SOUTHEASTERN LEGAL FOUNDATION, INC.

2255 SEWELL MILL ROAD • SUITE 320 • MARIETTA, GEORGIA 30062
(770) 977-2131 • FAX (770) 977-2134 • www.southeasternlegal.org

May 10, 2013

Via Online and E-Mail Submittal

ATTN: Docket ID No. EPA-HQ-OAR-2012-0322
U.S. Environmental Protection Agency
EPA West (Air Docket)
1200 Pennsylvania Avenue NW
Mail Code: 6102T
Washington, DC 20460

Re: Proposed Rule: 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; Docket ID No. EPA-HQ-OAR-2012-0322

Dear Sir or Madam:

Southeastern Legal Foundation ("SLF") is a non-profit public interest law firm specializing in the practice of constitutional law. SLF also undertakes research on policy issues of interest to the public. SLF submits the following comments on the Proposed Rule, 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 (the "Proposed SIP Calls"), 78 Fed. Reg. 12460 (Feb. 22, 2013). As discussed in these comments, the U.S. Environmental Protection Agency ("EPA") must withdraw the Proposed SIP Calls because of substantive and procedural flaws due in large measure to the agency's "sue and settle" rulemaking that was undertaken in this case. EPA did not follow appropriate and required rulemaking procedures rendering the Proposed SIP Calls arbitrary and capricious, an abuse of discretion, beyond the agency's statutory and Constitutional limits, and otherwise contrary to law.

Please consider this submittal notification that, if EPA proceeds with the Proposed SIP Calls as published, then SLF reserves its right to petition for judicial review on behalf of itself and affected clients of the entirety of EPA's related actions, including with respect to the agency's "sue and settle" rulemaking that violates Congressionally-established and Constitutional limits on EPA's authority. Without prejudice to or limitation of any future legal challenge, we provide the following initial comments to the Proposed SIP Calls.

I. Existing startup, shutdown, and malfunction provisions for decades have been reasonable and necessary components of numerous SIPs, regulations, and permits.

Because industrial, commercial, and municipal facilities and other stationary sources must necessarily start up, occasionally shut down, and inevitably experience malfunctions in equipment despite best management practices—and because emissions may temporarily fluctuate during these periods even if a source operates permitted emission control equipment or employs appropriate best management practices—SIPs in a vast majority of the states have long provided relief from emission limits applicable during normal, steady-state operations. For decades, EPA has approved startup, shutdown, and malfunction provisions in SIPs, permits, and regulations. As one example, EPA approved the startup, shutdown, and malfunction provision in the State of Georgia's SIP on January 3, 1980.[1] And Congress did not disturb this established practice in the 1990 Clean Air Act ("CAA") amendments.

In Georgia, for example, otherwise applicable emission limits do not apply during startup, shutdown, and malfunction *if* (1) "ordinary diligence is employed," (2) "the best operational practices to minimize emissions are adhered to," (3) "all associated air pollution control equipment is operated in a manner consistent with good air pollution control practice of minimizing emissions," and (4) "the duration of excess emissions is minimized." Ga. Comp. R. & Regs. 391-3-1-.02(a)(7)(i). Georgia's SIP further provides, "Excess emissions which are caused entirely or in part by poor maintenance, poor operation, or any other equipment or process failure which may be prevented during startup, shutdown, or malfunction are prohibited and are violations . . . ." *Id.* at 391-3-1-.02(a)(7)(ii). Georgia's startup, shutdown, and malfunction provisions provide rigorous requirements that apply during these events to minimize excess emissions. Consistent with the CAA, this approach recognizes that meeting emission limits otherwise applicable under normal, steady-state conditions may be impractical during necessary startup, shutdown, and malfunction events, and it imposes substantive alternative requirements at such times.

As further discussed below, EPA lacks authority to issue the Proposed SIP Calls because it has failed entirely to demonstrate that, as a result of startup, shutdown, and malfunction provisions, the SIPs for Georgia and other affected states are substantially inadequate to attain or maintain the applicable National Ambient Air Quality Standards ("NAAQS") or to otherwise comply with any requirement of the CAA.

---

[1] 45 Fed. Reg. 780 (Jan. 3, 1980); 44 Fed. Reg. 47557 (Aug. 14, 1979).

II. EPA lacks authority to issue the Proposed SIP Calls.

"The Clean Air Act . . . provides a cooperative-federalism approach to air quality regulation." *See, e.g., Ala. Envtl. Council v. EPA*, 711 F.3d 1277, --, 2013 U.S. App. LEXIS 4598, *4 (11th Cir. 2013). "The Act sets forth a basic division of labor: The Federal Government establishes air quality standards, but States have primary responsibility for attaining those standards within their borders." *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, at 29 (D.C. Cir. 2012), *petitions for cert. filed* (U.S. Mar. 29, 2013) (Nos. 12-1182, 12-1183). "That statutory federalism bar prohibits EPA from using the SIP process to force States to adopt specific control measures." *Id.* "If the SIP . . . meets the requirements in the Clean Air Act, the EPA must approve it." *Ala. Envtl.* Council, 2013 U.S. App. LEXIS 4598 at *5. Hence, before issuing a SIP Call, EPA must find that the SIP "is substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately the interstate pollutant transport . . . , or to otherwise comply with any requirement of [the CAA]." *See* 42 U.S.C. § 7410(k)(5).

Because EPA has not adequately demonstrated in the Proposed SIP Calls that the thirty-six states' SIPs that are the subject of the rulemaking are substantially inadequate, EPA lacks authority to promulgate the Proposed SIP Calls.[2] Specifically, EPA has not demonstrated a concrete threat to or interference with NAAQS attainment or maintenance from startup, shutdown, and malfunction provisions and, therefore, may not issue the SIP Calls on this basis. *See Virginia v. EPA*, 108 F.3d 1397, 1414-15 (D.C. Cir. 1997); *see also Tex. v. EPA*, 690 F.3d 670 (5th Cir. 2012); *Ala. Envtl. Council*, 2013 U.S. App. LEXIS 4598 at *45 ("We agree that where interference is not demonstrated, approval of the state's SIP revisions appropriately respects the state's choice to achieve air quality standards with 'whatever mix of emission limitations it deems best suited to its particular situation.'").

Likewise, EPA has not demonstrated that the startup, shutdown, and malfunction provisions are "substantially inadequate . . . to otherwise comply with any requirement of [the CAA]" in part because:

- EPA incorrectly interprets the CAA to require that previously-established and permitted numerical emission limitations at stationary sources apply at all times, including periods of unavoidable startup, shutdown, and malfunction. This proposed approach is not required by the definition of "emission limitation" because EPA (1) misconstrues the meaning of "continuous basis" in that definition and (2) fails to appreciate that existing startup, shutdown, and malfunction provisions serve as alternative emission limitations that are

[2] In the Proposed SIP Calls, EPA has not purported to rely on its "interstate pollutant transport" authority.

continuous and ensure regulated stationary sources are subject to emission limitations—even during startup, shutdown, and malfunction events; EPA misinterprets existing CAA case law as requiring the approach to startup, shutdown, and malfunction events embodied in the Proposed SIP Calls;

- EPA failed to account for contradictory provisions in EPA's regulations regarding startup, shutdown, and malfunction, including, for example, startup, shutdown, and malfunction provisions adopted by EPA in CAA New Source Performance Standards;[3]

- The CAA does not require the elimination of affirmative defenses for startups and shutdowns as provided in the Proposed SIP Calls; and

- EPA failed to perform adequate economic impact analyses required by the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.

When it enacted the 1990 CAA amendments, Congress did not disturb EPA's then-established practice of approving the kind of startup, shutdown, and malfunction provisions that are now subject to the Proposed SIP Calls and thereby reflected that EPA's practice correctly implemented the CAA. Thus, EPA's Proposed SIP Calls undermine apparent Congressional intent and usurp authority and discretion that the CAA reserves for states.

The Proposed SIP Calls would entail substantial amounts of work and expenditure of resources for each state's air pollution control agency or agencies. In addition to regulatory changes and/or legislative approval that would be necessitated in the thirty-six affected states, undoubted thousands of existing air permits would need to be modified and reissued. Significant capital expenditures may be needed at certain permitted facilities in order to comply with emission limits that were not designed for startup, shutdown, and malfunction events. That EPA appears to have totally failed to consider the economic impact of the Proposed SIP Calls is shocking when the rule entails large amounts of regulatory work for state agencies and may also require significant capital expenditures from regulated sources for newly-mandated operational controls, as well as impacts to the overall economy of each of the affected states.

As described above, EPA failed to adequately justify or support the Proposed SIP Calls on several counts. Such failure is a direct result of EPA's choice not to follow appropriate rulemaking procedures for the Proposed SIP Calls, but instead to pursue an *ultra vires* "sue and settle" approach involving a voluntary agreement with a private interest group and an untimely and grossly inadequate period for input from the affected states and

[3] 40 C.F.R. 60.11(d). In addition, startup, shutdown, and malfunction provisions appear in multiple NSPS Subparts.

regulated community. EPA's failure to follow appropriate rulemaking procedures is discussed below.

III. The "sue and settle" process leading to the Proposed SIP Calls was flawed and unlawful.

For many years, EPA has not issued SIP Calls based upon the alleged inadequacy of most states' startup, shutdown, and malfunction provisions. This is because such provisions are reasonable and necessary and EPA has not documented any related threat to NAAQS attainment. So, why now? Examining the "sue and settle" process by which EPA developed the Proposed SIP Calls confirms that EPA's statements in the Preamble do not tell the whole story and that the rulemaking process was hopelessly flawed.

The Proposed SIP Calls' recent story began in an unrelated Northern District of California lawsuit that Sierra Club and WildEarth Guardians (the "Groups") filed in September 2010 (No. 3:10-cv-04060). There, the Groups sued EPA for allegedly failing to perform nondiscretionary duties with respect to a number of SIP submissions. Through the initial complaint and two amendments, the Groups never pled any allegation addressing startup, shutdown, and malfunction provisions and never prayed for any relief with respect to such provisions.

On June 30, 2011, Sierra Club submitted to EPA in Washington D.C. an unrelated Petition for Rulemaking (the "Petition") asking EPA to promulgate a rule requiring thirty-nine states to revise their SIPs because the startup, shutdown, and malfunction provisions therein were allegedly inadequate. The 80-page Petition included state-by-state descriptions and arguments about the alleged deficiencies in the SIPs of thirty-nine states. In each instance, the Sierra Club demanded that the previously approved and published startup, shutdown, and malfunction provisions of the affected state either be stripped from the SIP or drastically revised. As such, the scope of the Petition sought drastic and sweeping rulemaking actions, reversing course on decades of established regulatory and permitting practices. And that reversal would impose tremendous unfunded administrative burdens and costs upon a majority of the states and subject thousands of industrial, commercial, and municipal facilities and other stationary sources to burdensome administrative and permitting proceedings and potentially costly new constraints on their operations. All of this was demanded of EPA based on no actual demonstration that the SIPs in the thirty-nine states failed to achieve the applicable NAAQs as a result of the startup, shutdown, and malfunction provisions.

Hardly a month later, on August 10, 2011, the Groups filed their Second Amended Complaint in the Northern District of California litigation. On the same date, the EPA and Groups notified the court that they had reached a proposed settlement agreement. Three

months later, EPA and the Groups entered into a settlement. EPA agreed in the settlement to address the Groups' explicit allegations in that case. But EPA also voluntarily agreed (1) to grant or deny the unrelated Petition regarding the allegedly illegal startup, shutdown, and malfunction provisions in thirty-nine states, and (2) if granted, to simultaneously issue a SIP Call requiring each of the affected states to revise the startup, shutdown, and malfunction provisions in their SIPs.[4]

In other words, within five months of receiving the Petition, EPA injected a response to that Petition into the settlement of an unrelated lawsuit, agreeing to a timetable and administrative process that had no connection with the lawsuit. Therefore, publication of the proposed settlement could be expected to fly under the radar of anyone not interested in the claims pled in the Northern District of California litigation. Through the spectacle of using a wholly-unrelated piece of litigation to manufacture obligations it otherwise would not have, EPA appears to have complicit in creating a vehicle for it to adopt virtually all of the demands of the Sierra Club. At minimum, such approach casts serious doubts upon the objectiveness and thoroughness of the resulting Proposed SIP Calls.

Subsequently, EPA acted on the Petition by issuing the Proposed SIP Calls. Sierra Club's level of success in demanding such drastic and sweeping rulemaking actions appears unprecedented. In one action, EPA has proposed to reverse decades of regulatory and permitting practices and issue SIP Calls to thirty-six—more than 90 percent—of the states that were the subject of the Sierra Club's Petition. And, once EPA overwhelmingly granted Sierra Club's Petition, EPA only initially offered a 30-day public comment period for its broad rulemaking. The single 30-day extension of the comment period and a single hearing in the District of Columbia were hopelessly inadequate for public input on a rulemaking affecting a majority of the states and thousands of industrial, commercial, and municipal facilities and other stationary sources.

EPA's "sue and settle" course of conduct has deprived the states, regulated companies and businesses, and other interested parties from meaningful participation in the process resulting in the Proposed SIP Calls. A rulemaking must provide interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments. 5 USC § 553(c); *see also* 42 U.S.C. § 7607(a). It is preposterous to suggest that the timetable established by EPA's private settlement with the Groups provides the public with a meaningful opportunity to develop and submit the data, views, and arguments that the Proposed SIP Calls demand. EPA's "sue and settle" agreement with the Groups to undertake a rulemaking that the CAA does not require raises the specter that the Proposed SIP Calls are actually EPA's pursuit of an unlawful agenda to (1) erode cooperative federalism under the Clean Air Act through an unfunded mandate, and (2) broadly constrain

[4] The settlement agreement allowed EPA the option of issuing a final error corrections rule instead of a SIP call. EPA obviously has chosen SIP calls.

and inflict increased operational costs upon industry regardless of Congressionally-established limits on EPA's authority, the importance of industry to the United States, and the lack of a demonstrated actual threat to NAAQS attainment.

By reversing decades of established regulatory and permitting practices without adequate justification, support and public input, the Proposed SIP Calls represent the very worst kind of executive fiat. Indeed, because of the pretextual nature of EPA's actions, finalizing the Proposed SIP Calls would lack adequate basis and be arbitrary and capricious and, therefore, unenforceable under the Administrative Procedure Act and the Fifth Amendment's Due Process Clause. *See Motor Vehicle Manufacturers Assoc. of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

To correct the substantive and procedural shortcomings of the Proposed SIP Calls described above—and to avoid litigation and resulting economy-harming uncertainty—EPA must withdraw the Proposed SIP Calls. If EPA considers any further rulemaking to be warranted with respect to startup, shutdown, and malfunction provisions in SIPs, then before any proposed rule is issued, it should be preceded by a deliberative and inclusive public process involving the states and the regulated community that could go a long way towards clearing the cloud of impropriety surrounding the present Proposed SIP Calls.

Sincerely,

Shannon L. Goessling, Esq.
Executive Director & Chief Legal Counsel