Message

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Sent: 8/7/2019 6:57:51 PM
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Subject: FW: Inside EPA: Former EPA Staff Warn State SSM Plan Approval Might Imperil Obama Rule

From: Casso, Ruben <Casso.Ruben@epa.gov>
Sent: Wednesday, August 07, 2019 1:54 PM
To: Feldman, Michael <Feldman.Michael@epa.gov>
Subject: Inside EPA: Former EPA Staff Warn State SSM Plan Approval Might Imperil Obama Rule

Former EPA Staff Warn State SSM Plan Approval Might Imperil Obama Rule

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Former EPA staff are attacking the agency's proposal to approve North Carolina's air quality plan that includes a waiver from an Obama-era prohibition on exemptions from Clean Air Act regulatory limits for facility emissions during startup, shutdown and malfunction (SSM) events, fearing the move risks unraveling the federal policy.

In comments filed ahead of an Aug. 6 deadline for public input, the Environmental Protection Network (EPN) of former EPA officials and staff says the proposal will undermine the consistent application of agency SSM policy, possibly resulting in more waivers for periods of high pollution such as during SSM events.

The comments, authored in part by former Obama EPA air office acting chief Janet McCabe, say EPA's proposed approval of the changes to North Carolina's Clean Air Act implementation plan sets "a dangerous precedent for casual approval of situations generally alleged to warrant an exception to national consistency."

The proposal "would open the door widely for states seeking virtually any exception to EPA's national policy on SSM, contrary to the [Clean Air Act] and judicial precedent, and could lead to increased emissions if exceptions are adopted and approved," EPN says.

In 2015, the Obama EPA issued a rule known as the "SIP Call" that disapproved the state implementation plans (SIPs) -- air quality blueprints -- of 36 states containing various exemptions for SSM emissions. The SIP Call followed federal appeals court rulings that found EPA SSM waivers and related exemptions unlawful. Obama-era officials believe the D.C. Circuit precedent to preclude SSM waivers not only in federal rules, but in SIPs as well.

But the Trump administration is proposing to approve North Carolina's SSM provisions that are part of its SIP for reducing emissions of nitrogen oxides (NOx) from large internal combustion engines.

EPA's proposed approval of the plan would serve to establish an alternative policy to the SIP Call. The new policy would allow such exemptions in EPA Region 4, despite the SIP Call still being in effect elsewhere. Region 4 includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee.

Trump EPA officials take a different view from the Obama administration on the appellate rulings barring SSM waivers in Clean Air Act policies, arguing it only applies to EPA rules and not state regulations.

Former agency air chief Bill Wehrum prior to his recent departure said that in his view, the U.S. Court of Appeals for the District of Columbia Circuit rulings do not apply to SIPs, which have employed various forms of SSM waivers for many years.

EPA has for some time been reconsidering its national policy, but critics such as EPN charge that rather than change the policy with a national rulemaking, the Trump EPA is choosing to do it piecemeal. In this way, EPA could claim its actions are only regional in scope and avoid judicial review in the D.C. Circuit, which normally hears cases over rules considered to be "nationally applicable," or declared by EPA to be of "nationwide scope or effect."

Explanation 'Thin To The Point Of Non-Existence'

"Region 4 purports to use a Regional guidance to approve a SIP in one state, effectively reversing an EPA national policy developed through a national SIP call using notice and comment rulemaking that disapproved the same SIP provision in North Carolina and 35 other SIPs with similar provisions in all ten EPA Regions," EPN says in its comments. The group says that allowing SSM waivers to proliferate could threaten states' compliance with national ambient air quality standards (NAAQS) by risking pollution spikes.

"The proposal to approve North Carolina's SIP revision would sanction emissions of potentially substantial amounts of unhealthy air pollution, which would be emitted during periods of start-up, shutdown or malfunction in amounts that cannot be determined in advance and thus cannot assure that the NAAQS will continue to be met," EPN says.

The group adds, "the explanation provided for this exception is thin to the point of non-existence, entirely conclusory, and fails entirely to meet expected standards of reasoned agency decision-making."

Failing to engage in "reasoned decision-making" is a legal flaw that could be raised in potential litigation against the SIP approval if finalized.

While EPN says that the SIP approval would set a "terrible precedent," it also notes that EPA Region 6 has already proposed approval of an SSM exemption, contravening the SIP Call, for Texas. Region 6 covers Arkansas, Louisiana, New Mexico, Oklahoma and Texas.

The Texas plan relies on findings by the 5th Circuit that allow for companies' use of an "affirmative defense" under the Texas SIP. Affirmative defenses shield parties from civil liability in the event of malfunctions, so long as they have taken prescribed steps to avoid breakdowns.

In its Texas proposal, EPA relies on the 5th Circuit's 2013 ruling in *Luminant Generating Co. v. EPA*, which upheld the legality of affirmative defenses for malfunction situations.

EPA says that the *Luminant* ruling controls in the 5th Circuit, which covers Louisiana, Mississippi and Texas, and overrides the D.C. Circuit's 2014 ruling in *Natural Resources Defense Council (NRDC) v. EPA*, that found affirmative defenses incompatible with federal courts' authority to fashion penalties for air law violations.

Meanwhile, litigation by states and industry against the national SIP Call is still on hold in the D.C. Circuit case *Environmental Committee of the Florida Electric Power Coordinating Group, Inc., v. EPA, et al.*, pending a national action by EPA to alter the policy.