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**Energy and Environment Cabinet
Department for Environmental Protection**

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May 13, 2013

Docket ID # EPA-HQ-OAR-2012-0322
Environmental Protection Agency
Mailcode: 6102T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dear Sir/Madam:

Respectfully, the Kentucky Division for Air Quality (Division), on the behalf of the Commonwealth of Kentucky, submits the following comments relating to the proposed rule: *State Implementation Plan: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Period of Startup, Shutdown, and Malfunction; Proposed Rule*. The Division previously submitted comments on May 3, 2013, and after further evaluation, the Division requests the following comments to replace the May 3 submittal. In its proposed rule, EPA finds the Kentucky State Implementation Plan (SIP) to be substantially inadequate. The Division disagrees with this assessment and explains its rationale below.

In response to EPA's proposed SIP Call, the Division expresses concern with the necessity, timing, and potential consequences associated with the finding. Without the benefit to participate in the monthly meetings held between the Sierra Club and EPA¹, the Division cannot discern whether EPA and the Sierra Club evaluated the Kentucky SIP in its entirety or narrowly focused on one regulatory provision in the Division's "General compliance requirements" regulation. If EPA and the Sierra Club did not thoroughly review each element of the Kentucky SIP, EPA is unable to appropriately determine whether the Kentucky SIP is substantially inadequate to comply with the requirements of the Clean Air Act pursuant to Section 110(k)(5).

Necessity

EPA acknowledges that 401 KAR 50:055, Section 1(1) does not eliminate enforcement authority of EPA or citizens; instead, in EPA's opinion, 401 KAR 50:055, Section 1(1) supposedly "renders them **less** enforceable by the EPA or through a citizen suit."² As the

¹ Modification of Settlement Agreement, *Sierra Club et al. v. Jackson*, No. 3:10-cv-04060-CRB (N.D. Cal.)

² 78 FR 12506

Division has previously explained to EPA in an interpretative letter, the Division reaffirms the provisions of 401 KAR 50:055 do not limit or exclude the authority of EPA and citizens from taking enforcement action under Sections 113 and 304 of the CAA.³ It should be noted that neither the Sierra Club's Petition nor EPA's proposed action provide a single example of Kentucky's regulation interfering with enforcement by EPA or a citizen.

Additionally, EPA's declarations that Kentucky's SIP is inadequate and the exemptions are "automatic" fail to recognize the review process during episodes of excess emissions.^{4,5} In accordance with the regulation, a source must demonstrate with documentation, and may use Form DEP4014 Record of Shutdown, Ensuing Startup or Malfunction, that the criteria of 401 KAR 50:055 Section 1(4) has been satisfied. Limited by and only after such demonstration will the Division director determine if the episode "shall be relieved from compliance with the standards set forth by the Cabinet." The Division carefully and thoroughly reviews shutdown and malfunction exemption requests.

The Division "intends to closely scrutinize any claim that [an emission standard] cannot be met during a malfunction to determine whether the event was in fact"⁶ a "failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner" and "not caused entirely or in part by poor maintenance, careless operation, or other preventable upset condition or preventable equipment breakdown."⁷

Open Records requests for these determinations are still available, further supporting that Kentucky's SIP provisions do not "undermine the ability of states, the EPA, and the public to enforce emission limitations in the SIP that have been relied upon to ensure attainment or maintenance of the NAAQS or to meet other CAA requirements."⁸ The Division maintains that the Kentucky SIP already uses a "CAA-consistent [approach]... to address excess emissions during SSM events" and "[includes] criteria and procedures for the use of enforcement discretion by air agency personnel and appropriately defined affirmative defenses."⁹

Timing

EPA admits that proposed SIPs in the early 1970's were not given enough attention to the adequacy, enforceability, and consistency of these SIPs and "consequently, many SIPs were approved with broad and loosely-defined provisions to control excess emissions."¹⁰ Since 1977, "EPA has been more careful... not to give new approval to SIP rules that are inconsistent with the CAA and had issued several guidance memoranda to advise states on how to avoid impermissible provisions as they expand and revise their SIPs."¹¹ The referenced guidance

³ A copy of this letter can be found in the docket for the rulemaking in 76 FR 77903.

⁴ 78 FR 12466

⁵ 78 FR 12464

⁶ Id.

⁷ 401 KAR 50:010 definition of malfunction

⁸ 78 FR 12466

⁹ 78 FR 12464

¹⁰ Id.

¹¹ Id.

memoranda that EPA established its SSM policy includes its *Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions* issued on September 28, 1982.

Historically, EPA had sufficient time to identify and rule upon the “impermissible provisions.” On June 6, 1979, the Division initially submitted 401 KAR 50:055 to EPA for inclusion into the Kentucky SIP. In response, EPA provided “conditional approval” on September 18, 1980, and December 24, 1980. To satisfy EPA’s concerns, the Division amended 401 KAR 50:055 (effective September 22, 1982) and submitted the amended regulation to EPA for inclusion into the SIP.¹² In the May 4, 1989 Federal Register, EPA granted “full approval” of the Kentucky SIP effective July 3, 1989.¹³ Thus, EPA granted full approval of the Kentucky SIP, including 401 KAR 50:055, long after EPA set its SSM policy and provided careful review of SIP submittals to avoid the granting of “impermissible provisions” into SIPs.

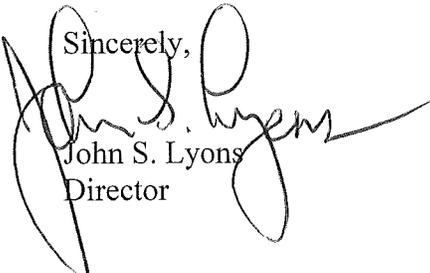
Consequences

If only one specific provision in 401 KAR 50:055, identified by the Petition and EPA, is amended, the Division may unintentionally create a situation that establishes a SIP inadequacy with other regulatory provisions included in the Kentucky SIP. Due to the limited public comment period, the Division is unable to fully evaluate every regulation included in the Kentucky SIP and determine the consequences of this proposed rulemaking on those SIP regulations. The Division is concerned that this proposed SIP Call would require the Division to amend each regulation and promulgate unit and source-specific startup and shutdown provisions to address every possible case of excess emissions due to shutdown and malfunction events, regardless of control technology limitations and previously established EPA guidance.

In reviewing the proposed rule, the Division does not find it necessary for EPA to issue a finding of inadequacy of the Kentucky SIP. There is no supporting evidence to indicate that Kentucky is not fulfilling its statutory obligations established under the Act. Further, the Division disagrees with the timing of this action. The narrow focus of one regulatory provision ignores the past EPA approvals of the Kentucky SIP and lacks a full SIP evaluation. Lastly, the Division is concerned with the potential “unintended consequences” associated with this rulemaking, including discrepancies between federal and state regulations.

Thank you for this opportunity to comment on the proposed rule. If you have any questions or concerns regarding the Division’s comments, please contact Andrea Smith, Program Planning and Administration Branch Manager, at 502-564-3999 or Andrea.Smith@ky.gov.

Sincerely,


John S. Lyons
Director

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¹² 51 FR 43742

¹³ 54 FR 19169

