COMMENTS OF ENVIRONMENTAL INTEGRITY PROJECT AND EARTHJUSTICE IN OPPOSITION TO EPA'S RECONSIDERATION OF THE NESHAP GENERAL PROVISIONS REGARDING STARTUP, SHUTDOWN AND MALFUNCTION

Docket Id. No. OAR-2004-0094

September 12, 2005

The Environmental Integrity Project (EIP) and Earthjustice file these comments in opposition to EPA's reconsideration of the National Emission Standards for Hazardous Air Pollutants (NESHAPs) General Provisions regarding Startup, Shutdown and Malfunction (SSM). 70 Fed. Reg. 43992 (July 29, 2005). EPA's proposal would: (1) significantly undermine the regulation of hazardous air pollution, (2) make enforcement for excess hazardous emissions extremely difficult, (3) likely subject the public to increased hazardous pollution, and (4) prevent the public from obtaining important information regarding procedures NESHAP facilities should follow to minimize emissions.

EPA has issued its proposal in response to a petition for reconsideration pointing out that EPA's final rule (68 Fed. Reg. 32586 (May 30, 2003) restricting public access to SSM plans is unlawful and arbitrary. Letter of July 29, 2003 from Pew to Horinko (attached as Attachment H hereto). Rather than correcting the defects in that rule, EPA has tried to shore it up by declaring the SSM plans are not enforceable and — for this new reason — do not have to be made available to the public. EPA's proposal is unlawful and arbitrary for the reasons given below. It bears emphasis that this proposal also effectively acknowledges that the position EPA took in its previous rule is untenable. By attempting to defend its unlawful rule by now proposing another unlawful and arbitrary rule that does further damage to the Clean Air Act's public health protections, EPA displays a remarkable contempt not only for the law, but for public safety, the environment, and the purposes for which the agency was created.

I. EMISSIONS FROM STARTUP, SHUTDOWN AND MALFUNCTION ADVERSELY AFFECT PUBLIC HEALTH

Startup, shutdown and malfunction events result in the release of significant quantities of pollutants, including hazardous pollutants. A 2004 study by EIP revealed that 37 facilities in Texas and Louisiana released over 63 million pounds of pollution from SSM in one year.[1] This included over 167 thousand pounds of benzene and 142 thousand pounds of butadiene. Updated data in attachments D and E document two Texas facilities' emissions from January 2003 to September 2005. As these attachments

[1] "Gaming the System: How Off-the-Books Industrial Upset Emissions Cheat the Public Out of Clean Air" (Environmental Integrity Project, Aug. 2004) (attached as Attachment B hereto). The Texas numbers include some emissions due to maintenance, which may or may not be linked to startups, shutdowns, or malfunctions.

show, BASF emitted almost three million pounds of VOCs, including over 113 thousand pounds of benzene and over 152 thousand pounds of butadiene, and had over 330 SSM events. Dow emitted over one million pounds of VOCs and had over 200 SSM events.[2] At a number of facilities, SSM emissions actually dwarf regular emissions. For example, EIP's study shows that one natural gas plant's annual VOC SSM emissions were 163 times the total VOC emissions it reported to the annual emission inventory for the previous year.[3]

Local governments around the country are discovering that startups, shutdowns and malfunctions result in significant emissions that are not only preventing them from attaining national ambient air quality standards, but are also presenting serious health threats to the public. For example, Texas studies have found that SSM VOC emissions are contributing to local ozone exceedances.[5] Likewise, the Metro Louisville Air Pollution Control District (MLAPCD),US EPA, the Commonwealth of Kentucky and the West Jefferson County Community Task Force conducted a study to determine if Louisville's residents were being exposed to airborne concentrations of toxic air pollutants that may pose an unacceptable risk to human health.[6] They study determined that they were. In response MLAPCD adopted rules that, among other things, eliminated its SIP SSM exemption and stated that all exceedances of SIP emission standards, including those due to SSM, are violations.[7] Similarly, while EPA is eliminating the requirement that sources follow SSM plans, the Bay Area Air Quality Management District is adopting rules requiring facilities to adopt – and comply with - Flare Minimization Plans.[9] While EPA proposes to weaken regulation of SSM emissions for the most hazardous of pollutants, States and local governments are finding that more stringent regulations of such events are necessary to protect public health.

II. EPA'S GENERAL PROVISIONS REGARDING SSM VIOLATE THE CLEAN AIR ACT

A. EPA'S PROPOSAL VIOLATIONS SECTION 112 OF THE CLEAN AIR ACT.

Section 112 of the Clean Air Act (Act) requires EPA to set initial emission standards for hazardous air pollutants that "require the maximum degree of reduction in emissions of the hazardous air pollutants … achievable for new or existing sources"

---

[2] This data was obtained from Texas' emission event database. Note that emissions include maintenance emissions which may or may not be related to a malfunction, startup or shutdown. See, http://www2.tnrcc.state.tx.us/eer/main/index.cfm?fuseaction=searchForm.
[3] *Id.* at p. 7.
[5] See, http://www.tnrcc.state.tx.us/air/aqp/airquality_science.html.
[6] Final Report West Louisville Air Toxics Study Risk Assessment (attached as Attachment A).
[7] MLAPCD Regulation 1.07. See, http://www.apcd.org/star/.
[9] Bay Area Air Quality Management District Regulation 12. See, http://www.baaqmd.gov/dst/regulations/rg1212.pdf.

taking into consideration costs and any non-air quality health and environmental impacts and energy requirements. 42 U.S.C. §7412(d)(2). For new sources, the emission limit shall not be less stringent than that achieved in practice by the best controlled similar source. 42 U.S.C. § 7412(d)(3). For existing sources, the emission limit shall not be less stringent that the average emission limitation achieved by the best performing twelve percent of existing sources.[10] *Id.*

Once initial standards are set, EPA is required to review such standards within eight years of promulgation to ensure they provide an ample margin of safety to protect public health. 42 U.S.C. §7412(f)(2). Standards for known, probable or possible human carcinogens must reduce lifetime excess cancer risks to the individual most exposed to emissions from the source to less than one in one million. *Id.*

The Act requires that numerical standards be set whenever it is feasible to promulgate and enforce such standards. 42 U.S.C. §7412(h)(4). If it is not feasible, EPA may promulgate a "design, equipment, work practice, or operational standard," or some combination thereof, in lieu of a numerical standard. 42 U.S.C. §7412(h)(1).

For the following reasons, EPA's Chapter 112 general provisions regarding SSM violate the requirements of section 112 of the Act.

1. EPA illegally exempts certain hazardous emissions from compliance with emission standards.

The Act requires EPA to set standards for sources of hazardous pollution that limit the quantity, rate, or concentration of emissions on a continuous basis.[11] 42 U.S.C. § 7602(k). Initial section 112 emission standards must be at least as stringent as the emission levels attained by the best performing similar source(s). 42 U.S.C. § 7412(d). The Act includes no exemption for emissions that occur as a result of SSM.

Nor should EPA read into the Act a Clean Water Act Marathon Oil-type exemption.[12] Even if an exemption modeled on Marathon Oil were permissible – which it is not - it would have to be based on a demonstration that the best performing sources cannot meet emissions standards during SSM due to technological limitations. To the contrary, in many cases, the best performing sources can and do meet otherwise applicable emission limits during SSM. EPA has stated in its guidance regarding SSM provisions in State Implementation Plans (SIPs):

---

[10] For categories or subcategories with 30 or fewer sources, the standard shall be no less stringent than that achieved by the best performing five sources in the category or subcategory.

[11] The CAA defines emission limitation as a requirement "which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." 42 U.S.C. § 7602(k) (emphasis added).

[12] *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1274 (9th Cir. 1977). As EPA has noted, "While *Marathon Oil* and several other courts have required EPA to provide an upset defense [for CWA effluent limitations], either through a permit program or in the underlying substantive requirement, to address the fallibility of technology, other courts have not out of concern that such a defense was inconsistent with Congress' intent that technology-based effluent limits force technological development and that enforcement of such limits be "swift and direct." 60 Fed.Reg 45559 (Aug. 31, 1995).

> In general, startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design, and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods.[13]

While EPA can, and in some instances has, included requirements for compliance during SSM in source-specific NESHAP standards, the default general provision exempting compliance during SSM creates an assumption that current technology does not allow sources to control emissions during such events. EPA has failed to provide any support for a general assumption that sources cannot meet emission limitations during SSM.

Furthermore, EPA cannot maintain a general exemption for SSM for those source categories for which it must provide an ample margin of safety to protect public health pursuant to section 112(f)(2). The courts made clear, when interpreting the "ample margin of safety" standard prior to the 1990 Act amendments, that EPA must consider only public safety when setting these initial thresholds. EPA can then set final limits at any level below that threshold in light of factors including technological practicability.[14] There is no way that EPA can determine that a NESHAP subject to only the general duty to minimize emissions during SSM is protective of public health. Under the general duty provision, if a source can demonstrate that it has minimized emissions, it will be deemed in compliance. There are no limits on the actual amount of hazardous pollution that may be emitted during SSM. It is, therefore, impossible for EPA to determine that such pollution will not seriously adversely affect public health.

EPA has recognized in the SIP context that general exemptions for SSM emissions are unlawful because SSM emissions can cause exceedances of ambient air quality standards. EPA's SIP guidance states, "because excess emissions might aggravate air quality so as to prevent attainment or interfere with maintenance of the ambient air quality standards, EPA views all excess emissions as violations of the applicable emission limitation."[15] EPA will, therefore, disapprove SIP provisions that include SSM exemptions.[16] Like the national ambient air quality standards, the section

---

[13] U.S. Environmental Protection Agency "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Sept. 20, 1999) (attached as Attachment C).
[14] *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146, 1163-66 (D.C. Cir. 1987).
[15] "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" at p.2.
[16] *Id.* at Attachment p. 1. EPA's guidance prohibits exemptions for excess emissions from SSM. EPA has allowed states to adopt limited affirmative defenses to penalties only, not to injunctive relief, for excess emissions due to SSM. To qualify for the defense, the burden of proof must be on the source to demonstrate that certain criteria are met. The affirmative defense may not apply in areas where emissions from a single source or small group of sources have the potential to violate ambient standards.

112(f)(2) requirement to limit hazardous emission so as to protect public health within an ample margin of safety is an ambient, health-based standard. Because the NESHAP SSM general provision allows unlimited hazardous emissions during SSM, as long as emissions are "minimized," it is impossible for EPA to determine that any particular NESHAP that is subject to the general SSM provision provides an ample margin of safety to protect public health.

2. EPA's Proposed Amendments To Specific MACT Rules Are Unlawful And Arbitrary.

EPA proposes not only to amend the General Provisions, but also the SSM requirements in scores of specific MACT standards. Yet EPA fails entirely to explain its reason for changing specific MACT standards. In particular, EPA fails to discuss how the proposed changes would affect the specific source categories for which the SSM alterations are being made. If the proposed changes would have any effect at all on any of the specific MACT standards that EPA proposes, the agency would be obliged to explain its reasons for making the changes with respect to each such standard. Rather than providing any such explanations, EPA apparently just assumes — without any basis whatsoever — that the proposed SSM provisions can simply be inserted into scores of different MACT standards without having any effect at all. Yet EPA does not even claim that there would be no effects, far less provide an adequate explanation for such a claim.

EPA's failure to explain its amendment of specific MACT standards is especially unlawful and arbitrary given that the exception from compliance with the continuous compliance requirement is limited — assuming *arguendo* it is applicable at all — to instances where EPA has demonstrated that the relevant best performing sources cannot comply with emission standards due to technological limitations. EPA does not even address whether the relevant sources in each of the source categories that would be affected by its proposal cannot comply with MACT standards. Accordingly, its proposed changes to the specific MACT standards for those sources is both unlawful and arbitrary.

3. EPA has not demonstrated that setting numerical emission limitations for SSM events is not feasible.

Rather than requiring sources to comply with emission standards at all times — as the Clean Air Act requires — EPA would allows them to comply during periods of SSM with a "general duty" requirement to "operate and maintain any affected source, including associated air pollution control equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions." 40 C.F.R. § 63.6(e)(1). That requirement is not a numerical emission limit, as expressly required by the Clean Air Act, except, as noted above, where setting and enforcing such standards is not feasible. It is only "not feasible" to prescribe and enforce an emission standard if:

> (A) a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or

> that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or
> (B) the application of measurement methodology to a particular class of sources is not practicably due to technological and economic limitations.

42 U.S.C. §7412(h)(2). For many, if not most, hazardous air pollutant releases due to SSM, these criteria cannot be met. The Act, therefore, requires EPA to set numerical emission standards to control these emissions on a continuous basis.

4. If setting SSM emission limitations was infeasible, EPA would still be required to set work practice standards.

For those hazardous SSM emissions for which EPA can demonstrate that setting emission standards is not feasible, EPA is required to establish a "design, equipment, work practice, or operational standard,"or a combination thereof. 42 U.S.C. §7412(h)(1). To the extent that EPA relies on design or equipment standards, those standards must "assure the proper operation and maintenance of any such element of design or equipment." 42 U.S.C. §7412(h). These design, equipment, work practice, or operational standards must meet the section 112(d) and (f) requirements, including the requirement to be no less stringent than the best controlled similar source(s). Even if EPA can establish that for some hazardous SSM emissions, establishing emission limitations is infeasible, EPA must still establish standards as noted above.

Rather than complying with this requirement, EPA has punted and is allowing the sources themselves to come up with their own work practice standards in the form of SSM plans. There is no review and approval process for such plans, and no requirement that they comply with the standards in section 112 (d) and (f).

To make matters significantly worse, pursuant to EPA's proposal, sources would not even be required to comply with such SSM plans. Instead, they would merely be required to comply with a general duty to "minimize" emissions. As noted below, such a standard is vague and unenforceable. It also does not ensure that NESHAP facilities are meeting standards at least as stringent as those achieved by the best controlled similar sources.

EPA must comply with the Act's requirement to establish numerical emission limits for all sources with hazardous SSM emissions for which such limits are "feasible." For those limited source categories for which it is no feasible to establish numerical limits, EPA must itself establish design, equipment, work practice, and/or operational standards for SSM emissions that are at least as stringent as those achieved by the best controlled similar source(s). The current proposal's failure to set emission limits for hazardous SSM emissions violates section 112 of the Act.

B. EPA'S PROPOSAL CONTRAVENES THE CLEAN AIR ACT TITLE V, AND IS ARBITRARY AND CAPRICIOUS

1. Under EPA's Proposal, a Source's Title V Permit Would Not Assure Its Compliance With its General Duty to Minimize Emissions

a. To assure compliance, a source's Title V permit must require the source to implement its SSM plan.

As explained above, the Clean Air Act requires sources to comply with emission standards at all times, including periods of SSM. In its proposal, however, EPA has taken the position that the only applicable requirement during periods of SSM is "the general duty to minimize emissions." 70 Fed. Reg. at 43993/3. *See* 40 C.F.R. § 63.6(e)(1)(i) ("At all times, including periods of startup, shutdown, and malfunction, owners or operators must operate and maintain any source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions to the levels required by the relevant standards."). Accepting EPA's position for argument's sake, the agency's proposal still contravenes title V of the Clean Air Act.[17]

Even according to EPA, the general duty to minimize emissions that is set forth in 40 C.F.R. § 63.6(e)(1)(i) remains an "applicable requirement." 70 Fed. Reg. at 43993. Title V provides

> Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with the applicable requirements of this chapter, including the requirements of the applicable implementation plan.

42 U.S.C. § 7661c(a) (emphasis added). Thus, each source's title V permit must contain conditions "necessary to assure compliance" with the general duty requirement. *Id. See also* 42 U.S.C. § 7661c(c). EPA's proposal fails to fulfill this important statutory directive.

Under the current MACT general provisions, a source's title V permit must require the source to "develop and implement a written startup, shutdown and malfunction plan…" 40 C.F.R. § 63.6(e)(3)(i) (emphasis added). EPA's proposal, however, would eliminate the requirement that sources "implement" their SSM plans. 70 Fed. Reg. at 43997/3 (proposed 40 C.F.R. § 63.6(e)(3)(i). EPA states that "[t]he SSM plan documents procedures that source owners and operators should follow during periods of SSM," but also makes clear that "a source would not be required to follow the

[17] The regulations currently set forth at 40 C.F.R. § 63.6(e)(1)(i) are the subject of petitions for review currently pending before the D.C. Circuit. *Sierra Club v. EPA*, D.C. Cir. No. 02-1135 (and consolidated cases). By citing to provisions in the challenged regulations, commenters do not suggest that any of the provisions therein are either lawful or non-arbitrary.

plan." 70 Fed. Reg. at 43993-43994 (emphasis added). *See also* 70 Fed. Reg. at 43994 ("we are proposing to retract the requirement to implement the plan during periods of SSM").

A permit does not contain conditions "necessary to assure compliance" with the general duty requirement during periods of SSM — as required by Clean Air Act § 504(a) — unless it requires a source to implement its SSM plan during such periods. Specifically, SSM plans lay out the steps that the source will take to minimize emissions during SSM events. Just having the plan on file does little if anything to minimize emissions. Unless a source is required to implement its plan — i.e., takes the steps it has identified as necessary to minimize emissions during SSM — the public has no assurance that the source is meeting its general duty requirement.

Recent cases from the Second and Ninth Circuits confirm that EPA must respect statutory requirements to assure compliance. In *Waterkeeper Alliance, Inc. v. EPA*, the Second Circuit addressed Clean Water Act (CWA) provisions requiring, *inter alia*, that permits "assure compliance" with all applicable CWA requirements. 399 F.3d 486, 498 (2nd Cir. 2005) (citing 33 U.S.C. § 1342(a)(2). Environmental groups challenged EPA regulations that allowed large concentrated animal feeding operations (CAFOs) to develop their own nutrient management plans under the CWA without having those plans reviewed or approved by a permitting authority. The court found that without requiring review, the CAFO rule "does nothing to ensure" that each large CAFO had a plan that met relevant CWA requirements, and thus violated the CWA. *Waterkeeper Alliance*, 399 F.3d at 498 (emphasis in original). Similarly, the Ninth Circuit addressed the requirement in § 402(p) of the CWA that permits "require controls to reduce the discharge of pollutants to the maximum extent practicable." *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 854 (9th Cir. 2003). Environmental groups challenged EPA's regulations for small municipal separate storm sewer systems (MS4s) that allowed MS4s to avoid getting a permit so long as they developed a stormwater management plan. *Id.* 344 F.3d at 854-855. The court found that because these plans did not have to be reviewed by a permitting authority, the rule "would do less than require controls to reduce the discharge of pollutants to the maximum extent practicable." *Id.*, 344 F.3d at 855 (emphasis in original). Accordingly, it rejected EPA's rule as "contrary to the clear intent of Congress." *Id.*, 344 F.3d at 856.

Both *Waterkeeper Alliance* and *Environmental Defense Center* are directly on point. In both cases, EPA created a regulatory scheme that did not assure that CWA requirements would be met. Here, by eliminating the requirement that sources implement SSM plans, EPA has created a regulatory scheme that fails to assure that sources will comply with their general duty requirement during SSM events.

Indeed, EPA itself has recognized repeatedly that implementation of SSM plans is key to compliance with the general duty requirement. In the preamble to its original General Provisions, for example, EPA made clear that a source owner or operator cannot possibly certify compliance without having implemented an appropriate SSM plan:

> Excess emissions are typically direct indications of noncompliance with the emission standard and, therefore, are directly enforceable. Without demonstrating that a startup, shutdown, or malfunction event caused the excess emissions, the owner or operator cannot certify compliance. In such instances where the excess emissions occurred during a startup, shutdown, or malfunction, the owner or operator must also have followed the plan to certify compliance. If the owner or operator prepares a deficient plan, the EPA can request that the plan be upgraded and may consider enforcement actions.

59 Fed. Reg. 12408, 12422 (March 16, 1994) (emphasis added). More recently, EPA stated:

> The SSM plans must be drafted in a manner which satisfies the general duty to minimize emissions (40 CFR 63.6(e)(3)(i)(A)). Thus, compliance with a properly drafted SSM plan during a period of startup, shutdown, or malfunction will necessarily also constitute compliance with the duty to minimize emissions…

68 Fed. Reg. 32586, 32590 (May 30, 2003) (emphasis added); 67 Fed. Reg. 72875, 72880 (December 9, 2002) (same).

Even in its present proposal to "retract" sources' obligation to implement their SSM plans, EPA continues to recognize the importance of a source implementing its SSM plan:

> It is during these periods of SSM that the general duty clause becomes most prominent. If the standards cannot be met during a period of SSM, then the owner or operator must take steps to minimize emissions to the extent practicable. … 40 CFR part 63 requires that owners or operators develop and implement a plan that describes procedures for operating and maintaining the source during periods of SSM, and a program of corrective action for malfunctioning process, air pollution control, and monitoring equipment used to comply with the relevant standards. A primary purpose of the plan is to ensure that, during periods of SSM, the owner or operator operates and maintains each affected source, including associated air pollution control and monitoring equipment, in a manner which satisfies the general duty clause of 40 CFR 63.6(e)(1)(i).

70 Fed. Reg. at 43993. Indeed, in the passage quoted above, EPA appears to forget that its proposal would eliminate the requirement to implement SSM plans, stating that "the requirement is that an owner or operator develop and implement an SSM plan." 70 Fed. Reg. at 43993/3 (emphasis added).

EPA's assertion that "the plan specifics … cannot be required to be followed" because they "are not applicable requirements" (70 Fed. Reg. at 43994/1) is wrong. Title V plainly requires that a permit include not only each applicable requirement, but also

"such other conditions as are necessary to assure compliance with the applicable requirements of this chapter." 42 U.S.C. § 7661c(a). Moreover, CAA § 304(a) makes each condition of a Title V permit federally enforceable. *See* 42 U.S.C. § 7604(a)(authorizing citizen suits to enforce "an emission standard or limitation"); *see also* § 7604(f)(defining "emission limitation or standard" to include "any permit term or condition"). Because, as EPA admits, SSM plans are designed to ensure compliance with the general duty requirement, the requirement that a source implement its plan must be included as an enforceable condition in the source's permit.[18]

Nowhere does EPA explain how eliminating the requirement to implement SSM plans comports with the agency's admission that implementing the plans is key to ensuring that sources meet their general duty requirement during periods of SSM. Indeed, eliminating the requirement to implement SSM plans is directly at odds with EPA's stated goal for SSM plans, assuring compliance with the general duty requirement. For both reasons, the agency's proposal is not only unlawful but also arbitrary and capricious.

b. <u>To assure a source's compliance with the general duty requirement, the source's plan must be subject to agency and public review as part of the source's Title V permit.</u>

As EPA recognizes, compliance with just <u>any</u> SSM plan would be insufficient to assure compliance with the general duty requirement. Rather, an SSM plan must be <u>adequate</u> for compliance with that plan to assure that the source is operated in compliance with the general duty to minimize emissions. 70 Fed. Reg. at 43994. Thus, it is not enough for a Title V permit to state that a source must develop and implement an SSM plan; the plan itself must be subject to agency and public review during the Title V permitting process.

EPA's attempt to rely on unreviewed (and publicly unavailable) SSM plans to assure a source's compliance with the general duty requirement is similar to rules governing other federal environmental programs that the Second and Ninth Circuits recently struck down. *See Waterkeeper Alliance*, 399 F.3d at 498; *Environmental Defense Center*, 344 F.3d at 854-855. *See generally WEPCO v. Reilly*, 893 F.2d 901, 917 (7th Cir. 1990) ("we agree that the EPA cannot reasonably rely on a utility's own unenforceable estimates of it annual emissions"); *Specialty Equipment Ass'n v. Ruckelshaus*, 720 F.2d 124, 138-139 (D.C. Cir. 1983); *South Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974). Like the unlawful rules at issue in those cases, EPA's proposed SSM rule would

[18] Moreover, EPA's attempt to justify its elimination of the regulatory requirement that sources implement their SSM plans on the basis that such plans are not "applicable requirements" is circular. Under EPA's Title V regulations, the phrase "applicable requirement" is defined to include "[a]ny standard or other requirement under section 112 of the Act." 40 C.F.R. §70.1. The definition encompasses "requirements that have been promulgated or approved by EPA." *Id.* Because EPA's current regulations require sources to implement their SSM plans, that requirement is an "applicable" one. It is only EPA's proposal to delete that obligation from the regulation that would make the obligation to implement an SSM plan something other than an applicable requirement. In sum, EPA's purported justification rests on a misunderstanding of the law, and is therefore arbitrary and capricious.

allow sources to write their own SSM plans without subjecting those plans to agency and public review. Like those rules, EPA's proposed approach to SSM plans is unlawful because it eliminates any "assurance" that sources will comply with their general duty requirement during SSM events.

EPA argues that review of SSM plans by the permitting authority is not necessary. 70 Fed. Reg. at 43994. However, the agency fails to provide any plausible explanation for that claim. To the contrary, absent permitting authority review of plans and plan revisions, neither EPA, nor the States, nor the public, nor even the source will have any assurance that implementation of an SSM plan is sufficient to demonstrate compliance with the general duty requirement.

EPA also argues that review of SSM plans is not "reasonable." 70 Fed. Reg. at 43994. Because such review is necessary to assure compliance with the general duty requirement, it is required by the Clean Air Act. Accordingly, EPA's views about whether review of SSM plans is reasonable are irrelevant. In any case, EPA's claim is wrong. Review of SSM plans is a part of the process of reviewing permits. This process requires substantial work but is entirely reasonable; without it the permitting program would be unable to fulfill the role that Congress designed it for: to assure compliance with each applicable requirement.

Contrary to EPA's claim, the proposed SSM "reporting regimen" would not accomplish the same result as review and approval of SSM plans by the permitting authority. First, under EPA's approach, deficiencies in a source's SSM plan would not be identified until well after the source's Title V permit is issued—if at all. Under the Act, however, a permit must comply with Title V requirements at the time that it is issued. Indeed, the Act prohibits a State from issuing a Title V permit to a major source until after giving EPA an opportunity to review and object to its issuance. 42 U.S.C. § 7661d. Furthermore, the Act requires the EPA Administrator to object to a deficient permit. 42 U.S.C. § 7661d(b)(1). If EPA does not object to a proposed permit, any person may petition the agency to do so. 42 U.S.C. § 7661d(b)(2). "The Administrator shall issue an objection … if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the Act]." *Id*. Thus, Congress expressed an unambiguous intent that a permit fully comply with the Act at the time it is issued. EPA's claim that it can defer any effort to ensure that a source's SSM plan is adequate until some time after the permit is issued contravenes that clear intent and is therefore unlawful.

EPA's reporting approach is also arbitrary in that it assumes without justification that: (1) sources will report all SSM events; (2) sources with inadequate plans will report a much higher number of SSM events than other sources; and (3) permitting authorities will then scrutinize such sources' SSM plan and force revisions. 70 Fed. Reg. at 43994. Remarkably, EPA also appears to assume that the public will scrutinize SSM plans, even though the agency's proposal would prevent the public from getting access to such plans. *Id.* None of those assumptions has any basis in the record or in reality. First, it is entirely possible that sources with inadequate SSM plans may exceed emission standards without

reporting them. Second, even if a source reports an SSM event, it may not report such a high number of them as to attract the attention of a permitting authority or the public. Third, even if a source with an inadequate SSM plan reports many SSM events, a permitting authority may not choose to require plan revisions. Fourth, the public is unlikely to be able to obtain a source's SSM plan no matter how inadequate it is, and will thus be frozen out of its intended role in enforcing Clean Air Act requirements and assuring compliance. Only up-front review of SSM plans and SSM plan revisions can provide any assurance that these plans are adequate.

2. EPA's Proposal Would Render The General Duty Requirement And MACT Emission Standards Unenforceable.

a. Eliminating the requirement to implement SSM plans would render the general duty requirement overly vague and unenforceable.

The Clean Air Act guarantees citizens' rights to enforce Clean Air Act requirements. 42 U.S.C. § 7604. Congress enacted the Clean Air Act's permitting program in large part to implement this guarantee. Thus, Clean Air Act § 504(a) expressly requires that emission limits and standards in a permit be "enforceable." 42 U.S.C. § 7661c(a). Further, the text and structure of § 504(a) both make clear that the enforceability requirement is integral to the additional requirement that a permit contain conditions necessary to "assure compliance" with all applicable Clean Air Act requirements. *Id.* The legislative history of title V confirms this point:

> The first benefit of the title V permit program is that, like the CWA program, it will clarify and make more enforceable a source's pollution control requirements. … This system will enable the State, EPA, and the public to better determine the requirements to which the source is subject, and whether the source is meeting those requirements.

S. Rep. No. 228, 101st Cong., 1st Sess. 347, A Legislative History of the Clean Air Act Amendments of 1990 at 8687 (emphasis added).

Because the general duty requirement is a standard that would remain in permits even if EPA finalized its misguided proposal, that requirement would still have to be "enforceable." *Id.* By eliminating the requirement that sources implement their SSM plans, however, EPA renders the general duty requirement unenforceable.

The general duty requirement in itself, merely requires sources to "operate and maintain any affected source, including associated air pollution control equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions." 40 C.F.R. § 63.6(e)(1). If EPA eliminates the requirement that sources implement their SSM plans (and, thereby, eliminates this requirement from future Title V permits), there will be no means by which a sources' compliance with this general duty requirement could be measured. Proving the source's violation of its general duty requirement in an enforcement case would be virtually impossible given the potential for

disagreement over what constituted "safety and good air pollution control practices." Moreover, eliminating the duty to comply with SSM plans would create the strong potential for conflicting results in enforcement cases as district courts in different jurisdictions had to determine the meaning of "safety and good air pollution practices" on a case-by-case basis. For these reasons alone, the general duty requirement is — without more — overly vague and unenforceable. The D.C. Circuit has recognized "the judicial disdain traditionally accorded standardless regulations":

> Ofttimes, out of necessity, delegations of regulatory power to agencies offer little in the way of concrete guidance toward accomplishment of stated goals. Such imprecise authorizations nonetheless garner judicial sanction on the assumption that the agency, pursuant to its mandate from the legislature, will fill the gaps through the rulemaking process. When the agency fails to supply this necessary precision, the continuing vagueness may be too great to withstand scrutiny.

Atlas Copco, Inc. v. EPA, 642 F.2d 458, 465 (D.C. Cir. 1979). Regulations that "summon[] covered parties to achieve specified objectives" but do not indicate how "regulated parties could measure their performance against the announced end," are too vague. *Id. See also New York v. EPA*, D.C. Cir. No. 02-1387 (June 24, 2005) slip op. at 51-56 (holding rule arbitrary and capricious EPA's failure to explain how its rule would be enforceable).

b. Denying public access to SSM plans makes the general duty requirement unenforceable.

By eliminating sources' obligation to implement their SSM plans, EPA also seeks to block public access to the information they contain. Specifically EPA claims that, with its proposed changes, SSM plans will no longer be part of a permit, a permit application, a compliance plan, a schedule of compliance, an emissions or compliance monitoring report, or a certification of compliance. 70 Fed. Reg. at 43994-43995. Thus, EPA claims that they do not have to be made available to the public. *Id.* To be enforceable under the Clean Air Act, however, a requirement must be enforceable by the public. If the public cannot get access to SSM plans — which would be the result of EPA's proposal — it cannot enforce the general duty requirement. Specifically, the public cannot enforce sources' general duty requirement unless they can measure a source's action during SSM against that source's SSM plan which defines likely malfunction events and sets forth the steps the source views as necessary to minimize emissions. Because the general duty requirement would not be enforceable by the public if the public is denied free access to SSM plans, EPA's proposal to eliminate the obligation to comply with SSM plans from sources' permit obligations contravenes the Clean Air Act. Further, EPA's proposal undermines EPA's stated goal of assuring compliance with the general duty requirement, and the agency nowhere explains the conflict. Accordingly, the agency's proposal also is arbitrary and capricious.

c. Eliminating the requirement to implement SSM plans would render MACT standards themselves overly vague and unenforceable.

Not only would EPA's proposal render the general duty requirement unenforceable, but it would also render the MACT standards themselves unenforceable.

For an emission limit to be "enforceable," a source's Title V permit must clearly indicate when the limit applies. Given EPA's position that the MACT emission limit does not apply under circumstances when a source is operating in SSM mode, the MACT emission limit is not enforceable against a source unless its permit clearly states what constitutes SSM for that source. Under EPA's proposal, however, no such information will be included in Title V permits.

By demoting SSM plans to something less than a permit requirement and denying public access to such plans, EPA would make it difficult—if not impossible—for the public to determine when an emission exceedance constitutes a violation of the MACT standard. Under such circumstances, the MACT standard is not enforceable. The existence of an unreviewed and unapproved SSM plan would not remedy this problem. First, the public cannot even obtain the plan unless government officials are willing to obtain the plan themselves. This contravenes one of the primary purposes of the Clean Air Act's citizen suit provision: to authorize the public to step in as a private attorneys general when the government fails to take action. Second, even if the public could obtain a source's SSM plan, there would be no assurance that the plan legitimately identifies what constitutes an SSM event for a particular facility, because there is no requirement that a plan be reviewed and approved by the permitting authority.

EPA's proposal also would allow sources not to follow their SSM plans during periods of SSM. But how a source responds to an alleged SSM event can be directly relevant to whether that event is or is not actually SSM. If a source's response to an alleged malfunction, for example, is not consistent with that event being "sudden, infrequent, and not reasonably preventable," that response would be strong evidence that the event itself is not actually a malfunction. EPA's proposal would allows sources to adopt ad hoc responses to an alleged SSM event without any accountability for departing from their SSM plans. Accordingly, it would leave parties seeking to enforce MACT standards unable effectively to evaluate whether a source's response to an alleged SSM event supported that source's claim that its exceedance of emission standards was caused by the SSM event. For this reason as well, EPA's proposal would render MACT standards overly vague and unenforceable.

Paradoxically, EPA appears to indicate that even though failure to follow an SSM plan during SSM is not a violation, a source could use the fact that it did follow the plan as a defense. 70 Fed. Reg. at 43994. Thus, the agency apparently seeks to create a system in which the SSM plan creates a shield from liability for exceeding emission standards but does not establish any corresponding liability.

III. EPA HAS FAILED TO COMPLY WITH EXECUTIVE ORDERS ON ENVIRONMENTAL JUSTICE AND CHILDREN'S HEALTH.

The Executive Order on Environmental Justice requires EPA to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States" Exec. Order 12898, Federal Actions To Address Environmental Injustice In Minority Populations And Low Income Populations (1994). As EPA is well aware, communities with minority and low income populations are located disproportionately near the major sources of hazardous air pollutants affected by the agency's general provisions and thus by the proposal at issue here. These communities will be adversely affected by any proposal that excuses sources of hazardous air pollution from complying with their SSM plans during SSM events, eliminates the need for review and approval of SSM plans and SSM plan revisions by the permitting authority, and blocks public access to the contents of SSM plans. EPA failed to consider or discuss these effects of its proposal, and thus failed to implement the Executive Order.

Where a planned EPA action is determined to be economically significant and concerns an environmental health of safety risk that EPA has reason to believe may have a disproportionate effect on children, the agency "must evaluate the environmental health and safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency." 70 Fed. Reg. at 43997 (citing Exec Order 13045, Protection of Children From Environmental Health And Safety Risks). Although EPA at least acknowledged this Executive Order — unlike the Order on Environmental Justice — the agency failed to comply with it. EPA argued that it does not have to evaluate the Executive Order on Children's Health unless it is engaged in regulatory actions that are based on health or safety risks. 70 Fed. Reg. at 43997. The agency's interpretation is both wrong and irresponsible. Nothing in the language of the Order indicates that it applies only to such regulatory activities. To the contrary, the Order applies to any action that EPA has reason to believe "may have a disproportionate effect on children." *Id.* As EPA is well aware hazardous air pollutants have a disproportionate effect on children, whose bodies are especially at risk to all toxins, all inhaled pollution, and especially air toxins that affect neurological development. As EPA is also aware enormous quantities of hazardous air pollutants are released during periods of SSM. Thus, EPA has ample reason to believe that <u>any</u> rule affecting SSM requirements — and especially the proposed rule, which would rob the public of any assurance that sources are meeting their legal obligations during SSM — will have a disproportionate effect on children. EPA's failure to implement the Executive Order on Children's Health shows a contempt for the order and an appalling disregard for the agency's mission of protecting public health and the environment.

ATTACHMENTS

A West Louisville Air Toxics Study Risk Assessment Final Report, Appendices and Errata

B Gaming the System: How Off-the-Books Industrial Upset Emissions Cheat the Public Out of Clean Air

C State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown

D. Spreadsheet detailing SSM emissions from Dow Chemical Freeport, Texas

E. Spreadsheet detailing SSM emissions from BASF --- from – to –

F. U.S. Chemical Safety and Hazard Investigation Board, "After Katrina: Precautions Needed During Oil and Chemical Facility Startup"

G. U.S. Chemical Safety and Hazard Investigation Board, "SCB Issues Preliminary Findings in Toxic Gas Release at MFG Chemical"

H Letter of July 29, 2003 from Pew to Horinko