier and shifting EPA policy statements dating back more than 20 years focus on the same question: how to control source emissions when a facility is starting up, shutting down, performing maintenance, or has unexpected emissions due to equipment malfunctions and similar events (SSM). Texas and sixteen other states have (or had, if they have changed them) provisions that create an affirmative defense for such emissions. EPA defines an "affirmative defense" as a response put forward by a defendant that, if established, would preclude a court from imposing monetary penalties or other forms of relief for violations of SIP requirements. 84 FR 17986, 17988 (April 29, 2019). That means that even if a facility violates emission limits, it suffers no legal consequences. In April 2014, the D.C. Circuit considered the legality of affirmative defenses in the context of national regulations and found them contrary to the Clean Air Act. *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). Specifically, the Court found that the Clean Air Act gives courts the authority to impose legal consequences for violations of the Act, and affirmative defense provisions improperly divest courts of that authority.

The history of this issue is complicated, however. The *NRDC* decision was issued in 2014. Prior to that decision, EPA had allowed certain affirmative defenses for SSM events. In fact, in 2013, the Fifth Circuit Court of Appeals found that an EPA decision to approve an affirmative defense provision in the Texas SIP, based on what was then the Agency's national policy, was not arbitrary and capricious. *Luminant Generation Company v. EPA*. 714 F.3d 841 (Fifth Cir. 2013, cert. denied).

After *NRDC*, EPA resolved the question of affirmative defense SIP provisions authoritatively when it proposed and later finalized a national SSM SIP policy, including a position on affirmative defenses. It also finalized a SIP call, finding SIP affirmative defense provisions inadequate under CAA 110(k)(5) for Texas and sixteen other states on May 22, 2015. The EPA determined that affirmative defense SIP provisions that operate to alter or eliminate federal courts' jurisdiction to

determine penalties for violations of SIP requirements would undermine Congress' grant of jurisdiction and are inconsistent with CAA requirements. 84 FR at 17988. Before taking this final action, EPA had received comments suggesting that its proposed action was inconsistent with the *Luminant* decision, discussed them at length, and found them unpersuasive. 80 FR 33848, 3856-57 (June 12, 2015).

Discussion

It is good public policy that EPA decisions be consistent nationally. EPA has ten Regional offices that review and approve or disapprove State Implementation Plan submittals and do many other activities where inconsistency among Regions would be problematic. Companies that operate in more than one state should be assured that activities requiring a federal permit in one state, for example, would also require a permit in all other states, or that interpretation of a technical term in a national rule will be the same in every state across the country. The public should be confident that air quality is protected the same way whether they live in Florida or Alaska or Texas or any state in between.

With respect to State Implementation Plans specifically, this principle is codified in 40 CFR 56.4[2] and 56.5.[3] Headquarters officials have the responsibility to "include, as necessary, with any rule or regulation proposed or promulgated under parts 51 and 58 of this chapter mechanisms to assure that the rule or regulation is implemented and enforced fairly and uniformly by the Regional Offices." Regional offices "shall assure that actions taken under the act: (1) Are carried out fairly and in a manner that is consistent with the Act and Agency policy as set forth in the Agency rules and program directives, (2) Are as consistent as reasonably possible with the activities of other Regional Offices, and (3) Comply with the mechanisms developed under § 56.4 of this part."

This proposal is seriously flawed because it does not provide an adequate explanation for why an exception to the national policy is warranted. It will open the door to other Regions seeking exceptions without articulating a valid basis. It is a backdoor attempt to change national policy

[2] § 56.4 Mechanisms for fairness and uniformity - Responsibilities of Headquarters employees.
(a) The Administrator shall include, as necessary, with any rule or regulation proposed or promulgated under parts 51 and 58 of this chapter, mechanisms to assure that the rule or regulation is implemented and enforced fairly and uniformly by the Regional Offices.
(b) The determination that a mechanism required under paragraph (a) of this section is unnecessary for a rule or regulation shall be explained in writing by the responsible EPA official and included in the supporting documentation or the relevant docket.

[3] § 56.5 Mechanisms for fairness and uniformity - Responsibilities of Regional Office employees.
(a) Each responsible official in a Regional Office, including the Regional Administrator, shall assure that actions taken under the act:

1. Are carried out fairly and in a manner that is consistent with the Act and Agency policy as set forth in the Agency rules and program directives,
2. Are as consistent as reasonably possible with the activities of other Regional Offices, and
3. Comply with the mechanisms developed under § 56.4 of this part.

(b) A responsible official in a Regional office shall seek concurrence from the appropriate EPA Headquarters office on any interpretation of the Act, or rule, regulation, or program directive when such interpretation may result in application of the act or rule, regulation, or program directive that is inconsistent with Agency policy.

through a Regional action that would be reviewable in a Circuit court rather than the D.C. Circuit. Lastly, the proposal does not provide analysis to support its finding that the Texas SIP is protective of the NAAQS even with an affirmative defense for SSM events, and data suggest that significant amounts of dangerous air pollution are emitted on a regular basis in Texas from these events.

1. **The proposal gives an inadequate explanation for authorizing an alternative interpretation.**

Region 6 claims that EPA regulations, including 40 CFR 56.5(b), allow the exception from the national policy it proposes and that it has obtained the required Headquarters concurrence on this action.[4] However, the proposal does not include any discussion of why its alternative interpretation would be approvable under the consistency policy, or how such an alternative interpretation could apply in Region 6 alone while a directly contrary interpretation of the same statutory requirements would continue to apply throughout the rest of the country. As explained above, the SIP call analyzed the *NRDC* decision and concluded that the statutory delegation of authority to require monetary penalties and otherwise enforce Clean Air Act provisions to the District Courts prevents inclusion of affirmative defenses in SIPs. Approval of an affirmative defense in a SIP would allow the state and individual sources of pollution to usurp the District Courts' ability to assess penalties and enforce the Act, and would therefore be inappropriate in all cases. The Agency also considered the *Luminant* decision in reaching its decision, and concluded that *Luminant* did not change its conclusion that the affirmative defense provisions in Texas' SIP were contrary to the Clean Air Act and should be removed.

Region 6's argument that the holding in *NRDC v. EPA* is not controlling is based on the fact that the decision in *NRDC v. EPA* was in the context of Section 112 of the Clean Air Act, not Section 110 (which governs the SIP development and approval process). It focuses on the fact that Section 112 sets forth a program where EPA establishes nationally applicable, industry-specific rules to reduce emissions of hazardous air pollutants, whereas Section 110 establishes a program for improvement in air quality that reflects the fundamental federal-state partnership approach of the Clean Air Act. That's correct, but Region 6 does not explain how that difference is relevant to the Court's holding in *NRDC v. EPA*, which is all about the authority vested by Congress in the federal courts with respect to enforcement of the federal air pollution requirements established under the Clean Air Act. As discussed further below, the proposal does not tackle head on the reasoning and conclusions in EPA's 2015 national SSM policy.

As noted above, consistency across the country in the application of policy and interpretation of rules and legal precedent is important to the orderly, fair and reasonable implementation of the Clean Air Act. For a Region to depart from a national policy, it must articulate a compelling reason,

[4] We note, however, that the concurrence in the docket only agrees to the start of a process. Specifically, it requests concurrence to "convene a proceeding for reconsideration, the outcome of which may potentially entail Region 6 proposing an action inconsistent with the EPA's interpretation of the Clean Air Act when acting pursuant to the reconsideration of the Texas SIP call. If, after undergoing a notice and comment rulemaking, Region 6 determines that it will deviate from EPA's national interpretation of the Clean Air Act, as outlined in the preamble to the June 12, 2015 rulemaking, Region 6 will again ask for your concurrence prior to taking a final action that so deviates." https://www.regulations.gov/document?D=EPA-R06-OAR-2018-0770-0009

one that sets it apart enough to warrant different treatment from other Regions. This proposal fails to meet this high bar.

2. Region 6 cannot approve Texas' inclusion of affirmative defenses because of the *NRDC* decision.

For the Region to justify the proposal, it would need to address the Regional policy in light of the considerations the national rulemaking considered, including its effects on: "the enforcement structure of the CAA," "the jurisdiction of courts to adjudicate questions of liability and remedies in judicial enforcement actions," and "the potential for enforcement by states, the EPA and other parties under the citizen suit provision as an effective deterrent to violations." It would also need to recognize that this deterrent "encourages sources to be properly designed, maintained and operated and, in the event of violation of SIP emission limitations, to take appropriate action to mitigate the impacts of the violation." 80 FR at 33852.

The Regional proposal effectively ignores these specific concerns directly relevant to the lawfulness of SIP affirmative defense provisions, effectively making no findings with regard to any of them. In other words, it has made no independent effort to address the substantive merits, under the Clean Air Act, of a rule allowing states to include affirmative defenses in their SIPs. Instead, it has apparently considered only "the particular relevance of the *Luminant* decision and whether the *NRDC* decision has any application to Region 6's SIP approvals under CAA section 110 in this context." As noted, that is an issue that EPA previously considered in the national rulemaking when it found *Luminant* was not persuasive.

Moreover, focusing on *Luminant* begs the real question before the Region in deciding how to proceed in 2019: whether, based on EPA's experience and current understanding, there is a solid legal basis for allowing affirmative defense provisions in SIPs in one Region notwithstanding contrary national policy. Because of the procedural posture of the *Luminant* decision, this is not a question that the Fifth Circuit had reason to address. EPA's policy at the time was to allow affirmative defense provisions, and the Fifth Circuit addressed only the narrow question of whether EPA acted unreasonably in following its existing guidance and approving the SIP provision.

Region 6 proposes that an alternative interpretation of the availability of affirmative defenses can apply in Texas under *Luminant*. But *Luminant* provides no support whatsoever for that position. In the SIP call, EPA specifically addressed the *Luminant* analysis and concluded that it could not stand in light of the *NRDC* decision concerning the authority of District Courts to impose monetary penalties and otherwise enforce the Act. EPA also analyzed the *NRDC* decision concerning section 112 of the Act and determined that given the similarity of statutory language, EPA could not reasonably interpret 110 differently with respect to the authority of

District Courts to assess penalties and enforce the statute.[5] In *Luminant* the Court addressed whether the SIP revision at issue was consistent with the then applicable SSM policy, which allowed affirmative defenses, and concluded that it was. However, that decision did not raise or address the legal issue addressed by the *NRDC* court concerning exclusive District Court authority. 749 F.3d 1062. Given the clarity of the *NRDC* decision, EPA concluded that it had no other choice than to interpret section 110 to prohibit affirmative defenses as well.

Therefore, EPA concluded that the *Luminant* decision was no longer good law and should no longer apply to SIP revisions in Region 6 or any other Region.

3. The proposal is a backdoor attempt to change the national SSM policy and undermine the SIP call without having to do a national rule that would be reviewable in the D.C. Circuit.

One clear reason for EPA to proceed in this manner—asserting a Regional exception to the national SSM policy—is so that the legal challenge would be brought in a circuit court, rather than the D.C. Circuit, which has jurisdiction over EPA rules of national applicability.

The proposal's candor in conceding that the Region's proposed guidance and Texas SIP approval do not follow national policy only highlights its lack of candor about the implications of issuing Regional guidance that flatly undoes national policy and its failure to provide any explanation for allowing a Region to ignore an Agency regulation.

But an obvious corollary of using this proposed Region 6 guidance and rulemaking to undo the Texas SIP call and approve the Texas SIP is that the new Regional policy applies throughout the Region, including two other states within Region 6 that were included in the nullified SIP call, Arkansas, which is in the Eighth Circuit, and New Mexico, which is in the Tenth. And once Region 6 has adopted a new policy interpreting nationally applicable regulations and applying it to states outside the Fifth Circuit, then it should logically follow that the new policy extends to *other* states

[5] The EPA is revising its interpretation of the CAA with respect to affirmative defenses based upon a reevaluation of the statutory provisions that pertain to enforcement of SIP provisions in light of recent court opinions. Section 113(b) provides courts with explicit jurisdiction to determine liability and to impose remedies of various kinds, including injunctive relief, compliance orders and monetary penalties, in judicial enforcement proceedings. This grant of jurisdiction comes directly from Congress, and the EPA is not authorized to alter or eliminate this jurisdiction under the CAA or any other law. With respect to monetary penalties, CAA section 113(e) explicitly includes the factors that courts and the EPA are required to consider in the event of judicial or administrative enforcement for violations of CAA requirements, including SIP provisions. Because Congress has already given federal courts the jurisdiction to determine what monetary penalties are appropriate in the event of judicial enforcement for a violation of a SIP provision, neither the EPA nor states can alter or eliminate that jurisdiction by superimposing restrictions on that jurisdiction and discretion granted by Congress to the courts. Affirmative defense provisions by their nature purport to limit or eliminate the authority of federal courts to determine liability or to impose remedies through factual considerations that differ from, or are contrary to, the explicit grants of authority in section 113(b) and section 113(e). Accordingly, pursuant to section 110(k) and section 110(l), the EPA cannot approve any such affirmative defense provision in a SIP. If such an affirmative defense provision is included in an existing SIP, the EPA has authority under section 110(k)(5) to require a state to remove that provision. 80 Fed. Reg. at 33851.

outside of the Fifth Circuit. Because the Region has offered no unique basis for applying the policy to Texas other than *Luminant*, and no unique basis for applying it to Arkansas and New Mexico other than that they are in Region 6, there is no principled reason, consistent with national consistency and equity, why the other seven Regions, with fourteen states covered by the SIP call, should not follow the course chartered by Region 6, disregard the Agency's national guidance, and approve those SIPs.

In sum, EPA is making a purportedly "Regional" decision as backdoor forum-shopping to obtain review of a new interpretation of SSM requirements in the Fifth Circuit, and avoid the D.C. Circuit. Under the Region's approach, a challenge to the "Regional" actions in New Mexico and Arkansas would be reviewed in, respectively, the Tenth and Eighth Circuits. And then as other Regions follow Region 6's lead, other circuits that include Regions covered by the national SIP call would review the SIP approvals, leaving out only the First, Second, and Seventh Circuits, and, of course, the one circuit the Clean Air Act intends to review national decisions, the D.C. Circuit. The straightforward and appropriate way to reverse the SIP call and accompanying SSM Guidance would be with a national rulemaking that accomplishes these goals in a single national, consistent action, rather than the piecemeal approach the Region 6 proposal is taking. It is likely that the proposed Regional action overruling the national action would be impossible to justify in terms of Agency consistency. In any event, the Region has made no effort to do so.

4. The proposal asserts, but does not explain, how the Texas SIP, including the affirmative defense provision, will protect public health from air quality that violates the National Ambient Air Quality Standards.

Neither the proposal, nor the *Luminant* decision on which it is purportedly based, contain any discussion of how the affirmative defense provision meets the legal requirement that a SIP ensures protection of the NAAQS or increment or any other substantive requirement. See CAA 110(a)(2). EPA's explanation is conclusory, containing no analysis of the types of upset situations and how those emissions can threaten the NAAQS. Just because a SIP says it doesn't allow violations of the NAAQS doesn't mean it actually doesn't. Region 6 should have done an analysis specific to sources in Texas, evaluating the potential impacts affirmative defenses would have on air quality throughout Texas, and demonstrating that the NAAQS would continue to be maintained in all areas of Texas notwithstanding the availability of such affirmative defenses. Region 6 has made no attempt to do so in this proposal and therefore the proposal fails to provide a reasoned basis for approval.

Although issues relating affirmative defenses to violations during startup, shutdown, and malfunctions may seem like the ultimate bureaucratic exercise, the fact is that the startup, shutdown, and malfunction events can release hundreds or even thousands of tons of air pollutants into neighborhoods. If state rules excuse, or provide an affirmative defense for these types of situations, which can happen with frequency in some industries and with some companies, the public health protections promised by the Clean Air Act and state clean air programs can be significantly undermined and people's health adversely affected. See, for example, The Health Consequences of Weak Regulation: Evidence from Excess Emissions in Texas. (Hollingsworth, Konisky, and

Zirogiannis, May 3, 2019).[6] Based on data provided by the Texas Commission on Environmental Quality, this study demonstrates that between 2002-2017(Q1), Texas was, on an annual average basis, experiencing: one excess emissions event per day emitting over 10 tons of toxic pollutants, three excess emissions events per month emitting over 100 tons of pollutants, and three excess events per year emitting over 1,000 tons of pollutants. Excess emissions represent a sizeable share of routine emissions in Texas. Emissions from upsets can include criteria pollutants such as SO2 and PM and hazardous air pollutants such as benzene. For further detail, see Comment from Nikolaos Zirogiannis, et al. https://www.regulations.gov/document?D=EPA-R06-OAR-2018-0770-0012. Neighboring communities would likely have no warning of potentially harmful emissions in advance of one of these events, and learning about it afterwards does nothing to protect public health, especially if the company is excused from responsibility.

5. This flimsy "justification" for allowing the Regional guidance opens the door for any Region to seek an exception.

The Region 6 proposal implies that the outdated *Luminant* case and the fact that this is a Section 110 rather than Section 112 situation provide the basis to take an alternative interpretation in Region 6. However, the alternative interpretation on its face could apply to any SIP submission with an affirmative defense provision, including the other sixteen states covered by the SIP call. And in fact, Region 4 issued a similar proposal based on an alternative interpretation of the SSM SIP call just weeks after the Region 6 proposal, highlighting the danger of allowing an alternative interpretation of statutory requirements in individual Regions. 84 FR 26031 (June 5, 2019). Through this Region 6 proposal, EPA has opened a door to deterioration of national consistency and a path to changing national policy through Regional actions, a door that other Regions are already starting to walk through.

Conclusion

This rule, if finalized, would set a very dangerous precedent for EPA's national consistency policy and process; would be contrary to clear direction in *NRDC* v. *EPA*; and would put residents of Texas at risk for exposure to significant amounts of pollution for which they would have neither advance warning nor recourse. We respectfully urge EPA not to finalize this approval.

[6] https://ssrn.com/abstract=3382541 or http://dx.doi.org/10.2139/ssrn.3382541