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May 13, 2013

Via E-mail to a-and-r-docket@epa.gov and
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RE: ***State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule; Docket ID No. EPA-HQ-OAR-2012-0322***

Dear Ms. McCarthy:

Alabama Power Company respectfully submits for your consideration the attached comments regarding EPA's proposed rule, *State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction* (also referred to as "SSM SIP call proposal," "SSM proposal," or "proposed rule"). 78 Fed. Reg. 12,460 (Feb. 22, 2013). Alabama Power is a leading U.S. producer of clean, safe, reliable and affordable electricity from nuclear, coal, natural gas, and hydroelectric generating facilities with a total nameplate capacity of 12,222 megawatts serving over 1.4 million customers in Alabama.

The attached comments articulate Alabama Power's concerns regarding EPA's proposed rule. EPA is proposing to overturn regulations and policy that have been in place for nearly four decades in the EPA-approved State Implementation Plan of Alabama by relying on a changed legal interpretation of language in the Clean Air Act. In the proposed rule, EPA explicitly declines to demonstrate that the rules in question have a negative impact on the NAAQS or are otherwise interfering with CAA requirements. The proposal also ignores the far-reaching consequences of eliminating these established provisions, including the overwhelming administrative burden on affected States and potentially hundreds of millions of dollars in costs for affected sources, which, as our comments show, will have little to no impact on the ability of the approved SIPs to attain or maintain the NAAQS.

As detailed in the attached comments, Alabama Power believes that EPA has failed to demonstrate that the SSM SIP call is necessary to protect the NAAQS and urges EPA to withdraw its proposal. If EPA believes that the SIP call is warranted, it should conduct the appropriate analyses to demonstrate that the SSM provisions in question are interfering with the ability of SIPs to attain and maintain the NAAQS or are otherwise interfering with CAA requirements. If, after careful analysis, EPA is able to demonstrate that a SIP call is indeed necessary, EPA must develop the appropriate technical analyses and tools to support the States' subsequent efforts and allow the States significant flexibility in determining how best to revise their SSM provisions.

Thank you for the opportunity to comment on this proposed rule. Please feel free to contact me should you have any questions about Alabama Power's comments.

Sincerely,

Matthew W. Bowden
Vice President, Environmental Affairs

Attachments

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

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I. EXECUTIVE SUMMARY

Alabama Power Company ("Alabama Power") submits these comments on the U.S. Environmental Protection Agency's ("EPA" or "Agency") proposed rule, "*State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction*." 78 Fed. Reg. 12,460 (Feb. 22, 2013) ("proposed rule"). EPA proposes to call the State Implementation Plans ("SIPs") of thirty-six States and dictate revisions to certain provisions regarding excess emissions during startup, shutdown and malfunction ("SSM") events. EPA has taken this action in response to a petition for rulemaking filed by Sierra Club asking the Agency to change its longstanding SSM policy and find that the SIPs of over two thirds of the States in the U.S. are suddenly "substantially inadequate" to meet the requirements of the Clean Air Act ("CAA"), and the States must act immediately to delete those provisions. EPA proposes to unilaterally invalidate the longstanding law of thirty-six States that EPA has previously approved and impose upon stationary sources within those States new standards with which they are in some cases technically incapable of complying. EPA's proposed rule not only reverses what have been the regulations and policy of the affected States for nearly four decades—it also ignores the principles of federalism Congress quite intentionally wrote into the CAA.

Specifically, EPA proposes to call two provisions of the Alabama SIP that allow for exclusions from otherwise applicable numeric emission limitations during startup, shutdown, or load change, Ala. Admin. Code r. 335-3-14-.03(1)(h)(1), and during emergencies, Ala. Admin. Code r. 335-3-14-.03(1)(h)(2). EPA first approved the startup, shutdown, load change provision over 40 years ago, and re-approved in 1993 this provision as currently written and the emergency provision. Without citing any supporting data or evidence, EPA proposes to find that these

provisions conflict with EPA's new interpretation of the meaning of "emission limitation," and are therefore "inconsistent with the fundamental requirements of the CAA." 78 Fed. Reg. at 12,502. Furthermore, EPA asserts that the provisions "*may* undermine the SIP emission limitations, and the emissions reductions they are intended to achieve" without a scrap of data or analysis, including any data about or analysis of air quality in Alabama. *Id.* (emphasis added). For the following reasons, EPA's proposed rule is arbitrary and capricious and contrary to law as applied to Alabama's SSM provisions and should not be finalized as proposed.

To justify its proposed SIP call, EPA relies on its changed legal interpretation of the meaning of "continuous" in the context of compliance with emission limitations. EPA seems to suggest that a numeric standard which does not apply during SSM periods violates the CAA's requirement of "continuous compliance," but, in fact, CAA section 302(k) defines "emission limitation" broadly to include standards related to the operation or maintenance of a source, or any design, equipment, work practice or operational standard and does not preclude exclusions from those standards for periods of operation during which they were never intended to apply. *See* 42 U.S.C. § 7602(k). EPA's changed interpretation appears to focus on whether the inclusion of SSM provisions may affect only one of many ways to measure compliance—a numerical emissions limitation. Section 110(a)(2)(A), however, provides broad discretion to the States, stating that SIPs must include "enforceable emission limitations *and other control measures, means, or techniques* . . . as may be necessary or appropriate to meet the applicable requirements of [the CAA]." 42 U.S.C. § 7410(a)(2)(A) (emphasis added). EPA claims that EPA and citizen enforcement is hindered by SSM provisions that have been incorporated into State SIPs for decades, yet SIPs have been and continue to be actively enforced, particularly in citizen suits. Furthermore, EPA has consistently interpreted the CAA to allow State SSM

provisions, and EPA itself has adopted SSM provisions in its New Source Performance Standards ("NSPS") and other federal standards. EPA's unilateral decision to dictate that the affected States must revise their SIPs based on a changed legal interpretation ignores the federal–State partnership Congress created under the CAA, whereby States have the authority to adopt the mix of requirements necessary to ensure attainment and maintenance of the National Ambient Air Quality Standards ("NAAQS") within their own borders.

EPA suggests that its changed legal interpretation of CAA section 302(k) is sufficient to justify the proposed SIP call, and yet it also claims that SSM provisions undermine the ability of SIPs to attain and maintain the NAAQS. The SSM provisions do not threaten the NAAQS, and EPA fails to provide any evidence to the contrary. EPA explicitly refuses to demonstrate with any technical analysis or facts that SIPs with SSM provisions are "substantially inadequate" to attain or maintain the NAAQS, the CAA's priority and purpose of every SIP. In fact, EPA explicitly refuses to demonstrate that these exclusions have *any* significant impact on air quality at all, purporting instead to justify calling the SIPs of thirty-six States for "inconsistency" with EPA's changed legal interpretation. EPA's omission is most likely due to the fact that the overwhelming consensus of available data demonstrates that emissions of CAA pollutants are decreasing and air quality is improving across the country, including in Alabama.

EPA's proposed rule would impose significant costs on existing sources without any appreciable air quality benefit. EPA effectively ignores the widely understood technical reality that some emissions during SSM events are often unavoidable, and the Agency fails to account for the measures already employed by sources to minimize emissions during SSM periods. Because of this technical reality, sources will be subjected continuously to enforcement litigation, civil penalties, and demands for injunctive relief over infrequent but unavoidable

periods of elevated emissions that heretofore have been recognized and accepted as necessary for the operation of well-controlled sources and widely regarded as having no significant impact on air quality but that EPA now proposes to consider "violations." EPA's proposed rule would also impose significant administrative burdens and costs on the States without any appreciable air quality benefits by requiring them to engage in time-consuming and costly undertakings like crafting alternative emission limits or work practice standards for SSM periods, developing category- and/or source-specific rules to account for the operational variability among affected industries, and modifying all affected operating permits. States have limited resources and staff available to develop, implement, and administer the sweeping changes EPA has proposed.

EPA has provided a mere eighty days for the affected States and the public to comment on a proposed rule that EPA developed over a period of nineteen months, during which it held settlement talks with Sierra Club and provided no information whatsoever to any other stakeholder, nor did it consult anyone other than Sierra Club. Because of EPA's lack of transparency in this rulemaking, the affected States, affected sources, and other interested parties are starting from scratch in attempting to discern EPA's intentions and the rule's possible impacts. The comment period has allowed those parties insufficient time to evaluate the far-reaching impacts of the proposed rule, much less develop ideas for alternative regulations or possible means of compliance. Far from fulfilling the standards of lawful agency decision-making, EPA developed the proposed rule with no transparency, failing to respond to the reasonable FOIA request submitted by Southern Company, Alabama Power's parent company, failing to comply with the clear requirements of several executive orders and a statute, and failing to uphold the principles of cooperative federalism that govern CAA implementation.

For all of these reasons, EPA's proposed SIP call is arbitrary, capricious, and contrary to law. Although Alabama Power opposes the proposed rule and believes that EPA should withdraw it, if EPA nonetheless finalizes the rule, States must be allowed significant flexibility in determining how to revise their SSM provisions within the wide bounds of their statutory authority. Furthermore, if EPA insists upon issuing a final SIP call, EPA should not do so until EPA has meaningfully reviewed the facts associated with its currently unsupported claims and addressed the myriad problems that sudden removal of the SSM provisions will create. EPA must also allow sufficient time for public review and comment on any re-proposal.

Alabama Power also supports the comments filed by Southern Company and the Utility Air Regulatory Group.

II. THE PROPOSED RULE IS ARBITRARY, CAPRICIOUS, AND OTHERWISE CONTRARY TO LAW

A. A Changed Legal Interpretation Does Not Justify a Nationwide SIP Call, Particularly a Legal Interpretation That Is Wrong

EPA's proposed rule is not the adoption or implementation of a federal standard or federal emission limitation, but dictation to the States of the control measures States must use in their SIPs for attaining the NAAQS set by EPA. EPA's proposed rule does not assert any evidence that the States' preferred control measures adversely affect the effectiveness of these SIPs to attain the NAAQS. EPA, in fact, ignores the obvious fact that air quality in the affected States has consistently and significantly improved. With the affected SIP provisions in place for the last 30–40 years, the NAAQS are being attained.

EPA's actions in this rulemaking prompt a fundamental question for the regulated community and the States: What is left of each State's CAA authority to select and implement its own SIP if shifting EPA legal interpretations alone automatically veto a State's SIP authority? The principle of cooperative federalism is at the heart of the CAA and it defines the development

and oversight of SIPs and the respective roles of the federal and State regulators. Here, EPA dictates that thirty-six States eliminate a preferred SIP control measure, one that has been in use for thirty to forty years, based only on a changed legal interpretation and without any consideration for how that federal dictate or the States' preferred control measures affect attainment of the NAAQS. That violates the cooperative federalism that is fundamental to the CAA.

EPA's fundamental justification, however, that "SSM provisions" in SIPs are inconsistent with the CAA is wrong. EPA seems to interpret the words "on a continuous basis" used to define the CAA term "emission limitation" in CAA section 302(k) to mean that the numeric standards included in these thirty-six States' multi-faceted emission limitations must be complied with during every moment of operation or a source is not in "continuous compliance." *See, e.g.*, 78 Fed. Reg. at 12,485 ("Automatic exemptions from otherwise applicable emission limitations thus render those limits less than continuous . . . ."). As shown by the multi-faceted statutory definition of emission limitation, court decisions addressing section 302(k), EPA's past practice and policy, and, most importantly, the affected SIPs themselves, the numeric standards in most emission limitations were intended and designed to apply during periods of normal operation and not during periods of SSM. The other elements and facets of typical emission limitations are designed and intended to control source emissions during non-normal operating periods like SSM. It is wrong to deny the obvious purpose and intent of these multi-faceted emission limitations and to pretend that such sources are uncontrolled unless the numeric element designed to control emissions during normal operations is operative. EPA's changed legal interpretation of how sections 302(k) and 110(a)(2) should be read together is not correct, but,

more importantly, does not suddenly render any SIP with SSM provisions "substantially inadequate."

1. SSM provisions are not inconsistent with the definition of or requirements for "emission limitations"

Section 110(a)(2) of the CAA specifies the necessary elements of a SIP, stating that each such plan shall:

(A) "include enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet *the applicable requirements of this chapter*;"

(B) provide for appropriate ambient air quality monitoring devices and systems;

(C) provide for an appropriate permitting program;

(D) include adequate provisions regarding interstate transport of pollution;

(E) provide adequate assurance of necessary authority for State and local implementation of the plan;

(F) provide for appropriate monitoring devices and systems at stationary sources;

(G) provide adequate emergency powers for State and local authorities;

(H) provide authority to revise the SIP as needed;

(I) provide authority to implement the nonattainment program requirements;

(J) include authority to consult and public warning requirements;

(K) provide adequate air quality modeling capability;

(L) authorize the imposition of CAA permit fees on stationary sources;

(M) provide for consultation with political subdivisions affected by the SIP.

See 42 U.S.C. § 7410(a)(2).

In the proposed rule, EPA looks past the thirteen substantive requirements for SIPs and selects the six catch-all words of the end of subparagraph (A), "the applicable requirements of this chapter" as its statutory authority for bureaucratically transporting its changed legal interpretation of section 302(k) into the list and making it the stand-alone basis for declaring a SIP "substantially inadequate" without even considering any of the other requirements. This ignores the fact that with this statutory phrase "to meet the applicable requirements of this chapter" Congress intended to describe its performance standard for SIPs, not create an unbounded universe of opportunities for EPA to prioritize its mechanical preferences over Congress's thirteen substantive requirements. EPA's purposeful parsing of section 110(a)(2)(A) eliminates the plain meaning of Congress's words that the performance goal Congress set for SIPs could be met by any combination of "emission limitations and other control measures, means, or techniques" a State may deem necessary or appropriate. 42 U.S.C. § 7410(a)(2)(A) (emphasis added). EPA wants to read the section as allowing EPA to dictate that SIPs will include certain emission limitations that EPA deems necessary or appropriate, with no discretion for States and no meaningful function for other control measures, means, or techniques. That is directly contrary to the intent of Congress as declared by the U.S. Supreme Court.

The Supreme Court has found that "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt *whatever mix* of emission limitations it deems best suited to its particular situation." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) (emphasis added). In the Court's view, EPA's focus in overseeing SIPs should be on whether those plans are attaining the NAAQS. Here, EPA made no attempt to evaluate that question or any of the other thirteen substantive requirements referenced above, choosing instead to "call" thirty-six SIPs for

noncompliance with EPA's changed legal interpretation of the definition of section 302(k). The proposed rule turns section 110(a)(2) on its head and completely ignores the Court's expectation for the system of cooperative federalism that defines the CAA SIP development and oversight process.

Section 302(k) provides the definition of "emission limitation" and "emission standard":

> The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.

42 U.S.C. § 7602(k) (emphasis added).

Most States, and all of the States in which Southern Company operates, utilize a mix of these different types of "emission limitations" to implement appropriate air pollution control requirements within State borders. For normal operations, States often include numeric emission limitations in that mix. For other periods of operation, including SSM events during which operations are generally transient and less efficient, the States have chosen to rely on non-numeric emission limitations which include duties to minimize emissions, operate in a manner consistent with good air pollution control practices, take immediate corrective action, and monitor and report on the situation. These non-numeric requirements are no less an "emission limitation" than the numeric requirements that apply during normal operations.

EPA's proposal seems to require that all numeric emission limitations apply at all times and State SIPs may not rely on non-numeric emission limitations unless numeric limitations are also applicable. That legal interpretation violates the plain meaning of section 302(k) by seemingly acting as if the words "on a continuous basis" (i) apply *only* to whatever numeric standard an "emission limitation" might include rather than the entire "emission limitation,"

which includes "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, *and any* design, equipment, *work practice or operational standard* promulgated under this chapter," (emphasis added), and (ii) mean that once an emission limitation technique has been selected, that technique must apply at all times regardless of the technical realities limiting application of that technique. The plain language of the section 302(k) requirement that an "emission limitation" control emissions "on a continuous basis" is just as explicitly satisfied when *any* statutorily recognized component of a section 302(k) "emission limitation," whether numeric in character or not, controls emissions from the source during a specified period of time. EPA's ostensible interpretation that the only "emission limitation" component that counts for continuous compliance purposes is one with numeric characteristics is completely contrived and contradicts the plain language of section 302(k), and is also unreasonable.[1]

In the proposed rule, EPA has reinterpreted the well-established CAA concept of "continuous" in a manner that does not comport with Congress's intended meaning. In enacting the CAA Amendments of 1977, Congress explained its reasoning behind including "continuous" in the definition of "emission limitation" and "emission standard." The legislative history of the

[1] By proposing to find "substantially inadequate" SIPs that allow exclusions from otherwise applicable numeric emission limits during periods of SSM, EPA appears to assume that a numeric limit must apply at all times and implies that a source is uncontrolled if it does not. Such a source, however, is constantly controlled by a statutory "emission limitation" because SSM emissions are still required to be minimized and the source is still subject to a variety of other control measures, including monitoring, reporting, corrective action obligations, and work practice standards. *See, e.g.*, Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) (Georgia's SSM provision, requiring that "(I) the best operational practices to minimize emissions are adhered to, and (II) all associated air pollution control equipment is operated in a manner consistent with good air pollution control practice for minimizing emissions and (III) the duration of excess emissions is minimized."). In any event, the statute calls for requirements that limit emissions on a "continuous" basis (as opposed to an "intermittent" basis) and not a numeric limit that applies at all times.

amendments shows that Congress wanted to prohibit emission controls that would be used only when weather conditions were not favorable for pollutant dispersion. The House committee report explains:

> By defining the terms "emission limitation," "emission standard," and "standard of performance," the committee has made clear that constant or continuous means of reducing emissions must be used to meet these requirements. By the same token, intermittent or supplemental controls or other temporary, periodic, or limited systems of control would not be permitted as a final means of compliance. These definitions apply to all emission limitations under the act, not just to limitations or standards under sections 110, 111 or 112 of the act.

H.R. Rep. No. 95-294 at 92 (1977). Likewise, the Senate committee report states:

> This bill includes a definition of the phrase "emission limitation" to clarify the committee's view that the only acceptable basic strategy is one based on continuous emission control. Intermittent controls or dispersion techniques are unacceptable as a substitute for continuous control of pollutants under this act. . . . EPA will be expected to review existing State implementation plans and require revision in any that depend upon dispersion techniques rather than continuous controls.

S. Rep. No. 95-127, at 94, 95 (1977). It would be absurd to determine from this legislative history, especially in light of the plain language of section 302(k), that Congress intended to require that every SIP include in every "emission limitation" a numeric standard that would be operative at all times of operation and that the other statutorily recognized components of a section 302(k) "emission limitation" are not relevant.

Relevant court decisions confirm this view of the "continuous compliance" issue. The Sixth Circuit addressed this issue in dismissing a petition filed by Dow Chemical Company seeking review of an EPA SIP disapproval the Agency issued in response to the 1977 Amendments. *Dow Chem. Co. v. U.S. E.P.A.*, 635 F.2d 559 (6th Cir. 1980). In *Dow Chemical*, the court agreed with "EPA's position . . . that the 1977 Amendments to the Clean Air Act adopted by Congress were designed to clarify the 1970 [Act] so as to show that national standards must be met by *constant control* of emissions." *Id*. at 561 (emphasis added). As the

court explained, the concept of an "emission limitation" being required "on a continuous basis" is consistent with the requirement under CAA section 123, 42 U.S.C. § 7423, that "the degree of emission limitation required for control of any air pollutant . . . shall not be affected in any manner by . . . any dispersion technique," which is defined to include "any intermittent or supplemental control of air pollutants varying with atmospheric conditions." *See id*. (quoting 42 U.S.C. § 7423(a), (b)) (emphasis added). In *Dow Chemical*, neither EPA nor the court interpreted Congress's 1977 definition of "emission limitation" as requiring constant application of a numeric limitation.

Two years later in *Kennecott Corp. v. E.P.A.*, the U.S. Court of Appeals for the D.C. Circuit also found that, "[i]n the 1977 amendments to the Act, Congress . . . provid[ed] that only *constant control technology* could be relied upon to meet ambient air quality standards." *Kennecott Corp. v. E.P.A.*, 684 F.2d 1007, 1009 (D.C. Cir. 1982) (emphasis added). At issue in that case was the scope of the limited exception under section 119 which allowed certain nonferrous smelting facilities to utilize intermittent controls in certain circumstances. *Id*. However, the court's analysis of the 1977 Amendments demonstrates that the Congress' concern was over requiring the use of emission control technology that provided for continuous emission reduction, not meeting specific numeric criteria on a constant basis.

The Ninth Circuit's analysis of the 1977 Amendments in *Kamp v. Hernandez*, 752 F.2d 1444 (9th Cir. 1985), is consistent with that of both the Sixth and D.C. Circuits. In *Kamp*, the U.S. Court of Appeals for the Ninth Circuit found that EPA's definition of "continuous" in the context of "emission limitation" was reasonable:

> Under the Agency's definition, an implementation plan operates continuously so long as some limitation on emissions, although not necessarily the same limitation, is always imposed on the SO_2 source. Under that definition, the multi-

> point plan operates continuously, since the SO_2 source is always subject to the specified emission profile.
>
> We cannot say that EPA's definition of "continuous" is unreasonable. In the first place, the requirement of regulation on a continuous basis *does not necessarily imply that the source always be subject to precisely the same limitation*. Equally important, EPA's definition is supported by the legislative history. Congress's primary purpose behind requiring regulation on a continuous basis was to exclude intermittent control techniques from the definition of emission limitations.

Kamp v. Hernandez, 752 F.2d 1444, 1452–53 (9th Cir. 1985) (emphasis added) (citing the House committee report, H.R. Rep. No. 294 (1977)).

EPA's new interpretation of a section 302(k) "emission limitation" is inconsistent with the common understanding of the 1977 Amendments, including its own. EPA articulated its understanding that multiple components of an emission limitation may apply to satisfy the "continuous" requirement of section 302(k) in its own guidance regarding its excess emissions policy, which described "continuous compliance" as meaning "without interruption, all applicable emission limitations and other control requirements [the mix described in 110(a)(2)(A)], unless such limitations specifically provide otherwise." Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air, Noise, & Radiation, EPA, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (Sept. 28, 1982).

In EPA's 2008 approval of the Alabama opacity rule, which was recently upheld by the U.S. Court of Appeals for the Eleventh Circuit, *see Ala. Envtl. Council v. EPA*, 711 F.3d 1277, 1294–95 (11th Cir. 2013), EPA fielded comments alleging a section 302(k) violation. EPA responded that continuous compliance pursuant to section 302(k) does not require compliance with the same emission limitation at all times:

> Comment 1: Commenters objected to EPA's approval of Paragraphs (3), (4) and (5) of AAC rule 335-3-4-.01, stating that doing so would be approving an "automatic exemption" from certain emission limitations that must function on a "continuous basis" and would result in a violation of Section 302(k) of the CAA and 40 CFR 51.100(z).

> Response: The revisions to ACC rule 335-3-4-.01 amend the requirements for certain units that operate COMS and are, therefore, revisions to the rule itself. A source that meets the requirements of the revised standard will be in continuous compliance with the standard. *The provisions of the CAA and its implementing regulations cited by the commenters do not require that all SIP measures require compliance with the same numerical emission limitation at all times*. *See Kamp v. Hernandez*, 752 F.2d 1444 (9th Cir.), modified, 778 F.2d 527 (9th Cir. 1985). EPA believes the rule, as amended, does not violate Section 302(k) of the CAA and 40 CFR 51.100(z).

Approval and Promulgation of Implementation Plans: Alabama: Approval of Revisions to the Visible Emissions Rule, 73 Fed. Reg. 60,957, 60,960 (Oct. 15, 2008) (emphasis added). Thus EPA's own interpretation of what constitutes "continuous compliance" has—until now—advised that as long as a source complies with an "emission limitation" as it is written, that source is in "continuous compliance" with that emission limitation.

EPA misconstrues case law to support its changed interpretation that the section 302(k) requirement that an "emission limitation" apply on a continuous basis prohibits SSM provisions. *Id.* EPA relies on *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), a case that dealt with technology-based standards for hazardous air pollutants ("HAPs"). The U.S. Court of Appeals for the D.C. Circuit rejected reliance upon a generalized duty alone as sufficient to provide continuous compliance with the underlying pollution control requirements of section 112. *Id.* at 1027–28. However, the court's decision was based on the combination of sections 112 and 302(k). The court found that, taken together with section 302(k), section 112 required a section 112-compliant standard—i.e., one based on a specific level of stringency—to apply continuously, and the general duty clause at issue was not section 112-compliant (section 112(h) provides for work practice standards, but only in certain situations, and EPA did not invoke any

of them). *Id.*[2] Moreover, the court in *Sierra Club* cited *Kamp* for the proposition that Congress's primary purpose behind requiring regulation on a continuous basis was to exclude dispersion-based control technologies from the definition of emission limitations. *Id.* at 1027. Consistent with *Kamp*, the court also describes the "continuous compliance" requirement in the context of section 112 as the requirement that "some" standard apply continuously as opposed to one particular standard applying continuously. *Id.* at 1028. In other words, the D.C. Circuit found that section 302(k) required that an "emission limitation" crafted to satisfy the specific air quality requirements of section 112 must continuously apply the level of control stringency specified in section 112. The specifics of section 112 drove the outcome, not the definition of "emission limitation."

Here, the underlying air quality/pollution control requirement for SIPs is to attain the NAAQS. No specific level of stringency comparable to section 112 is required, and, in fact, Congress gave States broad discretion in the design of their plans, including the stringency of the various emission limitations that comprise each plan. The principal and supreme mandate, as recognized by the U.S. Supreme Court, is that SIPs attain and maintain the NAAQS. Certainly a SIP provision that controls emissions during periods of SSM through various work practices does not violate the underlying requirement for SIPs. The *Sierra Club* court was focused solely on section 112, and held that reliance upon a general duty provision alone would violate the underlying section 112 requirement. Applied properly, the analysis from *Sierra Club* would instruct EPA to examine the underlying air quality/pollution control requirement to determine

[2] In the cooperative-federalism context, the standard of flexibility that Congress gave the States with respect to selecting the elements of their SIPs is not necessarily the same standard Congress set to govern EPA's responsibility to establish the NAAQS or section 112 standards.

whether SSM provisions violate the section 302(k) definition of emission limitation in the context of SIPs. In this case, the answer is "no."

Finally, beyond creating an erroneous interpretation of section 302(k), EPA also compounds the error by using that interpretation to strip from section 110(a)(2)(A) the flexibility that Congress gave States to develop SIPs that "meet the applicable requirements of this chapter." EPA's erroneous interpretation of "emission limitation" does not itself change the plain meaning of section 110(a)(2)(A) that SIPs may use "emission limitations and other control measures means, or techniques" to fulfill CAA requirements. 42 U.S.C. § 7410(a)(2)(A) (emphasis added). Obviously, an emission limitation is one type of control measure and, under section 110(a)(2)(A), States may use a wide variety of control measures to satisfy Congress's CAA requirements for SIPs.[3] But EPA has not only misinterpreted the definition of "emission limitation" but also ignored the clear fact that SIPs may use both emission limitations (however EPA defines the term) and other control measures as the States deem necessary or appropriate to meet CAA requirements. EPA's statutory interpretation errors are compound and compounding.

2. Alabama's SSM Provisions Comply with CAA Sections 110(a)(2)(A) and 302(k)

The Alabama SIP's "emergency provision" excludes, with a number of conditions, exceedances of numeric emission limitations caused by "emergencies":

[3] EPA has recognized that "[t]he fact that Congress used the undefined term 'measure' different in different provisions of the Act indicates that the term is susceptible to more than one interpretation." Memorandum from Mary D. Nichols, Assistant Adm'r for Air & Radiation, *Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment* (Oct. 14, 1994). Although EPA claimed in that document to have the discretion to interpret the term "measure" in a reasonable manner in the context of section 175A (in order to exempt States seeking redesignation from the need to establish a nonattainment NSR program), that same discretion must be afforded to States in the context of section 110(a)(2)(A), which clearly designates the States as the authors of their SIPs.

(h) Exceptions to violations of emissions limits.

2. Emergency provision.

(i) An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the facility, including acts of God, which situation require immediate corrective action to restore normal operation, and that causes the facility to exceed a technology based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(ii) Exceedances of emission limitations during emergencies (as defined above) at a facility may be exempted as being violations provided that:

(I) the permittee can identify the cause(s) of the emergency;
(II) the permitted facility was at the time being properly operated;
(III) during the period of the emergency, the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements of the permit;
(IV) the permittee submitted notice of the emergency to the Department within 2 working days of the time when the emissions limitations were exceeded due to the emergency; and
(V) the permittee immediately documented the emergency exceedance in an "Emergency Log", which shall be maintained for 5 years in a form suitable for inspection upon request by a representative of the Department.

(iii) The Director shall be the sole determiner of whether an emergency has occurred.

(iv) This provision is in addition to any emergency or upset provision contained in any applicable requirement.

Ala. Admin. Code r. 335-3-14-.03(1)(h)(2). The SIP also provides a discretionary exception for excess emissions that cannot reasonably be avoided, such as during periods of startup, shutdown, and load change:

(h) Exceptions to violations of emissions limits.

1. The Director may, in the Air Permit, exempt on a case by case basis any exceedances of emission limits which cannot reasonably be avoided, such as during periods of start-up, shut-down or load change.

Ala. Admin. Code r. 335-3-14-.03(1)(h)(1).

These provisions do not allow sources to operate without application of appropriate "emission limitations" within the meaning of CAA section 302(k). An "emission limitation" as defined by the plain language of section 302(k) is applicable at all times under the Alabama SIP, even if the numeric "emission limitation" is not. Non-numeric "emission limitations," such as obligations to minimize excess emissions, maintain equipment properly, take immediate corrective action, and monitor and report the circumstances of every period of excess emissions, are applicable, enforceable, and enforced during all periods of operation. Notably, these exclusions only apply if they are written into the source's Title V Operating Permit, and the permit is subject to review and comment by EPA and the public. The permittee is required to take all reasonable actions to minimize the magnitude and duration of emissions during SSM periods. In addition, deviations from permit requirements, including those attributable to upset conditions, must be reported to ADEM within forty-eight hours or two working days of such deviations. Any such report must include the probable cause of the deviation(s) and any corrective actions or preventive measures that were taken. Thus, Alabama's SIP package of controls, with the SSM provisions included, undeniably qualifies as a section 302(k) "emission limitation" and, taken together, undeniably applies to limit emissions "on a continuous basis." The implication of EPA's proposed rule that Alabama's SIP leaves sources uncontrolled during periods of SSM is plainly wrong. EPA might *prefer* that Alabama apply a numeric emission

limitation during all periods of operation, but EPA's argument that section 302(k) *requires* that outcome ignores the plain English meaning of the words in the statute.

Emissions from Alabama Power's sources are monitored at all times, including during periods of SSM, and ADEM receives and reviews that monitoring data regularly. Further, ADEM reviews periodic compliance reports submitted by Alabama Power and acknowledges receipt of each report. When a report indicates that periods of excess emissions have increased, ADEM takes action by contacting the source owner/operator, sending a warning letter, or issuing a notice of violation ("NOV"). Sources are not permitted to claim SSM exclusions without regulatory oversight and they must demonstrate compliance with all applicable non-numeric emission limitations.

3. SSM provisions are not inconsistent with the enforcement provisions—sections 113 (civil enforcement by EPA) and 304 of the Act (citizen suit provision)

One of EPA's arguments for the proposed rule is that EPA and citizens must be free to enforce all "violations" of otherwise applicable numeric standards during SSM events under sections 113 and 304. EPA's argument fails for two reasons. First, and quite obviously, the periods of emissions in question are completely in compliance with all CAA requirements at this time and will become "violations" only if EPA succeeds in changing the rules. Assuming the outcome and legality of EPA's proposal as the basis of an argument for the proposal itself is the kind of circular logic that dominates the proposed rule. Second, despite EPA's claim, the facts show that SSM provisions do not preclude or hinder enforcement of any CAA requirements.

First, EPA implies that SIP SSM provisions hinder CAA enforcement in some general sense. Specifically, EPA claims that the both Ala. Admin. Code Rules 335-3-14-.03(1)(h)(1) and 335-3-14-.03(1)(h)(2) are "unbounded director's discretion provisions" and that "the exercise of this discretion could preclude enforcement by the EPA or the public . . . ." 78 Fed. Reg. at

12,502. However, in some cases, the litigation brought by citizen groups has resulted in settlements that included injunctive relief and supplemental environmental projects ("SEPs") worth tens of millions, if not hundreds of millions, of dollars. In other cases, companies were able to show that the alleged violations were actually in compliance with the permit requirements. Such results, where the outcome is case-specific and is not entirely one-sided, are to be expected. EPA's position in this proposed rulemaking implies that they believe the system is only working if citizen groups are successful 100% of the time in litigation, even if the litigation is unfounded. Provided below is a list of recent litigation, including an Alabama case, where citizen groups or agencies have attempted to bring enforcement actions addressing opacity exceedances.[4] The sheer number of cases demonstrates that the existing regulations provide ample opportunity for enforcement.

- *Sierra Club v. Tenn. Valley Auth.*, No. 02-02279, 2004 U.S. Dist. LEXIS 28080 (N.D. Ala. Sept. 14, 2004), *affirmed in part and reserved in part by and remanded by* 430 F.3d 1337 (N.D. Ala. 2005), *summary judgment granted by and judgment entered by* 2007 U.S. Dist. LEXIS 63749 (N.D. Ala. Aug. 27, 2007), *findings of fact and conclusions of law at and injunction denied by and dismissed by* 592 F. Supp. 2d 1357 (N.D. Ala. 2009) (alleging opacity violations from 5 coal-fired units),

- *Sierra Club v. Ga. Power*, 365 F. Supp. 2d 1297 (N.D. Ga. 2004), *reversed and remanded by* 443 F.3d 1346 (11th Cir. 2006), *summary judgment granted for Defendant in* No. 02-00151, 2007 U.S. Dist. LEXIS 100219 (N.D. Ga. Jan. 11, 2007) (alleging violations of 6 min 40%

[4] Note that opacity limits are also the least likely to present the concerns EPA uses to justify its SIP call because (1) opacity is a condition, not a criteria pollutant, (2) there is no NAAQS for opacity, and (3) most opacity limits were only designed to apply during normal, steady-state operation, with compliance determined by EPA's Method 9 "Visual Observation" test. EPA requires the Method 9 test to be performed during normal operations, not startup or shutdown. Opacity exceedances are now more likely to be identified during SSM events than when the standards were developed, even though those standards were never meant to apply during those events, due to the prevalence of Continuous Opacity Monitoring Systems ("COMS"). Nevertheless, the vast majority of these cases resulted in settlements that involved civil penalties and the installation of additional pollution control equipment (even equipment that was not necessarily related to the opacity claims), confirming that the SSM provisions EPA would eliminate are by no means a bar to meaningful enforcement.

opacity limit at two units with the court ruling in favor of Georgia Power because the company showed it used best operational practices and good air pollution control practices during SSM periods consistent with affirmative defense requirements under the SSM SIP)

- *Sierra Club v. PSC Colo.*, 894 F. Supp 1455 (D. Colo. 1996) (alleging violations of 20% opacity standard between 1990 and 1995 at Units 1 and 2 of the Hayden Station, and resulting in a settlement that included $2 million in civil penalties, $2.25 million for supplemental environmental projects, and requiring the installation of lime spray dryers, low NO_X burners with overfired air, and fabric filters)

- *Sierra Club v. Tri-State Generation & Transmission, PSC of Colo., Salt River Project Agric. Improvement & Power Dist., Pacificorp, & Platte River Power Auth.*, No. 96-02368 (D. Colo. March 19, 2001) (alleging exceedances of the 20% opacity standard between 1991 and middle of 1996 at Units 1 and 2, resulting in a settlement that included $500,000 in civil penalties, $1.5 million in supplemental environmental projects, and requiring the installation of baghouses, scrubber upgrades, and low NO_X burners with supplemental overfired air)

- *United States v. Exelon Mystic LLC*, No. 04-10213 (D. Mass. Jan. 29, 2004) (alleging violations of opacity standards between June 1998 and November 2003, resulting in a settlement that included a civil penalty of $1,000,000 and a requirement to complete five supplemental environmental projects at a cost of nearly $5 million)

- *Grand Canyon Trust v. PSC N.M.*, No. 02-00552 (D.N.M. Mar. 10, 2005) (alleging violations of 20% opacity limit between August 1998 and May 2002 at the San Juan Generating Station, resulting in a settlement that included requirements for the installation of baghouses, demisters, low NO_X combustion controls, scrubber upgrades, and activated carbon injection systems, at a cost of well over $300 million)

- *Illinois v. S. Ill. Power Co.*, Illinois Pollution Control Board, PCB No. 04-201 (Feb. 16, 2006) (alleging violations of 6-minute 20% opacity standard and the SO_2 requirements during 2001, failure to submit required emissions summary reports and failure to maintain and operate one unit in a manner consistent with good air pollution control practices, resulting in a settlement that included a civil penalty of $48,000)

- *Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 175 F. Supp. 2d 1071 (E.D. Tenn. 2001), *reconsideration denied by* No. 00-547, 2002 U.S. Dist. LEXIS 4030 (E.D. Tenn. Jan. 14, 2002) (alleging that the opacity of emissions from the stacks at two plants exceeds 20% on a regular basis),

- *Biodiversity Conservation Alliance, et. al. v. Mountain Cement Co.*, No. 04-00361 (D. Wyo. Nov. 17, 2004) (alleging violations of 20% opacity limit at Kiln #2 since October 1999, violations of PM in excess of 29.30 lb/hr at Kiln #2, and violations of 10% opacity limit applicable to Clinker Cooler #1 and #2 since October 1999, resulting in a settlement that included requirement to install baghouses, landscaping to prevent fugitive dust, and $105,000 award for Plaintiffs' attorney fees and costs)

- *Citizens for Pa.'s Future v. Allegheny Energy Supply Co.*, No. 05-00186 (W.D. Pa. July 13, 2006) (alleging violations since January 1999 from Boilers 1, 2, and 3 of visible emission standards under the Pennsylvania SIP, resulting in a settlement that included requirement to install sulfur trioxide injection systems and repairs to electrostatic precipitators)

- *PennFuture v. FirstEnergy Corp.*, No. 07-01412 (W.D. Penn. Oct. 15, 2007) (alleging violations of Clean Air Act and Pennsylvania Air Pollution Control Act at Bruce Mansfield Plant between 11/22/02 – 3/29/07, resulting in a settlement that included requiring the installation of particulate matter continuous emission monitors)

- *Md. Dept. of Env't v. Constellation Power Source Generation, Inc.*, No. 02-CV-07122918 (Md. Cir. Ct. Sept. 28, 2007) (alleging violations of 10% opacity limit, resulting in a settlement that included a civil penalty of $100,000, a $100,000 supplemental environmental project, along with electrostatic precipitator upgrades, baghouse bag replacement, and installation of on-line coal analyzers)

- *Sierra Club & Wyo. Outdoor Council v. PacifiCorp*, No. 07-cv-042-J (D. Wyo. Feb. 21, 2007) (alleging opacity violations at PacifiCorp's Bridger Plant between 2001 and 2006, resulting in a settlement that included $1,000,000 in civil penalties and agreement to pay Plaintiffs' attorneys fees and litigation costs)

- *Conservation Law Found., Inc. and HealthLink, Inc. v. Dominion Energy New England, Inc.*, No 1:10-cv-11069 (D. Mass. Dec. 21, 2011) (alleging violations of opacity standards from 2005-2010 and violations of opacity monitoring requirements at Salem Harbor Station in Salem Massachusetts, resulting in a settlement that included agreement to remove Units 1 and 2 from service no later than December 31 2011 and to remove Units 3 and 4 from service no later than June 2014, along with $275,000 in supplemental environmental projects and $100,000 in Plaintiffs' litigation costs)[5]

Moreover, EPA Region 4, which oversees the Alabama SIP and Alabama's success in achieving the statutory purposes of that SIP, has a written enforcement policy that acknowledges

[5] Recent enforcement actions brought by Sierra Club and others have increasingly involved very few excess emissions events, suggesting that whereas EPA and/or States may use enforcement discretion, citizen groups do not. For example, on March 12, 2013, Sierra Club filed a citizen suit against Detroit Edison and DTE Energy for alleged excess opacity events that occurred between January 1, 2007, and June 30, 2012, at several of DTE's coal-fired units. Half of the units named in the complaint had, on average, fewer than ten six-minute periods of excess opacity per year during that time, and four of those had fewer than five individual six-minute periods per year on average. Two units named in the complaint had six or fewer six-minute excess opacity events over the entire five and a half year period. Complaint at 14, *Sierra Club v. Detroit Edison Co., DTE Energy Co. & DTE Elec. Co.*, No. 2:13-cv-11103 (E.D. Mich. Mar. 12, 2013).

the likelihood of occasional exceedances of numeric emission limitations and establishes an enforcement protocol that allows up to 5% non-compliance with numeric requirements before issuing a Notice of Violation. To ensure that "sources with monitoring requirements are in continuous compliance with their emissions standards," Region 4 created a Continuous Emission Monitoring ("CEM") Enforcement Plan ("CEP") for state and local "Air Program Directors." Memorandum from Roger O. Pfaff, Chief of Air Compliance Branch, to all State and local Air Program Directors (May 5, 1989) ("Region 4 CEP") (attached hereto as Exhibit 1). The Region 4 CEP was not developed informally or in isolation by Region 4; rather, it is "based on guidance documents and comments from Headquarters, Regional and state/local air agency staff." Region 4 CEP at 1. The plan's enforcement strategy begins with a review of Excess Emission Reports ("EERs") submitted by emission sources. *Id*. at 2. Data from these reports is then compared with "targeting criteria" provided in a table ("Table 1") to aid the reviewer in "determin[ing] . . . the <u>appropriate</u> follow-up action." *Id*. (emphasis added). Where EER data show that both "out-of-compliance" time and "monitor downtime" were less than 2%, the Region 4 CEP expressly recommends an enforcement response of "send[ing] a letter acknowledging receipt of EER and encouraging proper O&M of [the] facility and CEM." *Id*. at Table 1. Similarly, where the source is out of compliance between 2% and 5% of the time, and monitor downtime is also between 2% and 5%, the plan recommends "warn[ing the source] by letter or telephone of [the] unacceptable condition." *Id*. It is not until a source's out-of-compliance time or monitor downtime exceeds 5% that the enforcement plan recommends "request[ing] explanations of the condition, and [a] corrective action plan to prevent [the] condition from reoccuring." *Id*. And it is not until out-of-compliance time or monitor downtime exceeds 5% <u>for two consecutive quarters</u> that the plan recommends additionally "issu[ing an]

NOV" and "requir[ing a] performance (compliance) test for [the] monitored pollutant [and] monitor certification (Performance Specification) tests." *Id*. While the exercise of enforcement discretion is certainly different than the precise purposes of the underlying emission limitation, Region 4's enforcement policy shows that EPA's present finding that SSM provisions may undermine the Alabama SIP is not only lacking in factual or evidentiary basis but is also inconsistent with existing EPA policy on the same issue.

Second, EPA implies that SIP SSM provisions hinder CAA enforcement of non-numeric control measures such as work practice standards or reporting obligations. This is simply not true, as EPA admits in its discussion of Florida's SSM provisions: "EPA believes that these regulations are directly enforceable by the state, the EPA, or members of the public . . . ." 78 Fed. Reg. at 12,503. These other control measures often found in SSM provisions, although non-numeric, are 100% enforceable in the exact same fashion as numeric control measures. The different nature of various control measures allowed under section 110(a)(2)(A) and within the definition of emission limitation may require different types of evidence to prove a violation, but each measure is equally enforceable. The preference of the petitioner for one type of enforcement case over another does not render the control measures in question unenforceable or a hindrance to CAA enforcement.

In its Statutory Memorandum, EPA states that the Eleventh Circuit's decision in the opacity lawsuit filed by Sierra Club against Georgia Power's Plant Wansley[6] "illustrates the real-world concern that arises when a state's existing SIP provision is inconsistent with CAA

[6] *Sierra Club v. Ga. Power Co.*, 443 F.3d 1346 (11th Cir. 2006).

requirements."[7] According to EPA, the Georgia SSM provision "negated" the ability of EPA or citizens to "enforce the correct requirements of the CAA in the event of excess emissions." That is simply not the case.

As the Eleventh Circuit explained, "[t]he SSM Rule . . . simply provides a potential defense to alleged violations where the emissions exceedances at issue occur during SSM. *Sierra Club v. Ga. Power Co.*, 443 F.3d at 1353. It does not dictate the outcome. In fact, the court ruled in favor of Georgia Power in the Plant Wansley opacity case, not because the State SSM provision "negated" some fundamental enforcement right, but rather because Georgia Power demonstrated through extensive data and expert testimony that its emissions fully complied with the applicable State regulatory requirements that apply to startup, shutdown and malfunction events. Specifically, Georgia Power demonstrated that Plant Wansley (1) used best operational practices to minimize emissions, (2) operated all pollution control equipment consistent with good air pollution control practices, and (3) minimized the duration of all excess emissions events. Georgia Power also demonstrated that none of the events were due "entirely or in part" to poor maintenance, poor operation, or any other failure which could have reasonably been prevented. The Sierra Club, on the other hand, presented no evidence or expert testimony whatsoever, relying instead on a purely legal argument that Georgia's SSM provision did not apply in citizen suits or was simply illegal and not valid in an enforcement action. Sierra Club

[7] *Statutory, Regulatory, and Policy Context for this Rulemaking*, Memorandum to Docket for rulemaking, "State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction" (EPA-HQ-OAR-2012-0322) at 18 (Feb. 4, 2013) ("EPA Statutory Memorandum").

lost its enforcement action on summary judgment due to a lack of evidence, not because the Georgia SSM provisions precluded the action.[8]

In May 2005, Sierra Club also filed a petition with EPA seeking revision of the Georgia SSM rule alleging that it provided an automatic exclusion for SSM-related emissions and acted as a bar to citizen enforcement (attached as Exhibit 2). In contrast to the present rulemaking, EPA denied that petition because the Eleventh Circuit had found that the Georgia SSM rule simply provided an affirmative defense, not an automatic exemption or a bar to citizen or EPA enforcement.[9] EPA's characterization of this litigation and the related petition in the proposed rule and accompanying memo is thus inconsistent with not only the facts of the Georgia Power case, but also EPA's own previous position.

4. EPA's history of approving SSM provisions in SIPs and promulgating SSM provisions in federal standards contradicts its legal interpretation in the proposed rule

Although EPA often characterizes its new SSM policy as "consistent" and "long-standing,"[10] its actions over nearly four decades reveal otherwise. EPA claims that its initial approval of many SSM provisions in the 1970s was "inadvertent" or the product of a lack of resources and experience, but the evidence directly contradicts EPA's claim. In Alabama, for example, the SSM provision in Alabama's SIP, Ala. Admin. Code r. 335-3-14-.03(1)(h)(1), was

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[8] *Sierra Club v. Ga. Power Co.*, No. 02-151, 2007 U.S. Dist. LEXIS 100219 (N.D. Ga. Jan. 11, 2007).

[9] *See* Letter from Stephen L. Johnson, EPA Adm'r, to Richard M. Watson, Ga. Ch. of the Sierra Club, Resp. to Pet. for Rulemaking on Startup, Shutdown, Malfunction Excess Emissions Rule in Georgia (July 18, 2007) (attached as Exhibit 3).

[10] *See* EPA Statutory Memorandum at 5 ("The EPA's longstanding approach to excess emissions in the PSD program is reflected in a 1993 document . . . ."), 14 ("EPA guidance has consistently stated that excess emissions during periods of startup, shutdown, and malfunction constitute violations of the applicable SIP emission limitations.")

approved in 1972 as part of Alabama's original SIP. *See* 37 Fed. Reg. 10,842, 10,847-48 (May 31, 1972). Alabama's SIP was modeled after the State of Colorado's SIP, which EPA gave to the Alabama Department of Environmental Management ("ADEM") to use as a model for drafting Alabama's SIP. EPA approved the provision as currently written, as well as the addition of the emergency provision, in 1993.[11] 58 Fed. Reg. 45,439 (Aug. 30, 1993).

The State of Georgia also provides an excellent example of how EPA and State permitting agencies specifically discussed the SSM provisions at length before EPA decided to approve them. On January 17, 1979, Georgia submitted its excess emissions rule to EPA for approval as part of its SIP submission.[12] In response, EPA sent a draft proposal to disapprove the rule to the State.[13] In response to this draft proposal, the Georgia Environmental Protection Division (EPD) asked the Georgia Attorney General's office to draft a written statement on the excess emissions provision. *Id.* The Attorney General submitted a statement to EPD on July 13,

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[11] In approving a director's discretion provision in Alabama's SIP that year, Ala. Admin. Code r. 335-3-4-.01(d), EPA stated as follows:

> Originally, EPA did not officially approve or disapprove the revision due to the inclusion of a "Director's Discretion" clause in the regulation. On September 10, 1992, the Alabama Department of Environmental Management submitted a letter clarifying the role of "Director's Discretion." This clarification specified the method which would be used to approve an alternative and stated that any alternative would be subject to EPA review through the Title V permit process. Therefore, EPA is today approving the [visible emission] regulation . . . . The Agency has determined that the aforementioned changes are consistent with Agency policies. Therefore, EPA is today approving this amendment to the Alabama SIP.

58 Fed. Reg. 25,566 (Apr. 27, 1993). Several months later, EPA approved the emergency provision at issue in the proposed rule, which includes a director's discretion clause. 58 Fed. Reg. 45,439 (Aug. 30, 1993).

[12] *See* http://www.epa.gov/region4/air/sips/ga/391-3-1.02.pdf at 4.

[13] *See* Letter from J. Leonard Ledbetter, Division Director, to Robert S. Bomar, Senior Assistant Attorney General (July 3, 1979) (on file with the Georgia Archives).

1979,[14] and EPD submitted that statement to EPA on July 20, 1979.[15] That statement expressly confirmed that SSM emission would *only be considered a "violation"* if the source fails to comply with the requirements of Georgia's SSM provision.[16] EPA subsequently published a proposed approval of Georgia's SSM rule a few months later,[17] and EPA's final approval of the rule—including the originally submitted SSM provision—was published on January 3, 1980.[18] Given this evidence, EPA cannot possibly claim that its approval of the Georgia SSM provision was accidental.

Furthermore, EPA's characterization of its previous approval of SSM provisions in SIPs as merely "accidental" or an "oversight" that is now just a matter of correction[19] is also disingenuous because it ignores the reality that the States were at the same time proposing the numerical component of each affected emission limitation with the understanding that EPA was approving the subject emission limitation *package*, with the SSM exclusion in it. Had EPA told States *then* that SSM provisions are illegal, States would have submitted emission limitation packages with very different numerical components—namely, numeric limits that could accommodate the relatively higher emissions that are unavoidable during SSM periods. After

[14] *See* Letter from Sarah Evans Lockwood, Staff Assistant Attorney General, to J. Leonard Ledbetter, Division Director (July 13, 1979) (on file with the Georgia Archives).

[15] *See* Letter from J. Leonard Ledbetter, Division Director, to John C. White, Regional Administrator (July 20, 1979) (on file with the Georgia Archives).

[16] Those requirements were identified as follows in the letter: "(I) the best operational practices to minimize emissions are adhered to, and (II) all associated air pollution control equipment is operated in a manner consisted [sic] with good air pollution control practice for minimizing emissions, and (III) the duration of excess emission in [sic] minimized."

[17] 44 Fed. Reg. 47,557 (Aug. 14, 1979).

[18] 45 Fed. Reg. 780 (Jan. 3, 1980).

[19] Alabama Power notes that, contrary to EPA's suggestion, *see* 78 Fed. Reg. at 12,483 n.72, EPA could not properly have addressed the subject of the proposed rule by way of the SIP "error correction" provision, section 110(k)(6).

approving those packages, EPA cannot now come back and unilaterally delete a key component and ignore the effect of deleting that component on the States' original emission limitation packages.

The fact that EPA's SIP call also applies to SSM provisions that EPA approved much more recently also confirms that EPA's approval of SIP SSM provisions was not a mistake and that EPA's attempt to characterize its new SSM policy as "long-standing" is false. For example, New Mexico is one of the thirty-six States subject to EPA's SIP call, even though EPA approved the State's SSM provision in September 2009.[20] Although EPA's 2009 approval expressly stated that "the revisions to 20.2.7 NMAC are consistent with the Clean Air Act (the Act)," EPA has now—less than four years later—changed its mind, claiming that New Mexico's excess emissions provision renders the New Mexico SIP "substantially inadequate."

Numerous statements made in EPA's preamble to its 1997 credible evidence rule also confirm that EPA has in the past recognized the need for exceptions from numeric standards designed for normal, steady-state operation during SSM events. In fact, an entire section of that preamble is titled "*Emission Limits Require Continuous Compliance* (Consistent With Any Averaging Times) *Except During Periods Where Compliance Is Specifically Excused*."[21] In the preamble, EPA cites to the same section 302(k) that it relies on to justify its proposed SIP call. However, immediately after noting that the definition of "emission limitations" in that section requires compliance on a "continuous basis," EPA cites to the exceptions in its NSPS for SSM events, characterizing them as follows:

> In addition to requirements for continuous compliance, NSPS regulations also typically contain specifically excused periods of noncompliance. These periods

[20] 74 Fed. Reg. 46,909 (Sept. 14, 2009).

[21] 62 Fed. Reg. 8314, 8323 (Feb. 24, 1997).

> confirm that compliance is required at other times. They also confirm the basic reasonableness of this compliance scheme—that is, sources must generally comply continuously with their numerical emission limits, but not during periods of specifically excused noncompliance, and only in accordance with any specified averaging periods. For example, for many standards, compliance is not required during periods of startup, shutdown or malfunction. This exception is contained in the NSPS general provisions and in individual standards.[22]

EPA even provides a discussion of case law supporting its own SSM provisions, stating that "[i]n various judicial decisions, courts have approved the basic NSPS regulatory scheme of continuous compliance accompanied by limited, specified exceptions for noncompliance. The following is *EPA's own string of case citations* supporting the need for exceptions to "continuous" emission limitations:

> *See, e.g.*, *Portland Cement* [*Ass'n v. Ruckelshaus*, 486 F.2d 375, 399 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974)] (court noted EPA's then-proposed "startup, shutdown and malfunction" compliance exclusion regulation with approval, suggested that it was a "limited safety valve" and stated that it imparts a construction of "reasonableness" to the standards as a whole and adopts a more flexible system of regulation that can be had by a system devoid of "give"[ );] *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d. 427, 433 (D.C. Cir. 1973), cert. denied, 416 U.S. 969 (1974) (in a challenge to sulfuric acid plant and coal-fired steam generator NSPS standards, the court again noted with approval the proposed start-up, shutdown and malfunction exception and remanded the rule stating that "such variant provisions appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the "never to be exceeded'' standard currently in force") [ ]; and *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1301–02 (9th Cir. 1977) (in challenge to SIP sulfur dioxide standard, court observed that EPA regulations required that the standard be met "all of the time," and thus EPA must typically promulgate upset provisions to excuse noncompliance beyond the source's control).

Id. at 8323–24.

As EPA itself admitted in the credible evidence rule, EPA's own SSM provisions are perhaps the best evidence of the need for exclusions for SSM events, and they directly contradict the justifications EPA sets forth in attempting to support its proposed SIP call. EPA has a long

[22] *Id.*

history of excluding non-normal operational periods such as startup and shutdown, which confirms that "emission limitations" need not require a numeric emission limitation at all times, as suggested in EPA's SIP call proposal, and that such provisions do not interfere with appropriate enforcement of the CAA.

For instance, the general provisions in Subpart A of EPA's NSPS program states the following:

> Operations during periods of [SSM] shall not constitute representative conditions for the purpose of a performance test ***nor shall emissions in excess of the level of the applicable emission limit during periods of [SSM] be considered a violation*** of the applicable emission limit unless otherwise specified in the applicable standard.

40 C.F.R. § 60.8 (emphasis added). EPA has relied on the policy behind that provision to adopt SSM provisions in numerous individual NSPS that apply to specific source categories as well, some of which EPA promulgated as recently as last year. *See, e.g.*, 77 Fed. Reg. 9304, 9450 (Feb. 16, 2012) (promulgating revisions to NSPS Subpart Da at 40 C.F.R. § 60.42(e)(2) imposing particulate matter standards that apply "except during periods of startup and shutdown."). A review of all of EPA's NSPS indicates that, where appropriate, EPA has been fully willing to create (and justified in creating) appropriate exclusions from numeric standards for emissions during SSM events to ensure its standards are achievable on a continuous basis.[23]

[23] Where EPA has determined that no SSM provision is needed, generally because startup is considered normal operation during which performance tests can be completed, EPA has specifically recognized that fact in its regulations. *See, e.g.*, Subpart QQ, 40 C.F.R. § 60.433(a)(8) ("Printing press startups and shutdowns are not included in the exemption provisions under § 60.8(c). Frequent periods of press startups and shutdowns are normal operations and constitute representative conditions for the purpose of a performance test."); Subpart VVV, 40 C.F.R. § 60.743 (Emissions during startups and shutdowns are to be included when determining [emission reductions] because startups and shutdowns are part of normal operation for this source category). However, EPA has never before indicated that startup of electric utility generating units should be considered "normal operations." That portion of EPA's

- Subpart D (Standards of Performance for Fossil-Fuel-Fired Steam Generators, 40 C.F.R. § 60.45(b)(6)(iii));
- Subpart Da (Standards of Performance for Electric Utility Steam Generating Units, 40 C.F.R. § 60.42Da(e));
- Subpart Db (Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units, 40 C.F.R. § 60.43b(g));
- Subpart Dc (Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units, 40 C.F.R. § 60.43c(d));
- Subpart Ea & Eb (Standards of Performance for Municipal Waste Combustors, 40 C.F.R. §§ 60.58a(a), 60.58b(a));
- Subpart Ec (Standards of Performance for Hospital/Medical/Infectious Waste Incinerators for Which Construction is Commenced After June 20, 1996, 40 C.F.R. § 60.56c(d)(2));
- Subpart BB (Standards of Performance for Kraft Pulp Mills, 40 C.F.R. § 60.284(e)(1));
- Subpart DDD (Standards of Performance for Volatile Organic Compound (VOC) Emissions from the Polymer Manufacturing Industry, 40 C.F.R. 60.562-1(b) & (c));
- Subpart QQQ (Standards of Performance for VOC Emissions From Petroleum Refinery Wastewater Systems, 40 C.F.R. § 60.692-1);
- Subpart WWW (Standards of Performance for Municipal Solid Waste Landfills, 40 C.F.R. § 60.755(e)); and
- Subpart KKKK (Standards of Performance for Stationary Combustion Turbines (proposed), 40 C.F.R. § 60.4320(e)).

Just as EPA has the authority to provide for such exclusions, States have the authority to provide for exclusions from the standards they are authorized to develop for SIP planning purposes. EPA justifies the legality of the SSM provisions EPA includes in its own NSPS with a glib reference to the fact that the NSPS are technology-driven standards. EPA has not relied on some nuance in

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proposal is unreasonable for the many reasons discussed below in Section II.D of these comments.

EPA's legal interpretation of section 302(k) to explain how SSM provisions in the NSPS are "consistent with the CAA" while SSM provisions in SIPs are "inconsistent" with the same CAA provision. Therefore, EPA's position that the section 302(k) definition of "emission limitation" prohibits SSM provisions in SIPs must be based upon the fact that SIPs are NAAQS-driven standards, and the NAAQS must be protected. But if the basis for EPA's differing application of section 302(k) is the underlying purpose of the standards in question, then "calling" all thirty-six SIPs without any consideration of whether the SSM provisions in question affect the NAAQS or whether the SIPs in question are attaining the NAAQS renders EPA's proposed rule arbitrary and capricious. EPA has no way of knowing whether its justification for reading section 302(k) as it does where SIPs are concerned is to any extent justified. EPA justifies and employs SSM provisions in the design and implementation of its own technology-based NSPS and should do so here as well. Without considering air quality evidence, EPA cannot ban SSM provisions from SIP-based "emission limitations."

EPA also excluded emissions during SSM events from most of its National Emissions Standards for Hazardous Air Pollutants ("NESHAPs") promulgated under section 112 of the CAA, which establish Maximum Achievable Control Technology ("MACT") standards for specific industries. As previously discussed, that practice was challenged by Sierra Club in the U.S. Court of Appeals for the D.C. Circuit. In that case, EPA argued that the SSM exclusions it had adopted were appropriate because sources remained subject to the "general duty" to minimize emissions during SSM events. Relevant excerpts from the court's decision addressing these arguments are quoted below:

> ***In 1994, EPA adopted the SSM exemption for section 112. . . . Each source was thus exempted from the numerical limits set for emission control pursuant to section 112 and only the general duty would apply***. However, in order to avoid a blanket exemption, EPA required each source to develop and implement an SSM

> plan. 'The purpose of the plan [was] for the source to demonstrate how it will do its reasonable best to maintain compliance with the standards, even during [SSMs].' . . . In 2006, EPA retracted the requirement that sources implement their SSM plans during SSM periods. According to EPA, '[t]his is consistent with the concept that the plan specifics are not applicable requirements [under Title V] and thus cannot be required to be followed. Nonetheless, ***the general duty to minimize emissions remains intact and is the applicable requirement***.' . . . EPA suggests that the general duty is 'part of the operation and maintenance requirements with which all sources subject to a section 112(d) standard must comply,' Respt.'s Br. at 33, ***pointing to section 302(k)'s*** statement that an 'emission standard' includes 'any requirement relating to the operation or maintenance of a source to assure continuous emission reduction,' 42 U.S.C. § 7602(k).

Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2008) (emphases added). EPA's specific citation to section 302(k) to claim that the "general duty" to minimize emissions was sufficient to render the limitations "continuous" confirms that the interpretation of that provision EPA uses to support its proposed SIP call is of recent origin.

The D.C. Circuit's decision held that EPA can no longer rely on only the "general duty" to minimize emissions in developing MACT standards, but only because the MACT standard of control is highly prescriptive (i.e., it must represent the level of control achieved by the top twelve percent of existing sources or, for new sources, the level of control achieved by the best controlled similar source). *Id.* As such, the court's decision is extremely limited—it only prohibits SSM exclusions from emission limitations that must represent a specified level of control, and then only if EPA fails to show how the level of stringency required by the CAA is maintained in spite of the SSM exclusion. So long as an SSM provision maintains the level of stringency required by the Act, EPA can still include SSM exclusions in its MACT standards. But more importantly, the court's analysis does not apply at all to emission limitations where the State has the authority to determine the design and stringency of the emission limit.

The limited scope of the D.C. Circuit's opinion is reflected in EPA's own actions since the 2008 decision. EPA issued a guidance letter in 2009 indicating that, while thirty-five MACT

standards incorporated the vacated general SSM provision by reference, over seventy MACT standards have their own, source-specific SSM provision that EPA claimed would remain unaffected by the D.C. Circuit's vacatur of the general MACT SSM provision in Subpart A. *See* EPA Letter from Adam M. Kushner, Director, Office of Civil Enforcement re: Vacatur of Startup, Shutdown, and Malfunction (SSM) Exemption (40 C.F.R. §§ 63.6(f)(1) and 63.6(h)(1)) (July 22, 2009). EPA also expressed an intent to revise those MACT standards that had been affected by the courts decision, presumably to develop a new, source-specific SSM provision for those standards as well, stating that "EPA intends to give highest priority to reviewing and revising those section 112(d) source category standards that may be difficult for sources to meet during an SSM period given the technological limitations of the process involved." *Id.*

In addition, despite the decision in *Sierra Club*, EPA has continued to include alternative standards for startup and shutdown events in its MACT standards, further confirming that all numeric emission limitations—even MACT standards—need not be "continuous," at least not in the manner suggested by EPA's proposed SIP call. EPA's recently adopted Mercury and Air Toxics Standards ("MATS"), for example, includes an exception for startup and shutdown due to the lack of data upon which to develop a numeric emission limitation. 77 Fed. Reg. 9304, 9466 (Feb. 16, 2012); 40 C.F.R. § 63.10000(a). The MATS rule represents another instance in which the Agency indicated an understanding that continuous compliance does not require continuous application of a particular numerical emission limit. In the MATS rule, EPA determined that bifurcating operations into different periods and applying the most appropriate emissions limits to each period, whether these be numerical or work practice standards, is consistent with CAA section 112. This result is consistent with recent case law, in which courts determined that the Act did not require that numerical limits be applied at all times.

During startup and shutdown, sources subject to MATS must comply with "work practice standards" that only require engaging controls when feasible during startup, specifically allowing sources to bring certain control devices online as appropriate operating conditions are reached (*e.g.*, selective catalytic reduction and dry scrubber/dry sorbent injection systems). *Id.* Units must also continue to measure emissions during SSM, but those measurements are not included in compliance demonstrations due to reliability and accuracy concerns. EPA's recently reconsidered Industrial Boiler MACT, published in the Federal Register only a few months ago, contains similar provisions. 78 Fed. Reg. 7138, 7163 (Jan. 31, 2013); 40 C.F.R. § 63.7500(f) ("These standards apply at all times the affected unit is operating, except during periods of startup and shutdown during which time you must comply only with Table 3 to this subpart.").

Importantly, the MATS startup and shutdown ("SS") work practice standards were designed to address the fact that the numerical limits that apply during normal operations cannot be achieved during SS periods because of the limits of electric generating unit control technologies, which do not provide optimum emissions control until certain operating conditions are met. The MATS SS work practice standards were also designed to address the fact that EPA did not have sufficient information about emissions during SS periods to promulgate numerical emissions limits because of the limits of measurement technologies and the lack of data available regarding emission rates during SS. Therefore, EPA's implication that all SSM provisions that allow exclusions from numeric limits are inconsistent with the section 302(k) definition of "emission limitation" is wrong.

EPA ignores this obvious contradiction in its proposal by recommending that States replace their existing SSM provisions with the malfunction provisions that EPA authored in developing the MATS rule. 78 Fed. Reg. at 12,479. However, EPA's recommendation fails to

address the MATS provision for startup and shutdown in 40 C.F.R. 63.10000, which directly conflicts with EPA's policy that all startup and shutdown events must be treated as "normal operations" and subject to "otherwise applicable" emission limitations. *See* 78 Fed. Reg. at 12,477. EPA does not explain why the States' startup and shutdown provisions violate the requirement for all emission limitations to be "continuous," while EPA's provisions do not. If EPA has the authority to exclude startup and shutdown events from numeric emission limitations, so long as reasonable requirements continue to apply during those events, States should have similar authority with respect to the emission limitations they are authorized to implement.

EPA has also recognized the need to address SSM events in developing appropriate Best Available Control Technology ("BACT") emission limitations under the Prevention of Significant Deterioration ("PSD") program. For example, in a PSD permit EPA recently issued for the Desert Rock facility, EPA adopted the following permit condition to allow the facility to exceed its BACT limits during SSM events:

> Emissions from the PC boilers during startup and shutdown events shall not be subject to the emission limits in this permit which are specified in units of lb/MMBtu but shall be subject to all other limits and shall be included in the calculations of emission rates for demonstrating compliance with those limits.

Desert Rock Energy Co. Permit No. AZP 04-01, Condition IX.N.3. (July 31, 2008), Docket ID No. EPA-R09-OAR-2007-1110-0122. The fact that EPA recognized that some of the numeric standards do not apply during all periods directly contradicts the legal theory EPA has asserted to support its proposed SIP call.

All of these many examples of EPA-adopted SSM provisions directly contradict the arguments that EPA sets forth as justifications for its SIP call. None of EPA's many SSM provisions would be allowed under the interpretation of section 302(k) that EPA seems to

espouse in the proposed SIP call—*i.e.*, that all numeric emission limitations must be applicable at all times, even during SSM events. Likewise, EPA's own SSM provisions could not stand if all exceedances of numeric standards during SSM events must be treated as "violations" to allow for meaningful "enforcement." These examples demonstrate that for decades, EPA has consistently interpreted the CAA to allow for different components of "emission limitations" to apply to SSM-related emissions, including general duty provisions and operational limitations of the type required in the SIP provisions subject to this SIP call.

5. Alabama has the authority to determine the mix of requirements necessary to ensure compliance and enforcement of the NAAQS

Congress chose a "cooperative federalism" regime to implement the CAA, dividing authority between the federal government and the States. *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001); *see also Sierra Club v. EPA*, 315 F.3d 1295, 1300 (11th Cir. 2002); *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981) ("Congress chose a balanced scheme of state-federal interaction to implement the goals of the [Clean Air] Act.").

Consistent with this structure, EPA's job is to promulgate NAAQS for certain pollutants and to ensure that the minimum requirements for air pollution control programs are established. *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003). The CAA, however, gives States "the primary responsibility" for determining how to achieve those standards and meet those requirements within their own borders. *EME Homer City Generation v. EPA*, 696 F.3d 7, 11–12 (D.C. Cir. 2012); "The Act thus leaves it to the individual States to determine, in the first instance, the particular restrictions that will be imposed on particular emitters within their borders." *Id.* at 13. "That statutory division of authority is strict." *Id.* at 29. States achieve the NAAQS set by EPA through the development, administration, and enforcement of State Implementation Plans or "SIPs." *Sierra Club*, 315 F.3d at 1296; *Fla. Power & Light Co.*, 650

F.2d at 586–87. In general, a State's SIP must, "among other things . . . 'include enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate' to meet" the applicable NAAQS; "'appropriate devices, methods, systems, and procedures' to 'monitor, compile, and analyze data on ambient air quality;'" and an enforcement program. *See BCCA Appeal Group*, 355 F.3d at 822 (summarizing 42 U.S.C. § 7410(a)(2)). But, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt *whatever mix* of emission limitations it deems best suited to its particular situation." *Train*, 421 U.S. at 79 (emphasis added). EPA's role in reviewing SIPs is limited by statute. *See North Carolina v. EPA*, 531 F.3d 896, 922 (D.C. Cir. 2008) (quoting *Michigan*, 268 F.3d at 1081) (EPA is "'a creature of statute,' and has 'only those authorities conferred upon it by Congress.'"). "The great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by EPA." *Fla. Power & Light Co.*, 650 F.2d at 587. Accordingly, EPA's review of SIP revisions is cabined by section 110 of the CAA. The D.C. Circuit Court of Appeals "has described the *Train–Virginia* line of cases as erecting a statutory 'federalism bar' under Section 110 of the Act," which "prohibits EPA from using the SIP process to force States to adopt specific control measures." *EME Homer*, 696 F.3d at 29 (citing *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046 (D.C. Cir. 2001); *Train*, 421 U.S. 60, 95 S.Ct. 1470.

The Alabama SSM provisions that EPA now seeks to recall are a good example of how Congress expected this "cooperative federalism" to work. Under the federal–state partnership that Congress established for enforcement of the CAA (discussed in detail in Section III below), Alabama, through ADEM and its oversight body, the Alabama Environmental Management Commission ("AEMC"), "is the primary regulator of the state industries' visible

emissions." *Ala. Envtl. Council v. EPA*, 711 F.3d 1277, 1281–82 (11th Cir. 2013). ADEM develops SIP regulations, which are approved, disapproved, or modified by AEMC. Ala. Code § 22-22A-8. Alabama's SIP is codified at 40 C.F.R. § 52.69, which incorporates by reference certain provisions of ADEM's air regulations.

Pursuant to its authority and responsibility under State law and the CAA, the State of Alabama determined that the mix of controls on sources of air pollution in Alabama that would best achieve the State's obligation to attain the NAAQS is a mix that includes strict numeric emission limitations during periods of normal operation and detailed non-numeric emission limitations during periods of SSM. Under the CAA, that choice is clearly the State's responsibility and is within its authority. Where power plants are concerned, the State expressly chose not to apply numeric emission limitations during periods of startup, shutdown, and load change, especially not the same strict numeric emission limitations that apply during periods of normal operations when both the boilers and the associated pollution control equipment are expected to be operating at optimal conditions of efficiency and control. It is wrong to imply, as EPA's proposed rule implies, that the State's choice either leaves sources uncontrolled during periods of SSM or reflects some lack of strictness in the State's protection of its people or its environmental resources.

EPA has now developed a new interpretation of the Act under which it claims those SSM provisions are suddenly illegal. EPA's attempts to characterize its change in policy as merely a "clarification" are unconvincing and inconsistent with other statements in which EPA candidly admits that its proposal represents a change in policy.[24] However, regardless of the vintage of

[24] *Compare* 78 Fed. Reg. at 12,477 (claiming that "[t]he phrase 'need not be treated as violations' *may have been misunderstood*" when that phrase could have meant little else at the

EPA's current SSM policy, EPA policy cannot change the foundational authority Congress granted to States. Even if EPA finalizes its SIP call as proposed, States will retain the same discretion in making any revisions to their SSM provisions as they employed in developing those provisions in the first instance.

B. The SSM Provisions Do Not Threaten the NAAQS

EPA's second "justification" for the SIP call is the potential for SSM provisions to undermine attainment of the NAAQS and/or building blocks of the NAAQS. EPA's concern, however, is unsupported and unwarranted. EPA provides no evidence whatsoever that the SSM provisions interfere with NAAQS compliance. Instead, its "analysis" is based on speculation. In fact, the SIPs taken as a whole—including the SSM provisions—are sufficient to attain and maintain the NAAQS, as demonstrated by the States' attainment and maintenance plans and further protected by the contingency provisions contained within those plans. EPA's approval of those plans and redesignation of areas from nonattainment to attainment contradict the Agency's allegations here that SSM provisions could threaten the NAAQS. Even for areas that may not be covered by attainment or maintenance plans, the significant emission reductions achieved over the years and resulting ambient air quality trends confirm that the NAAQS are protected.

1. EPA fails to provide any evidence that Alabama's SSM emissions undermine the NAAQS or "building blocks" of the NAAQS

EPA's proposal fails to provide any technical analysis to support its proposed SIP call. EPA simply alleges that SSM-related emissions could theoretically undermine attainment or

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time) *with* 78 Fed. Reg. at 12,482–83 ("EPA is proposing to add to and clarify its prior statements in the 1999 SSM Guidance *and to make the specific changes to that guidance* as discussed in this action. Thus, the final notice for this action will constitute the EPA's SSM Policy on a going-forward basis.") (emphases added).

maintenance of the NAAQS or the "building blocks" designed to help protect the NAAQS, but EPA provides absolutely no facts to support its claims. They are entirely speculative. EPA fails to evaluate any of the "continuous" emission limitations that it claims to be "otherwise applicable" during SSM events. EPA also fails to refer to a single specific NAAQS or any single specific area that is failing to attain the NAAQS, revealing that its concerns over NAAQS compliance are merely theoretical. EPA also fails to identify or discuss any specific State's emission inventories or modeling analyses—the "building blocks" that EPA claims SSM provisions will undermine. EPA claims that the "building blocks" all assume "continuous" compliance of all emission limitations without taking into account SSM emissions, but EPA has not evaluated a single one of those "blocks" to support its claims.

To address the obvious lack of factual evidence in its proposal, EPA cites *US Magnesium v. EPA*, 690 F.3d 1157 (10th Cir. 2012) for the proposition that EPA need not prove that nonattainment has been caused by the provision in question before issuing a SIP call. According to EPA, when a SIP provision is "facially inconsistent" with the Act, section 110(k)(5) does not require "direct causal evidence" that excess emissions "literally caused a violation of the NAAQS."[25] However, as demonstrated in Section II.A above, SSM provisions are not facially inconsistent with the Act. They are authorized under sections 302(k) and 110(a)(2)(A) and do not interfere with enforcement under sections 113 or 304.

Contrary to EPA's assertion, the *US Magnesium* decision does not excuse EPA from making any factual showing at all—it merely states that EPA did not have to show actual past nonattainment events were *directly caused* by a particular SSM event. To the extent that the

[25] 78 Fed. Reg. at 12,483–84 (citing *US Magnesium, LLC v. EPA*, 690 F.3d 1157 (10th Cir 2012)).

court's analysis was legally correct (which is questionable for many reasons[26]), the decision says nothing about EPA's overall duty to reasonably support its justifications for issuing a SIP call because the court expressly refused to consider the full scope of EPA's obligation to find a SIP "substantially inadequate."[27] In addition, the Court had no opportunity to consider whether the Utah SIP as a whole provided sufficient protection of the NAAQS because the petitioner did not raise that issue on appeal.[28] Moreover, the Tenth Circuit's justification for upholding EPA's SIP call in that case was also based on the fact that the Utah provision arguably applied to MACT standards as well which, as noted above in the discussion of *Sierra Club v. EPA*, violates section 112 of the Act. None of the SSM provisions found in the SIPs for the States in which Southern Company operates suffers from this flaw. Thus, for all of these reasons, EPA cannot rely solely on the Tenth Circuit's review of a single State's SIP as support for taking similar action for thirty-six other States, particularly when EPA has made no effort to evaluate those States.

[26] Errors in the Tenth Circuit's opinion suggest the court did not properly evaluate the CAA provisions it was interpreting. For example, the court rejected US Magnesium's citation to legislative history from 1970, claiming that section 110(k)(5) was not created until the 1990 amendments, when in fact the 1990 amendments simply moved the provision from one section to another. As previously recognized by the D.C. Circuit, the current requirements of section 110(k)(5) have always been a part of section 110 and continue to have the same force and effect today as when they were first enacted even though the provision was relocated in 1990. *See Virginia v. EPA*, 108 F.3d 1397, 1407 (D.C. Cir. 1997).

[27] *Id.* at 1167 n.3 ("US Magnesium also argues that the EPA failed to define the term 'substantially inadequate,' but it raises this argument for the first time in its opening brief. Because US Magnesium did not raise this argument in its comments on the proposed rule, it cannot raise it now.").

[28] EPA did include specific factual information in the preamble to its final SIP Call suggesting that Utah did not appropriately take SSM emissions into account in its attainment or maintenance plans, but of course that information would have been of little help to commenters on the proposed rule, and no such analysis appears in EPA's proposed SIP call for thirty-six States.

Neither the CAA nor the Administrative Procedure Act (APA) allows EPA to issue a SIP call based entirely on unsupported and speculative claims. As discussed in more detail in Section II.C below, CAA section 110(k)(5) requires EPA to provide at least some reasonable factual basis for its claims, and the APA prohibits arbitrary and capricious rulemaking that would result if an agency were authorized to issue regulatory requirements without even a basic consideration of the facts. 42 U.S.C. § 7410(k)(5); 5 U.S.C. § 706. The burden of proof is EPA's to carry. Because the CAA does not prohibit SSM provisions, EPA's action will only be upheld if it is based on reasonable conclusions grounded in fact. *Id.* EPA's attempt to support its proposed SIP call without any factual basis whatsoever thus fails to satisfy the CAA standard for issuing a SIP call and violates the most basic requirements of the APA regarding appropriate rulemaking procedures.

2. Contrary to EPA's claim, SSM provisions do not threaten the NAAQS or their building blocks

a. SSM provisions do not threaten the NAAQS

EPA's allegations that SSM provisions could threaten the NAAQS is contradicted by its prior actions. EPA has consistently approved re-designation requests and attainment and maintenance plans, notwithstanding SSM provisions, as recently as January 2013. Alabama's continuous improvement of its air quality is evident in both the actual air quality monitoring data and by EPA's recent attainment designations and other recognitions of Alabama's air quality improvements, particularly in and around Birmingham, the State's most populous and economically developed city.

In 2004, EPA approved the redesignation of the Birmingham area[29] as in attainment with EPA's 1-hour ozone NAAQS. *See* 69 Fed. Reg. 11,798 (Mar. 12, 2004). As explained in EPA's 2004 proposed redesignation, Birmingham's attainment status was achieved through gradual improvement in air quality from its initial designation as nonattainment in 1978. *See* 69 Fed. Reg. 558, 559 (Jan. 6, 2004) (explaining history of Birmingham's improvements in ozone concentrations, including designation as "marginal nonattainment area" in 1991 and EPA's recall of its proposal to redesignate as attainment following a single 1-hour ozone NAAQS violation in 1995). EPA's 2004 approval and redesignation of Birmingham as an attainment area for 1-hour ozone followed its approval of Alabama's attainment demonstration SIP on November 7, 2001,[30] which the State submitted in response to EPA's 2000 SIP call.[31] In the 2004 final redesignation, EPA determined that the Birmingham area had "met the five criteria for redesignation to attainment specified by the Clean Air Act," which include "(1) The area has attained the applicable NAAQS; (2) the area has met all applicable requirements under section 110 and part D of the CAA; (3) the area has a fully approved SIP under section 110(k) of the CAA; (4) the air quality improvement is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and applicable Federal air pollution control regulations and other permanent and enforceable reductions, and (5) the area has a fully approved maintenance plan . . . ." 69 Fed. Reg. at 11,799 (citing 42 U.S.C. § 7407(d)(3)(E)). To make the second

[29] For purposes of NAAQS attainment, the "Birmingham area" consists of Jefferson County, Shelby County, and a portion of Walker County, Alabama.

[30] 66 Fed. Reg. 56,223 (Nov. 7, 2001).

[31] 65 Fed. Reg. 64,352 (Oct. 27, 2000) (final SIP call). Notably, in this SIP call, EPA found Alabama's SIP to be "substantially inadequate" based upon "the Birmingham area's continued nonattainment for ozone" according to actual air quality monitoring data, not an EPA legal interpretation of some other aspect of the CAA.

finding cited above, EPA "analyzed the Alabama SIP and determined that it is consistent with the requirements of CAA section 110(a)(2)" and that it "contains enforceable emission limitations"[32] and a number of other section 110 requirements. 69 Fed. Reg. at 560–61. Therefore, not only had air quality in the Birmingham area improved to the point of attainment, but EPA agreed that Alabama's SIP was in full compliance with the CAA.

Two years later, EPA also redesignated the Birmingham area as in attainment with the 8-hour ozone NAAQS. *See* 71 Fed. Reg. 27,631 (May 12, 2006). As with the 1-hour ozone attainment action, EPA "determined that the Birmingham area has attained the 8-hour ozone standard and . . . that the State of Alabama has demonstrated that all other criteria for the redesignation of the Birmingham area from nonattainment to attainment of the 8-hour ozone NAAQS have been met." *Id*. at 27,632 (citing CAA section 107(d)(3)(E) criteria). EPA concluded that air quality monitoring data demonstrated that the Birmingham area met EPA's 1997 8-hour ozone standard of 0.08 parts per million (ppm), described by EPA as "more stringent than the previous 1-hour ozone standard," the attainment of which the Birmingham area had achieved just two years previously. *See* 71 Fed. Reg. 4077, 4078 (Jan. 25, 2006) (proposal to redesignate Birmingham as in attainment of 8-hour ozone NAAQS). In addition, as in its 2004 attainment designation for the 1-hour ozone NAAQS, EPA determined that the Alabama SIP satisfies all "general requirements for a SIP" under section 110(a)(2) of the CAA. *Id*. at 4080–81.

[32] EPA's purported finding that SSM provisions render the Alabama SIP's emission limitations noncontinuous and unenforceable is obviously inconsistent with many previous EPA determinations that the Alabama SIP in fact does contain enforceable emission limitations that are consistent with the CAA.

In addition to Birmingham's and Alabama's improvements in air quality with respect to ozone, EPA's recent attainment designations and "clean data determinations" also demonstrate that the State continues to improve air quality with respect to fine particulate matter ("$PM_{2.5}$"). In 2010, EPA determined that the Birmingham area had achieved attainment of EPA's 2006 24-hour $PM_{2.5}$ NAAQS, based upon "certified ambient air monitoring data for the years 2007-2009 showing that the Birmingham Area has monitored attainment of the [NAAQS]." *See* 75 Fed. Reg. 57,186 (Sept. 20, 2010). A few months later in 2011, EPA determined that the Birmingham area has achieved attainment of EPA's 1997 annual average $PM_{2.5}$ NAAQS, based upon ambient air monitoring data from 2008-2010. *See* 76 Fed. Reg. 38,023 (June 29, 2011). Also during this time, EPA determined the Chattanooga, Tennessee area—including the portion lying within Jackson County, Alabama—to be in attainment with its 1997 Annual $PM_{2.5}$ NAAQS. *See* 76 Fed. Reg. 31,239 (May 31, 2011).

Due in large part to the continual improvement of air quality with respect to particulate matter in the Birmingham area, EPA earlier this year finalized two redesignations of the Birmingham area for attainment with EPA's 1997 Annual $PM_{2.5}$ NAAQS and EPA's 2006 24-hour $PM_{2.5}$ NAAQS. *See* 78 Fed. Reg. 4341 (Jan. 22, 2013) (attainment of 1997 Annual $PM_{2.5}$ NAAQS); 78 Fed. Reg. 5306 (Jan. 25, 2013) (attainment of 2006 24-hour $PM_{2.5}$ NAAQS). In each of these attainment designations, EPA concluded all of the required redesignation criteria in CAA § 107(d)(3)(E) had been satisfied. 78 Fed. Reg. at 4342, 5308. Again, satisfaction of those criteria includes EPA's determination that "Alabama has met all applicable SIP requirements for the Birmingham Area under section 110 of the CAA . . . which include enforceable emissions limitations" and a number of other requirements. *See* 76 Fed. Reg. 70,078, 70,081–82 (Nov. 10, 2011) (proposed redesignation as attainment with 1997 Annual $PM_{2.5}$ NAAQS); 75 Fed. Reg.

33,562 (June 14, 2010) (proposed redesignation as attainment with 2006 24-hour $PM_{2.5}$ NAAQS).[33] As EPA's own actions demonstrate, air quality in Alabama has continually improved, particularly over the decade leading up to EPA's proposed SIP call.

In addition, recognizing that the SIPs in the other States where Southern Company operates are achieving their ultimate objective of attaining and maintaining the NAAQS, EPA has approved or proposed to approve several redesignation requests from Alabama, Georgia and North Carolina:

State / Area	Date	NAAQS Attainment Re-designation	Citation
Alabama / Birmingham	1/25/13	2006 24-hr $PM_{2.5}$	78 Fed. Reg. 5306
Alabama / Birmingham	1/22/13	1997 Annual $PM_{2.5}$	78 Fed. Reg. 4341
Alabama / Birmingham	5/12/06	1997 8-hr Ozone	71 Fed. Reg. 27,631
Georgia / Atlanta	2/4/13	1997 8-hr Ozone	78 Fed. Reg. 7705*
Georgia / Macon	9/19/07	1997 8-hr Ozone	72 Fed. Reg. 53,432
Georgia / Murray County	10/16/07	1997 8-hr Ozone	72 Fed. Reg. 58,538
North Carolina / Greensboro-Winston Salem-High Point	11/18/11	1997 Annual $PM_{2.5}$	76 Fed. Reg. 71,455
North Carolina / Hickory-Morganton-Lenoir	11/18/11	1997 Annual $PM_{2.5}$	76 Fed. Reg. 71,452
North Carolina / Great Smoky National Park	12/7/09	1997 8-hr Ozone	74 Fed. Reg. 63,995

[33] Ironically, the effective dates of the rulemakings in which EPA redesignated the Birmingham area as in attainment with these two NAAQS and thereby determined that the Alabama SIP meets all applicable requirements under CAA section 110, including enforceable emissions limitations, fell on the same week in which EPA issued its proposed SIP call wherein it proposes to find the Alabama SIP to be "substantially inadequate" and inconsistent with the CAA due in part to the purported lack of enforceability of the emission limitations included therein.

State / Area	Date	NAAQS Attainment Re-designation	Citation
North Carolina / Raleigh-Durham-Chapel Hill	12/26/07	1997 8-hr Ozone	72 Fed. Reg. 72,948
North Carolina / Rocky Mount	11/6/06	1997 8-hr Ozone	71 Fed. Reg. 64,891

*proposed action

As noted in the Federal Register notices approving those re-designation requests, EPA may only re-designate an area to attainment if it meets certain requirements to ensure the SIP is properly constructed and implemented. Specifically, re-designation is only authorized if (1) "the Administrator has *fully approved* the applicable implementation plan for the area under section 110(k)," (2) "the Administrator determines that the improvement in air quality is due to permanent and *enforceable* reductions in emissions resulting from the implementation of the applicable SIP . . . ," and (3) "the Administrator has fully approved a maintenance plan for the area . . . ." *See, e.g.*, 78 Fed. Reg. 7705, 7707 (Feb. 13, 2013) (emphasis added).

The fact that EPA has already approved numerous re-designation requests for Alabama indicates that EPA has already (and in many cases, very recently) admitted that the Alabama SIP is fully approved, sufficient to achieve the NAAQS, and fully enforceable. EPA now attempts to claim the exact opposite as justification for its proposed SIP call. For EPA to contradict its own recent area-specific determinations regarding NAAQS compliance, without even taking notice of its own re-designation approvals, is arbitrary and capricious.

While EPA has failed to carry its burden of proving even a threat to the NAAQS, Alabama has already proven the exact opposite—that the SIPs will protect the NAAQS with

SSM provisions in place—as they are required to do under the CAA.[34] That proof can be found in the attainment plans and maintenance plans that many of the States named in EPA's proposal including Alabama, have already submitted, most of which EPA has already reviewed and approved. As part of the area re-designation process discussed above, EPA must approve a maintenance plan to ensure the NAAQS will continue to be protected going forward after re-designation of an area from nonattainment to attainment. Maintenance plans also include a "contingency plan" that serves as a backstop in the event unexpected emissions occur that could otherwise threaten NAAQS compliance. If EPA is genuinely concerned about NAAQS compliance, then the appropriate time to raise those concerns is in the context of its review and approval of those plans. The fact that EPA has not been raising such concerns but has been approving those plans, including as recently as this year, is evidence that the Agency has not viewed SSM-related emissions as a threat to attainment or maintenance of the NAAQS.

EPA's approval of these plans indicates EPA has officially recognized that the NAAQS will be protected. For EPA to now claim that the NAAQS are threatened, without any new evidence, is entirely inconsistent with its prior decisions.

b. SSM provisions do not threaten the "building blocks" for the NAAQS

EPA's concerns regarding the "building blocks" are also unfounded. According to EPA, these "basic building blocks" include State emission inventories, attainment demonstrations, and PSD increments. 78 Fed. Reg. at 12,485. EPA also mentions Reasonably Available Control Measures ("RACM") and Best Available Retrofit Technology ("BART") requirements. *Id.* EPA

[34] And, as EPA has stated, "EPA's view has been that if the SIP revision does not interfere with attainment or maintenance of the NAAQS, then it is unlikely to interfere with other applicable requirements." 76 Fed. Reg. 18,870, 18,873 (Apr. 6, 2011).

asserts that SSM exclusions interfere with these "basic building blocks" because they "typically assume continuous source compliance with applicable emission limitations." *Id.* However, EPA provides no support for that assertion.

EPA's concern about State emission inventories is inconsistent with its own guidance and regulations governing State emission inventories, which specifically require States to take into account the fact that "continuous" compliance with numerical limits *cannot* be assumed. Like sources in all of the States where Southern Company operates, Alabama Power is required to report its excess emissions on a regular basis. *See, e.g.*, Ala. Admin. Code r. 335-3-1-.04; Fla. Admin. Code r. 62-296.405 and 62-213.440; Ga. Comp. R. & Regs. 391-3-1.02(6)(a); 11-1-3 Miss. Code R. § III(A)(3); 15A N.C. Admin. Code 2D.0601–0615. EPA's Air Emissions Reporting Rule in turn requires States to report estimates of actual emissions. In guidance designed to implement the Air Emissions Reporting Rule, EPA specifically mentions startup, shutdown, and malfunction as events to be considered in reported emission estimates. In that guidance, EPA explains:

> Should emissions that occur during start-up, shut-down, upsets, and malfunctions be included in a facilities emission estimate? Emissions that occur under all modes of operation need to be included in a facilities emission estimate. State and local agencies can attempt to estimate emissions from start-up, shut-down, upsets and malfunctions using whatever techniques they believe will produce the most accurate result. Ideally, emission estimates for these types of non-normal operating conditions will be obtained using facility specific information. Alternatively, and less preferably, they can be accounted for using the rule effectiveness adjustment procedures outlined in this guidance.[35]

[35] EPA's Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations, EPA-454/R-05-001 (Nov. 2005), Appendix B: REVISED RULE EFFECTIVENESS GUIDANCE § 8. Note that EPA refers in this passage of its guidance to startup, shutdown and malfunction events as "non-normal operating conditions."

This guidance shows that EPA clearly expects States to include all emissions in their inventory, including those that occur during startup, shutdown and malfunction. In situations where facility specific information is not available, EPA's guidance lays out rule effectiveness adjustment procedures to account for these emissions. "Rule effectiveness" is:

> how well a regulatory program achieves all possible emission reductions. This rating reflects the assumption that controls typically aren't 100 percent effective because of equipment downtime, upsets, decreases in control efficiencies, and other deficiencies in emission estimates. [Rule Effectiveness] adjusts the control efficiency.

40 C.F.R. § 51.50.

Thus, under EPA's own rules and guidance, States must determine what percentage of the emissions actually released into the atmosphere exceeded established limits and apply that percentage in its future projections to ensure its analysis is as realistic as possible, recognizing that 100% compliance with numerical limits is unlikely.

If EPA has concerns regarding emission inventories, then it should address them in the inventory development and submittal process or as part of its review of SIPs. This SIP call is not an effective tool for addressing such issues. Even if finalized as proposed, it would not resolve EPA's concerns because it would not necessarily ensure that emission inventories and attainment demonstrations properly account for "emissions that occur under all modes of operation." Only diligent review of each SIP submitted, on a case-by-case basis, will accomplish that goal.

EPA's own "rule effectiveness" guidance aside, SSM emissions are unlikely to have any significant impact on modeling analyses or the attainment demonstrations that rely on them. Even to the extent SSM emissions present some level of uncertainty in the models (which may be very little, where States appropriately take such emissions into account), EPA fully recognizes that all modeling analyses entail a significant amount of uncertainty in the many assumptions that must be made for the basic inputs to the model, including emissions inventories, weather,

and economic growth. In fact, for some types of sources, emissions themselves are estimated as opposed to measured, which adds further uncertainty.[36] In Southern Company's experience, which has been confirmed in discussions with its permitting authorities, any uncertainty related to SSM emissions that may exist is insignificant compared to the uncertainty already inherent in these other data inputs and in the model formulation itself. In short, SSM emissions are "lost in the noise" of the model. In addition, the EPA guidance cited above provides tools to mitigate model uncertainty in States' attainment demonstration process. As a result, there is no reason to expect that SSM emissions will have any significant impact on attainment demonstrations or any underlying air quality modeling analysis, and EPA has provided none.

EPA also raises concerns about the impact of SSM emissions on PSD increments and similarly fails to provide any factual basis for such concerns. A PSD increment is the maximum allowable increase in the concentration of a pollutant in ambient air above a baseline concentration. These increments apply to new sources that are constructed or sources that undergo major modification after the baseline date (i.e., modified sources). Existing sources do not consume PSD increments. Because the emissions that occur during SSM periods at existing sources were captured in an area's baseline, EPA cannot claim that such emissions should also be counted as part of the increase allowed above that baseline. To do so would inappropriately "double count" those SSM emissions by treating them as both part of the baseline and "new" emissions above the baseline. New major sources, of course, must demonstrate that they will not cause or contribute to a violation of the applicable PSD increments as part of the PSD permitting process, an analysis that will often require consideration of new minor sources in the vicinity, as

[36] EPA Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM2.5, and Regional Haze (Apr. 2007).

well, and which must take into account emissions during SSM events. *See* 40 C.F.R. §§ 52.21(b)(48)(i)(a), 52.21(k) (requiring sources to consider emissions during startup, shutdown, and malfunctions to determine applicability of permitting requirements and requiring a source impact analysis evaluating all allowable emissions to demonstrate the source will not cause or contribute to a violation of the NAAQS or PSD increments). Furthermore, new sources would be subject to EPA's more recently adopted NSPS, which would preempt any State emission limitations (and any associated SSM exclusions).

Finally, to the extent EPA is concerned about applicability of SSM provisions to specific control technology requirements such as RACM in attainment plans for nonattainment areas or BART in regional haze SIPs, EPA has review and approval authority over those SIPs. Thus, EPA is free to raise questions and concerns about the applicability of SSM provisions to RACM and/or BART requirements in the SIP review process. Alabama Power is not aware of any SIP that has been disapproved, in whole or in part, based on the applicability of SSM provisions to control technology requirements. In fact, EPA has approved SIPs for ozone and particulate matter in Alabama and Georgia, and has approved the States' regional haze SIPs (with the exception of issues related to reliance on the Clean Air Interstate Rule ("CAIR")), while they have issued no disapproval based on SSM concerns. Thus, EPA cannot both approve an attainment or maintenance plan and claim the NAAQS are at risk without evaluating that plan, nor can EPA claim visibility is at risk based on current evidence. Such contradictory statements confirm the arbitrariness of the broad, unsupported assumptions underlying EPA's proposal.

Therefore, EPA cannot simply assume that SSM provisions undermine the "building blocks" of the NAAQS. EPA already has rules in place to ensure States take into account rule effectiveness and can simply enforce those rules if it is concerned that inventories do not comply

with those rules. Attainment plans, PSD increments and control technology requirements, likewise, should not be a concern for all of the reasons stated above. The best indication, however, that SSM provisions are not impacting the NAAQS or their building blocks is actual emissions and air quality data.

c. EPA has approved dozens of revisions to Alabama's SIP since its SSM Provisions were last approved and has never taken issue with these provisions

Despite EPA's newfound urgency to invalidate the Alabama SIP, EPA has never taken issue with Alabama's SSM provisions in any of the dozens of instances where EPA has reviewed Alabama SIP revision submittals. In fact, as summarized in the chart below, EPA has reviewed and approved revisions to Alabama's SIP at least 39 times since ADEM last revised its SSM provisions in 1993, not once indicating that it believed these rules to be inconsistent with the CAA.

Date	Citation	Approved SIP Revision
Aug. 30, 1993	58 Fed. Reg. 45,439	Approving various SIP revisions, including revisions to ADEM Rule 335-3-14-.03
Feb. 4, 1994	59 Fed. Reg. 5330	Approving SIP revisions related to particulate matter emissions and certain coke ovens
Aug. 4, 1994	59 Fed. Reg. 39,683	Approving SIP for purpose of implementing emission statement program for stationary sources within Birmingham ozone nonattainment area
Oct. 20, 1994	59 Fed. Reg. 52,915	Approving SIP revisions to incorporate rules for permitting of synthetic minor sources
Oct. 31, 1994	59 Fed. Reg. 54,385	Approving SIP revisions for purpose of establishing compliance assistance program
Jan. 6, 1995	60 Fed. Reg. 2026	Approving SIP revisions related to Alabama's plan for maintaining attainment of lead NAAQS in Leeds area
Feb. 12, 1996	61 Fed. Reg. 5285	Approving SIP revisions incorporating changes to ADEM's air permitting program
Mar. 19, 1996	61 Fed. Reg. 11,137	Approving SIP revisions regarding volatile organic compounds and air permitting
June 6, 1997	62 Fed. Reg. 30,991	Approving SIP revisions to ADEM's air pollution control program

Date	Citation	Approved SIP Revision
Jan. 7, 1998	63 Fed. Reg. 674	Approving SIP revisions incorporating "Revisions to Several Chapters of the [ADEM] Administrative Code for the Air Pollution Control Program"
Sept. 14, 1998	63 Fed. Reg. 49,058	Approving SIP revisions incorporating "Revisions to Several Chapters of the [ADEM] Administrative Code for the Air Pollution Control Program," including ADEM chapter 335-3-14 rules
Mar. 1, 1999	64 Fed. Reg. 9951	Approving SIP revisions to ADEM's Air Pollution Control Program
June 4, 1999	64 Fed. Reg. 29,958	Approving SIP revisions related to 1990 base year ozone emission inventory for Birmingham area
Nov. 3, 1999	64 Fed. Reg. 59,633	Approving SIP revisions related to Credible Evidence regulations and exemptions under ADEM chapter 335-3-14 rules
May 11, 2000	65 Fed. Reg. 30,358	Approving SIP revisions related to transportation conformity rule
Sept. 20, 2000	65 Fed. Reg. 56,797	Approving SIP revisions which include revisions to ADEM chapter 335-3-14 rules
Dec. 8, 2000	65 Fed. Reg. 76,938	Approving SIP revisions related to new sources and modifications
July 16, 2001	66 Fed. Reg. 36,919	Approving SIP revisions establishing NOx allowance trading program for certain categories of major sources
Nov. 7, 2001	66 Fed. Reg. 56,223	Approving SIP revisions related to 1-hour ozone NAAQS attainment demonstration for Birmingham area
Mar. 12, 2004	69 Fed. Reg. 11,798	Approving SIP revisions related to maintenance plan for 1-hour ozone attainment for Birmingham area and approving redesignation of Birmingham area as in attainment for same
Dec. 28, 2005	70 Fed. Reg. 76,694	Approving SIP revisions in response to EPA's NOx SIP Call Phase II
May 12, 2006	71 Fed. Reg. 27,631	Approving SIP revisions related to maintenance plan for 8-hour ozone attainment for Birmingham area and approving redesignation of Birmingham area as in attainment for same
June 22, 2006	71 Fed. Reg. 35,801	Approving SIP revisions related to ADEM open burning rules
Oct. 11, 2006	71 Fed. Reg. 59,674	Approving SIP revisions adopting modifications to ADEM volatile organic compound rules
Oct. 1, 2007	72 Fed. Reg. 55,659	Approving SIP revision addressing requirements of EPA's Clean Air Interstate Rule
May 1, 2008	73 Fed. Reg. 23,957	Approving SIP revisions addressing changes to federal New Source Review regulations

Date	Citation	Approved SIP Revision
Sept. 15, 2008	73 Fed. Reg. 53,134	Approving SIP revisions adopting further modifications to ADEM volatile organic compound rules
Oct. 15, 2008	73 Fed. Reg. 60,957	Approving SIP revisions incorporating changes to Alabama opacity rule
Mar. 26, 2009	74 Fed. Reg. 13,118	Approving SIP revisions for Birmingham and Jackson County areas for both 8-hour ozone and $PM_{2.5}$ NAAQS
July 30, 2009	74 Fed. Reg. 37,945	Approving SIP revisions adopting contingency measures for maintenance of 1997 8-hour ozone NAAQS
Sept. 21, 2010	75 Fed. Reg. 57,390	Approving SIP revisions modifying ADEM rules related to volatile organic compounds
Dec. 29, 2010	75 Fed. Reg. 81,863	Approving SIP revisions incorporating ADEM regulations related to regulation of greenhouse gases under Alabama's Prevention of Significant Deterioration program
July 13, 2011	76 Fed. Reg. 41,100	Approving SIP revisions providing for implementation of 1997 8-hour ozone NAAQS
Apr. 20, 2012	77 Fed. Reg. 23,619	Approving SIP revisions related to ADEM's low-Reid Vapor Pressure fuel program in Jefferson and Shelby Counties
Sept. 26, 2012	77 Fed. Reg. 59,100	Approving SIP revisions related to implementation of federal Prevention of Significant Deterioration $PM_{2.5}$ NAAQS requirements
Oct. 1, 2012	77 Fed. Reg. 59,755	Approving SIP revisions implementing infrastructure requirements for $PM_{2.5}$ NAAQS
Oct. 5, 2012	77 Fed. Reg. 60,904	Approving SIP revisions providing for attainment of 1997 $PM_{2.5}$ NAAQS for Chattanooga area
Jan. 22, 2013	78 Fed. Reg. 4341	Approving SIP related to maintenance plan for 1997 Annual PM NAAQS attainment for Birmingham area and approving redesignation of Birmingham area as in attainment for same
Jan. 25, 2013	78 Fed. Reg. 5306	Approving SIP related to maintenance plan for 2006 24-hour $PM_{2.5}$ NAAQS attainment for Birmingham area and approving redesignation of Birmingham area as in attainment for same

3. Actual emissions and air quality monitoring data demonstrate that EPA's speculation is unfounded—emissions have significantly declined and air quality has improved and continues to improve with Alabama's SSM provisions in place

Perhaps the best evidence that EPA's NAAQS concerns are unfounded is the actual emissions and ambient air quality data that show air quality is consistently and continuously improving in Alabama. Since enactment of the 1990 CAA Amendments, Alabama Power has spent billions of dollars installing new control equipment and even exploring new technologies for reducing emissions that did not exist even a few years ago. Numerous other companies have done the same. The dramatic success of the efforts of Alabama Power, other utilities, and other industries in reducing emissions belies EPA's sudden hypothetical concern over whether SSM provisions—which have been in place all along—may impede efforts to attain the NAAQS.

a. Actual State-wide emissions have declined significantly since 1990

EPA routinely touts the dramatic reduction in emissions of the six criteria pollutants since the 1990 CAA Amendments. Between 1990 and 2010, national emissions of PM-10, SO_2, CO and Lead decreased by 60% or more. Emissions of PM-2.5 and VOCs decreased by over 50%, and NO_X emissions decreased by almost 50% nationwide. The reductions are even more dramatic when compared to 1980 levels. These reductions are summarized in the chart below.

National Air Qualty Trends

Percent Change in Emissions[37]

	1980 vs 2010	1990 vs 2010	2000 vs 2010
Carbon Monoxide (CO)	-71	-60	-44
Lead (Pb)	-97	-60	-33
Nitrogen Oxides (NO_x)	-52	-48	-41
Volatile Organic Compounds (VOC)	-63	-52	-35
Direct PM_{10}	-83	-67	-50
Direct $PM_{2.5}$	---	-55	-55
Sulfur Dioxide (SO_2)	-69	-65	-50

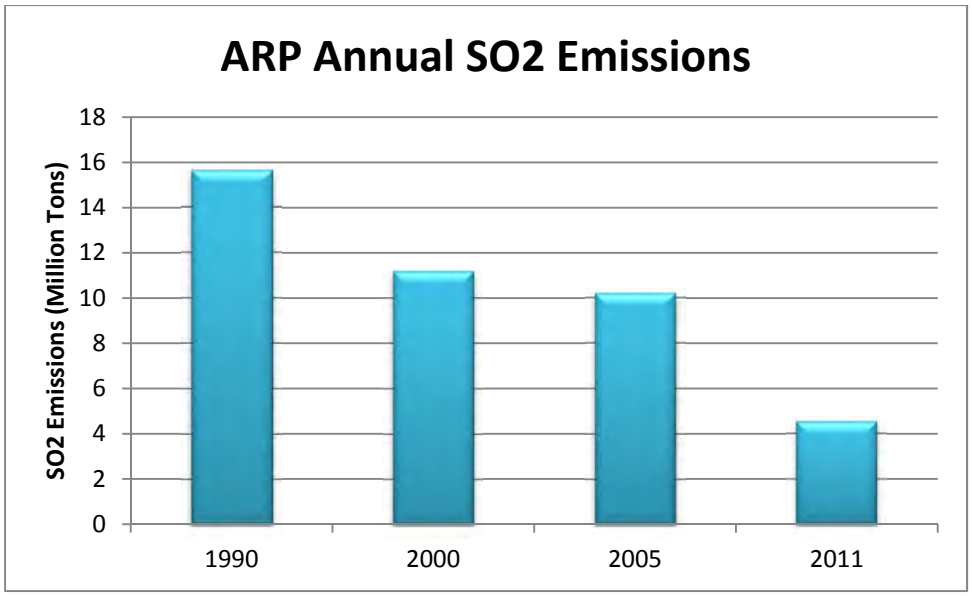
Notes:
1. --- Trend data not available
2. Direct PM10 emissions for 1980 are based on data since 1985
3. Negative numbers indicate reductions in emissions

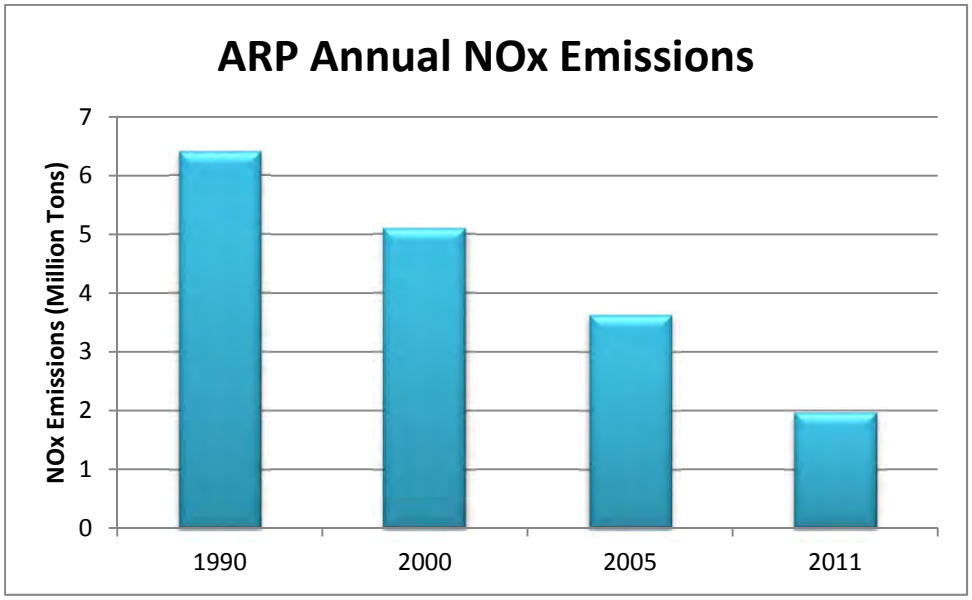
Consistent with these national trends, studies show that total State-wide emissions in Alabama have also decreased significantly since 1990. *See* C.L. Blanchard, G.M. Hidy, S. Tanenbaum, E.S. Edgerton & B.E. Hartsell (2013): The Southeastern Aerosol Research and Characterization (SEARCH) study: Temporal trends in gas and PM concentrations and composition, 1999–2010, Journal of the Air & Waste Management Association, 63:3, 247-259, *available at* http://dx.doi.org/10.1080/10962247.2012.748523.

[37] EPA, Air Quality Trends, http://www.epa.gov/air/airtrends/aqtrends.html#comparison (last visited May 12, 2013); *see also* EPA, Technology Transfer Network Clearinghouse for Inventories & Emissions Factors, Nat'l Emissions Inventory Air Pollutant Emissions Trends Data, http://www.epa.gov/ttnchie1/trends/ (last visited May 12, 2013) (providing trends based on EPA's National Emissions Inventory including average annual emissions of criteria pollutants between 1970 and 2012).

b. Electric generating unit emissions have decreased dramatically since 1990 and more reductions are coming

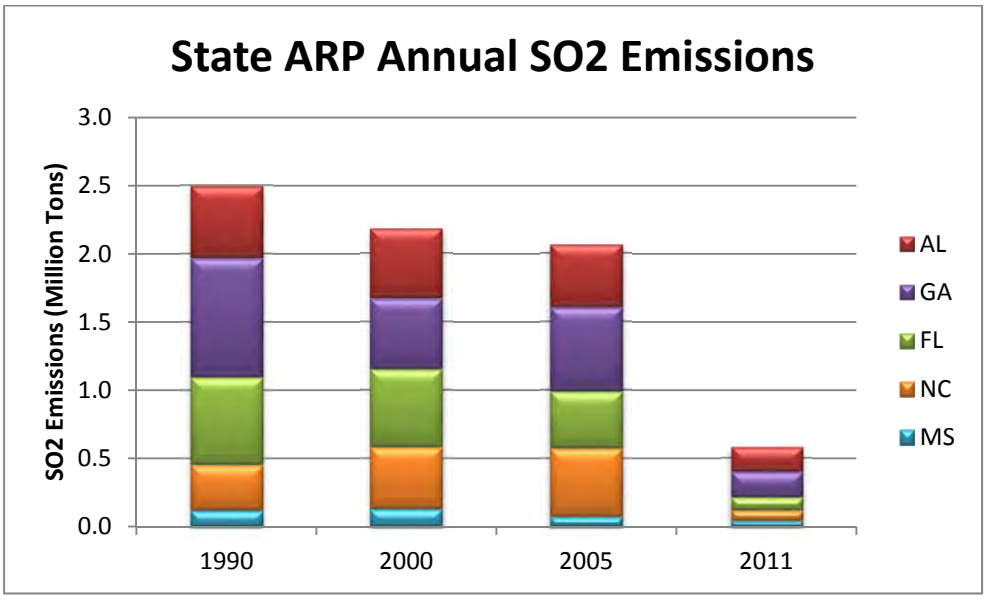
A significant portion of the recent reduction in emissions has been accomplished by electric utilities. The following charts take into account all SO_2 and NO_X emissions from utility sources, including those emitted during SSM, based on reports provided in accordance with the CAA Acid Rain Program and the CAIR:

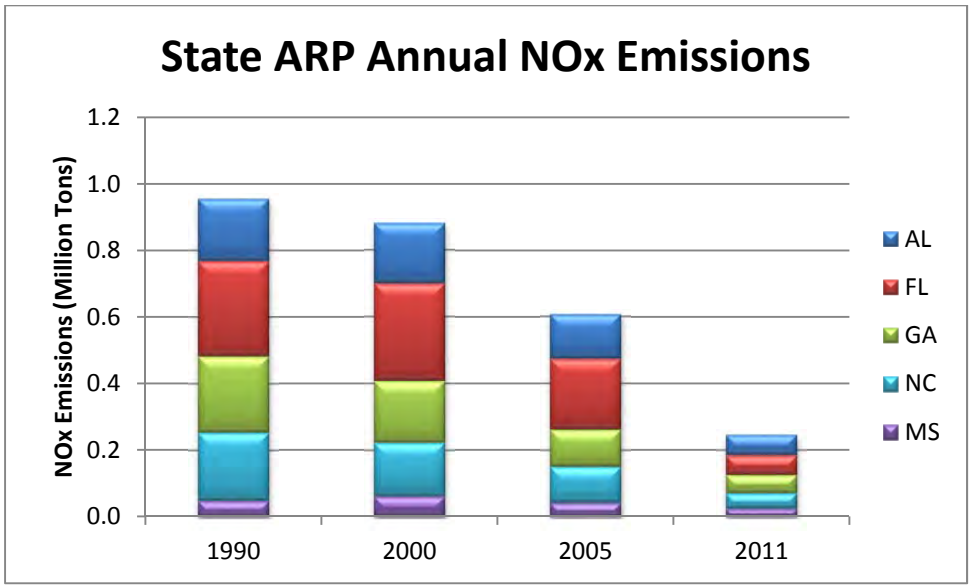


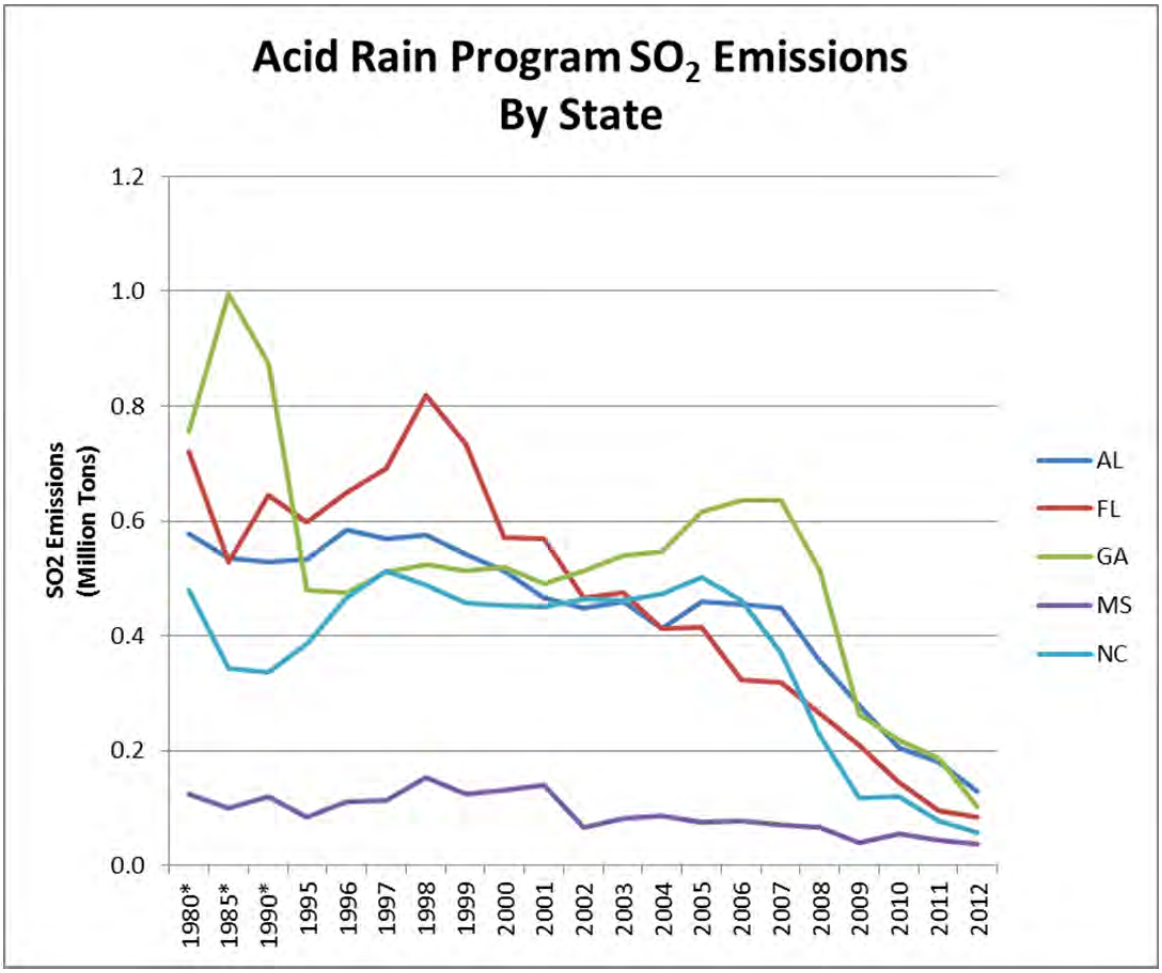


These charts show that, with the current State SSM provisions in place, emissions are decreasing rapidly.

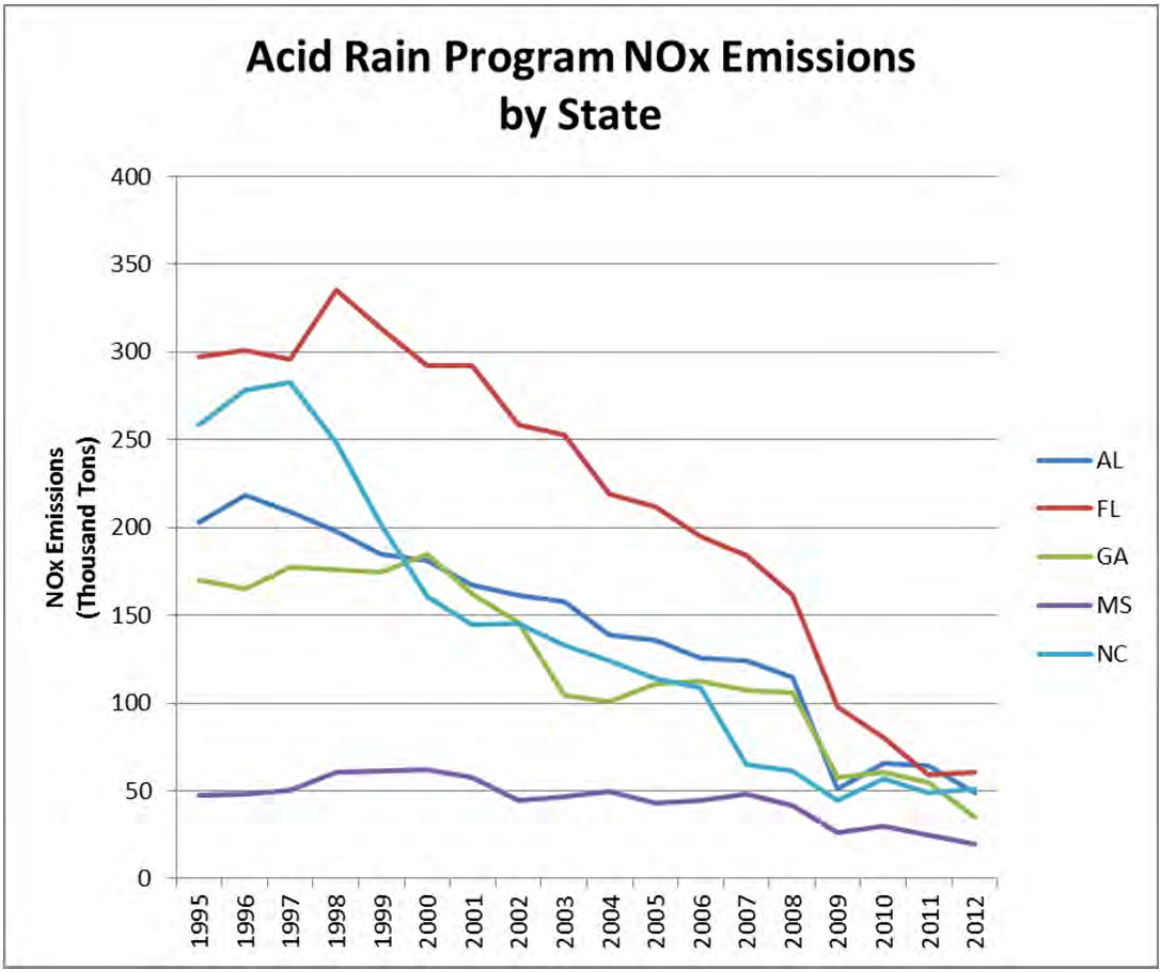
Even when only considering the States in which Southern Company subsidiaries operate, including Alabama, the results are equally impressive:







The foregoing chart shows SO_2 emissions from sources subject to the Acid Rain Program in Alabama, Florida, Georgia, Mississippi and North Carolina. Since implementation of the Acid Rain Program began in 1995, emissions from affected sources have declined substantially. Emissions data for the figure were obtained from the Air Markets Program Data website (http://ampd.epa.gov/ampd/).



The foregoing chart shows NO_X emissions from sources subject to the Acid Rain Program in Alabama, Florida, Georgia, Mississippi and North Carolina. Since implementation of the program in 1995, NO_X emissions from affected sources have decreased significantly. Emissions data for the figure were obtained from the Air Markets Program Data website (http://ampd.epa.gov/ampd/).

c. The emission reductions achieved have enabled attainment of the NAAQS

As expected, these significant emission reductions from EGUs, along with reductions from other stationary sources and mobile sources, have enabled Alabama and other States to achieve compliance with the NAAQS. As EPA's own actions demonstrate, air quality in Alabama has continually improved, particularly over the decade leading up to EPA's proposed SIP call. With only isolated exceptions, Alabama has achieved "attaining air quality" status

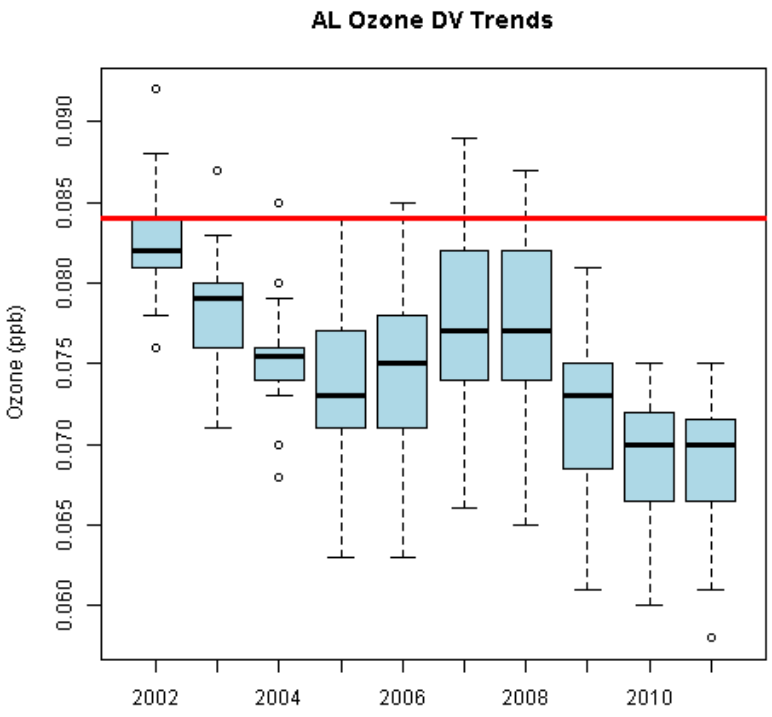
under all of the NAAQS fully implemented to date.[38] That success is illustrated in the box and whisker plots[39] shown below, which show how Alabama has achieved the 1997 and 2006 fine particulate matter standards, the 1997 ground-level ozone, and the 1971 carbon monoxide NAAQS.[40] The charts below display air quality trends, both statewide and in the designated Birmingham area[41]:

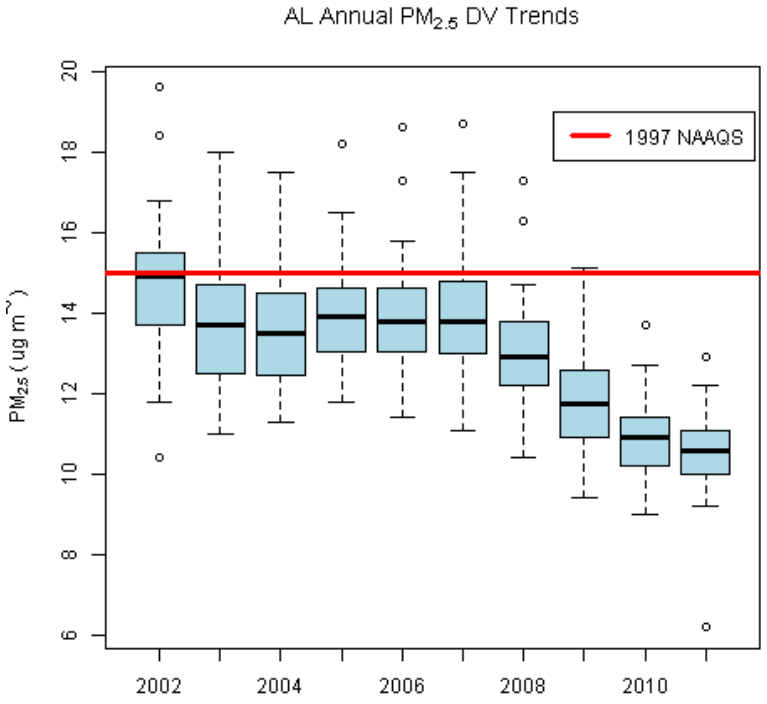
[38] The current attainment status of each State within the Southern Company territory, including Alabama, is provided in Exhibit 4 to these comments.

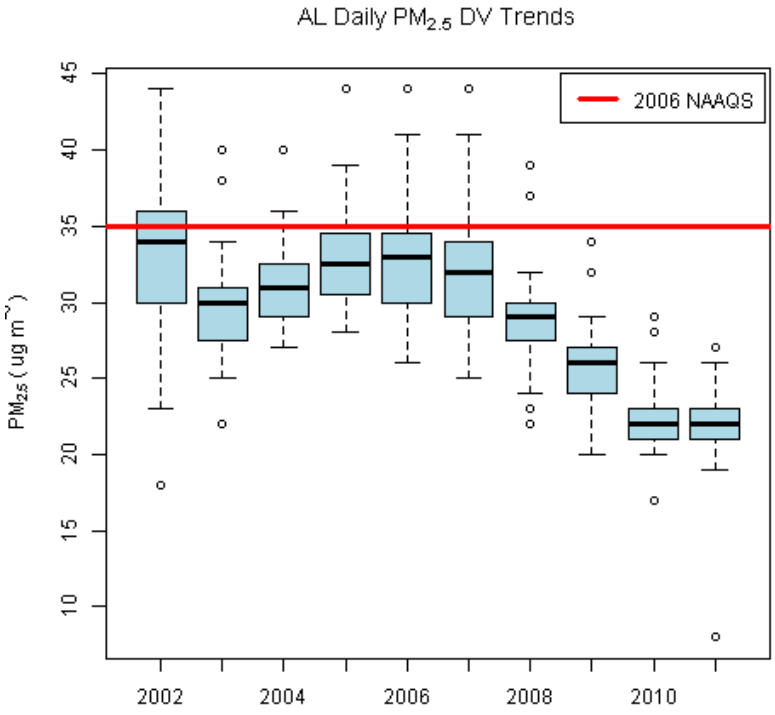
[39] The box and whisker plots use the following convention: The box in the middle is bounded by the upper ($q_{0.75}$) and lower ($q_{0.25}$) quartiles. The line inside the box represents the median. The lines, or whiskers, that extend above and below the boxes represent the inner fence, which is defined to extend outward from each quartile to a distance 1.5 * IQR, where IQR is the inter-quartile range ($q_{0.75} - q_{0.25}$). Circles plotted beyond the whiskers represent data values that are outside the inner fence.

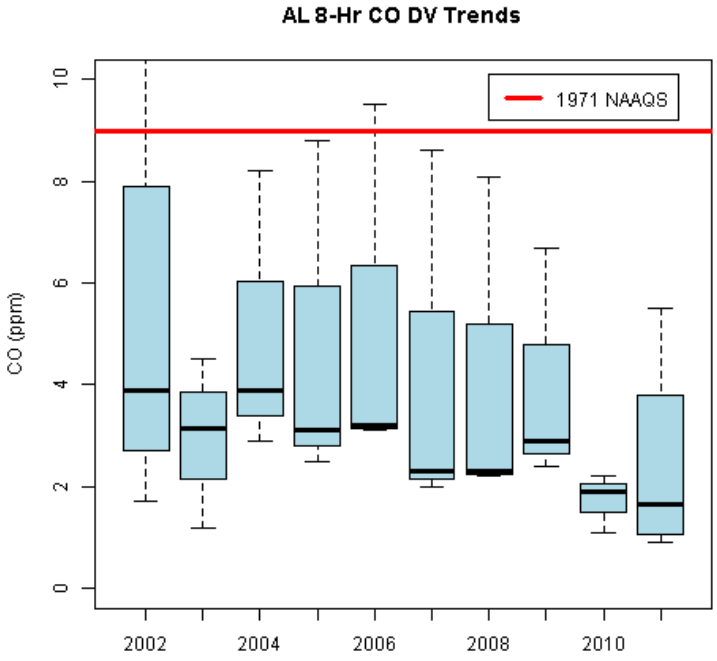
[40] All areas within Alabama have achieved attaining air quality or have been redesignated attainment for the 1978 Lead, 1971 Sulfur Dioxide, 1979 Ozone, and 1971 Carbon Monoxide NAAQS.

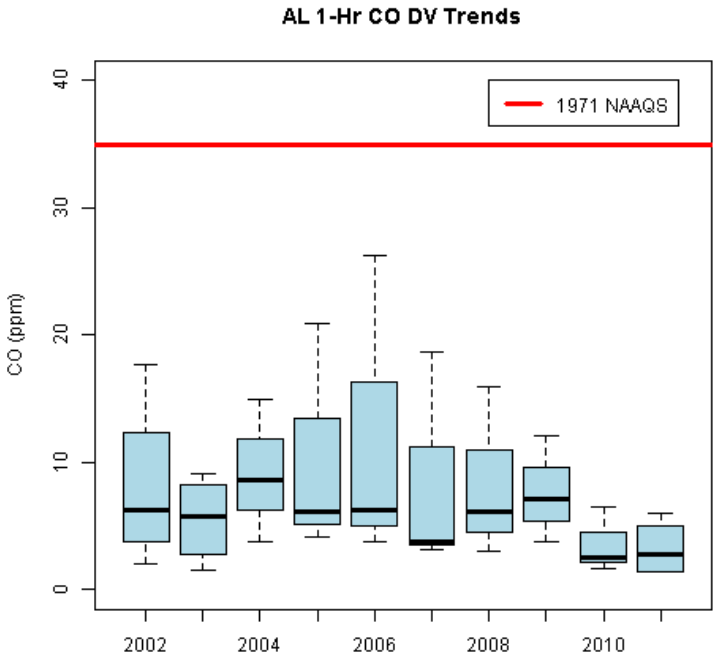
[41] All data reflected in the charts below are available on EPA's AirData website at http://www.epa.gov/airquality/airdata/. Note that EPA's database does not have $PM_{2.5}$ data prior to 1999.

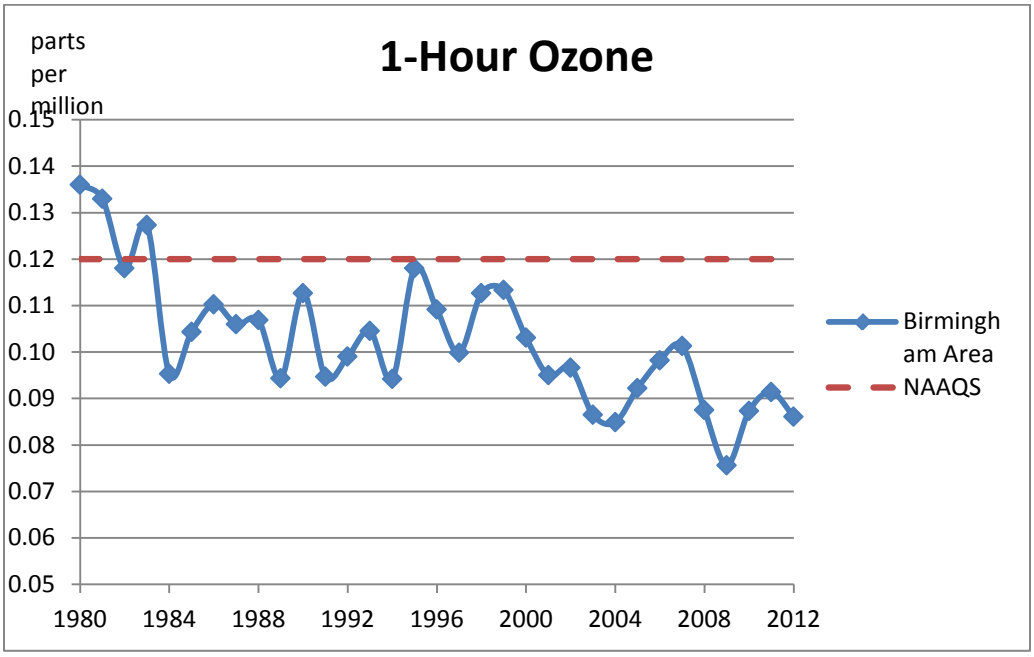

AL Ozone DV Trends
Ozone (ppb)
0.060
0.065
0.070
0.075
0.080
0.085
0.090
2002
2004
2006
2008
2010

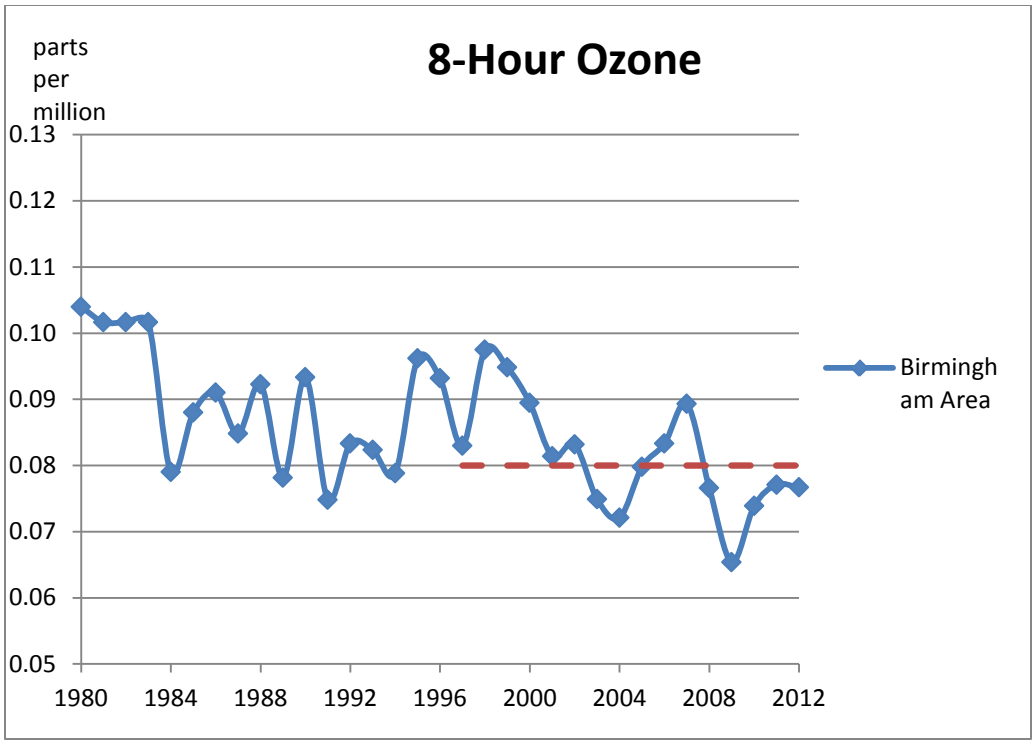

AL Annual PM2.5 DV Trends
PM2.5 (ug m-3)
6
8
10
12
14
16
18
20
1997 NAAQS
2002
2004
2006
2008
2010

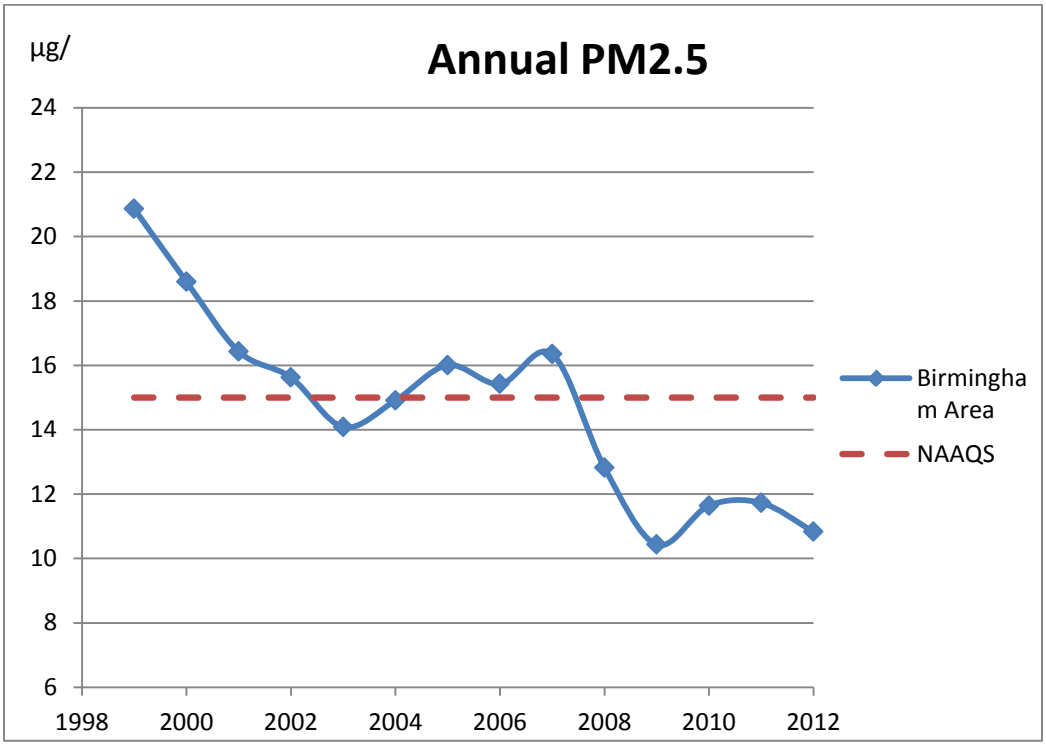

AL Daily PM2.5 DV Trends
2006 NAAQS
PM25 (ug m~)
10
15
20
25
30
35
40
45
2002
2004
2006
2008
2010

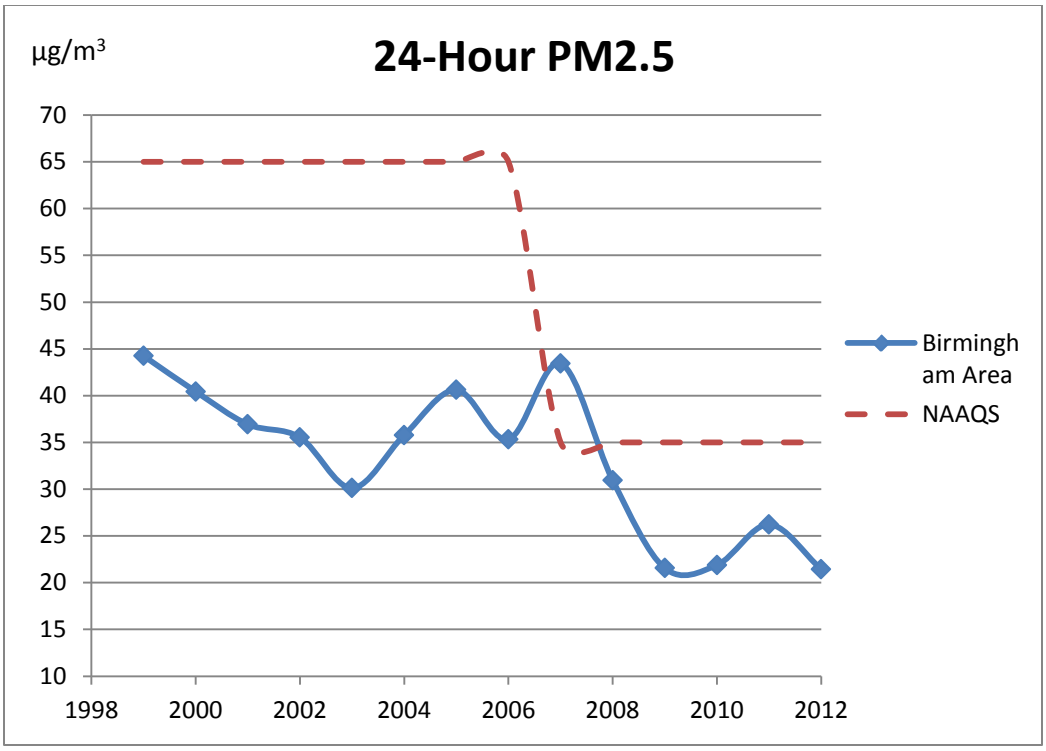

AL 8-Hr CO DV Trends
1971 NAAQS
CO (ppm)
0
2
4
6
8
10
2002
2004
2006
2008
2010


AL 1-Hr CO DV Trends
1971 NAAQS
CO (ppm)
0
10
20
30
40
2002
2004
2006
2008
2010


1-Hour Ozone
parts per million
0.15
0.14
0.13
0.12
0.11
0.10
0.09
0.08
0.07
0.06
0.05
1980
1984
1988
1992
1996
2000
2004
2008
2012
Birmingham Area
NAAQS


8-Hour Ozone
parts per million
0.13
0.12
0.11
0.10
0.09
0.08
0.07
0.06
0.05
1980
1984
1988
1992
1996
2000
2004
2008
2012
Birmingham Area


Annual PM2.5
µg/
24
22
20
18
16
14
12
10
8
6
1998
2000
2002
2004
2006
2008
2010
2012
Birmingham Area
NAAQS



Obviously, if EPA had based its SIP call decision here on air quality data, as EPA has in most all of its other SIP calls, EPA would have had no basis upon which to describe Alabama's SIP as "substantially inadequate" to achieve Alabama's CAA responsibilities.

EPA has recently revised several of the NAAQS, which include new 3-Month Pb (2008), 8-Hr Ozone (2008), 1-Hr NO2 (2010), 1-Hr SO2 (2010), and 24-Hr PM2.5 (2013) standards. While some of these standards may present attainment challenges, the implementation plans for those standards are either not yet due or have not been fully implemented and, therefore, could not form the basis of any justification for EPA's current proposal. In some cases, however, the new standards are projected to be attained without significant additional controls. For example, EPA expects that its significantly more stringent fine particulate matter standard will be achieved

by the deadline for compliance *without any additional control requirements*, except for a few counties in California.[42]

Alabama's success in achieving the NAAQS, even as EPA has repeatedly strengthened those standards, confirms that Alabama's SSM provisions—which have been in place all along—do not place the NAAQS at risk. Given the minimal amount of operating time SSM events generally represent, and the great strides taken Alabama and the sources it regulates to reduce emissions and achieve the NAAQS in spite of those unavoidable events, EPA's vague concern regarding the impact of SSM events on attainment of the NAAQS is really quite surprising.

d. Visibility is also continuing to improve

Under EPA's regional haze program, States are required to report to EPA on their progress toward meeting their "reasonable progress goals" in 2013 and, although those reports have yet to be submitted, Alabama appears to be on track to meet their long-term visibility goals. *See, e.g.*, http://adem.alabama.gov/newsEvents/pressreleases/2011/AchievingAirQuality.pdf. In addition, data measured by the IMPROVE monitoring network in the Southeastern States, show that visibility in national park and wilderness areas is improving. *See* http://views.cira.colostate.edu/web/Trends/. In fact, IMPROVE data compiled through 2010

[42] EPA Press Release, EPA Announces Next Round of Clean Air Standards to Reduce Harmful Soot Pollution (Dec. 14, 2012) ("It is expected that fewer than 10 counties, out of the more than 3,000 counties in the United States, will need to consider any local actions to reduce fine particle pollution in order to meet the new standard by 2020, as required by the Clean Air Act. The rest can rely on air quality improvements from federal rules already on the books to meet this new standard."), *available at* http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/a7446ca9e228622b85257ad400644d82!OpenDocument.

indicate that nearly all Class I areas in the Southeast are meeting or are doing better than their visibility goals on the most impacted visibility days.[43]

Thus, actual emissions and air quality data show that the SSM provisions are not undermining the NAAQS implemented to date, the building blocks of the NAAQS, or visibility goals under the Act. EPA's mere allegations cannot stand in the face of this evidence.

4. Alabama already has requirements to minimize emissions during SSM

Finally, EPA fails to account for the other control measures and standards States have developed to regulate emissions during SSM, which are better suited for SSM periods. In Alabama, for example, permits that allow for SSM exemptions also have a duty to minimize emissions and otherwise follow good operating practices during startup, shutdown or load change periods. The emergency provision also requires that emissions be minimized during emergency periods. *See* Ala. Admin. Code r. 335-3-14-.03(1)(h)(2)((ii)(III) (to be eligible for an exemption, a source must show that, "during the period of which the emergency occurred, the permittee took all reasonable steps to minimize levels of emissions that exceeded the standards, or other requirements of the permit"). In addition, the emergency provision also prohibits improper operation and maintenance of regulated emission sources. *See* Ala. Admin. Code r. 335-3-14-.03(1)(h)(2) ("permitted facility was at the time being properly operated"). Therefore, changes to the Alabama SIP are unnecessary, given that good work practice standards already exist in the SIP.

[43] E-mail from James Boylan, Unit Manager, Data & Modeling Unit, Ga. Envtl. Prot. Div., to Rosa Chi, Eng'r, Ga. Power Co. (Apr. 30, 2013) (on file with recipient) (regarding "Class I areas info").

In addition, SSM provisions in all of the Southern Company States affected by this proposed rule establish a general duty to minimize the magnitude and duration of emissions during startup, shutdown, and other operating conditions. *See, e.g.*, Ala. Admin. Code R. 335-3-14-.03(1)(h)(2) ("permittee took all reasonable steps to minimize levels of emissions"); Fla. Admin. Code Ann. r. 62-210.700(1) ("best operational practices to minimize emissions [must be] adhered to . . . duration of excess emissions shall be minimized"); Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) ("best operational practices to minimize emissions [must be] adhered to . . . duration of excess emissions [shall be] minimized"); 11-1-2 Miss. Code R. § 10.1 ("[source must take] all reasonable steps to minimize levels of emissions"); 15A N.C. Admin. Code 2D.0535(c) ("amount and duration of the excess emissions . . . have been minimized to the maximum extent practicable"). The rules also prohibit improper operation and maintenance of regulated emission sources. *See, e.g.*, Ala. Admin. Code R. 335-3-14-.03(1)(h)(2) ("permitted facility was at the time being properly operated"); Fla. Admin. Code Ann. r. 62-210.700(4) ("Excess emissions which are caused entirely or in part by poor maintenance, poor operation, or any other equipment or process failure . . . shall be prohibited"); Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7)(ii) ("Excess emissions which are caused entirely or in part by poor maintenance, poor operation, or any other equipment or process failure . . . are prohibited and are violations"); 11-1-2 Miss. Code R. § 10.1 ("source was at the time being properly operated"); 15A N.C. Admin. Code 2D.0535(c)(5) ("excess emissions are not part of a recurring pattern of indicative of inadequate design, operation, or maintenance"). These requirements ensure that SSM events are controlled to the greatest extent feasible and confirm that the States' SSM provisions do not allow any period of uncontrolled emissions, contrary to EPA's claims in support of its proposed SIP call.

C. EPA Has Failed To Demonstrate That SIPs Are "Substantially Inadequate," Which Is a Prerequisite for Issuing a SIP Call

Section 110(k)(5) of the CAA, which provides EPA the authority to issue a SIP call, reads as follows:

> (5) Calls for plan revisions. Whenever the Administrator finds that the applicable implementation plan for any area is ***substantially inadequate*** to [1] attain or maintain the relevant national ambient air quality standard, [2] to mitigate adequately the interstate pollutant transport described in section 176A or section 184 [42 USCS § 7506a or § 7511c], or [3] to otherwise comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies.

42 U.S.C. § 7410(k)(5). Therefore, to support its proposed SIP call to eliminate SSM provisions, EPA must find that the SSM provisions render each State's entire SIP "substantially inadequate" to fulfill at least one of the following: (1) attainment and maintenance of the NAAQS, (2) mitigation of interstate transport, or (3) compliance with any requirement of the Act.

Although EPA claims the SIPs for the States named in its proposal are "substantially inadequate," EPA has failed to provide any support for that finding. Specifically, EPA has not shown how any State's SSM provision threatens the NAAQS, fails to sufficiently mitigate interstate transport, or comply with any other CAA requirement. Most of EPA's attempts to justify its proposal fall into the third category—failure to "otherwise comply" with the Act—such as EPA's apparent interpretation of section 302(k) as requiring continuous compliance with otherwise applicable numeric "emission limitations," or its claim that exceedance of any numeric "emission limitation" must be a "violation" subject to enforcement. As outlined above in Section II.A.1, however, neither of these claims represents a reasonable interpretation of the CAA.

EPA also expresses a general concern over the possibility that SSM exclusions will interfere with attainment and maintenance of the NAAQS. Unsubstantiated concerns, however,

do not satisfy EPA's obligation to "find" each specific State SIP to be "substantially inadequate" before issuing a SIP call. EPA's failure to even consider the individual States' emission limitations, emission inventories, or attainment/maintenance demonstrations confirms that EPA's analysis amounts to nothing more than mere speculation. The complete absence of analysis to support the rulemaking is unprecedented.

1. By inserting the modifier "substantially" before "inadequate," Congress deliberately raised the degree of evidence necessary to support a SIP call

Although EPA notes in its proposed rule that the term "substantially inadequate" is not defined in the CAA, EPA makes no effort to define it. 78 Fed. Reg. at 12,483. Instead, EPA states that because the term is not defined, and because section 110(k)(5) "does not specify a particular form of analysis or methodology that the EPA must use to evaluate SIP provisions for substantial inadequacy," EPA is entitled to deference under *Chevron* step 2 to interpret this provision as it sees fit. *Id.* Moreover, to the extent the term "substantially inadequate" is ambiguous, EPA believes it is reasonable to interpret the term to measure long-standing SIP provisions against whatever interpretation of the CAA EPA happens to hold at the time. *Id.* The Tenth Circuit has held that when an agency fails to define an important term like this, "deference is inappropriate." *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1201–02 (10th Cir. 2001) (court stated that deference was inappropriate and that it was "unable to conclude that the [agency's] actions [we]re rational" because the agency failed "to define the terms at all").

In prior rulemakings, EPA has acknowledged that the CAA does not define the term "substantially inadequate" and stated that, as a result, "it should be given its ordinary, everyday

meaning."[44] Using its ordinary, everyday meaning here, it is clear that by including the modifier "substantially," instead of just using the word inadequate, Congress deliberately raised the burden that EPA must carry to issue a SIP call. "Substantially" means something that is "[c]onsiderable in importance, value, degree, amount, or extent." *The Am. Heritage Dictionary Second College Ed.*, 1213 (1982); *see also Webster's Third New International Dictionary*, 2280 (1993) (defining "substantial" as "considerable in amount, value, or worth," and "being that is specified to a large degree or in the main").[45] Accordingly, EPA cannot issue a SIP call under the *assumption* or unsupported *concern* that a SIP provision may prevent the State from complying with a requirement of the CAA.

Furthermore, EPA issued guidance on the meaning of "substantially inadequate" in the 1970's that lists the "factors that could be considered in making a determination as to whether a SIP is substantially inadequate." *See* EPA's Guidelines for Determining the Need for Plan Revisions to the Control Strategy Portion of the Approved State Implementation Plan, OAPQS No. 1.2-001 (1976).[46] All of these factors speak to air quality and none of them contemplates

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[44] *See* Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698, 77,705 (Dec. 13, 2010).

[45] *See* Letter from Stephen L. Johnson, EPA Adm'r, to Robert Ukeiley, Ctr. for Biological Diversity (June 29, 2007) (in declining to make a finding that the Kentucky SIP was "substantially inadequate," EPA noted in its letter to the petitioner that "the SIP call authority is only triggered upon a finding of *substantial* inadequacy, not mere inadequacy) (emphasis in original) (attached as Exhibit 5).

[46] Specifically, these factors include the following:

1.Factors favoring a finding that the SIP is not substantially inadequate:
   a. Available data provide a reasonable expectation that NAAQS have been or will be achieved by the currently approved SIP;
   b. The most recent air quality data are below or not far above NAAQS;
   c. Much abatement work is ongoing or yet to be completed;

using interpretations of legal issues to justify dictating to States on matters that are actually air quality matters. As stated in the guidance: "[T]he decision to call for a plan revision should be made only after detailed analysis of the status of air quality; the restrictiveness of the existing regulations; the status of major compliance actions and after thorough discussion with all pertinent program elements in the Regional Office and with the affected State and local control agencies." *Id.* at 2. In addition, the guidance states that the "Regional Office should document the reason why the plan revision is necessary, *providing a reasonable amount of detail on the*

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d. Air quality and emissions data are not yet extensive in terms of time, geographical coverage or trends;
e. Air quality levels have varied erratically up and down in recent years and a clear trend is not yet determinable;
f. Emission control regulations have been made more stringent in past few years;
g. Existing regulations are very stringent and almost all reasonable control measures that can be achievable are being used;
h. Major reductions in emissions have been made in the past few years and more are programmed for the near future;
i. Governmental air pollution control program has grown substantially in the past few years and enforcement actions are being intensified.

2.Factors favoring a finding that a SIP is substantially inadequate include:

a. There is good evidence that compliance with existing regulations will not result in achieving NAAQS by the existing attainment date;
b. Recent air quality levels are substantially above NAAQS;
c. Most existing regulations have been fully implemented and future improvement in air quality under existing regulations will not be substantial;
d. Air quality levels show an evident trend that the NAAQS will not be attained by existing control measures;
e. Air quality and emissions data are generally accurate and extensive as to time series and geographic coverage;
f. Emission control regulations have not changed greatly in recent years;
g. Existing regulations are not particularly stringent and do not include all emission limitations which it is reasonable to anticipate will be achievable within a reasonable period of time;
h. There has not been much change in air quality over the past few years (and levels are above NAAQS);
i. Government control activities have been reasonably adequate for the past few years and regulations are probably enforced well.

Id. at 10–12.

discovery analysis performed to determine the need for the revision." *Id.* at 26 (emphasis added). EPA has failed to gather and/or analyze any evidence or data or consult with affected State and local control agencies as recommended in its own guidance.

The clear language of the statute requires EPA, not the State, to demonstrate that the SIP is "substantially inadequate" before demanding SIP revisions. By including this standard, Congress deliberately raised the burden of proof necessary for SIP calls, and EPA may not ignore this standard and/or interpret the standard as it sees fit.

2. EPA has ignored the "substantially inadequate" standard and vested itself with unlimited discretion to dictate when a SIP must be revised

As stated above, by adding the modifier "substantially," Congress intentionally limited EPA's authority to issue a SIP call and heightened the burden EPA carries to demand revisions to a previously-approved SIP. The limitation in section 110(k)(5) is clear and unambiguous: EPA must find the SIP is substantially inadequate. To do so, it must point to facts that support its finding that Alabama's SIP is so substantially inadequate that the State cannot attain or maintain the NAAQS or comply with the CAA so long as the disputed provisions remain a part of their SIPs.

In issuing this SIP call, however, EPA has ignored the "substantially inadequate" standard and vested itself with unlimited discretion to dictate when a SIP must be revised. EPA offers no evidence or data supporting its conclusion. Instead, EPA simply claims that provisions in Alabama's SIP, one of which it approved over four decades ago are suddenly "substantially inadequate" because they are "inconsistent with the fundamental requirements of the CAA." 78 Fed. Reg. at 12,502. Without providing any proof or alluding to any studies conducted, EPA simply states that it believes these provisions fail to meet the "fundamental statutory requirements" of the CAA and "*may* undermine the SIP emission limitations, and the emissions

reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit." *Id.* (emphasis added). In addition to intruding upon the federal–state partnership Congress intentionally created through the SIP program, EPA has turned the substantially inadequate standard into a meaningless requirement. Although the CAA does vest EPA with broad discretion to take regulatory action in certain instances, this is not one of them. The history of the phrase "substantially inadequate," discussed below, demonstrates that EPA's burden is much higher than what it set out in this SIP call.

Congress intentionally limited EPA's authority to issue SIP calls. This can be shown by comparing the statutory language of discretionary provisions of the CAA with the language of section 110(k)(5). Such discretionary provisions generally include language stating that EPA is authorized to act with "discretion," as "may be appropriate," in "his judgment," or as the Administrator "may distinguish." *See Nat'l Ass'n of Clean Air Agencies v. EPA,* 489 F.3d 1221, 1230 (D.C. Cir. 2007) (finding that the terms in the statute authorizing the Administrator to act "in his judgment," and as "he deems appropriate," to confer "broad discretion" to the Administrator); *Lignite Energy Council v. EPA,* 198 F.3d 930, 932–33 (D.C. Cir. 1999) (acknowledging that use of the term "the Administrator *may* distinguish" in CAA section 111 granted EPA "a great deal of discretion"); *Envtl. Def. Fund v. Thomas,* 870 F.2d 892, 898 (2d Cir. 1989) (concluding that the terms "as may be appropriate" and to the "judgment of the Administrator" afford EPA discretion); *Natural Res. Def. Council v. EPA,* 824 F.2d 1146, 1153–54 (D.C. Cir. 1987) (stating that by using the phrase "in his judgment", Congress chose to grant the Administrator with "discretion to deal with uncertainty" in section 112 for setting emission standards for hazardous air pollutants).

Such discretionary language simply does not exist with respect to the "substantially inadequate" standard in section 110(k)(5). It is clear from the plain language of the statute and the inclusion of the "substantially inadequate" standard that Congress intended to limit EPA's authority under section 110(k)(5) to reverse course regarding SIPs that EPA had previously approved. EPA has pointed to no facts or evidence supporting its claims that the SIPs are substantially inadequate. Without considering how the SSM provisions have been applied over the past three decades and what actual effect the emissions during those periods have had on ambient air, EPA has failed to examine the data relevant to its conclusion that the SIP provisions are substantially inadequate.[47] As such, EPA has failed to legally or factually satisfy its substantially inadequate burden in issuing the SSM SIP call. Rather than making a "finding," EPA has merely proffered an unsubstantiated "guess."

3. Because EPA has already approved these SIPs in the past, the SIP call standard is higher than the standard for simply disapproving a SIP provision in the first instance

The significance of the "substantially inadequate" standard is perhaps best shown by comparing it with the standard Congress imposed upon EPA for approving or disapproving SIP revisions. Section 110(*l*), entitled "Plan Revisions," states that:

> [EPA] shall not approve a [SIP] revision . . . if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of [the Clean Air Act]."

42 U.S.C. 7410(*l*) (emphasis added). Accordingly, EPA must disapprove a SIP revision if it "would interfere" with the NAAQS or any other requirement of the CAA. Courts have

[47] *See Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997) (court invalidated multi-State SIP call after determining the modeling supporting the call could not stand without the data from one of the jurisdictions subject to the call).

addressed this provision in some detail and generally concluded that section 110(*l*) does not require absolute "certainty" or a demonstration by the State that a SIP revision "would *not*" interfere with attainment or maintenance of the NAAQS.

As the Sixth Circuit recognized, "[I]t seems fairly clear that Congress did not intend that the EPA reject each and every SIP revision that presents *some remote possibility* for interference [with the NAAQS]." *Ky. Res. Council, Inc. v. EPA*, 467 F.3d 986, 994 (6th Cir. 2006) (emphasis added) (rejecting petitioners' claim that the State should have demonstrated that the SIP revision in that case would not interfere with attainment of the 8-hour ozone standard). The Sixth Circuit went on to state that the CAA prohibits approval of a revision that "*would* interfere" with an applicable requirement, not one that "*could* interfere." *Id.* Thus, "where EPA does not find that a SIP revision would interfere with attainment, approval of the revision does no violence to the statute." *Id.* As long as a SIP revision does not "interfere with" air quality (i.e., make it worse), EPA must approve it. *See, e.g.*, *id.* at 996; *Ala. Envtl. Council*, 711 F.3d at 1292–93. Stated differently, if the SIP revision meets the requirements of the CAA, EPA must approve it. *See* 42 U.S.C. § 7410(k)(3) ("[T]he Administrator shall approve [a SIP or SIP revision] as a whole if it meets all the applicable requirements of this chapter."); *Texas v. EPA*, 690 F.3d 670, 676 (5th Cir. 2012) ("[I]f a SIP or a revised SIP meets the statutory criteria of the CAA, then the EPA must approve it."); *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 294 (5th Cir. 1998) ("EPA does not enjoy wide latitude in deciding whether to approve or reject a state's proposed permit program. 'Unless the Administrator . . . determines that the proposed state program does not meet [the specified] requirements, he must approve the proposal.'"); *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981) (holding that the CAA "*requires* the Agency" to approve a SIP revision that meets the statutory criteria) (emphasis added).

As demonstrated in the cases above, courts have interpreted EPA's role in reviewing SIP revisions to be limited by statute. Specifically, under section 110(*l*), EPA must disapprove a SIP revision only if it "would interfere with" attainment of the NAAQS or a requirement of the CAA. The plain language of this section, compared to section 110(k)(5), which requires EPA to call a SIP if it "finds" that the SIP is "substantially inadequate" to attain or maintain the NAAQS or to otherwise comply with the CAA, demonstrates that the SIP call standard is higher than the SIP revision standard. Accordingly, if Congress limited EPA's discretion with respect to disapproving SIP revisions, Congress certainly did not intend to give EPA unlimited discretion to call SIPs that the Agency had previously approved. It would be illogical and contrary to the CAA to interpret section 110 to establish a lower standard for calling a previously approved SIP and demanding revisions to it than for disapproving that SIP in the first place.

Additionally, in evaluating a SIP revision under section 110(*l*), EPA is required to use data and evidence to determine "whether the SIP revision will allow for an increase in actual emissions into the air over what is allowed under the existing EPA-approved SIP." 76 Fed. Reg. 18,870, 18,873 (Apr. 6, 2011).[48] For example, EPA's decision to approve Alabama's opacity SIP revision in 2008 was supported by substantial record evidence about impacts to the NAAQS. 73 Fed. Reg. 60,957 (Oct. 15, 2008); *but see Texas*, 690 F.3d at 677–78 (Commenting on EPA's failure to put forth evidence demonstrating an interference with the CAA to justify its disapproval of a SIP revision, the Fifth Circuit stated that "[t]he standard for disapproving a SIP revision—that the revision would interfere with the CAA—surely requires more than the EPA's

[48] EPA also said that, at least for the submittals at issue in the Alabama opacity SIP revision action, "EPA's view has been that if the SIP revision does not interfere with attainment or maintenance of the NAAQS, then it is unlikely to interfere with other applicable requirements." 76 Fed. Reg. at 18,873.

bare conclusion."). If EPA relies on data and evidence in making decisions on SIP revisions, the same level of data and evidence should be required, at a minimum, to support a decision to mandate revisions to SIPs under the more stringent "substantially inadequate" standard. EPA's interpretation of the SIP call provision in its proposed rule, however, provides the Agency with more discretion to call previously-approved SIPs and demand revisions to them than to disapprove SIP revisions.

Moreover, as the Sixth and Eleventh Circuits have acknowledged, the statutorily-limited role given EPA by section 110(*l*) in reviewing and approving SIPs gives the States more flexibility, which is in tune with the federal–State partnership created by the CAA, and in particular, the SIP program. *See Ky. Res. Council*, 467 F.3d at 996 (Sixth Circuit noted that "In rejecting [a] strict interpretation [of section 110(*l*)] in favor of one that allows Kentucky more flexibility, the EPA does service to a fundamental premise underlying the Clean Air Act scheme, which is that the states have the primary responsibility for ensuring that the NAAQS are met."); *Ala. Envtl. Council*, 711 F.3d at 1293 (Eleventh Circuit agreed that EPA's 2008 interpretation of section 110(*l*) was a "permissible reading" of the statute because it "appropriately respects the state's choice to achieve air quality standards with 'whatever mix of emission limitations it deems best suited to its particular situation.'") (quoting *Train*, 421 U.S. at 79); *EME Homer*, 696 F.3d 7, 29 (D.C. Cir. 2012) ("That statutory federalism bar prohibits EPA from using the SIP process to force States to adopt specific control measures."). Thus, the very powers these courts say Congress gave to States regarding SIP revisions, EPA effectively negates through its asserted power to call the same SIP.

EPA also noted in the context of a North Carolina opacity revision, that "the evaluation of compliance with section 110(*l*) must take into account all relevant impacts of the proposed

change, and that those impacts may differ depending upon the circumstance." 70 Fed. Reg. 61,556, 61,558 (Oct. 25, 2005). If EPA's discretion under section 110(*l*) has been interpreted as being limited, at least in part, for the purpose of protecting the federalism aspect of the CAA, Congress certainly intended to limit EPA's discretion under the SIP call provision as well. Otherwise, EPA would be free to arbitrarily demand SIP revisions without any proof or evidence that the SIP violates a requirement of the CAA, as it proposes in this instance. As discussed in greater detail above, EPA's interpretation of "substantially inadequate" in this SIP call undermines the States' role in the CAA's cooperative-federalism system and should not be entitled to deference. By ignoring its burden under the SIP call provision and failing to take into account all relevant impacts of the proposed change, EPA has infringed upon the States' rights and disrupted the federal–State partnership.

The D.C. Circuit and the Eleventh Circuit have recognized that Congress "undoubtedly can limit an agency's discretion to reverse itself." *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008); *Ala. Envtl. Council*, 711 F.3d at 1291 (citing *New Jersey*, the Eleventh Circuit noted that their decision was consistent with the important qualification on an agency's ability to change its position and reverse policy, and concluded that "the Clean Air Act's express statutory provisions for revising and correcting a SIP preclude the EPA's reliance on any claim of inherent authority here."). The issue in *New Jersey* involved EPA's authority to delist sources of hazardous air pollutants ("HAPs") that it has previously listed without making the findings required under section 112(c)(9), 42 U.S.C. § 7412(c)(9). Under the statute, to list certain EGU as sources of HAPs, EPA is merely required to find that doing so is "appropriate and necessary." 42 U.S.C. § 7412(n). To delist such a source, however, EPA must make "specific findings," as enumerated by section 112(c)(9). *New Jersey*, 517 F.3d at 578. EPA argued that it possessed the

authority to remove EGUs from the section 112 list under the "fundamental principle of administrative law" and its "inherent authority to reverse an earlier administrative determination." *Id.* at 582. The D.C. Circuit disagreed, finding that Congress "unambiguously limit[ed] EPA's discretion to remove sources . . . from the section 112(c)(1) list once they have been added to it" with the language used in section 112(c)(9). *Id.* at 583. The D.C. Circuit further stated that: "EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Id.* (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001)).

The Supreme Court of the United States has also recently found that an "agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 515 (2009). And the agency's "awareness that it is changing position" is not necessarily the only requirement, but rather is "demand[ed]" by and a part of the agency's "reasoned explanation . . . for the new policy." *Id.* In fact, the *Fox* court provided some examples of when an agency should "provide a more detailed justification than what would suffice for a new policy created on a blank slate," such as:

> when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

Id. at 515–16 (internal citation omitted).

Although the Court ultimately upheld the FCC's new position in this case, it noted that the specific circumstances in that case made obtaining "empirical evidence" to support the agency's rationale unusually difficult. *Id.* at 519. In the case of the proposed rule, the type of empirical evidence needed to support EPA's policy reversal is precisely the type of

information—specifically, data relating to air quality—that EPA routinely obtains and evaluates for other SIP actions. Therefore, EPA cannot escape its duty to base its policy reversal "upon factual findings that contradict those which underlay its prior policy" that SSM provisions are consistent with the CAA. *See Fox*, 566 U.S. at 515.

4. EPA's historical "substantially inadequate" findings have been based on facts such as new monitoring data or changes in law, not re-interpretations of the CAA and spontaneous changes in policy

A review of EPA's previous SIP calls reveals how different its current proposal is from its past practice and illustrates how EPA, at least until recently, understood its legal obligations before issuing a SIP call under section 110(k)(5). EPA has issued dozens of SIP calls. EPA has justified most of those historical SIP calls based on very specific factual findings, such as new monitoring data demonstrating that a State is failing to maintain the NAAQS[49] or attain the NAAQS by the required compliance deadline.[50] Other SIP calls have been based on the issuance of newly adopted laws or regulations requiring States to adjust their SIPs accordingly.[51] While

[49] *See, e.g.*, 76 Fed. Reg. 41,424 (July 14, 2011) (issuing a SIP Call to Iowa in light of NAAQS exceedances detected in the Muscatine area); 76 Fed. Reg. 763 (Jan. 6, 2011) (proposed rulemaking finding Kansas SIP substantially inadequate based on "updated modeling" that "demonstrates that emissions from Kansas do interfere with maintenance of the 1997 8-hour ozone NAAQS in downwind areas"); 71 Fed. Reg. 19,432 (Apr. 14, 2006) (explaining that "the [Missouri] SIP has been found inadequate to attain and maintain the NAAQS . . . as evidenced by three quarters of monitored violations in 2005 . . . despite implementation of all control measures contained in the SIP."); 58 Fed. Reg. 41,430 (Aug. 4, 1993) ("find[ing] the SIP inadequate based on predicted violations of the SO_2 NAAQS that have been modeled in the Billings-Laurel area" of Montana as demonstrated by a "modeling study . . . and the State's further analysis" and providing with rulemaking a technical support document that "discusses in more detail the ambient standard and its health effects . . . [and] modeling studies").

[50] *See, e.g.*, 53 Fed. Reg. 34,500 (Sept. 7, 1988) (issuing a SIP Call to thirty-five States for failure to attain the ozone NAAQS by December 31, 1987).

[51] *See, e.g.*, 78 Fed. Reg. 889, 890 (Jan. 7, 2013) (finding California SIP to be substantially inadequate for failure "to adopt and implement an attainment demonstration plan

those SIP calls were justified based on the development of new data or new laws, no such new information or change in law underlies EPA's proposed action here. Instead, EPA's proposal to eliminate Alabama's and thirty-five other States' SSM provisions is based on an interest group's petition for review, a spontaneous change in policy, and newly developed interpretations of the CAA that are contrary to Congress's intent and also unreasonable.

Only a very few SIP calls have been justified on a different basis from that described above. One example is EPA's NO_X SIP call. The NO_X SIP call was not based on new monitoring data or a newly adopted law, but rather a new technical analysis prepared by EPA demonstrating a failure of several States to sufficiently mitigate interstate transport of ozone. In the NO_X SIP call, EPA's primary concern was that twenty-two eastern States and D.C. failed to include sufficient provisions to prevent significant contribution to nonattainment in neighboring States, thus violating the "good neighbor" provision of section 110(a)(2)(D)(i)(I). However, instead of relying on a bald assertion that the States' SIPs did not address this "transport" problem, EPA's NO_X SIP call was supported by a detailed technical analysis of the amount of nitrogen oxide (NO_X) pollution that was drifting from each State into a neighboring State. Using that analysis, which involved a variety of complex modeling evaluations, EPA determined which States qualified as "significant" contributors and established specific numerical NO_X budgets for each State to eliminate that significant contribution.

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for the 1-hour ozone standard"); 75 Fed. Reg. 77,698 (Dec. 13, 2010) (EPA's Greenhouse Gas (GHG) PSD permitting program); 62 Fed. Reg. 8314 (Feb. 24, 1997) (EPA's Credible Evidence Rule, adopted in light of Congress's decision to "revise[ ] Section 113(e)(1) of the Act to overrule a federal court decision [Kaiser Steel] that had held that only specified reference test data could prove violations."); 59 Fed. Reg. 48,668 (Sept. 22, 1994) (proposed SIP call to require States to adopt in their SIPs an Ozone Transport Commission Low Emission Vehicle program to address pollution transport).

While the D.C. Circuit generally upheld the NO_X SIP call, it rejected the portions applicable to Wisconsin, Missouri, and Georgia because EPA's technical analysis did not sufficiently support its determination that those States contributed significantly to nonattainment in neighboring States. *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). Specifically, the court held that "EPA failed to explain how Wisconsin contributed to nonattainment *in any other state*" (even though it was clear that Wisconsin sources generally contributed to ozone in the region). *See id.* at 681. Similarly, the court held that EPA had not proven that Georgia and Missouri contributed significantly to neighboring States' nonattainment because the models relied upon only covered a *portion* of the State (even though EPA claimed that the portion analyzed did have a significant contribution). *See id.* at 681–82. The court thus vacated the SIP call for these three States because EPA did not provide sufficient factual support for its own justification.

In short, both EPA's own analytical approach to developing the NO_X SIP call and the D.C. Circuit's analysis of the unsupported portions of the NO_X SIP call confirm that EPA has a meaningful obligation to fully support any justification it provides for issuing a SIP call. EPA's proposed SIP call for Alabama's SSM provisions fails to contain *any* factual analysis, and thus fails to satisfy that obligation.

A relatively unique SIP call is EPA's effort to seek reasonable assurances from California regarding whether its permitting authorities could require major agricultural emission sources to obtain PSD permits. The California legislature had adopted a provision exempting such sources from the PSD permitting program entirely, despite the clear requirement in the CAA that all stationary sources emitting more than a certain amount of any regulated pollutant obtain a PSD

permit.[52] EPA's SIP call to California thus differs from EPA's proposed action in this instance because California's exemption for agricultural emissions sources misconstrued a clear requirement of the CAA. As noted above, the SSM provisions EPA seeks to eliminate do not run afoul of any clear requirement of the Act. The only CAA requirement EPA claims to be violated by SSM provisions is based on a flawed interpretation of the CAA that cobbles together section 302(k) and the Act's enforcement provisions by arguing that any exceedance of "continuous" numeric emission limitations during SSM must be considered a "violation." As noted above, the CAA contains no such requirement.

Only EPA's SIP call for the State of Utah's SSM provision relies on similar justifications as those it uses to support this current proposal to take similar action for Alabama and thirty-five other States. Although EPA's SIP call to Utah was recently upheld by the U.S. Court of Appeals for the Tenth Circuit,[53] that decision does not support EPA's proposal here for several reasons. As an initial matter, the court understood the Utah SSM provision to provide, not only an exclusion from State-based emission limit, but also from all MACT standards as well. As noted above, the D.C. Circuit has held that MACT standards are based on a highly prescriptive level of emissions control that SSM provisions may not override. Because Alabama's and many other SSM provisions in question do not apply to MACT standards, the court's narrow decision to

[52] *See* 42 U.S.C. § 7475 ("No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless – (1) a permit has been issued for such proposed facility in accordance with this part . . . ."); 42 U.S.C. § 7479 (emphasis added) ("For purposes of this part – (1) The term 'major emitting facility' means . . . [and] *any other source* with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.").

[53] *US Magnesium v. EPA*, 690 F.3d 1157 (10th Cir. 2012).

uphold EPA's Utah SIP call cannot serve as a broad basis for EPA's sweeping thirty-six-State SIP call.

More importantly, however, the Tenth Circuit did not consider a multitude of issues. In fact, the Court expressly refused to define EPA's obligation to find a SIP "substantially inadequate" before issuing a SIP call.[54] Although the court noted that EPA need not show actual NAAQS violations in the past to support a SIP call, the court's opinion does not exempt EPA from making any factual finding to support its NAAQS concerns. Even if EPA does not have to show *past* nonattainment, it must at least provide some explanation as why it is concerned about *future* nonattainment. In the Utah SIP call, EPA at least cited to the emission limitations that Utah relied upon in its attainment planning, but no such analysis can be found in its proposal for the other thirty-six States subject to its proposed SIP call. EPA's failure to even take this minimal step confirms that EPA has not yet even begun the process of determining whether its NAAQS concerns are warranted, and thus whether its proposed SIP call could be justified. EPA's limited success in defending its SIP call to Utah does not remedy these fundamental flaws in its proposed action.

Thus, taken together, EPA's own past practice in its previous SIP calls confirm that the obligation to find a State's SIP "substantially inadequate" before issuing a SIP call is not a meaningless requirement. EPA may not satisfy that obligation with mere speculation and conjecture. It must identify a provision that fails to comply with the CAA or show how a provision would interfere with a State's obligation to attain the NAAQS or mitigate interstate

[54] *Id*. at 1167 n.3 ("US Magnesium also argues that the EPA failed to define the term 'substantially inadequate,' but it raises this argument for the first time in its opening brief. Because US Magnesium did not raise this argument in its comments on the proposed rule, it cannot raise it now.").

transport. EPA has completed no such analysis in its proposed SIP call, and therefore has much more work to do before it could issue a legally supportable SIP call for all of the thirty-six States named in its proposal.

D. EPA Has Arbitrarily and Capriciously Failed To Consider the Significant Cost, Technical, and Operational Burden of This Rule

Contrary to EPA and Sierra Club's characterization, SSM provisions are not "loopholes." The States that adopted them had very good reasons for doing so. Recognizing that higher emission rates during SSM events are unavoidable, ADEM reasonably decided that emission limitations should be tailored to emission levels achievable during normal operations, in which most sources spend the vast majority of their operating time. As a result, ADEM determined that sources should not be penalized for unavoidable emissions during periods for which the limits were not designed, and adopted SSM provisions to excuse unavoidably higher emission rates, so long as sources continued to employ good air control practices. Thus, emission limits designed for normal operations simply do not apply during SSM events, just as emission limitations tailored for a specific industry do not apply to other industries.

Industrial facilities are not unique in requiring special consideration of periods of startup, shutdown, and malfunction. In the broad world of technology, the fact is that many systems do not operate at desired performance until the startup (or shutdown) has been completed—personal computers, cell phones, automobile emissions systems, heating and air conditioning systems, and other examples too numerous to mention—and users of those technologies understand that these short, transient periods are necessary given the limits of today's technology. Even emissions tests for automobiles must be completed after the car is warmed up rather than during startup due to factors outside of the driver's control affecting emissions during startup until the emissions

controls are fully functional.[55] Like the emission controls installed at industrial facilities, automobile emission controls systems may also malfunction in a way that results in increased emissions. In such cases, although a "check engine" light is displayed, the driver cannot simply abandon the vehicle immediately on the highway. Industrial facilities must likewise follow an orderly and safe path for assessing the malfunction and completing any necessary repairs. In many cases, an immediate shutdown will not be possible or could further increase emissions, damage to the equipment, or present a safety hazard.

These are the same reasons EPA has adopted numerous SSM provisions as part of its own emission standards for decades. The policy reversal inherent in EPA's proposed SIP call, however, ignores this reasonable approach and the real-world facts upon which it is based. In the preamble to its proposal, EPA at least acknowledges part of the reason that SSM provisions are needed, by recognizing that higher emissions are unavoidable during malfunctions. EPA Statutory Memorandum at 7–8. Yet EPA fails to consider the rest of the story by failing to evaluate even a single underlying emission limit that it generically claims should be "otherwise applicable" during SSM events. If EPA had analyzed even a single underlying emission limitation, it may have realized that those limits were never designed to apply during SSM events, thus eliminating EPA's justification for treating "excess emissions" during those events as "violations." In short, it is the underlying policy choice of States to tailor their emission

[55] As an example, the State of California's Bureau of Automotive Repair regulations state, "Before the emission portions of the inspection . . . Verify the vehicle is warmed up to normal operating temperature. If the vehicle is not at normal operating temperature, the vehicle may either be idled (low idle) or driven normally as necessary to achieve normal operating temperature." This is necessary because the vehicle's emission control (catalytic converter) cannot reduce emissions until it has reached its normal operating temperature. http://www.bar.ca.gov/80_BARResources/05_Legislative/RegulatoryActions/Smog%20Check%20Manual%20w-diesel%208-09%20V3.pdf.

limitations for normal operations that EPA's proposed SIP call fails to address, even though EPA's proposal would inevitably eliminate that policy choice. By failing to analyze any underlying emission limitations, EPA's proposal also fails to address the impact of its proposal or even consider whether its rule is technically feasible. The costs of EPA's proposal could be significant and, as explained further below, essentially limitless due to the impossibility of avoiding all "excess emissions" that EPA's proposal would label as "violations."

1. EPA's SIP call would impose significant costs and burdens on Alabama Power and its customers without any measurable air quality benefits

a. Increased emissions during SSM or other non-normal operations are often unavoidable

By EPA's own definition, malfunctions are unavoidable, and the disruptions of process and control equipment caused by malfunctions can lead to higher emission rates of some pollutants, depending on the type of malfunction involved. When malfunctions occur, facility operators typically must operate the facility differently to allow repairs to be made and to protect the equipment and/or structures from further damage, and to ensure compliance with additional fire and safety regulations as well as the protection of human life. Higher emissions during these periods can occur in spite of good operating practices. Due to their unexpected and unintended nature, however, malfunctions are difficult to describe in a general fashion, and instead must be addressed on a case-by-case basis, as EPA's proposed "affirmative defense" implies and accepts.

In its proposal, EPA seizes on the "planned" nature of startup and shutdown events, first to argue that such events should be considered "normal operations," then to deny that higher emission rates during such events are unavoidable, and finally to characterize such emissions as "violations" that are not entitled to any defense (despite the affirmative defense provided in all prior versions of EPA's SSM policy). EPA fails to recognize, however, that "planned" startup

and shutdown events are not "normal operations,"[56] as that term has always been used in the past, and that higher emission rates that occur during startups and shutdowns remain unavoidable, despite EPA's sudden change in policy.

Higher emission rates are unavoidable during startups and shutdowns because those events themselves are unavoidable, and because emission rates unavoidably increase during those events. Obviously, units must startup and shutdown from time to time (unless a unit is being retired, of course). The fact that such events are "planned" makes them no less unavoidable. In addition, the operating characteristics of most units during startup and shutdown will unavoidably result in higher emission rates of at least some pollutants. Appendices A and B to these comments provide a detailed explanation of the reasons that some emission rates are unavoidably higher during startup and shutdown events for pulverized coal-fired units and for natural gas- and oil-fired simple- and combined-cycle units, respectively. In summary, all three types of units have higher emissions during startup and shutdown for essentially the same two fundamental reasons: (i) combustion efficiencies are different during startup and shutdown and (ii) many emission control systems cannot operate, or operate at optimal efficiency, during startup and shutdown. These technical realities have been recognized and analyzed by EPA for decades, in its evaluation and promulgation of NSPS.

These realities are the unavoidable consequence of efforts to design facilities and emission controls for optimum efficiency during normal operations at or near full design capacity. Since emission units cannot be designed for optimum performance at all levels of

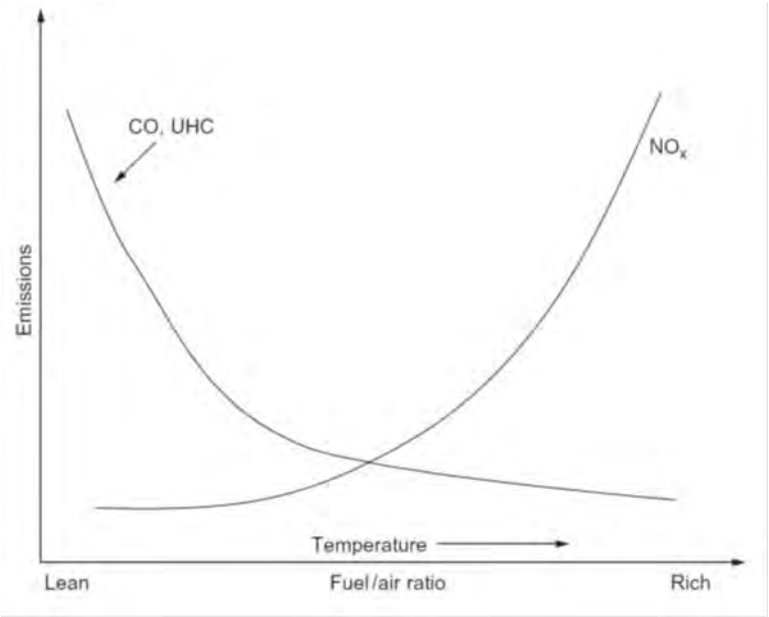
[56] Yet EPA has in the past referred to SSM as "non-normal operations." *See* EPA's Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations, EPA-454/R-05-001 (Nov. 2005), Appendix B: REVISED RULE EFFECTIVENESS GUIDANCE § 8.

operation (and optimizing a unit for maximum efficiency during transient conditions is also impossible), facilities and their emission controls are designed to operate at maximum efficiencies at full load. Designing facilities in this manner ensures the greatest efficiency of the emission units overall because the units will operate at or near design capacity far more often than lower operating levels, even though operational efficiency will unavoidably drop somewhat at lower levels. Ignoring these realities risks damaging the equipment, presenting serious safety concerns for the employees operating them, and perhaps even result in higher emission rates overall. For example, introducing a new fuel before combustion is optimized for that fuel can result in explosion hazards, and engaging an emissions control device before operational temperatures are reached can damage the equipment and result in higher emission rates once steady-state operations commence.

Because combustion occurring during startup and shutdown is less efficient than the steady combustion which occurs at normal operating temperatures, certain "combustion-related" pollutants (i.e., those generated primarily by the combustion process itself) may be emitted at higher rates than during normal operations.[57] For example, the two primary combustion-related pollutants—nitrogen oxides (NO_X) and carbon monoxide (CO)—can be emitted at higher short term emission rates during startups and shutdowns. Since natural gas generally contains relatively low concentrations of nitrogen, the primary mechanism of NO_X formation is thermal input, whereby free nitrogen in combustion air oxidizes to form NO_X. Because this reaction has a very high reaction temperature, more thermal NO_X is generated as load or other output and temperature increase. CO emissions, on the other hand, result from incomplete combustion that

[57] Fuel-based pollutants, in contrast, are generally emitted at lower rates because they are much more dependent on fuel usage and startup and shutdown procedures generally require less fuel than normal, steady-state operations.

often occurs during the low loads and transient conditions that occur during startup and shutdown. Accordingly, emission rates of these pollutants are generally inversely related – in other words, efforts to decrease one of the two pollutants can result in increases of the other, as shown in the chart below:



These characteristics make it very difficult to match the emission rates achievable during normal, steady-state operation with those occurring during periods of operation when temperatures are fluctuating, such as startup and shutdown.

In addition, many units are equipped with combustion controls (e.g., low NO_X burners or water/steam injection and dry low NO_X combustors) that must be operated differently during startup, resulting in unavoidable increases in short term emission rates. Although these controls are designed to carefully balance the combustion process at normal operating levels, they must complete several interim stages during startup during which the combustion equipment is slowly brought up to the temperature at which combustion can be optimized. During these interim stages, the efficiency of combustion cannot be optimized, which can result in even higher

emission rates of combustion-related pollutants, even though the reduction of these pollutants during normal operations overwhelms these initially higher emission rates and results in an overall improvement in emissions performance for the unit as a whole.

Finally, emissions during SSM periods are also higher than emissions during normal operations because emissions control technologies do not achieve maximum reductions until certain operating parameters, such as temperature and pressure, are met. It is impossible for emissions during transient SSM conditions to be reduced to the same levels achievable during normal operations with optimal operation of control technologies. For the many reasons described in the attached appendices, achieving all emission limitations during SSM is not only technically infeasible, but also inconsistent with manufacturers' recommendations and safe operating procedures for the control equipment. The following provides just a few of the examples explained in more detail in the attached appendices:

- Electrostatic Precipitators ("ESPs") often cannot be fully engaged during fuel oil startup because the fuel oil could coat the collecting plates, interfere with proper charging of the plates, and cause fires that could damage equipment.
- Selective Catalytic Reduction ("SCR") systems are not effective below certain temperature ranges. Operation of SCRs at inappropriate temperatures could damage the equipment and result in increased emissions of ammonia.
- Fabric Filter Baghouses, if operated at temperatures below the acid dew point, can be damaged by acid condensation on the bags, resulting in increased emissions.

EPA's own MATS rule recognizes the challenges that electric generating units face in attempting to engage certain types of emission controls during startup. *See* 40 C.F.R. Part 63, Subpart UUUU, Table 3.

The discussion presented in Appendices A and B for coal-, natural gas- and oil-fired units are not merely Alabama Power's concerns—all similar units share the same limitations across the industry. In fact, equipment specifications for controls at coal- and natural gas- and oil-fired units often limit or prohibit operation of control equipment during startup, which EPA's proposal could otherwise require. Requiring operation of controls during startup and shutdown could force facilities to compromise good engineering and operational practices, such as those outlined in the National Fire Protection Codes, designed to ensure proper, safe operation of large industrial equipment, like the boilers that comprise Alabama Power's generating units. Regardless of EPA's desire to impose one-size-fits-all emission limitations over operations where compliance will be impossible, neither Alabama Power nor any other industrial source can ignore safety and the practical realities associated with the unavoidable, transient conditions that occur during SSM events. Given the challenges in operating emissions control equipment during startup and shutdown, EPA's proposed SIP call is unreasonable—forcing units to attempt to continue complying with emissions limitations designed for normal operations even during startups and shutdowns is simply unrealistic.

Considering the typical emission limitations currently applicable to power plants, the greatest impact of EPA's proposed rule likely to fall upon power plants will be if elevated opacity conditions during periods of SSM not currently subject to numeric emission limitations become "violations." At twenty percent, with no exclusion for equipment malfunctions, Alabama's opacity limitation is among the most stringent in the United States, particularly when compared to a number of States whose SIPs allow sources up to thirty, forty, and even sixty percent opacity, either under certain circumstances or at all times. The chart below summarizes such opacity limitations in 15 of these states.

State	Citation	Opacity Limitation
Arkansas	Ark. Code R. § 19.503(A)(1)	Allowing sources in Arkansas installed prior to January 30, 1972, up to 40% opacity for aggregate of six minutes per hour and three six-minute periods above 40% per 24-hour period
Connecticut	Conn. Agencies Regs. § 22A-174-18(b)(1)(B) & (2)(B)	Allowing stationary sources in Connecticut up to 40% opacity during any one-minute block average
Hawaii	Haw. Code R. § 11-60.1-32(a)	Allowing stationary sources in Hawaii which commenced construction before March 21, 1972, up to 40% opacity
Indiana	326 IAC 5-1-2(1)(A),(B)	Allowing sources in certain portions of Indiana up to 40% opacity in any six-minute averaging period and up to 60% opacity for fifteen total minutes per six-hour period
Iowa	Iowa Admin. Code r. 567-23.3(2)(d)	Allowing sources in Iowa up to 40% opacity
Kansas	Kan. Admin. Regs. § 28-19-650(a)(2)	Allowing stationary emissions units in existence before January 1, 1971, up to 40% opacity
Maine	06-096-101 Me. Code. R. § (2)(B)(1)(f)	Allowing fuel burning equipment up to 30% opacity on a six-minute block average basis
Missouri	Mo. Code Regs. Ann. tit. 10, § 10-6.220(3)(A)	Allowing all existing sources in certain portions of Missouri up to 40% opacity at all times and up to 60% opacity for aggregate of six minutes per hour
Montana	Mont. Admin. R. 17.8.304(1)	Allowing any source in Montana installed by November 23, 1968, up to 40% opacity averaged over six consecutive minutes
North Dakota	N.D. Admin. Code 33-15-03-01	Allowing existing sources of emission in North Dakota up to 40% opacity under all circumstances and 60% opacity for one six-minute period per hour
Oregon	Or. Admin. R. 340-208-0110(1)	Allowing existing sources outside special control areas in Oregon up to 40% opacity
Utah	Utah Admin. Code r. 307-201-3(1)	allowing sources in Utah constructed by April 25, 1971, up to 40% opacity
Vermont	12 031 001 Vt. Code R. § 5-211(1)	Allowing sources in Vermont installed prior to April 30, 1970, up to 40% opacity during aggregate period of six minutes per hour and up to 60% at any time
Wisconsin	Wis. Admin. Code NR § 431.04	Allowing owner or operator of source in Wisconsin constructed or modified by April 1, 1972, up to 40% opacity
Wyoming	WAQSR 3 Wyo. Code r. § 2(b)	Allowing existing sources in Wyoming up to 40% opacity

Obviously, the State of Alabama has made choices to apply exceptionally strict numeric emission limitations for opacity, especially as compared to other States. Alabama made those choices through rules that explicitly stated that those strict numeric emission limitations do not apply during periods of SSM, when equally strict and enforceable non-numeric emission limitations apply continuously. EPA does not assert any air quality basis or justification for its proposed rule and, in fact, denies that it has any obligation to consider air quality in Alabama before finding Alabama's SIP to be "substantially inadequate" under the CAA, but it would be especially disingenuous of EPA to make such a finding about Alabama's SIP when the area of air pollution control most affected by that finding is an area where Alabama's SIP is very plainly more strict and more demanding on sources than almost any other State's. EPA's erroneous approach to this issue leads to absurd and unfair results for the affected States and the affected sources, especially for Alabama.

In summary, the emission characteristics of Alabama Power's generating units during startup and shutdown will often prevent compliance with emission limitations designed for normal, steady-state operations. That reality must be recognized in developing any air quality program to ensure it will be achievable during all periods of operation. EPA's proposal to eliminate the Alabama's SSM provisions, and prohibit the State from adopting any provision for startups and shutdowns, could force sources to comply with emission limitations during periods when they were never meant to apply, thus rendering those emission limitations unachievable.

b. Even during SSM events, Alabama Power minimizes emissions

Despite the challenges Alabama Power faces during SSM events, the Company's operating practices provide a safe working environment for our employees, protect the equipment, and at the same time ensure emissions are well-controlled during normal, steady-state

operations and minimized during SSM events. Although higher emission rates are often unavoidable during SSM events, Alabama Power has ample incentive to move through these transient conditions (i.e., startup, shutdown, and load change) as quickly and safely as possible. Unit startup is only initiated when there is enough electrical power demand on the grid to justify the operation of the unit, and that demand must be met on time and balanced on an immediate basis.

In addition to these practical and economic incentives, the air quality permits applicable to all Alabama Power units specifically require SSM emissions to be minimized and the use of good air pollution control practices. *See* Ala. Code § 22-28-16(d); Ala. Admin. Code r. 335-3-14-.03(1)(h)(2)(ii). All facilities must take all reasonable actions to minimize the magnitude and duration of emissions during SSM events, even though emission rates during those events may unavoidably rise above the emission limitations designed for normal, steady-state operation. Emissions from Alabama Power's sources are monitored at all times, including during periods of SSM, and ADEM receives and reviews that monitoring data regularly. Furthermore, ADEM reviews periodic compliance reports submitted by Alabama Power and, if necessary, is authorized to dispute any facility's efforts to minimize emissions and take enforcement action as appropriate. Citizen groups, such as Sierra Club, also retain this right.

c. <u>EPA's proposal to eliminate the States' SSM provisions will result in significant costs to Alabama Power</u>

Without an appropriate SSM provision, industrial facilities will be required to comply with numeric emission limitations that were never intended to apply in such circumstances, and which would ignore the practical reality of unavoidably higher emission rates during SSM events. The fundamental and unwarranted shift in policy proposed by EPA will have significant practical consequences for thousands of industrial facilities.

For industrial facilities, it may not be technically feasible to eliminate higher short term emission rates during SSM. In some cases, while it may be possible for a facility to make certain operational adjustments, there are potential consequences leading to increased costs of operation, including:

- Increased wear and tear and risks of damage to production and emissions control equipment
- Degradation of performance of production and control equipment during normal operation
- Constrained operational flexibility, limiting the ability of businesses to operate efficiently or start up when called to do so
- Installation of additional emission controls that can range in cost from tens of thousands of dollars for a small facility to hundreds of millions of dollars for a large facility, with perhaps little to no environmental benefit
- Installation of natural gas pipeline and combustion equipment to allow the use of alternative fuel during SSM, if economical, feasible, and available, that could easily reach hundreds of millions of dollars per facility

Specifically for Alabama Power, the potential costs associated with EPA's rules will involve (i) pressures to operate units out of dispatch order and rely on replacement power that will involve significantly higher production costs, (ii) unwarranted civil penalties for emissions that cannot be avoided and for which no defense will be available, and (iii) the potential for orders of injunctive relief that are far more stringent than any other standard ever before implemented under the CAA.

i. Running out of dispatch order and the use of replacement power

If Alabama Power facilities were required to slow the rates of load change or significantly limit the overall number of startups due to the proposed rule, the Company would likely have to bring more units on line at any given time to ensure sufficient capacity is readily available to balance electricity demand with load and avoid a blackout. The result would be

more costly to consumers and result in increased emissions. In addition, any changes to these good operating practices required by EPA's proposal could threaten worker safety and damage equipment. If a fossil fuel-fired EGU is experiencing elevated emissions during an excluded period and the unit is forced to reduce load or to come off line, it is likely that the replacement generation or purchased power is more costly than the generation it replaces. This added cost to customers is unjustified given the lack of any appreciable environmental benefit this proposed SIP call might achieve. Moreover, the replacement generation could even have higher emission rates than the generation it replaces, depending on the standards that apply to the replacement generating unit.

ii. Civil penalties

It should go without saying that civil penalties are not warranted for unavoidable events. That idea of fairness provides the foundation for EPA's decision to at least allow an affirmative defense for excess emissions during malfunction events. However, EPA denies the same level of fairness during startup and shutdown events, even though higher emission rates in those periods can be just as unavoidable as those that may occur during malfunctions. EPA's attempt to characterize startup and shutdown events illustrates EPA's lack of understanding as to how States have designed the "emission limitations" that EPA seeks to apply during SSM periods and the practical challenges all industrial sources face in designing and operating both process equipment and emission controls. Because startup and shutdown inevitably result in periods of higher emission rates, EPA's proposal will subject Alabama Power to an inevitable risk of civil penalties, regardless of the efforts made at the generating units subject to EPA's rule. At the current maximum penalty rate of $37,500 per day per violation, such penalties could represent a significant cost. If Alabama is forced to eliminate SSM exclusions and affirmative defenses

from their SIPs as EPA has proposed, then Alabama Power's sources will be exposed to such civil penalties immediately upon EPA's approval of the SIP revisions.

iii. Injunctive relief

EPA's proposed SIP call would also leave sources vulnerable to attack for injunctive relief which, under EPA's proposal, would be freely available for all unavoidable emissions. Without some form of relief, EPA's policy would thus force all sources to consider installing any additional controls available that could potentially reduce emissions during startup, even if those controls would not be cost-effective and even though those controls would not be capable of achieving 100 percent compliance. As such, EPA's recommended SSM policy would enable lawsuits for additional control equipment without regard to cost or achievability. As such, EPA and citizen groups such as Sierra Club could attempt to use lawsuits to force all sources across the country to comply with more stringent regulations than could ever be required as BACT, MACT, "Best System of Emission Reductions" or any other measure of stringency that takes into account cost or achievability. In fact, EPA's proposal, if followed to the letter by States, would even be more stringent than "Lowest Available Emission Rate" requirements because sources could be forced to install controls even if those controls could never be expected to achieve the 100 percent compliance during startup and shutdown that EPA's proposed SIP call would require. EPA's claim that this result is required by section 110, section 302(k), or any other section of the CAA is false. States are clearly authorized to determine the level of stringency needed to achieve the goals of the CAA, not EPA. EPA cannot force them to adopt a program that eliminates any consideration of cost or achievability through a SIP call seeking to impose EPA's own policy choices.

If successful, the costs associated with lawsuits seeking injunctive relief for SSM emissions could be staggering. For example, if such lawsuits seek to force a plant to replace

distillate fuel oil with natural gas for startup and flame stabilization on a coal-fired electric generating unit, and the generating plant does not already have natural gas available, a new natural gas pipeline would be required. The cost to install a natural gas pipeline can exceed $100 million. In order to reduce instances of elevated opacity during excused periods, future lawsuits could also seek to compel utilities to install a baghouse on a coal-fired electric generating unit (even if EPA's MATS rule would not require a baghouse). The cost to install a baghouse on a large coal-fired electric generating unit can exceed $300 million. EPA has made absolutely no showing of any environmental benefit that would result from such costs, as explained in other sections of these comments.

2. EPA's SIP call would also impose significant administrative burdens and costs on Alabama and ADEM without measurable air quality benefits

In Section X of the preamble, EPA claims that "EPA's proposed action . . . merely reiterates the EPA's interpretation of the CAA and does not require States to collect any additional information." 78 Fed. Reg. at 12,538. Instead, the proposal simply "requires the state to revise its SIP to comply with existing requirements of the CAA." *Id.* at 12,538. That conclusion is at odds with EPA's own statements. This action broadly applies to "states, U.S. territories, local authorities, and eligible tribes that are currently administering, or may in the future administer, the EPA-approved implementation plans." *Id.* at 12,461. EPA acknowledges that "the proposal may be of interest to <u>all</u> air agencies" given the significance of the rulemaking. *Id.* at 12,465. According to EPA's own statements, this proposal announces a new interpretation of the CAA and new CAA policy, revising the Agency's previous, non-binding guidance on emissions during SSM events. *See id.* at 12,477 (emphasis added) (discussing EPA's "Clarifications, Reiterations, *and Revisions* to the EPA's SSM Policy."). In a break with the

past, EPA has decided to apply this new interpretation and policy to SIPs retroactively.[58] *See* 2001 SSM Guidance, Docket ID No. EPA-HQ-OAR-2012-0322-0038 (clarifying that EPA's 1999 Guidance applies prospectively only and does not disturb previously EPA-approved SIP provisions). This new policy is so significant and so different from the past guidance that EPA has concluded that it requires a federal rulemaking and revision of the SIPs in well-over half of the States across the country. And EPA acknowledges that this SIP call will require States and local authorities to review SIP provisions that date back several decades. 78 Fed. Reg. at 12,464.

As previously noted, the SIP provisions at issue in this rulemaking apply to multiple SIP requirements, multiple categories of sources, and even more numerous and often diverse individual sources. Because EPA has completely failed to conduct any analysis of the impacts of its proposal, that obligation will fall to the States. The States will have to collect the information on impacts in order to inform the development of options for revising the SIP. For example, in Georgia alone, the SSM provision at issue in this proposal applies to dozens of other individual SIP provisions, is regularly relied on by more than seventy diverse major sources across the

[58] EPA may only act prospectively. "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988). EPA may change its legal interpretation but that change, if legal, may only be applied prospectively. EPA has no statutory authority to apply retroactively its proposed interpretation of "emissions limitation" and consequently find existing SIPs "substantially inadequate." Retroactive application will result in exposing sources to new unanticipated liability in place of what was thought legal activity. It will also render all past costs by States and sources in developing and implementing SSM wasted expenditures. The Administrative Procedures Act (APA) also denies rules with retroactive effect. The definitions say a rule "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4) (emphasis added).

State, and is included in literally hundreds of individual Title V permits.[59] Even if the Georgia Environmental Protection Division did nothing more than simply eliminate the current SSM rule from the SIP (which would be inappropriate), it would be required to undertake hundreds of permit revisions to remove the current SSM provision. In addition, States must evaluate individual permits to determine whether any of those permits include source-specific limits (either BACT or NSR-avoidance limits) that rely on the State SSM provision and revise those limits, an exercise that itself would raise numerous legal and technical issues.

In short, EPA's proposed action will exacerbate the heavy administrative burden ADEM already faces, particularly in a time of economic hardship.[60] ADEM will have to revise not only the direct SSM provisions of their rules in question, but also any other rules that currently rely on the provisions. In addition, ADEM will have to revise and reissue every active air permit in the State. In an era where agencies have to be more efficient to stretch their resources, the administrative burden alone of EPA's action is unjustified. EPA has made absolutely no showing that the costs associated with this rulemaking will produce any measurable air quality benefits. As illustrated in Section II.B above, SSM emissions are not impeding compliance with the NAAQS, do not undermine the building blocks of the NAAQS, and are not impeding progress toward the CAA visibility goals. In fact, because States have limited resources,

[59] This estimate is based on a preliminary analysis by the Air Protection Branch of the Georgia Environmental Protection Division (EPD) and reported to EPA in EPD's request for an extension of the comment period on this proposed rule. Letter from James A. Capp, Chief, Air Prot. Branch, to Docket ID No. EPA-HQ-ORA-2012-0322 (Mar. 12, 2013). These major sources all have continuous emissions monitors which record and report all emissions including those that occur during startup, shutdown, and malfunction events.

[60] In February 2013, ADEM proposed to increase permit fees by fifty percent across the board in order to make up for fringe increases incurred by the Department in addition to general fund budget shortfalls caused by decreased federal funding and the inability of ADEM to cut costs further.

implementing this rulemaking will necessarily take resources away from States' continued efforts to meet the new NAAQS and other CAA requirements.

3. Alabama's Recent Experience Shows That the SIP Revision Process Is Time-consuming and Unpredictable

EPA acknowledges in its proposed rule that the development of SIP revisions "may require the maximum time allowed by the CAA." 78 Fed. Reg. at 12,489. This is a very serious understatement, to say the least. Alabama's experience in seeking EPA's approval for a SIP revision to its opacity rules demonstrates that the process is likely to be very time-consuming and extremely unpredictable. EPA's vaguely optimistic representations about the SIP revision process that will be required for all thirty-six States if EPA finalizes its proposed SIP call fails to consider that the proposed rule provides no guidance whatsoever to States on developing SSM work practice standards or alternative emission limits that will be acceptable to EPA going forward. The only thing the affected States will know for sure is that EPA has "found" their SIPs to be substantially inadequate due to EPA's changed interpretation of what qualifies as a CAA "emission limitation." How to develop and demonstrate CAA consistency for alternative approaches remains a mystery. Considering EPA's view of its authority over SIP revisions, States without clear guidance will have no choice but to play an iterative game of hunt and peck with the EPA regions to find their way to an "approvable" SIP revision.

Revision of the Alabama SIP's opacity rule began in 2003 with pre-revision consultation between ADEM and EPA Region 4, which resulted in a letter from the Region indicating that ADEM's opacity rule revision was "approvable." ADEM completed notice and comment rulemaking to revise its rule as planned and submitted the new rule to EPA for approval as a SIP revision, learning only then that EPA had changed its mind. For the next *five years*, ADEM engaged EPA in continuing rounds of negotiations in an attempt to satisfy constantly changing

demands for information and continuing revisions to ADEM's rule. Finally, EPA approved a substantially altered SIP revision in October 2008. 73 Fed. Reg. 60,957 (Oct. 15, 2008). The uncertainty, however, was not over. EPA denied an environmental group's request for reconsideration, but after a change in Presidential administrations, EPA granted a second request for reconsideration from the same group and, two and a half years after its approval of a SIP revision Alabama had adopted in 2003, EPA attempted to rescind its approval. 76 Fed. Reg. 18,870 (Apr. 6, 2011). The U.S. Court of Appeals for the Eleventh Circuit finally ended the process with a decision on March 6, 2013, affirming EPA's 2008 approval and vacating EPA's 2011 attempt at rescission.

If this crucible of a SIP revision is any indication whatsoever of what lies in store for the affected States and the affected sources regulated by those States, the regulatory "train wreck" of thirty-six States dealing with this SSM SIP call will be massive in scope and costly in time and resources. The point is that EPA should not "call" the SIPs of the affected States without first developing and issuing clear guidance on how States can develop alternatives to the SSM provisions being "called" and demonstrate the "approvability" of those alternatives in the numerous and significant SIP revision processes that will follow. The same thinking that led EPA to conclude that a nationwide SIP call is necessary to set out EPA's changed policy on SSM provisions also requires EPA to conclude that a nationwide guidance document is needed, which details exactly what EPA is going to require of these thirty-six States when the States attempt to change their SIPs to comply with EPA's "call." If EPA has not yet developed that guidance, EPA should not call the SIPs. If EPA has developed that guidance, EPA should publish it for notice and comment rulemaking.

E. The SIP Call Was Conceived, Devised, Produced, and Justified Without Any Normal Hallmarks of Lawful Agency Decision-Making

EPA published the proposed rule on February 22, 2013,[61] and set the comment deadline for thirty days after publication. Acting as if this massive proposed rule might be inconsequential to the thirty-six affected States and hundreds of affected sources, EPA stated in the proposed rule that "if" a public hearing was requested, it would be held on March 12 (merely eighteen days after publication) and the deadline for comments would be April 11.[62] In response to requests for more time to analyze the proposed rule and prepare comments, including requests from Members of Congress, Attorneys General, and environmental officials from affected States, EPA on April 2 extended the comment period a mere thirty days.[63] This left the thirty-six affected States and all of affected industry a total of eighty days to provide comments on the proposed rule, which is clearly an insufficient period of time to consider a rule that substantially changes the enforcement and administration of myriad SIP standards in thirty-six different States and, more importantly, declares the end of the CAA's mandate regarding cooperative federalism by defining citizen suit enforcement litigation as more fundamental than the States' role as the primary regulator of air emissions within its own borders.

1. "Sue and Settle" was an arbitrary and capricious beginning

The aggressive deadline for public comment on the proposed rule is the product of EPA's practice of "sue and settle" rulemaking. Environmental advocacy groups are utilizing this practice to force burdensome regulations on industry while circumventing rulemaking procedures, a practice which ignores the "cooperative federalism" chosen by Congress to

[61] 78 Fed. Reg. 12,460 (Feb. 22, 2013).

[62] *Id.*. at 12,461.

[63] 78 Fed. Reg. 20,855 (Apr. 8, 2013).

implement the CAA. The "sue and settle" process generally unfolds in this manner: first, EPA fails to meet a statutory deadline or satisfy a regulatory requirement of the CAA. Utilizing the CAA's citizen suit provision, an environmental group, such as the Sierra Club, files a lawsuit against the EPA Administrator alleging that the Agency has failed to perform nondiscretionary duties. In the lawsuit, the environmental group demands that the EPA immediately carry out its obligations and may seek to recover the cost of litigation at the expense of taxpayers. Next, rather than defend the suit, EPA willingly negotiates a settlement that includes expedited deadlines for rulemaking. The negotiations allow the EPA and the environmental group to work behind closed doors protected as confidential settlement discussions. Finally, the settlement is locked in as a court-ordered and fully-enforceable consent decree, complete with accelerated deadlines for proposed rules which the environmental groups favor.

This sue and settle strategy sidesteps the proper rulemaking channels and undercuts meaningful opportunities for those affected by the proposed rule to develop and present evidence that would support a competing and fully informed viewpoint on substantive issues during the rulemaking process and create a more complete record for EPA to develop a fair and reasonable rule. Consequently, the first opportunity for input from the parties affected by the resulting rulemaking is <u>after</u> EPA has already committed to the settlement and already discussed possible outcomes with the environmental group. With shortened deadlines on proposed rules prepared to the environmental groups' liking, the affected parties are left to participate in a meaningless public comment period.

In this instance, the proposed rule and the corresponding aggressive deadline schedule stem from a "Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance

Provisions" submitted by the Sierra Club to the EPA on June 30, 2011.[64] The petition sought a determination by the Agency that thirty-nine SIPs were substantially inadequate because they include SSM provisions. In accordance with their sue and settle strategy, Sierra Club sued Lisa Jackson in her capacity as Administrator of the EPA, alleging that EPA had a nondiscretionary duty to "call" the referenced SIPs.[65] Rather than defend the SIPs EPA has already approved, or dispute the alleged shortcomings of the SIPs of thirty-nine of its CAA State "partners," or even question the often-disputed assertion that a SIP call of this type is a non-discretionary duty, EPA entered into a settlement agreement with Sierra Club on November 30, 2011, whereby EPA was given until August 31, 2012, to act on Sierra Club's petition.[66] After two successive negotiated extensions of the consent decree deadline, which gave EPA more time to prepare its proposed rule, EPA agreed to announce the rule on or before February 12, 2013, providing EPA more than nineteen months to analyze and prepare its proposed rule.[67] The settlement was negotiated and agreed to behind closed doors, with no notice to, or input from, the primary parties affected by the consequent rulemaking: thirty-nine States and the regulated community. Consistent with the

[64] Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions, Docket ID No. EPA-HQ-OAR-2012-0322-0002.

[65] *See* Sierra Club's Second Amended Complaint, *Sierra Club v. Jackson*, No. 3:10-cv-04060 (N.D. Cal. Aug. 10, 2011), a copy of which is attached hereto as Exhibit 6.

[66] Settlement Agreement ¶ 15, Docket ID No. EPA-HQ-OAR-2012-0322-0039. EPA's decision not to defend the SIPs challenged by Sierra Club is evident by reviewing the civil docket sheet, a copy of which is attached hereto as Exhibit 7. The only substantive document EPA filed with the court was its Answer, which contained only generic responses to Sierra Club's Amended Complaint, and it also avoided any conflict with Sierra Club's allegations where possible. *See id.*, doc. 16. It is further telling that EPA filed an Alternative Dispute Resolution (ADR) Certification on the same day it filed its Answer, and the parties stipulated to *continue* settlement talks within a mere twenty-three days after Sierra Club's filed its Amended Complaint. *Id.*, docs. 17 and 22.

[67] *See* Modification of Settlement Agreement, Docket ID No. EPA-HQ-OAR-2012-0322-0040 (a copy of which is attached hereto as Exhibit 8).

"sue and settle" practice, when EPA published its proposed rule, it proposed action perfectly consistent with Sierra Club's wishes—a "SIP call" for thirty-six States. EPA's use of negotiated settlements to establish self-imposed deadlines to justify providing an unreasonably short comment period that substantially hinders participation by thirty-six of EPA's CAA "partners" and the public is not acceptable.

This rulemaking is far from the only instance where EPA has utilized this type of closed-door policymaking with interest groups—to the exclusion of the affected States and industries. EPA's secretive policymaking has been so pervasive that many States, federal lawmakers, and other public interest groups have filed information requests and initiated formal inquiries into this practice. On August 10, 2012, thirteen State Attorneys General filed a Freedom of Information Act ("FOIA") request with EPA in which they sought, among other things, communications between EPA and eighty identified "interested organizations," related to thirty-three identified cases settled during the past three years which demonstrate EPA's reliance on its "sue and settle" practices. A copy of the States' FOIA request dated August 10, 2012, is attached hereto as Exhibit 9. After receiving no responsive documents for nearly six months, the States submitted a second FOIA request on February 6, 2013, seeking similar information and documents but narrowing the scope of the request to just a particular CAA program—EPA's Regional Haze rulemaking—with the hope that the narrower request would yield some kind of response from EPA. However, EPA has failed to adequately respond to that request as well, as evidenced by the States' need to pursue a FOIA appeal on March 18, 2013. Copies of the States' February 6, 2013 FOIA request, and March 18, 2013 appeal, are attached hereto as Exhibit 10. To date, EPA has produced no meaningful documents in response to either of the States' FOIA requests.

On April 1, 2013, Senator Vitter and Senator Jeff Sessions (R-Alabama), Ranking Member of the Subcommittee on Clean Air and Nuclear Safety, wrote a letter to EPA regarding its use of "sue and settle" strategy to justify this proposed rule. In the letter, the Senators state, "[o]ddly, it appears that, instead of defending EPA's own regulations and the SSM provisions in the EPA-approved air programs of 39 states, EPA simply agreed to include an obligation to respond to the petition in the settlement of an entirely separate lawsuit. In other words, EPA went out of its way to resolve the SSM petition in a coordinated settlement with Sierra Club." A copy of Senator Vitter and Senator Sessions' April 1 letter to EPA is attached hereto as Exhibit 11.

These same concerns were recently addressed in the June 28, 2012 hearing before the U.S. House of Representatives Oversight and Governmental Reform Committee (Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform). The Committee heard statements and testimony discussing, among other things, (i) how "sue and settle" settlements are a form of "off ramp" rulemaking bypassing the traditional rulemaking concepts of transparency, public participation and judicial review; (ii) how billions of dollars in added costs and millions of lost jobs have resulted from these off ramp settlements and why these added regulatory burdens may not have resulted had the traditional rulemaking process been followed; and (iii) the specific impact of EPA's "sue and settle" strategy upon the Regional Haze rules. Testimony from this hearing is attached hereto as Exhibit 12. For example, Oklahoma Attorney General Scott Pruitt testified that "EPA's alarming practice of relying on consent decrees to deny states their important role as a partner under cooperative federalism . . . have put states in the position of dealing with burdensome and harmful outcomes through processes in which they have no say." Roger R. Martella, Jr., former General Counsel for EPA**,** testified that while settlement decrees are generally noncontroversial and promote

judicial efficiency and reasonable outcomes of disputes, the sue and settle approach becomes problematic when it "effectively provide[s] an off ramp that ignores [the] various protections, procedures, and boundaries Congress has established." "Off ramp" settlements allow NGOs to usurp delegated government functions while undermining transparency, effective public participation, and effective judicial review. William Kovacs, Senior Vice President for the U.S. Chamber of Commerce, testified that, in addition to its effects on transparency and public participation, sue and settle practices have a profound effect on job creation. Notably, Kovacs testified that while Agency settlements are nothing new, EPA now regularly cedes its authority to environmental groups by granting them "a [contractual] right to be part of the supervision [of the rulemaking]." The practice has "gone from a few a year to being the policy of the administration." William Yeatman, of the Competitive Enterprise Institute explained how EPA used sue and settle to usurp States' authority to comply with the CAA's Regional Haze requirements. Mr. Yeatman stated, "[L]ike a one-two, left-right boxing combination, EPA first objects to the process used by the state to comply with Regional Haze, and then the Agency claimed it had no choice but to impose its preferred controls in order to comply with a consent decree [that was entered in a lawsuit that it declined to defend]. Thus, EPA has trumped the states' rightful authority on Regional Haze." Beyond these hearings, Members of Congress have introduced legislation to compel some transparency to EPA's practices.[68]

[68] In April 2011, Representative Darrell Issa (R-California), Chairman of the House Oversight and Government Reform Committee, introduced the Judgment Fund Transparency Act of 2011 (H.R. 1446) (Secretary of Treasury to disclose specific information related to agency settlements that made claims on the federal Judgment Fund), a copy of which is attached hereto as Exhibit 13. In February 2012, Representative Ben Quayle (R-Arizona) introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862) (imposed limitations on consent decrees and settlement agreements requiring agencies to act based on the negotiated terms), a copy of which is attached hereto as Exhibit 14. In July 2012, Senator Grassley (R-

2. EPA's use of a changed legal interpretation as the basis for calling thirty-six SIPs is an arbitrary and capricious avoidance of EPA's CAA duty

EPA argues in the proposed rule that it is calling the SIPs of thirty-six States based on failure to comply with EPA's changed interpretation of the meaning of a section 302(k) "emission limitation" in the context of State Implementation Plans. EPA argues that this basis for a SIP "call" requires no further analysis or evaluation of any of the thirty-six affected SIPs. According to EPA, it is not relevant whether the affected States are attaining the NAAQS, whether the SSM provisions in question have an adverse effect on attainment or whether EPA's dictate that the SSM provisions be eliminated will itself impact the NAAQS. As a result, EPA has not conducted any review whatsoever of air quality data for any of the affected States or evaluated the potential impact on air quality of any emission limitation presently subject to an SSM provision. The entire SIP call is based entirely on EPA's changed legal interpretation of the definition of "emission limitation", notwithstanding the established practice that all SIP calls have been based on air quality concerns and intended to produce air quality improvements. EPA is avoiding its CAA duties that arise whenever EPA seeks to exercise its authority to "call" a SIP.

If EPA had evaluated air quality data and interests in the respective States, the apparent policy motive of EPA and Sierra Club would not have been achieved with such ease and timely

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Iowa) introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012 (S. 3382) in the Senate, a copy of which is attached hereto as Exhibit 15. Substantially similar bills by the same name were reintroduced in the House and the Senate by Rep. Doug Collins of Georgia and Sen. Chuck Grassley on April 11, 2013. *See* H.R. 1492 and S. 714. In January 2013, Representative Gory Gardner (R-Colorado) and others introduced the Judgment Fund Transparency Act of 2013 (H.R. 317) (requires Treasury Department to disclose information regarding settlement payments made from the Judgment Fund), a copy of which is attached hereto as Exhibit 16.

dispatch, but the naked assumption that eliminating SSM provisions from SIPs must be consistent with CAA goals would have been evaluated against actual air quality data and actual permitting and compliance experience that EPA and Sierra Club are avoiding by this expurgated proceeding. Failure to perform that evaluation is arbitrary and capricious. If EPA had actually evaluated the purpose, application and air quality results of the SSM provisions in each of the affected States, rather than summarily and universally condemning those provisions for non-compliance with EPA's legal opinion, each State would have had an opportunity to present and defend its pursuit and accomplishment of the CAA obligation assigned to the States, attaining the NAAQS. Failure to perform that evaluation is arbitrary and capricious. Instead, that supreme priority for the CAA SIP development and oversight process has been completely eliminated from EPA's reasoning. Failure to follow the Supreme Court's mandate as to EPA's role and the priorities of the CAA in the SIP development and oversight process is contrary to law. In contrast to years of established practice where SIPs are concerned, EPA has quite intentionally avoided its CAA duty to consider air quality data and concerns in determining whether to "call" a SIP as "substantially inadequate" and relied upon a changed legal interpretation to which EPA demands fealty and "deference" by all parties, including ultimately the federal courts to which EPA's final rule will no doubt be appealed. EPA's attempt to use a legal interpretation as a "veto" over all other CAA considerations previously known to be supreme in EPA's CAA evaluations of SIPs is arbitrary and capricious and contrary to law.

a. <u>EPA has not asserted appropriate grounds for the urgency suggested by its short public comment period</u>

Since the inception of the SIP program in the early 1970s, the States have effectively implemented regulatory schemes with SSM provisions that improved air quality and in most cases attained the NAAQS. These SIPs with SSM provisions have been repeatedly approved by

EPA for decades and were "expressed, reiterated, and elaborated upon" by EPA guidance on SSM in 1982, 1983, 1999, and 2001. As discussed more thoroughly in Section II.A.4 above, over this time, the States achieved widespread and longstanding compliance with the NAAQS and other CAA standards, creating decades of enforcement precedent and operational experience. Accordingly, EPA's proposed rule to dictate elimination of such SSM provisions cannot now be characterized as a matter so urgent as to justify the unconscionably short comment period set out in the proposed rule and EPA's own self-imposed short deadline for finalizing the rule, catering to Sierra Club's demands. When it came to their own timeline, EPA and Sierra Club repeatedly extended self-imposed deadlines for the proposed rule so that EPA could formulate this proposed rulemaking. *See* Modification of Settlement Agreement in *Sierra Club v. Jackson*, No. 3:10-cv-04060 (N.D. Cal). In the end, EPA and Sierra Club agreed that EPA should be provided more than nineteen months to evaluate the merits of Sierra Club's petition and to prepare its 82-page proposed rule. Expecting States, industry, and sources to assess the affected provisions of each affected State, including myriad permits and sources, and provide comments on the proposed rule in the short amount of time provided is arbitrary and capricious.

b. <u>EPA's short public comment period is inconsistent with Executive Order 13563</u>

First, in the absence of a thorough technical and air quality analysis by EPA, as discussed more thoroughly herein, the impacted States and industries must perform the data collection and analysis necessary to evaluate the need for the proposed rule and its impacts in order to provide meaningful comment. Therefore, the public comment period provided by the proposed rule is at odds with Executive Order 13563, a copy of which is attached hereto as Exhibit 17. The order requires EPA to "afford the public a <u>meaningful</u> opportunity to comment" on proposed

regulations." 76 Fed. Reg. 3821 (Jan. 21, 2011) (emphasis added). Given the scope of the data collection and analysis required, as well as expansive nature of the proposed rule, the amount of time allowed is plainly insufficient and contrary to explicit requirements of the Order.

Second, even accepting EPA's assertion that EPA is not obligated to evaluated NAAQS-related air quality data for each State because the SIP call is based entirely on a legal interpretation, EPA's failure and refusal to perform any technical analyses of the feasibility of source operations after the elimination of SSM provisions or the likely capital and operating costs of additional control equipment required to meet numeric standards during all operational periods has denied the States, the affected parties, and the public a meaningful opportunity to evaluate and comment upon the proposed rule.

Third, pursuant to the Order, "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." *Id*. at 3822. Considering that EPA gave itself more than nineteen months to develop this proposal, yet failed to seek the views of those who are likely to be affected and those who are potentially subject to such rulemaking, EPA's actions ignore the requirements of the Executive Order. These failings violate Executive Order 13563 and render the proposed rule arbitrary and capricious.

3. EPA's failure to provide a transparent process, a reasoned analysis, and an evidentiary-based decision is regulatory misbehavior designed to support EPA's arbitrary and capricious decision

Pursuant to the CAA, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *See*

Train, 421 U.S. at 79. "The great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by the EPA." *See Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981). Nevertheless, through this proposed rulemaking, EPA has failed to provide any technical evidence demonstrating a correlation between Alabama's existing SIP SSM provisions and NAAQS attainment problems. In fact, as discussed in greater detail below, Alabama's SIP is in attainment with all of EPA's NAAQS. In the proposed rule, EPA also fails to assess alternatives to eliminating the SSM provisions at all potentially affected sources or to consider potential safety issues related to alternative operation of pollution control equipment during periods of SSM.

Additionally, EPA fails in its proposed rule to address the costs associated with compliance with the proposed rule, either in terms of increased costs of new controls or other changes at facilities or in the increased administrative costs of federal and State agencies associated with revising permits and implementing the proposed rule. Despite the fact that a final rule would mean changing emissions limitations applicable to a broad range of sources—which would require nearly universal permit revisions to account for the changes—and make compliance with overall emissions limitations more difficult and costly for these sources, EPA fails to assess and justify costs associated with such an increase in workload for all affected federal and State agencies in its proposed rule. In fact, the only comment EPA makes regarding these costs is a casual statement that "[t]he direct costs of this action on states would be those associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call. Examples of such costs could include development of a state rule, conducting notice and public hearing, and other costs incurred in connection with a SIP submission." 78 Fed. Reg. at 12,539. Concerns regarding the costs associated with this action were recognized

on page 313 of the U.S. Office of Management and Budget's comments on EPA's draft proposed rule, a copy of which is attached hereto as Exhibit 18.

Furthermore, EPA cannot issue a nationwide SIP call finding the challenged SSM provisions to be "substantially inadequate" to comply with the CAA, as required by CAA section 110(k)(5). Instead, EPA must review each separate emission limitation or standard and its relationship to the SSM provisions and determine, based upon the facts and circumstances rather than mere speculation and conjecture, that the emission limitation or standard, and, in fact, the State's approved plan as a whole, is substantially inadequate to "attain or maintain the relevant" NAAQS, mitigate adequately interstate pollution, or otherwise comply with the Act. Accordingly, EPA must withdraw this proposed rule and begin a review of each separate SIP provision that references an SSM provision to determine whether it meets the requirements of CAA section 110(k)(5). Only after making an adequate finding can EPA satisfy its statutory burden required for making a SIP call, and only then will the affected States and parties have a meaningful opportunity to evaluate the scope of EPA's proposal and comment upon its impacts.

Ironically, under the subsection of the proposed rule labeled, "Tips for Preparing Your Comments," EPA suggests that commenters should "describe any assumptions and provide any technical information and/or data that you used," as well as "explain how you arrived at your estimate [of potential costs or burdens] in sufficient detail to allow for it to be reproduced." 78 Fed. Reg. at 12,462. However, EPA did not follow its own recommendations in its proposed rule, as it failed to provide any technical information and/or data upon which its assumptions are based or explain how it arrived at its estimates of potential costs or burdens relating to the proposed rule. EPA recently responded to a comment objecting to the inclusion of a startup/shutdown exemption in a federal implementation plan ("FIP") by stating that the units

had "always operated with an exemption from opacity limits during shutdown," and that "[t]he commenter ha[d] not provided any information demonstrating that exempting these units during shutdown harms the environment or public health."[69] If EPA requires commenters to submit information, demonstrating that such exemptions harm the environment or public health, EPA should have to submit the information too. Accordingly, EPA failed to provide enough information in its proposed rule to allow for meaningful public comment.

a. EPA has failed to respond to Southern Company's FOIA request

EPA's failure to provide any analysis to support the proposed rule—aside from its repeated explanation that its proposed action is based on its "interpretation" of the CAA—has left the public with the daunting task of collecting, reviewing, and analyzing the voluminous amount of information that EPA should have relied upon in proposing such a sweeping action. To that end, Southern Company, Alabama Power's parent company, acting through counsel, filed a Freedom of Information Act request with EPA seeking information relating to EPA's SSM policy, data and analyses concerning SSM emissions and their relationship to NAAQS, and information related to EPA regulatory actions concerning SSM provisions, among other Agency records. A copy of the February 8, 2013 FOIA request filed with EPA Headquarters is attached hereto as Exhibit 19.[70]

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[69] *See* Response to Public Comments at 23–24, Docket ID No. EPA-R09-OAR-2006-0184-0042.

[70] Southern Company originally filed similar FOIA requests with each of the ten EPA regional offices in addition to EPA Headquarters. However, on a March 6, 2013 conference call, EPA informed Southern Company's counsel that EPA would be consolidating the eleven FOIA requests into a single request to be handled by EPA Headquarters to ensure that all responsive records in each regional office would be screened for withholding through EPA's Office of General Counsel. EPA has now given itself a deadline of May 17, 2013. Accordingly, no documents have been produced to date. A copy of Southern Company's response (through

Apparently, it is not unusual for EPA's first response to a FOIA request to include assertions that (1) the request is too broad, (2) the amount of fees authorized is inadequate, and that (3) EPA will need additional time to respond. In a March 7, 2013 letter from U.S. Senators Vitter, Grassley, and Issa to U.S. Attorney General Eric Holder, the senators wrote that "in a limited document production recently obtained," they "learned that the [EPA] has struggled to observe the President's commitment to transparency:[71] their staff is poorly trained, does not place a priority on responding to FOIA requests, and appears to be more interested in erecting barriers than in ensuring requests are promptly and properly fulfilled." The senators "are deeply concerned that the poor administration of the FOIA at the EPA will undermine the President's promise of transparency." The senators continue that, "[i]n addition to not being properly trained, it appears that EPA employees are also not receiving adequate support from the . . . Office of General Counsel (OGC)" and that there are "concerns about the priorities of the EPA upon receipt of FOIA requests." The letter identifies emails between EPA Region 6 and EPA's Office of General Counsel personnel on how to respond to two FOIA requests which—just like Southern Company's FOIA request—sought information related to EPA's proposed actions to

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counsel) to EPA's request for it to narrow the scope of its FOIA request is attached hereto as Exhibit 20.

[71] Days after taking office, President Obama issued a memorandum to all Federal agencies and departments setting a policy whereby agencies respond to FOIA requests with a "presumption of openness." *See* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009). On April 23, 2009, then-Administrator Lisa Jackson issued her own memorandum to all EPA employees expressing a commitment to the President's policy that FOIA "should be administered with a clear presumption that openness prevails" and that "personnel should ensure that this principle of openness is applied to the extent possible when responding to a FOIA request." *See* Lisa P. Jackson, Memorandum on Transparency in EPA's Operations (April 23, 2009). Copies of the President's and former Administrator's FOIA memoranda are attached hereto as Exhibits 21 and 22.

invalidate States' SIPs. The emails included correspondence from the OGC advising the Region 6 officials that:

> Unless something has changed, my understanding is that there are some standard protocols we usually follow in such FOIA requests. One of the first steps is to alert the requestor that they need to narrow their request because it is overbroad, and secondarily that it will probably cost more than the amount of $ they agreed to pay. Unless and until they respond to that, and tell us they will pay more, we usally [sic] tell them in writing that we are suspending our response to their request until they get back to us.

Clearly, neither FOIA nor EPA's FOIA regulations require or allow *carte blanche* such an approach to responding to FOIA requests. *See generally* 5 U.S.C. § 552; 40 C.F.R. Part 2, Subpart B.

For whatever reason, EPA's new "deadline" for responding to Southern Company's FOIA request is May 17, 2013—four days *after* the deadline for providing public comments on the proposed rule. EPA has maintained that under no circumstances would Southern Company's pending FOIA request—which is necessary to supplement EPA's paltry administrative record—have any effect on the amount of time EPA would allow the public to research, study, and respond to EPA's proposed rule. EPA's failure and refusal to perform technical and economic analyses necessary for the States, the affected parties, and the public to understand and comment upon the impact and costs of the proposed rule, combined with EPA's failure and refusal to respond in a timely fashion to an affected party's FOIA request *and* EPA's refusal to provide sufficient time for the affected parties to perform the necessary analyses themselves results in a rulemaking process that is completely opaque rather than transparent. It denies the public a meaningful opportunity to comment and renders the proposed rule arbitrary and capricious.

b. EPA failed to comply with Executive Order 12291 – Federal Regulation

EO 12291 provides that an agency promulgating a "major rule" must prepare, at the time of the notice of proposed rulemaking, a Regulatory Impact Assessment ("RIA"), which is essentially a cost–benefit analysis of the rule. EO 12291 defines "major rule" to mean "any regulation that is likely to result in" any one of the following:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The proposed change in EPA policy is likely to result in major cost increases for individual industries from increased operational and maintenance costs and capital costs. The electric utility industry, in particular, would be significantly impacted by this rulemaking if finalized as proposed. As described in detail in Section II.D above, EPA's policy change as applied to planned startups and shutdowns alone will increase operation and maintenance costs and control costs for Alabama Power. As discussed above, for fossil-fuel-fired electric utility steam generating units, the vast majority of these costs will likely be aimed at further reducing opacity during unit startup and shutdown at coal-fired units that already have controls in place that reduce particulate matter emissions by over 99%. Even the additional controls being installed to meet EPA's latest, most stringent standards under the MATS will in many cases not suffice to eliminate SSM-related excess opacity emissions. Ironically, while a unit may not need a baghouse to comply with the stringent mercury and PM limits in MATS, citizen groups like Sierra Club could seek installation of baghouses to further reduce opacity during planned startups and shutdowns if this rule is implemented as proposed. Installation of control measures,

whether the result of rule revisions or litigation, to attempt to address SSM emissions would increase the cost of generating electricity and thus increase the cost to consumers without a discernible environmental benefit. Under Section 3(d) of EO 12291, agencies are required to describe potential benefits and costs of the rule and to determine potential net benefits, including any benefits, effects, and net benefits that "cannot be quantified in monetary terms." A primary purpose of the RIA requirement is to ensure that "[a]dministrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action."[72] EPA has provided no information in this rulemaking on the costs and air quality benefits of this proposed rule. Even if the electric utility industry and its customers were the only industry and consumer group impacted by this rule, which they are not, EPA would be obligated under EO 12291 to prepare an RIA to assess the costs and benefits of its proposed action. Failure to do so renders the proposed rule arbitrary and capricious and contrary to law.

c. EPA failed to fully comply with Executive Order 12866 – Regulatory Planning and Review

Under EO 12866, agencies are required to specify to the Office of Information and Regulatory Affairs ("OIRA") in the Office of Management and Budget any actions that the agency believes are "significant regulatory actions." The EO defines "significant regulatory action" to mean:

> any regulatory action that is likely to result in a rule that may:
>
> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan

[72] Executive Order 12291, § 2(a).

> programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

If the agency or OIRA concludes that a given rulemaking is a "significant regulatory action," the agency is required to submit to OIRA an analysis that includes, among other things:

> (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.[73]

If the agency action is a "significant regulatory action" because it will "[h]ave an annual effect on the economy of $100 million or more *or adversely affect in a material way the economy, a sector of the economy*, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities," the agency is required to submit a more detailed analysis that also includes:

> (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.[74]

While EPA concluded that the SSM SIP call is a "significant regulatory action" under Executive Order 12866,[75] it did not conduct the required analysis under Section 6(a)(3)(B). Furthermore, because this proposed rule will adversely affect the electric utility industry and other sectors of the economy in a material way, EPA also should have conducted the additional analyses required

[73] Executive Order 12866, § 6(a)(3)(B).

[74] Executive Order 12866 § 6(a)(3)(C).

[75] 78 Fed Reg at 12,538.

under Section 6(a)(3)(C). Failure to do so renders the proposed rule arbitrary and capricious and contrary to law.

d. EPA failed to comply with the Unfunded Mandates Reform Act

Pursuant to the Unfunded Mandates Reform Act ("UMRA"), before conducting rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more EPA must first prepare a written statement containing: (1) an identification of the provision of Federal law under which the rule is being promulgated; (2) a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as the effect of the Federal mandate on health, safety, and the natural environment; (3) estimates by the agency of the future compliance costs of the Federal mandate and any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector; (4) estimates by the agency of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services; and (5) a summary of agency's prior consultation with elected representatives of the affected State, local, and tribal governments and its evaluation of such comments and concerns. *See* 2 U.S.C. § 1532(a). An agency enforcing the mandate must also choose the least-costly option that still achieves the goals of the mandate, as well as consult with elected officials of the affected State, local, and tribal governments to allow for their input on the implementation of the mandate and its goals. *See* 2 U.S.C. § 1535.

Despite the fact that the proposed rule will mean changing emissions limitations on a vast number of sources by increasing stringency of overall emissions limitations, which would require nearly universal permit revisions to account for the changes, EPA fails to assess and justify costs associated with such an increase in workload for all affected federal and state agencies in its proposed rule. Nevertheless, EPA states that the proposed rule is not subject to the requirements of the UMRA, because it "does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year." 78 Fed. Reg. at 12,538. In fact, the only comment EPA makes to "justify" this is a casual statement that "[t]he direct costs of this action on states would be those associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call. Examples of such costs could include development of a state rule, conducting notice and public hearing, and other costs incurred in connection with a SIP submission." *Id.* at 12,539. EPA fails to take into consideration many other direct and indirect costs associated with the proposed rule, some of which are discussed above. Further, EPA fails to provide any information as to how it arrived at a cost value below the $100 million threshold of the UMRA.

Accordingly, EPA must withdraw its proposed rule and begin a review of the costs associated with compliance with the proposed rule. After conducting such review, should EPA still deem it necessary, EPA may re-propose a rule that includes the relevant findings related to cost and, if such costs are found to be over the $100 million threshold, consult with all affected State, local, and tribal governments and prepare a written statement in accordance with the UMRA. If they are found to be under the $100 million threshold, then EPA should include in its

re-proposed rule justification as to how it arrived at a lower number, taking into account all direct and indirect costs of the rule on the affected State, local, and tribal governments.

e. EPA failed to conduct the analyses required by Executive Order 13211 – Energy Effects

EO 13211 requires agencies to produce a Statement of Energy Effects whenever they take a "significant energy action," defined as one that is a significant regulatory action under EO 12866, which EPA agrees this is, and is "likely to have a significant adverse effect on the supply, distribution, or use of energy." In the preamble to the SSM SIP call, EPA states that a Statement of Energy Effects is not required because the rule "is not likely to have a significant adverse effect on the supply, distribution or use of energy."[76] Instead, EPA claims, this rule only applies to States and their SIP obligations under the CAA.[77] Again, however, EPA reached this conclusion without considering the operational effects on major sources of energy. As explained above, this proposed rule will have a significant impact on the electric utility industry and has the potential to increase capital and O&M costs and the availability of individual generating units thus impacting the supply, distribution and use of energy. At a minimum, EPA must examine the issue. Failure to do so renders the proposed rule arbitrary and capricious and contrary to law.

f. EPA failed to comply with Executive Order 13132 – Federalism

EPA incorrectly concludes that EO 13132 does not apply to this rulemaking because the SSM SIP call does not have federalism implications.[78] EO 13132 applies to "policies that have federalism implications," and it defines such policies as those "actions that have substantial

[76] 78 Fed Reg at 12,539.

[77] *Id.*

[78] 78 Fed Reg at 12,539.

direct effects on the States, on the relationship between the national government and the States, *or on the distribution of power and responsibilities among the various levels of government.*"[79] EPA concludes that while this rulemaking "may impose direct effects on the states," the cost will not be substantial because the expenditures will be far less than $25 million in the aggregate in any one year.[80] Alabama Power disagrees with and disputes EPA's conclusion that the effect will not be substantial. But even if that were true, EPA has failed to address the fact that this rulemaking will have a direct effect on the distribution of power and responsibilities between the federal and State/local governments. In this SIP call, EPA reinterprets the CAA in a way that virtually eliminates the authority of State and local governments to control SSM emissions as provided under longstanding State regulations previously approved by EPA.[81] As discussed in detail in Section III below, the SIP call violates the federal–State partnership created by the CAA by impinging on the States' right to adopt the mix of controls necessary and appropriate to achieve the NAAQS within their borders. The D.C. Circuit recently affirmed these principals of cooperative federalism. *See EME Homer*, 696 F.3d at 29–30 (rejecting EPA's attempt to bypass the role of the States when it adopted the Transport Rule). By proposing to limit the authority of the States in this way, EPA triggered the requirements of this EO. Furthermore, by failing to provide any analysis of the impacts of this rule on the regulated community, EPA has effectively

[79] Executive Order 13132 § 1(a).

[80] 78 Fed Reg at 12,539.

[81] In fact, as described above, in this rulemaking, EPA is disallowing States and local regulators from providing SSM exclusions that are identical to current federal SSM regulations and, in some cases, are more stringent than federal SSM regulations. *See supra* Section II.A.4 (discussing SSM provisions in EPA's NSPS and NESHAPs).

shifted that obligation and the costs of that obligation to the States and local authorities that must comply with this rule.

This EO requires federal agencies to consult with State and local agencies on actions that implicate the balance of power between the States and federal government. EPA has not done that in this case. In fact, prior to releasing the proposed rule on February 12, 2013, the Agency provided only the most minimal information on this rulemaking prior to proposal and refused to respond to more specific inquiries from States about this rulemaking as it was being developed.

In addition to the obligation to consult with the States, under Section 6(b)(2)(B) of the EO, the Agency must provide the Director of OMB with:

> a federalism summary impact statement which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met.

Because EPA incorrectly concludes that this rulemaking has no federalism implications, it did not prepare the required impact statement. Failure to do so renders the proposed rule arbitrary and capricious and contrary to law.

4. EPA's justification for the rule ignores the congressional intent at the heart of the CAA—protecting air quality, creating a State and federal partnership, and ensuring certainty and efficiency in permitting—and instead facilitates a CAA system driven by litigation

EPA proposes to dictate that the affected States revise their SIPs with no regard for air quality, as explained in Section II.B above, upsetting the State–federal balance that Congress envisioned for CAA implementation, as detailed in Section III below, and creating significant administrative costs and burdens with respect to permitting, as outlined in Section II.D above. Ignoring Congress's intent in enacting the CAA, EPA proposes to create a new regime in which the scales of justice weigh heavily in favor of Sierra Club and other litigious private

organizations, which is exactly what Sierra Club sought in its SSM petition—one in which all defenses to liability in the litigation Sierra Club wishes to bring against electric generating plants have been eliminated. EPA's dictate to the affected States would expose existing sources to litigation over unavoidable periods of "violation" that heretofore have been accepted as necessary periods of flexibility for the operation of well-controlled sources and widely-regarded as being of no significant impact to air quality. It is technically impossible to eliminate all instances of excess emissions during SSM periods, and the consequences of this under EPA's proposed rule is that sources will be subjected continuously to enforcement litigation, demands for injunctive relief, and civil penalties.

III. THE PROPOSED RULE DESTROYS THE COOPERATIVE FEDERALISM CONGRESS BUILT INTO THE CLEAN AIR ACT

EPA's proposed rule constitutes dictation to the States regarding the control measures States may choose to use in their SIPs for attaining the NAAQS set by EPA. EPA's proposed rule does not proffer any evidence that the States' preferred control measures adversely affect the effectiveness of these SIPs to attain the NAAQS, and EPA even ignores the obvious fact that air quality in the affected States has consistently and significantly improved and the NAAQS are being attained with the affected SIP provisions in place for the last 30-40 years. Within the construct of cooperative federalism that governs CAA implementation, EPA may not dictate that States eliminate their longstanding, preferred SIP control measures based only on a changed legal interpretation of CAA provisions and without even considering how that federal dictate or the preferred State control measures affect attainment of the NAAQS. If EPA were permitted to finalize its proposed SIP call, there would be nothing left of the States' CAA authority to select and implement their own SIPs.

A. By Design, the Clean Air Act Is a Federal–State Partnership

Congress chose a "cooperative federalism" regime to implement the CAA, dividing authority between the federal government and the States. *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001); *see also Sierra Club v. EPA*, 315 F.3d 1295, 1300 (11th Cir. 2002); *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981) ("Congress chose a balanced scheme of state-federal interaction to implement the goals of the [Clean Air] Act.").

Consistent with this structure, EPA's job is to promulgate NAAQS for certain pollutants and to ensure that the *minimum* requirements for air pollution control programs are established. *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003). The CAA, however, gives States "the primary responsibility" for determining how to achieve those standards and meet those requirements within their own borders. *EME Homer City Generation v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012) ("Under this cooperative federalism approach, . . . [t]he Federal Government sets air quality standards for pollutants. The States have the primary responsibility for determining how to meet those standards and regulating sources within their borders."); *City of Seabrook, Tex. v. EPA*, 659 F.2d 1349, 1356 (5th Cir. 1981) (quoting 42 U.S.C. § 7404(a)) ("One of the central purposes of the Clean Air Act was to place the 'primary responsibility' for assuring air quality on the states."). "The Act thus leaves it to the individual States to determine, in the first instance, the particular restrictions that will be imposed on particular emitters within their borders." *EME Homer*, 696 F.3d at 12. "That statutory division of authority is strict." *Id.* at 29.

1. Congress gave States great flexibility to adopt pollution control rules best suited to achieve air quality standards within their borders

States achieve the NAAQS set by EPA through the development, administration, and enforcement of State Implementation Plans or "SIPs." *Sierra Club*, 315 F.3d at 1296; *Fla. Power & Light Co.*, 650 F.2d at 581. The SIP is the set of regulations adopted by the State for

the purpose of ensuring attainment and maintenance of the NAAQS and other federal CAA requirements.[82] It is approved by EPA and revised from time to time by the State and again reviewed by EPA. *See Sierra Club*, 315 F.3d at 1296. Once approved by EPA, the SIP or SIP revision is codified into EPA regulations and is fully enforceable as federal law. *Ala. Envtl. Council*, 711 F.3d at 1280–82.

In general, a State's SIP must, "among other things . . . 'include enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate' to meet" the applicable NAAQS; "'appropriate devices, methods, systems, and procedures' to 'monitor, compile, and analyze data on ambient air quality;'" and an enforcement program. *See BCCA Appeal Group*, 355 F.3d at 822 (summarizing 42 U.S.C. § 7410(a)(2)). But, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt *whatever mix* of emission limitations it deems best suited to its particular situation." *Train*, 421 U.S. at 79 (emphasis added); *see also Virginia*, 108 F.3d at 1407–08 (quoting *Train*, 421 U.S. at 79) ("The [Clean Air] Act gives [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a [SIP] which satisfies the standards of § 110(a)(2) . . . ."). The Clean Air Act "supplies the goals and basic requirements of [SIPs], but the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements." *BCCA Appeal Group*, 355 F.3d at 822.

[82] Notably, the term "SIP" is also used to refer to specific portions of the overall body of regulations (e.g., "Regional Haze SIP," "Interstate Transport SIP," "Infrastructure SIP," "PM2.5 SIP," "Ozone SIP," etc.).

2. EPA has a sharply limited role in reviewing SIPs

EPA's role in reviewing SIPs is limited by statute. *See North Carolina v. EPA*, 531 F.3d 896, 922 (D.C. Cir. 2008) (quoting *Michigan*, 268 F.3d at 1081) (EPA is "'a creature of statute,' and has 'only those authorities conferred upon it by Congress.'"). "The great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by EPA." *Fla. Power & Light Co.*, 650 F.2d at 587. Accordingly, EPA's review of SIP revisions is cabined by section 110 of the CAA. The D.C. Circuit Court of Appeals "has described the *Train–Virginia* line of cases as erecting a statutory 'federalism bar' under Section 110 of the Act," which "prohibits EPA from using the SIP process to force States to adopt specific control measures." *EME Homer*, 696 F.3d at 29 (citing *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046 (D.C. Cir. 2001); *Train*, 421 U.S. 60; *Virginia*, 108 F.3d at 1410 ("[S]ection 110 does not enable EPA to force particular control measures on states . . . ."); *Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000)). The CAA "gives EPA 'no authority to question the wisdom of a State's choices of emission limitations,' so long as the State's SIP submission would result in 'compliance with the national standards for ambient air.'" *EME Homer*, 696 F.3d at 29 (quoting *Train*, 421 U.S. at 79). As stated in *EME Homer*:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, *it is relegated by the Act to a secondary role* in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.

Id. (emphasis in original) (quoting *Train*, 421 U.S. at 79); *see also Texas v. EPA*, 690 F.3d 670, 675 (5th Cir. 2012) ("The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved for the states") (quoting *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984)).

Under section 110(*l*), EPA is to approve a SIP revision unless it determines that "the revision would interfere with [1] any applicable requirement concerning attainment [of the NAAQS] and reasonable further progress [toward attainment] . . . or [2] any other applicable requirement." 42 U.S.C. § 7410(*l*); s*ee also Ky. Res. Council, Inc. v. EPA*, 467 F.3d 986, 994 (6th Cir. 2006). If the SIP revision meets the requirements in the CAA, EPA must approve it. 42 U.S.C. § 7410(k)(3) ("[T]he Administrator shall approve [a SIP or SIP revision] as a whole if it meets all of the applicable requirements of this chapter.").

Thus, EPA cannot properly disapprove a State's proposed SIP revision, let alone call a SIP that the Agency has already approved, without finding that it will worsen or has worsened air quality. EPA's proposed SIP call flies in the face of congressional intent with respect to the role it prescribed for the Agency. EPA has failed to make any findings demonstrating that the SSM provisions in thirty-six SIPs make those SIPs substantially inadequate to attain or maintain the NAAQS. EPA offers no data or evidence to support its proposed rule, but instead concludes that these SSM provisions conflict with EPA's changed interpretation of the CAA. If EPA is permitted to use changed legal interpretations to justify dictating to the States that they revise their SIPs—without regard for air quality issues—then the States' authority to choose the elements of their own SIPs will have been revoked. The States will have lost their Congressionally-mandated role in CAA implementation, doing away with the cooperative federalism that Congress plainly wrote into the CAA.

B. The Proposed Rule Leaves No SIP Authority With the States

EPA's interpretation of section 110(k)(5) of the CAA, which is both contrary to Congressional intent and unreasonable, as discussed in detail in Section II.C above, ignores "[o]ne of the central purposes of [the Act]," which was to place the "primary responsibility" for assuring air quality on the States. *See City of Seabrook, Tex.*, 659 F.2d at 1356. EPA attempts to

use its legal interpretation of 110(k)(5)—particularly the meaning of "substantially inadequate"—to justify the proposed rule, but EPA's interpretation does not pass muster.

Review of an agency's interpretation of a statute which it administers is governed by the two-step analysis delineated in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). First, the court determines "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress's intent is clear from the statutory language, the Court must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Second, if Congress has not spoken and the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Congress may not have spoken directly to the meaning of "substantially inadequate," *see supra* Section II.C.1, but the Supreme Court has ruled that Congress clearly established "a federalism-based system of air pollution control," under which "both the Federal Government and the States play significant roles. The Federal Government sets air quality standards for pollutants. The States have primary responsibility for determining how to meet those standards and regulating sources within their borders." *EME Homer*, 696 F.3d at 11, 12 (citing *Train*, 421 U.S. at 63–67). The cooperative federalism that characterizes the SIP system makes it unique in terms of the deference owed EPA in interpreting CAA provisions: Where EPA's statutory interpretation would upset the State–federal balance that Congress created, it cannot be said to be "reasonable" or "a permissible construction of the statute." *See Chevron*, 467 U.S. at 843–44. Because EPA's interpretation of "substantially inadequate" and its obligations under section 110(k)(5) would allow the Agency to dictate that States revise their SIPs without any consideration for how that federal dictate or the preferred State control measures affect

attainment of the NAAQS, it would upset the Act's system of cooperative federalism. EPA has interpreted "substantially inadequate" so as to expand its own role in CAA implementation, stripping the States of their congressionally-mandated role of determining how to meet air quality standards. An interpretation of a CAA provision that so defies congressional intent with respect to CAA implementation cannot be said to be "a permissible construction of the statute."

C. EPA's Changed Legal Interpretation Does Not Justify Its Sweeping Power Grab

Even where EPA puts forth an otherwise reasonable interpretation of a CAA provision, if the Agency is permitted to use nothing more than a changed legal interpretation to justify dictating to the States that they revise their SIPs—without regard for air quality issues—then the States' authority to choose the elements of their own SIPs will have been revoked. The States will have lost their congressionally-mandated role in CAA implementation, doing away with the cooperative federalism that Congress envisioned in enacting the CAA.

EPA's proposed SIP call flies in the face of congressional intent with respect to the role it prescribed for the Agency. EPA has failed to make any findings demonstrating that the SSM provisions in thirty-six SIPs are so substantially inadequate that the States cannot attain or maintain the NAAQS or comply with the CAA so long as the disputed provisions remain a part of their SIPs. EPA offers no data or evidence to support its proposed rule, but instead concludes only that these SSM provisions conflict with EPA's changed interpretation of the CAA.

EPA's proposed rule exceeds its statutory authority and violates the secondary role to which the Agency is relegated under the CAA. Under the CAA's cooperative federalism principles, States—not EPA—have the authority to choose the proper mix of emission limitations they deem best suited to meet the requirements of the CAA.

IV. EPA SHOULD WITHDRAW ITS PROPOSED RULE, BUT IF EPA PROCEEDS IT MUST CONDUCT THE REQUIRED ANALYSIS, RE-PROPOSE THE RULE, AND PROVIDE STATES WITH BROAD DISCRETION TO AMEND THEIR SIPS

A. EPA Should Withdraw Its Proposed Rule

Because the proposal fails to demonstrate that the SIPs at issue are "substantially inadequate" under section 110(k)(5) and usurps authority granted to the States under the Act, EPA must withdraw its proposed rule. Alabama's SSM provisions do not violate sections 302, 113, or 304 of the Act, and EPA has provided nothing more than unsupported speculation that the SSM provisions could undermine the NAAQS—speculation that is inconsistent with actual air quality monitoring data demonstrating attainment of the NAAQS implemented to date. If EPA is concerned about NAAQS to be implemented in the future, EPA can address the application of SSM provisions in the context of its review and approval the SIP submittals designed to implement the NAAQS. If EPA is concerned that emission inventories and other tools that use those inventories are not properly accounting for SSM-related emissions, the Agency already has rules and guidance on the books to address that issue, and EPA should apply those rules and guidance.

In addition, if EPA believes that the CAA precludes SIPs from including SSM provisions, EPA should have proposed a change to rules in 40 C.F.R. Part 51, which sets forth the requirements for preparation, adoption, and submittal of SIPs. These requirements include, among other things, a description of control measures (40 C.F.R. § 51.111), demonstration of adequacy (*id.* § 51.112), and emissions data and projections (*id.* § 51.114). Part 51 also establishes standards with which SIP provisions must conform with respect to, for example, stack height (*id.* § 51.118), new motor vehicles (*id.* § 51.120), and emissions of certain pollutants (*id.* §§ 51.121–24). This approach would have provided EPA and affected States an opportunity

to develop rules and guidance on SSM provisions without the time constraints associated with a SIP call and without need for EPA to "find" without even considering any evidence that thirty-six SIPs are substantially inadequate. EPA's haste in this matter means it bypassed the appropriate means, place, and method for redefining the requirements of a SIP and, in so doing, left EPA with no choice but to make "findings" without considering evidence. This is arbitrary and capricious and contrary to law.

B. If EPA Proceeds With This Rule, It Must Conduct the Required Analyses

If EPA insists on recalling SSM provisions previously approved by the Agency, it must re-propose a rule that includes the relevant scientific and technical findings required under section 110(k)(5). Before requiring Alabama to revise its SIP in only eighteen months or less, EPA must provide much more information and analysis. Some of the analyses EPA must conduct include:

- A review of the history of NAAQS attainment and maintenance in Alabama for each NAAQS and evaluate whether the SIP requirements that apply during periods of SSM have affected that history in any way.

- An analysis of Alabama's SIP with respect to the approach and methodology used by the State to demonstrate attainment of the NAAQS; that is, for each NAAQS, identify the emission limitations subject to the SSM provisions and determine whether application of the SSM provision to those limits could adversely impact the NAAQS.

- An evaluation of the regulatory history of Alabama'sSIP to determine the basis for State's use of the SSM provisions and the basis for EPA approval of provisions.

- An evaluation of actual occurrences of SSM-related emissions by type (startup, shutdown or malfunction), pollutant, and source category and a determination of whether it is possible to avoid or reduce the frequency or severity of the events.

- If EPA finds that there are technologies, methods or means available to reduce the frequency of SSM-related emissions for one or more source categories and pollutants, then it should identify those options, including the costs and benefits, of those options in the proposed rule for public review and comment.

EPA cannot allow the accelerated timelines embodied in EPA's voluntary settlement with the Sierra Club to excuse its obligation to execute the basic analytical requirements of the CAA, the Administrative Procedure Act,[83] the Regulatory Flexibility Act,[84] the Unfunded Mandates Reform Act,[85] or all applicable executive orders, including 12291 (federal regulation), 12866 (regulatory planning and review), 13211 (energy effects), and 13132 (federalism).

C. If EPA Finalizes Its SIP Call, States Must Be Allowed Significant Flexibility in Determining How To Revise Their SSM Provisions Within the Wide Bounds of Their Statutory Authority

As discussed in Section III above, while EPA establishes the NAAQS, States have significant discretion in implementing those standards, and EPA does *not* have the authority to dictate how a State implements the NAAQS within its borders. In other words, while the CAA and EPA establish the *ends*, Congress granted to States the authority to determine the *means*.[86] As such, States have significant discretion in deciding how to structure the emission limitations and other regulatory requirements designed to achieve the NAAQS and comply with all other CAA requirements.

As demonstrated throughout these comments, EPA's new interpretation of the CAA is inconsistent with the plain language of the Act and unreasonable. But even if EPA proceeds, and

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[83] 5 U.S.C. § 551, *et seq.*

[84] 5 U.S.C. § 601, *et seq.*

[85] 5 U.S.C. § 1501, *et seq.*

[86] *See generally Train*, 421 U.S. at 79 ("The Act gives the Agency no authority to question the wisdom of a State's choices of emissions limitations if they are part of a plan which satisfies the standards of [the Act] . . . ."); *Bethlehem Steel Corp.*, 742 F.2d at 1036 ("The federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding those means to achieve those ends through state implementation plans . . . . The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states . . . .") (quoted in *Virginia*, 108 F.3d at 1408).

directs thirty-six States to revise their SSM provisions, those States would still have many different options in deciding how to respond to the proposed SIP call. EPA's proposal recommends one option: eliminate any consideration of unavoidable emissions during planned startups and shutdowns and adopt only an extremely limited affirmative defense for unavoidable emissions during a malfunction. While a State would certainly have the authority to adopt EPA's preferred approach, that approach would unrealistically render many existing emission limitations unachievable and subject thousands of well-run facilities to an unreasonable enforcement risk. EPA's preferred option is only one of many that States could select in responding to EPA's SIP call. Other available options include justifying existing provisions, adopting alternative numeric emission limits, work practice standards, additional operational limitations, or revising existing numeric emission limitations and/or their associated averaging times to create a sufficient compliance margin for unavoidable SSM emissions. These options are only a few examples—so long as a State's chosen response to EPA's SIP call complies with the CAA, EPA must approve it.

EPA's proposal, however, is filled with inconsistent statements regarding how it expects States to respond to its proposed SIP call. For example, EPA suggests that all startup and shutdown emissions above "otherwise applicable" numeric emission limitations must be considered a "violation" because startups and shutdowns must be treated as "normal operations." *See* 78 Fed. Reg. at 12,477. Nevertheless, on the very same page of its proposal, EPA generally supports the adoption of alternative emission limitations for startup and shutdown periods. *Id.* ("EPA intended to suggest that the air agency might elect to design special emission limitations or other control measures that applied to the sources in question during startup and shutdown . . . ."). However, without an exclusion from any "otherwise applicable" emission

limits, any alternative emission limits would not be effective because the "otherwise applicable" emission limit would simply continue to apply. EPA fails to explain how an alternative emission limit could be effective without an exclusion from the "otherwise applicable" emission limit.

Perhaps the best example of how EPA's own policies contradict the legal position it supplies to support its proposal is EPA's own SSM provisions in its recently promulgated MATS rule. As noted above, EPA's proposed SIP call expressly recommends that States adopt the *malfunction* provisions found in the MATS rule, 78 Fed. Reg. at 12,479, but EPA fails to recognize that the MATS rule also contains an exception for *startups and shutdowns* that applies as long as the source meets the general work practice standards found in Table 3 of the rule. See 40 C.F.R. § 63.10000 (emphasis added) ("These limits apply to you at all times *except during periods of startup and shutdown*; however, for coal-fired, liquid oil-fired, or solid oil-derived fuel-fired EGUs, you are required to meet the work practice requirements in Table 3 to this subpart during periods of startup or shutdown."). EPA's proposal fails to address, much less resolve the direct conflict between its recently adopted MATS startup and shutdown provisions and its newly-developed legal interpretation that all startups and shutdowns must be treated as "normal operations," even though they were announced within months of one another.

If EPA finalizes its SIP call, EPA should at a minimum resolve these conflicts and inconsistencies by confirming that States will have broad discretion in deciding how to respond, rather than trying to force States to adopt any particular "recommended" approach. To the extent EPA believes that States must follow EPA's preferred SSM policy in responding to the proposed SIP call, EPA is incorrect—the only limits on State discretion in responding to EPA's SIP call are the requirements of the CAA itself. Because EPA's preferred SSM policy is much more prescriptive than the CAA, and EPA does not have the authority to impose its policy preferences

on States, EPA's SSM policy represents only nonbinding guidance. Furthermore, EPA's SSM policy is the kind of guidance that deserves the least amount of deference from States and the courts—it is not long-standing as EPA suggests, but rather brand new, and it is not based on any claim of technical expertise, since EPA's only justifications for the proposal are purely legal in nature and do not rely on any factual evidence or support.

Accordingly, if EPA finalizes its SIP call, despite the complete lack of support for that action and the many flaws identified in these comments, at a minimum, EPA should confirm in its final rule that States will have wide discretion in revising their SSM provisions, even if those revisions differ significantly from EPA's preferred approach.

V. CONCLUSION

EPA must withdraw its fatally flawed proposed rule and begin to review the necessity of the rule for environmental protection and its effects on States and industry. Then, should the analyses prove its necessity, EPA may re-propose a rule that includes the relevant scientific and technical findings.

In the proposed rule, EPA relies on a flawed interpretation of the CAA, utterly failing to comply with the Act's standards for issuing a SIP call, and defying the federal–State partnership Congress created under the CAA. The proposed rule lacks the required technical analysis, presumably because it would demonstrate that SSM emissions are largely unavoidable and in fact do not impact air quality in the way EPA claims. The proposed SIP call would impose significant compliance costs on sources and administrative costs on States without providing any discernible air quality benefits. Finally, EPA provided insufficient time and information for the public and affected States to submit meaningful comments on the proposed rule and insufficient analysis to support a SIP call, refusing to assert, much less demonstrate, that SIPs with SSM

exclusions are "substantially inadequate" to attain or maintain the NAAQS or even that they have any significant impact on air quality.

For all of these reasons, each explained in detail above, EPA's SIP call proposal is fatally flawed and must be withdrawn. If EPA nonetheless finalizes it, States must be allowed significant flexibility in determining how to revise their SSM provisions within the wide bounds of their statutory authority. Furthermore, if EPA insists upon issuing a final SIP call, EPA should not do so until it has meaningfully reviewed the facts associated with its currently unsupported claims and addressed the myriad problems that sudden removal of the SSM provisions will create. EPA must also allow sufficient time for public review and comment on any re-proposal.

Attachments to Alabama Power's Comments on
State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (Feb. 22, 2013)

Docket ID No. EPA-HQ-OAR-2012-0322

Appendix A	Unavoidable Emissions During Startup, Shutdown, and Malfunction of Pulverized Coal-Fired Electric Generating Units
Appendix B	Unavoidable Emissions During Startup and Shutdown of Natural Gas- and Oil-Fired Simple- and Combined-Cycle Units
Exhibit 1	Memorandum from Roger O. Pfaff, Chief of Air Compliance Branch, to all State and local Air Program Directors (May 5, 1989)
Exhibit 2	Citizen Pet. to EPA to Require Revision of the Ga. SIP Provision on Excess Emissions During Startup, Shutdown, & Malfunction, *In re Ga. SIP Provision/Air Quality Control Rule 391-3-1-.02(2)(a)7; Excess Emissions* (May 23, 2005)
Exhibit 3	Letter from Stephen L. Johnson, EPA Adm'r, to Richard M. Watson, Ga. Ch. of the Sierra Club, Resp. to Pet. for Rulemaking on Startup, Shutdown, Malfunction Excess Emissions Rule in Georgia (July 18, 2007)
Exhibit 4	Air Quality Status of Nonattainment Areas in Southern Company States
Exhibit 5	Letter from Stephen L. Johnson, EPA Adm'r, to Robert Ukeiley, Ctr. for Biological Diversity (June 29, 2007)
Exhibit 6	Sierra Club's Second Amended Complaint, *Sierra Club v. Jackson*, No. 3:10-cv-04060 (N.D. Cal. Aug. 10, 2011)
Exhibit 7	Docket, *Sierra Club v. Jackson*, No. 3:10-cv-04060 (N.D. Cal.)
Exhibit 8	Modification of Settlement Agreement, *Sierra Club v. Jackson*, No. 3:10-cv-04060 (N.D. Cal. Dec. 17, 2012)
Exhibit 9	Freedom of Information Act Request, Letter from E. Scott Pruitt, Att'y Gen. of Okla., et al., to Freedom of Information Officer, U.S. EPA, Records, FOIA & Privacy Branch (Aug. 10, 2012)

Exhibit 10 Freedom of Information Act Request, Letter from E. Scott Pruitt, Att'y Gen. of Okla., & P. Clayton Eubanks, Deputy Solicitor Gen., Office of Okla. Att'y Gen., to Freedom of Information Officer, U.S. EPA, Records, FOIA & Privacy Branch (Feb. 6, 2013); and Appeal (Mar. 18, 2013)

Exhibit 11 Letter from Sen. David Vitter & Sen. Jeff Sessions to Hon. Gina McCarthy, Assistant Adm'r, Office of Air & Radiation, U.S. EPA (Apr. 1, 2013)

Exhibit 12 *Mandate Madness: When Sue and Settle Just Isn't Enough: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Governmental Reform*, 112th Cong. (2012)

Exhibit 13 Judgment Fund Transparency Act of 2011, H.R. 1446, 112th Cong. (2011)

Exhibit 14 Sunshine for Regulatory Decrees and Settlements Act of 2012, H.R. 3862, 112th Cong. (2012)

Exhibit 15 Sunshine for Regulatory Decrees and Settlements Act of 2012, S. 3382, 112th Cong. (2012)

Exhibit 16 Judgment Fund Transparency Act of 2013, H.R. 317, 113th Cong. (2013)

Exhibit 17 Exec. Order No. 13563 (2011)

Exhibit 18 Excerpt from Comments of Office of Management & Budget, Docket ID No. EPA-HQ-OAR-2012-0322-0043

Exhibit 19 Freedom of Information Act Request, Letter from Tal Simpson, Balch & Bingham LLP, to Nat'l Freedom of Information Officer, U.S. EPA (Feb. 8, 2013)

Exhibit 20 Letter from Tal Simpson, Balch & Bingham LLP, to Philip A. Lorang, Assoc. Dir. of Air Quality Policy, Office of Air Quality Planning & Standards, U.S. EPA (Mar. 22, 2013)

Exhibit 21 Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009)

Exhibit 22 Lisa P. Jackson, Memorandum on Transparency in EPA's Operations (April 23, 2009)

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Appendix A

Appendix A
Unavoidable Emissions During Startup, Shutdown, and Malfunction of Pulverized Coal-Fired Electric Generating Units

The startup process for a coal-fired electric generating unit involves a series of steps designed to bring the boiler up to operating temperature and the turbine generator online in a safe manner and to prevent mechanical damage to the equipment. Electrical generating plants are very large systems and equipment temperatures change from ambient conditions (50-100°F) to very high temperatures (flame temperatures of almost 3,000°F, with metal and steam temperatures that can exceed 1,000°F). It is necessary to use care to control the speed at which metal temperatures are increased to prevent excessive thermal stresses which can tear apart large structures such as boilers, flue gas ducts, emission control equipment, and other parts of a power station.

Additionally, care must be taken to start the combustion process in a large cold furnace at a power plant. Coal does not readily burn in a cold environment, so a typical startup process involves use of natural gas or lighter fuel oil as the initial fuel. Even these more volatile fuels do not combust easily in a cold furnace, so again special care must be taken, and commencement of combustion at the beginning of the startup process can result in higher emissions. Safety considerations are of upmost importance during the startup of a boiler, since stable combustion of the fuel is necessary to prevent explosions in the boiler and other downstream equipment. Therefore, because of both the necessity to control the thermal stresses and the necessity to carefully control the combustion process to safely achieve a coal-only flame, the startup of a coal-fired power plant is necessarily a deliberate process. The potential implications on emissions of the use of this essential operational approach to starting up a coal power plant are discussed in the rest of this document.

Coal-fired power plants use a number of technologies in order to reduce emissions from the coal combustion process, including low NOx burners, selective catalytic reduction systems (SCR), selective non-catalytic reduction systems (SNCR), electrostatic precipitators (ESP), baghouses, sorbent injection, and flue gas scrubbers. For most of these processes, as discussed below, the technologies are necessarily optimized for maximum emission reductions at normal operating conditions for the power plant. The physical and chemical characteristics of the technology for most of these processes require a design that reduces or eliminates the ability of the technology to reduce emissions during startup, shutdown, and malfunction to the degree achieved during normal operations. Each technology is covered in detail in the following sections.

Low NOx Burners (LNB)

Low NOx Burners were installed across almost every unit in the Southern Company fleet to reduce nitrogen oxides (NOx) emissions beginning in the 1990's, and lowered the Company's NOx emission rates by about half. These burners are intentionally designed to reduce combustion intensity in order to reduce the NOx emissions from the coal combustion process. By controlling the mixing process of the coal and the combustion air, the flame temperature is reduced and the nitrogen content of the coal is released in a flame zone where it can be converted to elemental nitrogen thus reducing the NOx emissions. One consequence of the design of low NOx burners is that the flame intensity is reduced and is less stable, especially at lower firing rates. In particular, during the startup process, the burners require higher air flows to maintain stable flames, and therefore have higher NOx emission rates due to higher excess air. Once the normal operating range of the burners is reached, the combustion process is optimized and NOx

emission rates decline. Any startup must go through this lower firing rate as the furnace and steam systems are heating up to reach the optimal firing load where the low NOx burners work most efficiently.

Selective Catalytic Reduction Systems (SCR)

Many Southern Company units are also equipped with state-of-the-art Selective Catalytic Reduction systems (SCR) designed to significantly reduce NOx emissions. This technology utilizes the reaction of ammonia (NH_3) with NO_X in the presence of a catalyst to produce nitrogen and water vapor. The reaction is temperature-dependent and cannot take place until exhaust temperatures and the SCR itself reach a requisite temperature. The SCR is typically bypassed until the startup fuel such as oil is no longer needed and thus removed from the combustion process to prevent catalyst contamination. Once the startup fuel is removed, the SCR inlet dampers must gradually open at a controlled rate in order to control temperature change and minimize thermal stress, formation of deposits of ammonium bisulfate, acid corrosion, and to prevent immediate structural damage within the SCR. Therefore, the SCR startup process must complete two steps before it can effectively be used to reduce NOx emissions. First, it must be heated in a controlled fashion to avoid thermal stress damage, and second, ammonia can only be fed to the SCR to begin removing NOx when the critical minimum operating temperature (typically 650 to 700°F) is reached. Following this process for safe startup of the unit and the SCR has contributed to Southern Company's SCRs being among the best performing and most reliable in the nation.

SCR systems also play a role in reducing mercury emissions in most plants equipped with the technology. The SCR catalyst serves to create oxidized mercury in the flue gas, which can be captured in a flue gas scrubber. Oxidized mercury is also easier to capture on the surface of fly ash, so native capture of mercury by the ash is usually higher for units with an SCR installed. Obviously, mercury capture is more efficient with lower overall emissions when the SCR is in the path of the flue gas. In this context, EPA has specifically recognized that dry scrubbers, SCRs, and selective non-catalytic reduction ("SNCR") cannot be brought online immediately once firing of the primary fuel begins. *See* 77 Fed. Reg. 71,323, 71,331 (Nov. 30, 2012). As a result, EPA's final MATS rule does not require this equipment to be engaged during startup until technically feasible to do so, after the requisite temperature is reached. *See* 40 C.F.R. Part 63, Subpart UUUUU, Table 3.[1]

Selective Non-Catalytic Reduction Systems (SNCR)

SNCR systems use an ammonia-based reagent to reduce NOx emissions in the high temperature heat transfer sections of the furnace, usually where the flue gas temperatures are in the range of 1800 to 2000°F. SNCR is an alternative NOx control technology to SCR, but with limited application to smaller units. Obviously, during startup periods, there is a finite amount of time where the flue gas is lower than the required temperature range as the furnace is being heated up. Attempts to use the SNCR system below the minimum flue gas temperature will result in excessive ammonia slip, with resultant corrosion and likely plugging of downstream equipment . Therefore, SNCR systems cannot be used to reduce NOx emissions until the point during startup that the flue gas temperature reaches the minimum temperature of 1800°F.

[1] Note, however, that EPA's definition of "startup" is unreasonably restrictive. As such, the MATS rule may still require controls to be engaged before technically feasible to do so.

Electrostatic Precipitators (ESP)

The most common technology in use in coal-fired power plants to capture ash particles in the flue gas and prevent their release is an electrostatic precipitator (ESP). The type of ESP primarily used in the electric utility industry is known as a "wire and plate" ESP. This type of ESP is comprised of a very large steel box filled with a series of discharge wires and collection plates. The ESP functions by applying a negative charge to thin hanging wires (or rigid electrodes) that are evenly spaced between the grounded plates. The negative charge is transferred to the fly ash particles so that the ash particles are negatively charged and attracted to the positively-charged collection plates. The ash layer that collects on the plates is removed periodically by rapping the plates (*i.e.*, striking the plates with mechanical hammers) and collecting the particulate matter with a series of hoppers. Proper long-term efficient operation of these devices requires that the charging wires and the collection plates remain free of sticky solid deposits, which can greatly reduce the amount of charge that can be applied and therefore the collection efficiency of the device.

Startups of coal power plants with ESPs are designed to protect the efficient operation of the technology for the normal load operating points, while sacrificing some collection of particles during the startup process. This approach, like many technologies, assures maximum capture of particles over the entire operating window, as startup times are a short period as compared to the regular operations of the plant and ESP. Thus, by protecting the ESP condition during startup, the maximum capture of particles during full-scale operations of the generating station is maintained.

Many coal-fired units utilize fuel oil to bring the units up to appropriate temperatures for coal combustion. The startup procedures are carried out to minimize overall emissions by bringing the ESP into operation as soon as safely possible, since prematurely starting this control equipment during the startup process will not necessarily reduce emissions. This is true since most control equipment does not function to design specifications until stable operating temperatures and flow rates are achieved and maintained, often later in the unit startup process.

ESPs typically do not function at optimal levels during startup. Flue gas temperature, for instance, can have a significant effect on ESP performance, and temperatures during SSM events are often too low for effective ESP operation. The temperature associated with good ESP performance can also vary from unit to unit depending on each unit's specific characteristics. ESPs located between the boiler and the air heater are called hot-side ESPs while those located downstream of the air heater are called cold-side ESPs. These two types of ESPs are intentionally designed differently to reflect the varying temperatures of the flue gases as it passes through each type of ESP. Operation outside of the optimum temperature for each ESP type will lead to a less than optimum collection of particulate matter. This temperature phenomenon can be attributed to particle "resistivity"—the electrical resistance of an ash particle to being charged by an electrical field, which is a function of flue gas operating conditions, such as temperature and moisture. ESPs work best under normal resistivity conditions, and thus the ESPs utilized by Southern Company were designed to operate with optimum performance while the unit is burning its primary fuel—coal—and while the ESP is operating at normal temperature conditions.

ESPs are constructed of mild carbon steel. The collecting electrodes are fabricated from very thin carbon steel plate (16 or 18 gauge). If the ESP is energized during low temperatures,

sub-dew point operation will lead to acidic moisture being collected on the collecting electrodes and will accelerate corrosion. Over time, this corrosion can decrease the effectiveness of the ESP components, such as the "rappers" used to dislodge collected ash into the "hoppers" below, and can result in damaged equipment and reduced performance. In addition, hot side ESPs are very sensitive to flue gas temperature changes. As the flue gas temperature decreases during load reduction and shutdown, hot side ESP performance often degrades, inhibiting capture on the plates and therefore increasing particulate matter emissions.

In addition, many coal-fired units utilize fuel oil to bring the unit up to appropriate temperatures for coal combustion. However, if ESPs are fully energized at startup, unburned startup oil can migrate to the ESP and present a serious combustion hazard, due to the sparks occurring between discharge electrodes and collecting electrodes. The thin collecting plates are easily damaged (warped) by even a small fire. Oil deposits on the collection plates are also difficult to remove and will eventually degrade ESP performance until it can be removed. The high voltage bus sections are electrically isolated by ceramic insulators (support and stabilization type), but startup oil that accumulates on the insulators will cause an electrical current path across the surface of the insulator and short out that electrical bus section. The insulators can also be severely damaged (cracked) by such an electrical current, resulting in degraded ESP performance until the ESP is brought off line to clean or replace the insulators. Although ESPs can be designed to collect particulate matter from oil combustion, those designs differ from ESPs designed to collect particulate matter from coal combustion in that they have lower gas velocities, different rapping schemes and different insulator types. Because ESPs must be designed for the primary fuel of the unit to ensure good performance during normal, steady-state

operations that comprise the vast bulk of the operating time of the unit, ESPs designed for oil combustion are not appropriate for coal-fired units.

During shutdown or low load operation, fly ash is often deposited on the floor of horizontal ducts due to low gas velocities. During the next startup, these ash deposits can be re-entrained into the gas stream all at once, which can affect an ESP's ability to collect the ash for that short period of time. Thus, the limitations of ESP performance are not simply confined by the characteristics of startup events; unavoidably short periods of higher emission rates can also be caused by previous shutdown events as well.

In summary, ESPs are proven, efficient control devices to remove fly ash particles from the flue gas. To ensure the continued effective and optimum performance of these devices, it is crucial to follow manufacturer recommendations, good pollution control practices, and safety regulations during all periods of operation.

Baghouses

Southern Company has experience operating fabric filter baghouses on a number of units and will install several more in the near future. Baghouses are another type of technology used to capture fly ash particles and can be used alone or in conjunction with an ESP. Baghouses use hundreds to thousands of individual fabric bags as filters to physically separate the fly ash particle from the flue gas. The flue gas is filtered from the outside of the bag to the inside, where the cleaned gas escapes. The captured fly ash builds a layer on the outside surface of the bags until it is removed by air or by shaking.

Although baghouses are considered "constant output devices" (*i.e.*, they limit emissions to a particular level regardless of emission levels reaching the input of the device) during normal

operations, they still have limitations similar to an ESP during startup of a unit. Baghouses are constructed of carbon steel and fabric. The casings, tube sheets, hoppers, dampers, etc., are fabricated from mild carbon steel and are subject to corrosion if operated for long periods at low temperatures. The filter bags consist of woven or felted fabric. If the baghouse is exposed to low temperature operation, such as occurs during a startup, moisture will collect on the bags and cause increased pressure drop and reduced bag life. In addition, if unburned oil makes its way to the fabric filters during startup, it can cause serious damage to the bags, resulting in increased pressure drop, reduced bag life, and, ultimately, poor particulate matter capture. Oil deposits on the bags also tend to be sticky and hard to remove and will degrade baghouse performance until the bags can be cleaned or replaced. The issues identified above related to moisture and fuel oil also apply during shutdown.

Therefore it is customary practice to bypass the baghouse or large portions of the baghouse during these startup and shutdown events to protect the equipment from permanent damage. The baghouse is brought into service slowly by heating it up after the combustion has started to avoid the oil residue from damaging the bags. Using this strategy, the optimal performance of the equipment for its intended use is preserved for the normal operating range of the power plant, where the amount of coal burned and thus the amount of fly ash generated is much higher than startup and shutdown transient conditions.

Sorbent Injection

Sorbent injection is used to remove mercury or sulfur oxides (or both) from the flue gas. The sorbent can be injected ahead of an ESP, a baghouse, or a FGD scrubber in some cases. The use of sorbent injection for emissions control has all the limitations during unit startup and the startup the downstream equipment – and can even make the limitations worse. The addition of a solid injected into the flue gas at low temperatures can produce solids buildup that can block flue gas flow and even cause structural failures of ducts and hoppers. If the flue gas temperature is low, as it always is during startup, the moisture (or acids) in the flue gas can condense and collect on any surface in the flue gas path. If there are wet surfaces, such as ductwork or structural braces, the injected sorbent solids can be captured and deposited. If these deposits grow, they can block the flue gas flow and provide an environment where corrosion may begin.

A common sorbent for both sulfur oxide and mercury control systems is hydrated lime. Lime is a cementitious solid; that is, it will turn into a hard cement solid if it is allowed to come into contact with moisture. Thus, a premature injection of lime where the flue gas moisture is condensing due to low temperatures such as in a startup can cause cement deposits to form on any surface in the flue gas path, including ESP collection plates and baghouse filter bags. Typically, because of the chemistry, once this crude cement forms, it is nearly impossible to remove by the systems ordinarily used to remove collected solids in an ESP or baghouse. Thus, permanent damage to the particulate collection system can occur if lime is injected before the minimum temperature is reached in the startup process. Therefore, it is not possible with the current state-of-the-art designs of sorbent injection systems and ESP/baghouse collection systems to engage these systems from the beginning of startup.

Flue Gas Scrubbers

Similar challenges exist in operating other types of emissions controls during SSM events. For example, many Southern Company units are equipped with Flue Gas Desulfurization (FGD) systems or scrubbers. These scrubbers typically use a slurry of water and powdered limestone to neutralize the sulfur oxide and halogen acids that are created from the coal combustion process. These control devices are usually very efficient with capture performances of over 95% during normal operation being common.

During SSM periods, it is often impossible to meet emission limits designed for normal, steady-state operations regardless of how well the unit is maintained and operated. Scrubbers can typically be used during startup and shutdown operations, but can have lower efficiencies in those periods due to lower gas flows which decrease the mixing available between the flue gas and the limestone slurry. Also, the startup oil can potentially cause the scrubber liquid to foam – much like laundry detergent – and thus impede good performance. Scrubbers have complex systems of equipment, such as pumps, motors, pipes, sprays, agitators, fans, limestone and gypsum handling, and must maintain a delicate balance of chemistry within the vessel to optimize removal. If there is a malfunction of or maintenance needed for any single component, there is potential that the entire vessel would be impacted. Bypass of the scrubber during such periods would be infrequent but could be necessary to maintain reliability. Depending on the type of scrubber, a malfunction of the generating unit could cause significant risk to the scrubber and result in the need to bypass the scrubber. Failure to bypass certain scrubbers during generating unit malfunctions (e.g., a malfunction causing the fans that are pushing flue gas through the scrubber to trip) could result in catastrophic damage to the scrubber or the ductwork, the ESP, the boiler or other components upstream of the scrubber (e.g., due to sudden

backpressure in excess of design criteria). In this instance, the mandatory bypass may result in higher emissions during the period.

As described in the sections above, state-of-the-art technologies used to control emissions from coal-fired power plants have technological and operational limitations that prevent them from operating efficiently and safely during all operating conditions, including startup, normal operation, unexpected equipment failures, and shutdown. EPA recognizes this fact in the recent Mercury and Air Toxics (MATS) rule that startup and shutdown are unique periods in the operation of a coal-fired power plant, and issued separate requirements for these periods. In this context, EPA has also specifically recognized that dry scrubbers, SCRs, and selective non-catalytic reduction ("SNCR") cannot be brought online immediately once firing of the primary fuel begins. *See* 77 Fed. Reg. 71,323, 71,331 (Nov. 30, 2012). As a result, EPA's final MATS rule does not require this equipment to be engaged during startup until technically feasible to do so, after the requisite temperature is reached. *See* 40 C.F.R. Part 63, Subpart UUUUU, Table 3.[2]

[2] Note, however, that EPA's definition of "startup" in that rule is unreasonably restrictive. As such, the MATS rule may still require controls to be engaged before technically feasible to do so.

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Appendix B

Appendix B
Unavoidable Emissions During Startup and Shutdown of
Natural Gas- and Oil -Fired Simple- and Combined-Cycle Units

Combustion turbine units, whether simple cycle or combined cycle units, inevitably must go through various transient stages in the startup and shutdown process that can result in short-term emission rates that can be higher than the technology-based limits that generally apply to these units. In general, the startup process for either a simple cycle combustion turbine or a combustion turbine that operates as part of a combined cycle unit includes several steps.[1] During the first step, known as roll-off, the turbine must be taken from a stationary, non-rotating condition to a spinning condition, also called "rolled," which is generally performed with an electrical starting motor or by back-feeding the unit's generator. This process continues until the turbine reaches the minimum speed that allows fuel to be introduced and ignited and the unit begins to turn on its own from combustion. Once ignition is achieved and the flame is established, the turbine begins to accelerate until it reaches the point at which the unit's generator can be synchronized to the power grid. Once synchronized, the unit can begin increasing fuel input to achieve the desired load. In the load ramp up phase, the turbine is operating at a lower efficiency and emissions are inevitably much higher than when the unit reaches the minimum load associated with the optimal emissions operating window for which the unit was designed.

For simple cycle combustion turbines, the description above comprises the entire startup process, whereas combined cycle units must still engage the associated heat recovery steam generator (HRSG), the boiler located downstream of the combustion turbine, and do not permit the combustion turbines to accelerate as quickly to minimum load. This is true because the

[1] Similar challenges are expected to arise at facilities with natural gas boilers. The number of natural gas boilers on Southern Company's system is expected to increase, given that several coal-fired units may switch to natural gas in the future.

mechanical structure of the HRSG and steam turbine must be slowly warmed up to maintain structural integrity and prevent damage to both the HRSG and steam turbine before the steam turbine can begin operation. In fact, the warming of the steam turbine is the limiting factor in any combined cycle startup. If the unit is being started after a short period of downtime, often referred to as a hot or warm start, the whole unit may be started much more quickly because the HRSG and steam turbine are still warm from the prior operations. However, if the unit has been off for an extended period of time, often referred to as a cold start, startup may take much longer to complete in order to protect the equipment from damage.

Startup of combined cycle units with more than one combustion turbine per steam turbine is even more complicated. For a combined cycle unit with two combustion turbines per steam turbine (which is the most common design), one CT/HRSG train is started first (the lead CT) and used to warm the steam turbine and associated piping. The second CT/HRSG train (the lag CT) is started near the end of the warming process. Both the lead and lag CTs are held at a holding point to warm the unit, which is required to prevent mechanical damage to the equipment. As discussed below, combustion is not as efficient during the startup process as is achievable during normal operations.

Combustion turbine units can also experience increased short-term emissions during shutdowns as the electrical generation of the units fall below normal operating conditions. Shutdown of a simple cycle CT and a combined cycle CT is very similar. Once the shutdown process begins, the CT is brought down in load and then disconnected from the grid. However, this entails operating for a period of time below the minimum normal operating load point which results in brief periods of higher emissions. (See the discussion below for more detail about the emissions from an example of an actual CT design across the generating load range.) At this

point, the fuel flow is shut off and no more combustion takes place. The increase in emissions during shutdown results from the increased flame temperatures needed to maintain stability, similar to startup.

Startups and shutdowns of combustion turbines (for both CTs and CCs) may also present challenges for both natural gas and oil units equipped with "combustion controls"—*i.e.*, combustion turbine equipment that has been specifically designed to minimize the formation of air pollutants. Two combustion controls employed at many Southern Company generating facilities, which are the most commonly used in the industry, are water/steam injection and dry low NO_x (DLN) combustion.

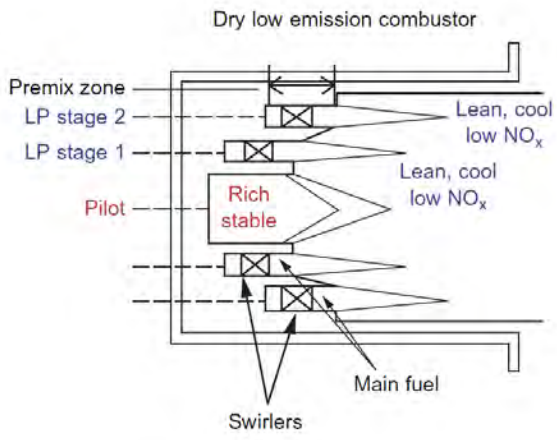
Water or Steam Injection

Water or steam injection combustion controls involve the injection of water or steam into the combustion zone to create a heat sink that lowers the combustion zone temperature, which is the primary parameter affecting NO_x formation. As the combustion zone temperature decreases, NO_x production decreases exponentially. Higher generating loads mean higher combustion temperatures, which produce more NO_x, and result in the need for more water or steam injection. However, as more water or steam is injected relative to the amount of exhaust gas, flame stability is adversely affected, resulting in increased carbon monoxide emission and dynamic pressure oscillations. These pressure oscillations or vibrations can quickly destroy the mechanical parts of the turbine combustor and could even damage the turbine itself. In order to minimize emissions and to prevent damage to the combustor, the amount of water or steam that can be injected is necessarily limited and must be carefully calibrated relative to the level of combustion. Limiting or shutting off the water or steam injection is especially important during

startup, shutdown, or malfunction when the amount of exhaust gas may be lower and the flame is often inherently less stable.

Dry Low NOx (DLN) Combustion

State-of-the-art combustion design for CTs is DLN combustion where the fuel and air are pre-mixed before it is burned. The goal is to burn the majority of the fuel at relatively cool, lean conditions to prevent the formation of NO_x. (The term "cool" is used here to describe a combustion temperature that is still hot, but reduced from normal flame temperatures by as much as several hundred degrees Fahrenheit.) Because of the mechanical nature of a CT, the actual design and geometry of the fuel combustor is fixed, and is optimized for combustion stability, efficiency, and minimal emissions at normal load. Therefore, it is impossible for DLN combustion to be achieved immediately upon startup because the DLN combustor will not perform at off-design conditions, as will occur during startup and shutdown. To avoid concerns over flame stability and prevent extensive damage to the turbine during startup, a CT must go through a complex startup process that requires a series of steps to achieve full optimization across the normal operating load range. Typically in this startup (or shutdown) sequence, a small proportion of the fuel is burned richer to provide a stable pilot flame, while the remainder is burned lean. A figure illustrating this process is provided below:



DLN Combustor Schematic [Boyce, Meherwan P. *Gas Turbine Engineering Handbook.* Oxford: Butterworth-Heinemann, 2012, pg. 459]

Typical modes that a unit must pass through to startup include the following:

1. Primary operation ignition. Fuel to the primary nozzles only. Flame is in the primary stage only. This mode of operation is used to ignite, accelerate, and operate the machine over low to mid loads, up to a preselected combustion reference temperature.

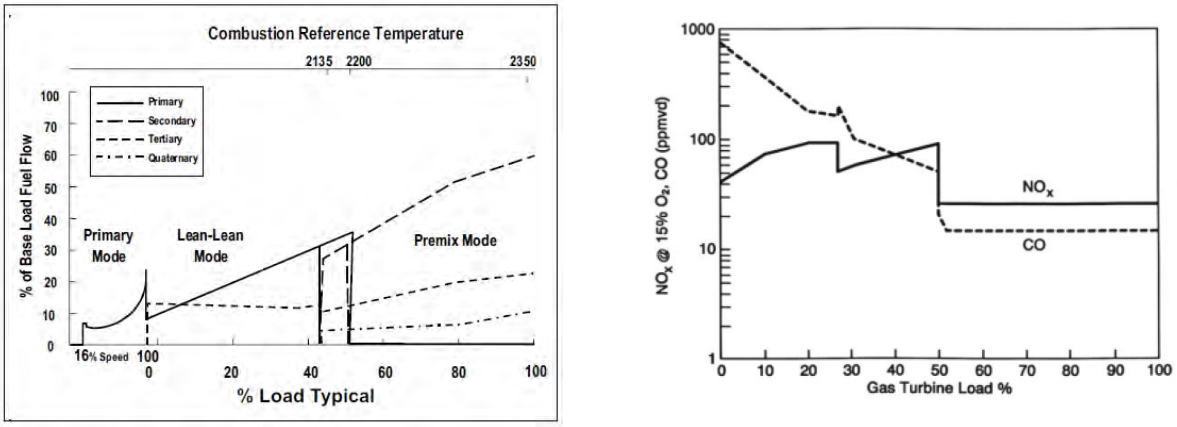
2. Lean–lean operation. Fuel to both the primary and secondary nozzles. Flame is in both the primary and secondary stages. This mode of operation is used for intermediate loads between two preselected combustion reference temperatures.

3. Secondary-stage burning transient mode. Fuel to the secondary nozzle only. Flame is in the secondary zone only. This mode is a transition state between lean–lean and normal operation modes. This mode is necessary to extinguish the flame in the primary zone, before fuel is reintroduced into what becomes the primary premixing zone.

4. Normal operation. Fuel to both primary and secondary nozzles. Flame is in the secondary stage only. This mode of operation is achieved at and near the combustion reference temperature design point. Optimum emissions are generated in this mode.

The pilot flame must be maintained at richer conditions during startups and shutdowns to ensure flame stability, which presents a challenge for maintaining low emission rates during these transient periods. At the higher loads associated with normal operating conditions, DLN

combustion is used. Under these conditions, the flame in the outer nozzles is stable enough that the pilot flame can be extinguished and all of the fuel can be directed into the other nozzles, resulting in lower emissions due to the decrease in fuel/air ratio and increase in combustion efficiency. An example startup sequence is illustrated in the figure below, which depicts the startup of a General Electric DLN 2 combustor. It is important to note that other manufacturers may have different load points or normal operating ranges than those depicted in the figures below.



Fuel Staging Schedule and Emissions vs. Load for GE DLN 2 Combustor [L.B. Davis, S.H. Black. "GE Dry Low NOx Combustion Systems for GE Heavy Duty Gas Turbines", GE Power Systems, GER-3568G, 10/00.]

In the left panel of the figure above, steps 1 through 4, as described previously for a CT startup, are illustrated. Step 1, the primary mode, which is shown on the far left, is where fuel is supplied to the primary (pilot) nozzles. During this mode, the flame is established at 16% of the normal operating speed of the turbine. The CT remains in this mode until the turbine reaches its operating speed. Once that occurs, step 2 begins, and the CT is synchronized to the grid and starts producing electricity. During this step, which starts at 0% load and proceeds to around

40% load (can vary by CT design), fuel input into the primary nozzles is increased and fuel is introduced into the secondary nozzles. Step 3 is the transition from these startup steps to the full load range of the CT. In the example in the figure, step 3 starts with the introduction of fuel into the tertiary and quaternary fule nozzles and ends with the elimination of fuel into the primary fuel nozzles. Step 4, which is normal operation, is the operating window that is optimized for both maximum efficiency and minimized emissions. This mode starts at about 50% of electrical generating load and extends up to 100% load.

The right panel of the figure above shows the corresponding emissions of carbon monoxide, CO, and nitrogen oxides, NOx, from this combustion turbine. As can be seen in the graph, emissions from the normal operating conditions of 50 to 100% electrical load are lower than anywhere in the startup (or shutdown) modes of operation. This design ensures that the highest fuel input conditions, which are associated with normal operation of the combustion turbine, have low emissions.

Due to the processes described above, the primary challenges in controlling emissions during startup and shutdown periods for turbine combustors equipped with combustion controls are as follows:

- Temperature and residence time are the primary variables controlled by design that determine thermal NOx emissions. With a fixed geometry, the residence time is also fixed therefore only temperature can be controlled by changing the fuel/air ratio.
- Carbon monoxide emissions are higher during startups and shutdowns due to lower flame temperatures. Any steps taken to reduce CO emissions during combustion will result in an increase in the amount of NO_x generated and could also damage the equipment.
- Increasing firing temperature to increase the efficiency of the combustion process produces more NO_x, which results in the need for more water or steam injection.

As more water or steam is injected, flame stability is adversely affected, resulting in increased CO and degradation of the equipment.

- The amount of steam injected is limited due to flame stability concerns. For DLN combustors the pilot flame must be maintained at richer conditions during transient operations, leading to a higher flame temperature and therefore higher NO_x emissions. The geometry of the combustor is fixed and designed to be optimized for full load operation, and therefore cannot be optimized during transitional periods during startup and shutdown.

Post-Combustion Emissions Control Equipment

Finally, similarly to coal-fired units, natural gas and oil-fired units also face challenges in engaging and operating post-combustion emissions control equipment during startup or shutdown events. A combined cycle unit may have post-combustion emissions control equipment which would be installed in the HRSG. This typically includes either a Selective Catalytic Reduction (SCR) catalyst and associated ammonia injection equipment for NOx control or a CO catalyst or both. The SCR must be located in an area where flue gas temperatures will be in the appropriate range necessary to reduce emissions, usually just downstream of the high pressure evaporator section. If the SCR is placed in service too early, optimal NO_x removal efficiencies cannot be achieved, and excess ammonia will also deposit and accelerate corrosion of the HRSG. The CO catalyst is also sensitive to temperature and must be located in close proximity to the SCR catalyst. Like SCR, CO catalysts have lower efficiencies during startup until the unit reaches a higher temperature. The duration of elevated emissions experienced during startups will vary depending on the type of startup. Longer durations would be expected in a cold start than warm or hot starts, since either SCR or CO catalyst must reach the requisite minimum temperature in order to reduce emissions. Minimum catalyst operating temperatures are a law of nature, and not a design choice. This is analogous to an automobile where emission testing guidance from state agencies explicitly states that the car is to be warmed

up to normal operating temperature before testing. This warm up period is in recognition that the emissions control technology of the car, the catalytic converter, is not effective at emissions reductions until it reaches its required operational temperature.

In summary, state-of-the-art emission control designs for combustion turbines – whether as standalone simple cycle units or as combined cycle units – are designed to minimize emissions during the normal operating range. In fact, it is physically and chemically impossible for the emissions control equipment to function effectively during startup and shutdown because temperatures are not suitable for the control technology to operate during these transient periods While the equipment does minimize emissions during these transient operations, the emissions are still higher than the normal operating range emissions of the CT, as seen in the included figure. This is inevitable given the technology and the ability to control the combustion process, and just like modern automobiles where fuel economy and emissions are optimal during highway driving, CTs are designed to deliver the lowest emissions possible during normal operating conditions where the units spend the majority of their time in operation.

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

MAY 5 1989

4APT-AC

To All State and Local Air Program Directors

Dear Air Program Director:

Enclosed is Region IV's Continuous Emission Monitoring (CEM) Enforcement Plan (CEP) which was presented in draft form at the State and Local Air Program Directors' meeting in Louisville, Kentucky on November 1-3, 1988. The CEP has been designed to fulfill the requirements of the Reissued OAQPS CEM Policy of March 31, 1988, from Gerald A. Emison, Director, Office of Air Quality Planning and Standards in addition to the goals of the SO_2 Continuous Compliance Strategy as issued on July 5, 1988, from John S. Seitz, Director, Stationary Source Compliance Division.

The primary purpose of the CEP is to ensure that sources with monitoring requirements are in continuous compliance with their emission standards and are properly operating and maintaining their facilities and CEMs. By returning problem sources to a state of continuous compliance, the environment will benefit because of a reduction in air pollution.

Although the primary purpose of the CEP is to ensure continuous compliance, we believe that the CEM data can result in better utilization of compliance monitoring resources. The review of CEM data can be substituted for onsite inspections under both the Inspection Frequency Guidance of June 11, 1986 and the Compliance Monitoring Strategy of March 31, 1988. Inspections of sources can be planned based upon historic or current CEM data.

For those that took time to submit comments, we appreciate your comments on the proposed CEP and your ideas have been incorporated into the final CEP, where appropriate. Please note that all comments are addressed in an addendum to the CEP.

If you have any questions regarding the CEP, please contact Brian Beals, Paul Reinermann, or me at 404-347-2904.

Sincerely yours,

Roger O. Pfaff, Chief
Air Compliance Branch
Air, Pesticides and Toxics
Management Division

Enclosure

REGION IV
CEM ENFORCEMENT PLAN

INTRODUCTION

In order to be prepared for the growing attention to continuous compliance within the constraints of limited resources, a CEM Enforcement Plan (CEP) has been developed for implementation. The CEP has been developed based on guidance documents and comments from Headquarters, Regional and state/local air agency staff. Recommendations are provided in order to minimize the man-hours necessary to implement the CEP.

The purpose of the CEP is to ensure that sources with monitoring requirements are in continuous compliance with emission standards in addition to properly operating and maintaining their facilities and CEMS. Sources with continuous compliance problems are to be identified and appropriate follow-up actions are to be initiated to return problem sources to a continuous compliance status. Sources with excessive amounts of monitor downtime will also be identified and dealt with appropriately. The definition of sources with monitoring requirements includes sources with instrumental monitoring devices as well as other types of self-monitoring such as fuel sampling and analysis (FSA) for SO_2 sources and recordkeeping/reporting requirements for VOC sources.

As an initial step, a list of SIP sources and NSPS sources with monitoring requirements must be generated. Region IV currently has a list of NSPS sources and SIP SO_2 sources required to submit CEM and FSA Excess Emission Reports (EER) on a quarterly basis. Therefore, identification of the other SIP and NESHAP sources with CEM reporting requirements, and sources with VOC reporting requirements is necessary. In the near future, state and local agencies will be requested to identify these other sources so that the CEM Subset of CDS can be updated.

The results of the CEP should be significant. Sources with monitoring requirements will realize that EPA and the state/local agencies are actively utilizing EER and that the sources are not merely performing a required paper exercise. Sources will become conscious that environmental regulatory agencies are requiring them to remain in continuous compliance and to properly maintain and operate their facilities and CEMS. An overall reduction in air pollution will most likely occur and should be documented by improvements in sources' EERs. Moreover, the identification and enforcement of violators through the CEM mechanism should greatly enhance the Region's overall productiveness.

CEM ENFORCEMENT PLAN

The first step of the CEP is the review of EERs. The review of an EER is essentially accomplished by summarizing an EER into the form presented in Figure 1. Although most state/local agencies already summarize EERs into this form, we recommend that the sources be required by the state/local agencies to submit a summary EER along with the raw CEM data. This will significantly reduce the man-hours necessary for EER review and will assist when inputting the data into the CEM Subset of CDS. As each source has been acknowledged to be summarizing correctly, a less detailed review of raw CEM data should ensue.

The second step of the CEP is the determination of the appropriate follow-up action. In order to determine the appropriate follow-up action, data from the summary EER will be used to target problem sources. The targeting criteria and follow-up actions indicated in Table 1 will be utilized as a guide but the final decision on the appropriate follow-up action should occur during the monthly conference calls. Of course, if an agency decides to adhere to the recommended follow-up actions in Table 1, the initiation of these actions prior to the monthly conference call is encouraged.

In general, a problem source will be considered one that is out of compliance greater than 5 percent of its total monitoring time or one that has monitor downtime greater than 5 percent of its total operating time. Please note that some sources that exceed this criteria may not be a problem source because of various circumstances such as limited operating time. Figure 2 provides example calculations for percent of time out of compliance and percent monitor downtime.

EPA Headquarters has issued guidance regarding the targeting criteria and follow-up actions, however, Region IV will initially adopt less stringent guidance because adherence to Headquarters' guidance would be too resource intensive. Eventually though, as experience is gained with the CEP, Region IV will tighten the targeting criteria until Headquarters' guidance is realized. This should take place in FY-92.

LEGAL BASIS FOR ENFORCEMENT

Section 113(a)(1) and (3) of the Clean Air Act basically state that whenever, on the basis of any information available to him, the Administrator finds that any person (source) is in violation of SIP, NSPS, or NESHAP regulations, he may issue an order requiring such person (source) to comply with the regulations or he may bring a civil action against such person. Therefore, the Clean Air Act allows CEM data to be utilized for finding a violation of an emission standard. Headquarters' CEM policy specifies that CEM data, regardless of whether the CEM is the compliance method or not, can be used for enforcement. In addition, 40 CFR §60.11(d) and §61.12(c) specifically allows CEM data to be used in the enforcement of the operation and maintenance requirements of NSPS and NESHAP, respectively.

Some state and local agencies maintain that their regulations do not allow taking enforcement action based solely on CEM data (EERs). This may be true for citing a violation of an emission standard, however, many state and local agencies have regulations similiar to 40 CFR §60.11(d) and agencies which have been delegated NSPS and NESHAP can initiate enforcement action based solely on CEM data. The type of appropriate follow-up action must take into account whether the CEM is the compliance method (determines compliance with an emission standard) or an indicator of proper operation and maintenance of the facility (is not the compliance method).

When emission violations are evident and the CEM is the compliance method, then an NOV must be issued citing violations of the emission standard and improper operation and maintenance of the facility (40 CFR §60.11(d) for NSPS sources, 40 CFR §61.12(c) for NESHAP Sources and similar provisions for SIP sources). Only one emission violation need occur for an NOV to be issued and the "Timely and Appropriate Guidance", including penalties, applies.

If the CEM is not the compliance method and excessive emissions fall into the worst case scenario of Table 1, then a violation of of 40 CFR §60.11(d) or similiar provisions must be cited, if applicable. In addition, citing a violation of the emission standard should be considered. If either type of violation is cited and the source is in the "significant violator" population, then the "Timely and Appropriate Guidance", including penalties, applies.

THE CEP AND FUTURE ACTIVITIES

Region IV is committed to utilizing CEM data in order to ensure continuous compliance for all sources with monitoring requirements. In addition, Region IV encourages the state and local agencies to develop air inspection plans which recognize sources with monitoring requirements so that compliance inspection resources can be better utilized. Both the Inspection Frequency Guidance and the Compliance Monitoring Strategy allow the review of CEM data to be substituted for inspection of the facility.

In FY-91, the targeting criteria will be tightened based upon the results of FY-90 activities. In FY-92, the targeting criteria and appropriate follow-up action be altered to reflect Headquarters' guidance.

Figure 1 CONTINUOUS EMISSION MONITOR QUARTERLY REPORT
SUMMARY

Source Name: _____
Emission Point: _____

Pollutant: _____

Time Period (circle one): Minutes - 6 Minutes - 15 Minutes - 30 Minutes - 1 Hour - 2 Hour - 3 Hour - 12 Hour - 24 Hour - 30 Day - Fuel Analysis

Total Source Operating Time: _____

Reason for Excess Emissions	Duration
Startup/Shutdown	
Cleaning/Scotblowing	
Process Malfunction	
Control Equipment Failure	
Unknown Cause	
Fuel Problems	
Other Known Excess Emissions	

TOTAL NUMBER OF INCIDENTS: _____
Percent of Time Out of Compliance: _____

Reasons for Monitor Downtime	Duration
Monitor Equipment Malfunction	
Non-Monitor Equipment Malfunction	
Quality Assurance	
Unknown Cause	
Other Known Monitor Downtime	

TOTAL NUMBER OF INCIDENTS: _____
Percent of Monitor Downtime: _____

1. Months and year to which this data applies _____
2. CDS number of source __ - _____ - _____
3. Date EER received by Agency _____
4. Date due _____
5. Additional Comments/Proposed Agency Action (if warranted): _____

Figure 2. Calculations to Determine Percentages of Time Out of Compliance and Monitor Downtime.

1. Percent of Time Out Of Compliance:

$$TOOC, \% = \frac{TEE, \text{ minutes or periods } x100}{(TSO-TMD), \text{ minutes or periods } ***}$$

Where: TOOC= Percent of time out of compliance
TEE = Amount of time with excess emissions, minutes or periods **
TSO = Total source operating time, minutes or periods *
TMD = Monitor downtime, minutes or periods

- while unit is running
- Assumes monitor runs only when unit running
- Includes cal, span, zero check malfunctions

2. Percent Monitor Downtime

$$MD, \% = \frac{TMD, \text{ minutes or periods } x100}{TSO, \text{ minutes or periods } *}$$

Where: MD= percent of monitor downtime

See Computations Sheet

* A

** D

*** B

Table 1. Target Criteria and Follow-up Actions[a]

Percent of Time Out-of-Compliance	Percent of Monitor Downtime	Appropriate Follow-up Action
<2.0%	<2.0%	If both cases exist, send letter acknowledging receipt of EER and encouraging proper O&M of facility and CEM.
>2.0% and <5.0%	>2.0 and <5.0%	If either or both cases exist, then warn by letter or telephone of unacceptable condition.
>5.0 and <10.0%	>5.0 and <10.0%	If either or both cases exist, then warn by letter of unacceptable condition, request explanations of condition, and request corrective action plan to prevent condition from reoccurring.
>5.0 and <10.0% for two consecutive quarters or >10.0%	>5.0% and <10.0% for two consecutive quarters or >10.0%	If either or both cases exist, then issue NOV and require performance (compliance) test for monitored pollutant, monitor certification (Performance Specification) tests and request corrective action plan to prevent condition from reoccurring. (T&A Guidance including penalties applies).

[a]Where CEMS are not the compliance test method for the emission standard.

COMPUTATIONS

A. Source Operating Time (Fan On - Fan Off)

B. Time Monitor Was Able to Record Source Performance
- Does Not Include Periods of Calibration, Span, Zero Checks

C. Monitor Availability (%) $= \frac{B}{A} \times 100$

D. Total Excess Emission Periods

E. Overall Source Performance (%) $= \frac{B - D}{B} \times 100$

F. Total Exempt Periods

F_1 = Startup/Shutdown

$F_2 = F_1$ + Load Change

$F_3 = F_2$ + Sootblowing (Hot Side Units)

$F_4 = F_3$ + Hourly Exempt Periods

F_2, F_3, F_4 ARE OPTIONAL

G. Net Excess Emissions $(D - F_{(X)})$

H. Net Source Performance (%) $H_{(X)} = \frac{G}{(B-F_{(X)})} \times 100$

ADDENDUM

Response to

Comments on the Proposed CEP

1. John S. Seitz, Stationary Source Compliance Division (SSCD)
2. Lou Paley, SSCD
3. William C. Eddins, Kentucky Department for Air Quality (KY DAQ)
4. Steve Hagedorn, KY DAQ
5. Ron Gore, Alabama Department of Environmental Management (ADEM)

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 2

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	)
Georgia SIP Provision/Air Quality Control Rule 391-3-1-.02(2)(a)7; Excess Emissions	)

CITIZEN PETITION TO EPA TO REQUIRE REVISION OF THE GEORGIA SIP PROVISION ON EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, AND MALFUNCTION

Sierra Club petitions the Administrator of the Environmental Protection Agency ("Administrator" or "EPA"), pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*; the Clean Air Act ("CAA"), 42 U.S.C. § 7401, *et seq.*; and the Environmental Protection Agency's Clean Air Act implementing regulations, to require the State of Georgia to revise its State Implementing Plan ("SIP") to correct a significant ambiguity in the Georgia Air Quality Rules; more specifically in the Excess Emissions provision dealing with startup, shutdown, and malfunction, Georgia Comp. R. & Regs. R. 391-3-1-.02(2)(a)7 (the "Georgia Rule").

PETITIONER

The Sierra Club is one of the nation's oldest and largest environmental organizations. The Sierra Club has long been involved in air pollution issues in Georgia and throughout the nation. The Georgia Chapter of the Sierra Club has approximately 12,000 members who live, work, farm, recreate, grow food, own land, own structures, and/or obtain spiritual and aesthetic pleasure from areas that are adversely affected by the

air pollution in Georgia. The Georgia Chapter of the Sierra Club is located at 1401 Peachtree Street NE, Ste. 345, Atlanta, GA 30309. The National Headquarters of the Sierra Club is located at 85 Second St., 2nd Fl, San Francisco, CA 94105.

PROCEDURAL AUTHORITY

Sierra Club petitions EPA pursuant to the APA. 5 U.S.C. § 551, *et seq.* The APA specifically requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e).

The SIP is a living document which the State and EPA can, from time to time, revise as necessary. Approval and Promulgation of Air Quality Implementation Plans; Vermont, 68 Fed. Reg. 34,808-34813 (June 11, 2003) (codified at 40 CFR Part 52) (final rule; notice of administrative change). EPA is authorized pursuant to the CAA to initiate rulemaking proceedings and to call for SIP revisions when a SIP is inadequate or fails to meet the requirements of the CAA. See 42 U.S.C. § 7410. Further, EPA can "require the State to revise the SIP as necessary to correct such inadequacies." 42 U.S.C. § 7410(k)(5).

The APA requires EPA to conclude the matter raised in this petition within a reasonable time. 5 U.S.C. § 555(b). Considering EPA's longstanding and express position on this issue and the fact that EPA itself suggested Sierra Club petition for this change, Sierra Club requests EPA to expedite the resolution of this matter. This matter is clear, and EPA has made policy statements consistent with the requested revision for over two decades.

I. THE GEORGIA RULE MUST BE REVISED TO ELIMINATE A SIGNIFICANT AMBIGUITY AND THEREBY AVOID UNNECESSARY LITIGATION AND THE POSSIBILITY OF DECISIONS WHICH WOULD CONFLICT WITH THE CLEAN AIR ACT.

As presently worded, the startup, shutdown and malfunction (SSM) provision of the Georgia Rules for Air Quality Control (Georgia Rule) is ambiguous and therefore inconsistent with the CAA. Sources have attempted to use the Georgia Rule as an excuse for exceeding emission limits during SSM. The ambiguous wording of the Georgia Rule fails to meet the standards of the CAA and the EPA requirements established pursuant to the CAA. The Georgia Rule, therefore, must be revised to meet all legal requirements.

The Georgia Rule states:

> Excess emissions resulting from startup, shutdown, malfunction of any source which occur though ordinary diligence is employed **shall be allowed** provided that (I) the best operational practices to minimize emissions are adhered to, and (II) all associated air pollution control equipment is operated in a manner consistent with good air pollution control practice for minimizing emissions and (III) the duration of excess emissions is minimized.

Ga. Comp. R. & Regs. r. 391-3-1-.02(2)(a)7(i) (2005) (emphasis supplied).

In 1978, EPA adopted an excess emissions policy which considers all periods of excess emissions to be violations of the CAA. In subsequent EPA policy statements, CAA interpretations, guidance documents, and administrative rules and orders, EPA has consistently and clearly reaffirmed that position. See Mich. Dep't of Envtl. Quality v. Browner, 230 F.3d 181, 183 (6th Cir. 2000) (citing 42 Fed. Reg. 21,472 (Apr. 27, 1977))

[EXHIBIT 1]; see also Memorandum from Eric Shaeffer, Dir., Office of Regulatory Enforcement, and John S. Seitz, Dir., Office of Air Quality Planning and Standards, to Reg'l Adm'rs, Regions I-X (Dec. 5, 2001); Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement and Compliance Assurance, to Reg'l Adm'rs, Regions I-X (Sept. 20, 1999) [EXHIBIT 2]; Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air Noise, and Radiation, to Reg'l Adm'rs, Regions I-X (Sept. 29, 1982).

EPA has also stated that automatic exemptions will not be allowed. Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air Noise, and Radiation, to Reg'l Adm'rs, Regions I-X, 1 (Sep. 28, 1982) [EXHIBIT 3]. An affirmative defense may be permitted only with respect to penalties, not to injunctive relief, and only when no single source or small group of sources has the potential to cause exceedance of NAAQS or PSD requirements. In those cases, a state director must exercise his enforcement discretion and cannot avoid that case-by-case obligation by allowing an automatic exemption.

EPA's policy of identifying all excess emissions as CAA violations and its disallowance of automatic exemptions is consistent with the CAA. SIPs protect ambient-based standards. Approval and Promulgation of State Implementation Plans; Michigan 63 Fed. Reg. 8573, 8575 (Feb. 20, 1998). Emissions above the allowable limits may cause or contribute to violations of the NAAQS and are therefore illegal and inexcusable. Id. EPA has determined that if there are circumstances preventing sources from complying with the SIP during startup or shutdown, then the State must address these problems in the underlying rules applicable to those particular sources and "not through overarching excess emission provisions." Id. (emphasis added). In fact, EPA has

determined that because excess emissions during startup and shutdown are reasonably foreseeable, those emissions should never be excused. Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement and Compliance Assurance, to Reg'l Adm'rs, Regions I-X, 3 (Sept. 20, 1999).

Malfunctions, however, typically result from equipment failure or improper maintenance and as such, can result in excess emissions which may not be as obviously foreseeable as those from startup or shutdown. Nonetheless, EPA has specifically stated that it "has a fundamental responsibility under the Clean Air Act to ensure that SIPs provide for attainment and maintenance of the national ambient air quality standards ("NAAQS") and protection of prevention of significant deterioration (PSD) increments. Thus, an affirmative defense provision that would undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the Clean Air Act," is illegal. Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement and Compliance Assurance, to Reg'l Adm'rs, Regions I-X, 3 (Sept. 20, 1999) (citing 42 U.S.C. § 7410(a) and (l)). Pursuant to Section 110(l), EPA may not approve a SIP revision if "the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of this chapter." Id.

Sierra Club has raised specific objections to the Georgia Rule in the past. For example, in its Comments on the Draft Permit for the Monroe Power Plant's Title V application, Sierra Club pointed out that the permit "excuses violations during startup, shutdown, and malfunction . . . contrary to the Clean Air Act and EPA guidance." Title V Application Review Monroe Power plant, TV-12332 p24. The Georgia Environmental

Protection Division (EPD) disagreed and refused to change its rule, claiming, "This condition is no different than EPA policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction as discussed by Kathleen M Bennett in her September 28, 1982 Memo." Id. at 24-25. EPD did not explain the apparent inconsistency between the plain language in the rule and Ms. Bennett's statement of EPA policy that automatic exemptions for excess emissions are prohibited, with the term "automatic exemptions" defined as "a generally applicable provision in a SIP that would provide that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations."

EPA itself raised the issue in a May 9, 2002 letter from Kay Prince, Chief of Air Planning for Region 4, responding to EPD's submission of a prehearing package on revisions to Georgia's Rules for Air Quality Control. Letter from Kay Prince, Chief of Air Planning, Region 4 to Ronald C. Methier, Chief, Air Protection Branch, GA EPD (May 9, 2002) [EXHIBIT 4]. In the letter, EPA highlighted its objections to the emission standard in Georgia Rule 391-3-1-.02(2)(a)7(i) and stated that the Georgia Rule was unacceptable. Further, EPA stated, "In general, because excess emissions during [startup and shutdown] are reasonably foreseeable, they should not be excused." Id. Nevertheless, EPA approved Georgia's SIP and has never required Georgia to correct the unclear and ambiguous SSM provision.

When faced with similar situations in other states, EPA has consistently required those states to correct the ambiguity. For example, in 1998 EPA found that a Michigan SIP revision violated the requirements of the CAA and disapproved the submitted rules. Michigan v. Browner, 230 F.3d 181, 184 (6th Cir. 2000). The EPA objected to

Michigan's rule, which "permitted automatic exemptions for violations of emissions standards," failed to limit the definition of malfunction to "failures that are 'infrequent' and 'not reasonably preventable,'" and impermissibly allowed a relaxation of CAA requirements during SSM. Id.

EPA's action to clarify other states' rules and conditions further supports immediate revision of the Georgia Rule.

II. THE GEORGIA RULE MUST BE REVISED BECAUSE SOURCES ARE USING THE RULE TO EXCUSE EMISSION LIMIT EXCEEDANCES AND AVOID ENFORCEMENT ACTIONS FOR CAA VIOLATIONS.

A. Sources are improperly claiming that the Georgia Rule establishes an automatic exemption and an affirmative defense for excess emissions during startup, shutdown, and malfunction.

Despite EPA's clear guidance on this issue, sources in Georgia improperly claim that the Georgia Rule establishes an affirmative defense excusing emission exceedances during startup, shutdown, and malfunction. See generally Sierra Club v. Ga. Power Co., No. 3:02-CV-151-JTC (N.D. Ga. 2004) [EXHIBIT 5]. Further, sources improperly claim that EPD's ambiguous permit template establishes the same affirmative defense. An automatic exemption violates the CAA regardless of the claims of litigants.

The clearest example of the misuse of the Georgia Rule's ambiguous language occurred in Sierra Club v. Georgia Power. Id. In that case, Georgia Power Company claimed the ambiguity established an affirmative defense to violations that occurred "during, or as a result of, startup, shutdown, or malfunction." Id. Georgia Power claimed that it was excused from compliance limits during SSM. The permit provision specifically stated:

8.13 Excess Emissions

8.13.1 The Division may allow excess emissions in certain cases as described below.

a. Excess emissions resulting from startup, shutdown, malfunction of any source which occur though ordinary diligence is employed shall be allowed provided that:

i. The best operational practices to minimize emissions are adhered to;

ii. All associated air pollution control equipment is operated in a manner consistent with good air pollution control practices for minimizing emissions; and

iii. The duration of excess emissions is minimized.

Ga. Pwr., Wansley Steam Elec. Gen. Plant, Part 70 Operating Permit 4911-149-0001-V-01, Condition 8.13.1, p.24 (Jan. 1, 2000). Like the Georgia Rule, the SSM conditions incorporated into permits are ambiguous, illegal, and unacceptable. In the Georgia Power case, the resulting exceedances were extreme and clearly violated the CAA as well as EPA policy. After years of costly and continuing litigation, the U.S. District Court determined that the SSM permit condition, "is merely an acknowledgement of EPD's enforcement discretion regarding excess emissions during SSM. It is not an affirmative defense available to Georgia Power in this citizen suit. . . ." Sierra Club v. Georgia Power, Order, 17 (Dec. 14, 2004). The court's interpretation affirmed EPA's extensive guidance on this issue over the past 25 years.

EPD has failed to take any action to correct the ambiguity in the Georgia Rule. EPD refuses to revise its rule to conform both to the EPA requirements and the CAA. Rather, EPD has chosen to remain in violation of CAA and EPA requirements.

In fact, EPD's own actions have only added to the confusion. For instance, in 2005, EPD revised its permit template and reinforced the ambiguity. As demonstrated in recent Georgia Power permits, EPD's new language appears to remove enforcement discretion and disallow enforcement actions by EPA and citizen groups. GA EPD's 2005 template states:

> 8.14.4 Excess Emissions
>
> a. Excess emissions resulting from startup, shutdown, malfunction of any source which occur though ordinary diligence is employed shall be allowed provided that:
>
> i. The best operational practices to minimize emissions are adhered to;
>
> ii. All associated air pollution control equipment is operated in a manner consistent with good air pollution control practices for minimizing emissions; and
>
> iii. The duration of excess emissions is minimized.

Ga. Pwr., Yates Steam Elec. Gen. Plant, Part 70 Operating Permit 4911-077-0001-V-02-0, Condition 8.14.4, p43 (Jan. 1, 2005) (emphasis added). In this 2005 Georgia Power Company permit, EPD deletes the former first sentence, which stated, "The Division may allow excess emissions in certain cases as described below." Id. The absence of the first sentence makes it more likely that stationary sources will continue to claim they are excused for exceedances during startup, shutdown and malfunction. The change only adds to the confusion and further evidences the urgency with which it needs to be revised.

The ambiguity in the Georgia Rule is a significant problem in Georgia. Both the EPA and the United States District Court for the Northern District of Georgia have found that this interpretation and use of the rule violates the CAA. However, sources continue

to try to carve out a defense and excuse to their violations, and the citizens of Georgia suffer the consequences from dirty, unhealthy air pollution.

B. Contrary to the CAA, sources are incorrectly claiming that the Georgia Rule bars citizen suits against sources for excess emissions during startup, shutdown, and malfunction.

The CAA creates a regulatory scheme that expressly envisions citizen suits as well as EPA enforcement. See, e.g., CAA § 304, 42 U.S.C. § 7604. The Georgia Rule, however, obstructs citizen actions and EPA enforcement.

The Georgia Rule states that excess emissions "shall be allowed provided that..." requirements of best operational practices, operation consistent with good air pollution control, and minimal duration are satisfied. Sources exploit this ambiguity in the rule and have already attempted to argue an affirmative defense to bar citizen enforcement actions. Their logic applies equally to EPA enforcement actions.

EPD refuses to acknowledge that its rule can be interpreted in this way. By stating that there is no difference between the Georgia Rule and EPA policy in the Title V Application Review Monroe Power Plant cited above, EPD implicitly accepted that the Georgia Rule does not prevent EPA action or citizen enforcement efforts. This, despite the claims of power companies to the contrary, which is clear evidence of the ambiguity in the rule.

In Sierra Club v. Georgia Power, the U.S. District Court for the Northern District of Georgia held that the affirmative defense violated the CAA and could not be used to bar citizen suits. Sierra Club v. Ga. Power Co., No. 3:02-CV-151-JTC 17-18 (N.D. Ga. 2004).

Similarly, in response to EPD's submission of a prehearing package on revisions to Georgia's Rules for Air Quality Control, EPA specifically requested that EPD add clarifying language to spell out both EPA's position and the clear letter of the law on the issue of citizen suits: "EPD's decision to bring or not to bring an enforcement action against a facility for an excess emissions event is not binding on the Environmental Protection Agency or citizens ability as provided under the Clean Air Act to enforce applicable requirements to which a facility is subject." Letter from Kay Prince, Chief of Air Planning, Region 4 to Ronald C. Methier, Chief, Air Protection Branch, GA EPD (May 9, 2002). EPA recognized and sought to clarify the ambiguity in the Georgia Rule. EPD, however, has done nothing to correct the problem.

As with provisions that may be interpreted to offer automatic exemptiona, state efforts that result in ambiguity on the issue of EPA or citizen enforcement rights have been consistently rejected by EPA. In 2004, EPA proposed disapproval of a revision to the Monterey Bay Unified Air Pollution Control District (MBUAPCD) portion of the California SIP concerning excess emissions during breakdown. Under the proposed change, MBUAPCD would have the discretion to take no enforcement action with respect to a breakdown when certain conditions were met. EPA stated, "The submitted SIP revisions conflict with section 110 and part D of the Act for the following reason. . . . [T]he September 20, 1999 [Excess Emissions] policy also makes clear that EPA will not approve SIP revisions that allow a State director's decision to bar EPA's or citizens' ability to take enforcement action. Accordingly, were EPA to approve an enforcement discretion rule such as Rule 214, we would do so only while making clear that such action had no effect on EPA's or citizens' enforcement prerogatives. Under these

circumstances, such a SIP revision would have no effect on the SIP. For this reason, EPA considers it unproductive and potentially confusing to approve this enforcement discretion rule into the SIP" 69 Fed. Reg. 30,845-6 (June 1, 2004) [EXHIBIT 6].

EPA's position on this issue has been consistent. In Mr. Herman's memo, EPA made sure "to clarify that it does not intend to approve SIP revisions that would enable a State director's decision to bar EPA's or citizen's ability to enforce applicable requirements. Such an approach would be inconsistent with the regulatory scheme established in Title I of the Clean Air Act." Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement and Compliance Assurance, to Reg'l Adm'rs, Regions I-X, p. 3 (Sept. 20, 1999). The Georgia Rule, in contrast, remains unclear and ambiguous on this issue. Use of this ambiguity as a defense is contrary to the CAA, particularly if the defense is used in a citizen suit or EPA enforcement action. The problem is easily corrected. EPA should require revisions to the language of the Georgia Rule to make it consistent with and supportive of the CAA.

CONCLUSION

EPA is authorized to require the States to revise their SIPs to correct for inadequacies. Section 110(k)(5) of the CAA states: "Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, . . . or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct for such inadequacies." 42 U.S.C. § 7410(k)(5). The Georgia Rule in its present form is ambiguous in at least two key respects -- automatic

exemptions and EPA and citizen enforcement actions -- and is therefore inadequate and inconsistent with the CAA. Accordingly, it must be revised.

Respectfully submitted,

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May 23, 2005

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Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 18 2007

Georgia Chapter of the Sierra Club
c/o Richard M. Watson
Georgia Center for Law in the Public Interest
175 Trinity Avenue, SW
Atlanta, GA 30303

OFFICE OF
AIR AND RADIATION

SUBJ: Response to Petition for Rulemaking on
Startup, Shutdown, Malfunction Excess Emissions Rule in Georgia

Dear Mr. Watson:

EPA has reviewed the May 23, 2005, Petition you submitted on behalf of the Georgia Chapter of the Sierra Club (referred to as "Petitioner") regarding the startup, shutdown, malfunction (SSM) portion of the excess emissions rule contained in the Georgia State Implementation Plan (SIP). As is discussed in more detail below, EPA is denying your Petition because I have determined that the rule is not ambiguous, as alleged in the Petition.

I. General Background

On May 23, 2005, EPA received a Petition from Petitioner pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, and the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q. The Petition requests EPA to "... require the State of Georgia to revise its [SIP] to correct a significant ambiguity in the Georgia Air Quality Rules; more specifically in the Excess Emissions provision dealing with startup, shutdown, and malfunction [Georgia SSM rule], Georgia Comp. R. & Regs. R. 391-3-1-.02(2)(a)7...." Petition at 1. Petitioner claims that the Georgia SSM rule is "ambiguous in at least two key respects – automatic exemptions and EPA and citizen enforcement actions – and is therefore inadequate and inconsistent with the CAA." Petition at 12-13.

On September 28, 2006, Petitioner notified EPA of its intent to file suit against EPA under the APA and CAA for unreasonable delay in responding to the Petition. Letter from George E. Hays, Attorney at Law, to Stephen L. Johnson, Administrator, EPA (September 28, 2006). On April 30, 2007, Petitioner filed a lawsuit in the United States District Court for the Northern District of Georgia. In that lawsuit, Petitioner alleged, among other claims, that EPA's failure to respond to Petitioner's APA Petition is unreasonable delay pursuant to section 555(e) of the APA and 42 U.S.C. § 7604(a). Today's action is intended to respond to the Petition. Although EPA has elected to respond to the Petition, EPA's action should not be construed as agreement that it is obligated to respond to such a request, or if it is obligated to respond, that the Agency's action has been unreasonably delayed.

II. Background on the CAA and Georgia SSM Rule

The CAA strives "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The CAA sets out a two-stage process for achieving this goal. In the first stage, EPA sets national ambient air quality standards for various pollutants. 42 U.S.C. § 7409. In the second stage, each state creates and implements a plan, known as a SIP, to ensure its air meets the EPA standards. 42 U.S.C. § 7410. Before implementing its plan, each state must submit a proposed SIP to EPA for approval. 42 U.S.C. § 7410(a)(1). To gain EPA approval, the SIP must "include enforceable emission limitations and other control measures, means, or techniques ... as may be necessary or appropriate to meet the applicable [CAA] requirements ...." 42 U.S.C. § 7410(a)(2). Each state's SIP must "assure that national ambient air quality standards are achieved ...." 42 U.S.C. § 7410(a)(2). Each state must revise its SIP periodically to account for new EPA standards and new emissions reduction technologies. 42 U.S.C. § 7410(a)(2)(H). Like an entirely new SIP, any SIP revisions must first be subject to public hearing and comment and must be approved by EPA. 42 U.S.C. § 7410(a)(1). EPA may also make what is known as a "SIP Call," notifying a state of substantial inadequacies in its current SIP and requesting that the state submit a revised plan. 42 U.S.C. § 7410(k)(5).

Georgia's CAA SIP provisions are codified in the Georgia Rules for Air Quality Control. *See*, Ga. Comp. R. & Regs. Ch. 391-3-1. The Georgia SSM rule expressly addresses emissions exceedences that occur during SSM. It states:

> Excess Emissions:
> (i) Excess emissions resulting from startup, shutdown, malfunction of any source which occur though ordinary diligence is employed shall be allowed provided that (I) the best operational practices to minimize emissions are adhered to, and (II) all associated air pollution control equipment is operated in a manner consistent with good air pollution control practice for minimizing emissions and (III) the duration of excess emissions is minimized.
> (ii) Excess emissions which are caused entirely or in part by poor maintenance, poor operation, or any other equipment or process failure which may reasonably be prevented during startup, shutdown or malfunction are prohibited and are violations of this Chapter (391-3-1).
> (iii) The provisions of this paragraph 7. shall apply only to those sources which are not subject to any requirement under section (8) of this Rule (i.e. Rule 391-3-1-.02) or any requirement of 40 CFR, Part 60, as amended concerning New Source Performance Standards.

Ga. Comp. R. & Regs. R. 391-3-1-.02(2)(a)7. The Georgia SSM rule was adopted as part of the Georgia SIP in 1979, and approved by EPA in 1980 through the formal rulemaking process

prescribed in the CAA. *See*, 42 U.S.C. § 7410(a)(1). Since 1980, the rule has not been revised and has been a continuous part of the Georgia SIP.

III. EPA's Review of the Petition

As noted above, Sierra Club filed its Petition with the Administrator of EPA in May 2005, requesting EPA to "call" the Georgia SIP because:

> The Georgia [SSM] Rule in its present form is ambiguous in at least two key respects – automatic exemptions and EPA and citizen enforcement actions – and is therefore inadequate and inconsistent with the CAA.

Petition at 12-13. On March 30, 2006, the Eleventh Circuit Court of Appeals specifically addressed both of these issues. *Sierra Club v. Georgia Power Company*, 443 F.3d 1346 (11th Cir. 2006).

Automatic exemptions. In its Petition, Petitioner alleges the Georgia SSM rule provides sources with an "automatic exemption" from emissions occurring during SSM.[1] Petitioner cites to longstanding EPA policy that "automatic exemptions will not be allowed." Petition at 4, citing to Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air, Noise, and Radiation, to Reg'l Adm'rs, Regions I-X, (Sept. 28, 1982). Additionally, Petitioner cites to a 2002 letter from EPA to the State of Georgia in which EPA made recommendations to convert the language in the Georgia SSM rule to provide for an affirmative defense or to provide for the use of enforcement discretion. Petition at 6, citing Letter from Kay Prince, Chief of Air Planning, Region 4, to Ronald C. Methier, Chief, Air Protection Branch, GA EPD (May 9, 2002).

In an enforcement action to which the Petitioner was a party, the Eleventh Circuit issued a decision in 2006, concluding that the Georgia SSM rule does not provide for an automatic exemption from compliance with emission limits during periods of startup, shutdown or malfunction. Rather, it provides an affirmative defense that may be asserted by the source in litigation. *Sierra Club* at 1353, 1355. Therefore, subsequent developments following the filing of the 2005 Petition concerning the provisions of the Georgia SSM rule have rendered the Petition moot as to this issue. *Flast v. Cohen,* 392 U.S. 83, 95, 88 S.Ct 1942, 1950, 20 L. Ed. 2d 947 (1968); *Sierra Club v. EPA,* 315 F.3d 1295, 1299 (11th Cir. 2002). In light of the Court's decision interpreting the Georgia SSM rule as providing for an affirmative defense, Petitioner's

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[1] The Petition appears to use the terms "automatic exemption" and "affirmative defense" interchangeably and implies that EPA has concluded that both types of provisions are unacceptable. To the contrary, in 1999, EPA issued a policy supplementing its 1982 and 1983 Guidance, and specifically clarifying that affirmative defenses for periods of excess emissions could be included in SIPs. *See* State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown, Sept. 20, 1999.

concerns that the rule may be cited as providing an automatic exemption are moot. Therefore, I am denying Petitioner's request that EPA require the State to revise the rule to eliminate any ambiguity as to whether the rule provides for an automatic exemption.

EPA/Citizen enforcement. Second, in its Petition, Petitioner alleges that the Georgia SSM rule must be changed because it is ambiguous as to whether it provides for citizen actions and EPA enforcement. "The CAA creates a regulatory scheme that expressly envisions citizen suits as well as EPA enforcement. *See,* e.g., CAA § 304, 42 U.S.C. § 7604. The Georgia Rule, however, obstructs citizen actions and EPA enforcement." Petition at 10. Petitioner cites again to the 2002 letter from EPA to Georgia in which EPA commented to the State that it should revise the rule to specifically state that a decision by the State not to bring an enforcement action would not bar action by EPA or citizens.

In 2006, the Eleventh Circuit clearly spoke to this issue, holding that the Georgia SSM rule does allow citizens and EPA to enforce the provisions of rule:

> The SSM Rule does not limit the SSM defense to actions initiated by the EPD, but simply provides a potential defense to alleged violations where the emissions exceedances at issue occur during SSM. Quite clearly, the SSM Rule applies to any enforcement action, whether initiated by the EPD or, as in this litigation, by a private citizen.

Sierra Club at 1353. Therefore, subsequent developments, following the filing of the 2005 Petition concerning the provisions of the Georgia SSM rule have rendered the Petition moot as to this issue. *Flast v. Cohen,* 392 U.S. at 95; *Sierra Club v. EPA,* 315 F.3d at 1299. In light of the decision of the Eleventh Circuit, I do not believe that the Georgia SSM rule is ambiguous as to whether a decision by the State regarding enforcement would bar citizen or EPA enforcement. Therefore, I deny the Petition as to this issue.

IV. Conclusion

For the reasons set forth above, I hereby deny the May 23, 2005, Petition requesting EPA to require the State of Georgia to revise the SIP-approved SSM rule to remove any ambiguity about whether it provides an automatic exemption or whether it would bar EPA or citizen enforcement.

Sincerely,

Stephen L. Johnson
Administrator

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 4

Air Quality Status of Nonattainment Areas in Southern Company States
Updated March 27, 2013

State	1997 Annual $PM_{2.5}$	2006 24-Hour $PM_{2.5}$	1997 8-HR Ozone	2008 8-HR Ozone
Alabama	***Birmingham, AL*** ***Design Value = 12.9 µg/m^3*** ***(2009-11 Data)*** Re-designation Final Rule 78 Fed. Reg. 5306 January 25, 2013	***Birmingham, AL*** ***Design Value = 27 µg/m^3*** ***(2009-11 Data)*** Re-designation Final Rule 78 Fed. Reg. 4341 January 22, 2013	***Birmingham, AL*** ***Design Value = 0.075 ppm*** ***(2009-11 Data)*** Re-designation Final Rule 71 Fed. Reg. 27,631 May 12, 2006	***Statewide*** Designated Attainment Final Rule 77 Fed. Reg. 30,088 May 21, 2012
Florida	***Statewide*** Designated Attainment Final Rule 70 Fed. Reg. 944 January 5, 2005	***Statewide*** Designated Attainment Final Rule 74 Fed. Reg. 58, 688 November 13, 2009	***Statewide*** Designated Attainment Final Rule 69 Fed. Reg. 23,858 April 30, 2004	***Statewide*** Designated Attainment Final Rule 77 Fed. Reg. 30,088 (May 21, 2012)
Georgia	***Atlanta, GA*** ***Design Value = 11.9 µg/m^3*** ***(2009-11 Data)*** Clean Data Final Rule 76 Fed. Reg. 76,620 December 8, 2011 ***Chattanooga, TN-GA*** ***Design Value = 11.2 µg/m^3*** ***(2009-11 Data)*** Clean Data Final Rule 76 Fed. Reg. 31,239 May 31, 2011 ***Macon, GA*** ***Design Value = 13.4 µg/m^3*** ***(2009-11 Data)*** Clean Data Final Rule 76 Fed. Reg. 31,858 June 2, 2011 ***Rome, GA*** ***Design Value =*** ***"Incomplete"*** Clean Data Final Rule 76 Fed. Reg. 18,650 April 5, 2011	***Statewide*** Designated Attainment Final Rule 74 Fed. Reg. 58, 688 November 13, 2009	***Atlanta, GA*** ***Design Value = 0.080 ppm*** ***(2009-11 Data)*** Re-designation Proposed Rule 78 Fed. Reg. 7705 February 4, 2013 ***Macon, GA*** ***Design Value = 0.073 ppm*** ***(2009-11 Data)*** Re-designation Final Rule 72 Fed. Reg. 53,432 September 19, 2007 ***Murray Co (Chattahoochee Nat Forest), GA*** ***Design Value = 0.071 ppm*** ***(2009-11 Data)*** Re-designation Final Rule 72 Fed. Reg. 58,538 October 16, 2007	***Atlanta, GA*** ***Design Value = 0.080 ppm*** ***(2009-11 Data)*** Designated Nonattainment Final Rule 77 Fed. Reg. 30,088 May 21, 2012

The design values in this chart are for the period ending in 2011 (i.e., 2009-11 data). They were retrieved from EPA's *Design Value Reports* available at http://www.epa.gov/airtrends/values.html.

State	1997 Annual $PM_{2.5}$	2006 24-Hour $PM_{2.5}$	1997 8-HR Ozone	2008 8-HR Ozone
Mississippi	***Statewide*** Designated Attainment Final Rule 70 Fed. Reg. 944 January 5, 2005	***Statewide*** Designated Attainment Final Rule 74 Fed. Reg. 58, 688 November 13, 2009	***Statewide*** Designated Attainment Final Rule 69 Fed. Reg. 23,858 April 30, 2004	***Memphis, TN-MS-AR*** ***Design Value = 0.077 ppm (2009-11 Data)*** Designated Nonattainment Final Rule 77 Fed. Reg. 30,088 May 21, 2012
North Carolina	***Greensboro-Winston Salem-High Point, NC*** ***Design Value = 11.1 µg/m^3 (2009-11 Data***) Re-designation Final Rule 76 Fed. Reg. 71,455 November 18, 2011 ***Hickory-Morganton-Lenoir, NC*** ***Design Value = 10.6 µg/m^3 (2009-11 Data)*** Re-designation Final Rule 76 Fed. Reg. 71,452 November 18, 2011	***Statewide*** Designated Attainment Final Rule 74 Fed. Reg. 58,688 November 13, 2009	***Charlotte-Gastonia-Rock Hill, NC-SC*** ***Design Value = 0.079 ppm (2009-11 Data)*** Clean Data Final Rule 76 Fed. Reg. 70,656 November 15, 2011 ***Haywood and Swain Cos (Great Smoky NP), NC*** ***Design Value = 0.067 ppm (2009-11 Data)*** Re-designation Final Rule 74 Fed. Reg. 63,995 December 7, 2009 ***Raleigh-Durham-Chapel Hill, NC*** ***Design Value = 0.073 ppm (2009-11 Data)*** Re-designation Final Rule 72 Fed. Reg. 72,948 December 26, 2007 ***Rocky Mount, NC*** ***Design Value = 0.070 ppm (2009-11 Data)*** Re-designation Direct Final Rule 71 Fed. Reg. 64,891 November 6, 2006	***Charlotte-Rock Hill, NC-SC*** ***Design Value = 0.079 ppm (2009-11 Data*** Designated Nonattainment Final Rule 77 Fed. Reg. 30,088 May 21, 2012

The design values in this chart are for the period ending in 2011 (i.e., 2009-11 data). They were retrieved from EPA's *Design Value Reports* available at http://www.epa.gov/airtrends/values.html.

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 29 2007

THE ADMINISTRATOR

Mr. Robert Ukeiley
c/o Hilary Lambert
Law Office of Robert Ukeiley, P.S.C.
433 Chestnut Street
Berea, Kentucky 40403

SUBJECT: Response to Petition for Rulemaking on Credible Evidence Revisions in Kentucky

Dear Mr. Ukeiley:

The U.S. Environmental Protection Agency (EPA) has reviewed the April 21, 2005, petition you submitted on behalf of Preston Forsythe, the Center for Biological Diversity, Kentucky Heartwood, and Hilary Lambert (collectively referred to as "Petitioners") regarding EPA's credible evidence revisions (CER) and the Kentucky State Implementation Plan (SIP). As is discussed in more detail below, EPA is denying your petition because, at this time, EPA is declining to make a finding that the Kentucky SIP is "substantially inadequate" pursuant to section 110(k) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7410(k).

General Background

On April 21, 2005, EPA received a petition from Petitioners pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (APA Petition). The APA Petition was part of a larger petition filed under title V of the Clean Air Act regarding the Tennessee Valley Authority's Paradise Fossil Plant located in Muhlenberg County, Kentucky.

The APA Petition, in its entirety, consisted of the following language:

> Moreover, to the extent that EPA determines that Kentucky's SIP is inadequate as it does not fully include the Credible Evidence [Revisions], Petitioners respectfully request that EPA treat this petition as also being a petition pursuant to the [APA] to promulgate a rule to correct the Kentucky State Implementation Plan to fully include the Credible Evidence [Revisions] into the Kentucky State Implementation Plan.

APA Petition at 22. On February 14, 2007, the U.S. Department of Justice (DOJ), on behalf of EPA, entered into a Settlement Agreement with Petitioners to resolve a lawsuit brought in the United States District Court for the District of Columbia (D.C. District Court) on July 31, 2006. As part of the Settlement Agreement, DOJ agreed that EPA would take final action to grant or deny the Petition by May 25, 2007; the deadline was later extended through a stipulated modification to June 29, 2007. This letter is intended to satisfy General Term 4 in the Settlement Agreement.

Pursuant to Section 110(k)(5) of the CAA, if EPA finds that a SIP is substantially inadequate to comply with any provision of the CAA, it must instruct the state to revise the SIP to correct the deficiency – this is often referred to as a "SIP call." Section 110(k)(5) states that the finding of substantial inadequacy, and notice to the affected state, shall be public. EPA also has the authority to require the submission of SIP revisions to remedy the inadequacy in a reasonable timeline.[1] Failure of the state to revise the SIP appropriately may result in sanctions under the CAA, including withholding of highway funds. See, e.g., 42 U.S.C. § 7509. Notably, the SIP call authority is only triggered upon a finding of *substantial* inadequacy, not mere inadequacy. See, People of the State of Illinois v. EPA, 621 F.2d 259 (7th Cir. 1980) (discussing a notice of SIP deficiency).

EPA does not construe the CAA to require that, in response to a petition for rulemaking, EPA must make a determination regarding the adequacy of a SIP. Likewise, Section 110(k)(5) of the CAA does not require that EPA periodically investigate and determine whether a SIP is adequate. Thus, EPA has the discretion to decide when it is appropriate to exercise its oversight authority and inquire into issues of SIP adequacy. See, e.g., Heckler v. Chaney, 470 U.S. 821 (1985) (discussing the analogous enforcement discretion); WWHT, Inc. v. Federal Communications Comm'n, 656 F.2d 807 (D.C. Cir. 1981) (discussing agency discretion to initiate rulemaking); Greater Cincinnati Chamber of Commerce v. EPA, 879 F.2d 1379 (6th Cir. 1989) (discussing the initiation of the SIP call process and EPA discretion). This is especially true where a determination of substantial inadequacy essentially initiates an enforcement-like process that can result in the imposition of sanctions on the state. See, e.g., Ohio Public Interest Research Group, Inc. v. Whitman, 386 F.3d 792 (6th Cir. 2004) (finding that EPA's decision whether to issue a Notice of Deficiency (NOD) regarding a title V program is a non-reviewable exercise of enforcement discretion); New York Public Interest Research Group v. Whitman, 321 F.3d 316, 331 (2nd Cir. 2003) (finding that the decision whether to issue a NOD "is necessarily discretionary"); Public Citizen, Inc. v. U.S. EPA, 343 F.3d 449 (5th Cir. 2003) (same).

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[1] To provide assurance that it has the authority to require the submission of SIP revisions in accordance with the specified timelines, EPA typically issues SIP calls through a rulemaking process that allows for public notice and, typically, public comment on the proposal to issue the SIP call. For example, a SIP call may be published in the *Federal Register* first as a proposed action and then, after accepting public comment, as a final action that serves to formally begin the SIP call. See, e.g., Greater Cincinnati Chamber of Commerce v. EPA, 879 F.2d 1379, 1381 (6th Cir. 1989) (explained that EPA first issued a notification to Ohio regarding SIP deficiencies, and such notice was subsequently published in the *Federal Register*, along with a timeline for remedying the identified deficiencies); see also, NOx SIP Call, 63 Fed. Reg. 57356 (October 27, 1998).

The APA Petition simply requested that, to the extent that EPA determines that the Kentucky SIP is inadequate, EPA should undertake a rulemaking action.[2] As discussed below, EPA is denying the petition because it is declining to make a finding, pursuant to section 110(k) of the CAA, that the Kentucky SIP is substantially inadequate with regard to its treatment of credible evidence. [3]

Background on EPA's Credible Evidence Revisions

Since 1970, Section 113(a) of the CAA has stated that EPA may bring an enforcement action based on "any information." In direct response to a 1984 district court opinion which erroneously limited the evidence EPA could use to prove a CAA violation, the United States Congress amended Section 113(e) of the CAA in 1990 to clarify that "any credible evidence" could be used for compliance and enforcement purposes.

Thus, following the 1990 CAA Amendments, which included many revisions in addition to those in section 113, EPA promulgated the final CER (62 Federal Register (Fed. Reg.) 8314 (February 24, 1997)). EPA promulgated the CER to clarify that any credible evidence could be used for compliance with the new title V permit program, as well as other compliance and enforcement efforts. As stated in the preamble, the CER "merely removes what some have construed to be a regulatory bar to the admission of non-reference test data to prove a violation of an emission standard, no matter how credible and probative those data are that a violation has occurred." 62 Fed. Reg. at 8315. Specifically, the CER was "designed to clarify that non-reference test data can be used in enforcement actions, and to remove any potential ambiguity regarding this data's use for compliance certifications under Section 114 and title V of the [CAA]." 62 Fed. Reg. at 8314. Further, to clarify the ability of citizens to use credible evidence (such as in an action under Section 304 of the CAA), EPA noted in the CER that "today's rule creates no new rights or powers for citizen enforcers; instead, the rule clarifies existing EPA regulations. Citizens have been free to use credible evidence in [CAA] enforcement, and have won at least two court cases using it." 62 Fed. Reg. at 8318. See, e.g., Sierra Club v. Public Service Company of Colorado, Inc., 894 F. Supp. 1455 (D. Colo. 1995); Unitek Environmental

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[2] The APA Petition was part of a larger petition filed under title V of the CAA regarding the Tennessee Valley Authority's Paradise Plant. The issue regarding credible evidence was raised in the context of that title V petition, and the APA Petition essentially was a follow-up request in the event EPA made certain findings as it considered the merits of the title V petition. On August 18, 2006, the Kentucky Division of Air Quality withdrew the title V permit for the Paradise plant; thus, on October 20, 2006, EPA denied the title V petition as moot. Arguably, the request raised by the APA Petition has also been made moot by the withdrawal of the title V permit which gave rise to the credible evidence issues. Nonetheless, EPA is addressing the APA Petition as required by the Settlement Agreement.

[3] Both before and after the CER was promulgated, EPA Region 4 sent letters to the states in its region, including Kentucky, updating them on the status of the CER and indicating that EPA was considering a SIP call. While such letters served as a placeholder for initiating a formal, public "call" on the SIPs pursuant to Section 110(k)(5) of the CAA, EPA did not take subsequent steps to publicly and formally initiate and effectuate a SIP call.

Services, Inc. v. Hawaiian Cement, 1997 U.S. Dist. LEXIS 19261 (D. HI 1997); but see, Sierra Club v. TVA, 430 F.3d 1337 (11th Cir. 2005) (prohibiting a citizen from admitting evidence because Alabama had not adopted the CER into its SIP).

The CER also included changes to federal regulations. Specifically, 40 Code of Federal Regulations (C.F.R.) § 51.212(c) – regarding SIPs – was revised to read that, "[f]or the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any standard in this part, the [SIP] must not preclude the use, including the exclusive use, of any credible evidence or information..." Similar changes were also made to 40 C.F.R. §§ 52.12 (concerning source surveillance); 52.33 (concerning compliance certifications); 60.11 (concerning New Source Performance Standards); and 61.12 (concerning National Emission Standards for Hazardous Air Pollutants).

EPA Review of the APA Petition

The Kentucky SIP includes numerous provisions relating to compliance and enforcement in a variety of contexts. The mere fact that the SIP was not revised after the CER in order to "fully incorporate" the CER and affirmatively allow the use of credible evidence does not necessarily make the SIP substantially inadequate. Pursuant to 40 C.F.R. § 51.212, the SIP must merely not preclude the use of credible evidence – it need not affirmatively allow for the use of such evidence. As stated in the CER preamble, the CER was meant to clarify what was already the status quo – that compliance (and noncompliance) with the CAA, including SIPs, could be demonstrated through the use of any credible evidence. In this case, EPA interprets Kentucky's SIP, consistent with the 1997 CER and, specifically 40 C.F.R. § 51.212(c), as not precluding any entity, including EPA, citizens, or the state, from using any credible evidence to enforce emission standards, limitations, conditions, or any other provision of the Kentucky SIP.[4]

Further, EPA is aware of no instance in which a federal, state, citizen, or regulated entity was barred from determining compliance (or noncompliance) with the Kentucky SIP based on relevant, probative, and credible information because of the language in the applicable SIP. Specifically, EPA has no information that the Commonwealth of Kentucky has affirmatively interpreted the Kentucky SIP to preclude the use of any credible evidence by EPA, the state, citizens, or a regulated entity. EPA is also not aware of, nor have Petitioners cited, reported state, administrative, or federal court decisions or orders in Kentucky affirmatively interpreting the Kentucky SIP to preclude the use of any credible evidence. Courts have significant flexibility pursuant to the Federal Rules of Evidence to allow the admission of evidence in such

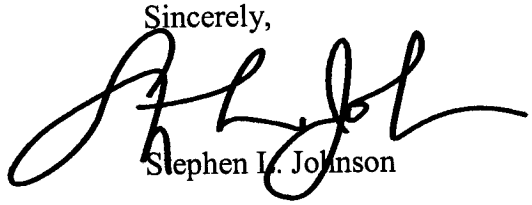
[4] The Kentucky SIP also includes language indicating that Kentucky can use "any information" to enforce its SIP. See, e.g., 40 Kentucky Administrative Regulations (KAR) 50:055 (concerning compliance); and 401 KAR 50:060 (concerning enforcement). These two provisions were incorporated into the Kentucky SIP on May 4, 1989 (54 Fed. Reg. 19169) and July 12, 1982 (47 Fed. Reg. 30059), respectively. Further, Kentucky's regulations include the incorporation by reference of 40 C.F.R. §§ 60.11 and 61.12 in 401 KAR 60:005, Section 2(1); and 401 KAR 57:002, Section 2(1), respectively. These provisions are not in the Kentucky SIP because regulations pertaining to new source performance standards and hazardous air pollutants are not included as part of the SIP for any state.

proceedings, regardless of EPA's CER. 62 Fed. Reg. 8322-23; Fed. R. Evid. Rules 401, 402. Notably, Petitioners do not suggest that the Kentucky SIP is substantially inadequate with regard to the CER. Rather, Petitioners merely noted that to the extent that EPA finds the Kentucky SIP is inadequate, further action is requested.

V. Conclusion

Thus, based on EPA's reasonable interpretation of the Kentucky SIP as not precluding any entity from using any credible evidence for compliance and enforcement purposes, EPA is now exercising its discretion and declining to make a finding that Kentucky's SIP is substantially inadequate. For the foregoing reasons, EPA is denying the APA Petition.

Sincerely,



Stephen L. Johnson

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 6

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SIERRA CLUB and WILDEARTH GUARDIANS, Plaintiffs, vs. LISA P. JACKSON, in her official capacity as Administrator, United States Environmental Protection Agency, Defendant	Case No. 3:10-cv-04060-CRB **SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

SIERRA CLUB and WILDEARTH GUARDIANS, Plaintiffs in the above-referenced matter, pursuant to written authorization of opposing counsel in accordance with Fed. R. Civ. P. 15(a)(2), submit this Second Amended Complaint [1] removing all allegations and claims

associated with Defendant's [a] failure to promulgate Federal Implementation Plans ("FIPs") for New Mexico, Oklahoma, Guam, American Samoa and the Northern Mariana Islands and [b] failure to take action on the 1997 8-hour Infrastructure SIP submittal for Washington, D.C., West Virginia and Delaware as well as [2] adding claims for Defendant's failure to take action on the 1997 8-hour Infrastructure SIP submittal for Tennessee (under 42 U.S.C. § 7410(a)(2)(C) and (J)) and for Arizona (under 42 U.S.C. §§ 7410(a)(2)(A)-(C), (E), (F), and (H) – (M). Plaintiffs' Second Amended Complaint states as follows:

1. Plaintiffs SIERRA CLUB and WILDEARTH GUARDIANS bring this Clean Air Act citizen suit to compel the United States Environmental Protection Agency ("EPA") to undertake long-overdue nondiscretionary duties. Specifically, Sierra Club challenges the failure of Defendant, LISA P. JACKSON, in her official capacity as Administrator of the EPA, to perform certain mandatory duties required by the Clean Air Act, 42 U.S.C. §§ 7401-7671q (2010), including the failure to: [1] promulgate Federal Implementation Plans pursuant to 42 U.S.C. § 7410(c)(1) (2010) and [2] take final action on State Implementation Plan submittals within 12 months as required by 42 U.S.C. § 7410(k)(2) (2010).

JURISDICTION, VENUE AND NOTICE

2. This action is brought pursuant to the Clean Air Act, 42 §7410 *et seq.* Thus, this Court has subject matter jurisdiction over the claims set forth in this Complaint pursuant to 42 U.S.C. §7604(a) (2010). This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 (2010) (federal question). An actual controversy exists between the parties. This case does not concern federal taxes, is not a proceeding under 11 U.S.C. §§ 505 or 1146 (2010), and does not involve the Tariff Act of 1930. This Court has authority to order the

declaratory relief requested under 28 U.S.C. §2201 (2010). If the Court orders declaratory relief, 28 U.S.C. §2202 authorizes this Court to issue injunctive relief.

3. **Intradistrict Assignment**. U.S. EPA Region 9 is headquartered in San Francisco. U.S. EPA Region 9 includes Arizona and Hawaii. Thus, a substantial part of the alleged events or omissions giving rise to Plaintiffs' claims occurred in the Northern District of California. Venue is therefore proper in this Court pursuant to 28 U.S.C. §1391(e) (2010).

4. On June 22, 2010, Plaintiffs mailed a sixty-day notice of intent to sue letter via certified mail, return receipt requested to Defendant Lisa P. Jackson. The notice letter stated, in relevant part, that Plaintiffs intended to sue Defendant for failure to: [1] promulgate Federal Implementation Plans under 42 U.S.C. § 7410(c)(1) (2010) for the 1997 8-hour ozone NAAQS for nine states[1] – North Dakota, Hawaii, Alaska, Idaho, Oregon and Washington; [2] promulgate Federal Implementation Plans under 42 U.S.C. § 7410(c)(1) (2010) to address certain elements required by 42 U.S.C. § 7410(a)(2) (2010) for Maryland, Virginia, Arkansas, Arizona, Florida and Georgia; [3] take final action on provisions of the 1997 8-hour ozone Infrastructure SIP submittals for Maryland, Virginia, Arkansas, Oklahoma, Florida, Georgia, and Tennessee and [4] take final action on 1997 8-hour Infrastructure SIP submittals for Nevada and North Carolina. Defendant received the sixty day notice of intent to sue letter no later than June 28, 2010.

5. On December 24, 2010, Plaintiffs mailed another sixty-day notice of intent to sue letter via certified mail, return receipt requested to Defendant Lisa P. Jackson. The notice letter stated that Plaintiffs intended to sue Defendant for failure to take final action on 1997 8-hour

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[1] The term "state" is used in this complaint as it is defined in the Clean Air Act, 42 U.S.C. § 7602(d) (2010).

Infrastructure SIP submittal for 42 U.S.C. § 7410(a)(2)(C) & (J) for Tennessee. Defendant received the sixty day notice of intent to sue letter no later than December 29, 2010.

6. On April 15, 2011, Plaintiffs mailed a third sixty-day notice of intent to sue letter via certified mail, return receipt requested to Defendant Lisa P. Jackson. The notice letter informed Defendant that Plaintiffs intended to sue Defendant for failure to perform non-discretionary duty – failure to take final action on Arizona's 1997 8-hour ozone Infrastructure SIP submittal for 42 U.S.C. §§7410(a)(2)(A)-(C),(E),(F) and (H)-(M). Defendant received the sixty day notice of intent to sue letter.

7. More than 60 days have passed since Defendant received Plaintiffs' notice of intent to sue letters. To date, Defendant has not remedied the violations alleged in the Notice Letters which are also set forth in this Second Amended Complaint. Therefore, an actual controversy exists between the parties.

PARTIES

8. Plaintiff **SIERRA CLUB** brings this action on behalf of itself and its adversely impacted members. Sierra Club, founded in 1892, is a nonprofit public-benefit corporation organized and existing under the laws of California with more than 600,000 members in the United States and with one or more chapters in every state. The Sierra Club's purposes include "to practice and promote responsible use of the earth's ecosystem and resources; to enlist and to educate humanity to protect and restore the quality of the natural and human environment, and to use all lawful means to carry out these objectives." Sierra Club activities include hiking, canoeing, caving, swimming, fishing, nature study, and advocacy for the improvement and protection of water quality and air quality across the country.

9. Plaintiff **WILDEARTH GUARDIANS** ("Guardians") brings this action on behalf of itself and its adversely impacted members. Guardians is a non-profit organization dedicated to protecting and restoring wildlife, wild rivers, and wild places in the American West. Guardians currently has four programmatic areas of focus - wildlife, wild places, wild rivers, and climate and energy. The organization has over 4,500 members.

10. Sierra Club and Guardians members live, work, raise families, recreate and engage in economic and other activities in and around North Dakota, Hawaii, Alaska, Idaho, Oregon, Washington, Maryland, Virginia, Arkansas, Oklahoma, Arizona, Florida, Georgia, Tennessee, Nevada, North Carolina and Washington, D.C. They are adversely affected by exposure to ozone. The adverse effects of such pollution include actual and/or threatened harm to their health, their families' health, their professional well being, their educational and economic interests, and their aesthetic and recreational enjoyment of the environment in these areas.

11. The Clean Air Act violations alleged in this Complaint also deprive Sierra Club, Guardians and their members of certain procedural rights, including notice and opportunity to comment, associated with EPA's failure to perform certain mandatory duties: failure to promulgate Federal Implementation Plans and failure to take final action on Infrastructure SIP submittals. The Clean Air Act violations alleged in this Complaint also deprive Sierra Club, Guardians and their members of certain information including but not limited to ambient monitoring data gathered in accordance with applicable regulations, public notice of exceedances of National Ambient Air Quality Standards and emission inventories.

12. Because Defendant has not (1) promulgated Infrastructure Federal Implementation Plans to address the 1997 8-hour ozone NAAQS for certain states and (2) taken

final action on 1997 8-hour ozone Infrastructure SIP submittals for certain states by the applicable deadlines, Sierra Club, Guardians and their members cannot be certain that the 1997 8-hour ozone NAAQS for the affected states conforms with the requirements of the Clean Air Act. Similarly, Defendant's failure to promulgate Federal Implementation Plans and to take final action on SIP submittals prevents Sierra Club and WildEarth Guardians' members from being certain that they are protected by the 1997 8-hour ozone NAAQS.

13. The Clean Air Act violations alleged in this Complaint have injured and will continue to injure the interests of Plaintiffs' organizations and their members, unless and until this Court grants the requested relief. Granting the relief requested in this lawsuit would address these injuries by compelling EPA action to perform its mandatory duties, thereby improving air quality and reducing the risk of exposure to air pollution and the uncertainty regarding that exposure.

14. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA") is the federal agency charged with implementation and enforcement of the Clean Air Act. As described below, the Clean Air Act assigns to EPA certain non-discretionary duties. In this case, EPA has failed to perform certain non-discretionary duties.

15. Defendant **LISA P. JACKSON** is sued in her official capacity as the Administrator of the EPA. She is charged in that role with taking various actions to implement and enforce the Clean Air Act, including the requirement to promulgate Infrastructure Federal Implementation Plans for the 1997 8-hour ozone NAAQS for certain states and to take final action on 1997 8-hour ozone Infrastructure SIP submittals for certain states.

STATUTORY FRAMEWORK

16. The Clean Air Act aims "to protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1) (2010). Congress intended the Clean Air Act in part to "speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." H.R. Rep. No. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356.

17. In order to achieve this goal, the Clean Air Act, including the 1990 amendments, establishes a partnership between EPA and the states for attainment and maintenance of national air quality goals. *See* 42 U.S.C. § 7401-7515 (2010).

18. Pursuant to the Clean Air Act, EPA sets NAAQS to limit levels of "criteria pollutants," including carbon monoxide, lead, nitrogen dioxide, particulate matter, ozone, and sulfur dioxide. *See* 40 C.F.R. part 50.4-50.13 (2010).

19. The NAAQS are designed to protect the public from being exposed to levels of air pollutants that EPA has found to have significant adverse health and welfare impacts.

20. The Clean Air Act requires all areas of the country to meet NAAQS. 42 U.S.C. §§ 7409-7410 (2010).

21. In order to achieve this goal, states, or regions within a state, must adopt a pollution control plan, known as a State Implementation Plan ("SIP"), that contains enforceable emissions limitations necessary to attain the NAAQS and meet applicable requirements of the Clean Air Act, including ensuring attainment, maintenance and enforcement of NAAQS. 42 U.S.C. §§ 7410(a)(1) (2010), (a)(2)(A) (2010); § 7401(a)(1),(k) (2010).

22. Pursuant to the Clean Air Act states are required to submit SIPs that provide for the "implementation, maintenance and enforcement" of any new or revised NAAQS within three

years of a NAAQS' promulgation. 42 U.S.C. § 7410(a)(1) (2010). EPA is then required to make a finding as to whether a SIP submittal administratively complies with the requirements of 42 U.S.C. § 7410(a)(2) (2010) within six months of the submittal; a determination known as the completeness finding. 42 U.S.C. §7410(k)(1)(B) (2010).

23. If EPA determines that a state has failed to submit a complete SIP, that determination triggers a 24-month period after which EPA has a mandatory duty to step in and promulgate a Federal Implementation Plan. 42 U.S.C. §7410(c)(1) (2010).

24. In situations where states make a SIP submittal and EPA either does not make (1) a completeness finding or (2) a finding that the submittal failed to meet the minimum criteria, the submittal is deemed administratively complete by operation of law six months after the submittal. 42 U.S.C. §7410(k)(1)(B) (2010).

25. Once a submittal is deemed complete, either by operation of law or a completeness finding, EPA has a mandatory duty to take final action on the submittal within twelve (12) months by approving it in full, disapproving it in full or approving part of it and disapproving part of it. 42 U.S.C. § 7410(k)(2) (2010).

STATEMENT OF FACTS

26. EPA has failed to perform certain mandatory duties required by the Clean Air Act, including the failure to: [1] promulgate Federal Implementation Plans pursuant to 42 U.S.C. § 7410(c)(1) (2010) for part or all of 12 states within twenty-four (24) months after it issued a finding of failure to submit all or part of the 42 U.S.C. § 7410(a) (2010) ("Infrastructure") SIP requirements for the 1997 8-hour ozone NAAQS and [2] take final action on State Implementation Plan submittals as required by 42 U.S.C. § 7410(k)(2) (2010) for 10 states within 12 months after these submittals were found or deemed complete.

27. On July 18, 1997, EPA promulgated an 8-hour NAAQS for ozone. 62 Fed. Reg. 38856 (July 18, 1997).

28. In 2008, EPA issued a determination as to whether each state had submitted a complete 1997 8-hour Infrastructure SIP. 73 Fed. Reg. 16205 (March 27, 2008). While EPA determined that certain states did submit a complete Infrastructure SIP, it also determined that numerous states either did not submit Infrastructure SIPs, or failed to submit certain elements that were required as part of the Infrastructure SIP, thereby triggering the twenty-four (24) month period after which EPA must promulgate a Federal Implementation Plan to address the deficiencies. 73 Fed. Reg. 16205 (March 27, 2008).

Failure to Promulgate Federal Implementation Plans Pursuant to 42 U.S.C. § 7410(c)(1)

29. EPA has failed to promulgate Federal Implementation Plans pursuant to 42 U.S.C. §7410(c)(1) (2010) to address the 42 U.S. §7410(a) (2010) Infrastructure SIP for the 1997 8-hour ozone NAAQS within two years after it issued a finding of failure to submit for several states: North Dakota, Hawaii, Alaska, Idaho, Oregon and Washington.

North Dakota, Hawaii, Alaska, Idaho, Oregon and Washington

30. On March 27, 2008, EPA found that the following states and territories "failed to make a complete (Infrastructure SIP) submittal to satisfy the requirements of [42 U.S.C. § 7410(a)(2) (2010)]" for the 1997 8-hour ozone NAAQS by the applicable date: North Dakota, Hawaii, Alaska, Idaho, Oregon and Washington. 73 Fed. Reg. 16205, 16207 (March 27, 2008). The effective date of this finding was April 28, 2008. *Id*.

31. It has now been over two years since EPA made its finding. Since this finding, EPA has not approved a 1997 8-hour ozone Infrastructure SIP that meets the requirements of 42 U.S.C. § 7410(a)(2) (2010) for any of these areas.

32. Pursuant to the Clean Air Act, EPA was required to promulgate Federal Implementation Plans for the 1997 8-hour ozone NAAQS for North Dakota, Hawaii, Alaska, Idaho, Oregon and Washington upon the expiration of the two year period, that is by April 28, 2010. EPA has failed to do so, in violation of its mandatory duty.

33. Similarly, EPA has failed to promulgate Federal Implementation Plans for several states that failed to submit certain elements of the Infrastructure SIP for 1997 8-hour ozone NAAQs required by 42 U.S.C. §7410(a)(2) (2010): Maryland, Virginia, Arkansas, Arizona, Florida and Georgia.

Maryland, Virginia, and Arkansas

34. On March 27, 2008, EPA found that Maryland, Virginia, and Arkansas "failed to submit a [SIP] addressing changes to [their] part C [Prevention of Significant Deterioration] permit program required by the November 29, 2005 …final rule that made NOx a precursor for ozone" by the applicable date as required to do so by 42 U.S.C. §§ 7410(a)(2)(C) and (J) (2010). 73 Fed. Reg. 16205, 16207-08 (March 27, 2008). The effective date for this finding is April 28, 2008. *Id.*

35. It has now been over two years since EPA made its finding. Since this finding, EPA has not approved an Infrastructure SIP that meets the requirements of 42 U.S.C. § 7410(a)(2)(C) and (J) (2010) for any of these areas.

36. Pursuant to the Clean Air Act, EPA was required to promulgate Federal Implementation Plans to address these Infrastructure SIP requirements for Maryland, Virginia, and Arkansas upon the expiration of the two year period, that is by April 28, 2010. EPA has failed to do so, in violation of its mandatory duty.

Arizona

37. On March 27, 2008, EPA found that Arizona "failed to make a complete submittal to satisfy the requirements of [42 U.S.C. § 7410(a)(2) (2010)]" for the 1997 8-hour ozone NAAQS by the applicable date. 73 Fed. Reg. 16205, 16208 (March 27, 2008). The effective date of this finding was April 28, 2008. *Id.*

38. Since this finding, Arizona submitted an Infrastructure SIP for all elements except 42 U.S.C. § 7410(a)(2)(G) (2010). It has now been over two years since EPA made its finding.

39. Pursuant to the Clean Air Act, EPA was required to promulgate a Federal Implementation Plan addressing this Infrastructure SIP requirement for Arizona upon the expiration of the two year period or by April 28, 2010. EPA has failed to do so, in violation of its mandatory duty.

Florida and Georgia

40. On March 27, 2008, EPA found both Florida and Georgia "failed to submit a SIP addressing the emergency episode plan requirement of [42 U.S.C. § 7410(a)(2)(G) (2010)]." 73 Fed. Reg. 16205 (March 27, 2008). The effective date of this finding was April 28, 2008. *Id.*

41. Since this finding, EPA has not approved an Infrastructure SIP for either Florida or Georgia addressing this requirement. It has now been over two years since EPA made its finding.

42. Pursuant to the Clean Air Act, EPA was required to promulgate Federal Implementation Plans addressing this Infrastructure SIP requirement for both Florida and Georgia upon the expiration of the two year period, which is by April 28, 2010. EPA has failed to do so, in violation of its mandatory duty.

Failure to Take Final Action on State Implementation Plan Submittals Pursuant to 42 U.S.C. § 7410(k)(2)

Maryland, Virginia, Arkansas and Oklahoma:

43. EPA has failed to take final action on provisions of the 1997 8-hour ozone Infrastructure SIP submittals for Maryland, Virginia, Arkansas, and Oklahoma and publish notice of its action.

44. As previously set forth, on March 27, 2008, EPA made a completeness finding for all elements of the Infrastructure SIP submittals for these four states except as it pertains to the requirements of 42 U.S.C. §7410(a)(2)(C) and (J) (2010). 73 Fed. Reg. at 16207-08 (the elements for which EPA did not find a failure to submit are deemed complete under 42 U.S.C. §7410(k)(1)(B) (2010)). The effective date of this finding was April 28, 2008. *Id*.

45. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action by approving in full, disapproving in full, or approving in part and disapproving in part all elements of the Infrastructure SIP submittals except the requirements of 42 U.S.C. §§7410(a)(2)(C) and (J) (2010) for these states within 12 months of its completeness finding on these submittals or by April 28, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

Florida and Georgia:

46. EPA has failed to take final action on provisions of the 1997 8-hour ozone Infrastructure SIP submittals for Florida and Georgia.

47. As previously set forth, on March 27, 2008, EPA made a completeness finding for all elements of the Infrastructure SIP submittals for Florida and Georgia except as it pertains to the requirements of 42 U.S.C. §7410(a)(2)(G) (2010). 73 Fed. Reg. at 16208 (the elements for

which EPA did not find a failure to submit are deemed complete under 42 U.S.C. §7410(k)(1)(B) (2010)). The effective date of this finding was April 28, 2008. *Id*.

48. Pursuant to U.S.C. § 7410(k)(2) (2010), EPA was required to take final action by approving in full, disapproving in full, or approving in part and disapproving in part all elements of the Florida and Georgia Infrastructure SIP submittals except the requirements of 42 U.S.C. §7410(a)(2)(G) (2010) within 12 months of its completeness finding on these submittals which is by April 28, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

Nevada:

49. EPA has failed to take final action on the 1997 8-hour ozone Infrastructure SIP submittal for Nevada.

50. Nevada submitted its 1997 8-hour ozone Infrastructure SIP on February 1, 2008. Pursuant to 42 U.S.C. §7410(k)(1)(B) (2010), the submittal was deemed complete by no later than August 1, 2008.

51. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action on Nevada's 1997 8-hour ozone Infrastructure SIP by approving in full, disapproving in full, or approving in part and disapproving in part within 12 months of Nevada's 1997 8-hour ozone Infrastructure SIP being deemed complete which is by August 1, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

North Carolina:

52. EPA has failed to take final action on the 1997 8-hour ozone Infrastructure SIP submittal for North Carolina.

53. On March 27, 2008, EPA made a completeness finding for all elements of the Infrastructure SIP submittal for North Carolina except as it pertains to the requirements of 42 U.S.C. §7410(a)(2)(C) and (J) (2010). 73 Fed. Reg. at 16208 (the elements for which EPA did not find a failure to submit are deemed complete under 42 U.S.C. §7410(k)(1)(B) (2010)). The effective date of this finding was April 28, 2008. *Id.*

54. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action by approving in full, disapproving in full, or approving in part and disapproving in part all elements of North Carolina's Infrastructure SIP submittal except the requirements of 42 U.S.C. §7410(a)(2)(C) and (J) (2010) within 12 months of its completeness finding on North Carolina's submittal which is by April 28, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

55. Since EPA's finding, North Carolina made a submittal addressing the 42 U.S.C. §7410(a)(2)(C) and (J) (2010) requirements which EPA deemed complete as of July 20, 2008.

56. Pursuant to CAA 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action by approving in full, disapproving in full, or approving in part and disapproving in part these elements of North Carolina's Infrastructure SIP submittal within 12 months of the completeness finding on North Carolina's submittal or by July 20, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

Tennessee:

57. EPA has failed to take final action on provisions of the 1997 8-hour ozone Infrastructure SIP submittal for Tennessee.

58. On March 27, 2008, EPA made a completeness finding for all elements of the Infrastructure SIP submittal for Tennessee except as it pertains to the requirements of 42 U.S.C.

§7410(a)(2)(C) and (J) (2010). 73 Fed. Reg. at 16208 (the elements for which EPA did not find a failure to submit are deemed complete under 42 U.S.C. §7410(k)(1)(B) (2010)). The effective date of this finding was April 28, 2008. *Id*.

59. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action by approving in full, disapproving in full, or approving in part and disapproving in part all elements of the Infrastructure SIP submittal for Tennessee except as it pertains to the requirements of 42 U.S.C. §7410(a)(2)(C) and (J) (2010) within 12 months of its completeness finding on these provisions of Tennessee's submittal which is by April 28, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

60. On November 28, 2009, either EPA or operation of law deemed Tennessee's state implementation plan submittal addressing the infrastructure requirements under 42 U.S.C. §§ 7410(a)(2)(C) and (J)(2010) administratively complete.

61. Under the Clean Air Act, EPA is required to take final action on Tennessee's submittal addressing 42 U.S.C. §§ 7410(a)(2)(C) and (J)(2010) by approving in full, disapproving in full, or approving in part and disapproving in part by November 28, 2010. *See* 42 U.S.C. § 7410(k)(2). EPA has failed to do so and is therefore in violation of its mandatory duty.

Arizona

62. EPA has failed to take final action on provisions of the 1997 8-hour ozone Infrastructure SIP submittal for Arizona.

63. On April 14, 2010, either EPA or operation of law deemed Arizona's SIP submittal which included the infrastructure requirements under 42 U.S.C. §§7410(a)(2)(A)-(C), (E), (F), and (H)-(M) administratively complete.

64. Pursuant to 42 U.S.C. § 7410(k)(2) and (3), EPA was required to take final action on Arizona's SIP submittal by approving in full, disapproving in full, or approving in part and disapproving in part all elements of the submittal by April 14, 2011. EPA failed to do so in violation of its mandatory duty.

FIRST CLAIM FOR RELIEF

FAILURE TO PERFORM A NON-DISCRETIONARY DUTY TO PROMULGATE FEDERAL IMPLEMENTATION PLANS (CAA 42 U.S.C. § 7410(c)(1))

65. Each allegation set forth in the Complaint is incorporated herein by reference.

66. EPA has a mandatory duty to promulgate a Federal Implementation Plan within two years after EPA determines that a state has failed to submit a complete SIP. 42 U.S.C. § 7410(c)(1) (2010).

67. EPA failed to promulgate Federal Implementation Plans for 1997 8-hour ozone Infrastructure NAAQS for North Dakota, Hawaii, Alaska, Idaho, Oregon and Washington after determining more than two years ago that these states failed to submit a complete Infrastructure SIP for the 1997 8-hour ozone NAAQS.

68. EPA failed to promulgate Federal Implementation Plans to address certain elements identified above of the Infrastructure SIPs for the 1997 8-hour ozone NAAQS for Maryland, Virginia, Arkansas, Arizona, Florida and Georgia after determining, more than two years ago, that these states failed to submit portions of the Infrastructure SIP for the 1997 8-hour ozone NAAQS.

69. EPA has violated and remains in violation of its non-discretionary duty to promulgate Federal Implementation Plans for all or part of the states identified above.

SECOND CLAIM FOR RELIEF

FAILURE TO PERFORM A NON-DISCRETIONARY DUTY TO ACT TO TAKE FINAL ACTION UNDER 42 U.S.C. §7410(k)(2) & (3) ON STATE IMPLEMENTATION PLAN SUBMITTALS

70. Each allegation set forth in the complaint is incorporated herein by reference.

71. Pursuant to 42 U.S.C. §7410(k)(2) & (3)(2010), EPA has a mandatory duty to take final action on a SIP submittal that has been deemed complete (either by operation of law or a completeness finding by EPA), within 12 months by approving it in full, disapproving it in full or approving part of it and disapproving part of it.

72. EPA has failed to take final action (and publish notice of that action) within 12 months of its completeness findings on Infrastructure SIP submittals or portions of Infrastructure SIP submittals for the 1997 8-hour ozone NAAQS for Maryland, Virginia, Arkansas, Oklahoma, Florida, Georgia, Nevada, North Carolina, Tennessee, and Arizona.

73. EPA has violated and continues to violate CAA §110(k)(2)&(3), 42 U.S.C. §7410(k)(2)&(3) (2010).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

[A] DECLARE

[1] That Defendant's failure to promulgate Federal Implementation Plans for 1997 8-hour ozone Infrastructure NAAQS for North Dakota, Hawaii, Alaska, Idaho, Oregon and Washington after determining more than two years ago that these states failed to submit a complete Infrastructure SIP for the 1997 8-hour ozone NAAQS constitutes a failure to perform an act or duty that is not discretionary for Defendant as required by 42 U.S.C. § 7410(c)(1) (2010);

[2] That Defendant's failure to promulgate Federal Implementation Plans to address certain elements of the 1997 8-hour ozone Infrastructure NAAQS for Maryland, Virginia, Arkansas, Arizona, Florida and Georgia, after determining more than two years ago that these states failed to submit portions of an Infrastructure SIP for the 1997 8-hour ozone NAAQS constitutes a failure to perform an act or duty that is not discretionary for Defendant as required by 42 U.S.C. § 7410(c)(1) (2010);

[3] That Defendant's failure to take final action on all or portions of the Infrastructure SIP submittals for 1997 8-hour ozone NAAQS for Maryland, Virginia, Arkansas, Oklahoma, Florida, Georgia, Nevada, North Carolina, Tennessee, and Arizona within 12 months after EPA made a completeness finding for these submittals constitutes a failure to perform an act or duty that is not discretionary for Defendant as required by 42 U.S.C. §7410(k)(2) (2010);

[B] ORDER

[1] Defendant to promulgate Infrastructure Federal Implementation Plans for 1997 8-hour ozone NAAQS for North Dakota, Hawaii, Alaska, Idaho, Oregon and Washington;

[2] Defendant to promulgate Infrastructure Federal Implementation Plans to address provisions of the 1997 8-hour ozone NAAQS for Maryland, Virginia, Arkansas, Arizona, Florida and Georgia;

[3] Defendant to take final action on all or portions of the Infrastructure SIP submittals for the 1997 8-hour ozone NAAQS for Maryland, Virginia, Arkansas, Oklahoma, Florida, Georgia, Nevada, North Carolina, Tennessee, and Arizona;

[C] RETAIN jurisdiction of this action to ensure compliance with the Court's Order;

[D] AWARD Plaintiffs the costs of litigation, including reasonable attorneys' fees and costs; and

[E] GRANT such other relief as the Court deems just and proper.

Respectfully submitted this 10th day of _August, 2011.

/s/ Kimberly Sturm

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CERTIFICATE OF SERVICE

I certify that on August 10, 2011, a copy of the foregoing Second Amended Complaint for Injunctive and Declaratory Relief was served electronically via the Court's e-filing system to Counsel of Record.

*/s/ Kimberly Sturm*_____

KIMBERLY A. STURM

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 7

ADRMOP,CLOSED,E-Filing

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:10-cv-04060-CRB

Sierra Club et al v. Jackson
Assigned to: Hon. Charles R. Breyer
Demand: $0
Cause: Environmental Matters

Date Filed: 09/09/2010
Date Terminated: 12/19/2011
Jury Demand: None
Nature of Suit: 893 Environmental Matters
Jurisdiction: U.S. Government Defendant

Plaintiff

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Kimberly Ann Sturm ,
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V.

Defendant

Lisa P. Jackson
in her official capacity as Administrator, United States Environmental Protection Agency

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Date Filed	#	Docket Text
09/09/2010	1	COMPLAINT for Injunctive & Declaratory Relief - [Summons Issued] against Lisa P. Jackson. [Filing Fee: $350.00, Receipt Number 34611050424] Filed by Plaintiffs Sierra Club & WildEarth Guardians. (Attachments: #(1) Civil Cover Sheet) (tn, COURT STAFF) (Filed on 9/9/2010) (Entered: 09/10/2010)
09/09/2010	2	SUMMONS Issued as to Defendant Lisa P. Jackson. (tn, COURT STAFF) (Filed on 9/9/2010) (Entered: 09/10/2010)
09/09/2010	3	ADR SCHEDULING ORDER: Joint Case Management Statement due 12/14/2010 & InitialCase Management Conference set for 12/21/2010 at 10:00 AM.. (tn, COURT STAFF) (Filed on 9/9/2010) (Entered: 09/10/2010)
09/09/2010	4	Certification of Interested Entities or Persons filed by Sierra Club & WildEarth Guardians. (tn, COURT STAFF) (Filed on 9/9/2010) (Entered: 09/10/2010)
09/09/2010	5	PROOF OF SERVICE filed by Sierra Club & WildEarth Guardians of re 2 Summons Issued, re 1 Complaint & 4 Certificate of Interested Entities. (tn, COURT STAFF) (Filed on 9/9/2010) (Entered: 09/10/2010)
09/09/2010		CASE DESIGNATED for Electronic Filing. (tn, COURT STAFF) (Entered: 09/10/2010)

09/15/2010	6	SUMMONS Issued as to Melinda L. Haag, U.S. Attorney for Northern District of California & Eric H. Holder, Jr., U.S. Attorney General on behalf of Defendant Lisa P. Jackson. (tn, COURT STAFF) (Filed on 9/15/2010) (Entered: 09/16/2010)
09/23/2010	7	SUMMONS Returned Executed by Sierra Club. Lisa P. Jackson served on 9/23/2010, answer due 10/14/2010. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons)(Henry, Kristin) (Filed on 9/23/2010) (Entered: 09/23/2010)
10/14/2010	8	APPLICATION of Attorney Kimberly [Kasey] A. Sturm for Leave to Appear in Pro Hac Vice, [Filing Fee: $275.00, Receipt Number 34611051682] filed by Sierra Club, WildEarth Guardians. (Attachments: #(1) Proposed Order) (tn, COURT STAFF) (Filed on 10/14/2010) (Entered: 10/15/2010)
10/18/2010	9	ORDER GRANTING Application of Kimberly A. Sturm for Admission of Attorney Pro Hac Vice re 8 . Signed by Magistrate Judge Elizabeth D. Laporte. (lmh, COURT STAFF) (Filed on 10/18/2010) (Entered: 10/18/2010)
11/10/2010	10	NOTICE of Appearance by Michelle R. Lambert (Lambert, Michelle) (Filed on 11/10/2010) (Entered: 11/10/2010)
11/16/2010	11	Declination to Proceed Before a U.S. Magistrate Judge by Lisa P. Jackson. (Lambert, Michelle) (Filed on 11/16/2010) (Entered: 11/16/2010)
11/16/2010	12	CLERK'S NOTICE of Impending Reassignment to U.S. District Judge. (lmh, COURT STAFF) (Filed on 11/16/2010) (Entered: 11/16/2010)
11/23/2010	13	ORDER REASSIGNING CASE. Case reassigned to Judge Hon. Charles R. Breyer for all further proceedings. Judge Magistrate Judge Elizabeth D. Laporte no longer assigned to the case.. Signed by Executive Committee on 11/23/10. (as, COURT STAFF) (Filed on 11/23/2010) (Entered: 11/23/2010)
11/23/2010	14	AMENDED COMPLAINT , *First* against Lisa P. Jackson. Filed bySierra Club, WildEarth Guardians. (Sturm, Kimberly) (Filed on 11/23/2010) (Entered: 11/23/2010)
11/29/2010	15	CLERKS NOTICE Initial Case Management Conference set for 1/14/2011 08:30 AM in Courtroom 8, 19th Floor, San Francisco. (Attachments: # 1 Standing Order) (be, COURT STAFF) (Filed on 11/29/2010) (Entered: 11/29/2010)
11/30/2010	16	Answer to 14 Amended Complaint byLisa P. Jackson. (Lambert, Michelle) (Filed on 11/30/2010) Modified on 12/1/2010 (mcl, COURT STAFF). (Entered: 11/30/2010)
11/30/2010	17	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Lambert, Michelle) (Filed on 11/30/2010) (Entered: 11/30/2010)
11/30/2010	18	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Henry, Kristin) (Filed on 11/30/2010) (Entered: 11/30/2010)
11/30/2010	19	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options *(WildEarth Guardians)* (Henry, Kristin) (Filed on 11/30/2010) (Entered: 11/30/2010)
11/30/2010	20	NOTICE of need for ADR Phone Conference (ADR L.R. 3-5 d) (Lambert, Michelle) (Filed on 11/30/2010) (Entered: 11/30/2010)

12/01/2010	21	NOTICE of need for ADR Phone Conference (ADR L.R. 3-5 d) *Corrected Notice* (Lambert, Michelle) (Filed on 12/1/2010) (Entered: 12/01/2010)
12/16/2010	22	STIPULATION *To Continue Initial Case Management Deadlines by 60 Days and Proposed Order Thereon* by Lisa P. Jackson. (Lambert, Michelle) (Filed on 12/16/2010) (Entered: 12/16/2010)
12/17/2010	23	ORDER to continue ICMC re 22 Stipulation filed by Lisa P. Jackson Initial Case Management Conference set for 3/18/2011 08:30 AM in Courtroom 8, 19th Floor, San Francisco.. Signed by Judge Charles R. Breyer on 12/17/2010. (be, COURT STAFF) (Filed on 12/17/2010) (Entered: 12/17/2010)
03/01/2011	24	ADR Clerks Notice Setting ADR Phone Conference on 3/15/11 at 11:30 a.m. Pacific time. Please take note that at the appointed time, all parties shall call 605-477-3000 and use access code 560060. (sgd, COURT STAFF) (Filed on 3/1/2011) (Entered: 03/01/2011)
03/10/2011	25	JOINT CASE MANAGEMENT STATEMENT filed by Lisa P. Jackson. (Attachments: # 1 Proposed Order)(Lambert, Michelle) (Filed on 3/10/2011) (Entered: 03/10/2011)
03/14/2011	26	ORDER vacating CMC set for 3/18/2011 re 25 Joint Case Management Statement filed by Lisa P. Jackson Status Conference set for 5/6/2011 08:30 AM in Courtroom 8, 19th Floor, San Francisco before Hon. Charles R. Breyer.. Signed by Judge Charles R. Breyer on 3/11/2011. (beS, COURT STAFF) (Filed on 3/14/2011) (Entered: 03/14/2011)
03/15/2011		ADR Remark: ADR Phone Conference held by GDB on 3/15/11. (sgd, COURT STAFF) (Filed on 3/15/2011) (Entered: 03/15/2011)
04/28/2011	27	Joint MOTION to Appear by Telephone *at Status Conference* filed by Lisa P. Jackson. (Attachments: # 1 Proposed Order)(Lambert, Michelle) (Filed on 4/28/2011) (Entered: 04/28/2011)
04/28/2011	28	ORDER by Judge Charles R. Breyer granting 27 Motion to Appear by Telephone (beS, COURT STAFF) (Filed on 4/28/2011) (Entered: 04/28/2011)
05/06/2011	29	Minute Entry: Status Conference (Date Filed: 5/6/2011). Further Case Management Conference set for 8/19/2011 08:30 AM in Courtroom 8, 19th Floor, San Francisco. (Court Reporter - Not Reported.) (be, COURT STAFF) (Date Filed: 5/6/2011) (Entered: 05/06/2011)
08/10/2011	30	SECOND AMENDED COMPLAINT against Lisa P. Jackson. Filed bySierra Club, WildEarth Guardians. (Sturm, Kimberly) (Filed on 8/10/2011) Modified on 8/11/2011 (mcl, COURT STAFF). (Entered: 08/10/2011)
08/10/2011	31	Joint MOTION to Stay *All Deadlines for 90 Days and Notice of Proposed Settlement* filed by Lisa P. Jackson. Responses due by 8/24/2011. Replies due by 8/31/2011. (Attachments: # 1 Proposed Order)(Lambert, Michelle) (Filed on 8/10/2011) (Entered: 08/10/2011)
08/15/2011	32	ORDER by Judge Charles R. Breyer granting 31 Motion to Stay All Deadlines for

		90 Days (beS, COURT STAFF) (Filed on 8/15/2011) (Entered: 08/15/2011)
08/15/2011		***Deadlines terminated. CMC set for 8/19/2011 vacated (beS, COURT STAFF) (Filed on 8/15/2011) (Entered: 08/15/2011)
12/16/2011	33	Joint MOTION Administrative Closure of Case filed by Lisa P. Jackson. Responses due by 12/30/2011. Replies due by 1/6/2012. (Attachments: # 1 Exhibit Stipulation, # 2 Proposed Order)(Lambert, Michelle) (Filed on 12/16/2011) (Entered: 12/16/2011)
12/16/2011	34	NOTICE of Substitution of Counsel by Christina Louise Richmond (Richmond, Christina) (Filed on 12/16/2011) (Entered: 12/16/2011)
12/19/2011	35	ORDER by Judge Charles R. Breyer granting 33 Motion for administrative closure (beS, COURT STAFF) (Filed on 12/19/2011) (Entered: 12/19/2011)

PACER Service Center

Transaction Receipt

05/12/2013 13:18:08

PACER Login:	bb0160	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	3:10-cv-04060-CRB
Billable Pages:	4	**Cost:**	0.40

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 8

MODIFICATION OF SETTLEMENT AGREEMENT
Sierra Club et al. v. Jackson
No. 3:10-cv-04060-CRB (N.D. Cal.)

WHEREAS, on August 10, 2011 Plaintiffs Sierra Club and WildEarth Guardians filed their second amended complaint in Sierra Club v. Jackson, No. 3:10-cv-04060-CRB (N.D. Cal.) against Defendant Lisa P. Jackson, in her official capacity as Administrator of the United States Environmental Protection Agency ("EPA"), alleging that EPA failed to undertake certain nondiscretionary duties under the Clean Air Act, 42 U.S.C. §§ 7404-7671q; and

WHEREAS, on June 30, 2011, Sierra Club submitted a petition for rulemaking to EPA, requesting that EPA act on specific alleged State Implementation Plan ("SIP") deficiencies related to provisions in SIPs related to excess emissions during periods of startup, shutdown, or malfunction at sources ("Plaintiff's SSM Petition"); and

WHEREAS, on November 30, 2011, the Parties executed a settlement agreement ("Agreement") resolving the lawsuit in Sierra Club v. Jackson, No. 3:10-cv-04060-CRB (N.D. Cal.); and

WHEREAS, Paragraph 19 of the Agreement provides that the Parties may modify any deadline in the Agreement by mutual written consent; and

WHEREAS, Paragraph 15 of the Agreement, as modified by a previous stipulation, provides:

> Sierra Club submitted Plaintiff's SSM Petition on June 30, 2011. Plaintiff's SSM Petition addresses certain specifically identified provisions in the SIPs of states that Sierra Club contends are contrary to the CAA and EPA's policies for emissions during SSM events, and explains the basis for that contention with respect to each identified provision. EPA shall propose action to grant or to deny Plaintiff's SSM Petition by December 14, 2012. EPA shall take final action to grant or to deny Plaintiff's SSM Petition by June 28, 2013. Plaintiffs agree that EPA may meet these obligations in one or more administrative actions, as EPA determines appropriate, and that EPA may elect to grant or to deny Plaintiff's SSM Petition with respect to individual alleged illegal SSM provisions, as EPA determines is consistent with the CAA and its policies. EPA further agrees that for purposes of this Settlement Agreement, a grant of the petition in question with respect to an alleged illegal SSM provision shall entail the issuance of a final SIP call under CAA section 110(k)(5) or of a final error correction under CAA section 110(k)(6), as EPA deems appropriate, by June 28, 2013, deadline. Nothing in this Settlement Agreement shall be construed as precluding the Plaintiff from challenging EPA's response to Plaintiff's SSM Petition in whole or in part.

WHEREAS, Paragraph 28 was added to the Agreement by a previous stipulation, and provides that counsel for EPA shall confer with counsel for Sierra Club concerning the Agency's

progress towards meeting these obligations on November 2 and December 2, 2012, and January 8, February 2, March 2, April 2, May 2 and June 2, 2013, or on such other date that is mutually agreeable.

WHEREAS, the Parties wish to extend the deadlines for EPA to propose action and to take final action by 60 days, and to continue to confer on the Agency's progress toward these obligations on a monthly basis;

NOW, THEREFORE, the Parties agree as follows:

1. The references in Paragraph 15, as modified by previous stipulations, to "December 14, 2012" and "June 28, 2013" are hereby replaced by "February 12, 2013" and "August 27, 2013," respectively.

2. The references in Paragraphs16 and 17, as modified by previous stipulations, to "December 14, 2012 or June 28, 2013 deadlines" are hereby replaced by "February 12, 2013 or August 27, 2013 deadlines."

3. Paragraph 28 is replaced by:

> The Parties agree that counsel for EPA shall confer with counsel for Sierra Club concerning the Agency's progress towards meeting these obligations on a mutually agreeable date at the beginning of each month until EPA takes final action to grant or to deny Plaintiff's SSM Petition.

4. The modification changes only the above-specified text, and does not change any other requirement or term of the Agreement.

5. Each undersigned representative of the Parties certifies that he or she is fully authorized by that Party to enter into and execute the terms of this modification, and to legally bind such Party to this modification.

6. This modification may be executed in any number of counterpart originals, all of which shall collectively constitute one agreement.

FOR PLAINTIFFS:

Robert Ukeiley
Law Office of Robert Ukeiley

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Berea, KY 40403
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(866) 618-1017
rukeiley@igc.org

Dated: 12/15/12

Counsel for Plaintiffs

FOR EPA:

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Assistant Attorney General
Environment and Natural Resources
Division

Christina L. Richmond

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Environment and Natural Resources
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(202) 514-8865
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Dated: 12/17/2012

Counsel for Defendant

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 9

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

August 10, 2012

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Hq.foia@epa.
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. §552, as amended).

By this letter the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Nebraska, North Dakota, Michigan, South Carolina, South Dakota, Texas, Utah and Wyoming ("**Requesting States**") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009 to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("**Other Organizations**"), concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2); the Clean Water Act ("**CWA**"), 33 U.S.C. § 1365;

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

or the Resource Conservation and Recovery Act ("**RCRA**"), 42 U.S.C. § 6972;

ii. the course of action to take with respect to any state implementation plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") under the CAA for any State;

iii. the course of action to be taken concerning a State's administration of any provision of either the CAA, CWA or RCRA; or

iv. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered, under the CAA, CWA or RCRA concerning a State (the "**Subject**").

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

i. the Office of the Administrator;
ii. the Office of Air and Radiation;
iii. the Office of Chemical Safety and Pollution Prevention;
iv. the Office of Enforcement and Compliance Assurance;
v. the Office of Environmental Information;
vi. the Office of General Counsel;
vii. the Office of Inspector General;
viii. the Office of International and Tribal Affairs;
ix. the Office of Research and Development;
x. the Office of Solid Waste and Emergency Response;
xi. the Office of Water;
xii. Region 1;
xiii. Region 2;
xiv. Region 3;
xv. Region 4;
xvi. Region 5;
xvii. Region 6;
xviii. Region 7;
xix. Region 8;
xx. Region 9; or

xxi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

This request is not meant to be exclusive of any other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

"Interested Organizations" include the:

1. AFL-CIO
2. American Lung Association
3. American Nurses Association
4. Appalachian Center for the Economy and the Environment and Public Justice
5. Appalachian Mountain Club
6. Biodiversity Conservation Alliance
7. Center for Biological Diversity
8. Chesapeake Bay Foundation
9. Coal River Mountain Watch
10. Coalition for Clean Air
11. Coalition for a Safe Environment
12. Colorado Environmental Coalition
13. Conservation Law Foundation
14. Conservation Northwest
15. Defenders of Wildlife
16. Delaware Riverkeeper Network
17. Desert Citizens Against Pollution
18. Dine Citizens Against Ruining Our Environment
19. Door County Environmental Council
20. Environmental Activist League
21. Environment America
22. Environment California
23. Environmental Defense Fund
24. Environmental Integrity Project
25. Environmental Law and Policy Center
26. Farm Labor Organizing Committee
27. Florida Wildlife Federation
28. Friends of Animals
29. Grand Canyon Trust

30. Greater Yellowstone Coalition
31. Green Law
32. Greenpeace
33. Gulf Restoration Network
34. Habitat Education Center
35. Iowa Environmental Council
36. Izaak Walton League of America
37. Kentucky Environmental Foundation
38. Kentucky Waterways Alliance
39. Louisiana Environmental Action Network
40. Medical Advocates for Healthy Air
41. Michigan Nature Association
42. Migrant Clinicians Network
43. Minnesota Center for Environmental Advocacy
44. Missouri Coalition for the Environment
45. Montana Environmental Information Center
46. Montanans Against Toxic Burning
47. Mossville Environmental Action NOW
48. National Parks Conservation Association
49. National Wildlife Federation
50. Natural Resources Defense Council
51. Natural Resources Council of Maine
52. Northwest Treeplanters and Farmworkers United
53. Northwoods Wilderness Recovery
54. Ohio Environmental Council
55. Oregon Natural Desert Association
56. Our Children's Earth Foundation
57. Pacific Coast Federation of Fishermen's Associations
58. Pesticide Action Network North America
59. Physicians for Social Responsibility
60. Plains Justice
61. Powder River Basin Resource Council
62. Prairie Rivers Network
63. Red Rock Forests
64. Riverkeeper
65. San Juan Citizens Alliance
66. Save the Bay
67. Sierra Club
68. Southern Environmental Law Center
69. Southern Utah Wilderness Alliance
70. Tennessee Clean Water Network
71. United Farm Workers

72. Valley Watch
73. Waterkeeper Alliance
74. Western Colorado Congress
75. Western Resource Advocates
76. Western Watersheds Project
77. WildEarth Guardians
78. Wilderness Society
79. Wilderness Workshop
80. Winter Wildlands Alliance

Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA, the CWA, the RCRA, and the Endangered Species Act ("**ESA**"). *See* **Attachment A**. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost $1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs – including the imposition of proposed federal implementation plans ("**FIPs**"). Still other Consent Decrees concern stringent new air and water regulations impacting large segments of American industry; and Consent Decrees with other agencies concern "listing" 674 plant and animal species as "threatened" under the ESA.

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs – something EPA has not done before in administering the CAA. This is detrimental to the States and "unwinds" the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought

to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where Wildearth Guardians filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP.

State Attorneys General from the Requesting States are in the process of evaluating EPA's alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA's action harm and jeopardize the States' role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University Libraries in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Further, most, if not all, of these Libraries are a Federal Repository, its Congressionally certified status as a resource to foster openness in government, as well is its role in facilitating the teaching and research occurring at the Universities, will be well served. These materials will not be used for commercial use or gain.

In light of the ongoing and contentious public policy controversy regarding EPA's coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA's actions.

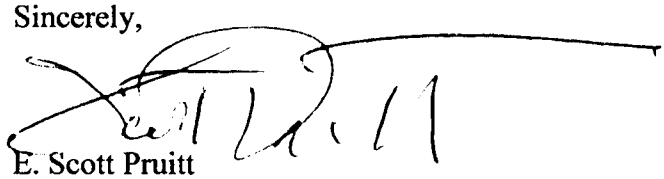
In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve our right to appeal the withholding or deletion of any information and expect that you will list the office and address were such an appeal can be sent.

We anticipate, however, that you will make the requested materials available within the statutorily prescribed period. We thus also request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns "the operations or activities of the government;" disclosure is "likely to contribute" to an understanding of government operations or activities; disclosure will contribute to "public understanding;" the disclosure is likely to contribute "significantly" to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States' interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv). In this regard, we reiterate that we have no intention of using the information disclosed for financial gain. If for some reason, the fee waiver request is denied, while reserving our right to appeal such a decision, the Requesting States are willing to pay $5.00 (five dollars) to cover costs of document search and duplication.

Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.
Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,



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State of South Dakota

Gregg Abbott
Attorney General
State of Texas

Mark Shurtleff
Attorney General
State of Utah

Gregory A. Phillips
Attorney General
State of Wyoming

Case Name	**Additional Plaintiff(s)**	**Issue**
Portland Cement Assn. v. EPA, No. 07-1046 (D.C. Cir.)	Sierra Club, Desert Citizens Against Pollution, Downwinders At Risk, Friends of Hudson, Huron Environmental Activist League, Montanans Against Toxic Burning	NESHAP for Cement Kilns
California v. EPA, No. 08-1178 (D.C. Cir.)	Sierra Club, Environmental Defense Fund, NRDC, Environment California	California GHG Waiver
Florida Wildlife Federation v. Jackson, No. 4:08-cv-000324-RH-WCS (N.D. Fla.)	Sierra Club, St. Johns Riverkeeper, Conservancy of Southwest Florida, and Environmental Confederation of Southwest Florida	Numeric nutrient criteria for waters in the State of Florida
WildEarth Guardians v. Jackson, No. 09-cv-00089-CCK (D. D.C.)	San Juan Citizens Alliance	CAA Regulations on Oil and Gas Drilling Operations
Mississippi v. EPA, No. 08-1200 (D.C. Cir.)	American Lung Association, Environmental Defense Fund, NRDC, National Parks Conservation Association, Appalachian Mountain Club	Ozone NAAQS Reconsideration
Sierra Club v. EPA, No. 1:09-cv-00218 (D.C. Cir.)	Environmental Integrity Project	Review and revision of new source performance standards for nitric acid plants
Mossville Environmental Action NOW v. Jackson, No. 1:08-cv-01803 (D. D.C.)	Louisiana Environmental Action Network, Sierra Club	New MACT standards for PVC manufacturers
WildEarth Guardians v. Jackson, No. 4:09-cv-02453 (N.D. Cal.)		Compliance with Regional Haze rules in California, Idaho, New Mexico, North Dakota, Oklahoma, Oregon

Case Name	**Additional Plaintiff(s)**	**Issue**
Center for Biological Diversity v. EPA, No. 09-00670 (W.D. Wash.)		Regulation of GHG under the CWA
American Nurses Association v. Jackson, No. 1:08-cv-02198-RMC (D. D.C.)	Chesapeake Bay Foundation, Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, Natural Resources Council of Maine, NRDC, Physicians for Social Responsibility, Sierra Club, Ohio Environmental Council, Waterkeeper Alliance	CAA National Emissions Standards for Hazardous Air Pollutants (NESHAP) for coal- and oil-fired electric generating units. Plaintiffs sued seeking to require EPA to set MACT standards under Section 112 of the CAA.
Sierra Club v. EPA No. 09-1063 (D.C. Cir.)	Louisiana Environmental Action Network	Emission-Comparable Fuels rule reconsideration
Sierra Club v. Jackson, No. 1:10-cv-133-PLF (D. D.C.)	WildEarth Guardians	Final action on (and disapproval of) Ozone State Implementation Plans for 21 states
Natural Resources Defense Council v. EPA, No. 06-0820-ag (2d Cir.)	AFL-CIO, Farm Labor Organizing Committee, Migrant Clinicians Network, Pesticide Action Network North America, United Farm Workers, Northwest Treeplanters and Farmworkers United, Physicians for Social Responsibility	Pesticide human testing consent rule.
Sierra Club v. Jackson, NO. 4:09-cv-00152-SBA (N.D. Cal.)		Multi-industry CAA Section 112 air toxics rules

Case Name	**Additional Plaintiff(s)**	**Issue**
Ohio Valley Environmental Coalition, et al v. United States Army Corps of Engineers, et al. petition for cert. dismissed, (U.S. August 19,2010) (No. 09-247)	Appalachian Center for the Economy and the Environment and Public Justice, Coal River Mountain Watch, and West Virginia Highlands Conservancy	CWA Guidance for Mountaintop Removal Mining Permits
Sierra Club v. Jackson, No. 09-1041 (D.C. Cir.)		Revisions to the Definition of Solid Waste under RCRA
Riverkeeper v. EPA, No. 1:06-cv-12987 (S.D. N.Y.)	Soundkeeper, Raritan Baykeeper, Delaware Riverkeeper Network, American Littoral Society, Save the Bay, Friends of Casco Bay, Santa Monica Baykeeper	CWA Section 316(b) standards on Cooling Water Intake Structures
Coke Oven Environmental Task Force v. EPA, consolidated into New York v. EPA (power plants); Environmental Integrity Project v. EPA, consolidated into American Petroleum Institute v. EPA (oil NSPS), No. 06-1332 (D.C. Cir.)	Environmental Defense Fund, Sierra Club, NRDC	GHG NSPS for Power Plants and Refineries
WildEarth Guardians, et al. v. Jackson, No. 1:11–cv–0001–CMA–MEH (D. CO)		Compliance with Regional Haze rules in Colorado, Wyoming, Montana, and North Dakota
Sierra Club, et al. v. Jackson, No. 10-cv-01954 VRW (N.D. CAO.).	Sierra Club, Medical Advocates for Healthy Air	EPA decision on adequacy of California's State Implementation Plan for Ozone in the San Joaquin Valley

Case Name	**Additional Plaintiff(s)**	**Issue**
Sierra Club, et al. v. Jackson, No. 10–cv–00889–CKK (D. D.C.)	Kentucky Environmental Foundation	EPA decision on adequacy of Kentucky's State Implementation Plans for Ozone and Regional Haze
Natural Resources Defense Council, Inc., et al. v. Jackson, No. CV-10-6029-MMM-AGR (C.D. Cal.).	Coalition for a Safe Environment	Approval/disapproval of plan revisions to State Implementation Plans for Ozone and PM2.5 for California's South Coast Air Basin
WildEarth Guardians v. Jackson, Case No. 4:11-cv-02205-SI (N.D. Cal.).	Elizabeth Crowe	EPA decision on adequacy of Phoenix-Mesa State Implementation Plan for 1997 Ozone standard
Sierra Club v. Jackson, No.3:09-cv-00122-slc (W.D. WI)		Decision to grant or deny a petition by Sierra Club that EPA object to Title V operating permit for Columbia Generating Station in Wisconsin
Sierra Club v. Johnson, No. 2:09-CV-00085-WOB (E. D. KY)		Decision to grant or deny a petition by Sierra Club that EPA object to Title V operating permits for Spurlock Generating Station in Maysville, KY
Sierra Club, et al. v. Jackson, No. 1:09-cv-00312 (D.D.C)	Valley Watch	Decision to grant or deny a petition by Sierra Club that EPA object to Title V operating permit for Cash Creek Generating Station in Kentucky

Case Name	**Additional Plaintiff(s)**	**Issue**
Sierra Club v. Jackson, No. 1:09–cv–01028–CKK (D.D.C).		Decision to grant or deny a petition by Sierra Club that EPA object to Title V operating permit for William C. Dale Generating Station in Kentucky
Environmental Integrity Project, et al. v. Jackson, No. 1:09-cv-01025-EGS (D.D.C).	Environmental Integrity Project	Decision to grant or deny a petition by Sierra Club that EPA object to Title V operating permit for John W. Turk Generating Station in Arkansas
Sierra Club v. Jackson, No. 09-cv-0751 (W.D. WI).		Decision to grant or deny a petition by Sierra Club that EPA object to Title V operating permit for J.P. Pulliam Generating Station in Wisconsin
Sierra Club v. Jackson, No. 10–cv–0127 (W.D. Wis.).		Decision to grant or deny a petition by Sierra Club that EPA object to Title V operating permit for Edgewater Generating Station in Wisconsin
Sierra Club v. Jackson, Sierra Club v. Jackson, No. 10-cv-0859 (D.D.C.)		Decision to grant or deny a petition by Sierra Club that EPA object to Title V operating permits for TVA Paradise Fossil Plant in Drakesboro, KY
National Parks Conservation Ass'n et al v. Jackson and U.S. EPA et al, No. 1:11-cv-01548-ABJ; also No. 12-5211 in the D.C. Circuit		Consent Decree entered in the D.C. District Court between the EPA and Environmental Organizations on regional haze SIPs and FIPs. State of Arizona has Intervened and appealed the Decree to the D.C. Circuit Court of Appeals

Case Name	**Additional Plaintiff(s)**	**Issue**
Gulf Restoration Network v. Jackson, U.S. EPA, No.: 2:12-cv-00677 (E.D. Louisiana)	Missouri Coalition for the Environment, Iowa Environmental Council, Tennessee Clean Water Network, Minnesota Center for Environmental Advocacy, Sierra Club, Waterkeeper Alliance, Prairie Rivers Network, Kentucky Waterways Alliance, Environmental Law & Policy Center, and the Natural Resources Defense Council	Challenge by environmental organizations to EPA's conclusion that the EPA does not have authority to implement numeric nutrient water quality standards and a nutrient TMDL in the Mississippi River Basin

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 10

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

February 6, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Hq.foia@epa.
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming ("**Requesting States**") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("**Other Organizations**"), concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

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ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

"**Interested Organizations**" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

i. the Office of the Administrator;
ii. the Office of Environmental Information;
iii. the Office of General Counsel;
iv. the Office of Inspector General;

v. the Office of International and Tribal Affairs;
vi. the Office of Research and Development;
vii. Region 1;
viii. Region 2;
ix. Region 3;
x. Region 4;
xi. Region 5;
xii. Region 6;
xiii. Region 7;
xiv. Region 8;
xv. Region 9; or
xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost $1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs – including the imposition of proposed federal implementation plans ("**FIPs**").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs – something EPA has not done before in administering the CAA.

This is detrimental to the States and "unwinds" the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where Wildearth Guardians filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota's intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA's alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA's action harm and jeopardize the States' role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns "the operations or activities of the government;" disclosure is "likely to contribute" to an understanding of government operations or activities; disclosure will contribute to "public understanding;" the disclosure is likely to contribute "significantly" to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States' interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems ("**Library Systems**") in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

A. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,

newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to Congress and the media.

As detailed above, the Requesting States intend to disseminate the requested information by making the report as well as the underling information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform **all** U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in many of the federal environmental programs. 40 C.F.R. § 2.107(*l*)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to

the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

B. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA's coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA's actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address were such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay $5.00 (five dollars) to cover costs of document search and duplication.

Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt
OKLAHOMA ATTORNEY GENERAL

P. Clayton Eubanks
DEPUTY SOLICITOR GENERAL
Office of Oklahoma Attorney General
(405) 522-8992 Fax (405) 522-0608
clayton.eubanks@oag.ok.gov

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

CERTIFIED MAIL

91 7199 9991 7032 0592 1186

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21
OKLAHOMA CITY, OK 73105

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

FIRST CLASS MAIL

Department: 2822T
Sigcon,

9999917032059211 86

Appeal Details

Tracking Number : EPA-HQ-2013-004583

Request Information

Tracking Number :	EPA-HQ-2013-003886
Full Name :	P. Clayton Eubanks
Organization :	Office of Oklahoma Attorney General
Date Submitted :	February 21, 2013
Request Phase :	Assignment
Request Track :	TBD
Final Disposition :	Undetermined

Appeal Information

Tracking Number :	EPA-HQ-2013-004583
Full Name :	Mr. P. Clayton Eubanks
Organization :	Office of Oklahoma Attorney General
Date Submitted :	March 18, 2013
Appeal Status :	Submitted
Final Disposition :	Undetermined

Basis for Appeal :

The basis for this appeal is under Agency review.

BACK TO SEARCH RESULTS BACK TO SEARCH HOME

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 11

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

April 1, 2013

The Honorable Gina McCarthy
Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Assistant Administrator McCarthy:

We are writing to express concerns with your February 12, 2013, proposed rule, "Startup, Shutdown, and Malfunction: Proposed Response to Petition for Rulemaking, Findings of Inadequacy, and Call for Plan Revisions." We find this proposed rule deeply flawed for several reasons.

First, this is the latest in a series of rulemakings initiated by this Administration in response to so-called "sue and settle" agreements with special interest groups. In November 2011, the Environmental Protection Agency (EPA) and the Sierra Club negotiated a settlement whereby EPA unilaterally agreed to respond to a petition filed by Sierra Club seeking the elimination of a longstanding Clean Air Act (CAA) exemption for excess emissions during periods of startup, shutdown, and malfunction ("SSM"). The EPA went out of its way further to deny the participation of the States, and other affected parties. Oddly, it appears that, instead of defending EPA's own regulations and the SSM provisions in the EPA-approved air programs of 39 states, EPA simply agreed to include an obligation to respond to the petition in the settlement of an entirely separate lawsuit. In other words, EPA went out of its way to resolve the SSM petition in a coordinated settlement with the Sierra Club. Our concerns with the Agency's sue and settle tactics are well documented—these settlement agreements are often accomplished in a closed door fashion that contravenes the Executive Branch's solemn obligation to defend the law, avoids transparency and accountability, excludes impacted parties, and often results in the federal government paying the legal bills of these special interest groups at taxpayer expense. The circumstances under which EPA has agreed to initiate this new rulemaking reaffirms a pattern and practice of circumventing transparency.

Second, EPA's new approach, embodied in the SSM proposal, contravenes four decades of prior EPA practice. The SSM exemption has been approved by EPA since 1972 and has been a key element of most EPA-approved State Implementation Plans (SIPs). In fact, EPA has included SSM exemptions in EPA's own standards, including the New Source Performance Standards, for decades. Notwithstanding 40 years of precedent to the contrary, EPA has now decided that the SIPs of 36 states are legally inadequate because of their SSM provisions.

Third, EPA aims to command by federal edict that 36 States submit revised SIPs for EPA review and approval. This approach—confounded by "sue and settle" style tactics—blatantly ignores the proper role of the States and EPA under the Clean Air Act's cooperative federalism structure. The U.S. Court of Appeals for the D.C. Circuit recently explained the primary role of the States when it invalidated EPA's Cross State Air Pollution Rule (which likewise sought to override the States):

> To deal with [the Clean Air Act's] complex regulatory challenge, Congress did not authorize EPA to simply adopt limits on emissions as EPA deemed reasonable. Rather, Congress set up a federalism-based system of air pollution control. Under this cooperative federalism approach, both the Federal Government and the States play significant roles. The Federal Government sets air quality standards for pollutants. The States have the primary responsibility for determining how to meet those standards and regulating sources within their borders.

Eme Homer City Generation v. EPA, 696 F.3d 7, 11 (D.C. Cir. 2012) (emphasis added). Likewise, as the Fifth Circuit has long recognized, "The great flexibility accorded the states under the Clean Air Act is [...] illustrated by the sharply contrasting, narrow role to be played by the EPA." Fla. Power & Light Co. v. Costle, 650 F.2d 579, 587 (5th Cir. 1981). EPA's latest proposal on SSM exemptions would suggest that EPA believes the States have been relegated to mere regional offices of the EPA. See U.S. Const. amend. X ("powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

Finally, we find unacceptable the unreasonably brief time period for public comments on the SSM proposal. EPA is allowing just 30 days for public comment and, if requested, just one public hearing—in Washington, DC. More time is required for a proposal changing four decades of EPA precedent and the SIPs of 36 states. We have heard rumors of a short extension, but we would ask that, at a minimum, EPA grant an extension of the public comment period to at least 120 days, as requested by the Attorneys General of seventeen states (including Alabama and Louisiana) in a letter to you dated March 15, 2013.

In light of these concerns, we request an immediate response to the following questions with a simple "yes" or "no" answer:

1. Will EPA provide all records, electronic or otherwise, of meetings, conversations, e-mails, letters, or other communications or other documents in EPA's possession referring or relating to the Sierra Club SSM petition and settlement agreement?

2. Did EPA or any other federal entity make any payments, for attorneys' fees or otherwise, to the Sierra Club in relation to the above-referenced litigation or settlement agreement?

3. Did EPA invite the States to participate in the settlement discussions with the Sierra Club in this matter?

4. Did EPA amend the settlement agreement in December 2012 to require that "EPA shall confer with counsel for Sierra Club concerning the Agency's progress towards meeting these obligations"?

5. Did EPA amend the settlement agreement to require that EPA or Sierra Club confer with the affected States concerning the settlement?

6. Did EPA invite the States to review the draft settlement agreement with the Sierra Club?

7. In a letter dated March 15, 2013, the Attorneys General of seventeen States requested that the public comment period for the SSM proposed rule be extended by a minimum of 120-days from February 22, 2013. We believe this request should be granted. Will EPA grant this request?

8. In a letter dated August 10, 2012, the Attorneys General of thirteen States requested, pursuant to the Freedom of Information Act, documents concerning, among other things, recent Clean Air Act settlements with non-governmental organizations. Will EPA provide the requested documents?

Your kind attention to this important matter is greatly appreciated.

Sincerely,

David Vitter
Ranking Member
Senate Committee on Environment
& Public Works

Jeff Sessions
Ranking Member
Senate Subcommittee on Clean Air
& Nuclear Safety

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 12

MANDATE MADNESS: WHEN SUE AND SETTLE JUST ISN'T ENOUGH

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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MANDATE MADNESS: WHEN SUE AND SETTLE JUST ISN'T ENOUGH

Thursday, June 28, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:02 a.m., in Room 2203, Rayburn House Office Building, Hon. James Lankford [chairman of the subcommittee] presiding.

Present: Representatives Lankford, Kelly, Labrador, Connolly and Speier.

Staff Present: Alexia Ardolina, Assistant Clerk; Joseph A. Brazauskas, Counsel; Brian Daner, Counsel; Linda Good, Chief Clerk; Kristina M. Moore, Senior Counsel; Noelle Turbitt, Assistant Clerk; Jeff Wease, Deputy CIO; Jaron Bourke, Minority Director of Administration; Adam Koshkin, Minority Staff Assistant; Suzanne Owen, Minority Health Policy advisor; and Cecelia Thomas, Minority Counsel.

Mr. LANKFORD. The committee will come to order.

This is a hearing from the Oversight and Government Reform, Technology and Procurement Reform and Intergovernmental Relations Subcommittee. We exist to secure two fundamental principles: First, that Americans have the right to know the money Washington takes from them is well spent; and, second, Americans deserve an efficient and effective government that works for them.

Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers because taxpayers do have a right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy. This is the mission of the Oversight and Government Reform Committee.

We have a significant amount of attention that is going to happen today focused on the red tape, and that has happened across all of Congress recently from both parties actually trying to make us more efficient. This is an issue that does hold us back from our own growth in prosperity.

Today's hearing we are going to focus on examining the highly questionable practice that's been perfected by the Environmental Protection Agency known as "sue and settle." This has emboldened

the administration to pursue an aggressive green agenda while escaping political accountability for the costs and burdens of these regulations and what they impose on job creators.

The process is rather simple. Environmental groups will sue the EPA, demanding the agency issue a regulation on an accelerated timeframe. Rather than fighting the lawsuit, EPA quickly agrees to the special interest demands. These settlement agreements are reached after closed-door negotiations between EPA and environmental groups, where other interested parties are excluded. Once the settlement agreement is approved by a Federal Court in a consent decree, the EPA is legally bound to engage in the rulemaking.

It is important to note that when a court approves the consent decree, it does not consider the merits. The court is merely accepting and ratifying what the parties agreed to.

In the past 3 years, the administration has conducted approximately 60 settlements with special interests. Twenty-nine of these agreements bound the EPA to make major policy changes. The plaintiffs in these cases are often the very same reoccurring players: The Sierra Club, NRDC, Defenders of Wildlife, Wild Earth Guardians, Center for Biological Diversity. These special-interest groups not only hold a special seat at the table with the EPA, EPA is effectively paying them to sue the agency. In 2011 alone, taxpayers reimbursed these groups millions of dollars to participate in these sue-and-settle agreements.

In addition to examining this outrageous practice, we will hear today about two particular egregious cases where EPA defied all norms of transparency, sidelined interested parties, and is now in the process of imposing extraordinary burdensome regulations. These two cases are EPA's regional haze regulations and its greenhouse gas standards for power plants.

In the case of regional haze, Congress was crystal clear that this is purely an aesthetic visibility program and is to be administered by the States, not by the EPA. Through sue and settle, EPA is attempting to federalize the program in imposing costs well beyond what the State had determined was necessary or justified. Ultimately, EPA's proposal will cost billions of dollars for visibility improvements that are undetectable to the human eye.

In the second case study, New Source Performance Standards for electric utilities, EPA concluded settlement negotiations on December 23rd, 2010, and agreed to promulgate NSPS for greenhouse gases for both new and existing electric generating units under section 111(a) and 111(d) of the Clean Air Act. At the time this settlement was reached, EPA was not in violation of any mandatory duty, and as such the litigants didn't have a legal leg to stand on. And yet the Agency settled, committing the Agency to make major policy changes without interested parties at the table, and they rewarded litigants with a cash prize they were never entitled to.

These two case studies are but two examples of the dozens of policy changes EPA has committed to in sweetheart sue-and-settle arrangements with special interests.

Time and again when the EPA is criticized for the excessive burden imposed by their Agency, whether it be Utility MACT, Boiler MACT, Florida water quality standards, regional haze, NSPS, EPA's response is suspiciously similar: The Agency had no discre-

tion to extend the timeline to hear additional points of view. It is under a court order to finalize those regulations by date certain. Of course, that court order was agreed to by EPA in the first place.

Let's be clear: What EPA claims the law requires them to do is nothing more than what EPA agreed to do in a collusive agreement with special-interest allies. The lack of transparency is designed to circumvent other regulatory checks Congress has put in place.

Environmental regulations only work when they are made in an open process that involves all stakeholders. Sue-and-settle rulemaking is an affront to that process.

Finally, I want to tell you that we very much wanted a representative from the EPA here today to respond to these concerns that our panelists will raise and that I am raising. However, despite adequate notice, EPA has refused to provide a witness for today's proceedings. I am hopeful we can find a date in the near future when they can make an appropriate witness available to respond and add to detail to our questions today.

With that, I would like to recognize the person filling in for our ranking member today Ms. Speier for an opening statement.

Ms. SPEIER. Mr. Chairman, thank you. And let me say at the outset, first I would like to offer this into the record and ask unanimous consent that it be placed in the record. This is a letter from the United States Environmental Protection Agency dated June 22.

The chair mentioned that there was ample time offered to those at EPA to have a participant here. Actually, the first request came in on June 14th. They checked their travel schedules and other hearing requirements and found that one of the—both of the people that would be appropriate to testify at this hearing could not make it. So rather than finding a date that could accommodate both our schedules, this hearing went forward without having EPA represented, which frankly does not meet my standards as a committee that is supposed to be about oversight and hearing from the parties. So I would like to submit this for the record.

Mr. LANKFORD. Without objection.

Mr. LANKFORD. And one additional side note. We responded back to them when they said these three individuals were not available, asked for other individuals, asked for people by name. They responded back they had no one available. We asked for basically what the reasons were there was no one available on any of the topics on it, and we just received back a correspondence on that. So we do look forward to having them to get a chance to discuss this at a further hearing.

Ms. SPEIER. All right. Thank you, Mr. Chairman.

I must say that I have been a member of this committee for 4 years. I chaired a committee on oversight when I was in the State legislature in California for 6 years. And oversight hearings are supposed to be objective evaluations of an issue. It is in the interests of both the Democrats and the Republicans in Congress to find where there are problems and to fix them. But when hearings are entitled, as most hearings in this committee recently, with a point of view, we are not being objective, we are not looking at both sides, we are ramming down a particular principle, and I find that particularly disconcerting.

The focus of today's subcommittee hearing is on consent decrees and settlement agreements to commonplace court procedures that give parties in lawsuits the opportunity to settle their differences, while avoiding prolonged trials and mounting legal expenses. These procedures help parties in court cases reach compromises that bring advantages to both sides.

In lawsuits against the Environmental Protection Agency, whether brought by State or local governments, private companies, environmental groups or local citizens, a consent decree often leads to a timelier and less expensive resolution for all involved. Consent decrees and settlements provide resolution and certainty, while allowing EPA to do its job and protect the public interest. That is the commonsense, noncontroversial context for today's hearing. Or at least it should be.

Unfortunately, the majority has chosen to break with this historic support for these environmental protections, which are overwhelmingly popular with the public, and which they once helped create, in order to push a false narrative to fit a propollution agenda. Terms to describe consent decrees like "mandate madness" and "sue and settle" are catchy political slogans, but they are based on a flawed understanding of how our environmental laws work.

Accusations that environmental groups are somehow dictating government policy through court settlements rings just as hollow. In fact, an August 2011 GAO report covering the years 1995 to 2010 found, and I repeat this, no discernible, no discernible trend in lawsuits against the EPA. Now, this is the GAO, which is a separate entity that is independent, making that statement. However, it did note that private companies and industry trade associations accounted for 48 percent of those lawsuits, while local and national environmental and citizen groups collectively accounted for 30 percent.

So what are we saying here? Is black white and white black? The reality is that EPA gets sued a lot, not just by green groups, but more often than not by polluting industries, which are better funded and choose to fight their violations in court instead of cleaning up their acts. "Sue and settle" is a manufactured term and a distraction from the real sue-and-pollute strategy that these corporations prefer.

Existing law already provides ample means for parties to comment on and seek changes to consent decrees that they don't like. However, partisan attempts to rewrite those rules that have served the courts and the American people so well for decades is a solution in search of a problem.

I would like to thank our witnesses here for appearing before the subcommittee, and I would like to say that I look forward to your testimony. We will see.

Mr. LANKFORD. Thank you.

Mr. LANKFORD. All the Members will have 7 days to submit opening statements and extraneous material for the record.

I would like to recognize our panel. The Honorable Scott Pruitt is the attorney general of my State, of the State of Oklahoma. I know that he also has an appointment across the street at the Supreme Court. There is something happening today at 10 o'clock, I understand, over there, I have heard some sort of rumor on that.

And our State was also part of that, so he will be part of that as well. So we will excuse you around 9:30 today after we hear your testimony.

Mr. Roger Martella is a partner at Sidley Austin LLP and a former general counsel of the U.S. Environmental Protection Agency. Thank you for being here as well.

Mr. William Kovacs is senior vice president for environment and technology and regulatory affairs at the U.S. Chamber of Commerce.

Mr. Robert Percival is the director of the environmental law program, professor of law at the University of Maryland Francis King Carey School of Law. Thank you for being here very much.

And Mr. William Yeatman—is that correct, Yeatman—is the assistant director for the Center for Energy and Environment at the Competitive Enterprise Institute. Thank you for being here.

Pursuant to committee rules, all witnesses are sworn in before they testify. If you would please rise and raise your right hands, please.

Do you solemnly swear or affirm that the testimony you're about to give to this committee will be the truth, the whole truth, and nothing but the truth so help you God?

Thank you.

Let the record reflect all witnesses answered in the affirmative.

You may be seated.

In order to allow time for discussion, I would like you to limit your oral testimony to 5 minutes. You will see there the time, but we will also be attentive to that as well. We are not going to try to cut people off in the middle of it, but we would like you to be attentive to that. Your written statement, of course, has already been submitted for the record itself.

I would like to recognize Mr. Scott Pruitt to begin our testimony today.

WITNESS STATEMENTS

STATEMENT OF E. SCOTT PRUITT

Mr. PRUITT. Chairman Lankford, Ranking Member Connolly and members of the subcommittee, good morning, and thank you for inviting me to appear before you today to present my concerns on the legal and policy implications of recent actions that the chairman identified taken by the U.S. Environmental Protection Agency. This is a critical issue for Oklahoma, and I appreciate the attention that the chairman and this subcommittee is devoting to this matter.

First I would like to be clear about my intentions today regarding environmental policy. My comments will in no way disregard the law or the provisions we as a Nation or States have put into place to protect our natural resources. We take seriously our responsibility to preserve and protect these valuable natural assets so that they may be enjoyed by our children and grandchildren.

This responsibility requires a delicate balance between environmental and economic interests, which is why Congress, when drafting the Clean Air Act and the Regional Haze Program, gave deference and authority to the States, not a Federal agency, to take economic factors into consideration when deciding what actions

needed to be taken and over how many years for implementation. With these considerations in mind, the State of Oklahoma submits that Oklahoma stakeholders, not the EPA, should make decisions on regional haze where outcomes directly affect Oklahomans.

Congress was clear when they drafted the Clean Air Act and other environmental laws they intended for States and EPA to work together. They intended for cooperative federalism to take place to reach outcomes that protect our environment and at the same time take into consideration the economic costs. Unfortunately, this has not been the case over the past 3 years.

In Oklahoma's case, the regional haze matter, the EPA ignored its own provisions and denied our carefully crafted State plan in place of an unwarranted Federal plan. The State plan was not devised on a whim, but created after careful consideration and input from all the stakeholders in the State, including the Oklahoma Department of Environmental Quality. We followed the rules. The EPA did not.

If the EPA's unlawful Federal plan is allowed to move forward, utility rates in the State of Oklahoma will rise as much as 20 percent over a 3-year period, and the economic harm to the State will be irreparable. To stop the Federal plan, I, on behalf of the State, filed an appeal to the EPA's final rule and asked the tenth circuit for a stay. In a rare decision, as this committee will recognize, the court granted a stay this month, which we believe recognizes the potential merits of our case.

Once we became aware of actions by the EPA in Oklahoma, we began to dig deeper into the current EPA practices across the country. What we found was a complete abrogation of notice and public comment requirements when instituting Federal plans, as well as a setting of an environmental agenda through consent decrees. In several instances the EPA filed consent decrees on the same day that environmental groups filed lawsuits. This was in spite of the fact that these cases involved, as you know, Mr. Chairman, involved complex legal issues that typically would take weeks to review and respond. Such actions raised questions and concerns about the motives and transparency behind EPA's activities.

Attorneys general are in the process of evaluating the EPA's alarming practice of relying on consent decrees to deny States their important role as a partner under cooperative federalism. We are also concerned with the use of these consent decrees to implement Federal law. These decisions have put States in the position of dealing with burdensome regulations and harmful outcomes through processes in which they have no say.

In conclusion, the EPA's refusal to follow its own rules and create its agenda through consent decrees has denied States due process and ignored the foundation of cooperative Federalism set forth by Congress under the Clean Air Act. With the backing of the administration, the EPA is conducting, we believe, superlegislative activity that Congress has not authorized.

Members must take seriously their role in passing legislation and not delegate their authority to agencies through unchecked rulemaking and questionable settlements. These issues are of great importance to the State of Oklahoma because Oklahomans value

our State's natural resources which provide sustenance to Oklahoma's citizens and fuel our economic development.

I look forward to answering any questions the chairman and the committee may have. Thank you.

Mr. LANKFORD. Thank you.

[Prepared statement of Mr. Pruitt follows:]

Testimony before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform of the House Committee on Oversight and Government Reform

"Mandate Madness: When Sue and Settle Just Isn't Enough"

June 28, 2012

E. Scott Pruitt
Attorney General
State of Oklahoma

Dear Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee,

Thank you for allowing me to present my concerns on the legal and policy implications of the U.S. Environmental Protection Agency's actions regarding Regional Haze Regulations ("RHR"). There are three main points that cause concern among members of my staff, state leadership and Oklahoma stakeholders in relation to the EPA's actions: (1) the arbitrary and capricious nature of the EPA's preemption and disapproval of the Oklahoma State Implementation Plan ("SIP"); (2) the EPA's abrogation of notice and comment requirements when it imposes Federal Implementation Plans ("FIP") under the Regional Haze Regulations; and (3) the economic cost to states, industry and utility customers from the EPA's illegal actions under the Regional Haze Regulations. The EPA's refusal to follow its own rules has denied states due process and ignored the foundation of cooperative federalism set forth by Congress under the Clean Air Act. With the backing of the Obama Administration, the EPA is engaging in super legislative activity that Congress has not authorized, resulting in unchecked rule-making through questionable consent decrees. These issues are of great importance to the State of Oklahoma because Oklahomans value our state's natural resources, which provide sustenance to Oklahoma citizens and fuel our economic development. We take seriously our responsibility to preserve and protect these valuable natural assets so they may be enjoyed by future generations. This responsibility requires a delicate balance between environmental and economic interests. We must craft our environmental protection objectives with due consideration of the burden those objectives place on our economic development and overall well-being. With these considerations in mind, the State of Oklahoma submits that Oklahoma stakeholders, not the federal agency, should make decisions where outcomes directly affect Oklahomans.

Background on Oklahoma's Battle against the EPA and the Agency's Abuse of Regional Haze Regulations

In Section 169A of the 1977 Amendments to the Clean Air Act (CAA), Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section establishes as a national goal the "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). Congress recognized that this program requires a delicate balance that considers the timing, cost and economic impact of alternative methods to achieve such goals. 42 U.S.C. § 7491(g)(1) ("In determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance . . . .").

Congress added Section 169B to the Act in 1990 to address regional haze issues, and in 1999, EPA promulgated regulations addressing regional haze, 70 Fed. Reg. 39,104 (July 6, 2005), codified at 40 C.F.R. part 51, subpart P ("Regional Haze Regulations" or "RHR"). In Section 169B, Congress made clear its intent to delegate significant power to States to develop, review, approve, and implement site-specific implementation plans designed to make reasonable progress in achieving regional haze goals while balancing each State's unique economic and power needs. *See, e.g.*, 123 Cong. Rec. 13,696, 13,709 (1977). EPA has recognized that, because the issues to be balanced are uniquely State and source specific, "the State must determine the appropriate level of BART (best available retrofit technology) control for each source subject to BART." 70 Fed. Reg. at 39,107.

Ultimately, the CAA requires deference to State decision-making. The structure of CAA and RHR create distinct and defined duties of the State and EPA. The EPA is, for instance,

charged with promulgating general regulations designed to "assure ... reasonable progress toward meeting the national goal." *Id.* § 7491(a)(4). The EPA must also promulgate the list of "mandatory Class I Federal areas" which are to receive visibility protection under the Act. *Id.* § 7491(a)(2). Further, the statute tasks the EPA with providing support to the states by, for instance, studying methods for redressing visibility impairment and then providing "guidelines" to the states suggesting such appropriate methods. Similarly, under section 169B of the Act, the EPA is tasked with studying regional visibility impairment, and convening regional commissions comprised of state authorities. *Id.* § 7492(a)(1), (c). The CAA does not give the EPA authority to question the wisdom of a state's choices of emission limitations if they are part of a plan that satisfies the standards of the Act.

For more than a decade, Oklahoma Gas & Electric (OG&E) has voluntarily burned low sulfur coal with the electrical generating units ("EGUs") at the Muskogee and Sooner Generating Stations ("OG&E Units") in order to limit sulfur dioxide emissions (SO2). OG&E is Oklahoma's largest electricity provider and serves approximately 789,000 customers in 268 communities in Oklahoma and western Arkansas. Oklahoma Industrial Energy Consumers (OIEC) is a non-partisan, unincorporated association of large consumers of energy with facilities located in the State of Oklahoma. OIEC members are engaged in energy price-sensitive industries such as pulp and paper, cement, refining, glass, industrial gases, plastic, film, and food processing. OIEC members employ thousands of Oklahomans.

On February 17, 2010, the State of Oklahoma submitted to EPA its regional haze revisions to the Oklahoma State Implementation Plan ("Oklahoma SIP"). *See* Oklahoma SIP, Doc. ID No. EPA-R06-OAR-2010-0190-0002 (relevant portions attached hereto as Exhibit 3). After properly balancing the statutory factors related to regional haze, Oklahoma determined that

low sulfur coal constituted BART for SO2 emissions from the OG&E Units and proposed a SIP that would have made OG&E's continued use of that low sulfur coal a mandatory condition of operation. In balancing the BART factors, Oklahoma had before it both a 2008 cost analysis for the OG&E Units — one that both the EPA and the Oklahoma Department of Environmental Quality ("ODEQ") had stated was prepared in conformity with the EPA Air Pollution Control Cost Manual ("CCM") — and a 2009 cost analysis prepared at ODEQ's and EPA's request that was more robust and site-specific than the 2008 cost estimate. *See id.* Both the 2008 Cost Analysis and the 2009 Cost Analysis were prepared with the assistance of OG&E's engineering consultant, Sargent & Lundy LLC ("S&L"). Oklahoma concluded, based on this and other information, that scrubbers were not cost effective for the OG&E Units.

On March 22, 2011, more than one year after Oklahoma submitted its SIP to the EPA, EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part the Oklahoma SIP. *See* Proposed Rule, 76 Fed. Reg. 16,168. In the same notice, and without waiting for its proposed disapproval of parts of the Oklahoma SIP to become final — i.e., without waiting for and considering public comments on its proposed disapproval of portions of the Oklahoma SIP — EPA proposed a FIP to substitute its judgment for the judgment of Oklahoma on certain key issues statutorily delegated to Oklahoma, including the BART determinations for the OG&E Units.

On May 23, 2011, the State of Oklahoma, OIEC, and OG&E (among others) separately submitted extensive legal, policy, and technical comments to EPA opposing its proposed action and arguing that, for numerous reasons, the EPA's proposed action was contrary to the CAA and RHR and was otherwise arbitrary and capricious. Despite these comments, EPA published the Final Rule with respect to the Oklahoma SIP on December 28, 2011, disapproving the State's

SO2 BART determinations for the OG&E Units and for two units at another facility in the State. *See* 76 Fed. Reg. 81,728. EPA then simultaneously finalized the Oklahoma FIP that imposed an SO2 emission limit of 0.06 lbs/MMBtu for each OG&E Unit, which would require the installation of a scrubber at each affected unit by January 27, 2017. Moreover, in support of the FIP, EPA adopted entirely new approaches not contained within its proposed rule without proper notice and the opportunity to comment, in violation of APA requirements.

On December 28, 2011, EPA published a final rule with respect to the Oklahoma SIP, disapproving the State's SO2 BART determinations for the four OG&E units and for two units at another facility in the State based on EPA's own balancing of the five statutory factors. *See* Partial Approval of Oklahoma SIP and Promulgation of FIP, 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule"), JA 23. Petitioners filed requests for reconsideration with EPA in February 2012, but no action has been taken on those requests. The Final Rule both disapproved the Oklahoma SIP provisions that set out BART for the OG&E Units and promulgated a FIP, substituting EPA's own BART determination in place of the State's.

On February 24, 2012, the State of Oklahoma filed its Petition for Review in the Tenth Circuit Court of Appeals. On April 4, 2012, the State of Oklahoma filed a Joint Motion for a Stay of the Final Rule.

On June 15, 2012, Oklahoma filed its Joint Opening Brief in the Tenth Circuit Court of Appeals to resolve the pressing issues surrounding the EPA's abuse of the RHR, CAA, and rulemaking procedures. On June 22, 2012, the Tenth Circuit Court of Appeals granted the Petitioners Joint Motion for Stay of the Final Rule, concluding that the stay factors had been

met.[1] The stay was granted pending a hearing by the Tenth Circuit Court of Appeals merits panel.

a. The Role of the States

The role of the states under the CAA's visibility program is unique, as provided by sections 169A and 169B of the CAA. Unlike other programs where the states' role is to implement federally established standards, under the visibility program, the states have primary responsibility for establishing standards. In particular, the states are charged with developing emissions limitations after balancing a number of factors. The EPA's role under this program is simply one of support. Accordingly, the EPA must treat with special deference the determinations of a state, as embodied in a state's proposed Regional Haze SIP. States also are tasked with determining "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal ...." *Id.* § 7491(b)(2). States are responsible for determining best available retrofit technology for BART-eligible facilities. *Id.* § 7491(b)(2)(A). The states define the long-term strategy for making reasonable progress toward the national visibility goal. *Id.* § 7491(b)(2)(B). And it is the states, in consultation with one another, who are directed to assess the interstate transport of visibility impairing emissions and to decide what measures are necessary to address regional haze. *Id.* § 7492(d). Congress believed it important that states retain wide latitude in choosing how best to achieve national standards, given local needs and conditions. In addition to plain statutory language and the case law interpreting this language, the legislative history behind the Regional Haze Rule also is clear that Congress intended to vest individual states with broad authority to make BART determinations. For example, the following exchange occurred during the U.S.

[1] The stay factors are" I. Petitioners Are Likely To Succeed on the Merits II. Petitioners Will Suffer Irreparable Harm Absent a Stay III. The Balance of Equities Favors Granting Petitioner' Stay Request, and Granting a Stay is in the Public Interest.

Senate debate preceding adoption of the Conference Agreement behind Section 169A of the CAA:

> *Mr. McClure:* Under the conference agreement, does the state retain the sole authority for identification of sources for the purpose of visibility issues under this section?
>
> *Mr. Muskie:* Yes; the State, not the Administrator, identifies a source that may impair visibility and thereby falls within the requirement of section 128.
>
> *Mr. McClure:* And does this also hold true for determination of "Best Available Retrofit Technology?"
>
> *Mr. Muskie:* Yes; here again it is the State which determines what constitutes "Best Available Retrofit Technology," as defined in section 128. . . . .

123 CONG. REC. S13696, S13709 (1977).

Consistent with this legislative intent, EPA itself has explained that "the State must determine the appropriate level of BART control for each source subject to BART." 70 Fed. Reg. at 39, 107. The EPA has even acknowledged that "[i]n some cases, the State may determine that a source has already installed sufficiently stringent emission controls for compliance with other programs . . . such that no additional controls would be needed for compliance with the BART requirement." *Regional Haze Regulations*, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999). The EPA also has acknowledged that "the State retains the primary responsibility of developing a viable visibility program" consistent with the goal established in section 169 A (a). This responsibility includes "final authority for the development of the SIP, BART determinations, and implementation of the visibility program" in light of the goals of the Act. *See Am. Corn Growers Ass'n v. E.P.A.*, 291 F.3d 1 (D.C. Cir. 2002).

b. Limitations on EPA's authority

The content of the EPA's regulations and guidance and their deference to State decision-making is no accident. These rules stem from the 2002 opinion of the D.C. Circuit in *American Corn Growers*. That case involved a challenge to EPA's 1999 regional haze rules. *See* 64 Fed. Reg. 35714 (July 1, 1999). The court confirmed the primacy of the states by invalidating EPA's rule on the grounds that it impermissibly constrained state authority. *See Am. Corn Growers Ass'n*, 291 F.3d at 8 (EPA's rule is invalid because it is "inconsistent with the Act's provisions giving the states broad authority over BART determinations"). The D.C. Circuit relied on, in part, the legislative history of the CAA's visibility provisions in reaching this conclusion. Summarizing H.R. CONF. REP. NO. 95-564 , the court stated:

> The Conference Report thus confirms that *Congress intended the states to decide* which sources impair visibility and *what BART controls should apply to those sources*. The Haze Rule attempts to deprive the states of some of this statutory authority, in contravention of the Act. *Id.* (emphasis added).

The EPA therefore, cannot, through either approving or disapproving a SIP, interfere with the state's primary role in determining how national ambient air quality standards should be met under the CAA. 42 U.S.C.A. §§ 7401 et seq. As long as the ultimate effect of a state's choice of emission limitations is compliant with the national standards for ambient air, the state is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. Reviewing the history of section 110, and judicial interpretations of it, the court in *Commonwealth of Virginia v. Environmental Protection Agency*, noted that as section 110 stood in 1975, and as it stood after the 1977 and 1990 amendments, the provision did not confer upon the EPA authority to condition approval of a state implementation plan on the state's adoption of specific control measures. *See* 108 F.3d 1397(D.C. Cir. 1997). Although the EPA has the authority to determine whether a state's plan meets the Act's requirements for approval (42

U.S.C.A. § 110(a)(2)), courts have held that the agency cannot tell the states what measures they should employ in meeting the requirements. (42 U.S.C.A. § 7410)

In *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) the U.S. Supreme Court found that although the CAA plainly charges the EPA with the responsibility for setting the national ambient air quality standards, the Act, just as plainly, relegates the EPA to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations that are necessary if the national standards are to be met. According to the Court, the Act gives the agency no authority to question the wisdom of a state's choices of emission limitations if they are part of a plan that satisfies the standards of §110(a)(2), and the agency may devise and promulgate a specific plan of its own only if a state fails to submit an implementation plan that satisfies those standards. The Court stated:

> "So long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."

Id at 79.

The CAA then "establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). "Air pollution prevention . . . at its source is the primary responsibility of States and local governments. . . ." 42 U.S.C. § 7401(a)(3). Congress "carefully balanced State and national interests by providing for a fair and open process in which State and local governments, and the people they represent, will be free to carry out the reasoned weighing of environmental and economic goals and needs."

The CAA specifically vests states with the primary authority to determine BART by weighing the five statutory criteria set forth in 42 U.S.C., section 7491(g)(2). CAA Section

169A provides that "in determining [BART] the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the five BART factors]." 42 U.S.C. § 7491 (g)(2). Section 169A also provides that sources subject to BART "shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the [BART], as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) . . . ." 42 U.S.C. §§ 7491(b)(2)(A). The EPA may disapprove a SIP and issue a FIP under section 7410(c) only where the State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3). In the case of regional haze, the CAA requires only that States weigh the five statutory factors and arrive at a reasonable understanding of BART requirements. 42 U.S.C. § 7491 (g)(2).

As stated above, the U.S. Court of Appeals for the D.C. Circuit has reviewed the EPA's authority under the Regional Haze program and agreed that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n.* 291 F.3d 1, at 2. In 2002, the court reversed a portion of the EPA's original Regional Haze Rule that required states to analyze visibility improvements from multiple sources, rather than on a source-by-source basis, when determining BART requirements. The court held that the EPA could not require the states to evaluate one BART factor collectively while mandating that the other four factors be evaluated separately for individual sources. In addition to distorting the statutory factors, the court thought the EPA's approach was "inconsistent with the Act's provisions giving the states broad authority over BART determinations." *Id.* at 8; *see also Utility Air Regulatory Group v. E.P.A.*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination "requires states to determine the particular technology that an individual source subject to BART must install.")

I. The Arbitrary and Capricious Nature of the EPA's Preemption and Disapproval of Oklahoma's SIP

The CAA directs the States — not the EPA — to determine the appropriate level of BART to regulate regional haze. The EPA's proposed Federal Implementation Plan ("FIP") as it pertains to the disapproval of portions of the State Implementation Plan ("SIP") as to best available retrofit technology ("BART") and the long-term strategy ("LTS") is in violation of the Clean Air Act (CAA) and the discretion and authority granted to the State under that Act. In its quest to issue a Federal Implementation Plan ("FIP") that requires Oklahoma Gas and Electric Company ("OG&E") to spend over $1.2 billion to install dry flue gas desulfurization technology ("scrubbers") on four electric generating units in the next five years to address aesthetic concerns about regional haze, the Environmental Protection Agency ("EPA") eviscerated the authority and discretion given to the State of Oklahoma by the Clean Air Act ("CAA" or "Act"). In substituting its judgment for the judgment of the State, EPA illegally usurps the broad authority given by Congress to the States to make best available retrofit technology ("BART") determinations for regional haze. *See* 42 U.S.C. § 7491. The Oklahoma SIP included a state-specific balancing of BART factors that considered Oklahoma's unique energy and economic needs; a balancing that EPA is neither equipped nor authorized to conduct. Instead, EPA improperly mandated its desired outcome in place of Oklahoma's considered judgment as to the appropriate BART for facilities in the state.

The CAA and RHR set forth the process that must be followed in determining BART, but neither requires any specific outcome. Thus, the CAA and RHR require, in part, that a State balance five factors in making a BART determination for each qualifying facility.[2] EPA

[2] The five BART factors are: (i) the costs of compliance; (ii) the energy and nonair quality environmental impacts of compliance; (iii) any existing pollution control technology in use at the source; (iv) the

recognizes that "States are free to determine the weight and significance to be assigned each factor." Proposed Oklahoma BART Rule, 76 Fed. Reg. 16,168, 16,174 (Mar. 22, 2011) ("Proposed Rule"). EPA further acknowledges that "[i]n some cases, the State may determine that . . . no additional controls would be needed for compliance with the BART requirement." Original Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999).

The CAA and RHR require that *States*, not EPA, have the primary role in implementing the regional haze program, including making BART determinations. *See, e.g.*, CAA § 169A(b)(2)(A), (g)(2), 42 U.S.C. § 7491(b)(2)(A), (g)(2) ("in determining [BART] *the state* (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the BART factors]") (emphasis added). The states are directed to define the long-term strategy and BART, one component of the long-term strategy, under the Act. It is the states that are required to consider and balance the five factors relevant to a BART determination. *See id.* § 7491(g)(2). The scope of state discretion is further confirmed in EPA guidance, which states that "*[t]he glidepath [to the national goal] is not a presumptive target, and States may establish a RPG [reasonable progress goal] that provides for greater, lesser, or equivalent visibility improvement as that described by the glidepath.*" *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program* at 1-3 (June 1, 2007)(emphasis added).

The EPA Proposed Rule ignores the plain language of the CAA and the Court of Appeals' recognition of the states' dominant role in determining BART in an effort to advance EPA's preference for scrubbers on all EGUs. EPA does not have authority to disapprove a SIP simply because it disagrees with a state's choice in emission control measures for specific

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remaining useful life of the source; and (v) the degree of improvement in visibility that may be expected as a result of such technology. 2 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii).

sources. *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981) ("If an [sic] SIP or a revised SIP meets the statutory criteria, however, the EPA must approve it").

The EPA is proposing to take an action that usurps authority granted to Oklahoma in the Clean Air Act. The Clean Air Act created a Regional Haze program to improve visibility in certain national parks and wilderness areas. The EPA can set national goals and guidelines for the program, but individual states have the authority to craft plans specific to and appropriate for their state's citizens and interests. Each state has the right to select the best control technology ("BART") for sources of emissions that contribute to regional haze, taking into consideration five specific factors, including costs of control. Oklahoma chose the technologies that are appropriate for its sources in light of these five factors and submitted an implementation plan to EPA in February 2010. In particular, Oklahoma determined that low sulfur coal was the cost effective way to control sulfur dioxide emissions to address haze issues. A benefit of this determination is that it gives state utilities greater flexibility to switch to generating electricity with natural gas or renewable sources. The state determined that installing scrubbers now is not cost effective and would lock the utilities into burning coal for the next 20 years.

On March 22, 2011, EPA proposed to reject the state's determination and substitute its own judgment for the state's via implementation of its proposed FIP.[3] The EPA proposed to select scrubbers as the best technology for the relevant sources in Oklahoma. The adoption of a Federal Plan would go beyond the authority granted to the EPA by the Clean Air Act because the

[3] On March 23, 2011 The State of Oklahoma submitted to the Administrator of the EPA a Notice of Intent to file suit pursuant to Clean Air Act section 304 (b)(2), 42 U.S.C. section 7604 (b)(2) and 40 C.F.R. Part 54, for the EPA's failure to perform nondiscretionary duties. The suit against the EPA will be filed because the EPA was not authorized to propose a FIP for regional haze in Oklahoma on March 22, 2011, as no final action has been taken regarding Oklahoma's SIP. In addition, the window for EPA to propose a regional haze FIP was not open on March 22nd. The EPA has violated its nondiscretionary duty to honor the time constraints provided in Section 110 (c) of the CAA and 42 U.S.C. § 7410(c) regarding the promulgation of a FIP.

EPA does not have the power to question the state's determination as long as the state relied on the proper factors in making it, which Oklahoma did. It is estimated that the emission controls required by EPA will cost approximately $2 billion to install and result in a 15% - 20% increase in residential electric rates.

EPA may disapprove a SIP and promulgate a FIP only where a State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3); *see also Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975). The RHR and BART guidelines issued by EPA, 70 Fed. Reg. 39,104 (July 6, 2005), require only that States engage in the process of weighing the five statutory factors in determining BART for eligible sources in a manner consistent with the RHR, and that "States are free to determine the weight and significance to be assigned to each factor." *See* 76 Fed. Reg. 16,168, 16, 174 (Mar. 22, 2011). As the Oklahoma SIP clearly shows, Oklahoma did properly engage in that process in making its BART determinations for the OG&E Units.

Oklahoma submitted its' SIP to EPA long before EPA proposed the Oklahoma FIP, and with a full record. Since ODEQ applied the statutory factors in promulgating the Oklahoma SIP, EPA was not free to reject Oklahoma's BART determinations with respect to the OG&E Units and promulgate a FIP substituting its judgment for that of the State.

As previously set forth, the U.S. Court of Appeals for the D.C. Circuit has affirmed that EPA's role in determining regional haze plans is limited, stating that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002). The Court reversed a portion of EPA's original RHR because it found that EPA's method of analyzing visibility improvements distorted the statutory factors and was "inconsistent with the Act's provisions giving the *states* broad authority

over BART determinations." *Id.* at 8 (emphasis added); *see also Utility Air Group v. EPA*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination "requires states to determine the particular technology that an individual source 'subject to BART' must install"). EPA lacks the authority to disapprove the Oklahoma SIP merely because it disagrees with Oklahoma's choice in emission controls for specific sources.

The CAA gave Oklahoma the right to conduct this analysis and make a determination without being second-guessed by EPA. Oklahoma exercised the authority granted by the CAA and determined that "[t]he cost for [scrubbers] is too high, the benefit too low and these costs, if borne, further extend the life expectancy of coal as the primary fuel in the Sooner facility for at least 20 years and beyond. BART is the continued use of low sulfur coal." *See* Ex. 3, Oklahoma SIP, App. 6-5, Item 1, Sooner BART Review at p. 29, and Muskogee BART Review at p. 29.

EPA second guessed Oklahoma's authority by rejecting significant portions of the 2009 site-specific costs estimates, in many instances simply assuming, without verifying, that they resulted in the double counting of expenses. While OG&E disputes EPA's conclusion regarding the 2009 cost estimates, once EPA reached the conclusion that the CCM estimates should control, the proper response by EPA should have been to return to the 2008 cost estimates, which both EPA and ODEQ had stated complied with the CCM and which support the State's BART determinations for the OG&E Units. EPA's attempt to create a hybrid cost estimate by selectively modifying the 2009 estimate resulted in cost estimates that were neither site-specific and real (like OG&E's 2009 cost estimates) nor reflective of the CCM general estimates (like OG&E's 2008 cost estimates). EPA's "cherry-picking" approach to the cost estimates for the OG&E Units in order to justify its predetermined conclusion that scrubbers were BART was, therefore, arbitrary and capricious.

Despite the Act's exclusive assignment to the States of the authority to weigh the statutory factors, EPA nonetheless disputes Oklahoma's cost effectiveness analysis and seeks to use the assumptions and speculation of its consultant as the basis for disapproval of the Oklahoma SIP. EPA's principle contention is that the 2009 site-specific cost estimates considered by Oklahoma did not comply with the CCM. To reach that result, however, EPA (i) ignored the 2008 cost estimates that it had acknowledged were prepared in accordance with the CCM; (ii) rejected the 2009 estimates by giving preference to the assumptions and speculation of its consultant over the judgment of the State; and (iii) manipulated the inputs for the cost effectiveness calculation by ignoring the requirements of its own guidelines and basic engineering principles. Even beyond these fundamental flaws in EPA's cost effectiveness review of the Oklahoma SIP, the separate cost analysis conducted by EPA's consultant was not supported by the record and was arbitrary in its approach. At the same time, EPA took an improper approach to visibility improvement designed to overstate the benefits from the installation of scrubbers. The fundamental flaws in EPA's cost-effectiveness analysis not only demonstrate that its disapproval of the Oklahoma SIP was arbitrary and capricious, but also preclude a finding that EPA had a reasoned and proper basis for the FIP.

"States have flexibility in how they calculate costs." 70 Fed. Reg. at 39,127. Where the RHR give States flexibility and Congress has designated that States take the dominant role in determining BART, EPA is not free to undercut the State's reasonable exercise of that flexibility, particularly by substituting its own arbitrary approach. EPA illegally usurped State authority in violation of the plain language of the Act when it rejected Oklahoma's BART determination for the OG&E Units and, thus, the FIP is unlawful. In addition, because EPA published a notice that certain States, including Oklahoma, had initially failed to meet the deadline for submitting

regional haze SIPs, the CAA unequivocally imposed a two-year requirement for EPA to issue a FIP. *See* 42 U.S.C. § 7410(c); *Gen. Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA §110(c) as an example of "explicit deadlines" established by the CAA). It is undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act. Clearly, the EPA is going beyond its authority and abusing its power by overregulating in areas statutorily regulated by the States.

As previously noted, Oklahoma has the primary authority to determine BART and, pursuant to EPA's own guidelines, this primacy extends to the cost analysis, where the State is given "flexibility in how [it] determines costs." 70 Fed. Reg. at 39,127. Oklahoma's cost analysis, set forth in the Oklahoma SIP, clearly meets statutory requirements. Even if EPA was authorized to second guess Oklahoma's judgment, EPA has not articulated any sound or reasonable basis for rejecting Oklahoma's considered judgment regarding the appropriate costs to consider.

II. The EPA's Abrogation of Notice and Comment Requirements When Imposing FIP's

The Final Rule violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et. seq.*, because it introduces and relies upon rules or approaches not previously discussed in the proposed rule. *See* 5 U.S.C. § 553(b)(3) (requiring agencies to give notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved."). "To satisfy the APA's notice requirement, . . . an agency's final rule need only be a logical outgrowth of its notice." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (internal

quotations and citations omitted). However, "a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine the agency's unspoken thoughts because the final rule was surprisingly distant from the proposed rule." *Id.* (vacating portion of agency's final rule for violating APA's notice requirements) (internal quotations and citations omitted). Here, Oklahoma had no means by which to divine EPA's introduction of several new outcome determinative approaches set forth for the first time in the Final Rule and, therefore, had no opportunity to properly comment on or present evidence regarding them. The issues raised by the use of these new approaches are particularly important in this case because they tread on areas that the CAA commits to the discretion of the State in the first instance.

EPA's issuance of the Oklahoma FIP was also procedurally defective because of its timing. First, the CAA does not give EPA authority to propose a FIP prior to final disapproval of the Oklahoma SIP. The Act, moreover, requires that EPA give Oklahoma a reasonable opportunity to cure any alleged defects in a disapproved SIP. CAA Section 110(c)(1)(A) allows promulgation of a FIP after EPA "finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section or . . . disapproves a State implementation plan submission in whole or in part." 42 U.S.C. § 7410(c)(1). Section 110(c) also states that EPA shall propose a FIP "unless the State corrects the deficiency," thereby reflecting Congress's intention for States to have the power to design their own SIP and have an opportunity to correct a SIP before a FIP is issued. § 7410(c). Simultaneous promulgation of the FIP is also inconsistent with the Act's definition of a FIP. A FIP is defined as a plan "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in

a State implementation plan." § 7602(y). Thus, a FIP cannot properly exist until after final action has been taken on a State's SIP.

CAA § 307(d)(3) requires that "[t]he statement of basis and purpose" that must accompany each proposed FIP include a summary of "the factual data on which the proposed rule is based" and "the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3). EPA cannot credibly claim to be able to present the relevant factual, legal, and policy information and rationale to justify a proposed FIP before it has: (1) determined whether and to what extent the Oklahoma SIP may be deficient and un-approvable; (2) provided the public with an adequate explanation of any such determination in a proposed EPA rule on SIP approval or disapproval that is published for public review and comment; (3) received, considered, and responded to public comments on the proposed action; and (4) made a final determination and taken final action to disapprove the SIP in whole or in part.

This due order of action by EPA is important because, as demonstrated by the discussion above regarding cost effectiveness, EPA's authority when reviewing a Regional Haze SIP is much different than its authority when promulgating a FIP. Because the CAA delegates the power to determine BART exclusively to the States, the fact that EPA would take a different approach or reach a different conclusion is irrelevant to its approval or disapproval of a Regional Haze SIP. Yet, if EPA is allowed to take final action on such a SIP at the same time that it issues a FIP, it can blur this distinction and impermissibly use the FIP process to impose its preferences with respect to the five statutory BART factors onto the States.

Second, because EPA published a notice that States, including Oklahoma, had failed to meet the statutory deadline for submitting regional haze SIPs, it is undisputed that the CAA

unequivocally imposes a two-year limit on EPA's ability to take such action. *See* 42 U.S.C. § 7410(c)(1); *Gen. Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA § 110(c) as example of "explicit deadlines" established by the CAA). It is also undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act.

The new "overnight" cost method used by EPA to determine the cost effectiveness of scrubbers is at the core of EPA's Final Rule, both in disapproving the Oklahoma SIP and in justifying its FIP. EPA's failure to raise these new approaches as justification for its proposed actions in the Proposed Rule deprived Petitioners of the right and opportunity to comment on them. It was, therefore, improper under the APA and it deprived the State of the authority delegated to it by the CAA to determine the reasonable and appropriate methods for evaluating costs in making BART determinations. EPA's Final Rule is fatally defective because of its failure to provide notice of this new approach and allow comment on it.

The Final Rule also reveals, for the first time, EPA's new methodology to determining visibility improvement—the so-called "number of days" approach. 76 Fed. Reg. at 81,736. Again, because this approach was not raised by EPA in the Proposed Rule, the Final Rule is fatally defective. Because the Final Rule fails the logical outgrowth test, Petitioners' challenges to the Oklahoma FIP are likely to succeed, justifying a stay of the FIP.

The administrative record shows that EPA's "nothing but scrubbers" approach led it to reject a final regional haze state implementation plan ("SIP") that Oklahoma sent to EPA over a year before EPA proposed to adopt the FIP. The only way that EPA could achieve this predetermined outcome was to ignore the Act and its own guidance and violate the

Administrative Procedures Act ("APA") by raising and relying on new rules and methodologies for the first time in its final rule adopting the FIP. For EPA to accomplish this objective, it had to ignore its own policies and procedures for making these determinations and, in the Final Rule, use new approaches regarding cost effectiveness and visibility improvement that it had not identified in the proposed rule. This approach precluded public comment and violated Petitioners' procedural rights.

The RHR require States to submit their BART determinations, along with other required elements, as SIP revisions to EPA for approval ("Regional Haze SIPs"). EPA may disapprove a Regional Haze SIP and issue a FIP only when a SIP fails to meet all of the applicable requirements of the Act. 42 U.S.C. § 7410(k)(3). In this instance, the applicable requirements are that the emission limitations developed to address regional haze be developed pursuant to the evaluation process and balancing of the BART factors set out in the CAA and RHR. 42 U.S.C. § 7491(b).

III. Economic Costs Associated with the EPA's Illegal Actions Under the Regional Haze Program

The EPA's action is sure to raise the costs of electricity to consumers, with a corresponding loss of jobs and economic activity. EPA's illegal adoption of the Final Rule will have an immediate and irreparable impact on the State whose CAA authority has been eviscerated by EPA's actions. Likewise, electricity consumers in Oklahoma will face significant electricity rate increases as a result of the costs imposed by the Final Rule.

Oklahoma has demonstrated the substantial economic impact EPA's Final Rule would have on the State. OG&E will be required to expend significant resources immediately in order to implement the installation of the scrubbers with any chance of meeting the five year deadline,

and just in the first two years, the costs will exceed $200 million. Even if OG&E were able to roll some of those costs into its rate structure, this will have an obvious adverse effect on the citizens of Oklahoma who have to pay those higher electricity rates. In today's economic climate, those very real economic impacts of EPA's FIP cannot and should not be ignored.

IV. Conclusion

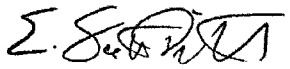
First, as noted above, Congress designated the State as the principle decision maker for BART determinations and regional haze programs. The EPA's actions here deprive Oklahoma of the ability to fashion a regional haze program that balances costs and visibility improvement in a manner that is appropriate for the citizens and economy of this State. The EPA's actions undermine the State's authority and damage the ability of Oklahoma to fulfill its regulatory function as created by Congress.

Second, as noted above, the EPA's abrogation of notice and comments when imposing FIP's on Oklahoma violates key and foundational principles of rulemaking.

Finally, if some of these costs are imposed on consumers in Oklahoma, the increased electricity rates will have an adverse economic impact with consumers paying higher rates directly and businesses looking to pass their higher costs to their customers. Indeed, as a large electricity consumer, the State too will feel the direct economic impact of higher rates. Neither the State nor its citizens has recourse for such unnecessary costs. Thus, irreparable harm will result from continuation of the current effective date for the Oklahoma FIP.

The State of Oklahoma has properly exercised its discretion under the CAA's visibility program to establish a long-term strategy for the reduction of visibility impairing pollutants, including the selection of BART. The EPA's proposed action disregards clear congressional intent that primary regulatory authority under the visibility program rests with the States. The

EPA's proposal would impose the EPA's policy judgments based on the EPA's balancing of factors where it has no authority to do so. The EPA does not have the right under the Clean Air Act to substitute its judgment for that of the state when it comes to determination of the best control technology for sources in the state.



E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

Mr. LANKFORD. Mr. Martella.

STATEMENT OF ROGER R. MARTELLA, JR.

Mr. MARTELLA. Thank you.

Chairman Lankford, Ranking Member Connolly and members of the committee, thank you for providing me the opportunity and the honor to appear before you today.

I would like to start with the uncontroversial proposition that rulemaking activities should be built upon three bedrock principles of transparency, public participation and judicial review. The Administrative Procedure Act guarantees these principles and protections for all citizens when the government engages in rulemaking, and these procedural protections that are inherent to our democratic system are just as critical to protecting the environment as the substantive laws and rules themselves.

However, the APA and our process for enacting effective Federal regulations is confronting new challenges that in some cases are bypassing these protections. Today I want to share with you my concern about recent efforts to circumvent the protections of transparency, public participation and judicial review in an emerging phenomenon that provides an off ramp to these principles.

The concern arises out of a growing trend where certain groups increasingly are employing a so-called sue-and-settle approach to the government on regulatory issues. Such an approach effectively provides an off ramp that ignores these bedrock protections, such as, first, a lack of transparency. In such settlements, discussions and agreements typically are reached with a subset of interested parties without full stakeholder input, and frequently take place outside the boundaries of the public process.

Second, a lack of public participation. In such settlements public participation is foreclosed three times. First, the agreement on how to regulate is reached without full input of stakeholders; second, the negotiated deadlines for final rules are frequently so quick that the public's comments might receive little weight in the actual subsequent rulemaking; third, because the final rule must be the logical outgrowth of the proposal, settlement agreements that influence even the proposed rule effectively preordain the final outcome without full public participation.

Third, a lack of judicial review. In such settlements parties frequently reach an agreement before a lawsuit is even filed or defended, thus depriving interested parties from intervening in the litigation to defend their interests where intervention has been granted.

Fourth, a conflation of government and nongovernmental roles. In such settlements the NGO plaintiffs effectively set the priorities and timelines for how the government enacts certain rulemakings over other competing concerns and resources, in turn influencing policies and priority settings far beyond the reach of a particular settlement. These concerns are not theoretical or abstract, but have been rising with increasing frequency in the last several years.

One recent example alluded to by the chairman includes the greenhouse gas New Source Performance Standards for utilities. In December of 2008, an NGO group predicted publicly it would be successful in convincing the EPA to phase out new coal-fired power

plants by setting a New Source Performance Standard at a level that no coal-fired power plant could meet. Exactly 2 years later, on December 23, 2010, EPA announced a consent decree with the very same NGO committing the Agency to propose and finalize this very rule even though it was not required to do so.

Importantly, EPA agreed to promulgate such standards without any prior input from a single stakeholder in those affected impacted industries. When the ultimate proposal came out on March 27th of this year, it was virtually identical to what the NGO had predicted in 2008 and barred the construction of new coal-fired facilities in the United States. Because of the unique nature of NSPS proposals, the rule is already in effect, even though EPA has yet to respond to a single stakeholder comment from industry on the issue. Thus, as a result of this settlement, we now have an effective rule that is barring new facilities without first offering transparency to the industry impacted, allowing for public participation before the rule took effect, and providing no real means of judicial review at this time.

Finally, Mr. Chairman, just to emphasize a point, I do strongly support and encourage efforts to pursue settlement agreements and consent decrees whenever feasible. I don't intend my comments to suggest it's always inappropriate for a settlement agreement to provide some definition of scope to a proposed rule. However, my overarching recommendation to this subcommittee is to address and improve the process by which these agreements are reached in the first instance.

By promoting fairness, transparency and public participation of interested stakeholders in the first instance, settlement agreements will better reflect a wide range of interests that must be balanced, result in stronger and more defensible outcomes, and improve the success of the subsequent rulemaking process.

Thank you very much for this opportunity today to share my views.

Mr. LANKFORD. Thank you.

[Prepared statement of Mr. Martella follows:]

Addressing Off Ramp Settlements:
How Reform Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity

Roger R. Martella, Jr.
Sidley Austin LLP

Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee:

Thank you for providing me the opportunity and the honor to appear before you today.

The subject of today's hearing is critically important because it raises issues about fairness, transparency, and public participation in administrative rulemakings while discussing mechanisms for the Executive Branch to ensure sound and principled environmental decision making in this very litigious environment we all inhabit. I commend the Subcommittee for addressing this issue at a critical time, and look forward to assisting your efforts.

America's successful use of administrative law and rulemaking is critical to implementing the laws that you enact. We should agree that essential hallmarks of administrative law have always included the bedrock principles of:

(1) **transparency** in government action;

(2) **public participation** through the solicitation of public and stakeholder input prior to final government action; and

(3) **equal access to judicial review** by all parties impacted by government action.

The Administrative Procedure Act originally adopted by Congress in 1948 is confronting new challenges in this era where every significant administrative law initiative seems to be comprised of three inexorable components: the agency's proposed rule, the final rule, and the litigation by the loser in the rulemaking. I do not think we can or should endeavor to change those components of modern life in Washington, but it is appropriate and timely that this Subcommittee is focusing on the growing problems regarding settlements of administrative law litigation that bring a new layer of complexity to the ability of the public to participate in the rulemaking process. Key elements of reform, including proposed legislation pending before the House Judiciary Committee, are critical to ensuring that our democratic rulemaking processes maintain the principles associated with enactment of the APA in 1948.

Today, I want to share with you my concern about recent efforts to circumvent such protections in an emerging phenomenon that I call "off ramp settlements."

By way of background, I am both a lifelong environmentalist and a career environmental lawyer. I am very proud to have spent the majority of my career in public service, as a trial attorney in the Justice Department's Environment Division, as the General Counsel of the United States Environmental Protection Agency, and as a judicial law clerk on the Tenth Circuit Court of Appeals. In my current capacity as a private practitioner, I am privileged to work with a plethora of stakeholders including private companies and trade associations, environmental organizations, and the government, to develop creative solutions that advance environmental protection while also enabling the United States to retain economic competitiveness in a trade sensitive, global environment where very few economies provide even the faintest glimmer of our own environmental controls and public process protections. In both my government and private careers, I am very proud of the opportunities I have had to participate in and advance international rule of law initiatives, working to help develop the enactment of environmental and public participation laws in growing economies. In particular, last I was honored to have served as one of five American Bar Association delegates to the United Nations at the Rio+20 sustainable development conference in Brazil.

In my opportunities to explain and teach the American environmental protection regime in China and elsewhere, I always begin with the simple proposition that substantive environmental law is inextricably intertwined with the core process concepts of transparency, public participation, and judicial review. Although it was Congress that took the initiative in the 1970s to enact the suite of environmental laws that continue to provide Americans with the cleanest environment in the world, the success of environmental protection is ultimately attributable to a wide range of actors, including the implementation of the Executive Branch through rulemakings and the rigorous scrutiny of the Judicial Branch. Again, the APA is our benchmark and its preservation is our goal.

But especially in environmental matters, we must look beyond the government and recognize that just as key to the success of our environmental regime has been the role of a myriad of stakeholders and public citizens who have taken part in advancing environmental protection. This includes multinational companies developing novel environmental solutions and technologies, and also encompasses local and national environmental organizations that participate in rulemakings impacting public health and the environment. Ultimately, when a rulemaking is concluded with full public input and participation and any of these parties, including private citizens, invoke the courts to address environmental concerns, the success of environmental protection in

the United States is ensured because of the broad roles played by actors outside the government as much as the role played by the government itself.

Key among the parties contributing to the success of environmental laws are environmental nongovernmental organizations, or NGOs. Decades prior to the enactment of environmental laws, these groups drove the environmental movement in the United States in response to issues such as protecting wilderness areas and addressing Love Canal, the Cuyahoga River, and smog in our nation's urban areas. In my experience, the advancement of environmental protection frequently has been synonymous with efforts by such NGOs. I am personally proud of the opportunities I have had to serve with several NGOs and my experiences with NGOs in various capacities reinforces the strong role they play in advancing environmental protection.

At the same time I believe that a subset of NGOs recently has added a new and unanticipated weapon in an unfortunate effort to conflate the respective roles and boundaries of governmental and nongovernmental organizations. This approach, if not carefully considered, can risk the core principles of transparency, public participation, and judicial review. Specifically, certain groups increasingly are employing a "sue and settle" approach to interactions with the government on regulatory issues. Before going further, let me be perfectly clear about my views: while the general notion of settling disputes with the government is noncontroversial and properly serves as a key component of promoting judicial efficiency and reasonable outcomes to disputes, such an approach takes on new concerns in a regulatory context when such settlements effectively provide an off ramp that ignores these various protections, procedures, and boundaries Congress has established.

Specifically, such off ramp settlements implicate the following issues:

- **The opportunities for non governmental actors to engage in a quasi-governmental role:** Frequently, when NGOs engage in settlements with administrative agencies over rulemaking schedules, the outcome is a reallocation of government priorities, resources, and deadlines. Effectively, in such settlements the NGO plaintiffs and petitioners, and not the government officials entrusted to the effective implementation of the laws, can set the priorities and timelines for how the government enacts certain rulemakings over other competing concerns and resources. A well established line of case law makes it clear that ultimately the government has wide deference and discretion in setting its own regulatory schedule, particularly when Congress has not mandated a given deadline. However, in these off-ramp settlements, the NGOs typically gain agreements that dictate a schedule instead of allowing a Court to address the merits of such arguments. In those circumstances, such

settlements can impose obligations on the government that the Court unlikely would have compelled. Such a quasi-governmental role is not only inconsistent with the respective dividing lines between governmental and nongovernmental functions, but, critically, also threatens to distract the government's limited resources away from other important priorities, contributing to a cycle of the government unable to meet other important obligations and priorities. Further, as described below, experience has shown that such settlements have resulted in unrealistic commitments of government resources that the government is not capable of satisfying. These missed deadlines in turn lead to litigation to enforce such deadlines, thus entailing the further engagement of the Court in a cycle that violates every notion of why judicial settlements make sense.

- **Lack of transparency:** A core element of American environmental rulemaking that is distinguishable from almost every other system in the world is the promise and guarantee of transparency. The Administrative Procedure Act, the Clean Air Act, and many other laws mandate notification to the public and stakeholders of rules and decisions impacted by such governmental actions. Such affected and interested stakeholders, along with other members of the public, have an opportunity and a right for adequate notice and comment. Not only must this opportunity precede any final agency action, but also the government is compelled by the APA to publically respond to and take into account comments. These laws permit only the narrowest of exceptions to waive such processes, and the agencies appropriately have exercised restraint in invoking such exceptions. Similarly, on the rare occasions when the government takes action without providing adequate transparency, notice, and public participation, Courts have been rigorous in their enforcement. Sue and settle consent decrees, however, effectively provide an off ramp to these critical procedural protections. Such discussions and agreements typically are reached with a subset of interested parties without full and broad stakeholder input, and in many instances take place outside the boundaries of the public process.

- **Lack of effective public participation:** In most off ramp settlements, even when the government provides some opportunity for comment after an agreement is reached, experience has shown that in many instances such process is pro forma, with at most minor changes to deals made in rare circumstances. In addition, the negotiated deadlines for final rules are frequently so quick and ambitious that the public's comments might receive little weight in the actual subsequent rulemaking due to artificially imposed time constraints. Thus, public participation is foreclosed essentially twice—at the settlement and the rulemaking stages—leading to final agency action that

circumvents the intended role of stakeholder input and fails to account for broader views.

- **Lack of judicial review:** Another core tenet of environmental rulemaking in the United States is the ability both to challenge rulemaking decisions adversely impacting stakeholders and to participate as intervenors—frequently, in defense of the government's decisions and priorities—in the litigation of rule challenges brought by other parties. Congress guaranteed such protections both by affirmatively waiving the government's sovereign immunity to rulemaking challenges in laws like the Administrative Procedure Act and by providing explicit causes of action under the APA or, for example, the Clean Air Act. However, in off ramp settlements, NGOs and the government may reach an agreement before a lawsuit is even filed, thus depriving interested parties and potential intervenors from participating in the negotiations or intervening in the litigation to defend their interests. Even where settlement occurs later, after parties may have been granted intervention by demonstrating they may be adversely impacted by the outcome of a lawsuit and may not be adequately represented by the government, such parties have little to no opportunity to participate in settlement discussions to which they are not invited by the government and NGOs. Thus, settlements in a regulatory context can adversely impact the interests of interested parties while depriving them of meaningful judicial review.

These concerns regarding off ramp settlements are not theoretical or abstract, but have been rising with increasing frequency in the last several years. In fact, they have become so common that some groups have labeled the phenomenon of reaching an enforceable agreement with the government on regulatory commitments and shifting of government resources as "mega settlements." Some recent examples include:

- **Greenhouse Gases Performance Standards:** On December 23, 2010, EPA announced a consent decree with several NGOs committing the agency to propose and finalize the first ever New Source Performance Standards for greenhouse gases. EPA agreed to promulgate such standards for utilities and refineries without any prior input from stakeholders in those industries. Specifically, EPA committed to propose the first-ever GHG NSPS for these sectors in July and December of 2011, which is an unprecedented quick schedule. In fact, the schedule was so ambitious that it took until March 27, 2012 to propose standards for utilities and the Agency has yet to propose standards for refineries.. Beyond the mere commitment of schedules and timelines, EPA also made various substantive commitments in the agreement that would ordinarily be open for public comment in a rulemaking process,

such as a decision to regulate both new and existing sources in these categories, without prior industry input on the feasibility of such controls, the ability to implement in a timely manner, and the lack of adequate data to create such standards. Although the Agency ultimately held listening sessions and took comment on the agreements after finalizing them, the agreements did not materially change before being lodged with the Court. When the Agency did propose standards for utilities in March, 2012, it essentially adopted a December 2008 Sierra Club proposal to set the standard at 1000 lbs CO2/MWh, which effectively phases out new coal facilities in the United States as of the date of the proposal.

- **Endangered Species Consultations:** In May and June 2011, the Fish and Wildlife Service and certain NGOs filed joint settlement agreements in U.S. District Court to resolve claims that sought to mandate listing decisions on more than 600 species. The settlements specified certain actions the Service is to take regarding 600 species during FY 2011 and FY 2012, including the commencement of a review of 251 candidate species in a five year period, resulting in 130 decisions by September 30, 2013 alone. The Court approved and enforceable settlements, which were negotiated absent participation from stakeholders who ultimately will be impacted by the listing decisions, are raising significant questions about the Agency's resources and ability to meet the deadlines and commitments in a manner that entails adequate public participation and promotes sound decision making.

- **Water:** Chairman John L. Mica, Chairman Bob Gibbs, and Ranking Members James. M Inhofe and Jeff Sessions raised similar concerns regarding two off ramp settlements in the water context. In a January 29, 2012 letter to the Environmental Protection Agency, they pointed to examples of Clean Water Act settlements as demonstrating a "trend recently, whereby EPA has been entering into settlement agreements that purport to expand Federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature."

While the long history of NGO achievements has been essential to the success of environmental protection, there is significant doubt about whether recent off ramp settlements have truly realized better environmental outcomes. From an outsider's perspective, it certainly appears that these agreements have both disrupted and displaced the government's authority to prioritize its resource and rulemaking agendas. In many if not most instances, the government deadlines and commitments are unrealistic and not realistically capable of being met, as demonstrated by the

missed NSPS deadlines above and the unprecedented scope of the endangered species consultation commitments. Meanwhile, the reallocation of resources to the agenda set by outside parties comes at a cost of other priorities, deadlines, and goals for the environment. And while on the surface the agreements may appear procedural over substantive, they ultimately restrain the government's discretion to develop a full range of options on a proposed rule for stakeholder input and even restrict the scope of the final rule, which must be the "logical outgrowth" of the proposal. This unfortunately is a pattern capable of repetition, as groups then initiate litigation to challenge missed deadlines in the settlement agreements all while bringing new actions to create new enforceable deadlines, further constraining the ability and discretion of the Agency to advance its own agenda.

Beyond these substantive concerns, the off ramp settlement approach in the rulemaking context potentially risks greater consequences to the protections Congress established for all stakeholders in environmental rulemaking. Transparency, public participation, and judicial review are the bedrock principles in our rulemaking system that should be provided equally for all parties. Congress should guarantee these protections remain not only to ensure the strongest possible environmental rulemakings, but to uphold the essential democratic process for providing public input and participation into such rulemakings.

Elements of proposed Bills being considered by the House Judiciary Committee could help ensure that these public protections remain in effect in rulemaking challenges while preserving the government's broad discretion to enter into settlement agreements and consent decrees when agencies deem such agreements to be in the government's best interest. Specifically, regarding the Sunshine for Regulatory Decrees and Settlements Act:

- **Requiring transparency:** The proposed Bill provides a process by which affected parties would be notified of proposed settlement agreements and consent decrees, so that such parties can assess whether to intervene in related litigation and participate in commenting on the agreement. I think most if not all would agree that in environmental decision-making, transparency is a good thing, not to be feared or avoided.

- **Providing public participation:** The proposal would memorialize a process where agencies would be required to publish any applicable proposed consent decree or settlement agreement for public comment, and allow comment on any issue related to the matters alleged in the complaint or addressed in the proposed agreement. Government agencies would be required to respond to comments as they do with other regulatory actions and provide a summary and

record to the Court of the comments and concerns that have been raised by all affected parties, not just the parties to the agreement.

- **Enabling opportunities for judicial review:** The proposed Bill facilitates the participation of affected parties and stakeholders before the Court by providing an opportunity for intervention prior to the finalization of an agreement. In addition, the proposal provides the opportunity to bring intervenors—those parties whom the Court necessarily has deemed have an interest that could be adversely affected by the litigation—to the settlement table to contribute ideas, interests, and solutions through a mediated process.

- **Affirming the priority setting discretion of agencies:** Finally, the proposal has a number of provisions intended to ensure that the government, prior to the approval of an agreement or consent decree, can meet the commitments made in any agreement without disrupting other key priorities and allocations of resources. For example, the measure would enable courts to assess whether the agreement allows sufficient time and procedure for the agency to comply with procedural protections relating to public participation in related rulemakings. The provisions requiring certifications to the court on the creation of new mandatory duties through agreements, the expenditure of unappropriated funds, and the divestment of agency discretion may encourage more principled agreements with realistic expectations. And the modification provision would aid the government in seeking modifications to agreements whose implementation jeopardize the public interest when considered against changed facts or circumstances or other pressing mandatory duties.

These key principles promoted in the proposed Sunshine for Regulatory Decrees and Settlements Act will hopefully bring little controversy. The measure would preserve the ability of the government to seek efficient settlement agreements while assuring along the way that information is shared, the public has an ability to participate and be heard, and that that the views of parties that could be adversely affected are considered by the Agency and the Court. Although some may find it inefficient to bring presumably adverse parties together in a mediation program, in my experience the opposite is true. The opportunity and ability to reach compromise prior to an agreement with all interested stakeholder input only increases the likelihood of an agreement that is long lasting, effective at realizing its intended goals, and responsive to a wide range of issues and solutions.

Finally, to emphasize the point, I strongly support and encourage efforts to pursue settlement agreements and consent decrees whenever feasible. And I do not intend my comments to suggest it is always inappropriate for a settlement agreement to

provide some definition and scope to the subsequent proposed rule; I recognize that frequently such terms are critical to reaching an agreement outside of litigation. However, my overarching recommendation to the Subcommittee is to address and improve the *process* by which these agreements are reached in the first instance. By promoting fairness, transparency, and public participation of interested stakeholders in the first instance, settlement agreements will better reflect a wide range of interests that must be balanced, result in stronger and more defensible outcomes, and improve the success of the subsequent rulemaking process.

Thank you for the opportunity to share my views on this important topic. I would be happy to answer any questions.

Mr. LANKFORD. Mr. Kovacs.

STATEMENT OF WILLIAM L. KOVACS

Mr. KOVACS. Thank you, Mr. Chairman and members of the committee. I am not going to try to go over old ground that others have discussed, so I am going to briefly hit sue and settle, but I also would like to talk about how it impacts jobs, and I think that's where the business committee really comes in.

But in essence, sue and settle is really a good-government concern. It's transparency, public participation and the impact on jobs. And really what we are talking about is when you look at sue and settle, this is a subset of the interested community that is actually entering into contract negotiations. They are contracts.

When the contract is decided, it is decided without the rest of the public involved. And I think from the business community point of view, being involved in those contract negotiations should be a fundamental right that we have under the Administrative Procedure Act, which the Congress passed decades ago to literally open up the process to the citizens and for participation between the citizens.

So when this contract is executed and is filed with the court, the court doesn't review the substance. What the court does is the court reviews the representations of the parties. And when it enters a judgment, that judgment cannot be disturbed unless it's shown that there is an abuse of discretion by the court, which is an almost impossible standard. And then when the final rule comes out, even if it's identical to what the agency and the environmental groups sought, our chances of overturning that based on an arbitrary and capricious standard are very, very low. So once the contract is made, the decision is made as to how to go forward.

But let me talk about the more practical aspects of it. Environmental litigation is costing this country tens of thousands and hundreds of thousands and millions of jobs. In 2010, the U.S. Chamber did a study called Project No Project and we looked at environmental litigation across the country from the point of view of what was the private sector trying to finance in 2010. And we looked at just electric generation. We could have looked at cell towers, big box stores, cement companies. We could have looked at anything. We looked simply at electric generation.

There were 351 projects where developers were trying to get permits. They could not get the permits. And the impact of not getting the permits meant that they could not invest $576 billion, which would have created 1.9 million jobs a year during the 7 years of construction.

That is the impact of environmental litigation. There are ways to address it, and the Judiciary Committee is doing some of that. That is not my point here.

The second point in sue and settle—and this is very, very specific because there is great data from the Department of Labor—when sue and settle occurs, it is a specific regulation on a specific industry. Take Utility MACT, take NSPS, take whatever you want, but that regulation is targeted at an industry. Jobs will be lost in that industry.

And let's assume that everything that the other side says is true, that jobs are created somewhere, and there is full employment ev-

erywhere, and, in fact, more jobs are created. But what your own statistics from your Department of Labor show is that the jobs that are created aren't created in the same communities, they are created in different communities. So what happens is you have a real person with a real job that is lost in a real community that is impacted; and then on the other side of the equation, you have jobs created somewhere that they can't get.

Let me give you the statistics, because this is really what the key is. The Bureau of Labor Statistics every 3 years does a study of displaced workers, and the sampling is of about, just so we've got the numbers, 15 million workers. And of the 7 million workers that were what we would call long-term displaced, they didn't have a job for 3 years—or they had worked for 17 years, but were out of a job during the survey—out of that, out of those 7 million workers, a majority of those workers were not able to get a job during the entire survey period, meaning that if the survey was 2007 to 2009, in 2010 51 percent of those workers did not have jobs. Now, that is displaced from all, and we've got to keep that in mind. But once you lose a job in an impacted area, you're not going to get another one. And of the 49 percent who actually ended up getting jobs, we have 55 percent getting lower wages.

So when you look at the impact of regulations, you look at—and litigation, you look at it twofold. One is you don't create the jobs, and that, I think, the Project No Project study clearly determines. And the second part of it is when you lose a job due to a regulation, even if jobs are created in other industries, that community is really impacted and that worker is impacted, and that's something we have to keep in mind.

And the most frustrating part is that since 1977, this Congress mandated that EPA do a continuing analysis of job loss and shifts in employment due to regulations, and in 35 years the Agency has never conducted that study. And this is what is so frustrating about it. On one hand, we want to turn everything into a mandate and let the Agency do what it wants, but Congress can give the Agency a mandate to worry about jobs, and the Agency won't do it.

Thank you very much.

Mr. LANKFORD. Thank you, Mr. Kovacs.

[Prepared statement of Mr. Kovacs follows:]

BEFORE THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM OF THE U.S. HOUSE OF REPRESENTATIVES

"Mandate Madness: When Sue and Settle Just Isn't Enough"

Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

June 28, 2012

Good morning, Chairman Lankford, Ranking Member Connolly, and members of the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. You have asked me to come before the Subcommittee today to discuss the impact of sue and settle agreements on job creation. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today on this most important topic.

I. Introduction

The abuse of citizen suit provisions in 20 environmental statutes and the use of "sue and settle" agreements – out of court settlements that get around the public participation and transparency protections of the Administrative Procedure Act (APA)[1] – have become primary tools used by certain agencies to issue many more regulations than would otherwise be written. The direct result of these tactics is to significantly dampen job creation. If this nation is ever to begin creating the jobs needed by the 23 million citizens who are out of work or underemployed, we need to begin building again. And to begin building we need a transparent and certain regulatory process.

Sue and settle occurs when an activist organization and a federal agency enter into behind closed-doors settlement negotiations in which the agency agrees to undertake the actions requested – usually the implementation of a regulation – and requests the court to enter a consent decree as a judgment against the agency. What is most disturbing however, about sue and settle, is the fact that the federal agencies do not even maintain organized records of the number and types of lawsuits brought against them. And until this Congress, there has not been any oversight of the issue. In short, federal agencies have not provided Congress and the public a comprehensive list:

- of all the litigation in which they are involved;

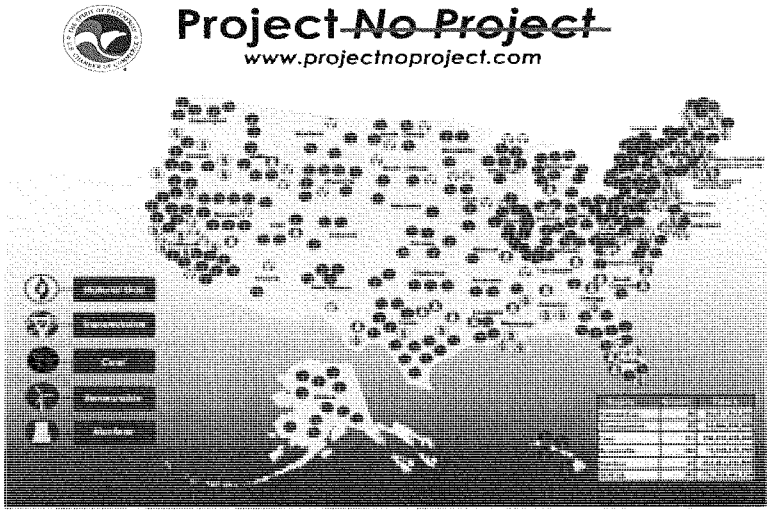
[1] Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

- of the new regulations they agreed to initiate through a consent decree; or
- of all the attorneys' fees they paid to private litigants under the Judgment Fund or the Equal Access to Justice Act, as part of the entry of a voluntary consent decree.

Accordingly, Congress should (1) pass the Sunshine for Regulatory Decrees and Settlements Act of 2012,[2] which has passed out of the House Judiciary Committee, (2) improve oversight over citizen suits, (3) move the current citizen suit provisions from the various scattered statutes to Title 28 and the direct jurisdiction of the Judiciary Committee, (4) ensure that agencies do not give up their discretionary power contrary to law, and (5) require the Environmental Protection Agency to undertake the congressionally mandated studies on potential job loss and shifts in employment due to its regulations.

While my testimony today will focus on the adverse impacts on the transparency and fairness of the regulatory process caused by the abuses of sue and settle and citizen suits, I want to briefly draw your attention to another way that litigation undermines the regulatory process and as a result has adverse impacts on job creation. Specifically, the current permitting process for projects is broken, making it very difficult if not impossible to create jobs across the country.

The Chamber conducted a study, entitled *Project No Project*, which examined 351 energy projects nationwide being impacted by the current permitting process.



[2] H.R. 3862, Sunshine for Regulatory Decrees and Settlements Act of 2012, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.03862:

If all 351 projects were allowed to move forward the impact would be over one trillion dollars in economic activity and over 1.8 million new jobs created annually during the construction period. To provide context, 1.8 million more jobs would lower the unemployment rate from May's 8.2 percent to 7.0 percent. The critical point is that, as our current energy plants retire and key infrastructure such as ports and highways are needed, we must build ***something***; unfortunately, however, right now we are building very little. More information can be found on the *Project No Project* web site at http://www.projectnoproject.com.

II. How the Sue and Settle Process and the Abuse of Citizen Suit Provisions Limit Public Participation While Increasing the Number of Economically Significant Regulations

A. What is Sue and Settle?

Sue and settle refers to a process whereby friendly advocacy groups sue federal agencies and the agencies settle the cases behind closed doors. Only *after* a settlement has been agreed to does the public have a chance to provide any comments. Often this is a pointless exercise because the meaningful decisions have already been made.

Agencies develop major public policy by entering into consent decrees and settlement agreements without the public having any means to voice whether such actions are appropriate. Often agencies will agree to issue regulations on a fast-track schedule as part of the settlement agreement.

The public does not have a meaningful voice in the agency determination to propose a regulation. While there will be a notice and comment period as required under the APA before the regulation is final, agencies are unlikely to change the regulations in a manner that could threaten the consent decree that has been entered into with environmental organizations. As a result, the limited protections that do exist for public participation are rendered meaningless.

B. Regulations that Otherwise Would Not Have Existed

Courts treat consent decrees between an environmental organization and an agency in the same manner as a consent decree between two private individuals. This is a primary reason why sue and settle is such a major problem. Two private individuals voluntarily enter into agreements acting in their own self-interests. It is appropriate in that situation for a court to defer to their agreement, but the same principle applied to government agency sue and settle agreements enables the agency to avoid meaningful public input.

An environmental organization and government agency may be taking voluntary action, but these organizations and agencies are supposed to be serving the interests of a third party: the public. An agency is not a private individual, it is an arm of the

government with a fiduciary obligation to represent the interests of all the people, but the settlement process enables a few individuals within the agency to substitute their private or political agenda for the general public interest. Environmental groups often are only able to bring lawsuits against agencies because they are supposed to be acting as private attorneys general. To serve the interests of the public, they are supposed to be ensuring that agencies perform nondiscretionary acts that the agency is required to take under statute. Instead, the environmental groups act in their own self-interests. The consent decree reflects not what best serves the public, including job creation, but instead what serves the narrow goals of the environmental organizations and sometimes that of the agencies, without regard for jobs or the interests of the public and regulated community.

Courts do not look at whether agencies are even obligated to enter into a consent decree. As noted in a recent case, *American Nurses Association v. Jackson*,[3] courts do not provide the necessary oversight over consent decrees between environmental organizations and the federal agencies. The District Court of the District of Columbia wrote:

> It is the Administrator's legal position that she is under a mandatory, nondiscretionary duty to issue emission standards for coal- and oil-fired EGUs [electric generating units]...by entering this consent decree the Court is only accepting the parties' agreement to settle, not adjudicating whether the EPA's legal position is correct.[4]

Therefore, courts are approving consent decrees merely on a claim by the agency that it has a nondiscretionary duty to take the requested actions. The courts are not even questioning whether the agency is acting within its statutory authority or requiring proof of the underlying basis for settlement. Once the consent decree is entered, agencies can promulgate more regulations than otherwise would have existed, simply by using the environmental group's lawsuit as justification for the regulations. The agencies may even welcome such lawsuits. They also may not welcome such lawsuits, but because of the threat of litigation they may just settle a suit. Regardless of the reason, the result is more regulation that imposes a greater burden on the regulated community and hurts the businesses that are creating jobs.

C. Regulations that Include New Requirements that are Not Mandated by Statute or Exceed Statutory Limits

Agencies often develop regulations that they are not mandated to promulgate. Through the sue and settle process, new regulatory requirements have been created beyond what the underlying environmental statute requires. The environmental groups are not just compelling agencies to act within clear statutory parameters. These organizations use regulatory agreements to create law, albeit with agency approval, that can hinder economic growth.

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[3] American Nurses Association v. Jackson, Civil Action No. 08-2198, (D.D.C.), April 15, 2010.
[4] *Id.*

D. Deadlines that are Used as Pretexts by Agencies to Impose Substantive Requirements on Regulated Entities

Even when agencies agree in consent decrees to procedural terms, such as deadlines, this can be used as a means to change the substantive nature of regulations. As noted in the discussion of the Environmental Protection Agency's (EPA) regional haze program in section IV, federal agencies will agree to unrealistic deadlines in consent decrees. For the regional haze program (an aesthetic program addressing visibility), states must file with the EPA their own plans to control regional haze. This program was abused through the use of sue and settle.

Environmental groups sued EPA to act on state regional haze plans. At the last second, EPA informed the states that there was something wrong with their submissions, such as inadequate cost estimates. Since there was inadequate time to fix the problems, EPA stepped in and imposed its own regional haze programs on the states. The federal programs are far costlier than the state programs. Even worse, any benefits are minimal at best, but the cost to states and employers within those states is significant.

E. What is a Citizen Suit?

Citizen suits are often the means by which sue and settle cases are brought. The primary problem with citizen suits is their purpose has been changed from compelling nondiscretionary acts to compelling agencies to give up discretionary power. If this problem were addressed, the costly new regulations that are imposed through sue and settle could be a thing of the past. Private entities that create jobs would not have to bear the brunt of poorly conceived regulations that were never properly vetted through the regulatory process.

In 1970, Congress enacted the first citizen suit provision,[5] which was contained within the Clean Air Act of 1970 (CAA).[6] Since that time, this new approach to enforcing federal law has become a staple of most environmental statutes.

A citizen suit allows a private citizen to sue any person (including the government) for violating environmental laws. Further, the private citizen can sue the federal government for failure to take nondiscretionary acts or duties that are required by an environmental statute.[7]

Citizen suits were not designed to enrich the plaintiffs but to serve the interests of the public.[8] Therefore, plaintiffs are not awarded damages, but can receive injunctive relief to secure the desired action and may be entitled to litigation costs, including

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[5] *See e.g.* Barton H. Thompson, Jr., Symposium: Innovations in Environmental Policy: *The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185 (2000).

[6] Clean Air Amendments of 1970, Pub. L. No. 91-604.

[7] *See e.g.* 42 U.S.C. § 7604. For a brief discussion of these two types of citizen suit lawsuits, see e.g. Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 Ind. L.J. 65 (1996) at 72-73.

[8] *See supra* note 5 at 198; *See also* Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).

attorney and expert witness fees, when a court deems it is appropriate.[9] In many of the sue and settle cases that result in a consent decree the federal agency agrees as part of the consent decree to pay the attorneys' fees incurred by the environmental organization.

Under some environmental statutes, plaintiffs also can trigger penalties on polluters. These penalties though are not given to the plaintiffs but instead are placed in a United States Treasury fund that helps finance compliance and enforcement activities.[10]

F. Lack of Congressional Oversight Over Citizen Suits

There needs to be much greater oversight over citizen suits. The judiciary committees should have oversight over these numerous provisions. Since the enactment of the first citizen suit provision in the CAA, the judiciary committees have not had the chance to weigh in and provide the necessary expertise on citizen suits.

The inclusion of a citizen suit provision was far from a given when it was being considered in the CAA. The House version of the bill did not include a citizen suit provision.[11] The Senate bill did include such a provision,[12] but serious concern was expressed during the Senate floor debate.

After acknowledging the importance of the bill, Senator Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed his concerns about the citizen suit provision. Two primary concerns were the limited review time and the failure to involve the Senate Judiciary Committee:

> Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best course of action to follow.
>
> Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.[13]

The citizen suit provision in the CAA was never considered by either the House or Senate Judiciary Committees.[14] The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.[15]

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[9] *See e.g.* 42 U.S.C. § 7604.
[10] *Id.*
[11] *See e.g.* "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.
[12] *Id.*
[13] *Id.* Senate debate on S. 4358 at 277.
[14] "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980; The legislative history was also searched using Lexis.

As shown in Figure 1, there are at least 20 environmental statutes that have citizen suit provisions.[16] Every major environmental statute has a citizen suit provision except the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[17] Based on our research, the House and Senate Judiciary Committees never addressed any of the bills that created the various citizen suit provisions and greatly expanded access to the federal courts.[18] In addition, while there was a Senate Judiciary Committee hearing over 25 years ago on Superfund that discussed various issues, including citizen suits, there has never been a House or Senate Judiciary Committee hearing focused on citizen suits and their impact on the federal court and regulatory system since the creation of the first citizen suit provision in 1970.[19]

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[15] "A Legislative History of the Water Pollution Control Act Amendments of 1972, Together with a Section-By-Section Index," Library of Congress, U.S. Govt. Print. Off., 1973-1978; The legislative history was also searched using Lexis.

[16] Act to Prevent Pollution from Ships, 33 USC § 1910; Clean Air Act, 42 USC § 7604; Clean Water Act, 33 USC § 1365; Superfund Act, 42 USC § 9659; Deepwater Port Act, 33 USC § 1515; Deep Seabed Hard Mineral Resources Act, 30 USC § 1427; Emergency Planning and Community Right-to-Know Act, 42 USC § 11046; Endangered Species Act, 16 USC § 1540(g); Energy Conservation Program for Consumer Products, 42 USC § 6305; Marine Protection, Research and Sanctuary Act, 33 USC § 1415(g); National Forests, Columbia River Gorge National Scenic Area, 16 USC § 544m(b); Natural Gas Pipeline Safety Act, 49 USC § 60121; Noise Control Act, 42 USC § 4911; Ocean Thermal Energy Conservation Act, 42 USC § 9124; Outer Continental Shelf Lands Act, 43 USC § 1349(a); Powerplant and Industrial Fuel Use Act, 42 USC § 8435; Resource Conservation and Recovery Act, 42 USC § 6972; Safe Drinking Water Act, 42 USC 300j-8; Surface Mining Control and Reclamation Act, 30 USC § 1270; Toxic Substances Control Act, 15 USC § 2619.

[17] Meltz, Robert, "The Future of Citizen Suits After Steel Co. and Laidlaw," Congressional Research Service, January 5, 1999.

[18] The legislative histories for each bill that created the citizen suits were analyzed primarily using Thomas (the Library of Congress legislative web site). Since Thomas does not include bills before 1973, legislative histories were examined through other means, such as the Library of Congress documents cited previously for the Clean Air Act and Clean Water Act. A legislative history search also was conducted using Lexis. The only bills considered are those that created the citizen suits. For example, it does not include a bill that may have amended a citizen suit provision. The bills creating the provisions, as opposed to amending them, generally are the primary opportunity for a committee to address the merits of citizen suits.

[19] In 1985, the Senate Judiciary Committee did hold a hearing on the Superfund Improvement Act of 1985 that among other things did discuss citizen suits (S. Hrg. 99-415). The hearing covered a wide range of issues, such as financing of waste site clean-up, liability standards, and joint and several liability. To find hearing information, a comprehensive search was conducted using ProQuest Congressional at the Library of Congress. The search focused on hearings from 1970-present that addressed citizen suits.

Figure 1
Statutes and Citizen Suit provisions, including whether the original bill creating the citizen suit provision was heard by the Senate or House Judiciary Committee.

Statute	Provision	Was the original bill creating the citizen suit provision heard by the Senate or House Judiciary Committee? Yes	No
Act to Prevent Pollution from Ships	33 USC § 1910		☑
Clean Air Act	42 USC § 7604		☑
Clean Water Act	33 USC § 1365		☑
Superfund Act	42 USC § 9659		☑
Deepwater Port Act	33 USC § 1515		☑
Deep Seabed Hard Mineral Resources Act	30 USC § 1427		☑
Emergency Planning and Community Right-to-Know Act	42 USC § 11046		☑
Endangered Species Act	16 USC § 1540(g)		☑
Energy Conservation Program for Consumer Products	42 USC § 6305		☑
Marine Protection, Research and Sanctuary Act	33 USC § 1415(g)		☑
National Forests, Columbia River Gorge National Scenic Area	16 USC § 544m(b)		☑
Natural Gas Pipeline Safety Act	49 USC § 60121		☑
Noise Control Act	42 USC § 4911		☑
Ocean Thermal Energy Conservation Act	42 USC § 9124		☑
Outer Continental Shelf Lands Act	43 USC § 1349(a)		☑
Powerplant and Industrial Fuel Use Act	42 USC § 8435		☑
Resource Conservation and Recovery Act	42 USC § 6972		☑
Safe Drinking Water Act	42 USC 300j-8		☑
Surface Mining Control and Reclamation Act	30 USC § 1270		☑
Toxic Substances Control Act	15 USC § 2619		☑

Citizen suits are inherently a legal matter, and therefore need the expertise of the judiciary committees. Some of the most important legal questions are brought up as a result of citizen suits. For example, the issue of standing is central to citizen suits. The relationship between citizen suits and standing is unique because citizen suit provisions give plaintiffs unusually wide latitude to sue in federal court. However, this statutory

expansion of standing does not allow federal courts to ignore Article III of the Constitution.[20]

G. Undermining the Purpose of Citizen Suits: Ignoring the Nondiscretionary Language

Citizen suits give plaintiffs the power to compel agencies to take nondiscretionary actions. The Clean Air Act (CAA) language states:

> [A]ny person may commence a civil action on his own behalf—
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. [21]

The plain language of the statute is clear: citizen suits may be brought to compel *nondiscretionary* acts or duties. On its face, these refer to acts or duties that the Administrator has no choice but to perform. The purpose of this provision is to make sure that agencies do not sit on their hands and ignore their statutory obligations.

The CAA legislative history clarifies the meaning of this provision. In the House debate on the conference report, Representative Springer, who was a conferee, explained:

> Citizen suits may be instituted against the administrator only for failure to act where he must. In other words wherever he is given discretion in the act, he may not be sued. He may be sued only for those matters imposed in the bill upon the administrator as a matter of law.[22]

"Mandatory" is used in the legislative history to describe the government actions that are at issue.[23] Federal courts have used "mandatory" as well.[24] The courts also have used stronger language to clarify the meaning of nondiscretionary acts, including calling them "clear-cut" requirements[25] and "purely ministerial acts."[26]

Put simply, the plain language of the statute, the legislative history, and case law have gone out of their way to make sure that citizen suits do not allow plaintiffs to compel an agency to perform a discretionary act. In practice though, this is precisely what happens many times in sue and settle consent decrees. The nondiscretionary limitation is effectively eliminated when agencies enter into consent decrees because courts allow plaintiffs to dictate terms that are at the discretion of agencies.

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[20] U.S. Const. art. III.
[21] *See e.g.* 42 U.S.C. § 7604(a)(2).
[22] *Supra* note 14, House Debate on the Conference Report, at 117.
[23] *Id.* at 112 (House Debate on the Conference Report, statement of Rep. Staggers who brought the conference report to the floor). *See also* the Conference Report at 206.
[24] *See e.g.* Kennecott Copper Corporation v. Costle, 572 F. 2d 1349 (9th Cir. 1978).
[25] *See e.g.* Sierra Club v. Thomas, 828 F.2d 783, (D.C. Cir. 1987).
[26] *See e.g.* Environmental Defense Fund v. Thomas, 870 F.2d 892 (2th Cir. 1989).

Courts do not review whether an act or duty is discretionary or nondiscretionary when the plaintiff and the agency come before the court with a settlement agreement. While plaintiffs serve an oversight function over agencies to ensure that they perform their required functions, there is inadequate judicial or congressional oversight as to whether these same agencies are properly entering into consent decrees. Agencies should have discretion when to enter into a consent decree, but that does not entitle agencies to have discretion to ignore the express language of citizen suit statutes.

Courts generally view their role differently when adjudicating a citizen suit case in which the agency is actively defending its actions as opposed to a situation in which the court is asked by the agency to approve a consent decree.[27] As a result, two types of citizen suit cases are created.

In citizen suits, the plaintiff is empowered to bring the case in the first place to serve the public. Both parties, when entering into consent decrees, are supposed to be serving the public. But under sue and settle agreements, the consent decree flips the whole concept of citizen suits on its head. As a result, a legal process designed to protect the public has effectively become a means to protect the interests of special interest actors and the special interests of the agencies. The public is even excluded from having a voice in a process that is supposed to serve the public interest. The loser from this distorted process is the public because sound policy is ignored.

III. Sue and Settle: How Did We Get Here?

To fully appreciate the tremendous impact that the sue and settle process and the abuse of citizen suit provisions has on the federal regulatory process, one needs to review how the federal administrative state has expanded so greatly while the powers of Congress to manage the administrative state have so diminished.

The very first sentence of Article I of the U.S. Constitution reads: "All legislative powers herein granted shall be vested in a Congress of the United States."[28] Congress makes the nation's laws, and the Executive Branch carries them out. Over time, however, this separation of powers has eroded to such an extent that federal agencies can now use the regulatory process to "legislate by regulation." And at times, agency regulations create broad new policies that impact many industries in the regulated community; these policies can literally determine the fate of industrial sectors, the well-being of thousands of families and the competitiveness of the nation. Given the current political climate, Congress cannot easily get its power back.

Congress has long recognized the challenges posed by the power of Executive Branch agencies. Therefore, it has repeatedly attempted to create statutory safeguards to ensure the regulatory state is transparent and accountable, and to ensure agency power is

[27] See, for example, American Nurses Association v. Jackson, Civil Action No. 08-2198, (D.D.C.), April 15, 2010.
[28] U.S. Const. art. I.

properly cabined within appropriate constitutional and statutory limits. For example, in 1946, Congress enacted the Administrative Procedure Act (APA) requiring agencies to regulate openly and with notice to and comment from the public, and subject to judicial review.[29] Over time, the procedural protections in the APA grew in importance as Congress passed vague laws delegating agencies with ever more expansive power. However, increased judicial deference to agency decisions and Congress' general avoidance of its oversight authority over regulatory actions combined to severely limit the operational checks on the regulatory power of federal agencies.

By the late 1970s, it had become clear that the delegation of congressional authority to the agencies to "fill in the legislative blanks," the lack of congressional oversight over the agencies, and judicial deference to agency decisions were fundamentally altering the original constitutional balance between the legislative and executive branches of government. Starting in 1980, Congress began enacting laws to restore the balance and to check executive power.[30] Over the past three decades, Congress has repeatedly attempted to rein in the Executive Branch agencies,[31] but it would be an understatement to assert that efforts to control expanding agency power have been of little impact. Agencies are just too skilled at manipulating the regulatory system.

Regulations are a necessary part of a complex society. But an unbalanced regulatory process, which allows sue and settle agreements, has led to an unprecedented increase in major, economically significant regulations, some of which are harming the economy and inhibiting job creation, and to the erosion of the carefully calibrated constitutional system of checks and balances that is the foundation for our system of government.

IV. Specific Examples of How Sue and Settle Hurts Job Creators

Since 2009, EPA has aggressively used out-of-court settlements as the legal basis for sweeping new rulemakings that, whether viewed separately or together, have a tremendous impact on the U.S. economy and its ability to provide jobs. This is particularly true where EPA enters into settlement agreements that purport to expand Federal regulatory authority well beyond the limits of the statutes the agency administers, e.g., the Clean Air Act, the Clean Water Act, etc. Notable examples of this disturbing trend and the devastating impacts these actions have on our economy include:

A. Reconsideration of the 2008 Ozone National Ambient Air Quality Standards (NAAQS)

Environmental advocacy groups sued EPA in 2008 challenging the just-promulgated NAAQS for ground-level ozone, which had been lowered from 84 parts per

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[29] *Supra*, note 1.
[30] *See e.g.* Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612.
[31] *See e.g.* Congressional Review Act of 1996, 5 U.S.C. §§ 801-808 and H.R. 10, "Regulations from the Executive in Need of Scrutiny Act of 2011 (REINS Act)," http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.10: The Senate version of the REINS Act is S. 299.

billion (ppb) to 75 ppb.[32] In 2009, EPA announced that it would reconsider the 2008 standard, and an environmental advocacy group agreed to place its lawsuit on hold. EPA subsequently developed a new ozone NAAQS in the range between 60 and 70 ppb. EPA estimated that the reconsidered ozone standard would cost up to **$90 billion per year** to implement nationwide.[33] Industry estimated that the ozone standard would result in the loss of up to **7.3 million jobs** throughout the economy by 2020.[34] The White House ultimately forced EPA to postpone the ozone reconsideration in September 2011. Nevertheless, EPA was content to use the environmental advocacy groups lawsuit as the impetus for agreeing to significantly tighten a NAAQS standard less than a year after it had been finalized, and well before it had been implemented. The resulting regulatory uncertainty caused by EPA's unprecedented and ill-advised action makes businesses reluctant to commit capital to expansion, modernization, and hiring until it is clear what EPA will eventually do.

B. Regional Haze and the Takeover of State Programs

EPA's regional haze program, established decades ago by the Clean Air Act, seeks to remedy visibility impairment at federal national parks and wilderness areas. Because regional haze is an aesthetic requirement, not a health standard, Congress emphasized that **the states** – and not EPA – should decide which measures are most appropriate to address haze within their states.[35] However, EPA has relied on settlements in cases brought by environmental advocacy groups to usurp state authority and federally impose a strict new set of emissions controls costing 10 to 20 times more than the technology chosen by the states. Beginning in 2009, advocacy groups filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state regional haze plans. Rather than defend these cases, EPA simply chose to settle. In five separate consent decrees negotiated with the groups and, importantly, **without notice to the states that would be affected**, EPA agreed to commit itself to specific deadlines to act on the states' plans.[36] Next, on the eve of the deadlines it had agreed to, EPA found that each of the state haze plans was in some way deficient. Because the deadlines did not give the states time to resubmit revised plans, EPA claimed that it had no choice but to impose its preferred controls federally. By using the sue and settle process and agreeing to a court-imposed deadline for action, EPA manufactured a way to reach into the state haze decision-making process and supplant the states as

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[32] Legal challenges to the 2008 Ozone NAAQS were consolidated as State of Mississippi, et al. v. EPA, No 08-1200 (D.C. Cir. 2008).

[33] Letter from President Barack Obama to House Speaker John Boehner, August30, 2011, available at www.whitehouse.gov.

[34] Donald Norman, Manufacturers Alliance, Economic Report, *Economic Implications of EPA's Proposed Ozone Standard* (September 2010), available through http://www.nam.org.

[35] *See* 42 U.S.C. § 7491 (b)(2)(A).

[36] The five consent decrees are: Nat'l Parks Cons. Ass'n et al. v. Jackson, No. 1:11-cv-01548 (D.D.C. Aug 18, 2011); Sierra Club v. Jackson, No. 1-10-cv-02112-JEB (D.D.C. Aug. 18, 2011); WildEarth Guardians v. Jackson, No. 1:11-cv-00743-CMA-MEH (D.Col. June 16, 2011); WildEarth Guardians v. Jackson, No. 4-09-CV02453 (N.D.Cal. Feb. 23, 2010); WildEarth Guardians v. Jackson, No. 1:10-cv-01218-REB-BNB (D.Col. Oct. 28, 2010).

decision makers, despite the protections of state primacy built into the regional haze program by Congress.

So far, the federal takeover of the states' regional haze program has cost eight states some **$642 million** over and above what they were planning to spend for visibility improvements.[37] Additional states in all parts of the country will be required to follow suit. And because the federal haze requirements do nothing to improve public health or perceptibly improve visibility in the affected states, citizens of those states are literally being required to spend their money for nothing. The federalized regional haze requirements will cost jobs to be lost at the numerous facilities that must either install costly new equipment in the name of visibility or shut down. Moreover, increases in the cost of electricity and products such as cement caused by the regional haze rules will further strain the weak U.S. economy.

C. Chesapeake Bay Clean Water Act Rules

In response to a lawsuit filed against EPA in January 2009 by environmental advocacy groups, which alleged that EPA had failed to take measures adequately to protect the Bay, EPA agreed in May 2010 to establish a suite of new regulations for the Bay by December 2010.[38] In the settlement agreement, the agency obligated itself to establish stringent new Total Maximum Daily Load (TMDL) standards for the Bay, create a framework for implementation, expand EPA's review of watershed permits, and write new regulations for concentrated animal feedlot operations and stormwater discharges. These actions, the direct result of a settlement of the case, create a rigid federal program to address water quality in the Bay, despite ample evidence that voluntary measures being taken by the states, localities, agricultural operations, and private interests had significantly improved the health of the Bay over the past 25 years. If these voluntary efforts had been allowed to continue, the improvement goal identified by EPA for nitrogen was likely to be achieved by 2027, the phosphorus goal by 2023, and the sediment goal by 2035.[39] In other words, the Bay was on pace to achieve its improvement goals with or without the new federal program.

The federal program for the Chesapeake Bay is major in its scope and economic impact. The TMDLs, which essentially sets land use-type limits on businesses, farms, and communities on the Bay based on their calculated daily pollutant discharges, cover the entire 64,000 square mile Chesapeake Bay watershed and its tidal tributaries. EPA's displacement of state authority to implement TMDLs is estimated to cost Maryland more than **$11 billion**,[40] with an additional **$7 billion** for Virginia.[41] Maryland industries alone

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[37] *See* William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (DRAFT)(August 2012).
[38] Fowler v. EPA, No. 1:09-cv-00005-CKK (D.D.C. Jan. 2009).
[39] *See* U.S. Senate Committee on Environment and Public Works, *Clouded Waters: A Senate Report Exposing the High Cost of EPA's Water Regulations and Their Impacts on State and Local Budgets* (Minority Report) (June 30, 2011), at 2-3.
[40] Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans o Key Maryland Industries* (April 2011).
[41] *CHESAPEAKE BAY JOURNAL*, January 2011, available at www.bayjournal.com/article.cfm?article=4002.

are expected to suffer an economic loss of $10 billion through 2017, with the commensurate loss of **65,000 jobs**.[42] The federal takeover of the Chesapeake Bay program is unprecedented in its scope and impact, yet by relying solely on the consent agreement as the source of its regulatory authority, EPA did not have to seek public input, or explain the basis for its actions in the Clean Water Act, or give stakeholders an opportunity to evaluate the science which the agency relies on in setting the TMDLs. It is also very likely that the assigned pollutant loads for farms, businesses, and communities are based on incorrect data derived from faulty modeling. Because the TMDL rulemakings resulted from a settlement agreement which set tight timelines for action, the public never had access to the information that would be necessary to comment effectively on the modeling and the assumptions used to set the TMDLs. EPA would have been better served to promulgate the Chesapeake Bay program rules through the normal Administrative Procedure Act notice and comment rulemaking process.

D. Utility MACT Rule

Following the February 2008 rejection of EPA's Clean Air Mercury Rule by the Court of Appeals, environmental advocacy groups sued EPA on December 18, 2008 seeking to force EPA to set MACT standards under Section 112.[43] EPA had sought to avoid promulgating a MACT standard when it originally promulgated the Clean Air Mercury Rule. On April 15, 2010, EPA and the environmental plaintiffs entered into a consent decree requiring EPA to issue MACT standards under Section 112 for coal- and oil-fired electric generating units, also known as the "Utility MACT" rule. Although the rule is supposed to reduce emissions of mercury and other toxic air pollutants, more than 99.9 percent of the rule's purported health benefits come from requiring further reductions in fine particulate matter (which is already adequately regulated under several existing EPA rules). The Utility MACT rule is expected to force 25 percent or more of the country's power stations to be shut down. Power plants that don't shut down will be required to install costly new technology to control particulates. According to recent industry analyses, American energy businesses are more likely to face a total of **$32 billion** in costs to comply with the Utility MACT rule.[44] This is reflected in recent annual reports from two dozen energy producers that have announced power plant closures. These companies' compliance costs alone will be **three times higher than EPA's estimate for Utility MACT <u>for the entire country</u> ($9.6 billion)**.[45] Of the 24 companies that have reported Utility MACT cost estimates, some have announced direct layoffs from the rule, totaling 5,100 jobs so far. Further, according to recently-announced power plant retirements, more than **9,100** jobs are being directly affected by Utility MACT.[46] More will follow as the impacts of Utility MACT ripple out to affected businesses and communities.

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[42] Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans o Key Maryland Industries* (April 2011).
[43] American Nurses Association v. Jackson, Case No. 1:08-cv-01298 (D. D.C. 2008).
[44] Sam Batkins, *American Action Forum* (June 6, 2012) available at http://americanactionforum.org/topic/american-energy-companies-report-over-three-times-higher-utility-impact-mact-compliance-costs-epa-pro
[45] *Id.*
[46] *Id.*

E. FWS Critical Habitat Designation

EPA is not the only federal agency to embrace a "sue and settle" approach. The U.S. Fish and Wildlife Service (FWS) used an out of court settlement in 2009 to designate a large critical habitat area under the Endangered Species Act.[47] In 2008, environmental advocacy groups sued FWS to protest the exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the endangered Hine's emerald dragonfly under the Endangered Species Act. FWS initially disputed the case. However, while the case was pending, the new administration took office, changed its mind, and settled with the plaintiffs on February 12, 2009. FWS agreed under the settlement to a remand without vacatur of the critical habitat designation in order to reconsider the federal exclusions from the designation of critical habitat for the Hine's emerald dragonfly. On April 30, 2009, FWS doubled the size of the critical habitat from 13,000 acres to 26,000 acres, exactly what the plaintiffs sought in the lawsuit. FWS also agreed to pay $30,000 in attorney's fees and costs to the plaintiffs. The critical habitat designation agreed to by FWS effectively restricts development of all kinds within the 26,000 acre areas. While the cost of the critical habitat designation and its potential impact on jobs can be debated, it is clear that the designation carries a significant impact. The inability to build, or farm, or otherwise use those lands clearly has an economic effect. By simply agreeing to designate the critical habitat, FWS avoided the economic review and impacts analyses that would have been required if the agency had gone through an ordinary notice and comment rulemaking.

F. What is the Larger Economic Impact of These Regulations?

In evaluating the larger impact to the economy of the sue and settle approach to regulation, it is important to remember that much more is at stake than the immediate cost of each new rule an agency agrees to issue or the net number of jobs that will be affected by each new rule. The immediate reality is that these new regulations will deter investment that creates new jobs and dislocate workers from the jobs that they now have. Whatever the future benefits may be, EPA's rush to regulate means that today more workers are losing jobs, families are losing income, and those least able to afford it are saddled with the burden of job search, relocation, and retraining.

The workers who lose their jobs today because regulation forces the plants where they have invested their working lives to shut down typically do not have the skills needed to take the new jobs that EPA promises will materialize. And typically those new jobs are also in the wrong places. For example, the basic idea that a job lost today at a power plant in Ohio that shuts down will be replaced within a year or two by a new job at an electric vehicle plant in Michigan is little comfort for workers who need to feed their families and to make their mortgage payments in Ohio today.

Data from the Bureau of Labor Statistics' latest (January 2010) Displaced Worker Survey underscores the challenges facing workers who are targeted for job losses by

[47] Northwoods Wilderness Recovery v. Kempthorne, No. 1:08-cv-1407 (N.D. Ill. 2008).

EPA. BLS looked at 6.9 million workers who lost jobs from January 2007 through December 2009 and found that in January 2010 over half still had not found another job. Many workers had experienced one to three years of unsuccessful job search. Others dropped out of the labor market in frustration and even quit looking. And it is important to note that the challenge of finding re-employment by displaced workers is not just the result of the recent recession. The previous BLS survey which covered the expansion years of 2005 through 2007 found that one-third of displaced workers did not find another job within three years. The BLS data clearly shows that EPA cannot justify ignoring employment displacement impacts by assuming that displaced workers quickly find new employment at the same wage rate. In short, EPA does not now count the loss of a job as a cost. The government's own survey evidence shows that destroying jobs has long-lasting adverse impacts on workers. When an agency of the federal government proposes a policy that it knows will result in employment dislocation for some citizens, at the very least the costs of job displacement should be recognized in the cost benefit analysis that justifies the regulation, and a decent respect for the families whose livelihoods are affected should require that the agency actively address how the burden of job dislocation will be mitigated. The burden that is being placed on workers today is compounded by the likelihood that new jobs, when and if they materialize, will pay less than the jobs that were destroyed. The same BLS survey found that among the minority who did find new jobs, 55 percent reported lower earnings in the new job than in the job that was lost (in the previous survey round of January 2008, 45 percent of reemployed workers reported lower earnings than in the previous job).[48]

Recent studies discuss the startling human disaster impacts of unemployment. For example, the prospects of re-employment of older workers deteriorate sharply the longer they are unemployed. A 50 – 61 year old worker unemployed for 17 months has only a nine percent chance of securing a job in the next three months and workers over 62 have only a six percent chance of finding a new job.[49] Another study finds mid-career workers who lose long-held jobs and experience long term unemployment can expect to live one and one – half years less than a continuously employed worker.[50] Moreover, the rate of suicides for unemployed workers also increases by up to ten percent.[51] These are real people, and not EPA's computer modeled people.

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[48] "Worker Displacement: 2007-2009." U.S. Bureau of Labor Statistics (USDL-10-1174) August 26, 2010, at http://www.bls.gov/news.release/pdf/disp.pdf The BLS Displaced Worker Survey focuses on "long-tenured" employees who lose their jobs because of plant closures or relocation, shift elimination, or decline in demand for the product. The survey tracks workers who lost jobs that they had previously held for three or more years. This category fits well with the experience of workers who are in industries most affected by EPA regulations.

[49] Dean Baker and Kevin Hassett, "The Human Disaster of Unemployment." New York Times, May 12, 2012, http://www.nytimes.com/2012/05/13/opinion/sunday/the-human-disaster-of-unemployment.html?pagewanted=all.

[50] Daniel Sullivan and Till von Wachter, "Job Displacement and Mortality: An Analysis Using Administrative Data Quarterly Journal of Economics, Vol. 124 (2009), number 3 (Aug), pp. 1265-1306 at http://qje.oxfordjournals.org/content/124/3/1265.short.

[51] *Supra*, note 49. *See also* Annie Lowery, "Death and Joblessness," Washington Independent, August 17, 2010 at http://washingtonindependent.com/94925/death-and-joblessness.

EPA needs to consider more than the supposed net impacts of its regulations. While EPA's regulations have both benefits and costs, the reality is that the winners and the losers are not the same people and usually not even in the same communities. EPA's regulatory decisions create massive shifts in the structure of the economy, benefiting some workers, some communities and some industries and imposing costs or complete destruction on others. Even if EPA's redistributive mandates yield a net benefit for society as a whole over time, the rapidity of change that EPA mandates and the nationwide scope of change is a tremendous shock to the economic system. EPA needs to consider how it can lessen the burdens it is placing on the workers, families and communities that it targets for losses. EPA could reduce the economic shocks of its mandate by adopting more gradual approaches that phase in new standards over longer periods of time and that apply new standards only to new facilities, allowing existing facilities and the communities that depend on them to live out their natural lives. EPA could learn from the experience of the diffusion of technological change. New technologies yield net benefits to society, but their efficiency gains also come with costs as jobs and industries dependent on old technology are replaced. But in the case of technological change, the typical experience is gradual adjustment that cushions the shocks of economic change. EPA should endeavor to make its program of environmental change resemble more closely the successful experience of adoption of technological change. In addition to gradual schedules for adoption of new standards and "grandfathering" of older facilities, such an approach might also feature greater reliance on voluntary compliance, demonstrations, and incentive programs. A more gradual approach to regulation implementation would yield the added benefit of facilitating empirical study of effects to ensure that policies really are effective and on the right track.

Unfortunately, the sue and settle system makes it difficult, if not impossible for EPA to make such strategic choices. Consent decrees and court orders dramatically accelerate the regulatory juggernaut. Rather than developing regulatory policy in a coordinated, deliberate fashion that includes public participation, rules are hastily issued, one on top of the other. This scattershot approach to regulation makes the shocks to the economic system immediate and more pervasive than would otherwise happen.

Finally as far back as 1977, Congress, in section 321 of the Clean Air Act, anticipated the negative impacts of regulations on jobs and it mandated the Administrator of EPA to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this Act and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement."[52] Thereafter, Congress imposed similar mandates in the Clean Water Act[53]; the Toxic Substances Control Act[54]; CERCLA[55] and the Resource Conservation

[52] 42 U.S.C. § 7621(a).
[53] 33 U.S.C. § 1367(e).
[54] 15 U.S.C. § 2623(a).
[55] 42 U.S.C. § 9610(e).

and Recovery Act.[56] Had these studies been conducted, EPA and Congress would better understand how regulations impact job loss and the impacts of job loss on the communities where the losses occur; unfortunately EPA has failed to implement the clear intent of Congress and has ignored being able to appreciate the hard facts of job loss caused by its regulatory madness.

V. Recommendations

The sue and settle problem can be fixed by ensuring that existing law works as intended. Solutions do not require undermining the government's ability to settle lawsuits or restricting citizen suits. The problem requires solutions based on good government principles. This includes transparency, public participation, and strong government oversight.

A. Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862)

There already is a strong bill that would go a long way to addressing many of the problems associated with sue and settle. Representative Benjamin Quayle (R-AZ) introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012, which passed out of the House Judiciary Committee. It would do several very important things:

- Require disclosure of proposed consent decrees and settlement agreements before they are filed with a court;
- Give the public a chance to provide comments before proposed sue and settle agreements are filed with a court, thereby allowing the public to have a meaningful voice;
- Make it easier for affected parties to intervene in legal actions;
- Require agencies to give proper notice of proposed sue and settle agreements.
- Ensure that agencies, in sue and settle agreements, have sufficient time to comply with all statutory requirements.
- Require agencies to give annual reports to Congress regarding the number, identity, and content of complaints and sue and settle agreements, along with attorney's fees and costs awarded in connection with the sue and settle agreements.[57]

With passage of H.R. 3862, the public and Congress would know how often sue and settle agreements are used. The public would get a chance to have a voice in the process and environmental groups and agencies would not be able to do an end-run around the procedural protections that are supposed to apply to regulations under the Administrative Procedure Act. By having public participation, the agencies would formulate better public policy and would better consider the impact regulations have on jobs and employers.

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[56] 42 U.S.C. § 6971(e).
[57] *Supra*, note 2.

B. Improve Oversight over Citizen Suits: Move Citizen Suit Provisions to Title 28 and Under the Jurisdiction of the Judiciary Committee

The House and Senate Judiciary Committees should have jurisdiction to oversee citizen suit provisions. This would strengthen the oversight over citizen suits by having the committee with the legal expertise and clear jurisdictional charge overseeing this inherently legal matter. To ensure that such jurisdiction exists, citizen suit provisions would need to be included in statutes under the jurisdiction of these committees.

Existing citizen suit provisions would fit perfectly into Title 28 of the United States Code, which addresses the federal judiciary and judicial procedure.[58] Moving the existing citizen suit language to Title 28 would be easy since the language throughout the various environmental statutes is generally identical.

C. Ensure that Agencies Do Not Give Up Discretionary Power Contrary to Law

Congress has made it clear that citizen suits may only be used to compel agencies to perform nondiscretionary acts or duties. When cases are adjudicated, courts and agencies ensure that the will of Congress is respected through judicial rulings and the defense of the agency. Unfortunately, in sue and settle cases, courts allow agencies to give up discretionary power when there are consent decrees and settlement agreements. To address this concern, courts must actively supervise consent decrees entered into by agencies.

Moreover, if agencies were precluded from improperly giving up discretionary power through consent decrees, agencies would not be able to agree to regulations not mandated by law or develop new regulatory requirements that are not contained within environmental statutes. There would be no way for a single environmental group to create major public policy by doing an end-run around the regulatory process.

D. EPA Must Conduct Employment Loss Studies

EPA must comply with the intent of Congress and undertake the mandated continuing evaluations of potential loss or shifts of employment caused by its regulations. Only by undertaking these studies can EPA begin to understand how its regulations impact real people, in real communities. Moreover, since the Bureau of Labor Statistics prepares Worker Displacement Studies every several years, Congress may want to consider having EPA fund a new section of the study that addresses job loss from regulation.

In the final analysis, many activities cause job loss, e.g. technological change, competition, but those changes are caused by market forces and take place over time with the market constantly reallocating jobs and resources. But government regulations are different from market forces. They are direct and blunt instruments intentionally applied

[58] 28 U.S.C. §1 *et. seq.*

against specific industries, in specific areas of the country and designed to change industry practices and employment in the specific industry. As such, EPA must be conscious that its regulations can have severe negative impacts on jobs and it must continuously evaluate these impacts. To address EPA's 35 year indifference to Congress' mandate, EPA should be required to undertake an evaluation of the cumulative impacts of all economically significant regulations it has issued in the last three years on job loss and shifts in employment. It if performed this action it would only be doing what Congress mandate it do.

Again, thank you for the opportunity to testify today. I am happy to answer any questions that you may have.

Mr. LANKFORD. Mr. Pruitt, I know you have got to be able to scoot out of here as well. You are excused from the panel. Thank you for being here.

Mr. PRUITT. Thank you, Mr. Chairman.

Mr. LANKFORD. Mr. Percival.

STATEMENT OF ROBERT PERCIVAL

Mr. PERCIVAL. Thank you, Mr. Chairman. Thank you for inviting me. I am Robert Percival, the director of the environmental law program at the University of Maryland Law School.

I'm afraid I'm going to be a bit of a skunk at the party. I've been practicing environmental law for 31 years. When I first started practicing environmental law, it was during the early days of the Reagan administration. And what I've heard here today is complaints about how environmental regulation, which had long been a bipartisan issue, is killing jobs and killing the economy.

Every time a new major program was being implemented, the feature of environmental law in the United States that has so distinguished us is the fact that we have citizen participation. We allow for citizen suits, and virtually every major program had to be implemented only because the agencies were forced by citizen suits to implement it.

As Congresswoman Speier indicated, most lawsuits brought against the EPA are actually brought by industry groups. That's part of the system. We allow ordinary citizens to go into court to make sure that EPA abides by the law.

When the Reagan administration proposed to phase lead out of gasoline, there were cries of doom, we were going to have gasoline shortages. It has been one of the most successful environmental regulations in the world, adopted by virtually every country in the world.

We had a very healthy economy until the global economic problems in 2008. At the same time we had environmental law that made us the envy of the world. All you have to do is go to China, as I do fairly regularly, and you see these young public-interest lawyers in China who would love to have a system like we have where they can hold their government accountable.

And what I have heard today is that illegal regulations are being adopted, that the public is being cut out of the process because of these settlements. Similar charges were investigated way back in the Reagan administration in 1986, when Attorney General Edwin Meese came up with the Meese Memorandum to provide guidelines for what agencies could agree to when they reached settlements. And as I indicated in my testimony, settlements are a prominent feature of the U.S. legal system, and they're expressly favored by public policy because they have so many benefits.

The characterization of collusive litigation and sue and settle, I believe, is simply a fantasy. To be sure, agency policies are going to change when there is a change in Presidential administration. Administrations have the ability to change course, and if we have a new Republican administration coming into office in January, you may see a situation where EPA is more frequently reaching settlements with industry groups.

But there has not been any change in EPA that has in any way cut out the public from the process. There are already very important safeguards that prevent that; standing requirements that require concrete adverseness among litigants, the need to obtain judicial approval of settlements, and, most importantly, the requirements of the Administrative Procedure Act that preclude agencies from making commitments concerning the substance of rules.

The D.C. circuit and other U.S. courts of appeal have not been shy about striking down EPA regulations, as Mr. Martella well knows, if they are, in fact, illegal, or if the Administrative Procedure Act has been violated. But the charge that EPA is out of control and as a result acting illegally I think was quite well refuted on Tuesday when the D.C. circuit came down with its Coalition for Responsible Regulation v. EPA decision upholding EPA's greenhouse gas regulations, saying that everything EPA did essentially was correct.

So I simply am not on board with the notion that we need to do more to discourage settlements. I think that will only make it more difficult for agencies to benefit the public, whether it's in a Democrat administration or a future Republican administration.

Thank you.

Mr. LANKFORD. Thank you, Mr. Percival.

[Prepared statement of Mr. Percival follows:]

My name is Robert V. Percival. I am the Robert F. Stanton Professor of Law and the Director of the Environmental Law Program at the University of Maryland Francis King Carey School of Law. Thank you for inviting me to testify today. A copy of my c.v. is attached to this testimony as Appendix A. As indicated on the c.v., I have long taught Environmental Law, Constitutional Law, and Administrative Law. I also have written extensively in these areas, including research on the specific focus of this hearing, which is attached as Appendix C to this testimony ("The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making," 1987 University of Chicago Legal Forum. 1987 U. Chi. Legal F. 327 (1987)).

I. U.S. ENVIRONMENTAL LAW IS THE ENVY OF THE WORLD

In recent years I have devoted much of my academic work to global environmental law. I have lectured in 26 countries on six continents and at more than 20 academic institutions in the People's Republic of China. During the spring semester 2008 I taught as a J. William Fulbright Distinguished Lecturer at the China University of Political Science and Law in Beijing. Based on these experiences, I can testify that the U.S. legal system is the envy of the world. A major reason for this is because we authorize citizen suits, heard by an independent judiciary, that allow ordinary citizens and businesses to hold government agencies accountable.

U.S. environmental law generally authorizes two types of citizen suits against government agencies. First, the Administrative Procedure Act (5 U.S.C. §702), and the judicial review provisions of the federal environmental laws (see, e.g., §509 of the Clean Water Act, 33 U.S.C. §1369) authorize judicial review of agency action to assess its conformity to legal and procedural requirements. Second, the

environmental laws authorize citizen suits against agencies for failure to perform non-discretionary duties (see, e.g., §505(A)(2) of the Clean Water Act, 33 U.S.C. §1365). We enjoy much cleaner air and water today than countries like China because citizen groups were able to go to court to compel agencies to implement the ambitious promises Congress made in our environmental laws. These laws have produced enormous net benefits to society and the economy that make U.S. environmental law the envy of the world.

II. SETTLEMENTS ARE DESIRABLE AND FAVORED BY PUBLIC POLICY

Settlements are a prominent feature of the U.S. legal system, both civil and criminal, because they provide important benefits to litigants and to society. They avoid the time and expense of protracted litigation, free up valuable judicial resources and enable both parties to reduce the risk of unfavorable litigation outcomes. Thus, as courts have recognized, there is a "broad public interest favoring" settlement. Southern Union Gas Co. v. Fed. Energy Regulatory Comm'n, 840 F.2d 964 (D.C. Cir. 1988). In most cases where agencies are sued for failing to perform a non-discretionary duty, such as missing a statutory deadline, liability is clear and the primary issue is when the violation will be cured by the agency performing its mandatory duty. An agency will only enter into a settlement when it believes that the settlement will leave it better off than it would have been had the litigation continued to judgment.

III. EXISTING LEGAL SAFEGUARDS PRECLUDE COLLUSIVE LITIGATION

The characterization of settlements of environmental litigation against agencies as collusive "sue and settle" to bypass normal statutory and rulemaking

requirements is simply a fantasy. Such litigation does not exist because existing legal safeguards preclude it. Agencies must comply with the law as written by Congress, including the requirements for notice and comment rulemaking provided in the Administrative Procedure Act (APA) (5 U.S.C. §553). Courts must approve agency settlements and they are directed by the APA to reverse agency actions that are contrary to law or undertaken without observance of legally required procedures (§5 U.S.C. §706). While agencies can commit to a schedule for performing their mandatory duties, agencies cannot settle litigation by making commitments concerning the substance of final regulations they will issue.

To be sure, agencies policies may change, particularly when there is a change in presidential administrations. Agencies have inherent authority to reconsider prior regulatory decisions so long as they have a reasoned basis for doing so. Motor Vehicle Mfrs. Ass'n v. State Farm Automobile In. Co., 463 U.S. 29, 56-57 (1983). Thus, it should surprise no one if the Obama administration's EPA finds it easier to reach settlement agreements with environmental groups than with industry. Nor should it surprise anyone if, for example, a future Romney administration's EPA found it easier to settle litigation with industry. This does not mean that collusion is occurring. Nor does it mean that statutory and rulemaking requirements are being bypassed. Settlements approved in cases such as *American Nurses Association v. Jackson* and *National Pork Producers v. EPA* commit EPA to propose regulations, but they make no commitments concerning the substance of any final rules the agency may adopt. These will be subject to notice and comment rulemaking in which all

members of the public can participate. Any regulations EPA ultimately adopts can be challenged in court to assess their legality.

There already are substantial safeguards built into the legal system to preclude collusive settlements. These safeguards include: (1) standing requirements that require concrete adverseness among litigants, (2) the need to obtain judicial approval of settlements, and (3) requirements of the Administrative Procedure Act (APA) that preclude agencies from making commitments concerning the substance of future rules. Moreover, the U.S. Department of Justice, whose Environment and Natural Resources Division (ENRD) has operated with the greatest integrity in a non-partisan fashion throughout Democratic and Republican administrations, has undertaken to provide its own additional safeguards. The ENRD now posts proposed consent decrees online and solicits public comment on them prior to their entry (see http://www.justice.gov/enrd/Consent_Decrees.html).

In March 1986 Attorney General Edwin Meese issued a memorandum restricting the scope of permissible settlement commitments by executive agencies and the circumstances under which consent decrees can be employed by them. Memorandum from Edwin Meese III to All Assistant Attorneys General and All United States Attorneys, Department Policy Regarding Consent Decrees and Settlement Agreements, March 13, 1986. Even this memorandum recognized that settlement is "a perfectly permissible device" that "should be strongly encouraged." It noted that consent decrees are beneficial "for ending litigation without trial, providing the plaintiffs with an enforceable order, and insulating the defendant from the ramifications of an adverse judgment."

In the article appended to this testimony, I concluded that the "Meese Memorandum" was unwise as a policy matter but clearly within the discretion of the Attorney General. Although the Meese Memorandum was premised on the notion that it was constitutionally mandated, I argued that it was not, a position that has withstood the test of time. See "Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion," Memorandum from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, for Raymond C. Fisher, Associate Attorney General (June 15, 1999) available online at: http://www.justice.gov/olc/consent_decrees2.htm.

The Meese Memorandum was motivated largely by the Reagan administration's efforts to persuade courts to vacate consent decrees entered into during previous administrations. The one environmental consent decree targeted by the Reagan administration was the "Flannery Decree," which was upheld by the D.C. Circuit in Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983). In that case the EPA had fallen hopelessly far behind statutory deadlines for implementing a detailed regulatory program covering virtually all industrial sources of water pollution. Faced with multiple lawsuits, EPA agreed to a detailed timetable to carry out its nondiscretionary duties to promulgate effluent limits and performance standards under the Clean Water Act for sixty-five pollutants discharged by twenty-one industries. The settlement was largely ratified by Congress in the 1977 Amendments to the Clean Water Act. In a subsequent challenge to the consent decree, the D.C. Circuit upheld it, emphasizing that it was consistent with the purposes of the Act, fairly resolved the controversy, and did not

prescribe the content of the regulations that EPA would promulgate. Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983). The decree has produced significant results.

Contemporary consent decrees in environmental cases again involve situations where EPA has clearly violated a statutory duty mandated by Congress. The consent decree approved in 2010 in *American Nurses Association v. Jackson* resolved litigation charging that EPA was more than a decade late in issuing standards to control hazardous air pollutants required by the 1990 Amendments to the Clean Air Act. EPA's failure to meet the statutory deadline was undisputed. The question addressed by the settlement agreement was how much time the agency should be allowed to cure this violation. While industry intervenors argued that the schedule EPA had agreed to for issuing the regulations was too rapid, the court approving it noted that "[s]hould haste make waste, the resulting regulations will be subjected to successful challenge. If EPA has correctly estimated the speed with which it can do the necessary data gathering and analyses, harmful emissions will be sooner reduced." American Nurses Association v. Jackson, Civil Action No. 08-2198 (D.D.C. April 15, 2010).

In fashioning relief courts generally have been deferential to agency representations concerning the amount of time needed to complete rulemakings. Yet given EPA's track record of repeatedly missing deadlines, occasionally a court will lose patience with the agency. In a very rare case where a court refused to give EPA more time to meet deadlines for performing long overdue mandatory duties, see Sierra Club. V. Jackson, 2011 WL 181097 (D.D.C. Jan. 20, 2011), EPA issued the

regulations, 76 Fed. Reg. 15,608 (Mar. 21, 2011), while simultaneously publishing a notice of its intent to reconsider them. 76 Fed. Reg. 15,266 (Mar. 21, 2011).

IV. CONCLUSION

The ability of citizen groups and businesses to go to court to hold agencies accountable is one of the most important features of our legal system that makes it the envy of the world. It has been absolutely critical to ensuring that our federal environmental laws are implemented and enforced in a manner consistent with statutory directives. Settlement of litigation has long been a prominent feature of our legal system that is expressly encouraged by public policy because of the substantial benefits it provides. The notion that collusive settlements are being used by agencies to expand their powers beyond existing legal authorities or to bypass procedures for promulgating rules is a fantasy. Existing legal safeguards preclude collusive litigation and settlements cannot be used to make commitments concerning the substance of future regulations. Congress should not further burden federal courts and agencies with new obstacles to settlements that will result in more protracted litigation and less efficient implementation of the law.

APPENDIX A

C.V. for ROBERT V. PERCIVAL
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UNIVERSITY OF MARYLAND SCHOOL OF LAW, Baltimore, Maryland *1987-present*
Robert F. Stanton Professor of Law
Director, Environmental Law Program
Developed and manage one of the nation's top-rated environmental law programs. Created the program's environmental law clinic in 1987. From 1987-89 served as director of the university-wide Coastal and Environmental Policy Program. Appointed full professor in 1994 and Robert F. Stanton Professor in 2004. Selected as "Teacher of the Year" for the University of Maryland Baltimore in 2007.

Courses taught: Environmental Law, Environmental Law Clinic, Torts, Constitutional Law, Administrative Law, Environmental/Administrative Law Workshop, Seminars in Toxic Torts, Risk Assessment and Regulation, Management of Global Fisheries, Transboundary Pollution & the Law, Tobacco Control and the Law, and interdisciplinary seminars on Lead Poisoning Control and Comparative Environmental Law and Politics (winner of the 2005 University of Maryland Board of Regents' Award for Collaboration in Teaching for course co-taught with the Department of Government and Politics).

Summer teaching: Comparative U.S./China Environmental Law at Vermont Law School, South Royalton, Vermont (Summer 2012), Principles of Environmental Law at Shandong University, Jinan, China (Summer 2012), Comparative Environmental Justice at University of British Columbia/Southwestern University School of Law, Vancouver, Canada (Summer 2006, Summer 2009), Environmental Law at Lewis & Clark College of Law in Portland, Oregon (Summer 1995), Comparative Environmental Law at the University of Aberdeen in Aberdeen, Scotland (Summer 1994, Summer 2000).

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Mr. LANKFORD. Mr. Yeatman.

STATEMENT OF WILLIAM YEATMAN

Mr. YEATMAN. Chairman Lankford, distinguished members of the subcommittee, thank you very much for inviting me to testify this morning. My name is William Yeatman. I work at the Competitive Enterprise Institute. We are a free-market think tank here in Washington, D.C.

Wonderful. I am getting a visual aid.

I am here this morning to speak to you about how EPA is using the sue-and-settle—so-called sue-and-settle consent decrees to usurp the States' rightful authority on regional haze.

First a short primer on the regional haze regulation. It's a Clean Air Act regulation, and its purpose is to improve the view at national parks and wilderness areas. This point bears repeating. It's an aesthetic regulation, not a public health regulation. Due to this fact, the Congress intended for the States to be the lead decision-makers on regional haze policy, on visibility improvement policy.

Despite State primacy, the Environmental Protection Agency has already imposed three Federal implementation plans for regional haze on Oklahoma, New Mexico and North Dakota over the staunch objection of State officials. EPA's plans would cost almost $400 million per year more than the States' plans, which were crafted with all due process over the course of years. Sue and settle featured prominently in EPA's actions in these Federal implementation plans, and I'll briefly sketch out how it worked for each of these States.

In a northern California court, EPA agreed to deadlines on regional haze as part of a settlement agreement with Wild Earth Guardians. The States were not notified and were not part of this agreement. They were notified after the fact, but were not part of the agreement.

On the eve of the consent decree deadline, EPA objected to the process used by States for their regional haze determinations. They didn't take on the determinations directly due to State primacy accorded by the Clean Air Act on regional haze policy. Instead, they objected to the process. Usually it was the State's cost-effectiveness analysis. That's what they went after. This didn't reject the State's plan outright; rather, it held it in abeyance, sort of holding pattern. Then EPA claimed that, pursuant to the consent decree, it had no choice but to run roughshod over the State and impose its own preferred plan, Federal implementation plan.

So that is how it has worked in each of these three States, this three-part strategy, already, and as I mentioned, Oklahoma, New Mexico and North Dakota, $400 million per year of cost over what the States had determined was necessary to comply with the regional haze rule. EPA's proposed fix for Wyoming and Nebraska, these would cost $120 million per year more than the States' plans. Utah and Arkansas are likely next.

And for what? What is the ultimate benefit of these Federal implementation plans? Thanks to Colorado State University professors, they have actually created software that allows us to visualize visibility impairment. It is known as WinHaze. It is available on the Internet for free. I downloaded that software. I input the EPA's

own data, its own baseline data, and its own visibility improvement data. What I found was rather striking. I have two images to convey what I did find.

On the left here, this is Oklahoma, Wichita Mountains National Park. This is the most affected Class 1 area of the EPA's Federal implementation plan for Oklahoma. This is the result. This is the putative benefits of the regulation right here.

On the left we've got the State's controls. On the right we've got EPA's controls. Notably, this is the largest disparity between State and EPA controls. This is the biggest improvement engendered by any of EPA's actions on regional haze today. This improvement, quote/unquote, was worth $282 million per year in control costs, in compliance costs. So this is a side-by-side photo.

Up on the monitor—aww jeepers, we had it there right before, but perhaps it's the not there anymore. We'll get it back.

Up on the monitor, in addition to side-by-side images, WinHaze, the aforementioned software, allows us to do split images, so it's, in essence, a melding of two. On the left half, those are the State controls. On the right half, right 50 percent, those are EPA's controls. The split image is meant to accentuate any difference between the two visibility results.

As you can tell, or at least certainly to my eyes, there is no difference. Even the split image, which is supposed to accentuate the difference, is invisible. I cannot tell the difference. Last night at the Competitive Enterprise Institute, I lined up my colleagues and had them each look at this placard. None of them could distinguish a difference. So in essence, it appears to be all pain and no gain with respect to this regional haze regulation.

That concludes my testimony. I look forward to taking your questions. Thank you very much.

Mr. LANKFORD. Thank you.

[Prepared statement of Mr. Yeatman follows:]

Testimony of William Yeatman
Assistant Director, Center for Energy and Environment
Competitive Enterprise Institute
on
"Mandate Madness: When Sue and Settle Just Isn't Enough"
before the
Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform
Committee on Oversight and Government Reform
U.S. House of Representatives

June 28, 2012

Chairman Lankford, Ranking Member Connolly, Members of the Subcommittee, thank you for inviting me to testify before you today about the Environmental Protection Agency's Regional Haze program. I am William Yeatman, assistant director of the Center for Energy and Environment at the Competitive Enterprise Institute. We are a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI specializes in regulatory policy. We accept no government funding and rely entirely on individuals, corporations, and charitable foundations for our financial support.

My testimony addresses whether the Environmental Protection Agency is infringing on the States' rightful authority on visibility improvement policy pursuant to the Clean Air Act. So-called "sue and settle" consent decrees—among other regulatory maneuvers described below—have figured prominently in Regional Haze Federal implementation plans imposed by EPA on Oklahoma, New Mexico, and North Dakota, over the staunch objections of State leaders. EPA's imposed Regional Haze plans would cost almost $400 million per year more than the State plans.[1]

In addition to the aforementioned Regional Haze plans imposed on Oklahoma, New Mexico, and North Dakota, EPA has proposed Federal implementation plans for visibility improvement on Nebraska and Wyoming, at an estimated cost above the States' plans of $24 million per year[2] and $96 million per year,[3] respectively. Moreover, the Agency is poised to propose a Regional Haze Federal implementation plan for the Navajo Generating Station in the Navajo Nation, which, according to a Federal study, could raise water rates in Southern Arizona by 15 percent.[4] Regional Haze State implementation plans submitted by Arkansas and Utah were rejected by EPA. Finally, in Minnesota, EPA has signaled its intention to impose the same Regional Haze requirement twice, at the same time, in order to address the same visibility impairment. This regulatory "double dip"—a seemingly flagrant violation of President Barack Obama's Executive Order 13563 asking Federal agencies to eliminate duplicative regulation—would cost ratepayers almost $30 million annually.[5]

The costs of EPA's imposed Regional Haze plans are significant; the benefits, however, are suspect. According to peer-reviewed research, the visibility improvement achieved by EPA's Regional Haze plans is imperceptible to the average person.

Regional Haze: The Basics

In 1977 and 1990, Congress passed amendments to the Clean Air Act providing that States work together to improve visibility at Federal National Parks and Wilderness Areas. Together, these amendments are known as the Regional Haze provision.

A defining characteristic of the Regional Haze program is that States—and not EPA—are the lead decision-makers. In floor debate in 1977, the Congress unequivocally indicated that States should have the authority to decide how much value to assign to an aesthetic benefit[6], and the resulting language of the Clean Air Act reflects this fact.[7]. According to EPA's 2005 Regional Haze implementation guidelines, "[T]he [Clean Air] Act and legislative history indicate that Congress evinced a special concern with insuring that States would be the decision-makers"[8] on visibility-improvement policy making. The courts, too, have interpreted the Clean Air Act such that states have primacy on Regional Haze decision making. In the seminal case *American Corn Growers v. EPA* (2001), which set boundaries between the States and EPA on Regional Haze policy, the D.C. Circuit Court remanded EPA's 1999 Regional Haze implementation guidelines for encroaching on States' authority.

The important points about Regional Haze are: (1) it is an aesthetic regulation, and not a public health regulation; and (2) the program accords States a unique degree of authority.

How EPA Trumped State Authority on Regional Haze

In New Mexico, Oklahoma, and North Dakota, EPA and State officials disagreed over which controls were required at a number of coal-fired power plants for compliance with the Regional Haze provision of the Clean Air Act. However, the legal and regulatory record is clear: States get to make visibility policy. In order to trump State primacy on Regional Haze, EPA has relied on a mixed bag of regulatory maneuvers, which are explained in the subsections below.

1. Procedural Second Guessing

Before EPA can impose a Federal implementation plan, it must first disapprove the Regional Haze State implementation plan submitted by the States. Due to the primacy accorded States on visibility improvement policy by the Clean Air Act, EPA could not simply reject the emissions controls selected by the States. Instead, EPA only has the authority to object to process used by State's in the course of selecting controls for compliance with Regional Haze.

For example, in the course of reviewing Regional Haze implementation plans submitted by New Mexico,[9] Oklahoma,[10] and North Dakota,[11] EPA hired an independent contractor to vet the States' cost-effective analysis. In Nebraska, EPA audited the State's analysis using this same

contractor's previous Regional Haze work in Oklahoma.[12] In fact, this independent contractor is a paid consultant who routinely serves as a witness for the very same environmental groups who sued to obtain the Regional Haze consent decrees.[13] Unsurprisingly, the cost-estimates of controls at coal fired power plants calculated by this independent contractor/paid environmental consultant were hundreds of millions of dollars lower than those performed by New Mexico, Oklahoma, North Dakota, and (by extension) Nebraska. EPA then predicated its disapproval of these States' Regional Haze strategies based largely on these analyses.

EPA also issued questionable objections to Regional Haze visibility modeling used by the States. For example, North Dakota accounted for the significant interstate emissions originating in neighboring Canada that impact visibility in the States. However, EPA determined that such a real world approach was "inappropriate."[14] In New Mexico, EPA relies on a metric for cumulative visibility improvement, as if a two National Parks, hundreds of miles apart, could be viewed at the same time.[15]

2. Sue and Settle

As is explained above, EPA could not object to the final Regional Haze determinations rendered by the States, due to the unique primacy accorded States *vis-à-vis* EPA on visibility improvement policy. Instead of directly taking on the emissions controls selected by States in order to comply with Regional Haze, EPA disapproved the process by which the States rendered those determinations.

However, even if EPA does have the authority to object to the state's cost-effectiveness analyses and visibility modeling (the courts will decide), it is doubtful whether EPA could impose a preferred alternative, due to the State's prerogatives under the statute.

Enter "sue and settle." Beginning in 2009, a group of nonprofit environmental advocacy organizations—Sierra Club, WildEarth Guardians, Environmental Defense Fund, National Parks Conservation Association, Montana Environmental Information Center, Grand Canyon Trust, San Juan Citizens Alliance, Our Children's Earth Foundation, Plains Justice, and Powder River Basin Resource Council—filed lawsuits against EPA alleging that the agency had failed to perform its non-discretionary duty to act on State submissions for regional haze. Rather than litigate these cases, EPA simply chose to settle. In five consent decrees negotiated with environmental groups[16]—and, importantly, without notice to the States that would be affected[17]—EPA agreed to commit itself to various deadlines to act on all States' visibility improvement plans.

Like a one-two, left-right boxing combination, EPA first objects to the process used by the States to comply with Regional Haze, and then the Agency claimed it has no choice but to impose its preferred controls in order to comply with the consent decree.[18] Thus, EPA has trumped the States rightful authority on Regional Haze.

In New Mexico, EPA went even further. After years of deliberations, State regulators in New Mexico formulated a Regional Haze State implementation plan that met all Federal and State laws and requirements. Simply put, there were no grounds for objection.[19] EPA, however, refused to even consider the State's plan. According to EPA, it had no choice but to ignore the New Mexico's submission—despite State primacy on Regional Haze—because the Agency had to comply with a consent decree that had been filed in an Oakland court.[20]

3. Hybridization of Provisions of the Clean Air Act

In the course of imposing Regional Haze Federal implementation plans on New Mexico, Oklahoma, and North Dakota, EPA claimed an additional, independent source of authority to improve visibility under the Clean Air Act. In addition to the Regional Haze provision, the EPA also claims to have authority under the Good Neighbor provision of the Clean Air Act, [21] which provides that States demonstrate they have implemented adequate measures to ensure that their emissions do not "interfere with measures required to be included in the applicable implementation plan for any other state...to protect visibility."

In 1997, EPA tightened national ambient air standards for two criteria pollutants—particulate matter and ozone. Accordingly, the Good Neighbor provision requires that States must ensure that their emissions of these two pollutants do not interfere with compliance in downwind States of the 1997 revisions. Now, however, EPA claims that the 1997 revisions to health-based standards for particulate matter and ozone requires the Agency to ensure that emissions of other regulated pollutants from upwind States do not interfere with downwind States, in addition to particulate matter and ozone. Specifically, the Agency alleges that the Regional Haze plans submitted by New Mexico, North Dakota, and Oklahoma are insufficient to ensure that these States do not adversely affect visibility protection in downwind States.

This is a dubious legal reasoning, because the Regional Haze provision explicitly mandates that states control emissions of haze-causing pollutants that significantly diminish visibility in all Federal National Parks and Wilderness Areas, not just ones within their own borders. That is, the Regional Haze provision effectively requires States to meet the Good Neighbor provision. It makes no sense for Congress to create a program requiring States to work together to reduce visibility impairment in the Regional Haze provision, and then to also create a vague, amorphous, ill-defined separate source of authority with one phrase in the Good Neighbor provision, an altogether different section of the law.

More importantly, at the time that EPA imposed Federal implementation plans on New Mexico, Oklahoma, and North Dakota, the Agency had yet to fully approve a single Regional Haze plan. How could the Agency know whether one state is adversely affecting other States' visibility improvement programs that do not yet exist? Indeed, this is the exact reasoning used by EPA in 2006, when it published implementation rules for the Good Neighbor provision. In those rules, EPA said that, "is not possible at this time to assess whether there is any interference with

measures in...another State designed to 'protect visibility'...until regional haze [plans] are submitted and approved."[22]

4. Regulatory "Double Dip"

There is a common misperception that Regional Haze is a Western problem. This is because EPA has proposed to allow States to meet the preponderance of their Regional Haze commitments by participating in the Cross State Air Pollution Rule (CSAPR),[23] which is confined largely to Eastern States. Thus, EPA proposed to approve 20 Regional Haze plans in January and February 2012.[24]

CSAPR states are not, however, in the clear; in fact, they may be worse off than non-CSAPR States. They face a "double dip" of redundant 1999 and 1980 Regional Haze regulations, being implemented by EPA as "phase one" and "phase two" of a larger Regional Haze plan. This power grab is a result of the phased approach EPA has used in implementing the Regional Haze program. EPA first issued Regional Haze regulations in 1980.[25] At that time, computing was nascent and complex atmospheric modeling was non-existent. As a result, EPA largely deferred requiring States to act, because attributing visibility impairment to a specific source was impossible. Nineteen years later, in 1999, atmospheric modeling had advanced to the point whereby EPA could support a regulatory regime to improve visibility, and the Agency issued a second set of Regional Haze regulations.[26] For whatever reason, EPA never repealed the 1980 regulation (known as "Reasonably Attributable Visibility Impairment" or "RAVI") despite the fact that its most significant requirements were virtually identical to the 1999 Regional Haze Program. As such, both regulations remain on the books, even though they are essentially duplicates.[27]

Now, EPA is claiming the authority to impose both of these copycat Regional Haze regulations, one on the heels of the other. On January 25, 2012, EPA proposed to approve Minnesota's preferred Regional Haze controls for the 2,025-megawatt Sherburne County Generating Plant ("Sherco Plant") operated by Xcel Energy. EPA predicated its proposed approval based on the state's participation in the CSAPR.[28]

However, in the same notice, EPA warned that it would soon be issuing further Regional Haze requirements for the Sherco Plant, pursuant to the 1980 "RAVI" regulations.[29] In discussions with the Minnesota Pollution Control Agency, EPA has indicated that it will press for $250 million in "double dip" controls, specifically SCR technology.[30] As is demonstrated in the Minnesota Case Study later in this paper, EPA's preferred "RAVI" controls would achieve an imperceptible benefit in visibility improvement. The Minnesota example makes clear that there is no refuge from EPA's visibility regulations.

Dubious Benefits

By employing the regulatory machinations above, EPA has usurped the State's rightful authority on Regional Haze, and imposed hundreds of millions of dollars of emissions controls on New Mexico, Oklahoma, and North Dakota. And for what? The visibility improvements achieved by EPA's imposed controls are invisible to the average eye.

EPA uses a metric known as a "deciview" to measure the amount of haze as it relates to the amount of light that is scattered and absorbed. A deciview value of 0 represents the clearest possible visibility, *i.e.*, the view is unaffected by haze. As the deciview number increases, visibility becomes progressively poorer.

In New Mexico, Oklahoma, and North Dakota, EPA's controls would improve visibility over the state plans by 1.12 deciviews,[31] 2.89 deciviews,[32] and .061 deciviews[33] (respectively). According to peer-reviewed research, however, a 2-4 deciview change gives a 67 percent maximum probability of detecting the improvement.[34] As a result, EPA's Regional Haze program is imposing significant costs on utilities in several States—costs that will ultimately be borne by ratepayers—in order to achieve visibility improvements that are imperceptible to most people.

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[1] For Oklahoma, annual costs taken from Oklahoma Department of Environmental Quality Air Quality Division BART Application Analysis for the Muskogee Generating Station (Table 10: Economic Cost for Units 4 and 5 – Dry FDG – Spray Dryer Absorber, p 17); the Sooner Generating Station (Table 10: Economic Cost for Units 4 and 5 – Dry FDG – Spray Dryer Absorber, p 17); and the Northeastern Power Plant (Table 11: Economic Cost for Units 4 and 5 – Dry FDG – Spray Dryer Absorber, p 14). These were three separate BART analyses that were completed in January 2010.
For New Mexico, annual costs taken from New Mexico Environment Department Air Quality Bureau BART Determination for San Juan Generating Station, Units 1-4, 28 February 2011, Table 10, "Impact Analysis and Cost-Effectiveness of Additional NOx Control Technologies,"
For North Dakota, annual costs taken from 76 FR 58603 and 76 FR 586266

[2] For Nebraska, Annual cost achieved by multiplying emissions reductions at Gerald Gentleman Station required to meet EPA's "presumptive limits" for BART (39,185 tons per year of sulfur dioxide; see 77 FR 12780) time EPA's estimated 2012 price for a ton of sulfur dioxide on the emissions market established by the Cross State Air Pollution Rule ($600).

[3] For Wyoming, Annual cost data compiled from 77 FR 33022: Table 9—Summary of Jim Bridger Units 3 and 4 NOx BART Analysis—Costs per Boiler; Tables 28-30, Summaries of Basin Electric Laramie River Units 1-3 NOx BART Analysis; Table 31—Summary of Dave Johnston Unit 3 NOx BART Analysis; Table 32—Summary of Jim Bridger Units 1 and 2 NOx BART Analysis—Costs per Boiler; Table 33—Summary of Wyodak Unit 1 NOx BART Analysis

[4] Hurlbut et al., Navajo Generating Station and Air Visibility Regulations: Alternatives and Impacts, National Renewable Energy Laboratory technical report, January 2012

[5] Annual costs for Minnesota based on Minnesota Pollution Control Agency BART Determination for Xcel Energy's Sherburne County Generating Plant, October 2009

[6] The House and Senate versions of the 1977 Amendments to the Clean Air Act differed on the balance of federalism for the Regional Haze provision. In Conference, Members of Congress came to agreement whereby States would have a distinctly high degree of primacy vis a vis EPA. Consider this floor exchange between Sens. James A. McLure (Idaho) and Edmund Muskie (Maine):

> Mr. McLure: "Under the conference agreement, does the State retain the sole authority for identification of sources for the purpose of visibility issues under this section?"
>
> Mr. Muskie: "Yes; the State, not [EPA] Administrator, identifies a source that may impair visibility and thereby falls within the requirement of [Regional Haze]."
>
> Mr. McLure: "And does this also hold true for determination of "Best Available Retrofit Technology" [a primary control required by the Regional Haze program]?"
>
> Mr. Muskie: "Yes. Here again it is the State which determines what constitutes "Best Available Retrofit Technology"..."

See Congressional Record-1977-0804-26854

[7] *See* 42 U.S.C. § 7491(b)(2)(A), which stipulates that States determine both which sources are subject to Best Available Retrofit Technology and what constitutes BART; *see also id.* at § 7491(A)(g)(2), which states that BART determinations can be made only after consideration of costs.

[8] 70 FR 39137

[9] *See* "Revised BART Cost-Effectiveness Analysis for Selective Catalytic Reduction at the Public Service Company of New Mexico San Juan Generating Station," Final Report, prepared by Dr. Phyllis Fox, Ph.D. (November 2010).

[10] 76 Fed. Reg. 16183, at n.24.

[11] 76 Fed. Reg. 58599, at n.22.

[12] *See* Appendix A, "EPA's evaluation of cost of Flue Gas Desulfurization (FGD) controls Nebraska Public Power District (NPPD) Gerald Gentlemen Station (GGS), Units 1,2," to EPA Region 7 Technical Support Document, *available at* www.regulations.gov, Document ID No. EPA-R07-OAR-2012-0158-002.

[13] *See* "Dr. Fox Resume," 25 February 2011, *available at* www.regulations.gov, Document ID No. EPA-R06-OAR-2010-0190-0070.

[14] 76 FR 58603

[15] 76 FR 52395

[16] The five consent decrees:

- *National Parks Conservation Ass'n, et al. v. Jackson*, Civil Action No. 1: 11-cv-01548 (D.D.C. Dec. 2, 2011);
- *Sierra Club v. Jackson*, No. 1-10-cv-02112-JEB (D.D.C. Aug. 18, 2011);
- *WildEarth Guardians v. Jackson*, No. 4:09-CV-02453 (N.D. Cal. Feb. 23, 2010);
- *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743-CMA-MEH (D. Col. June 16. 2011); and
- *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218-REB-BNB (D. Col. Oct. 28, 2010).

[17] *See, e.g.*, Comments submitted by Sue Kidd, Director, Environmental Policy and Programs, Arizona Public Service, Document ID EPA-HQ-OGC-2011-0929-0013, available at www.regulations.gov ("Finally, APS is concerned that Arizona was not properly consulted by EPA prior to entering into the proposed consent decree with the environmental plaintiffs. Given the lead role and considerable discretion given to states by Congress under the regional haze provisions of the CAA, it is axiomatic that EPA should have discussed with ADEQ the terms of the proposed consent decree *before* signing it.").

[18] In North Dakota, where EPA tried to ignore a major component of the State's Regional Haze submission (namely, North Dakota Department of Environmental Quality's Best Available Control Technology determination for the Milton R. Young power plan. EPA said, "Given our September 1, 2011 deadline to sign this notice of proposed rulemaking under the consent decree discussed in section III.C, we lack sufficient time to act on or consider this aspect of Amendment No. 1. Under CAA section 110(k)(2), EPA is not required to act on a SIP submittal until 12 months after it is determined to be or deemed complete. We have considered some of the documents related to the State's BACT determination for Milton R. Young Station and have included those documents in the docket for this proposed action." 76 Fed. Reg. 58579.

In promulgating a federal implementation plan for Regional Haze on Oklahoma, EPA stated, "We also are required by the terms of a consent decree with WildEarth Guardians, lodged with the U.S. District Court for the Northern District of California to ensure that Oklahoma's CAA requirements for 110(a)(2)(D)(i)(II) are finalized by

December 13, 2011. Because we have found the state's SIP submissions do not adequately satisfy either requirement in full and because we have previously found that Oklahoma failed to timely submit these SIP submissions, we have not only the authority but a duty to promulgate a FIP that meets those requirements." 76 Fed. Reg. 81732

[19] For more, see William Yeatman, EPA's Shocking New Mexico Power Grab, Competitive Enterprise Institute/Rio Grande Foundation joint white paper, October 2011

[20] In New Mexico, EPA used a putatively non-discretionary consent decree deadline to actually ignore the State's Regional haze submission. "We did receive a New Mexico RH SIP submittal on July 5, 2011, but it came several years after the statutory deadline, and after the close of the comment period on today's action.3 In addition, because of the missed deadline for the visibility transport, we are under a court-supervised consent decree deadline with WildEarth Guardians of August 5, 2011, to have either approved the New Mexico SIP or to have implemented a FIP to address the 110(a)(2)(D)(i) provision. It would not have been possible to review the July 5, 2011 SIP submission, propose a rulemaking, and promulgate a final action by the dates required by the consent decree." 76 Fed. Reg. 52390.

[21] Section 110(a)(2)(D)(i)

[22] Memorandum to Regional Air Division Director, Regions 1-10, August 15, 2006, p. 9, http://www.epa.gov/ttn/oarpg/t1/memoranda/section110a2di_sip_guidance.pdf

[23] 76 Fed. Reg. 82219.

[24] New Jersey (proposed approval 3 January 2012); Minnesota, Virginia, Ohio (proposed approval 25 January 2012); Illinois, Delaware (proposed approval 26 January 2012); Alaska (proposed approval 26 February 2012); Georgia (proposed approval 27 February 2012); Rhode Island, New Hampshire, Maryland, North Carolina, Michigan, South Carolina, Vermont, Wisconsin, Alabama, Missouri, Iowa (proposed approval 28 February 2012)

[25] 40 C.F.R. §§ 51.302-51.306.

[26] 64 Fed. Reg. 35714

[27] Both Regional Haze and RAVI require Best Available Retrofit Technology. The difference between the two programs is that States get to decide which units are subject to Regional haze BART, whereas Interior Department officials and EPA officials determine which units are subject to RAVI BART. Unfortunately, the Interior Department has proved that it won't be a responsible check on EPA. In 2009, it decided to subject the Sherco Units 1 and 2 to RAVI BART, despite the fact Minnesota, at the time, was crafting a Regional Haze BART determination for the power plant. As such, the only thing that stands in the way of EPA "double dipping" on Regional Haze is the Department of the Interior, which is to say that the only thing preventing the Obama administration from imposing the same regulation twice on coal fired power plants is the Obama administration.

[28] 77 Fed. Reg. 3681.

[29] 77 Fed. Reg. 3689 ("Therefore, this proposed rule only addresses satisfaction of regional haze requirements and does not address whether Minnesota's plan addresses requirements that apply as a result of the certification of Sherco as a RAVI source. EPA will act on RAVI BART in a separate notice").

[30] *See* Xcel Energy, Resource Plan Update, Docket No E002/RP-10-825 before the Minnesota Public Utilities Commission, at 45, 46 (Dec. 1, 2011) ("In its June 2011 preliminary review of the MPCS's BART assessments, EPA Region 5 indicated that it believes BART for [Sherco] Units 1 and 2 should include "Selective Catalytic Reduction...Plant specific estimates for Sherco Unites 1 and 2 demonstrate that SCRs would cost customers upwards of $250 million.").

[31] Visibility improvement data for New Mexico taken from Table 6, "NMED Modeled Maximim Impacts of the 98th Percentile Delta-dv Impacts from 2001-2003," 76 FR 502

[32] Visibility improvement data for Oklahoma taken from EPA's proposed Regional Haze federal implementation plan for Oklahoma, Table 9, "EPA Modeled Maximum Impacts Due To Dry Scrubbing of the 98th Percentile Delta-DV Impacts from 2001-2003," 76 FR 16186

[33] Visibility improvement data for North Dakota taken from North Dakota Regional Haze BART submittal by Great River Energy for Coal Creek Stations 1, 2 (GRE's modeling data was approved by North Dakota) Table 7-4 "Year 2000 Modeling Results"; Visibility improvement data for Antelope Valley Station was taken from State of North Dakota, Comments on U.S. EPA Region 8 Approval and Promulgation of Implementation Plans; North Dakota Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze," p 67.

[34] Henry, Ronald C., Estimating the Probability of the Public Perceiving a Decrease in Atmospheric Haze, Journal of Air & Waste Land Management Association, 55: 1760-1766, 2005

Mr. LANKFORD. Thanks to all of you.

I now recognize myself for 5 minutes, and we will begin some rounds of questions here.

Mr. Martella, you've dealt with this in the past. Tell me what is typical in the EPA for a consent decree and working through the process, because you had mentioned it's not inappropriate, and I would agree with you that not all settlements are inappropriate. But you also outlined a couple key statements. You said that we have to deal with the actual public policy and make sure the public is engaged in that.

What would you set as a policy for this? Mr. Percival mentioned the Meese memo on it in the past. Is there a certain process that you would look at for that?

Mr. MARTELLA. Sure, and thank you for the question. I would like to clarify that. I fully support settlements and consent decrees in every opportunity. In an ideal world, all litigation would be settled. I was a Justice Department attorney before EPA, and my incentive was always to settle over going to trial, as it is today.

I think, though, you have to look at a number of factors, the first being the merits of the case that's coming in. It's not in the government's interests to be settling frivolous cases. And so for the group, whether it's an industry group or an NGO group, I am not trying to, you know, preference one over another, any group that comes to the EPA and says, we are going to assert this frivolous claim to get you to do something, will you settle it with us, the agency should be comfortable standing up in court and telling the court, this is frivolous; we are not going to be giving up our discretionary obligations just because somebody wants us to.

I think, unfortunately, that is my gripe is that I'm seeing a lack of willingness to defend cases I think are frivolous, or at least where legitimate arguments could be made to defend them, and the result is it's shifting resources. All of a sudden EPA is now adopting the folks who are coming in, their policies and their priorities as opposed so what the Agency's priorities are.

Mr. LANKFORD. Let me ask you about that then. The citizen suits that are set up there are really designed to force EPA to do its mandatory responsibilities. Am I correct on that?

Mr. MARTELLA. That's exactly what the intent should be, yes.

Mr. LANKFORD. Correct. So if a citizen suit pushes them to do a discretionary responsibility, has that extended their—the NGO's ability to be able to then take something as uniquely EPA's responsibility?

Mr. MARTELLA. I think that's, you know, fundamentally kind of transforming the purpose of the citizen suits. A citizen suit, as you point out, is the government was required to do something, it didn't do it. When you now enter the realm of we're going to make you do something you're not required to do because we think it is important even if you don't think it is important, the government has limited resources, and that becomes a fundamental reallocation of resources.

Mr. LANKFORD. Can a citizen suit also create a new policy; change previous policy and create a new policy off a citizen suit?

Mr. MARTELLA. Right, and we saw that in the New Source Performance——

Mr. LANKFORD. Is that appropriate? Is that an appropriate use of a consent decree?

Mr. MARTELLA. I don't believe that's what Congress intended.

Mr. LANKFORD. So we've got some basics here. If it is a mandatory responsibility, and it doesn't extend to new policy, then you would suggest that is a better policy; that if a consent decree creates new policy or expands an existing policy, or if it mandates something for future administrations of something that's clearly discretionary, then it's also expanded beyond its bounds.

Mr. MARTELLA. I would agree with that.

Mr. LANKFORD. Are you familiar with the Meese memorandum Mr. Percival mentioned before?

Mr. MARTELLA. Yes, sir.

Mr. LANKFORD. I would ask unanimous consent to submit the Meese memorandum for the record. Without objection.

This highlights three areas. It says the department or agency should not enter into a consent decree that converts into a mandatory duty otherwise discretionary authority.

The second aspect of this is departments or agencies should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

And the third thing, the department or agency should not enter into a consent decree that divests the Secretary or agency, Administrator or his successors of discretion committed to him by Congress or the Constitution where such discretionary power was granted with the changing circumstances.

Any issues with those three?

Mr. MARTELLA. I think those are principles that I would hope would be vigorously applied to today. They are sound principles both intended to preserve the government's own ability to set its own policies, but also avoid an infinite loop where people are constantly forcing the government to new obligations that it can't meet, and people go back to court, and it ends up being less efficient for the courts.

Mr. LANKFORD. Right. This is currently not what we're doing now, right?

Mr. MARTELLA. I would argue we've given examples today of things that are inconsistent with those principles.

Mr. LANKFORD. This is really about process. This is not about trying to throw out all citizen suit possibilities. This is about trying to see if process is being followed through correctly, and if we are achieving the end result or if we are creating new legislation in a way that is outside of this Congress.

Mr. MARTELLA. It's about public participation, it's about transparency, it's about affirming the principles of the Administrative Procedure Act that Professor Percival referred to.

Mr. LANKFORD. I was very interested in the fact that when the consent decree was formed dealing with Oklahoma, when that decree was formed, there were some timelines that were set on those, and for those timelines to change or to get an extension of those timelines, the State of Oklahoma would have to return to the environmental groups to request permission for an extension of the timeline.

Do you see that being appropriate, that a State would go to an environmental group to request permission to have an extension with the EPA? Does that seem like an appropriate extension to you?

Mr. MARTELLA. I don't want to speak for the Attorney General, but I would imagine that States would be very concerned about their sovereignty being intruded upon.

Mr. LANKFORD. That seems just a little odd to me that in a consent decree that's been signed off on, that we don't come back to the EPA for an extension permission, we go back to environmental groups to acquire permission for that.

With that, I would like to recognize Ms. Speier for 5 minutes.

Ms. SPEIER. Mr. Chairman, thank you.

And let me say at the outset, I have a great deal of respect for the chairman. I think there are some issues here that could really be looked at, and I'm willing to do them. But I must say that doing it in this manner doesn't get us to a constructive resolution.

To Mr. Martella, you suggest that maybe sometimes we should be defending cases. I think one of the questions we need to ask is is there enough staff to defend these cases? If you don't have enough staff to defend the cases, then sue and settle is exactly where we're going to go.

To Mr. Kovacs, your comments about regulation and how it's a job killer is something that is articulated over and over again. But I look to the deregulation of the financial services industry with the Gramm-Leach-Bliley Act and with the number of laws that were passed by this Congress after that act, and we now have 50 million people out of work in this country because the financial service industry came to a shutdown, and this government had to bail out that industry to the tune of over $1 trillion. So in terms of jobs lost, I think you can make the case that when you deregulate, sometimes there is greater job loss.

Now, to you, Dr. Percival, I'm going to turn over the rest of my time to you, because I believe this hearing is, frankly, not as constructive as it could be. I would like to do a whole hearing on the haze in Oklahoma, because if, in fact, that is what is presented by Mr. Yeatman, then we should look at it, and we shouldn't have third parties dictating to States whether or not there's an extension. Those are legitimate issues we should be talking about. But I'm not interested in kangaroo hearings, and that's what I think this is.

So, Professor, please make any comments you would like to make about what everyone else has said.

Mr. PERCIVAL. Thank you.

I still, you know, come back to the point that this is not a situation where third parties are dictating what regulations are adopted. That still has to be done through the Administrative Procedure Act. Now, it is true that EPA, when it fails to perform a mandatory duty, then can be hauled into court, and a schedule is negotiated for how you're going to cure this violation of law.

The Meese memorandum, which I wrote the Law Review article that I submitted with my testimony about, I thought was unwise policy because it was designed essentially to say that the only remedy for the government not carrying out the commitments we make

in a settlement should be reviving the litigation rather than having an enforceable consent decree that actually increased the value of the government's work.

Now, you say if it's true that the haze rules are outrageous and illegal, the tenth circuit steps in, you get them overturned in court. We have that open process, and EPA will have wasted a whole lot of time doing something illegal. People said that's what they were doing with respect to greenhouse gas emissions, but the D.C. circuit has confirmed that that certainly wasn't the case.

The argument that somehow this private group is going to be able to dictate whether or not there could be an extension of time, if EPA feels it needs an extension of time, it can ask the court for an extension of time, and its word is probably going to be given some deference. But what we have seen in case after case is a situation where rules that Congress mandated be adopted a decade ago still have not been promulgated, and deadline after deadline passes, and sometimes courts say, enough is enough, and the rule ends up getting promulgated, but, as I mentioned in my testimony, even then the agency is free to reconsider them if they think that the rules are not adequately supported.

Ms. SPEIER. You have more time.

Mr. PERCIVAL. Oh, okay.

So what I would like to emphasize is that this is well-trod territory. Since 1986, when there was the big kerfluffle over the Meese memorandum, this charge was made that somehow environmental groups were dictating the priorities of EPA. When everyone looked into it, it turned out it wasn't true then. There is absolutely nothing that has fundamentally changed about EPA during the Obama administration. It's not a situation where the Agency is being dictated to by a group of environmental groups.

If, in fact, it's true that the agency is being sued in a situation where it does not have a mandatory duty, then the plaintiffs don't have a leg up in court. They don't have any possibility of winning that lawsuit. And that can be challenged when the court is trying to approve a consent decree if, in fact, they're trying to say this is a mandatory duty and it's not.

So I'm saying the system works pretty well for both industry and environmental groups. EPA unfortunately gets beat up on by all sides, has its budget cut and the like, and the result is that you see a situation where the Agency is always the bogeyman, and occasionally, because our judiciary functions so well, you see a decision like the decision on Tuesday upholding the greenhouse gas regulations that tells the Agency, you are doing something that, in fact, complies completely with the law.

Ms. SPEIER. Thank you.

Mr. LANKFORD. I would like to recognize Mr. Kelly for 5 minutes.

Mr. KELLY. I thank the chairman.

I do believe this is—I would not use the term "kangaroo court." I really am interested, Mr. Martella, I've watched this. Coming from Pennsylvania, I am watching now what's going on. If we could go to just a little bit of background.

We're having coal plants shut down, all right? I know that there's 11 plants in Pennsylvania just shutting down. Slide number 3, if you could just go to that, please, for a minute. This is the

President before he became President: "So if somebody wants to build a coal-powered plant, they can; it is just that it will bankrupt them because they're going to be charged a huge sum for all that greenhouse gas that's being emitted."

Now, I watched another clip this morning of the President explaining how cap and trade would work because some people just don't get it, so you have to force feed them into this, which I think is kind of an unusual take on things. I think there's a much better way to do it.

With New Source Performance Standards, let me ask you, what was the Sierra Club—what was their involvement in the New Source Performance Standards?

Mr. MARTELLA. Well, what we know is December of 2008, the Sierra Club wrote an article that was public saying that their goal for the administration was to set a New Source Performance Standard that would make sure that no new coal-powered power plant could be built. Two years after that, the administration entered into a settlement with them setting a deadline for proposing such a standard. That agreement was entered into. It affected both the utilities and refineries, but no one ever consulted with the utilities and refineries in setting the schedule.

Just a couple months ago in March, the EPA enacted the very proposal that looked identical to what the Sierra Club had written in 2008, and, again, without any prior consultation with the industries actually impacted by the substance of the proposal.

Mr. KELLY. Without objection, Mr. Chairman, I wanted to enter into the record the newsletter from the Sierra Club.

Mr. LANKFORD. Without objection.

Mr. KELLY. I am interested, because this process that takes place, you call it an off-ramp decision, and so for those of us that come from the normal world, the regular world, the commonsense—and I don't mean to in any way diminish people that come from the legal world where they use—things don't have to make sense to you, commonsense, you have to have a law decree to understand some of it.

I believe that if you're not at the table, you're on the menu. So when we have these decisions being made by groups, and it comes forward like that, would you have—in your former position at EPA, would you have litigated the New Source Performance Standards?

Mr. MARTELLA. I believe, you know, I would have liked to have seen the government stand up in court and explain why it should not be forced to do this. And, in fact, Congress has given EPA a process that would have solved this for everybody without having invoked this impact. EPA could have done an Advanced Notice of Proposed Rulemaking. That would have allowed it to study the issue. Everyone could have been at the table. I share your point, everyone should be at the table. But it wouldn't have had the immediate impact of shutting down coal-fired power plants.

So there was clearly was an option before EPA that I would have advocated for to go with an Advanced Notice of Proposed Rulemaking that would not have had the immediate impact while shutting folks out.

Mr. KELLY. Okay. So was there a mandatory duty?

Mr. MARTELLA. I would have been—if I was back at the Justice Department, I would have been very happy to stand up in the court and argue to the court there was no mandatory duty here. I would have felt very comfortable with that argument.

Mr. KELLY. And I think—listen, I don't think there's anybody in this country that doesn't want clean air and clean water. I think we are all serious in that. But there is also a factor of our economic freedom. And as we continue to take a look at this—I'm just trying, coming out of the private sector, understanding as we continue to turn on our back on things that are very abundant, accessible and affordable, which I believe in the fossils, we are turning our back on those and going in another direction that really costs the American consumer, which is who we represent, the American people, not just Republicans or Democrats, but everybody. Their costs of living under some of these new regulations are going to skyrocket because energy costs are going off the board.

As I said, in Pennsylvania we see power plants shutting down all the time. The trend is, okay, well, fine, we're going to go to natural gas. And now we are finding out, you know what? Well, you know what, that's a little bit better than coal, but we're finding problems with that, too. So sometimes you can mandate yourself into a situation where it's so untenable.

Mr. Kovacs, because I do believe it's about jobs, I really do, and if we're going to turn this thing around that we're in right now, this decline that we're in, it's going to be about getting people back to work and having more people being able to obtain the standard of living that makes sense and they can support a family on.

There's a slide. If we can go to slide number 4. I think this is really something that we need to take a look at.

This is a statement that was made by Curtis Spalding. He says, "Lisa Jackson has put forth a very powerful message to the country. Just 2 days ago, the decision on greenhouse gas performance standards and saying basically gas plants are the performance standard, which means if you want to build a coal plant, you got a big problem. This was a huge decision. You can't imagine how tough that was, because you got to remember if you go to West Virginia, Pennsylvania, and all those places, you have coal communities who depend on coal. And to say that we just think those communities should just go away, we can't do that. But she has to do what the law and the policy suggested, and it's painful. It's painful every step of the way."

Now, this is about jobs, and you mentioned some metrics about the numbers of jobs that were being walked away from.

Mr. KOVACS. Sure. The Bureau of Labor Statistics does this displaced worker survey, and it's 7 million. So this isn't a random survey. It's 7 million for long-term unemployed. If you take long-term/short-term, it's 15 million. So we're talking about whoever is unemployed and displaced. And what it finds is that the workers who lose a job, the long-term workers, the coal miners, the person who works in the utility plants, does not get a job within the survey period, which is a 3-year period. And after the survey period, 51 percent of those long-term workers who were unemployed—and this is going to a regulation that takes an industry out—51 percent of

those still did not have jobs afterwards. And of the 49 percent who got jobs, 55 percent were below what they made before.

So that's the impact. And of the jobs that are created, if you take a job out of Pennsylvania or West Virginia, and you build a battery plant in Michigan or California, they're different workers. So you have a real-life impact on the workers where the displacement occurs, and you have a theoretical or modeled worker somewhere else.

But the second point, which is, I think, more important, is that since 1977, Congress imposed a very—mandated a duty on EPA—the language is "shall"—mandated that when they do a major regulation, that they do a jobs analysis and a shift in employment analysis. And that was specifically to find out what is the impact of these major economic regulations. And EPA has never done that, and that is mandatory.

And what I think, and this is my last point, as I listen to this, we're talking about mandatory duties and discretionary duties and how you convert them, but here is a clear example of a mandatory duty that EPA has never attempted even to do, and that's really where I think the disgrace is, because they had the opportunity to link up what they were doing, what the Bureau of Labor Statistics were doing, and to find out what the impact of the regulations are. And if there was true public participation, and they truly cared about jobs, then they would be doing that analysis.

Mr. KELLY. Thank you.

Mr. LANKFORD. I'd like to recognize the ranking member Mr. Connolly.

Mr. CONNOLLY. Mr. Chairman, I know at the full committee we have descended into the bad habit of prejudging the outcome of a hearing in the selection of the title. I had hoped we would not do that in this subcommittee. To have a hearing entitled "Mandate Madness: When Sue and Settle Just Isn't Enough" kind of gives away the game. I don't think it's an intellectually honest pursuit. I don't think this hearing is an intellectually honest pursuit.

I'm glad, I guess, you have provided a forum for folks who don't like the Environmental Protection Agency or don't like environmental regulation to have a forum. And I can't express enough my disappointment in the structure of this hearing and in the title itself.

I'm all for an honest intellectual pursuit of the issue of unfunded mandates or burdensome mandates that may, in fact, be unproductive. I come from local government, where we had a struggle with that ourselves. I'm not unsympathetic. But to basically simply provide a forum for ranting about the EPA and its mission with very little empirical evidence to back it up is very troubling to this Member of Congress.

Mr. CONNOLLY. I had hoped we would continue, or try to continue, a tradition in this subcommittee where we actually pursue issues in as neutral and objective a way as possible. I don't think that's going to happen here, and I register my disappointment.

I yield back.

Mr. LANKFORD. I would—I would say that it might be good to go through some of the notes in the testimony and such that is here to be able to examine the process and how things have significantly

changed in the process of this, because there has been a significant change. This issue is a process issue, and that has shifted, and it needs to be an appropriate process so the citizens have the opportunity to hear and be heard.

Mr. CONNOLLY. Mr. Chairman, may I ask, is it your contention that the title of a hearing called "Mandate Madness" is an objective title? That's just an objective, honest pursuit of public policy?

Mr. LANKFORD. You know, the hearing itself deals with the policy issues. This is not a hearing about a title. This is a hearing about the facts in the case.

Mr. CONNOLLY. Titles—titles matter, Mr. Chairman.

Mr. LANKFORD. Yes, they do, but the facts matter even more.

Mr. CONNOLLY. Well, I think the facts get skewed when the title clearly channels those facts in a certain direction.

Mr. LANKFORD. Well, fortunately, this is not a court. This is a case where we have to bring things to light, and it has been done by——

Mr. CONNOLLY. It most certainly is not a court; otherwise a fair hearing on both sides would, in fact, be provided.

Mr. LANKFORD. We would be glad to have a fair hearing for all people involved since we have consent decrees that don't give a fair hearing to all involved. That would be wonderful.

Mr. CONNOLLY. That's your opinion, sir. That's not my opinion.

Mr. LANKFORD. I recognize Mr. Labrador.

Mr. LABRADOR. Mr. Chairman, that's actually the purpose of a hearing is to share both opinions, but apparently one side only wants their opinion heard and not the other. And we've actually been holding a hearing so we can give the other side the opportunity for them to actually state their opinions, but instead they want to just make statements about the fairness or unfairness of this hearing, which is rather shameful.

Mr. Kovacs, I just have two questions for you, and then take as much time as you want, and then I'll yield the rest of my time to the chairman. But I just heard Professor Percival state that there has been no change between the Bush administration and the Obama administration with respect to the EPA. Can you recall who in the Bush administration said that there was a plan to crucify regulated industries? Do you know what I am referring to?

Mr. KOVACS. Yes, sir.

Mr. LABRADOR. Can you explain what the change has been between the Bush administration and the Obama administration?

Mr. KOVACS. Well, certainly the—let's take a step back as I answer this. And to make it very clear, we're not here to argue that we want to eliminate citizen suits or what is mandatory and what is discretionary. We're here to say that as the EPA begins to exercise its discretion as to whether to sue or not, that the impacted parties need a seat at the table. And by a seat, we don't mean sitting there and negotiating, but when the environmental group and the EPA come to that understanding, before it is filed with the court and has a court order attached to it, did it go out for comment. And if there is an impact on the—on the regulated community, that they have a right to use intervention within that court.

Right now the regulated community is locked out of that process. And so what happens, as I explained in my opening statement, is

once the decision is made, the chances—and there is a court order, the chances of reversing that are virtually nil through the process. That decision has been made.

So when you get into asking the question, how have things been different, the issue of sue and settle has been around for decades, and that's why you have the Meese memo. The Reagan administration looked at it and said, this is not a process that the government should be actively involved in because it's—it's ceding the discretion of the agency to private groups, who then, because of the consent decree, literally have an involvement in that issue forever. And just the comment was made before where you have to go back to the environmental group to change the deadlines.

The private party actually by contract gets a right. Let me repeat this. The private party by contract gets a right to be part of the supervision, not the regulator community, and, frankly, EPA cedes its authority.

So what has changed is although you had sue-and-settle agreements going on for decades, right now you have, as the chairman mentioned in his opening, somewhere around 60 of them. And they're filed—like in regional haze that William Yeatman was talking about, the States of Oklahoma, North Dakota, and New Mexico were involved, but the lawsuit was brought in Oakland, California.

And so the first notice that they—that the States and the attorney generals and the Governor had was when the settlement agreement was actually entered and approved by the courts, and then they got notice. So what's changed is it's gone from a few a year to being the policy of the administration. That's the change. And that's the 60 of them that you have.

And in some of these instances, to give you an idea of how broad they are, there was one in Oakland, California—seems to be a popular court—where there are actually 28 rules that were subject to 1 consent decree regulating two-thirds of the industries in the United States.

Mr. LABRADOR. Excellent. And I liked some of your comments. You said that the decision has already been made, that there has been no opportunity to be heard, but yet this hearing has been called a kangaroo court. I find that really fascinating.

As you know, the Endangered Species Act is often the premise to these sue-and-settle rulemakings. Last week I was in a different hearing, Natural Resources hearing, and we heard testimony that the EP—that the ESA actually creates jobs. And in your experience, how does the ESA actually create jobs?

Mr. KOVACS. Well, I always go back to Milton Friedman's comment when he was—he was in China one time, and he was asking why they were building a dam with shovels, and the Chinese replied, well, that's what the regulations call for, because we are trying to create jobs through—in essence through regulation. And Friedman's remark was, well, if that's the case, why don't you just use spoons? You'll create more.

So the purpose of a regulation should be to undertake and to achieve what Congress intends of the—the public interest. And in, for example, the Endangered Species, I think, you know, you do have a situation where you are going to have more boots on the ground, you're going to have more inspectors, you're going to have

more government paperwork, you're going to have more petitions for protection. You're going to create jobs there, but the key is you lose; you lose jobs because the land that's impacted, and if you go into some of the energy issues, in many instances is so vast that you've taken large areas of the United States out of development.

And that's why I keep on going back to the Bureau of Labor Statistics displaced workers. When a regulation comes in, it impacts a specific industry. Whether it be coal, cement, logging, we've got a lot of instances of that. And maybe jobs are created in Washington, D.C., but the jobs that are lost in Pennsylvania or New Mexico are not the same, are not—are not—these people do not get the jobs in Washington, D.C. And it's the community that's displaced. And I keep on coming back. These are real workers who are really displaced, whose families are displaced, whose communities are harmed. And that doesn't mean that jobs aren't created somewhere else. They might be. But that community has been harmed by that regulation.

Mr. LABRADOR. Thank you.

Mr. Chairman, I—it has been my experience as a practicing attorney for 15 years, and just watching and observing, you know, debates, that when you can't debate the facts, you resort to ad hominem attacks.

You're one of the people I respect the most here in Congress. You've been one of the most fair individuals. And to come here this morning and listen to two different members of the minority attack you personally has been pretty distasteful. I thought I was just coming to a regular hearing, actually a pretty boring hearing, I thought that it was going to be. But maybe what we should do is see if the opinions of the chairman or the opinions of the ranking member prevail after having a full and fair hearing this morning.

I yield back.

Mr. CONNOLLY. Mr. Chairman.

Mr. LANKFORD. This is—just a moment. I will definitely yield to you.

This is what makes America a great country is that we do have divergent opinions, and all opinions are open here. Of all places, in the House of Representatives, every opinion should be heard on that one. And with that, I'd be honored to yield to the ranking member.

Mr. CONNOLLY. Mr. Chairman, I want to directly respond to my colleague.

No ad hominem attack was made against Mr. Lankford. My remarks were strictly limited to the nature of this hearing.

Mr. LABRADOR. He is the chairman.

Mr. CONNOLLY. He may be. I am the ranking member of the committee. I still don't like the hearing, and I am entitled to not like the hearing.

I have never cast a negative word about Mr. Lankford. In fact, we have worked well together. I consider him a friend. And I would ask you to withdraw those words, because no ad hominem attack was ever made against Mr. Lankford in this hearing.

Mr. LABRADOR. Before you got here, Mr. Connolly, this was called a kangaroo court by a member of your party. You came in, and you

had some pretty distasteful statements about this. So I—I came this morning to hear both sides and——

Mr. CONNOLLY. Mr. Labrador, I can't, any more than you can—you can't take responsibility for other members of your party. I can take responsibility for my remarks. I think you would agree, since you pointed out you practiced law for 15 years, so pretend you're in a courtroom.

What you heard from the ranking member of this subcommittee was a critique of the intellectual foundation of this hearing and a critique of the nature of the title of this hearing that I consider to be intellectually dishonest. None of that had anything to do with Mr. Lankford as a person or as the chairman of the committee other than I don't—I don't like the judgment exercised. But it's not about him personally. Would you not agree?

Mr. LABRADOR. We can agree to disagree. Thank you.

Mr. CONNOLLY. Mr. Chairman, I would have hoped my colleague would have given me the courtesy of acknowledging no ad hominem attack was made against you by this Member.

Mr. LABRADOR. I have no further comments. I just made my comments because I—I was surprised by the nature of the attacks from your side. But we don't need to debate this.

Mr. CONNOLLY. Well, Mr. Chairman, a charge was made that an ad hominem attack was made. I would point out to Mr. Labrador there are actually rules in the House of Representatives about ad hominem attacks.

Mr. KELLY. Mr. Chairman, could I ask for regular order, please?

Mr. LANKFORD. We do need to move on, Mr. Connolly. I am going to do a quick round here and would be honored to be able to yield you time in that time just to be able to allow all voices to be heard, all opinions to be heard.

Mr. CONNOLLY. I would have thought a point of personal privilege would have been respected, Mr. Chairman.

Mr. LANKFORD. Well, it has been.

I would like just to do a 3-minute round here of questions so we can do some follow-up on it and get a chance to pull some things together.

I would also like to submit for the record, ask unanimous consent, a letter from the Association of Builders and Contractors. They make a statement in this letter. With that, so ordered.

It says, when settlements are agreed to, they're often—they often mandate that rulemakings go forward and frequently establish arbitrary timeframes for completion without stakeholder review or public comment. And they continue on from there.

Where this originated from was over the past year and a half, and multiple hearings and multiple settings that I have been in, I have heard members in leadership and individuals who work with the EPA say to me, we have to do that because the court ordered us to do that. They couldn't point to a specific piece. It was a court order that mandated us to do that.

So it started me on a journey to go back and start to pull some of these court orders and to say, where did that court order come from, and exactly what did they order? What I found is many of these consent decrees did not order them directly to take a specific action; it ordered them to review policy, as is appropriate, if it had

not been reviewed, and it was a mandatory responsibility. But then they took that statement of it has to be reviewed and greatly expanded where it would go and then hid behind the statement, "We were ordered by a court to do that."

We were also—new policies were created. The NSPS, as Mr. Kelly mentioned before, where it went from new construction to now existing construction, that's entirely new policy that's been created by—without public comment, without input in the stakeholders. That's something uniquely different than we're just creating some sort of regulation, running it through the Administrative Procedures Act; now we're creating new policy based on the consent decree. That's a giant shift in what has occurred.

There are also moments where outside litigants are placed in authority over States, or States are not given primacy to make a decision. Now they have to request permission of a litigant, and the States were not given the opportunity to be at the table. What we have is a situation where the people that are affected by it do not have the opportunity to actually address their grievance. They don't have an opportunity to be able to express that unless they have a court case, unless they go through a process and try to reverse something, which is difficult to do. As Attorney General Pruitt mentioned before we are currently in the tenth circuit in Oklahoma and just had a stay because it was extended too far. It was a case gone too far.

Now, that is very difficult when you're planning for a power plant construction that is incredibly expensive and very capital intensive, now you don't know what the rules are. And at any moment they could shift, and you have to sue and countersue and try to work through the process, all the time planning on a billion-dollar construction project. This creates instability.

We have a stable process for this, and the concern is that we're shifting away from that stable process, and we're now creating regulations based on preferences and based on a consent decree without the appropriate people at the table. And I'm simply asking the question, who sets the timelines, who comes up with this, who has the opportunity to actually speak and comment into these issues, and shouldn't it be the people that are affected.

With that, I would like to recognize Mr. Connolly for 3 minutes.

Mr. CONNOLLY. Mr. Chairman, I have no questions for this panel.

Mr. LANKFORD. Mr. Kelly.

Mr. KELLY. I thank the chairman.

And, Mr. Martella, I want to go back to this, because I think what the chairman is hitting on is something that's very critical here. Of course, it looks—the court's only accepting the parties' agreement to settle and not adjudicating whether the EPA's legal position is correct, and I think that goes to the crux of the problem.

Now, we can tap dance around all of the other issues, but the truth of the matter is when we change, and there's a new administration that comes in, they also have the ability to appoint to these different agencies the structure of it and how it's going to go forward. So if I have an agenda in place, what I do is I place into effect people who are going to go along with my agenda, and then I tell them, you know what, we got a problem, we can't legislate

it, could you possibly take us to court, sue us, and then we'll settle out of court, and then it will become law without the judiciary system? So please explain that to people, because I think that's where we're missing the point today.

Mr. MARTELLA. And I think, you know, that' the contrast between what our democratic system, you know, wants and then what is happening in some cases. Our system is all about transparency, that—the notion that government leaders are not going into back rooms with a subset of folks who are interested by things. It's all about public participation, that everyone has an equal role to play in a process, and it's about having an opportunity to challenge things in court.

I think some of the examples you've heard today, again, we're not here to say settlements are bad things. What we're worried about is when we don't have that level playing field of transparency and public participation.

And just to give you one more example, back to NSPS, when EPA entered the consent decree with NGOs, there were other parties in the litigation. Trade associations had intervened, and in order to intervene in a case, it's not automatic. You have to prove to a court that you're adversely impacted, you could be adversely impacted by this case. And then the court says, okay, you could be harmed here, so I'm going to give you a right to participate.

The concern with the NSPS is despite the fact the court had already found those parties could be adversely impacted, they were at no point part of the settlement discussions. They were never brought into the room. And that's what, to me, I think, is kind of the fundamental flaw I have with our notion of transparency and public participation.

Mr. KELLY. And I've got to tell you, when I'm back home in western Pennsylvania—the thing about the American people, they trust us so much with the process, and they have great faith in the process until they find out they've been gamed.

Mr. MARTELLA. Right.

Mr. KELLY. And so if I can effectively structure a situation to come out with the answer that I need or that I want and somehow do an end run, it's not what made America great. And I think that's the thing that frustrates us all. And when we look at why people are losing faith in the way the Federal Government works, it is because we have been able to take what was there and available to us, and tools that were supposed to be there for all people, and we have gamed them by people who know how to maneuver.

And I got to tell you, it is deeply disappointing to me to sit and watch this and have it come down to something that it was never supposed to. It has morphed into something entirely different than what the American people believe, what they have faith in, and what the Founders started off with to begin. And that's where it comes to—the wheels come off of it.

And I appreciate what you have done. And I know that this agreement came about because it was legislation that was defeated. So when the legislation went down, we found a way to game it and do a settlement that becomes law without everybody being at the table. As I said earlier, if you're not at the table, you're on the menu. And I'm telling you right now that we are being gamed to

a point where no wonder the American people are losing faith in the people they have sent to represent them. So I thank you.

I yield back, Mr. Chairman, and I thank you for your patience. And thank you for calling this hearing. It is essential that the people of the United States—not the people who are in the Beltway understand how to game it, but the people of the United States understand that they do have their day in court, and they should have been heard. And when they find out there was an out-of-court settlement made, that just rubs them the wrong way. And you know what? It doesn't pass the smell test.

Mr. LANKFORD. I would like to thank the witnesses for being here today. This is a very important issue, and this is something that has to be resolved.

One of the things this committee has responsibility for is process, make sure process is followed. We also have a responsibility of dealing with the relationship between the States and cities, counties and the Federal Government. And it is essential that the States, cities, counties do their responsibility and the Federal Government does theirs. And you do bring things to light, and I appreciate all opinions coming out and being able to be shared today. And we will continue on a process of this Congress checking into these issues to make sure that we continue to follow through. So, thank you.

With that, the committee stands adjourned.

[Whereupon, at 10:20 a.m., the subcommittee was adjourned.]

Opening Statement
Rep. Jackie Speier

Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform
Hearing on "Mandate Madness: When Sue and Settle Just Isn't Enough"

6/28/12

Thank you, Chairman Lankford.

The focus of today's Subcommittee hearing is on consent decrees and settlement agreements – two commonplace court procedures that give parties in lawsuits the opportunity to settle their differences while avoiding prolonged trials and mounting legal expenses. These procedures help parties in court cases reach compromises that bring advantages to both sides.

In lawsuits against the Environmental Protection Agency – whether brought by state or local governments, private companies, environmental groups or local citizens – a consent decree often leads to a timelier and less expensive resolution for all involved. Consent decrees and settlements provide resolution and certainty, while allowing the EPA to do its job and protect the public interest.

That is the common sense, noncontroversial context for today's hearing, or at least it should be. Unfortunately, the Republican majority has chosen to break with its historic support for these environmental protections, which are overwhelmingly popular with the public and which they once helped create, in order to push a false narrative to fit a pro-deregulation and pro-pollution agenda.

Terms to describe consent decrees like "Mandate Madness" and "Sue and Settle" are catchy political slogans, but they are based on a flawed understanding of how our environmental laws work. Accusations that environmental groups are somehow dictating government policy through court settlements ring just as hollow.

In fact, an August 2011 GAO report covering the years 1995 to 2010 found no discernible trend in lawsuits against the EPA – however, it did note that private companies and industry trade associations accounted for 48 percent of those lawsuits, while local and national environmental and citizens groups collectively accounted for 30 percent.

The reality is that EPA gets sued a lot – not just by green groups, but more often than not by polluting industries, which are better funded and choose to fight their violations in court instead of cleaning up their act. "Sue and Settle" is a manufactured term and a distraction from the real "Sue and Pollute" strategy that these corporations prefer.

Existing law already provides ample means for parties to comment on and seek changes to consent decrees that they don't like. However, partisan attempts to rewrite those rules that have served the courts and the American people so well for decades is a solution in search of a problem.

I would like to thank our witnesses for appearing before the Subcommittee today, and I look forward to your testimony.

I yield back.

Draft Remarks for Chairman Lankford
Mandate Madness:' When Sue and Settle Just Isn't Enough
June 28, 2012

The Oversight and Government Reform Committee has focused a significant amount of attention this Congress on the red tape that is strangling economic growth and holding us back from prosperity.

At today's hearing, we will continue this inquiry by examining the highly questionable practice perfected by the Environmental Protection Agency – known as "Sue and Settle," which has emboldened the Administration to pursue an aggressive green agenda while escaping political accountability for the cost and burdens these regulations impose on job creators.

The process is rather simple: environmental groups will sue the EPA, demanding the agency issue a regulation on an accelerated timeframe. Rather than fighting the lawsuit, EPA quickly agrees to the special interest demands.

These settlement agreements are reached after closed-door negotiations between EPA and environmental groups where other interested parties are excluded.

Once the settlement is approved by a federal court in a consent decree, the EPA is legally bound to engage in the rulemaking.

It is important to note that when a court approves a consent decree, it does not consider the merits – the court is merely accepting and ratifying what the parties agreed to.

In the past 3 years, the Administration has concluded approximately 60 settlements with special interest – 29 of these agreements bound EPA to make major policy changes. The plaintiffs in these cases are often the very same reoccurring players – the Sierra Club, NRDC, Defenders of Wildlife, Wild Earth Guardians, and Center for Biological Diversity.

These special interest groups not only hold a special seat at the table with Obama's EPA – EPA effectively pays them to sue the agency! In 2011 alone, taxpayers reimbursed these groups millions to participate in cozy sue and settle arrangements.

In addition to examining this outrageous practice, we will hear today about two particularly egregious cases where EPA defied all norms of transparency, sidelined interested parties, and is now in the process of imposing extraordinarily burdensome regulations.

These two case studies are EPA's Regional Haze Regulations and its' Greenhouse Gas Standards for Power Plants.

In the case of Regional Haze – Congress was crystal clear that this purely aesthetic visibility program is to be administered by the states and not by EPA. Through Sue and Settle, EPA is

attempting to federalize the program; and imposing costs well beyond what the state had determined was necessary or justified. Ultimately, EPA's proposal will costs billions of dollars for visibility improvements that are undetectable to the human eye.

In the second case study – New Source Performance Standards (NSPS) for Electric Utilities, EPA concluded settlement negotiations on December 23, 2010, and agreed to promulgate NSPS for greenhouse gases for BOTH new and existing electric generating units under Sections 111(a) and 111(d) of the Clean Air Act.

At the time the settlement was reached, EPA was not in violation of any mandatory duty and as such, the litigants didn't have a legal leg to stand on. And yet the agency settled, committing the agency to make major policy changes, without interested parties at the table, and rewarding litigants with a cash prize they never were entitled to.

These two case studies are but two examples of the dozens of policy changes EPA has committed to in sweetheart sue and settle arrangements with special interests. Time and again, when EPA is criticized for the excessive burden imposed by their agency – whether it be Utility MACT, Boiler MACT, Florida Water Quality Standards, Regional Haze, NAAQS or NSPS – EPA's response is suspiciously similar – The agency has no discretion to extend the timeline to hear additional points of view – it is under court order to finalize the regulations by a date certain.

But let us be clear – What EPA claims the law requires them to do is nothing more than what EPA has agreed to do in a collusive arrangement with special interest allies. These arrangements are fundamentally unfair, lack transparency, are designed to circumvent other regulatory checks Congress has put in place. Environmental regulations only work when they are made in an open process that involves all stakeholders. Sue-and-settle rulemaking is an affront to that process.

Finally, I want to note that I very much wanted a representative from the EPA to be here today to respond to the concerns that our panelists will be raising. However, despite adequate notice, EPA has refused to provide a witness for today's proceedings. I am hopeful that we can find a date in the near future when they can make an appropriate witness available to respond and add detail.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2012

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL RELATIONS

The Honorable James Lankford
Chairman
Subcommittee on Technology, Information Policy,
Intergovernmental Relations and Procurement
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your June 26, 2012, letter regarding an upcoming hearing that your Subcommittee is planning on holding. The Administrator asked that I respond to your letter.

As I said in my letter on June 22, 2012, and reiterated in e-mails and phone conversations with your staff, the Agency remains willing to testify in front of your Subcommittee, provided that accommodations can be reached on scheduling. Please let me be clear, Mr. Chairman. This is not a matter of refusing to testify on this topic, this is simply a request to begin discussions on when we can testify, based on availability of appropriate witnesses and the Subcommittee's schedule.

Specifically, to your questions regarding scheduling, the Agency does not believe that Michael Goo, Associate Administrator of the Office of Policy is an appropriate witness to testify at hearing entitled "Mandate Madness: When Sue and Settle Just Isn't Enough," because Mr. Goo's office does not interact with litigants – either from industry or from stakeholder groups. His office provides policy analysis, manages the internal process for regulatory development, and has other functions which are wholly unrelated to any settlement activities with external parties. A summary of his office's functions can be found at: http://www.epa.gov/aboutepa/opei.html.

Holding a hearing where the allegation of "sue and settle" appears to be a central theme is wholly inconsistent with Mr. Goo's portfolio in the Agency. As such, the Agency does not believe he is an appropriate witness for the topic that has been noticed.

One of the ways that the Agency believed we could accommodate the hearing scope was to send multiple witnesses: Gina McCarthy, the head of the Office of Air and Radiation, and Nancy Stoner, the head of the Office of Water. However, Ms. McCarthy is slated to prepare for a hearing in front of the Energy and Commerce Committee on Friday morning, June 29th, at 9:00 a.m. That hearing was scheduled prior to receiving notification of your Subcommittee's hearing. Testimony in front of all Congressional committees is highly important to the Agency, so time for preparation is crucial. Despite

Ms. McCarthy's unavailability, and the fact that both witnesses would be required to testify on the topic outlined by the Subcommittee, the Agency nonetheless consulted the schedule of Ms. Stoner. Unfortunately, Ms. Stoner is participating in an Urban Waters grant announcement in Boston, Massachusetts on June 28th. Initially, when the Agency responded to the Subcommittee's request, Ms. Stoner was slated to be on personal travel. Subsequently, she confirmed her attendance at the Urban Waters grant announcement. We also consulted the schedule of other potential witnesses. Bob Perciasepe, EPA's Deputy Administrator, is on international travel this week, and Lisa Jackson, EPA Administrator, had been scheduled to appear before the House Committee on Science, Space and Technology at the time of your hearing until that Committee cancelled the hearing just last night. That hearing had also been scheduled prior to receiving notification regarding your Subcommittee's hearing.

This is not a matter of shirking the Agency's obligation to be held accountable to Congress. The Agency has testified 80 times just this Congress, including 15 times by the Administrator and 10 times in front of your Committee.

Again, please let me be clear. The Agency holds the oversight functions of Congress in high regard and would be pleased to present testimony on this topic at a future date that works for the Subcommittee and for the appropriate Agency witness.

Sincerely,

Arvin Ganesan
Associate Administrator

cc: The Honorable Gerry Connolly
Ranking Minority Member

Office of the Attorney General
Washington, D. C. 20530

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III
Attorney General

SUBJECT: Department Policy Regarding Consent Decrees and Settlement Agreements

The following policy is adopted to guide government attorneys involved in the negotiating of consent decrees and settlements. Adopted pursuant to the Attorney General's litigation and settlement authority, these guidelines are designed to ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts. They are to be followed in all cases tried by counsel under the direction of the Attorney General.

I. General Policy on Consent Decrees and Settlement Agreements

Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgement. In the past, however, executive departments and agencies have, on occasion, misused this device and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of judiciary -- often with the consent of government parties -- at the expense of the executive and legislative branches.

The executive branch and the legislative branch may be unduly hindered by at least three types of provisions that have been found in consent decrees:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.

In Section II these guidelines address each of these concerns and limit authority to enter into consent decrees that would require the Secretary or agency administrator to revise, amend or promulgate regulations; that would require the Secretary or agency administrator to expend funds which Congress has not appropriated, or to seek appropriations from Congress; or that would divest the Secretary or the agency administrator of discretion granted by the Constitution or by statue.

These limitations on entry into consent decrees that might include such provisions are required by the executive's position, that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.

The limitations in Section II.A. of the guidelines are not intended to discourage termination of litigation through negotiated settlements. The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion. Settlement agreements -- similar in form to consent decrees, but not entered as an order of the court -- remain a perfectly permissible device for the parties and should be strongly encouraged. Section II.B., however, places some restrictions on the substantive provisions which may properly be included in settlement agreements. For example, Section II.B.1. allows a department or agency to agree in a settlement document to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA. Similarly, under Section II.B.2. the Secretary or agency administrator may agree to exercise his discretion in a particular manner, but may not divest himself entirely of the power to exercise that discretion as necessary in the future. The guidelines further provide that in certain circumstances where the agreement constrains agency discretion, a settlement agreement should specify that the only sanction for the government's failure to comply with a provision of a settlement agreement shall be the revival of the suit. Revival of the suit as the sole remedy removes the danger of a judicial order

awarding damages or providing specific relief for breach of an undertaking in a settlement agreement.

Finally, it must be recognized that the Attorney General has broad flexibility and discretion in the conduct of litigation to respond to the realities of a particular case. Such flexibility can be exercised by the Attorney General in granting exceptions to this policy.

II. Policy Guidelines on Consent Decrees and Settlement Agreements

A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to

expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General at least two weeks before the consent decree is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines.

OnEnergy

State Energy Efficiency Rankings Released

Earlier this month the American Council for an Energy Efficient Economy (ACEEE) revealed its state rankings on energy efficiency. The 2008 State Energy Efficiency Scorecard rates and ranks state-level action on model energy efficiency policies, programs, and practices.

Below are the top ten US states "employing energy efficiency to grow their economies while meeting electricity demand, combating global warming, and contributing to U.S. energy security:"

1. California
2. Oregon
3. Connecticut
4. Vermont
5. New York
6. Washington
7. Massachusetts
8. Minnesota
9. Wisconsin
10. New Jersey

Utah tied with New Mexico for 25th place. Both states received fifteen points; by comparison California received fifty points. Each state is given points in eight categories including building codes, combined heat and power, and appliance standards. Utah got 6.5 points in the utility and public benefits efficiency programs and policies category but 0 in the appliance standards category. The executive summary of the report is on line at: http://www.aceee.org/pubs/e086_es.pdf.

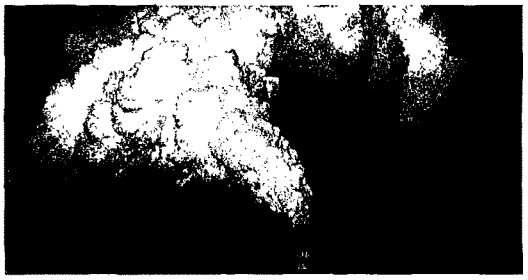
Unfortunately this issue puts some people to sleep; it shouldn't. The cheapest and most reliable source of energy is energy efficiency and conservation, but because traditional pricing and regulation models punish utilities, such as Rocky Mountain Power, when their customers conserve energy, there have been few large institutions promoting it.

Energy efficiency and conservation is both more and less than turning down one's thermostat in winter. It includes everything from passive solar in school construction to more efficient motors in industry to more efficient refrigerators in houses.

This article was compiled from a Sierra Club press release and local sources.

What Does the Bonanza Decision Mean?

by David Bookbinder, Chief Climate Counsel for Sierra Club



Rule #1 when you're in a hole is to stop digging. And in the climate hole we've dug for ourselves, that means not building any more coal-fired power plants, the leading source of carbon dioxide emissions both in the U.S. and worldwide. We know that carbon dioxide is the largest component among human-source emissions contributing to destabilizing the earth's climate. Thanks to the Bonanza decision on Thursday, November 13, 2008, from the Environmental Protection Agency's Environmental Appeals Board (EAB), we appear to have put down the shovel. (And maybe a little bit more.)

Hallelujah.

Technically, all EAB did was vacate the PSD permit for a relatively small (110 megawatt) proposed power plant and send it back to the permit writers for further consideration. But that would be kind of like saying that Marbury v. Madison was all about whether William Marbury got to be a District of Columbia justice of the peace. That is because the exact same rationale EPA used in refusing to impose carbon dioxide emission limits on the Bonanza plant has been used by EPA and state permitting authorities in virtually every one of the dozens of other coal-truth PSD permits we're challenging across the country. And by rejecting (eviscerating is more like it) this rationale, every one of those other permits faces the same fate: remand for the agencies to try and come up with a more plausible excuse for not imposing carbon dioxide limits, or, better still, take a different position.

Agency action will take months. Many months. Perhaps up to a year or two. For all of them. Which means we have a de facto moratorium on building new coal-fired generation. And the timing could not be better, because it gives the Obama Administration both a blank slate to write on and plenty of breathing room as they will not have to be rushing around from Day 1 reacting to individual permit decisions. (To preserve this hiatus, the Lords of Transition would be advised to make it very, very clear that any new state-issued PSD permit coming out either before or after January 20 will be vacated by EPA using its authority under Section 167 of the Clean Air Act.)

So what next? Logically, I think the answer is New Source Performance Standards for fossil-fuel fired power plants. Just such a rulemaking is sitting in limbo at EPA, and it is the appropriate vehicle for limiting new power plant emissions to 800 lb. CO2/MWh.

This would permit new gas-fired plants but would effectively stop any new coal-fired ones that did not employ carbon capture and sequestration (CCS). Perhaps this rulemaking could also contain a second phase, effective 2016 or so, tightening the standard to approximately 250 lb. CO2/MWh. This would be achievable via either combined gas/solar or gas/wind generation or 90% CCS. And then they could start thinking about how to deal with existing power plants under Section 111(d) of the Act. But one thing at a time.

Right now we have a de facto moratorium on new coal-fired power plants, a blank slate on which the Obama Administration can begin writing its global warming policy and some breathing room in which to write it.

June 28, 2012

The Honorable James Lankford
Chairman
Technology, Information Policy, Intergovernmental Relations and Procurement Reform Subcommittee
on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Gerald Connolly
Ranking Member
Technology, Information Policy, Intergovernmental Relations and Procurement Reform Subcommittee
on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20510

Chairman Lankford and Ranking Member Connolly:

On behalf of Associated Builders and Contractors (ABC), a national association with 74 chapters representing 22,000 merit shop construction and construction-related firms, I am writing in regards to the Oversight and Government Reform Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform hearing titled, "Mandate Madness: When Sue and Settle Just Isn't Enough." ABC supports increased transparency and opportunities for public feedback in situations where agencies promulgate rulemakings via consent decrees and settlement agreements.

The practice of regulation through litigation (or "sue and settle" as it is sometimes described) is used and often abused by advocacy groups in order to initiate rulemakings when they feel federal agencies are not moving quickly enough to draft and issue these policies. Organizations routinely file lawsuits against federal agencies claiming they have not satisfied particular regulatory requirements, at which point agencies can opt to settle. When settlements are agreed to, they often mandate that rulemakings go forward and frequently establish arbitrary timeframes for completion—without stakeholder review or public comment. These settlements are agreed to behind closed doors and their details kept confidential. Agencies release their rulemaking proposals for public comment after the settlement has been agreed upon, but this is often too late for adequate and meaningful feedback.

ABC is opposed to regulation through litigation and supports H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act of 2012." H.R. 3862 would promote enhanced openness and transparency in the regulatory process by requiring early disclosure of proposed consent decrees and regulatory settlements. In addition, H.R. 3862 would require agencies to solicit public comment prior to entering into a consent decrees with courts, which would provide affected parties proper notice of proposed regulatory settlements, and would make it possible for affected industries to participate in the actual settlement negotiations.

Thank you for your attention on this important matter and we urge the House to pass the "Sunshine for Regulatory Decrees and Settlements Act of 2012."

Sincerely,

Kristen Swearingen
Senior Director, Legislative Affairs

June 26, 2012

The Honorable Lisa Jackson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Jackson:

On Thursday, June 28, 2012, the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform is holding a hearing entitled "Mandate Madness: When Sue and Settle Just Isn't Enough." I am in receipt of a letter from Associate Administrator Arvin Ganesan informing the Committee that the Environmental Protection Agency (EPA) will not provide a witness to the hearing. EPA has reached this decision despite the fact that Committee staff provided EPA with an appropriate notice of the Committee's request. I am troubled by this outcome and believe that EPA has acted in a manner that is deficient in accommodating the needs of a co-equal branch of government. I write to you today in an effort to resolve this matter.

Committee staff provided EPA notice of this hearing on June 14, 2012.[1] At this time, my staff informed EPA of my desire to have EPA represented at the hearing and suggested that four separate EPA officials would be appropriate to testify.[2] On Monday June 18, 2012, an EPA employee declared that "after checking, due to travel schedules and other hearings we don't have an appropriate witness available."[3] Within an hour, Committee staff replied to this email asking whose schedule EPA had checked and the reason for each individual's inability to appear before the Committee.[4] Two days later, EPA finally responded, stating that the Agency believes the only appropriate witnesses are Nancy Stoner, Gina McCarthy, and Bob Perciasepe, all of whom the agency asserted are not available.[5] Committee staff immediately responded, repeating the original request for Associate Administrator for Policy Michael Goo, and also suggesting Senior Policy Counsel Bob Sussman as individuals who would also be acceptable to the Committee. This request was dismissed by EPA without substantive explanation.[6]

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[1] Email from Committee Staff to Tom Dickerson, Legislative Counsel Unit, Office of Congressional and Intergovernmental Affairs (June 14, 2012).
[2] *Id.*
[3] Email from Steven Kinberg, Legislative Counsel Unit, Office of Congressional and Intergovernmental Affairs to Committee Staff (June 18, 2012).
[4] Email from Committee Staff to Steven Kinberg (June 18, 2012).
[5] Email from Tom Dickerson to Committee Staff (June 20, 2012)
[6] Email from Tom Dickerson to Committee Staff (June 21, 2012).

In a further effort to resolve the situation, Committee staff, via a telephone conversation with EPA staff, explained in detail that the hearing will fundamentally be about the regulatory process – a topic for which Associate Administrator Goo is certainly an appropriate witness. EPA responded to the additional attempt to resolve the matter with a letter sent on Friday, June 22, 2012, at 4:46 p.m., wherein EPA reiterated the unavailability of Stoner, McCarthy, and Perciasepe.[7] In this letter, EPA presented a distorted view of the facts and failed to acknowledge that staff also identified other appropriate witnesses for the hearing, both of whom appear to be available at the designated time.

In light of these facts, and the apparent availability of an acceptable witness, I am forced to conclude that EPA is not operating in good faith to satisfy its obligation to participate in Congressional oversight. As such, I must insist that EPA reconsider its position and either make yourself or Associate Administrator Goo available to testify at Thursday's hearing. In addition, I request that EPA provide to the Committee a detailed explanation of why each individual is unable to appear before the Committee. This explanation should include a description of the conflict, when the conflict arose, and why EPA was unable to alter plans to make the individual available to the Committee. I request that this information be delivered to the Committee no later than 9:00 a.m., Thursday, June 28, 2012.

The Committee on Oversight and Government Reform is the principal oversight Committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X.

If you have any questions regarding this request, please contact Kristina Moore of the Committee staff at 202-225-5074. Thank you for your prompt attention to this matter.

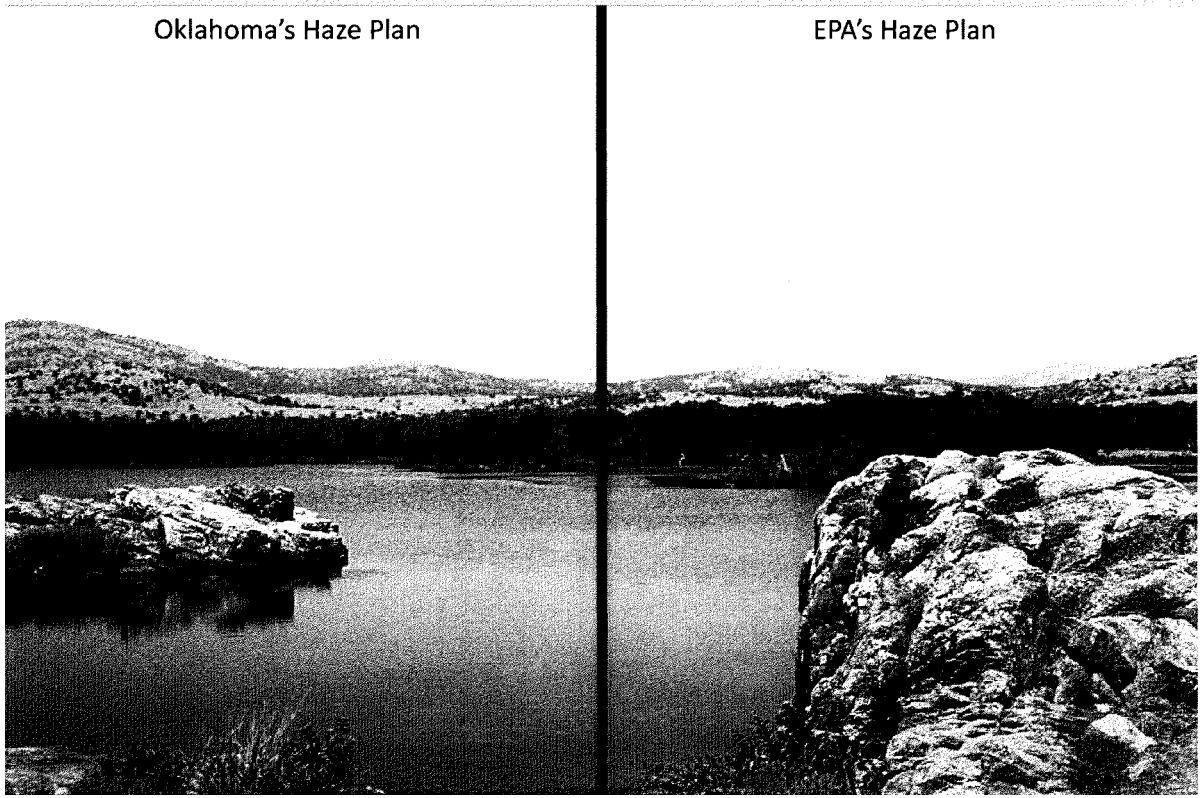
Sincerely,

James Lankford
Chairman
Subcommittee on Technology, Information Policy,
Intergovernmental Relations and Procurement Reform

cc: The Honorable Gerald Connolly, Ranking Minority Member
Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform

[7] Letter from Arvin Ganesan, Associate Administrator, EPA to the Honorable James Lankford, Chairman, Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement (June 22, 2012).

Can You Spot the $1.5 Billion Difference?



"So if somebody wants to build a coal-powered plant, they can; it's just that it will bankrupt them because they're going to be charged a huge sum for all that greenhouse gas that's being emitted." – Candidate Barack Obama, February 2008

"Lisa Jackson has put forth a very powerful message to the country. Just two days ago, the decision on greenhouse gas performance standard and saying basically gas plants are the performance standard which means if you want to build a coal plant you got a big problem. That was a huge decision. You can't imagine how tough that was. Because you got to remember if you go to West Virginia, Pennsylvania, and all those places, you have coal communities who depend on coal. And to say that we just think those communities should just go away, we can't do that. But she has to do what the law and policy suggested. And it's painful. It's painful every step of the way."

– EPA Region 1 Administrator Curtis Spalding,

March 30, 2012

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 13

I

112TH CONGRESS
1ST SESSION

H. R. 1446

To amend title 31, United States Code, to provide for transparency of payments made from the Judgment Fund.

IN THE HOUSE OF REPRESENTATIVES

APRIL 8, 2011

Mr. ISSA introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 31, United States Code, to provide for transparency of payments made from the Judgment Fund.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Judgment Fund Transparency Act of 2011''.

SEC. 2. JUDGMENT FUND TRANSPARENCY.

(a) TRANSPARENCY REQUIREMENT.—Section 1304 of title 31, United States Code, is amended by adding at the end the following new subsection:

''(d) The Secretary of the Treasury shall make available to the public on a website the following information with regard to any payment made under this section, unless the disclosure of such information is otherwise prohibited by law or court order:

''(1) The name of the plaintiff or claimant.

''(2) The name of the counsel for the plaintiff or claimant.

''(3) The name of the agency that submitted the claim.

''(4) A brief description of the facts that gave rise to the claim.

''(5) The amount paid representing principal, attorney fees, and interest, if applicable.''.

(b) IMPLEMENTATION.—The Secretary of the Treasury shall implement section 1304(d) of title 31, United States Code, as added by subsection (a), beginning not later than 60 days after the date of the enactment of this Act.

○

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 14

I

112TH CONGRESS
2D SESSION

H. R. 3862

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 1, 2012

Mr. QUAYLE (for himself, Mr. COBLE, and Mr. ROSS of Florida) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Sunshine for Regulatory Decrees and Settlements Act of 2012''.

SEC. 2. CONSENT DECREE AND SETTLEMENT REFORM.

(a) APPLICATION.—The provisions of this section apply in the case of—

(1) a consent decree or settlement agreement in an action to compel agency action alleged to be unlawfully withheld or unreasonably delayed that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of State or local governments—

(A) brought under chapter 7 of title 5, United States Code; or

(B) brought under any other statute authorizing such an action; and

(2) any other consent decree or settlement agreement that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of State or local governments.

(b) IN GENERAL.—In the case of an action to be resolved by a consent decree or a settlement agreement described in paragraph (1), the following shall apply:

(1) The complaint in the action, the consent decree or settlement agreement, and any award of attorneys' fees or costs shall be published, including electronically, in a readily accessible manner.

(2) Until the conclusion of an opportunity for affected parties to intervene in the action, a party may not file with the court a motion for a consent

decree or to dismiss the case pursuant to a settlement agreement.

(3) In considering a motion to intervene by any party that would be affected by the agency action in dispute, the court shall presume, subject to rebuttal, that the interests of that party would not be represented adequately by the current parties to the action.

(4) If the court grants a motion to intervene in the action, the court shall refer the action to its mediation program or a magistrate judge to facilitate settlement discussions, which shall include the plaintiff, the defendant agency, and the intervenors.

(5) The defendant agency shall publish any proposed consent decree or settlement agreement for public comment before filing it with the court, allowing comment on any issue related to the matters alleged in the complaint or addressed or affected by the consent decree or settlement agreement.

(6) The defendant agency shall—

(A) respond to public comments received under paragraph (5); and

(B) when moving that the court enter the consent decree or for dismissal pursuant to the settlement agreement—

(i) submit to the court a summary of the public comments and agency responses;

(ii) certify the administrative record of the notice and comment proceeding to the court; and

(iii) make that record fully accessible to the court.

(7) The court shall include in the judicial record the administrative record certified by the agency under paragraph (6).

(8) If the consent decree or settlement agreement requires an agency action by a date certain, the agency shall, when moving for entry of the consent decree or dismissal based on the settlement agreement—

(A) inform the court of any uncompleted mandatory duties to take regulatory action that the decree or agreement does not address;

(B) how the decree or agreement, if approved, would affect the discharge of those duties; and

(C) why the decree's or agreement's effects on the order in which the agency discharges its mandatory duties is in the public interest.

(9) The court shall presume, subject to rebuttal, that it is proper to allow amicus participation by any party who filed public comments on the consent decree or settlement agreement during the court's consideration of a motion to enter the decree or dismiss the case on the basis of the agreement.

(10) The court shall ensure that the proposed consent decree or settlement agreement allow sufficient time and procedure for the agency to comply with chapter 5 of title 5, United States Code, and other applicable statutes that govern rule making and, unless contrary to the public interest, the provisions of any executive orders that govern rule making.

(11) The defendant agency may, at its discretion, hold a public hearing on whether to enter into the consent decree or settlement agreement. If such a hearing is held, then, in accordance with paragraph (6), a summary of the proceedings and certification of the hearing record shall be provided to the court, access to the hearing record shall be given to the court, and the full hearing record shall be included in the judicial record.

(12) The Attorney General, in cases litigated by the Department of Justice, or the head of the de-

fendant Federal agency, in cases litigated independently by that agency, shall certify to the court his or her approval of any proposed consent decree or settlement agreement that contains any of the following terms—

(A) in the case of a consent decree, terms that—

(i) convert into mandatory duties the otherwise discretionary authorities of an agency to propose, promulgate, revise or amend regulations;

(ii) commit the agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commit an agency to seek a particular appropriation or budget authorization;

(iii) divest the agency of discretion committed to it by Congress or the Constitution, whether such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or

(iv) otherwise afford relief that the court could not enter on its own authority upon a final judgment in the litigation; or

(B) in the case of a settlement agreement, terms that—

(i) interfere with the agency's authority to revise, amend, or issue rules through the procedures set forth in chapter 5 of title 5, United States Code, or any other statute or executive order prescribing rule making procedures for rule makings that are the subject of the settlement agreement;

(ii) commit the agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question; or

(iii) provide a remedy for the agency's failure to comply with the terms of the settlement agreement other than the revival of the action resolved by the settlement agreement, if the agreement commits the agency to exercise its discretion in a particular way and such discretionary power was committed to the agency by Congress

or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

(c) ANNUAL REPORTS.—Each agency shall submit an annual report to Congress on the number, identity, and content of complaints, consent decrees and settlement agreements described in paragraph (1) for that year, and any awards of attorneys fees or costs in actions resolved by such decrees or agreements.

SEC. 3. MOTIONS TO MODIFY CONSENT DECREES.

When a defendant agency moves the court to modify a previously entered consent decree described under section 2 and the basis of the motion is that the terms of the decree are no longer fully in the public interest due to the agency's obligations to fulfill other duties or due to changed facts and circumstances, the court shall review the motion and the consent decree de novo.

SEC. 4. EFFECTIVE DATE.

The provisions of this Act apply to any covered consent decree or settlement agreement proposed to a court after the date of enactment of this Act.

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Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 15

112TH CONGRESS
2D SESSION

S. 3382

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 12, 2012

Mr. GRASSLEY (for himself, Mr. KYL, Mr. CORNYN, Mr. LEE, Mr. PAUL, and Mr. COBURN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Sunshine for Regulatory Decrees and Settlements Act of 2012''.

SEC. 2. DEFINITIONS.

In this Act—

(1) the terms ''agency'' and ''agency action'' have the meanings given those terms under section 551 of title 5, United States Code;

(2) the term ''covered civil action'' means a civil action—

(A) seeking to compel agency action;

(B) alleging that the agency is unlawfully withholding or unreasonably delaying an agency action relating to a regulatory action that would affect the rights of—

(i) private persons other than the person bringing the action; or

(ii) a State, local, or tribal government; and

(C) brought under—

(i) chapter 7 of title 5, United States Code; or

(ii) any other statute authorizing such an action; and

(3) the term ''covered settlement agreement'' means—

(A) a consent decree or settlement agreement entered into in a covered civil action; and

(B) any other consent decree or settlement agreement that requires agency action relating

to a regulatory action that affects the rights of—

(i) private persons other than the person bringing the action; or

(ii) a State, local, or tribal government.

SEC. 3. CONSENT DECREE AND SETTLEMENT REFORM.

(a) PLEADINGS AND PRELIMINARY MATTERS.—In any covered civil action—

(1) the agency against which the covered civil action is brought shall publish the complaint in a readily accessible manner, including by making the complaint available online; and

(2) a party may not make a motion for entry of a consent decree or to dismiss the covered civil action pursuant to a settlement agreement until after the end of the period during which a person may intervene.

(b) INTERVENTION.—

(1) REBUTTABLE PRESUMPTION.—In considering a motion to intervene in a covered civil action by a person who alleges that the agency action in dispute would affect the person, the court shall presume, subject to rebuttal, that the interests of the

person would not be represented adequately by the existing parties to the covered civil action.

(2) STATE, LOCAL, AND TRIBAL GOVERNMENTS.—In considering a motion to intervene in a covered civil action by a State, local, or tribal government, the court shall take due account of whether the movant—

(A) administers jointly with an agency that is a defendant in the covered civil action the statutory provisions that give rise to the regulatory action to which the covered civil action relates; or

(B) administers an authority under State, local, or tribal law that would be preempted by the regulatory action to which the covered civil action relates.

(c) SETTLEMENT NEGOTIATIONS.—Efforts to settle a covered civil action shall—

(1) be conducted pursuant to the mediation or alternative dispute resolution program of the court or by a district judge other than the presiding judge, magistrate judge, or special master, as determined appropriate by the presiding judge; and

(2) include any party that intervenes in the covered civil action.

(d) PUBLICATION OF AND COMMENT ON COVERED SETTLEMENT AGREEMENTS.—

(1) IN GENERAL.—Not later than 60 days before the date on which a covered settlement agreement is filed with a court, the agency seeking to enter the covered settlement agreement shall publish in the Federal Register and online—

(A) the proposed covered settlement agreement; and

(B) a statement providing—

(i) the statutory basis for the covered settlement agreement; and

(ii) a description of the terms of the covered settlement agreement, including whether it provides for the award of attorneys' fees or costs and, if so, the basis for including the award.

(2) PUBLIC COMMENT.—

(A) IN GENERAL.—An agency seeking to enter a covered settlement agreement shall accept public comment during the period described in paragraph (1) on any issue relating to the matters alleged in the complaint in the covered civil action or addressed or affected by the proposed covered settlement agreement.

(B) RESPONSE TO COMMENTS.—An agency shall respond to any comment received under subparagraph (A).

(C) SUBMISSIONS TO COURT.—When moving that the court enter a proposed covered settlement agreement or for dismissal pursuant to a proposed covered settlement agreement, an agency shall—

(i) inform the court of the statutory basis for the proposed covered settlement agreement and its terms;

(ii) submit to the court a summary of the comments received under subparagraph (A) and the response of the agency to the comments;

(iii) submit to the court a certified index of the administrative record of the notice and comment proceeding; and

(iv) make the administrative record described in clause (iii) fully accessible to the court.

(D) INCLUSION IN RECORD.—The court shall include in the court record for a civil action the certified index of the administrative

record submitted by an agency under subparagraph (C)(iii).

(3) PUBLIC HEARINGS PERMITTED.—

(A) IN GENERAL.—After providing notice in the Federal Register and online, an agency may hold a public hearing regarding whether to enter into a proposed covered settlement agreement.

(B) RECORD.—If an agency holds a public hearing under subparagraph (A)—

(i) the agency shall—

(I) submit to the court a summary of the proceedings;

(II) submit to the court a certified index of the hearing record; and

(III) provide access to the hearing record to the court; and

(ii) the full hearing record shall be included in the court record.

(4) MANDATORY DEADLINES.—If a proposed covered settlement agreement requires an agency action by a date certain, the agency shall, when moving for entry of the covered settlement agreement or dismissal based on the covered settlement agreement, inform the court of—

(A) any required regulatory action the agency has not taken that the covered settlement agreement does not address;

(B) how the covered settlement agreement, if approved, would affect the discharge of the duties described in subparagraph (A); and

(C) why the effects of the covered settlement agreement on the manner in which the agency discharges its duties is in the public interest.

(e) SUBMISSION BY THE GOVERNMENT.—

(1) IN GENERAL.—For any proposed covered settlement agreement that contains a term described in paragraph (2), the Attorney General or, if the matter is being litigated independently by an agency, the head of the agency shall submit to the court a certification that the Attorney General or head of the agency approves the proposed covered settlement agreement. The Attorney General or head of the agency shall personally sign any certification submitted under this paragraph.

(2) TERMS.—A term described in this paragraph is—

(A) in the case of a consent decree, a term that—

(i) converts into a duty a discretionary authority of an agency to propose, promulgate, revise, or amend regulations;

(ii) commits an agency to expend funds that have not been appropriated and that have not been budgeted for the civil action in question;

(iii) commits an agency to seek a particular appropriation or budget authorization;

(iv) divests an agency of discretion committed to the agency by statute or the Constitution of the United States, without regard to whether the discretion was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or

(v) otherwise affords relief that the court could not enter under its own authority upon a final judgment in the civil action; or

(B) in the case of a covered settlement agreement other than a consent decree, a term that—

(i) interferes with the authority of an agency to revise, amend, or issue rules under the procedures under chapter 5 of title 5, United States Code, or any other statute or Executive order prescribing rulemaking procedures for a rulemaking that is the subject of the covered settlement agreement;

(ii) commits the agency to expend funds that have not been appropriated and that have not been budgeted for the civil action in question; or

(iii) for a covered settlement agreement that commits the agency to exercise in a particular way discretion which was committed to the agency by statute or the Constitution of the United States to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, provides a remedy for a failure by the agency to comply with the terms of the covered settlement agreement other than the revival of the civil action resolved by the covered settlement agreement.

(f) REVIEW BY COURT.—

(1) AMICUS.—A court considering a proposed covered settlement agreement shall presume, subject to rebuttal, that it is proper to allow amicus participation relating to the covered settlement agreement by any person who filed public comments on the covered settlement agreement under subsection (d)(2).

(2) REVIEW OF DEADLINES.—

(A) PROPOSED CONSENT DECREES.—For a proposed covered settlement agreement that is a consent decree, a court shall not approve the covered settlement agreement unless the proposed covered settlement agreement allows sufficient time and incorporates adequate procedures for the agency to comply with chapter 5 of title 5, United States Code, and other applicable statutes that govern rulemaking and, unless contrary to the public interest, the provisions of any Executive order that governs rulemaking.

(B) OTHER SETTLEMENT AGREEMENTS.—For a proposed covered settlement agreement other than a consent decree, a court shall ensure that the covered settlement agreement allows sufficient time and incorporates adequate

procedures for the agency to comply with chapter 5 of title 5, United States Code, and other applicable statutes that govern rulemaking and, unless contrary to the public interest, the provisions of any Executive order that governs rulemaking.

(g) ANNUAL REPORTS.—Each agency shall submit to Congress an annual report that, for the year covered by the report, includes—

(1) the number, identity, and content of covered civil actions brought against and covered settlement agreements entered by the agency; and

(2) a description of the statutory basis for—

(A) each covered settlement agreement entered by the agency; and

(B) any award of attorneys fees or costs in a civil action resolved by a covered settlement agreement entered by the agency.

SEC. 4. MOTIONS TO MODIFY CONSENT DECREES.

If an agency moves a court to modify a covered settlement agreement and the basis of the motion is that the terms of the covered settlement agreement are no longer fully in the public interest due to the obligations of the agency to fulfill other duties or due to changed facts and

circumstances, the court shall review the motion and the covered settlement agreement de novo.

SEC. 5. EFFECTIVE DATE.

This Act shall apply to—

(1) any covered civil action filed on or after the date of enactment of this Act; and

(2) any covered settlement agreement proposed to a court on or after the date of enactment of this Act.

○

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 16

I

113TH CONGRESS
1ST SESSION

H. R. 317

To amend title 31, United States Code, to provide for transparency of payments made from the Judgment Fund.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 18, 2013

Mr. GARDNER (for himself, Mrs. LUMMIS, Mr. GRIFFIN of Arkansas, Mr. COLE, Mr. AMODEI, Mr. BENISHEK, Mr. THOMPSON of Pennsylvania, Mr. GRAVES of Missouri, Mr. STEWART, Mr. GOSAR, Mr. CHABOT, Mr. TIPTON, and Mr. BISHOP of Utah) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 31, United States Code, to provide for transparency of payments made from the Judgment Fund.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Judgment Fund Transparency Act of 2013''.

SEC. 2. JUDGMENT FUND TRANSPARENCY.

(a) TRANSPARENCY REQUIREMENT.—Section 1304 of title 31, United States Code, is amended by adding at the end the following new subsection:

''(d) Unless the disclosure of such information is otherwise prohibited by law or court order, the Secretary of the Treasury shall make available to the public on a website, as soon as practicable but not later than 30 days after a payment under this section is tendered, the following information with regard to that payment:

''(1) The name of the specific Federal agency or entity whose actions gave rise to the claim or judgment.

''(2) The name of the plaintiff or claimant.

''(3) The name of counsel for the plaintiff or claimant.

''(4) The amount paid representing principal liability, and any amounts paid representing any ancillary liability, including attorney fees, costs, and interest.

''(5) A brief description of the facts that gave rise to the claim.

''(6) A copy of the original or amended complaint or written claim, and any written answer given by the Federal Government to that complaint or claim.

''(7) A copy of the final action by a court regarding the claim (whether by decree, approval of

settlement, or otherwise), or of the settlement agreement in any action not involving a court.

''(8) The name of the agency that submitted the claim.''.

(b) IMPLEMENTATION.—The Secretary of the Treasury shall implement the amendment made by this section beginning not later than 60 days after the date of the enactment of this Act.

○

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 17

Federal Register
Vol. 76, No. 14
Friday, January 21, 2011

Presidential Documents

Title 3—

The President

Executive Order 13563 of January 18, 2011

Improving Regulation and Regulatory Review

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. *General Principles of Regulation.* (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

(b) This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Sec. 2. *Public Participation.* (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally

be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

(c) Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

Sec. 3. *Integration and Innovation.* Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization. Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation.

Sec. 4. *Flexible Approaches.* Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.

Sec. 5. *Science.* Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

Sec. 6. *Retrospective Analyses of Existing Rules.* (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 7. *General Provisions.* (a) For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 18, 2011.

[FR Doc. 2011–1385
Filed 1–20–11; 8:45 am]
Billing code 3195–W1–P

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 18

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-HQ-OAR-2012-0322; FRL-xxxx-x]

RIN 2060-AR68

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to take action on a petition for rulemaking filed by the Sierra Club with the EPA Administrator on June 30, 2011 (the Petition). The Petition includes interrelated requests concerning the treatment of excess emissions in state rules by sources during periods of startup, shutdown, or malfunction (SSM). The EPA is proposing to grant in part and to deny in part the request in the Petition to rescind its policy interpreting the Clean Air Act (CAA) to allow states to have appropriately drawn state implementation plan (SIP) provisions that provide affirmative defenses to monetary penalties for violations during periods of SSM. The EPA is also proposing either to grant or to deny the Petition with respect to the specific existing SIP provisions related to SSM in each of 39 states identified by the Petitioner as inconsistent with the CAA. Further, for each of those states where the EPA proposes to grant the Petition concerning specific provisions, the EPA also proposes to find that the existing SIP provision is substantially inadequate to meet CAA requirements and thus under CAA authority proposes a "SIP call." For those states for which the EPA proposes a SIP call, the EPA also proposes a

number of small entities. Courts have interpreted the RFA to require a regulatory flexibility analysis only when small entities will be subject to the requirements of the rule. *See, e.g., Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985). This proposed rule will not impose any requirements on small entities. Instead, the proposed action merely reiterates the EPA's interpretation of the statutory requirements of the CAA. To the extent that the EPA proposes to grant the Petition and thus proposes to issue a SIP call to a state under CAA section 110(k)(5), the EPA is only proposing an action that requires the state to revise its SIP to comply with existing requirements of the CAA. The EPA's action, therefore, would leave to states the choice of how to revise the SIP provision in question to make it consistent with CAA requirements and determining, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The action may impose a duty on certain state governments to meet their existing obligations to revise their SIPs to comply with CAA requirements, but with lesser expenditures. The only costs of this action would be those associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

Comment [A21]: A number of commenters expressed concern that the rule may impose unfunded mandates on states. As EPA states, "the action may impose a duty on certain state governments to meet their existing obligations to revise their SIPS to comply with CAA requirement," and asserts that, "the only costs of this action would be those associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call. Given that EPA proposes to issue SIP calls for 36 of the 39 states, some commenters maintain that these states will be required to impose new requirements on facilities in order to comply with EPA's new interpretation of CAA obligations contained in this rule.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The regulatory requirements of this action would apply only to the states for which the EPA issues a SIP call. To the extent that such states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action would not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

E. Executive Order 13132 – Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 because it will simply maintain the relationship and the distribution of power between the EPA and the states as established by the CAA. The proposed SIP calls are required by the CAA because the EPA is proposing to find that the current SIPs of the affected states are substantially inadequate to meet fundamental CAA requirements. In addition, the effects on the states will not be substantial because where a SIP call is finalized for a state, the SIP call will require the affected state to submit only those revisions necessary to address the SIP deficiencies and applicable CAA requirements. Thus, Executive Order 13132 does not apply to this action.

Comment [A22]: Has EPA analyzed whether this effect could be considered substantial?

In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 19

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BALCH
& BINGHAM LLP

M. TALMADGE SIMPSON
t: (205) 226-3453
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February 8, 2013

VIA SUBMISSION @ FOIAONLINE.REGULATIONS.GOV
VIA CERTIFIED MAIL

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460

Re: Freedom of Information Act Request

Dear National FOIA Officer:

Please accept this request for information pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and the U.S. Environmental Protection Agency's ("EPA") FOIA regulations at 40 C.F.R. Part 2. Please also note that while the scope of this FOIA request may include responsive agency records located in EPA offices outside of EPA's Headquarters ("Headquarters"), this request is intended to include only those records located at Headquarters and/or in the possession of Headquarters personnel. Similar, but separate FOIA requests are being filed with other EPA offices in the interest of administrative efficiency. In addition, and also in the interest of administrative efficiency, this FOIA request is initially being filed with Headquarters and all EPA regional offices from which I am seeking information via the Federal Government's FOIAOnline system, with courtesy hard copies to follow by way of United States mail.

This FOIA request seeks information, as described in greater detail below, regarding EPA's policy concerning provisions of State Implementation Plans ("SIPs") which exclude excess emissions during periods of "startup, shutdown, and malfunction" ("SSM")[1] from compliance obligations or enforcement actions, pursuant to the Clean Air Act, 42 U.S.C. § 7401, *et seq.* ("CAA" or the "Act"). Specifically, this request seeks information pertaining to (1) any final, proposed, or planned "SIP call" by EPA under Section 110 of the Act, 42 U.S.C. § 7410, concerning one or more SSM exclusions in any State SIP; or (2) any EPA final, proposed, or planned disapproval—in whole or in part—of a State's SIP submittal based in whole or in part on a State's inclusion of one or more SSM exclusions in the plan.

Please include in your response to this FOIA request any and all agency records, regardless of form, which contain the following types of information:

[1] For purposes of this request, the term "SSM" also includes any similarly named event, such as, *e.g.*, "startup, shutdown, or maintenance."

- Final opinions, orders, notices, determinations, letters of applicability, conclusions, analyses, recommendations, and instructions to staff, whether intended for use within or outside of EPA, about the exclusion of excess emissions during periods of SSM from compliance obligations or enforcement actions under the CAA;

- Statements of policy and interpretations—which have not been published in the Federal Register—about the exclusion of excess emissions during periods of SSM from compliance obligations or enforcement actions under the CAA;

- Data, calculations, modeling, formulas, and any other mathematical computations concerning ambient air quality or excess emissions of any "pollutant"—as that term is defined under the CAA—from a stationary source during periods of SSM, or concerning the ability, performance, or efficacy of any method of controlling excess emissions from any such pollutant during periods of SSM;

- Technical, legal, or policy analyses regarding whether excess emissions during periods of SSM in any state interfere with the ability of any state to attain or maintain one or more NAAQS;

- Communications, regardless of form, whether between or among two or more EPA employees or involving one or more persons outside of EPA, specifically including but not limited to emails and any and all attachments thereto, about the exclusion of excess emissions during periods of SSM from compliance obligations or enforcement actions under the CAA, or about whether excess emissions during periods of SSM in any state interfere with the ability of any state to attain or maintain one or more NAAQS;

- Any and all records which have previously been disclosed to any person pursuant to an information request of any kind, whether in a formal (*i.e.* litigation or adjudicatory) or informal forum, and whether or not the request specifically references FOIA, regarding the exclusion of excess emissions during periods of SSM from compliance obligations or enforcement actions under the CAA, or regarding whether excess emissions during periods of SSM in any state interfere with the ability of any state to attain or maintain one or more NAAQS.

For purposes of this FOIA request, the term "record" has the meaning provided under the FOIA, 5 U.S.C. § 552(f)(2), and includes but is not limited to all forms of information provided under the Federal Records Act. *See* 44 U.S.C. § 3301. In addition, for purposes of this request, the term "email" includes any electronic message sent or received by any Headquarters employee, whether previously or currently employed, or upon which any such previous or current Headquarters employee was carbon copied ("CC") or blind carbon copied ("BCC"). This includes any and all emails involving any Headquarters employee "alias" or personal email accounts, as well as the official ".gov" accounts. This also includes any and all emails sent to, received by, or which CC or BCC any person not employed by EPA.

I believe that the requested information is not exempt from FOIA's mandatory disclosure requirements. However, should EPA maintain that one or more responsive records are exempt and that discretionary disclosure is inappropriate, please provide a description of each such record and the basis for EPA's assertion that the information is exempt under FOIA.

I am willing to pay the fees associated with this request up to $500.00 without further authorization. Should the fees reach this amount, please contact me immediately to discuss further cost assurance beyond this amount. I am willing to accept records reproduced in electronic format should doing so decrease the time or cost to reproduce the records. Should you have any questions or the need to clarify any aspect of this request, please contact me immediately so as to not delay the processing of my request. My telephone number is (205) 226-3453 and email is tsimpson@balch.com.

Sincerely,

BALCH & BINGHAM LLP

Tal Simpson

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 20

1901 Sixth Avenue North • Suite 1500 • P.O. Box 306 (35201) • Birmingham, AL 35203-4642 www.balch.com

BALCH
& BINGHAM LLP

TAL SIMPSON
t: (205) 226-3453
e: tsimpson@balch.com

March 22, 2013

VIA E-MAIL (LORANG.PHIL@EPA.GOV)

Mr. Philip A. Lorang
Associate Director of Air Quality Policy
Office of Air Quality Planning and Standards
U.S. Environmental Protection Agency
109 T.W. Alexander Drive
Research Triangle Park, NC 27709

Re: SSM FOIA Request

Dear Phil:

This a follow-up to our phone call on March 6, 2013, where we discussed my Freedom of Information Act ("FOIA") request for EPA records concerning its policies and actions relating to exclusions of excess emissions during periods of startup, shutdown, and malfunction ("SSM FOIA Request"). On behalf of the EPA, you and your colleagues provided us with estimates as to the time and costs necessary for EPA to complete its response to the SSM FOIA Request and suggested several ways in which I could narrow the scope of the request to facilitate EPA's response. Thus, generally speaking, the three primary topics we discussed were (1) timeline; (2) costs; and (3) narrowing the scope of the request. As a recap, I have summarized below my understanding of the topics we discussed on that phone call. In addition, below each topic or sub-topic summary, I have provided my response.

1. Timeline

EPA estimates and proposes a timeline of approximately eight (8) weeks to complete its response to the SSM FOIA Request, which would set EPA's response completion time at approximately May 17, 2013.[1] EPA also suggested that within this timeframe, records could be

[1] FOIA provides a deadline of 20 days (excluding weekends and legal holidays) beginning from "the date on which the request is first received by the appropriate component of the agency, but in any event [beginning] not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations . . . to receive requests." 5 U.S.C. § 552(a)(6)(A). The SSM FOIA Request is dated February 8, 2013, was received by EPA no later than the following Monday, February 11, 2013, and was last assigned to the "appropriate component" of EPA on February 13, 2013. Therefore, the 20-day FOIA timeline would put the original deadline at approximately March 14, 2013. However, the original due date assigned by EPA to the SSM FOIA Request was March 26, 2013, due to the request apparently not being "perfected" by EPA until February 26, 2013.

produced on a rolling basis based on my priorities, where appropriate. EPA recommended that I not authorize EPA to begin working on its response plan until we have decided on the various questions and suggestions raised by EPA on the phone call. We agreed that EPA should wait until it has received our answers before starting its response.

Response: I agree to EPA's proposed extension and estimated timeline to complete its response. I also agree that a rolling production of records would be helpful. Therefore, please produce records on a rolling basis whenever EPA has determined that the records may be released, to the extent that records can be reasonably grouped together in stages, and to the extent that doing so does not significantly reduce the overall efficiency or significantly increase the cost of EPA's response.

2. Costs

EPA estimates that a complete response to the SSM FOIA Request will cost between $13,000 and $14,000. EPA explained that its proposed response plan would involve approximately 100 EPA employees nationwide, approximately 60% of which work in the regional offices, with approximately 40% being located in the headquarters offices. The majority of the fees would cover the time spent searching for and reviewing responsive records, and a small percentage of the fees would cover the reproduction of the records to be produced. EPA suggested that they will produce records via thumb drives and compact discs to the greatest extent practicable but can provide hard copies if preferred. EPA also stated that it would likely upload at least some of the produced records on the FOIAOnline website. At the time of the phone call, I had authorized a total of $2,300 in fees across the ten regional offices and headquarters. EPA advised that this amount of fees would yield an incomplete and fragmented response.

Response: I agree to increase the level of cost assurance up to $14,000 without further authorization. If and when EPA's response approaches this amount, please contact me immediately to discuss further authorization. Additionally, to expedite EPA's response, I further agree to receive records in the cheapest and most convenient form available, including electronic records being provided on thumb drives or compact discs.

3. Narrowing the Scope

EPA requested that I narrow the scope of the SSM FOIA Request and suggested several ways in which this can be accomplished. Each suggestion is summarized and responded to individually.

a. Removing altogether, or in the alternative, tailoring, the request for information regarding any "planned" State Implementation Plan ("SIP") call or SIP disapproval. Currently, the SSM FOIA request seeks information pertaining to "any final, proposed, or planned 'SIP call'" and information pertaining to any "final, proposed, or planned disapproval—in whole or in part—of a state's SIP submittal[.]" *See* SSM FOIA Request at 1, ¶2. EPA stated that including any "planned" SIP action makes this request too broad because a "planned" action could include a wide range of records made at various stages of EPA's consideration of such an action, including mere "ideas" that never materialized into an action or proposed action.

Response: I agree to exclude records pertaining to any SIP consideration which never made it to the proposed rulemaking stage. However, for those actions which eventually materialized into a proposed rulemaking (including those that progressed into a final rulemaking), I am requesting all such related records, including those made or prepared during the "planning" stages of the action or proposed action.

b. Date Limitations. EPA noted that SSM provisions date back to the 1970s, and requested that the SSM FOIA Request be limited as to a beginning date. EPA suggested a number of alternatives for this beginning date, including the date of Sierra Club's petition (June 30, 2011); the date of the Utah SSM SIP Call (November 19, 2010), the date of the Colorado SIP action (2006), or EPA's most recent comprehensive SSM policy memorandum (1999).

Response: As indicated by the original SSM FOIA Request, the scope of EPA records which I seek extends well beyond those directly related to the February 22, 2013 proposed SIP Call, and indeed well beyond the records directly related to either of the two other specific SSM-related SIP actions suggested by EPA as possible benchmarks. In its most recent proposed SIP call, EPA discusses its "longstanding" policy on SSM provision and frequently cites or refers to EPA policy memoranda prepared in 1982, 1983, 1999, and 2001. Therefore, I believe that EPA records dating back to and relating to those policy memoranda are likely to provide a great deal of insight on EPA's policies. While the more recent EPA records are likely to support EPA's proposed SIP call, I am also interested in the older records which may not necessarily support that action or EPA's current SSM policy, as such records are nonetheless likely to be informative and useful in understanding EPA's policies.

However, while I am interested in EPA records dating back to the earliest iterations of EPA's policy on SSM provisions, I understand and agree with EPA that limiting the scope of the request by date can reduce the time and costs of EPA's response. As we have previously discussed, I need to receive EPA records as soon as possible to aid in my client's efforts to provide public comments on the proposed rulemaking. Therefore, I agree that the SSM FOIA Request can initially be limited to those records dating back to January 1, 1998, in order to include relevant records made or developed leading up to the 1999 policy memorandum. In addition, because I am still very interested in earlier records, I will reserve the right to expand that time frame further back to include records related to the earlier policy memoranda at a later time.

c. SSM Provisions in Other Areas of Clean Air Act Regulation. EPA suggested that the SSM FOIA Request be limited to just those records in the SIP-action context, to the exclusion of records related to EPA's policy on SSM provisions in other areas of CAA regulation, such as New Source Performance Standards ("NSPS") and hazardous air pollutants ("HAP").

Response: As explained above, I am interested in records beyond those directly related to and supportive of EPA's recent SIP actions. Much of EPA's SIP-related records have already been compiled by EPA in support of its rulemaking; however, agency records related to EPA's SSM policies in these other areas of regulation are also likely to provide valuable insight. The purpose of the SSM FOIA Request is to obtain additional relevant information beyond that which EPA has already explained and provided as part of its

rulemaking; therefore, limiting the scope of the request as suggested by EPA would not be helpful or appropriate to serve that purpose. Thus, I am unable to agree with EPA's suggestion to limit the SSM FOIA Request in this manner.

d. Limiting the scope of "final opinions," "instructions to staff," and similar types of records to only those involving EPA management rather than all EPA staff.

Response: I agree to generally limit the scope of the SSM FOIA Request with respect to purely internal EPA records (i.e. communications, opinions, memoranda, etc., within an EPA office) to just those involving (1) one or more EPA employees from the level of Section Chief—or its approximately equivalent position to the extent it varies between regions and offices—and above; and/or (2) one or more persons considered to be a regional or staff expert in the relevant subject matter. In addition, I want to be sure to include within the scope of the SSM FOIA Request certain types of records regardless of the level of employees involved, including records (1) between a headquarters office and a regional office, (2) between regional offices, (3) between different headquarters offices, and (4) between EPA and any person or party outside of EPA.

e. Limiting the scope to "final" statements of policy, interpretations, and similar records, to the exclusion of "draft" versions of these documents.

Response: I agree to this limitation.

f. Excluding all documents provided on the rulemaking docket or otherwise publicly available, either through EPA's website, or through publication in the Federal Register.

Response: I agree to this limitation.

Conclusion

It is my understanding that the above items constitute the full range of topics discussed on our phone call which require an answer in order for EPA to proceed with its response to the SSM FOIA Request. However, if I have omitted anything necessary for EPA's response to continue, or should you have any questions about any of my responses, please contact me immediately to resolve any such omissions or questions.

Sincerely,

Tal Simpson

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 21

Federal Register
Vol. 74, No. 15
Monday, January 26, 2009

Presidential Documents

Title 3—

The President

Memorandum of January 21, 2009

Freedom of Information Act

Memorandum for the Heads of Executive Departments and Agencies

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, ''sunlight is said to be the best of disinfectants.'' In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 21, 2009

[FR Doc. E9–1773
Filed 1–23–09; 11:15 am]
Billing code 3110–01–P

Comments of Alabama Power Company

To the United States Environmental Protection Agency

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

78 Fed. Reg. 12,460 (February 22, 2013)
Docket ID No. EPA-HQ-OAR-2012-0322

Exhibit 22

EPA

Former Administrator Lisa P. Jackson (This site is no longer updated.)

- Home
- Speeches & Statements

« April 18, 2009: Administrator Jackson encourages children to save energy in a variety of ways at the Boys and Girls club .
Administrator Jackson Reflects on Her First Months on the Job »

Note: EPA no longer updates this information, but it may be useful as a reference or resource.

Memo to EPA Employees: Transparency in EPA's Operations

Memo to EPA Employees

DATE: April 23, 2009

SUBJECT: Transparency in EPA's Operations

FROM: Lisa P. Jackson, Administrator

TO: All EPA Employees

* General Principles
* Appointment Calendars
* Freedom of Information Act Policy
* Rulemaking Proceedings
* Litigation and Formal Adjudication
* Contacts with Congress and the Press
* Communications Generally
* Conclusion

In my testimony before the Senate Committee on Environment and Public Works and in my January 23, 2009, memorandum to all employees, I expressed my commitment to uphold the values of transparency and openness in conducting EPA operations. President Obama recently said in a memorandum to agency heads: "Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset." I am asking each one of you to help me ensure EPA operates in full compliance with this principle.

The success of our environmental efforts depends on earning and maintaining the trust of the public we serve. The American people will not trust us to protect their health or their environment if they do not trust us to be transparent and inclusive in our decision-making. To earn this trust, we must conduct business with the public openly and fairly.

In 1983, then-Administrator William Ruckelshaus promised that under his leadership, EPA would operate "in a fishbowl." I wish to reaffirm this commitment and take the opportunity to provide guidelines about how we will ensure transparency in our interactions with all members of the public. These guidelines are intended to maintain the fairness and openness of our operations and thus strengthen public confidence in our decisions. I am relying on EPA employees to use their good judgment to conduct themselves with the openness and integrity that alone can guarantee public trust in EPA.

General Principles

In all its programs, EPA will provide for the fullest possible public participation in decision-making. This requires not only that EPA remain open and accessible to those representing all points of view, but also that EPA offices responsible for decisions take affirmative steps to solicit the views of those who will be affected by these decisions. This includes communities of color, Native Americans, people disproportionately impacted by pollution, small businesses, cities and towns working to meet their environmental responsibilities, and others who have been historically underrepresented in EPA decision-making. EPA will not accord privileged status to any special interest, nor will it accept any recommendation or proposal without careful, critical, and independent examination.

Appointment Calendars

To keep the public fully informed of my contacts with interested persons, I have directed that a working copy of my appointment calendar, showing meetings with members of the public, be provided to the EPA Office of Public Affairs, where it will be available to the public each day on the EPA Web site. I also direct other senior Agency officials, including the Deputy Administrator, the Assistant Administrators, and the Regional Administrators, to make their working appointment calendars available to the public in a similar fashion.

Freedom of Information Act Policy

As President Obama has stated, the Freedom of Information Act should be administered with a clear presumption that openness prevails. All Agency personnel should ensure that this principle of openness is applied to the extent possible when responding to a FOIA request. Managers should give their staffs and the Agency's FOIA professionals the

support needed to satisfy FOIA's transparency requirement in as timely and efficient a manner as possible. In accordance with guidance issued by Attorney General Holder on March 19, 2009, EPA offices should exercise their discretion in favor of disclosing documents whenever possible under the FOIA. Offices should assert an exemption to disclosure only where the Agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. Offices should also take steps to make information public on the Agency's Web site without waiting for a request from the public to do so. More detailed FOIA implementation procedures will be provided in the near future to assist you in carrying out this important government responsibility.

Because EPA is a public regulatory agency and employer to about 18,000 employees, EPA staff may come into possession of certain information that may need to be protected from disclosure under FOIA, including certain contract or business data, trade secrets, or personal privacy information. Although the Agency's business is to be conducted in an open and accountable manner, we must also ensure that information entitled to special protection is handled with the utmost care and in full compliance with all applicable laws and regulations. Questions about whether special protections apply to certain information should be directed to the Office of General Counsel's General Law Office.

Rulemaking Proceedings

Much of EPA's business is conducted through rulemaking. It is crucial that we apply the principles of transparency and openness to the rulemaking process. This can only occur if EPA clearly explains the basis for its decisions and the information considered by the Agency appears in the rulemaking record. Therefore, each EPA employee should ensure that all written comments regarding a proposed rule received from members of the public, including regulated entities and interested parties, are entered into the rulemaking docket.

Robust dialogue with the public enhances the quality of our decisions. EPA offices conducting rulemaking are therefore encouraged to reach out as broadly as possible for the views of interested parties. However, while EPA may and often should meet with groups and individuals, we should attempt, to the maximum extent practicable, to provide all interested persons with equal access to EPA. In addition, it is essential to ensure that the public receives timely notice, as far as practicable, of information or views that have influenced EPA's decisions. This means that EPA employees must summarize in writing and place in the rulemaking docket any oral communication during a meeting or telephone discussion with a member of the public or an interested group that contains significant new factual information regarding a proposed rule.

Questions about how to handle comments and other communications regarding a proposed rule should be directed to the appropriate program office personnel, attorneys in the Office of General Counsel, or regional staff working on the specific rulemaking.

I am committed to fulfilling President Obama's direction to agency heads to make use of tools and technology to increase outreach and interaction with the public. Public participation in Agency rulemaking proceedings may take a variety of forms, including public hearings and meetings, workshops, forums, focus groups, surveys, roundtables, Federal Register notice-and-comment procedures, advisory committee meetings, informal meetings with interested parties, Internet-based dialogues, and other opportunities for informal dialogue, consistent with applicable legal requirements. I encourage our staff to be creative and innovative in the tools we use to engage the public in our decision-making.

Litigation and Formal Adjudication

EPA is engaged in a wide range of litigation. The conduct of litigation by the Agency should reflect the principles of fairness and openness that apply to other EPA activities. However, we must also protect privileged litigation and enforcement-sensitive information from unauthorized disclosure. Communication with parties involved in litigation with EPA about that litigation should be through an attorney representing EPA in the case. Program personnel who receive inquiries about pending litigation from persons who are not parties to the litigation should consult with an attorney representing EPA in the case before responding. If you do not know which attorneys are representing EPA in a specific case, contact knowledgeable EPA lawyers, including the Office of General Counsel, the Office of Enforcement and Compliance Assurance, or an Office of Regional Counsel, as appropriate.

Formal adjudications (including certain administrative penalty proceedings and pesticide cancellation proceedings) are also governed by specific requirements that limit communications between EPA staff and interested parties. These limitations appear in the various EPA rules governing those proceedings. Information about these rules is available from the Office of General Counsel and on the EPA Intranet.

Contacts with Congress and the Press

EPA often receives requests for records or information from Congress, i.e. the Speaker of the House, the President of the Senate, the Chair of a Committee or Subcommittee with jurisdiction over EPA. It also receives informal requests from individual members of Congress and their staffs. I recognize the importance of Congressional oversight and encourage our programs to provide Congress with the information necessary to satisfy its oversight and legislative interests to the extent possible and consistent with our Constitutional and statutory obligations. Information requests from Congress should be handled in consultation with managers of the affected EPA programs and our legislative affairs staff in the Office of Congressional and Intergovernmental Relations.

EPA also should be accessible to the press, which performs a vital role in informing the public about EPA's actions. As we respond to press inquiries, the EPA staff should respect our internal deliberative processes and strive for accuracy and integrity in our communications. This will ultimately enhance public trust in the Agency. When interacting with the press in the performance of your official duties, please coordinate with the managers of your program and media relations experts in the Office of Public Affairs.

Nothing contained in this memorandum interferes with your right to petition or to furnish information to Congress or a Member of Congress, as provided under applicable law, or to engage in protected whistleblowing activities.

Communications Generally

The Office of Public Affairs plays a central role in shaping the Agency's communications with the public. OPA will be providing further guidance on how our programs and regions

should coordinate with it on the preparation of messaging materials and interactions with the press.

Conclusion

I have the utmost confidence in the ability of EPA's workforce to promote full public involvement and openness in all EPA affairs. I believe this will enhance the credibility of the Agency, boost public trust in our actions and improve the quality of our decisions. In short, we will let more sunlight into our Agency. I look forward to hearing any additional ideas you may have on how we can achieve this goal.

As I continue to work with all of you, I plan to provide further thoughts on how we can strengthen EPA's public role in serving the needs of the public and advancing our environmental protection mission.

Last published on 5/7/2013