Message

From: Feldman.Michael@epa.gov [Feldman.Michael@epa.gov]
Sent: 7/8/2019 12:21:20 PM
To: Shar, Alan [shar.alan@epa.gov]; Bartley, Richard [Bartley.Richard@epa.gov]
Subject: Fwd: Inside EPA: Environmentalists, Industry Spar Over Future Of EPA SSM Air Waiver Policy

Sent from my iPhone

Begin forwarded message:

From: "Casso, Ruben" <Casso.Ruben@epa.gov>
Date: July 8, 2019 at 7:17:15 AM CDT
To: "Donaldson, Guy" <Donaldson.Guy@epa.gov>, "Feldman, Michael" <Feldman.Michael@epa.gov>
Subject: Inside EPA: Environmentalists, Industry Spar Over Future Of EPA SSM Air Waiver Policy

Environmentalists, Industry Spar Over Future Of EPA SSM Air Waiver Policy

July 03, 2019
Environmentalists and former EPA air officials are sparring with Texas and industry groups over the future of the agency's policy on Clean Air Act regulatory exemptions for emissions during facility startup, shutdown and malfunction (SSM), as the Trump administration seeks to reauthorize the exemptions for states on a piecemeal basis.
Opponents and supporters of SSM waivers detail their position on reviving the policy in comments filed ahead of a June 28 deadline on the agency's proposed approval of a revised Texas state implementation plan (SIP), which is a blueprint for Clean Air Act compliance. The SIP reintroduces an "affirmative defense" against penalties for air law violations from emissions associated with facility malfunctions and other unplanned events. Companies can assert the defense provided they can show they took reasonable steps to ensure their equipment is in proper working order.
EPA is also proposing to rescind an Obama-era "SIP Call" that disapproved a prior version of the SIP that included the affirmative defense as part of a broader push to undo SSM waivers in states' air plans.
Approval of the Texas SIP would be the first step in a region-by-region action that environmentalists say would undermine and eventually scrap the Obama SIP Call of 2015, which required states to remove SSM exemptions from their air plans by the fall of 2016. Allowing the exemptions would enable industrial facilities to emit far above their permitted levels, environmental groups argue.
The Obama EPA justified the SIP Call on the basis that rulings by the U.S. Court of Appeals for the District of Columbia Circuit demand that states end the exemptions.
But the Trump EPA under just-departed air chief Bill Wehrum has argued that in fact, the D.C. Circuit's rulings apply only to federal rules, and not to SIPs. EPA therefore continues to remove automatic SSM exemptions from its own rules, but is pushing to allow the exemptions back into state plans, first in Texas then in North Carolina.
Wehrum has been replaced in an acting capacity by Anne Idsal, the Texan former EPA Region 6 Administrator known for what environmentalists say is her industry-friendly approach.
For Texas, EPA in its April 29 SIP proposal is relying on a 2013 ruling by the 5th Circuit in *Luminant Generation Co., LLC, et al. v. EPA* that upholds the state's use of affirmative defenses to shield industry from enforcement actions for excess emissions deemed unavoidable by EPA.
The 5th Circuit ruling applies to Texas, Oklahoma and Louisiana. EPA Region 6, which covers Texas, asserts the right to depart from EPA national policy based on the 5th Circuit ruling, under the agency's "national consistency" policy that allows regions to depart from national policy where regional appeals court rulings dictate a different approach.
But critics say that in North Carolina, which is part of EPA Region 4, the agency cannot justify departing from its supposed national policy because there is no authorizing appeals court ruling applicable to the state.
Environmentalists have therefore accused EPA of trying to end the national policy piecemeal, hoping to avoid litigation in the D.C. Circuit, which hears challenges to nationally-applicable rules.

'Contrary to Legal Requirements'

The Environmental Protection Network (EPN) of former Obama EPA employees in its June 28 comments says, "EPA Region 6 purports to use a Regional guidance to approve a SIP in one state, reversing an EPA national policy developed through a national SIP call using notice and comment rulemaking, that disapproved the same SIP provision in Texas and sixteen other SIPs with similar provisions in seven EPA Regions.
"The proposal to approve Texas' SIP revision would sanction emissions of substantial amounts of unhealthy air pollution, which is emitted contrary to legal requirements."

The group says the "casual approval" of an exemption from national policy in Texas sets a "dangerous precedent," and that EPA has failed to justify why the SSM measures should be allowed. "If finalized, this rule would open the door to any other EPA Region to seek a similar exception to the national policy," EPN says.

The group says that affirmative defenses are counter to the D.C. Circuit's finding on the issue in its 2014 ruling in *Natural Resources Defense Council v. EPA*, in which the court found that the exemptions deprive federal courts of their ability to fashion remedies for unlawful emissions. EPN urges EPA not to finalize the proposal.

Texas Environmental Justice Advocacy Services (TEJAS) in June 19 comments says EPA's proposal threatens to reopen an "illegal loophole" that would allow excess emissions of harmful pollution. The impacts are most strongly felt among fenceline communities living close to facilities such as refineries, where "upset" emissions are common and adversely affect public health, the group says.

In June 20 comments, professors with Indiana University Bloomington, IN, say, "Excess emissions in Texas are frequent, large in magnitude and often represent a substantial share of a given facility's permitted emissions. In many cases they are not a result of unavoidable circumstances." Such emissions cause measurable harm to public health, the researchers say, urging EPA not to finalize its proposal.

'Considerable Discretion'

But supporting EPA's proposed SIP approval are the Texas Commission On Environmental Quality (TCEQ), which is the state's air regulator, and also several industry coalitions.

TCEQ in its comments says, "TCEQ agrees with and supports Region 6's policy position that affirmative defense SIP provisions for malfunctions are allowed and that the D.C. Circuit's reasoning in *NRDC v. EPA* does not apply to the affirmative defense provisions in the Texas SIP."

In June 28 comments, the National Environmental Development Association's Clean Air Project (NEDA/CAP) -- a coalition of major companies -- says Region 6's decision is consistent with a correct reading of the D.C. Circuit's decision in *NRDC*, and that in fact a formal request by the region to depart from national policy is not required. "Regional Consistency Rules themselves provide that a Regional EPA office need not seek concurrence from Headquarters to follow a federal court decision in the geographic jurisdiction of the court rendering it."

The maintenance, startup, and shutdown (MMS) Working Group, an industry body, also backs EPA's proposed approval of Texas' SIP, arguing in June 28 comments that the exemptions are a "longstanding and integral" part of Texas' air pollution control strategy, and that they are permissible under the "considerable discretion" in choosing the components of such a strategy afforded to states under the Clean Air Act.

However, the group warns EPA to limit the scope of its action to Texas only. EPA invites comment on whether it should expand its scope to cover other states within Region 6, which covers Louisiana, Arkansas, Oklahoma, New Mexico and Texas. "The bases for EPA's proposal -- including the Luminant decision -- are specific to Texas, and thus Region 6's intention of taking action only on the Texas SIP in this action is appropriate," the group says.

"The facts before the Fifth Circuit in Luminant were specific to EPA's approval of the Texas affirmative defenses. Although the Working Group would support further reconsideration of the SIP Call by EPA Region 6, such reconsideration must take into account the specific aspects of each state's provisions."