NSSGA®

NATIONAL STONE, SAND & GRAVEL ASSOCIATION

October 3, 2024

EPA Region 6 Office
1201 Elm Street
Suite 500
Dallas, Texas 75270

Submitted Electronically

Re: Air Plan Disapproval; Texas; Control of Air Pollution From Visible Emissions and Particulate Matter, Docket No. EPA–R06–OAR–2021–0029, 89 Fed. Reg. 71237 (September 23, 2024)

Dear Docket Personnel,

The National Stone, Sand & Gravel Association (NSSGA) offers the following comments on EPA's proposed disapproval of the Texas State Implementation Plan (SIP) provisions for maintenance, startup and shutdown (MSS) provisions for visible emissions and particulate matter.[1]

NSSGA urges EPA to abandon its proposal as inconsistent with the fundamental principles underlying the Clean Air Act (CAA) and relevant judicial decisions, and to approve the Texas SIP provisions at issue. The CAA grants states primary authority to choose the emission control measures necessary to comply with the Act in that state. Where EPA proposes to disapprove a state provision that previously was approved, the agency bears a heavy burden to show that the provision is substantially inadequate to meet the Act's applicable requirements. The agency has failed to meet that burden here. These issues are discussed in detail below.

[1] NSSGA represents the crushed stone, sand and gravel-or construction aggregates-industries. The aggregates industry—literally the foundation of our nation's infrastructure—is a significant contributor to the economic wellbeing of the United States, generating $27 billion in annual sales and employing 100,000 mostly skilled workers. Impacts are felt throughout the broader economy. The industry supports $122 billion in national sales, $32 billion in national earnings (i.e., wages), and between 364,000 and 600,000 jobs across a wide range of occupations and industries.

I. The Clean Air Act Grants States Primary Authority To Determine Necessary Emissions Controls

CAA Section 101(a)(3) states the following fundamental Congressional finding:

> (3) that air pollution prevention (that is, the reduction or elimination, *through any measures,* of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments (emphasis added).

The Supreme Court emphasized this approach in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001):

> It is to the States that the Act assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources. See 42 U. S. C. §§7407(a), 7410 (giving States the duty of developing implementation plans). It would be impossible to perform that task intelligently without considering which abatement technologies are most efficient, and most economically feasible— which is why we have said that "the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan," *Union Elec. Co.* v. *EPA,* 427 U. S. at 266 (531 U.S. at 470).

As the D.C. Circuit stated recently in *Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. EPA*, 94 F.4th 77 (2024):

> Congress tasked EPA with ensuring that SIPs comply with the Act's requirements. If a SIP submission meets "all of the applicable requirements" of the Act, EPA must approve it. *Id.* § 7410(k)(3). If a state wants to revise its SIP, EPA reviews the proposed revision and may only approve it if it does not interfere with attainment of the national ambient air quality standards (NAAQS) "or any other applicable requirement" of the Act. *Id.* §§ 7410(k)(2)-(3), 7410(*l*); *see also id.* § 7515 (94 F. 4th at 85).

EPA's proposal to disapprove the TX MSS SIP provision unlawfully intrudes on the state's authority to determine how best to meet the Act's requirements within the state. EPA's proposal is unlawful because the agency has not demonstrated that the TX provisions at issue are substantially inadequate to meet the applicable requirements of the Act.

II. EPA Bears a Heavy Burden of Proof to Justify Disapproval of a Previously Approved SIP Provision

EPA's proposal indicates that the TX provisions at issue here initially were approved many years ago, and subsequently were incorporated into operating permits. In such cases the Act imposes a heavy burden of proof for subsequent EPA disapproval. Section 110(k)(5) allows

disapproval of a previously approved SIP provision only where EPA finds that the previously approved provision is "substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport . . . or to otherwise comply with any requirement of this chapter."

This standard imposes a higher burden of proof on EPA than was required for initial SIP approval. As the court explained in *Florida Electric Power*, supra:

> Second, our reading respects that section 7410(k)(5), governing EPA's SIP-call authority, suggests the agency should evaluate states' earlier-approved SIPs with a degree of leeway not afforded when EPA reviews states' initial SIP submissions or their proposed revisions . . .
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> In contrast, Congress directed EPA, when calling an earlier-approved SIP, to apply a more forgiving compliance standard. The higher bar on SIP Calls than on initial approvals makes sense: While Congress sought to ensure strict compliance with the Act in the first instance, it did not want EPA calling long-approved implementation plans for minimal forms of noncompliance too insubstantial to justify a re-do. There may well be provisions of the Act, then, with which a SIP's failure to ensure compliance should prevent the SIP's initial approval but, if only identified later, would not justify a SIP Call (94 F.4th at 92).

In sum, EPA's prior approval of a SIP provision, coupled with years of experience indicating that the provision is sufficient to meet the requirements of the Act, effectively establishes a presumption that the provision is adequate. EPA must rebut this presumption to show that the provision is "substantially inadequate" and must be revised.

III. EPA Has Not Met Its Burden to Establish That the Texas SIP Provisions Are Substantially Inadequate To Comply With The Act

EPA proposes to find that the TX SIP provisions are inadequate because they are "emission limitations" but do not operate on a continuous basis. However, as the court explained in *Florida Electric Power*, supra, emission controls need not be continuous to be included in a valid SIP:

> So, even if a given emission restriction does not qualify as an "emission limitation" under the CAA—including, for instance, because it does not operate on a "continuous basis," id. § 7602(k)—it could still be part of a SIP. And EPA would lack authority to call such a measure solely on the ground that it fails to meet the statutory definition of an "emission limitation"—a definition it did not need to satisfy . . .
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> But EPA, in that event, would not rest its SIP Call solely on the ground that the SIP's "other control measures" do not satisfy the statutory definition of an "emission limitation." Rather, EPA would rely on its determination that, for the state to meet the NAAQS, it is "necessary or appropriate" that one of the SIP's

> measures be converted from a non-"emission limitation" to an "emission limitation." EPA's SIP-call authority, that is, would be predicated on that kind of "necessary or appropriate" determination (94 F.4th at 100-01).

EPA has made no such finding here. The agency finds that the provision at issue imposes no limit on the frequency of startup or shutdown events. Yet there is no finding that such a limit is necessary or appropriate to meet the NAAQS, and no finding that these SIP provisions, in operation for many years, have led to violations of the Act. The agency finds that the SIP provisions do not require all feasible measures to minimize emissions during startup and shutdown periods. Yet there is no finding that additional measures, whether feasible or not, are necessary to comply with the NAAQS and meet the Act's other relevant requirements. The agency finds that the restrictions in the SIP provisions are not practically enforceable because they are vague. Yet the agency makes no finding that additional clarity is required to meet the Act's requirements, and points to no instance where the alleged vagueness has caused a failure to comply with the Act. Finally, the agency finds that a requirement to operate in accordance with good air pollution control practices during planned shutdown periods is not sufficient. Once again, there is no finding that additional requirements are feasible and necessary, or that the current measures have proven to be substantially inadequate.

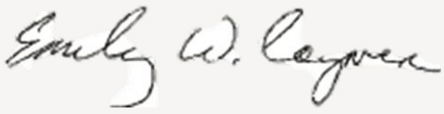
The Clean Air Act grants states primary responsibility for deciding what emissions reductions will be required from which sources to comply with the federal standards. EPA. In cases such as this, where EPA previously has approved SIP provisions that appear to be working well, the agency has a heavy burden to show that the provisions are substantially inadequate to comply with the relevant provisions of the Act and must be revised. It has failed to meet that burden in this case, and therefore must approve the provisions at issue here.

Conclusion

For the reasons stated above, EPA should withdraw its proposal to disapprove the Texas SIP provisions at issue and should propose to approve them.

Questions or comments concerning these Comments should be directed to me at (703) 772 - 2499 or at ecoyner@nssga.org.

Sincerely,



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