



west virginia department of environmental protection

Executive Office
601 57th Street, Southeast
Charleston, West Virginia 25304
Phone: (304) 926-0440
Fax: (304) 926-0446

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.dep.wv.gov

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Attention Docket ID No. EPA-HQ-OAR-2012-0322
U.S. Environmental Protection Agency
EPA West (Air Docket)
1200 Pennsylvania Avenue N.W.
Mail Code: 6102T
Washington, D.C. 20460

Re: Comments regarding “*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. 12460, et seq. (Feb. 22, 2013), Air Docket No. EPA-HQ-OAR-2012-0322

Dear Docket Manager,

The State of West Virginia, by and through the Cabinet Secretary of the West Virginia Department of Environmental Protection and the Attorney General of West Virginia, submits the following comments on the U.S. Environmental Protection Agency’s (“EPA”) proposed action detailed in “*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. 12460, et seq. (Feb. 22, 2013) (the “Proposed Rule”). EPA is proposing to require West Virginia and thirty-five other States to revise their previously approved State Implementation Plans (“SIPs”) through a “SIP Call.” The proposed SIP Call would invalidate portions of eight separate West Virginia emissions regulations that the State has adopted into its SIP. Some of the substantive requirements have been in force for over forty years. Others have been updated through periodic SIP revisions, which EPA has fully approved.

The State of West Virginia objects to the Proposed Rule for four reasons. First, EPA has misinterpreted the Clean Air Act (“CAA”) as prohibiting States from allowing for emissions exceptions for Startup, Shutdown, and Malfunction (“SSM”). Second, EPA lacks authority to issue the proposed SIP Call. Third, the Proposed Rule is arbitrary and capricious and fails to comply with the Administrative Procedures Act (“APA”). And fourth, EPA has misconstrued the West Virginia emissions regulations that it proposes to invalidate. EPA’s Proposed Rule is not supported by law and must be withdrawn.

Promoting a healthy environment.

I. Background

A. The CAA mandates that EPA defer to State emissions plans so long as they satisfy federal limits.

When Congress passed the CAA, it created a system by which the states and the federal government would work cooperatively to control air emissions. The CAA “establishes a comprehensive program for controlling and improving the nation’s air quality through state and federal regulation.” *BCCA Appeal Group v. U.S. Dep’t Env’tl. Prot.*, 355 F.3d 817, 821-22 (5th Cir. 2003). It tasks the EPA with identifying air pollutants and establishing National Ambient Air Quality Standards (“NAAQS”), and then makes the states responsible for establishing federally enforceable measures through SIPs that attain and maintain the NAAQS. 42 U.S.C. §§ 7407(a), 7410. States have wide discretion in crafting their SIPs, which EPA must ultimately approve through a notice-and-comment process. *Luminant Generation Co. LLC v. EPA*, 699 F.3d 427, 432 (5th Cir. 2012). Notably, “[t]he 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 which satisfies” the NAAQS. *Train v. Nat’l Resources Def. Council*, 421 U.S. 60, 79 (1975).

Given this mandated deference to SIPs, EPA may require a state to revise a previously approved SIP only upon a “find[ing] that the applicable implementation plan . . . is substantially inadequate to attain or maintain the relevant national ambient air quality standard which it implements[.]” CAA § 110(k)(5); 42 U.S.C. § 7410(a)(2)(H). This standard is crucial; the states and the regulated community take reasonable comfort in the fact that if they work toward complying with an EPA-approved SIP, EPA will not capriciously change the regulatory landscape. *Cf. Blanco Oil Co. v. FERC*, 598 F.2d 152, 163 (D.C. Cir. 1979) (“Finality ordinarily assures regularity of administrative process and avoids unfairness to parties who have relied on a final decision.”). Thus, while EPA has substantial discretion in deciding whether to approve a SIP in the first instance, its discretion is far more limited when it is seeking to have a state revise a previously approved SIP in the context of a SIP Call.

B. West Virginia has a long history of effectively enforcing emissions limitations.

West Virginia has a robust history of air pollution control that predates the CAA. For fifty years, West Virginia has consistently demonstrated its ability to implement state and federal emissions-control requirements. In 1961, West Virginia became the sixteenth state to implement a statewide air pollution control law when it passed the Air Pollution Control Act (the “APCA”). The APCA established a separate state agency, which was composed of a seven-member Commission, a Director and staff. The purpose of this agency was to protect and preserve the State’s air quality. Those powers were subsequently transferred to the West Virginia Department of Environmental Protection (“WVDEP”). WVDEP’s Division of Air Quality’s staffing, funding and legal authorities now incorporate over 90 full time staff, with a multi-million dollar annual budget and approximately 40 legislative rules. West Virginia Code Chapter 22, Article 5, delegates to WVDEP the legislative authority to ensure that West Virginia’s air quality satisfies the CAA and EPA-established NAAQS. Notably, out of fifty-five West Virginia counties, only two have exceeded the most recent NAAQS and will require attainment demonstrations via SIP

revisions.¹ This directly contradicts EPA's allegation that West Virginia's SSM "exemptions" are compromising West Virginia's general ability to maintain the NAAQS.

C. The Proposed Rule seeks unnecessarily to invalidate several previously approved West Virginia emissions regulations.

The Proposed Rule purports to target "air emissions that exceed the otherwise applicable emission limitations in a SIP." Memorandum, U.S. Env'tl. Prot. Agency, *Statutory, Regulatory, and Policy Context for this Rulemaking* (Feb. 4, 2013) ("EPA Memorandum"). Specifically, EPA contends that "excess emissions during periods of startup, shutdown, and malfunction constitute violations of the applicable SIP emission limitations." *Id.* at 14. As such, EPA maintains that "[a]utomatic exemptions to excuse excess emissions during SSM events from applicable emission limitations in SIPs are not permissible because they are inconsistent with the fundamental statutory requirements of the CAA." *Id.* Furthermore, EPA asserts that "no SIP can have an enforcement discretion provision that could legally bar enforcement against violations of SIP emissions limitations by the EPA or by citizens, because such a provision would be inconsistent with the express requirements of CAA sections 113 and 304." *Id.* at 13. Nevertheless, because "there are circumstances where, under conditions that are beyond the control of the source, the source has done all within its power to prevent the violation and to minimize adverse consequences of the violation," EPA states that its policy does permit states themselves to exercise discretion in enforcing emissions violations and to allow sources to assert such uncontrollable circumstances as an affirmative defense to an alleged violation. *Id.* at 14-15.

Purportedly in furtherance of this non-binding policy, the Proposed Rule criticizes several West Virginia regulations that apply to certain SSM emissions. Without a single factual finding, the Proposed Rule would declare West Virginia's SIP "substantially inadequate" and invalidate eight separate West Virginia emissions regulations that EPA had previously approved. Specifically, the Proposed Rule alleges that West Virginia's SIP impermissibly: (1) allows for automatic emissions exemptions for SSM emissions²; (2) allows for alternative emissions limits during SSM³; and (3) grants a state official unilateral discretion whether to grant exceptions for SSM emissions.⁴ EPA asserts that "any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion." Proposed Rule at 12499. Otherwise, EPA alleges, the SIP has the effect of "precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations." *Id.*

Crucially, however, there are many things the Proposed Rule does not do. The Proposed Rule does not identify any change in the law or EPA-established NAAQS that would justify a SIP Call. Furthermore, the Proposed Rule does not make a single factual finding: EPA has not identified any instance in which a NAAQS was violated as a result of a SSM provision in the

¹ Indeed, nonattainment designations for these pollutants have not yet been issued.

² W. Va. Code R. §§ 45-2-9.1, 45-7-10.3, and 45-40-100.8.

³ W. Va. Code R. §§ 45-2-10.1, 45-3-7.1, 45-5-13.1, 45-6-8.2, 45-7-9.1, 45-10-9.1, and 45-21-9.3.

⁴ W. Va. Code R. § 45-3-3.2 (automatic); W. Va. Code R. § 45-7-10.4 (discretionary).

West Virginia SIP. Nor does EPA identify any instance in which EPA or a citizen has been precluded from taking civil action in West Virginia because of any SSM provision in any state rule. Instead, the Proposed Rule makes “findings” based on pure speculation and seeks to have the majority of states in the Union revise their previously approved SIPs as a result. This is not the sort of cooperative regulation that Congress envisioned when the CAA was enacted.

II. EPA Has Misinterpreted the CAA Requirement That Emissions Limitations Be “Continuous.”

The Proposed Rule is fundamentally based on EPA’s erroneous interpretation of the CAA as requiring emissions limitations to be “continuous,” regardless of the category of operations to which they apply. Section 302(k) of the CAA defines “emission limitation” as

a requirement established by the State or the Administrator which limits the quantity, rate, or concentration 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.

CAA § 302(k); 42 U.S.C. § 7602(k) (emphasis added). EPA interprets Section 302(k)’s “continuous basis” requirement as a prohibition of states’ ability to create emissions exceptions for SSM events. EPA Memorandum at 3-4. This interpretation is unreasonable and will not survive judicial scrutiny.

Although it is generally true that “an agency’s interpretation of the statute which that agency administers is entitled to *Chevron* deference,” *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012), an unreasonable interpretation is not afforded any deference. To be entitled to *Chevron* deference for its interpretation of an ambiguous statutory provision, an agency “must have provided a rational connection between the facts found and the choice made and its explanation must not run[] counter to the evidence before the agency, or [be] so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 90 (D.C. Cir. 2010) (internal quotations and citations omitted) (alterations in original). Importantly, “*Chevron* deference is not abject or ‘rubber stamp’ deference; agency interpretation of even an ambiguous or silent statute the agency administers will be set aside if unreasonable.” *United Transp. Union-III. Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 613 (7th Cir. 1999) (internal citation omitted).

Contrary to EPA’s interpretation, Section 302(k)’s “continuous basis” language does not require that the same standard apply to every type of emission. Rather, the “continuous” requirement simply requires that emissions standards be maintained continuously within each category of operations. Emissions that occur during SSM must be subject to a continuous limitation, and emissions that occur during regular operations may be subject to a different, but also continuously applied, limitation. Furthermore, all of these different standards together form a “continuous” limitation, because there is no period of time during which one or the other standard does not apply. The plain text mandates only that a “requirement” be applied on a “continuous basis,” and it clearly contemplates that there might be multiple requirements for

different circumstances. See CAA § 302(k) (highlighting “any requirement relating to the operation or maintenance of a source”).

This reading of the CAA’s “continuous” requirement follows directly from its original purpose. Through this language, Congress sought to preclude the use of intermittent control systems; that is, to prevent sources from operating control systems when dispersion conditions are bad and then turning them off when dispersion conditions are good. See H.R. Rep. 95-294, at 92 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1170. It did not seek to require that one emissions limitation apply in all circumstances, regardless of the source’s ability to control those emissions.

This interpretation of “continuous” is also the only reasonable interpretation of the CAA because, unlike the EPA’s interpretation, this understanding of the word can be applied consistently. As even EPA recognizes, a single emissions limit applied in all circumstances is not attainable given current technology. See EPA Memorandum at 7 (“NAAQS can, in limited circumstances, conflict with the reality that some sources may occasionally have difficulties in meeting those emission limitations during all phases of operations[.]”). The simple fact is that emissions sources have less ability to control emissions during SSM events than they do during standard operations. As EPA acknowledges, “regulators have long recognized a tension between the requirements of the CAA and the practical realities of controlling source emissions continuously *because even the best-designed, best-maintained, and best-operated source may have difficulty meeting a legally required emission limitation 100 percent of the time.*” EPA Memorandum at 7 (emphasis added). A category-by-category interpretation of continuous allows different standards to apply where necessary, without having to create extra-textual exceptions for special circumstances.

In contrast, EPA’s apparent interpretation of “continuous” is unreasonable because it cannot be applied consistently. Under EPA’s interpretation, emissions must be maintained consistently across operational categories. The standards that apply to regular operations would also apply to the more unusual SSM operations. But in light of the reality that a singularly continuous standard is not feasible, EPA proposes to create out of whole cloth an exception for certain malfunctions. See *id.* at 11-12 (stating that malfunctions may not be excluded from emissions totals but may be asserted as an affirmative defense). The need to create that exception—which the text of the statute does not recognize—is clear evidence of the unreasonableness of EPA’s interpretation. A self-defeating interpretation of a statute can hardly be considered reasonable. See *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 228 (1998) (“[T]he act cannot be held to destroy itself.” (internal quotations omitted)); *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991) (“In statutory interpretation it is a given that statutes must be construed reasonably so as to avoid absurdities.”).

The best and only reading of Section 302(k)’s “continuous” requirement is to conclude that it applies category by category. West Virginia’s emissions regulations satisfy this requirement. The regulations obligate sources to minimize their emissions during SSM events to the greatest extent consistent with safety and good air pollution control practices. Thus, sources are subject to limits on “a continuous basis” even though the specifics of those limits may differ depending on whether the source is in normal operations or in a startup, shutdown, or malfunction event.

III. EPA Lacks Authority to Issue the Proposed SIP Call.

A SIP Call is a narrow grant of authority that permits the EPA, under unique circumstances, to require states to revise their previously approved SIP. EPA may require a state to revise a previously approved SIP only upon a “find[ing] that the applicable implementation plan . . . is substantially inadequate to attain or maintain the relevant national ambient air quality standard.” CAA § 110(k)(5); 42 U.S.C. § 7410(a)(2)(H). The term “substantially inadequate” modifies both the phrase “attain or maintain the relevant [NAAQS]” and the phrase “to otherwise comply with any requirement of this chapter.” *Id.* Thus, to issue a SIP Call, EPA must determine that the SIP at issue is substantially inadequate to attain or maintain the NAAQS or is substantially inadequate to comply with the CAA. These circumstances are not present here.

A. EPA has not made the factual findings required for a SIP Call.

Section 110(k)(5) of the CAA requires that EPA “find” that a state SIP is substantially inadequate before it may issue a SIP Call. The specific requirement that EPA “find” substantial inadequacy commands that EPA review evidence and make factual determinations to support a SIP Call. Statutes should be enforced according to their plain meaning. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (recognizing the “cardinal canon” of statutory construction that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there”).

The word “find” is defined as “to discover by study or experiment.” Merriam-Webster’s Collegiate Dictionary 469 (11th ed. 2012). Thus, as many courts have made clear in reviewing agency action, a “finding” requires actual factual support. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection *between the facts found and the choice made.*” (internal quotation marks omitted) (emphasis added)); *see also Appalachian Power Co. v. Env’tl. Prot. Agency*, 251 F.3d 1026, 1034 (D.C. Cir. 2001) (stating that a “failure to examine the relevant data and articulate a satisfactory explanation for its action either is arbitrary decision-making or at least prevents a court from finding it non-arbitrary” (internal quotation marks omitted)); *Tex Tin Corp. v. U.S. Env’tl. Prot. Agency*, 992 F.2d 353, 356 (D.C. Cir. 1993) (stating that “the Agency was not entitled merely to assume” underlying facts); *Nat’l Gypsum v. U.S. Env’tl. Prot. Agency*, 968 F.2d 40, 43-44 (D.C. Cir. 1992) (holding that “unsupported assumptions” may not form the basis of action by EPA). Indeed, the D.C. Circuit has explained that “EPA must ‘demonstrate a reasonable connection between the facts on the record and its decision’ made pursuant to its statutory authority.” *Michigan v. U.S. Env’tl. Prot. Agency*, 213 F.3d 663, 681 (D.C. Cir. 2000) (quoting *Ethyl Corp. v. Env’tl. Prot. Agency*, 51 F.3d 1053, 1064 (D.C. Cir. 1995)); *see also Greater Cincinnati Chamber of Commerce v. U.S. Env’tl. Prot. Agency*, 879 F.2d 1379, 1381 (6th Cir. 1989) (noting that modeling showed predicted violations of sulfur dioxide were likely to occur). Here, in failing to make any factual findings whatsoever, EPA has fallen short of satisfying its prerequisite obligations to issue a SIP Call.

This interpretation of the statute is confirmed by the provision that requires states to include in their SIPs a clause that reserves EPA’s right to issue SIP Calls. A SIP must “provide

for revision of such plan” whenever the Administrator “*finds on the basis of information available* to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements.” 42 U.S.C. § 7410(a)(2)(H)(ii) (emphasis added). The phrase “finds on the basis of information available” clearly indicates that a SIP Call must be justified by factual findings supported by record evidence

Moreover, by using the term “substantially inadequate”—as opposed to just using the word “inadequate” – Congress deliberately identified the heavy burden that EPA must carry to issue a SIP call. *See Wright v. Fed. Bureau of Prisons*, 451 F.3d 1231, 1234 (10th Cir. 2006) (stating that the court must read the words of a statute “in their context and with a view to their place in the overall statutory scheme”) (internal quotation marks omitted). “Substantially” means “[c]onsiderable in importance, value, degree, amount, or extent.” *The Am. Heritage Dictionary of the English Language*, 1284 (1981). And as an adverb, “substantial” enhances the degree, or level, of proof of inadequacy that must be shown by EPA to issue a SIP Call. Thus, before EPA may legally issue a SIP Call, it must point to information that, to a considerable degree, calls into question West Virginia’s ability to attain or maintain the NAAQS or comply with the CAA. EPA cannot merely *assume* that a provision may prevent the state from attaining the NAAQS. *Virginia v. Env’tl. Prot. Agency*, 108 F.3d 1397, 1415 (D.C. Cir. 1997), *modified on other grounds* by 116 F.3d 499 (D.C. Cir. 1997). It cannot simply cite the “magic words” to support a finding of substantial inadequacy. *W.R. Grace & Co. v. U.S. Env’tl. Prot. Agency*, 261 F.3d 330, 340 n.3 (3d Cir. 2001).

Here, however, EPA has not identified any instance in which West Virginia SSM emissions have exceeded or contributed to an exceedence of the NAAQS. EPA contends that it may, without making any factual findings, simply conclude as a matter of law that a SIP is substantially inadequate. *See* EPA Memorandum at 21 (“The EPA believes that it is not necessary to prove the specific impacts of an impermissible SIP provision[.]”). According to EPA, “it is sufficient for the EPA to establish that the provision is inconsistent with the fundamental requirements of the CAA and thus *could* have adverse impacts.” *Id.* As the cases cited above explain, agency action of this sort must be tied to factual findings, and EPA’s view is plainly wrong.

B. EPA seeks to use a SIP Call to accomplish an inappropriate end.

EPA also lacks authority because it seeks to use a SIP Call to accomplish an inappropriate end. To begin with, a SIP Call is not a vehicle for EPA to require revisions in light of a change in EPA policy. Although EPA contends that it merely seeks to bring the state SIPs in line with a longstanding interpretation of the CAA, the truth is that EPA is changing its SSM policy. Clear language in EPA’s 1983 policy provides that “a state could elect to adopt SIP provisions providing parameters for the exercise of enforcement discretion by the state’s personnel.” 78 Fed. Reg. 12460, 12470. EPA now seeks to revoke that discretion.

But a SIP Call is not a means for implementing new regulatory requirements. Rather, a SIP Call is intended to allow EPA to require revisions where an approved SIP has proven over time and in reality to be inadequate to meet its *original* goals. As the statute expressly states, findings of substantial inadequacy shall “subject the State to the requirements of this chapter to

which the State was subject *when it developed and submitted the plan for which such finding was made.*” CAA § 110(k)(5) (emphasis added).

This reading of the statute comports with basic principles of fairness and finality. Although “regulatory **agencies** do not establish rules of conduct to last forever,” *American Trucking Assoc., Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967), a “settled course of behavior embodies the **agency's** informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.” *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–808, (1973). States and industry invest valuable time and resources in complying with EPA regulations. Fairness dictates that EPA not change its policy or require States to revise previously approved SIPs without substantial justification.

If EPA believes that the CAA precludes SSM exclusions, it should withdraw this proposal and adopt rules that reflect its conclusion by amending 40 C.F.R. Part 51, which describes the requirements for SIP contents. In such a rule, EPA should provide options of SSM provisions that would be acceptable. This would give affected States certainty and a clear path forward.

Alternatively, even accepting that EPA is not changing its policy, a SIP Call is inappropriate. EPA is contending that it “has a longstanding interpretation of the CAA with respect to the treatment of excess emissions during periods of startup, shutdown, or malfunction in SIPs.” EPA Memorandum at 8. The agency maintains that its policy with regard to automatic exceptions for SSM events has been consistent since 1982. *Id.* at 9-10. Based on this reasoning (which West Virginia rejects), EPA should never have approved the West Virginia regulations that it alleges provide for automatic exceptions, all of which were promulgated after 1982.

But a SIP Call is not a vehicle for EPA to correct a SIP that should not, based on circumstances known at the time of approval, have been approved in the first place. A separate provision covers that circumstance. CAA § 110(k)(6) provides: “Whenever the Administrator determines that the Administrator’s action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State.” EPA contends that this provision and its SIP Call authority under § 110(k)(5) are essentially interchangeable, *see* Proposed Rule at 12483 n.72, but that assertion violates the “basic interpretive canon[]” that the statute must be read to ensure that this provision is not rendered “inoperative or superfluous, void or insignificant,” *Corley v. United States*, 556 U.S. 303, 314 (2009).

In sum, whether EPA is changing its policy or not, the proposed SIP Call is not appropriate.

IV. The Proposed SSM Rule Fails to Comply with The Administrative Procedures Act.

Even where it is statutorily authorized, an EPA SIP Call is subject to the restraints of the Administrative Procedures Act, 5 U.S.C. § 500, *et seq.* (the “APA”). *West Virginia v. U.S. Env’tl. Prot. Agency*, 362 F.3d 861, 867 (D.C. Cir. 2004). The APA prohibits EPA from enacting regulations that are “arbitrary, capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. 706(2)(A). “An agency rule is arbitrary and capricious ‘if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” *Tex. Oil & Gas Ass’n v. U.S. Env’tl. Prot. Agency*, 161 F.3d 923, 933 (5th Cir. 1998) (quoting *State Farm*, 463 U.S. at 43).

A. The APA requires EPA to provide a record-based rational explanation for a SIP Call.

Under the APA, an agency must show that it has “‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.’” *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (quoting *State Farm*, 463 U.S. at 43) (alterations in original). Actual factual findings and a record-based rational explanation are required for agency action. If agencies were allowed to enact rules and regulations without such support, the result would upset the democratic process. The Supreme Court has explained that “[e]xpert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.” *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (internal quotation marks omitted).

The Proposed Rule fails to satisfy this basic requirement of administrative law. As explained above, EPA has made no effort to make any factual findings regarding actual SSM emissions in West Virginia and whether such emissions exceed or contribute to an exceedance of the NAAQS. This failure renders the Proposed Rule arbitrary, capricious, and contrary to law. *See Qwest Corp. v. Fed. Comm. Comm’n*, 258 F.3d 1191, 1201-02 (10th Cir. 2001) (stating that when an agency fails “to define the terms at all . . . deference is inappropriate” and the court is “unable to conclude that the [agency's] actions are rational”). The Proposed Rule thus fails because “[t]here are no findings and no analysis to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion.” *Burlington Truck Lines*, 371 U.S. at 167.

B. Changes in EPA policy require a rational basis.

While EPA is entitled to change its policy interpretations, it must acknowledge that it actually is changing policy, and it may only do so based on a rational basis. The Supreme Court has explained that “[a]n agency may not . . . depart from a prior policy *sub silencio* or simply disregard rules that are still on the books.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Indeed, “the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.” *Pauley v. BethEnergy Mines*, 501 U.S. 680, 698 (1991). When an agency changes its position, it “bears the burden of rationally

explaining its departure from its previous position.” *Penn. Fed. of Sportsmen’s Clubs, Inc. v. Kempthorne*, 497 F.3d 337, 350 (3d Cir. 2007).

Here, EPA is most certainly changing its SSM policy. Again, the Proposed Rule itself acknowledges that EPA’s 1983 policy provided that “a state could elect to adopt SIP provisions providing parameters for the exercise of enforcement discretion by the state’s personnel.” 78 FR 12460, 12470. And EPA recognizes that the 1983 guidance could be read to allow for SSM exemptions. *Id.* at 12477. In fact, before entering into the Sierra Club settlement that precipitated this Proposed Rule, EPA had actually argued in litigation that the CAA allows for the very SSM emissions exceptions it is now seeking to invalidate. *See* Final Br. of Respondents 30-41, *Sierra Club v. U.S. Envtl. Prot. Agency*, No. 02-1135 (D.C. Cir. Mar. 14, 2008). The Proposed Rule is clearly a change in policy, not a mere revision of existing policy.

EPA, however, has offered no rational basis for its change in SSM policy. Indeed, EPA contends that there has been no change in policy at all. EPA Memorandum at 8-13 (“The EPA has a longstanding interpretation of the CAA with respect to the treatment of excess emissions during periods of startup, shutdown, or malfunction in SIPs.”). This is a clear violation of the requirements of the APA.

C. The Proposed Rule violates the APA because it is inconsistent with several existing EPA regulations.

The Proposed Rule is also arbitrary and capricious in violation of the APA because it is inconsistent with several existing EPA regulations. A rule is arbitrary if it is inconsistent with existing statutes or regulations. 5 U.S.C. § 706(2)(A); *State Farm*, 463 U.S. at 43.

EPA’s position that States may not provide for SSM exemptions contradicts EPA’s own emissions regulations. Several EPA regulations pertaining to New Source Performance Standards (“NSPS”) and Maximum Achievable Control Technology (“MACT”) expressly provide that excess SSM emissions are not violations. For example, under 40 C.F.R. part 60, subpart A, which pertains to “Standards of Performance for New Stationary Sources,” “[o]perations during periods of startup, shutdown, and malfunction 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 startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard.” 40 C.F.R. § 60.8(c). Similarly, NSPS opacity standards expressly exclude emissions occurring “during periods of startup, shutdown, malfunction, and as otherwise provided in the applicable standard.” 40 C.F.R. § 60.11(c). Similar examples can be found throughout Title 40 of the Code of Federal Regulations. *See, e.g.*, 40 C.F.R. pt. 60, subpart Da (Standards of Performance for Electric Utility Steam Generating Units); *id.* at subpart Db (Industrial-Commercial-Institutional Steam Generating Units); *id.* at subpart Dc (Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units); *id.* at subpart Eb (Standards of Performance for Large Municipal Waste Combustors); *id.* at subpart P (Standards of Performance for Primary Copper Smelters).

V. EPA Has Misconstrued West Virginia's SSM Emissions Regulations.

Finally, even if EPA has the authority to act here and complies with the APA, West Virginia's regulations do not warrant a SIP Call. West Virginia's SSM regulations do not have the effect that EPA claims they do. EPA's Proposed Rule contends that the identified West Virginia regulations improperly allow for automatic emission exemptions and give West Virginia regulators unfettered discretion over whether to exempt some emissions. As a result, EPA contends that West Virginia's regulations would effectively bar EPA and citizen suits for certain emissions. A closer review of the West Virginia regulations, however, reveals that the Proposed Rule takes West Virginia's SSM provisions out of context, both within the specific State rules and when considered within the State's holistic, integrated air program. Read in context, West Virginia's SIP rules generally provide a backstop to other emissions regulations. It is improper for EPA to declare these rules insufficient when they are taken out of context in this fashion. This is particularly true in this instance, where the CAA mandates a cooperative regime and EPA's interpretation of the West Virginia regulations conflicts with the State's interpretation. *See, e.g., Bldg. Trades Employers' Educ. Ass'n v. McGowan*, 311 F.3d 501, 507 (2002) ("We defer to a state agency's interpretation of its own regulations, unless the interpretation is arbitrary or capricious."); *Rogers v. Bucks Cnty. Domestic Relations Section*, 959 F.2d 1268, 1273 (3d Cir. 1992) (recognizing that state agency's interpretation of its own regulations is entitled to deference).

A. West Virginia's SIP does not allow for emissions in excess of NAAQS.

EPA misconstrues the effect that West Virginia's SSM regulations will have on air emissions. Although some of the contested rules may, in isolation, appear to be inconsistent with the Proposed Rule, a variety of mechanisms, beyond those identified by EPA, significantly constrain SSM excess emissions in West Virginia. These mechanisms include other provisions within the rules themselves; provisions in other state rules (including federal provisions which the State has incorporated by reference); provisions contained in federally enforceable permits; EPA oversight of West Virginia's Air Program, including permitting and enforcement; and the statutory duty applicable to any person [natural or artificial] not to cause "statutory air pollution," W. Va. Code § 22-5-3.

West Virginia emissions sources are often subject to multiple permitting requirements. A source that is subject to Title 45, Series Two of West Virginia's Code of State Rules (W. Va. Code R. § 45-2), which addresses particulate air pollution, may also be subject to other permitting requirements. For example, the state regulations in W. Va. Code R. §§ 45-13, -14 or -19, and the federal regulations of the New Source Performance Standards ("NSPS") of 40 C.F.R. part 60, the National Emissions Standards for Hazardous Pollutants ("NESHAPS") of 40 C.F.R. part 63, and the monitoring and reporting requirements of 40 C.F.R. part 64 might also apply. Moreover, sources not subject to the permitting requirements of W. Va. Code R. §§ 45-13, -14 or -19, the NSPS standards, or the NESHAPS may still be subject to the Title V permitting requirements of W. Va. Code R. § 45-30, and the requirements of 40 C.F.R. part 64.

By viewing the target regulations in isolation, EPA has distorted the purpose and effect of these regulations. For example, electric utility sources subject to W. Va. Code R. §§ 45-2 and -

10 (which include some of the contested “exemptions”) are also subject to 40 C.F.R. part 63, subpart UUUUU, which does not include SSM exemptions. Under the West Virginia Code of State Rules, the more stringent provisions would apply.

B. EPA has misinterpreted the level of executive discretion bestowed by West Virginia’s SIP.

The Proposed Rule contends that West Virginia’s regulations “purport to make a state official the unilateral arbiter of whether the excess emissions in a given malfunction, maintenance, or emergency event constitute a violation.” Proposed Rule at 12500. Contrary to EPA’s assertion, West Virginia’s SIP rules do not provide unbounded discretion to the Secretary of WVDEP determine whether or not excess emissions constitute a violation.

In many cases, a state official’s discretion to exercise his or her enforcement authority is constrained by a variety of factors. These factors include whether equipment was properly operated prior to any malfunction, whether the malfunction was avoidable, whether the malfunction occurred because of bad faith, or whether the excess emissions endangered the health or safety of the public. In fact, within the State’s air pollution control rules, “[f]ailures that are caused entirely or in part by poor maintenance, careless operation or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions.” W. Va. Code R. § 45-2-2.16; *see also* W. Va. Code R. §§ 45-2-9.1, 10.1, & -10.2 (providing exemptions from visibility standards but not weight emission standards).⁵

VI. The Proposed Rule Must Be Withdrawn.

Finality in rulemaking is essential to states and industry participants. If EPA is permitted to approve SIPs, and then years later reverse course and declare them invalid, then the entire rulemaking process is meaningless. Such a regime would provide no predictability for anyone—states, industry, or the public—and would undermine the foundation of cooperative federalism on which the CAA was built.

EPA is overstepping its authority in seeking to issue the Proposed Rule and issue the corresponding SIP Call. As explained above, the Proposed Rule is invalid and must be withdrawn. First, EPA has misinterpreted the Clean Air Act (“CAA”) as prohibiting States from allowing for emissions exceptions for Startup, Shutdown, and Malfunction (“SSM”). Second, EPA lacks authority to issue the proposed SIP Call. Third, the Proposed Rule is arbitrary and capricious and fails to comply with the Administrative Procedures Act (“APA”). And fourth, EPA has misconstrued the West Virginia emissions regulations that it proposes to invalidate.

⁵ The provisions of W. Va. Code R. § 45-2-4 contain the particulate matter weight emission standards, which are protective of the NAAQS and do not contain any provision that allows for an exemption or variance from the weight emissions standards. Similarly, W. Va. Code R. § 45-3 provides an alternative visible emission standard of forty-percent opacity for one six-minute period during start-up or shutdown, not a blanket exemption from the twenty-percent opacity standard set forth in W. Va. Code R. §§ 45-3-3.1 and 45-7-10.1.

For this proposed action to be valid, EPA must have (1) engaged in a legal interpretation of the CAA's "continuous" requirement that is consistent with both the statute and practical realities; (2) made factual findings that West Virginia SSM emissions actually caused or contributed to an exceedence of the NAAQS; and (3) based its findings on a change in law or the NAAQS, not a re-interpretation of existing non-binding EPA policy. EPA has failed to satisfy any of these requirements, and therefore it is without authority to issue the Proposed Rule. The Proposed Rule must therefore be withdrawn.

Sincerely,



Randy Huffman, Cabinet Secretary
West Virginia Department of
Environmental Protection



Patrick Morrisey
Attorney General of West Virginia