May 13, 2013

*Via Electronic Mail to:* a-and-r-docket@epa.gov

**RE: Docket ID: EPA-HQ-OAR-2012-0322**
***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***

**Comments of American Municipal Power, Inc.**

This letter constitutes the comments of American Municipal Power, Inc. on behalf of the organization and its 129 member electric systems (collectively "AMP") for consideration and inclusion in the docket for U.S. Environmental Protection Agency's ("EPA") proposed *State Implementation Plans ("SIP"): 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* ("SSM Rulemaking"), issued for public notice and comment on February 22, 2013 at 78 Fed. Reg. 12460 (extension of comment period published on April 8, 2013 at 78 Fed. Reg. 20855).

## I. Background

AMP's municipal member electric systems, spanning seven states from Michigan to Delaware, collectively serve more than 625,000 customers and have a system peak of more than 3,600 megawatts. AMP's core mission is to develop, manage and supply diverse, competitively priced, reliable wholesale energy to public power members through strategic partnerships, member-focused relationships and a diversified power resource mix. AMP's diverse energy portfolio makes the organization a leader in the deployment of renewable and advanced power assets that include a variety of base load, wholesale and distributed generation using hydro, wind, landfill gas, solar and fossil fuels.

Because of AMP's structure as a non-profit power provider, AMP closely follows federal and state regulation that could impact its members' costs and reliability. To that end, AMP is concerned that the SSM Rulemaking could not only negatively impact our assets but also the entire wholesale electric market, and make permitting and compliance more time consuming and complex. Additionally, we are concerned that the SSM Rulemaking represents a federal regulatory overreach



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that removes needed, practical state discretion and authority. As such, AMP encourages EPA to reconsider whether or not the SSM Rulemaking is necessary and, if so, to integrate the following specific comments into any final rulemaking.

## II. The SSM Rulemaking Inappropriately Restricts States' Discretion

EPA acknowledges in its "Memorandum to Docket EPA-HQ-OAR-2012-0322, Statutory, Regulatory, and Policy Context for this Rulemaking," at 2 (Feb. 4, 2013) (hereinafter "EPA Memo"), that States "are at liberty to adopt whatever mix of emissions limitations it deems best suited" to their particular situations. EPA, through the SSM Rulemaking, then goes on to deprive the States of any such liberty in light of the agency's policy preference that States be stripped of the right to grant automatic exemptions, directors' discretionary rulings, or certain types of affirmative defenses.

Sierra Club's petition, and EPA's action proposing to approve any part of that petition, are collectively a facial challenge to the legality of several States' SIP provisions. As a facial challenge, Sierra Club must first demonstrate, and EPA must find, that there is no situation in which the a State's SIP provisions can be applied in a way that is consistent with the Clean Air Act ("CAA") before EPA can justify a SIP call on the basis that the provisions are substantially deficient. *United States v. Salerno*, 481 U.S. 739, 745 (1987). EPA cannot rely on speculation to support such a challenge. *Sabri v. United States*, 541 U.S. 600, 609 (2004). EPA cannot meet this burden. In *Luminant Generation Co. v. U.S. EPA*, 675 F.3d 917, 930-31 (5th Cir. 2012), the Court held that director's discretion provisions, so long as properly crafted, are appropriately within the framework of the CAA. EPA cannot, therefore, issue a "blanket" disapproval of directors' discretion provisions. To do so illegally eliminates the discretion the CAA provides to the States.

EPA's blanket, one-size-fits-all policy also does not follow the spirit of cooperative federalism underlying the CAA. The CAA "establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). "Air pollution prevention . . . at its source is the primary responsibility of States and local governments. . . ." 42 U.S.C. § 7401(a)(3). As the U.S. Court of Appeals for the D.C. Circuit recently explained:

> To deal with [the Clean Air Act's] complex regulatory challenge, Congress did not authorize EPA to simply adopt limits on emissions as EPA deemed reasonable. Rather, Congress set up a federalism-based system of air pollution control. Under this cooperative federalism approach, both the Federal Government and the States play significant roles. The Federal Government sets air quality standards for pollutants. The States have the primary responsibility for determining how to meet those standards and regulating sources within their borders. *EME Homer City Generation v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012) (emphasis added).

Other courts have recognized that, "[t]he great flexibility accorded the states under the Clean Air Act is [...] illustrated by the sharply contrasting, narrow role to be played by the EPA." *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981). EPA's SSM Rulemaking suggests that EPA believes the States' authority should be relegated to mere regional offices of the EPA.

However, the U.S. Constitution makes it clear that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

EPA's SSM Rulemaking attempts to override the States' rights to develop air rules that are consistent with the CAA but that also recognize the individual needs of each State. Law and caselaw provide EPA no such overarching control absent an obvious and clear violation of the CAA in each SIP. Here, EPA has no such proof.

## III. Neither the Text Nor the Legislative History of the CAA Support EPA's SSM Rulemaking

In the EPA Memo, EPA cites the definition of "emission limitation" in CAA Section 302(k) to support its position in the SSM Rulemaking. Section 302(k) does not provide the support that EPA contends. Section 302(k) states:

> The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on 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 Act. 42 U.S.C. § 7602(k).

EPA selectively omits reference to the broader definition set forth above and fails to explain why, even if SIP provisions may not qualify as "emission limitations" or "emission standards" under the first part of the definition, the SIP provisions are not approvable as "design, equipment, work practice or operational standards" promulgated under the CAA pursuant to the second part of the definition.

Similarly, the legislative history cited by EPA does not support EPA's position. Instead, it merely makes it clear that "token, intermittent, or supplemental controls or other temporary, periodic, or limited systems of control" are not permitted as final means of compliance. This reference is clearly directed at minimizing or banning the future use of intermittent or supplemental controls, as authorized under CAA Section 110(a)(6), 42 U.S.C. § 7410(a)(6). The controls addressed by this provision are those that are not intended to run, and do not run, during all times that the source is in "normal operating mode," but instead are run for substantially less than normal operation, such as only at times of certain environmental conditions (e.g., inversions, ambient monitor levels, etc.). These "token, intermittent, or supplemental" controls, which are designed not to operate during normal operation, are far different than controls that operate at all times the source is running, except during startup, shutdown or malfunction of the source or the emission control system itself.

## IV. A Revision to the SSM Rulemaking is Unnecessary

### No Evidence that there is any Risk of a Violation of a NAAQS

EPA and Sierra Club express concern that emissions occurring during startup, shutdown or malfunction result in NAAQS violations. There is, however, no evidence that the implementation of startup, shutdown and malfunction provisions automatically equate to violations of ambient air quality standards. Speculation and conjecture in the place of evidence cannot support EPA's desire to undermine the current regulatory regime nor justify EPA's departure from prior SIP approvals.

EPA's new approach, embodied in the SSM Rulemaking, contravenes four decades of prior EPA practice. The SSM exemption has been approved by EPA since 1972 and has been a key element of most EPA-approved SIPs. In fact, EPA has included SSM exemptions in EPA's own standards, including the New Source Performance Standards, for decades. Notwithstanding 40 years of precedent to the contrary and its own previous actions, EPA has now determined that the SIPs of 36 states are legally inadequate solely because of SSM provisions. EPA's multiple SIP approvals, along with Sierra Club's historic failure to challenge previous SIP approvals, are dispositive on the issue since the legal doctrines of waiver, res judicata and due process (procedural and substantive) apply.
There is no need to undermine 40 years of practical success with respect to SSM, and EPA lacks the evidence or legal basis to support such a change.

### EPA's Sue-and-Settle Approach to Rulemaking is Inappropriate

AMP is concerned that EPA's sue-and-settle approach often results, as it has with the SSM Rulemaking, in a removal of the public's opportunity to provide meaningful comment on whether such an action taken by EPA is necessary or appropriate. Here, EPA agreed to issue the SSM Rulemaking as part of a settlement with the Sierra Club on a fast track, committing to publish a final regulation by August 2013 - a very swift turnaround for a comprehensive rulemaking that upends decades of EPA precedent and SIP approvals. While there is a notice and comment period as required under the APA before the regulation is finalized, it can easily be inferred that EPA would be unlikely to change the regulation in a manner that could threaten its settlement with the Sierra Club. As a result, the limited protections that do exist for public participation with respect to the SSM Rulemaking have been diminished.

## V. The Premise Underlying the SSM Rulemaking is Flawed

EPA has concluded that "excess emissions'' are air emissions that exceed the otherwise applicable emission limitations in a SIP, *i.e.*, emissions that would be violations of such emission limitations. 78 Fed. Reg. 12468. In fact, in many cases the "otherwise applicable emission limitations in a SIP" were only legally acceptable because of the automatic exemptions, director discretion, or affirmative defense provisions which the Agency approved and to which the Sierra Club and EPA now object. The States and localities that developed and submitted the SIPs to EPA recognized that process and control equipment could meet certain limits more or less continuously during normal operation, but could not meet those limits during unique periods, such as startup, shutdown or malfunction. In order to create a legally permissible and defensible limit in a SIP, those periods

during which inadequate information was available to establish a permissible and defensible limit were excluded from coverage by the limit (the "automatic exemption"), addressed by director discretion, either guided (preferable) or absolute, or provided an affirmative defense to prevent injustice or to allow the limit to be promulgated in the first place. Understood in context, emissions emitted pursuant to such provisions are not "excess." To the contrary, they are SIP-approved and have been SIP-approved for decades without demonstrable degradation to air quality.

## VI. Conclusion

AMP requests that EPA withdraw the SSM Rulemaking and allow each State to resume its appropriate function as the primary body responsible for air pollution prevention. AMP appreciates the opportunity to provide comment on the SSM Rulemaking.

On Behalf of AMP and its Members,

Jolene M. Thompson
Senior Vice President

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