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EPN Comments on Proposed SIP Call Withdrawal and Air Plan Approval; NC: Large Internal Combustion Engines NOx Rule Changes

August 5, 2019

Re: **Docket ID No. EPA–R04–OAR–2019–0303**

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 June 5, 2019, EPA Region 4 (Region 4) issued a proposed rule indicating that it is considering "adopting an alternative policy regarding startup, shutdown, and malfunction (SSM) exemption provisions" in the State of North Carolina's State Implementation Plan (SIP). Region 4's proposed interpretation would depart from the nationally applicable policy set forth in the final rule EPA issued in 2015 relating to such exemptions.[1] Specifically, Region 4 states that it is "evaluating whether there is a reasonable alternative way to consider SSM provisions in SIPs that allows such exemptions if the SIP considered as a whole is protective of the [National Ambient Air Quality Standards] NAAQS." Region 4 indicates that it obtained concurrence from the relevant office in EPA's Office of Air and Radiation (OAR) 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;
- Provides neither legal nor technical justification that approval of the North Carolina SIP revision is both protective of public health and consistent with the Clean Air Act (CAA) as interpreted in EPA's national rulemakings; and
- Would open the door widely for states seeking virtually any exception to EPA's national policy on SSM, contrary to the CAA and judicial precedent, and could lead to increased emissions if exceptions are adopted and approved, and unnecessary administrative and legal proceedings when those exceptions are legally challenged.

Region 4 purports to use a Regional guidance to approve a SIP in one state, effectively reversing an EPA national policy developed through a national SIP call using notice and comment rulemaking that *disapproved* the same SIP provision in North Carolina and 35 other SIPs with similar provisions in all ten EPA Regions. The proposal to approve North Carolina's SIP revision would sanction emissions of potentially substantial amounts of unhealthy air pollution, which would be emitted during periods of start-up, shutdown or malfunction in amounts that cannot be determined in advance and thus cannot assure that the NAAQS will continue to be met. And perhaps most disturbing to EPN members, who worked diligently at EPA to fully

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

and transparently explain our analysis and basis for proposals and policy decisions, the explanation provided for this exception is thin to the point of non-existence, entirely conclusory, and fails entirely to meet expected standards of reasoned agency decision-making. If finalized, this rule would open the door to any other EPA Region to seek a similar exception to the national policy and set a terrible precedent that undermines the agency's approach to national consistency. EPN urges EPA not to finalize approval of this element of the North Carolina SIP.

Background

The CAA 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. Coming on the heels of a similar proposal from EPA's Region 6 (Region 6) Office, this proposal, if approved, would be the second step in what is now undeniably a clear strategy by EPA to reverse a national policy using regional decisions. That national policy was announced in a national rulemaking that established nationwide criteria for SIP approvability, and specifically disapproved the North Carolina SIP provision that Region 4 is now proposing to approve, along with SIPs with similar defects in 35 other states.

The Start-up, Shutdown and Malfunction question

Region 4's 2019 proposed 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). North Carolina and 35 other states have (or had, if they have changed them) provisions that provide an exemption for such emissions. Although EPA had policies in the past that allowed certain SSM exemptions under specific circumstances, which EPA at the time believed would adequately protect the NAAQS, EPA had for some time allowed automatic SSM exemptions solely from national technology-based emissions limitations and only discretionary exemptions from SIP limits if specific protections were in place. However, the D.C. Circuit in 2008 determined that SSM exemptions under section 112 of the CAA violated the requirement of CAA section 302(k) that all emissions limitations must be continuous. *Sierra Club v. EPA*, 551 F.3d 1019 (2008). Subsequently, in 2011, EPA received a petition for reconsideration urging EPA to clarify its policies respecting SSM exemptions in SIPs.

After *Sierra Club* and in response to the petition for reconsideration, EPA resolved the question of SIP SSM exemption provisions authoritatively when it proposed and later finalized the national SSM SIP policy, including a position on exemptions restating its longstanding interpretation and clarifying that such exemptions were not acceptable. It also finalized a SIP call, finding SIP SSM exemptions inadequate under CAA 110(k)(5) for North Carolina and 35 other states on May 22, 2015.

On April 29, 2019, Region 6, which includes the states of Texas, Oklahoma, New Mexico, Louisiana and Arkansas, issued a proposed rule indicating that it is considering an "alternative interpretation regarding affirmative defense provisions" in the State of Texas' SIP.[2] Like Region 4's reasoning here, Region 6's interpretation departs from the nationally applicable policy set forth in EPA's 2015 final, nationally

[2] https://www.federalregister.gov/documents/2019/04/29/2019-08480/withdrawal-of-finding-of-substantial-inadequacy-of-implementation-plan-and-of-call-for-texas-state

applicable, rule. 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 [the] protection of the 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 EPA's OAR to take an alternative interpretation that deviates from the nationally applicable interpretation.[3]

Discussion

It is good public policy that EPA decisions be consistent nationally. EPA has 10 Regional Offices that review and approve or disapprove SIP 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 North Carolina or any state in between.

With respect to SIPs specifically, this principle is codified in 40 CFR 56.4[4] and 56.5.[5] EPA 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."

Just as with the Region 6 proposal, this proposal is seriously flawed because it does not provide an adequate explanation for why an exception to the national policy is warranted. It opens the door even wider to other Regions seeking exceptions without articulating a valid basis. It is a backdoor attempt to change national policy through a Regional action that would be reviewable in an individual Circuit court rather than the D.C. Circuit tasked with such review. Lastly, neither the proposal itself nor any other documents from either EPA or North Carolina that we have been able to identify in the docket for this rulemaking provide analysis

[3] EPN submitted comments on this Region 6 proposal on April 29, 2019. https://www.environmentalprotectionnetwork.org/wp-content/uploads/2019/06/EPN-Region-6-SIP-Comment-6.28.19.pdf.

[4] § 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.

[5] § 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.

to support its finding that the North Carolina SIP is sufficiently protective of the NAAQS even with an exemption for SSM events, even though data from a study conducted in another state (Texas) indicate that significant amounts of dangerous air pollution are emitted on a regular basis from these events.[6]

1. The proposal gives an inadequate explanation for authorizing an alternative interpretation.
Region 4 claims that EPA regulations, including 40 CFR 56.5(b), allow an exception from the national policy it proposes and that it has obtained the required Headquarters concurrence on this action. 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 4 alone while a directly contrary interpretation of the same statutory requirements would continue to apply throughout the rest of the country. Further, the concurrence request itself did not contain any such explanation, nor did the Headquarters concurrence. As explained above, the SIP call clarified EPA's longstanding interpretation that automatic SSM exemptions were not acceptable in SIPs. The SIP call also analyzed the section 301(k) statutory requirement that all emissions limitations be continuous, as well as the *Sierra Club* decision applying that definition to section 112 of the Act, and concluded that a similar interpretation must continue to apply to approval of SIPs under section 110 as well.

Region 4's argument that the holding in *Sierra Club* is not controlling is based on the fact that the decision in *Sierra Club* was in the context of Section 112 of the CAA, 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 CAA. That's correct, but Region 4 does not explain how that difference is relevant to the Court's holding in *Sierra Club*, which is all about the definitional requirement that emissions limitations apply continuously under the CAA. Nor does the region address the fact that EPA's historic policy had not allowed automatic SSM exemptions in SIPs long before the *Sierra Club* decision. As discussed further below, the proposal's analysis on the reasoning and conclusions in EPA's 2015 national SSM policy make clear that Region 4 is attempting to reconsider and revise the national SSM policy through a regional rulemaking.

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 CAA. Courts have recognized that this requirement for consistency applies to EPA policies such as the 2015 SSM policy as well as regulations and the CAA itself. See *National Environmental Development Assoc. v. E.P.A.*, 752 F.3d 999 (2014). For a Region to depart from a national policy, it must articulate a compelling reason, one that sets it apart enough to warrant different treatment from other Regions. This proposal fails to meet this high bar. We request that EPA answer the following questions before it finalizes this proposal: how many states have made changes to their SIPs in response to EPA's SIP call, how many of those SIPs revisions has EPA approved, and what communications has EPA had with states about its intent to act on pending SIP revisions or entertain further changes from those states.?

2. Region 4 cannot approve North Carolina's SSM exemptions because of EPA's longstanding SSM policy as well as the *Sierra Club* decision and other case law.

[6] See, for example, The Health Consequences of Weak Regulation: Evidence from Excess Emissions in Texas. (Hollingsworth, Konisky, and 7 Zirogiannis, May 3, 2019), https://ssrn.com/abstract=3382541 or http://dx.doi.org/10.2139/ssrn.3382541, which we attach to this comment for inclusion in the docket.

As noted above, the final 2015 SIP call clarified EPA's SSM policy and clearly stated that neither automatic exemptions for SSM emissions nor directors' discretion provisions that allow states to approve such exemptions are acceptable in SIPs. Further, EPA clarified that this policy has long been EPA's interpretation of the CAA through many past SSM policies. "The EPA's longstanding position, at least since issuance of the 1982 SSM Guidance, is that SIP provisions providing an exemption from emission limitations for emissions during SSM events are prohibited by the CAA." 80 FR at 33904. EPA stated that this is primarily due to the mandate that SIPs provide for attainment and maintenance of the health based NAAQS. "In support of its interpretation of the CAA that exemptions for periods of SSM are not acceptable in SIPs, the EPA has long relied on its view that NAAQS are health-based standards and that exemptions undermine the ability of SIPs to attain and maintain the NAAQS, to protect [Prevention of Significant Deterioration] PSD increments, to improve visibility and to meet other CAA requirements." 80 FR at 33905.

Region 4 includes a detailed analysis of why such exemptions should be allowed in SIPs, relying on arguments distinguishing section 110 and 112 of the CAA in an attempt to distinguish SSM exemptions in SIPs from those in national regulations to justify SSM exemptions in SIPs notwithstanding the *Sierra Club* decision. However, EPA specifically addressed similar comments in the SIP call and explained that although EPA had allowed SSM exemptions for national regulations leading to the *Sierra Club* decision, EPA had for many years not allowed SSM exemptions in SIPs because the CAA Section 110 SIP program focuses on state plans intended to meet the health-based NAAQS. Id. Region 4 is restating arguments for an alternative interpretation that were explicitly discussed and rejected in the final 2015 SIP call without acknowledging that these very arguments were already dismissed at the national level. Further, it is not only the *Sierra Club* case that supported the requirement that emissions limitations apply continuously. In the final SIP call, EPA noted several other example cases where courts upheld EPA action finding that SSM exemptions in SIPS are inappropriate. "Court decisions confirm that this requirement for continuous compliance prohibits exemptions for excess emissions during SSM events."[7] 80 FR at 33889.

Region 4 further argues that SSM exemptions should be allowed because SIPs include other provisions that require use of the best emissions control practices, adequate maintenance, and limitations on duration of SSM emissions, as well as general obligations to prevent violations of the NAAQS. Region 4 now argues that prerequisites for eligibility to use SSM exemptions requiring compliance with provisions such as these are sufficient to support such exemptions while maintaining NAAQS compliance. However, and once again, EPA addressed these exact same issues in the 2015 SIP call and specifically rejected them. 80 FR at 33903 - 4. EPA found that such provisions in a SIP were not sufficient to render an emissions limitation continuously applicable. "Furthermore, the fact that a SIP provision includes prerequisites to qualifying for an SSM exemption does not mean those prerequisites are themselves an "alternative emission limitation" applicable during SSM events. The text and context of the SIP provisions at issue in this SIP call action make clear that the conditions under which sources qualify for an SSM exemption are not themselves components of an overarching emission limitation—i.e., a requirement that limits emissions of air pollutants from the affected source on a continuous basis." Id.

If EPA wishes to revise its SSM policy, which it quite evidently does, it must do so at the national level and address the reasons for changing policy in light of all the prior justifications for existing policy. Region 4

[7] "See, e.g., Sierra Club v. Johnson, 551 F.3d 1019, 1021 (D.C. Cir. 2008) (interpreting the definition of emission limitation in section 302(k) and section 112); Mich. Dep't of Envtl. Quality v. Browner, 230 F.3d 181 (6th Cir. 2000) (upholding disapproval of SIP provisions because they contained exemptions applicable to SSM events); US Magnesium, LLC v. EPA, 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's issuance of a SIP call to a state to correct SSM-related deficiencies)."

cannot change the national policy without even addressing the detailed explanations for the existing policy that EPA clearly laid out in its extensive response to comments in the final SIP call.

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 North Carolina 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 applicable agency regulation.

Further, if Region 4 finalizes its proposal to undo the North Carolina SIP call and approve the North Carolina SIP, it follows that the new Regional policy would apply throughout the Region, including the other states within Region 4 that were included in the 2015 SIP call. And once Region 4 has adopted a new policy interpreting nationally applicable regulations and applying it to states within the region, then presumably other regions would feel that they could also pursue regional actions approving SIPs that contain SSM provisions prohibited by the 2015 national SSM policy. And because Region 4 has set such a low bar for providing a reasoned basis for approving an exception and offered no unique basis for applying the policy to North Carolina, there is no principled reason, consistent with national consistency and equity, why the other nine Regions, covering all of the remaining states covered by the SIP call, should not follow the course chartered by Region 4, 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 Fourth Circuit, and avoid the D.C. Circuit. Under the Region's approach, a challenge to similar purportedly "Regional" actions taken in other Region 4 states would be reviewed in the Fifth, Sixth and Eleventh Circuits. And then as other Regions follow Region 4's lead, other circuits that include Regions covered by the national SIP call would review the SIP approvals, leaving out potentially only the Second Circuit and the one circuit the CAA intends to review national decisions, the D.C. Circuit. The straightforward and appropriate way to reverse the SIP call and accompanying SSM Guidance is with a national rulemaking that accomplishes these goals in a single national, consistent action, rather than the piecemeal approach the Region 4 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 satisfactorily explain, how the North Carolina SIP, including the SSM exemption provisions, will protect public health from air quality that violates the NAAQS.
The proposal does not contain sufficient discussion of how the specific SSM exemption provisions in the North Carolina SIP meet the legal requirement that a SIP ensures protection of the NAAQS or increment or any other substantive requirement. See CAA 110(a)(2). Although the proposal cites other limitations on emissions from the subject sources such as a duty to employ best practices, to minimize emissions, to properly maintain equipment, and to prevent violations of the NAAQS, it contains no technical analysis of the amount of emissions that could be caused by use of the SSM exemption and how the NAAQS could still be maintained even accounting for such emissions, nor could it, as such emissions are essentially unbounded. EPA's explanation is conclusory, containing no analysis of the types of upset situations, their

anticipated emissions, and how those emissions can threaten the NAAQS. A thorough search of the docket finds no analysis from either EPA or North Carolina. Just because a SIP says it doesn't allow violations of the NAAQS doesn't mean it actually doesn't. Region 4 should have done an analysis specific to sources in North Carolina, evaluating the potential impacts SSM exemptions would have on air quality throughout the state, and demonstrating that the NAAQS would continue to be maintained in all areas of North Carolina notwithstanding the availability of such exemptions. Region 4 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 to exemptions for violations during startup, shutdown, and malfunctions may seem like the ultimate bureaucratic exercise, the fact is that startup, shutdown, and malfunction events can release hundreds or even thousands of tons of air pollutants into neighborhoods. If state rules excuse these types of situations, which can happen with frequency in some industries and with some companies, the public health protections promised by the CAA 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).[8] 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 ten 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. For further detail, see Comment from Nikolaos Zirogiannis, et al. https://www.regulations.gov/document?D=EPA-R06-OAR-2018-0770-0012. It does not appear that either Region 4 or the state of North Carolina has done this kind of analysis—or any in fact—to evaluate the extent of excess emissions that could be authorized by approving this SIP revision. Emissions from upsets can include criteria pollutants such as SO2 and PM and hazardous air pollutants such as benzene. 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.

And if the proposal is unpersuasive, Region 4's request for concurrence is even more so. It is worth quoting the full substance of Region 4's explanation:

> Pursuant to 40 CFR § 56.5(b), Region 4 is requesting concurrence from the Office of Air Quality Planning and Standards (OAQPS) to undertake an action that will rely on an interpretation of the Clean Air Act (CAA) that is inconsistent with Agency policy as articulated in the State Implementation Plan (SIP) call to North Carolina (North Carolina SIP call), which was included as part of the final rule entitled "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of the EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction." 80 FR 33839, published on June 12, 2015. In the process of preparing for this action, Region 4 has reviewed the specific provisions of North Carolina's SIP, including the provisions subject to the SIP call, and believes that it would be appropriate to deviate from the EPA's national interpretation of the CAA, as outlined in the preamble to the June 12, 2015, rulemaking, that provisions providing automatic exemptions and exemptions at the discretion of the state agency during periods of unit startup, shutdown and malfunction (SSM) for emissions exceeding otherwise applicable SIP limitations are not consistent with CAA requirements.[9]

[8] https://ssrn.com/abstract=3382541 or http://dx.doi.org/10.2139/ssrn.3382541
[9] https://www.regulations.gov/document?D=EPA-R04-OAR-2019-0303-0011, p. 1.

This brief request does not contain any explanation of the basis for an alternative interpretation in North Carolina, and the docket does not appear to contain any additional documentation.

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

Region 4's proposal implies that the fact that this is a Section 110 rather than Section 112 situation provides the basis to take an alternative interpretation in Region 4. However, the alternative interpretation on its face could apply to any SIP submission with an SSM exemption provision, including the other 35 states covered by the SIP call. And in fact, as noted, Region 6 issued a similar proposal based on an alternative interpretation of the SSM SIP call just weeks before the Region 4 proposal, highlighting the danger of allowing an alternative interpretation of statutory requirements in individual Regions. 84 FR 17986 (April 29, 2019). Through this Region 4 proposal, EPA has opened the door further 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 EPA's nationally applicable SSM SIP call and *Sierra*; and would put residents of North Carolina 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.