Legal Backgrounder

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 28 No. 14 September 13, 2013

LAST CALL FOR COOPERATIVE FEDERALISM?

WHY EPA MUST WITHDRAW SIP CALL PROPOSAL ON STARTUP, SHUTDOWN & MAINTENANCE

by
Patrick Morrisey, Randy Huffman and Elbert Lin

Since January 20, 2008, the Obama Administration has waged an escalating and legally suspect war on coal. In five years, federal regulation of coal extraction and utilization has dramatically increased, resulting in increased energy costs for all Americans and many lost jobs. But perhaps most troubling is the way that this increase in federal regulation has happened. Rather than working within the Clean Air Act's framework of cooperative federalism, the Environmental Protection Agency ("EPA") has acted well beyond its authority.

One example of this EPA's overreach is its proposed rule regarding emissions during power plant startup, shutdown, and maintenance ("SSM"). On February 22, 2013, EPA proposed to require more than two-thirds of the states to revise previously approved State Implementation Plans ("SIPs") through a "SIP Call." *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 (Feb. 22, 2013) (the "Proposed Rule"). The Proposed Rule results directly from a 2011 "sue and settle" agreement between EPA and the Sierra Club. *See generally* Consent Decree, *Sierra Club v. Jackson*, No. 3:10-cv-04060 (N.D. Cal. Nov. 30, 2011). It is an unlawful exercise of administrative authority that, if adopted, would substantially and adversely affect the country's energy-producing states.

BACKGROUND

Congress based the Clean Air Act ("CAA") on the principle of "cooperative federalism." *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). Under this arrangement, EPA identifies air pollutants and establishes National Ambient Air Quality Standards ("NAAQS"), but *the states* establish federally enforceable measures through SIPs that attain and maintain the NAAQS. 42 U.S.C. §§ 7407(a), 7410. States have "wide discretion" in crafting SIPs, *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976), which EPA approves through a notice-and-comment rulemaking process.

Consistent with the CAA's framework of cooperative federalism, EPA has limited ability to compel revision of an approved SIP. Though EPA has discretion in approving a SIP in the first instance, it may issue a SIP Call to require revisions to an 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[.]" 42 U.S.C. § 7410(a)(2)(H). This makes sense: states and regulated entities that work

---

Patrick Morrisey is Attorney General of West Virginia. **Randy Huffman** is Cabinet Secretary of the West Virginia Department of Environmental Protection. **Elbert Lin** is Solicitor General of West Virginia. The authors wish to acknowledge the valuable contributions of Assistant Attorney General **Christopher S. Dodrill**.

to comply with an EPA-approved SIP expect EPA not to capriciously change the regulatory landscape.

The Proposed Rule requires SIP revisions for "excess emissions" during SSM. Memorandum, U.S. Envtl. Prot. Agency, *Statutory, Regulatory, and Policy Context for this Rulemaking*, at 14 (Feb. 4, 2013) ("EPA Memorandum"). EPA maintains that "[a]utomatic exemptions" for SSM are "inconsistent with the fundamental statutory requirements of the CAA." *Id.* EPA also rejects "enforcement discretion provision[s]" that "bar enforcement against violations of SIP emissions limitations by the EPA or by citizens." *Id.* at 13. Nevertheless, acknowledging "conditions that are beyond the control of the source," EPA's policy allows states themselves to exercise enforcement discretion and to permit sources to assert such uncontrollable circumstances as an affirmative defense to an alleged violation. *Id.* at 14-15. As it does to all 36 states that would be subject to the SIP Call, the Proposed Rule targets several West Virginia regulations that apply to certain SSM emissions.

Crucially, there are many things the Proposed Rule does not do. It does not identify any change in the NAAQS that would require a new or revised SIP. Nor does it make a single factual finding. For example, EPA has not identified any NAAQS violation resulting from an SSM provision in West Virginia's or any state's SIP.

EPA HAS MISINTERPRETED THE REQUIREMENT OF CONTINUOUS" EMISSIONS LIMITATIONS

The Proposed Rule draws fundamentally on EPA's erroneous view that the CAA requires "continuous" emissions limitations, 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.

42 U.S.C. § 7602(k) (emphasis added). EPA interprets "continuous basis" as prohibiting states from creating emissions exceptions for SSM. EPA Memorandum at 3-4. This is wrong.

Contrary to EPA's interpretation, the "continuous basis" language mandates only that standards be maintained continuously *within each category of operations*. Emissions occurring during SSM must be subject to a continuous limitation, and those during regular operations may be subject to a different—but also continuously applied—limitation. Furthermore, these standards together form a "continuous" limitation, because there is no time during which some standard does not apply. The text mandates only that a "requirement" be applied on a "continuous basis," and clearly contemplates multiple requirements for different circumstances. *See* 42 U.S.C. § 7602(k) (highlighting "any requirement relating to the operation or maintenance of a source"); *see also Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) ("[E]missions reduction requirements 'assure continuous emission reduction' without necessarily continuously applying a single standard.").

This reading follows from the statute's purpose. Congress sought to prevent the intermittent operation of control systems—turning them on in some conditions and off in others. *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. *See Kamp v. Hernandez*, 752 F.2d 1444, 1452 (9th Cir. 1985) (recognizing that the "continuous" requirement was intended "to exclude intermittent control technologies from the definition of emission limitations").

This interpretation is also the only one that can be applied consistently. As even EPA recognizes, "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. A category-by-category interpretation of "continuous" allows different standards to apply where necessary, without having to create extra-statutory exceptions for special circumstances. In contrast, EPA's view requires the agency to manufacture an exception for certain malfunctions. *See id.* at 11-12 (stating that malfunctions may be asserted as an affirmative defense). The need to create that exception—found nowhere in the text of the CAA—is clear evidence that EPA's interpretation is unreasonable. *Cf. 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).

EPA LACKS AUTHORITY TO ISSUE THE SIP CALL

A further problem with the Proposed Rule is that EPA has exceeded its authority to issue a SIP Call. EPA may issue a SIP Call only upon a "find[ing] that the applicable implementation plan . . . is substantially inadequate to attain or maintain the relevant national ambient air quality standard." 42 U.S.C. § 7410(a)(2)(H). These circumstances are absent here.

No Factual Findings. The requirement that EPA "find" substantial inadequacy commands a review of evidence and factual determinations. "Find" means "to discover by study or experiment." *Merriam-Webster's Collegiate Dictionary* 469 (11th ed. 2012). Consistent with that plain meaning, courts typically require agency "findings" to have actual support. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The CAA should be similarly construed according to its plain meaning.

Bolstering this interpretation is the statutory requirement that each SIP reserve 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 highlighted phrase clearly indicates that a SIP Call must be justified by factual findings supported by record evidence.

Furthermore, the term "substantially inadequate" confirms that EPA carries a heavy burden in justifying a SIP call. "Substantially" means "[c]onsiderable in importance, value, degree, amount, or extent." *The Am. Heritage Dictionary of the English Language* 1284 (1981). EPA 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.

In failing to make any factual findings, EPA has not made the case for a SIP Call. EPA contends that it "is not necessary to prove the specific impacts of an impermissible SIP provision." EPA Memorandum at 21. In the agency's view, "it is sufficient … to establish that the provision is inconsistent with the fundamental requirements of the CAA and thus *could* have adverse impacts." *Id.* But that is not enough: factual findings are required for EPA to issue this SIP Call.

An Inappropriate End. EPA is also using a SIP Call to accomplish an inappropriate end. Although EPA contends that it seeks to bring state SIPs in line with a longstanding interpretation of the CAA, the truth is that EPA is changing its SSM policy. In 1983, EPA allowed "a state … to adopt SIP provisions providing parameters for the exercise of enforcement discretion by the state's personnel." 78 Fed. Reg. 12460, 12470. But the agency now seeks to revoke that discretion. In fact, EPA has previously argued for the very SSM exceptions it presently wishes to invalidate. *See* Final Br. of Respondents 30-41, *Sierra Club v. EPA*, No. 02-1135 (D.C. Cir. Mar. 14, 2008).

A SIP Call is not intended to be a vehicle for implementing a change in EPA's SSM policy. Rather, it is meant to allow EPA to require revisions of an approved SIP that has proven inadequate to meet its *original* goals. 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*." 42 U.S.C. § 7410(k)(5) (emphasis added). If EPA now believes that the CAA precludes SSM exclusions, it should withdraw this proposal and adopt rules that reflect this new conclusion. The states could then take that policy into account the next time a NAAQS is changed or promulgated and the states are consequently obligated to

submit a SIP. *See id*. § 7410(a)(2)(C) (requiring states to implement regulations that ensure NAAQS are satisfied).

Alternatively, even accepting that EPA is *not* changing its SSM policy, the SIP Call is inappropriate because it cannot be used to correct a SIP that should not have been approved. The agency contends that, since 1982, it has had a "longstanding interpretation of the CAA" relating to SSM. EPA Memorandum at 8. Based on this reasoning (which we reject), EPA should never have approved the West Virginia regulations that it alleges provide for automatic exceptions, all of which post-date 1982.

A separate statutory provision covers erroneously approved SIPs. Section 110(k)(6) of the CAA 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." 42 U.S.C. § 7410(k)(6). EPA contends that this provision and its SIP Call authority are essentially interchangeable, *see* Proposed Rule at 12483 n.72, but that assertion violates the cardinal rule that statutory provisions not be rendered "inoperative or superfluous, void or insignificant," *Corley v. United States*, 556 U.S. 303, 314 (2009).

THE PROPOSED RULE FAILS TO COMPLY WITH THE ADMINISTRATIVE PROCEDURES ACT

The SIP Call also violates the Administrative Procedures Act, 5 U.S.C. § 500, *et seq.* ("APA"). The APA prohibits regulations that are "arbitrary, capricious, an abuse of discretion, or not in accordance with law." 5 U.S.C. § 706(2)(A). The Proposed Rule violates that standard because it lacks a record-based explanation, constitutes an unexplained change in policy, and is inconsistent with existing rules.

First, EPA has not "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) (internal quotations omitted). "There 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 v. United States*, 371 U.S. 156, 167 (1962). That is insufficient. The APA does not permit an agency to issue a rule without a factual basis.

Second, EPA is changing its SSM policy but offers no rational explanation for the change. 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." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). EPA plainly fails to justify its change in policy, as it contends there has been no change in policy at all.

Third, the Proposed Rule is inconsistent with existing rules. A rule is arbitrary if it contravenes existing statutes or regulations. 5 U.S.C. § 706(2)(A). Several EPA regulations pertaining to New Source Performance Standards and Maximum Achievable Control Technology expressly provide that excess SSM emissions are not violations. *See, e.g.*, 40 C.F.R. § 60.8(c); *id.* § 60.11(c).

CONCLUSION

As it has repeatedly in recent years, EPA has overstepped its authority in seeking to issue the proposed SIP Call. 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, the entire rulemaking process is meaningless. Such a regime would provide no predictability for anyone—states, industry, or the public—and would undermine the cooperative federalism that lies at the core of the CAA.

  ISBN 1056 3059