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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.

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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