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March 5, 2020

Mr. Will Stone
Environmental Protection Agency
Region 7 Office
Air Quality Planning Branch
11201 Renner Boulevard
Lenexa, Kansas 66219

**Re: Docket ID No. EPA–R07–OAR–2020–0014**

Dear Mr. Stone:

On behalf of the Center for Biological Diversity and the Center for Environmental Health, Air Law for All, Ltd. submits the following comments to Docket No. EPA-R07-OAR-2020-0014 in opposition to EPA's proposed action, "Air Plan Approval; Missouri; Control of Emissions From Production of Pesticides and Herbicides," 85 FR 6123 (Feb. 4, 2020).

## I. INTRODUCTION

The Center for Biological Diversity's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health through science, policy, and environmental law. Based on the understanding that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked, the Center for Biological Diversity is working to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for a healthy, livable future for all of us.

Since 1996, the Center for Environmental Health has protected people from harmful chemicals in air, water, food, and consumer products. Driven by a strategic, science-first approach, CEH eliminates prevalent, but often little-known threats to children's and families' health, and strengthens the political and economic case for environmentally

sound business practices.

## II. MISSOURI'S RULE DOES NOT REQUIRE USE OF A CONTROL DEVICE FOR ALL VOC EMISSIONS

Section 10 CSR 10-2.320(1), *Applicability*, as proposed for revision, makes 10 CSR 10-2.320, *Control of Emissions from Production of Pesticides and Herbicides*, applicable in Clay, Jackson, and Platte Counties to pesticide or herbicide manufacturing installations (with certain exceptions) with an uncontrolled potential to emit equal to or greater than 250 kilograms/day or 100 tons/year of volatile organic compounds ("VOC").

Section 10 CSR 10-2.320(3), *General Provisions*, as proposed for revision, provides:

> All source operations in installations affected by this regulation that are venting emissions to VOC emission control devices as of November 23, 1987 shall be required to continue venting emissions to these control devices and these emissions shall be controlled to the extent required in this section. Any pesticide or herbicide manufacturing installation VOC emissions control devices subject to this regulation must achieve an instantaneous VOC destruction or removal efficiency greater than or equal to ninety-nine percent (99%).

The issue with this language is that, for sources that started operation after November 23, 1987, it does not state that all VOC emissions from the subject manufacturing installations must be routed to a VOC emissions control device. It just says that if there is a VOC emissions control device, it must achieve the specified removal efficiency. We assume the intent of the rule was to require the use of a VOC emissions control device for all VOC emissions (or perhaps all VOC emissions except fugitive emissions) from sources that started operations after November 23, 1987.[1] However, the plain language of the rule does not clearly state that. Assuming that intent, the state must revise the rule to reflect the state's intent.

The General Preamble gives four principles for state implementation plan ("SIP") control measures, including emission limitations. In particular, "[t]he second principle is that the measures be enforceable. Measures are enforceable when they are duly adopted, and specify *clear, unambiguous*, and measurable requirements."[2] The revised language does not set forth clear and unambiguous requirements to rout VOC emissions to a VOC emissions control device. EPA must disapprove the submitted revision.

[1] The rule would be irrational otherwise. A source that started operations before November 23, 1987 could simply shutdown, remove its control devices, and restart, perhaps under a different owner, and no longer be subject to the requirement for 99% removal efficiency. And there is no good reason to treat new sources less stringently than existing sources, as new sources can be designed to incorporate VOC emission control devices. An irrational rule is likely, under Missouri administrative law, beyond the authority of the Department of Natural Resources, and therefore under section 110(a)(2)(E)(i), 42 U.S.C. § 7410(a)(2)(E)(i), and 40 C.F.R. § 51.210(a), cannot be approved into the SIP.

[2] "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 57 FR 13498, 13566 (Apr. 16, 1992) (emphasis added).

## III. Missouri's Rule Has Inadequate Monitoring, Recordkeeping, and Reporting

For any SIP emission limitation to be enforceable, the SIP must specify adequate monitoring, recordkeeping, and reporting ("MRR") requirements. These requirements for SIPs are set forth in subpart K, Source Surveillance, of 40 C.F.R. part 51.

To determine compliance with the 99% removal efficiency requirement, Missouri's rule specifies Test Method 25 from 40 C.F.R. part 60, Appendix A. However, for VOC control devices other than thermal oxidizers the rule does not require periodic testing of the device, and in the particular case of thermal oxidizers, relies on illegal director discretion for periodic testing. For VOC control devices other than thermal oxidizers, the rule relies on illegal director discretion to specify recordkeeping requirements. Finally, the rule does not require periodic reporting of records to the state, contrary to subpart K.

### A. EPA's Rules for Stationary Source Surveillance

Section 110(a)(2)(F) of the Clean Air Act ("Act") requires each state implementation plan ("SIP") to:

> *require, as may be prescribed by the Administrator*— (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection.[3]

Subpart K, "Source Surveillance," of 40 C.F.R. part 51, contains portions of EPA's rules to address section 110(a)(2)(F). Section 51.210 states the purpose of subpart K:

> Each plan must provide for monitoring the status of compliance with any rules and regulations that set forth any portion of the control strategy. Specifically, the plan must meet the requirements of this subpart.[4]

Thus, the requirements of subpart K address compliance with (and therefore also enforcement of) the control strategy. With respect to section 110(a)(2)(F)(i), in relevant part section 51.212 provides:

> The plan must provide for (a) Periodic testing and inspection of stationary sources; and ….. (c) Enforceable test methods for each emission limit specified in the plan.[5]

With respect to section 110(a)(2)(F)(ii), section 51.211 provides:

[3] 42 U.S.C. § 7410(a)(2)(F) (emphasis added).
[4] 40 C.F.R. § 51.210.
[5] 40 C.F.R. § 51.212(a), (c).

> The plan must provide for legally enforceable procedures for requiring owners or operators of stationary sources to maintain records of and periodically report to the State— (a) Information on the nature and amount of emissions from the stationary sources; and (b) Other information as may be necessary to enable the State to determine whether the sources are in compliance with applicable portions of the control strategy.[6]

### B. Unbounded Director Discretion is Contrary to the Act

"Director discretion" is the ability of the state director to unilaterally change SIP requirements without going through the SIP revision process, that is, submitting the change to EPA for approval.[7] "Unbounded" director discretion refers to insufficient constraints on the exercise of that discretion so that it is not possible to

> ascertain in advance, at the time of approving the SIP provision, how the exercise of that discretion to alter the SIP emission limitations for a source could affect compliance with other [Act] requirements. If the provision includes director's discretion that could result in violation of any other CAA requirement for SIPs, then the EPA cannot approve the provision consistent with the requirements of section 110(k)(3) and section 110(l).[8]

#### 1. *Section 110(i) Prohibits Unbounded Director Discretion*

With certain exceptions not applicable here, section 110(i) prohibits states from "modifying any requirement of an applicable implementation plan with respect to a stationary source" without going through the SIP revision process.[9] The Missouri rule contains requirements with respect to stationary sources and therefore falls under section 110(i).

Section 110(i) was added in the 1977 Amendments:

> [T]o confirm the correctness of the Supreme Court's opinion in the Train case. If a State variance or other delaying action will not prevent or interfere with the timely attainment and maintenance of the national ambient standards or with the policy of prevention of significant deterioration required by section 101(b) of the act, and the Administrator so determines, then such a variance may be

[6] 40 C.F.R. § 51.211. Subpart A, Air Emissions Reporting Requirements, contains other requirements for reporting of stationary (and other) source emissions, for purposes such as developing attainment plans, but Subpart A's requirements do not replace Subpart K's requirements, which are focused on compliance with and enforcement of the SIP.

[7] EPA has sometimes used a narrower definition that applies only to a control measure or emission limitation, and not the ancillary but necessary MRR requirements. "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," 80 FR 33840, 33842 (June 12, 2015). However, the principles that make unbounded director discretion illegal for an emission limitation apply equally to unbounded director discretion for MRR requirements.

[8] *Id.* at 33918.

[9] 42 U.S.C. § 7410(i).

> treated as a plan revision and approved by the Administrator under section 110(a)(3) of the act.[10]

Thus, a key consideration for Congress in adding section 110(i) was non-interference with attainment and maintenance of the NAAQS. Unbounded director discretion could interfere with attainment and maintenance of the NAAQS by allowing a state to replace a requirement that EPA had approved as consistent with attainment and maintenance of the NAAQS by one that EPA has no chance to review.[11]

The 1990 Amendments moved the SIP revision process from section 110(a)(3)(A) to section 110(k)(6).[12] This left the reference in section 110(i) to section 110(a)(3) dangling; however, EPA has since properly continued to interpret section 110(i) to refer to the SIP revision process and to prohibit modification of stationary source requirements outside the SIP process.[13]

EPA's post-1990 interpretation is correct: there is no indication in the legislative history of the 1990 Amendments that EPA sought to narrow or abrogate this fundamental requirement when EPA moved the processing requirements for SIP submittals into section 110(k). Furthermore, while some substantive provisions remain in section 110(a)(3), section 110(a)(3) no longer contains the process for revising SIPs. Therefore, if section 110(i) were read strictly to only refer to section 110(a)(3), and not to the SIP revision process in section 110(k), states could never revise their SIPs with respect to stationary sources except for some limited circumstances. Thus, Congress' failure to update the reference must be understood as a mere scrivener's error.[14]

### *2. SIP Revisions Must Be Reviewed by EPA Under the Standards in Section 110(l)*

Section 110(l) provides in relevant part:

> The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and

[10] H.R. Rep. 95-294 57; *see also* S. Rep. 95-127 45. While *Train v. NRDC*, 421 U.S. 60 (1975), concerned the proper procedures for variances from a SIP emission limitation, section 110(i) is not so limited: it applies to any requirement with respect to stationary sources.
[11] The 1977 version of the Act did not have the separate standard for SIP revision review now set forth in section 110(l). Instead, section 110(a)(3)(A) required revisions to meet the standards in section 110(a)(2), including the requirements to attain and maintain the NAAQS in sections 110(a)(2)(A) and 110(a)(2)(B), respectively. *See* 1 Legislative History of the Clean Air Act Amendments of 1977, A Continuation of the Clean Air Act Amendments of 1970, Together with a Section-by-Section Index, ("1977 Legislative History") 23-26 (Environmental Policy Division, Congressional Research Service, Aug. 1978).
[12] *Compare* 1 1977 Legislative History 26 (1978) *with* 1 Legislative History of the Clean Air Act Amendments of 1990, Together with a Section-by-Section Index 34, 40-41 (Environment and Natural Resources Policy Division, Congressional Research Service, Nov. 1993).
[13] *See, e.g.*, 63 FR 51325, 51326/2-3 (Sept. 25, 1998); 65 FR 80329, 80330/3-331/1 (Dec. 21, 2000); 74 FR 51795, 51795/3 (Oct. 8, 2009); 80 FR 33840, 33918/3 (June 12, 2015).
[14] *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1039-44 (D.C. Cir. 2001).

> reasonable further progress (as defined in section [172 of the Act]), or any other applicable requirement of [the Act].[15]

Section 110(l) is in harmony with Congressional intent for section 110(i): Under section 110(i) changes to SIP requirements for stationary sources must undergo the SIP revision process, which in turn requires EPA to determine that the standards in section 110(l) are met, including non-interference with attainment and maintenance of the NAAQS.[^6]

Unbounded director discretion is thus impermissible for structural reasons: by short-circuiting the SIP revision process, it allows the state to evade application of the standards in section 110(l) to the changes to SIP requirements. Appropriately bounded director discretion, on the other hand, could only be exercised in a way that would be consistent with the requirements of the Act.[16]

For a concrete example, take the following provision:

> To determine compliance with the emission limitation, the owner or operator of the source must use a test method that has been approved by the state director.

In this case, the test method may not have been reviewed by EPA and may not be appropriate for determining compliance. On the other hand, suppose the provision stated:

> To determine compliance with the emission limitation, the owner or operator of the source must use a test method that has been approved by the state director and by EPA.

This may be appropriately bounded director discretion, as EPA has in some context reviewed the test method to ensure that it accurately measures the relevant emissions or other quantities.

### *3. Unbounded Director Discretion Interferes with Enforceability*

Section 110(a)(2)(A) requires SIP emission limitations and control measures to be enforceable.[17] The structure of the Act supports this conclusion.[18] Under subpart K of 40 C.F.R. part 51, MRR requirements must also be enforceable.[19] In addition to potential interference with attainment and maintenance of the NAAQS, unbounded director discretion can interfere with the enforceability of SIP requirements in two ways. First, the specific language used by the state to define the alternative requirement may not be sufficiently clear and unambiguous to be practically enforceable.[20] On the other hand, if the language is submitted to EPA through the SIP revision process, then EPA would necessarily review the language for enforceability.

[15] 42 U.S.C. § 7410(l).
[16] 80 FR at 33918.
[17] 42 U.S.C. § 7410(a)(2)(A).
[18] *Committee for a Better Arvin v. U.S. EPA,* 786 F.3d 1169, 1176-77 (9th Cir. 2015).
[19] *See supra*, section III.A.
[20] *See supra*, section II, quoting 57 FR at 13566 .

Second, requirements created under a SIP director discretion provision are not clearly federally enforceable, especially by citizens. Section 113 allows EPA to enforce against "any requirement or prohibition of an applicable implementation plan or permit" and any "requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under [the Act]."[21] It is unclear–and it appears neither EPA nor the courts have stated–whether an alternative requirement issued under an approved director discretion provision falls within this language. Similar concerns are present for citizen suits under section 304.[22]

### C. Missouri's Pesticide and Herbicide Rule Does Not Require Periodic Testing

As described above, subpart K requires the SIP to provide for periodic testing of stationary sources, using enforceable test methods for each emission limit specified in the plan.[23] Missouri's rule applies to "pesticide or herbicide manufacturing installations";[24] in turn "installation" is defined in Missouri's rules in similar fashion to the definition of "stationary source" in the prevention of significant deterioration ("PSD") program.[25] Thus, pesticide and herbicide manufacturing installations subject to Missouri's rule are stationary sources within the meaning of subpart K.

Missouri's rule does specify the use of an appropriate test method: Method 25, Appendix A, 40 C.F.R. part 60. However, for thermal oxidizers, the rule provides that the "test results are subject to periodic confirmation at the discretion of the director."[26] This is an example of unbounded director discretion: there is simply no way to "ascertain in advance" that the periodic confirmation–if any–chosen by the director will be sufficient to ensure the thermal oxidizers will continuously operate at the specified removal efficiency of 99%.

For VOC control devices other than thermal oxidizers, there is no requirement whatsoever for periodic testing. The reference to periodic testing–although it relies on illegal director discretion–for thermal oxidizers tends to confirm the intent to not require periodic testing for other VOC control devices.

As a result, the rule fails to meet the requirements for periodic testing in subpart K and should therefore be disapproved.

### D. Missouri's Pesticide and Herbicide Rule Has Inadequate Recordkeeping and Reporting Requirements

As stated above,[27] section 51.211 provides:

[21] 42 U.S.C. §§ 7413(a)(1), (a)(3), (b)(1), (b)(2).
[22] *See* 42 U.S.C. 7604(f) (defining the scope of citizen suit actions).
[23] *Supra,* section III.A.
[24] 10 CSR 10-2.320(1)(B).
[25] *Compare* 10 CSR 10-6(I)17.B *with* 40 C.F.R. § 51.166(b)(5), (b)(6).
[26] 10 CSR 10-2.320(4)(B)(2).
[27] *Supra*, section III.A

> The plan must provide for legally enforceable procedures for requiring owners or operators of stationary sources to maintain records of and periodically report to the State— (a) Information on the nature and amount of emissions from the stationary sources; and (b) Other information as may be necessary to enable the State to determine whether the sources are in compliance with applicable portions of the control strategy.[28]

As explained above, the pesticide and herbicide manufacturing installations are "stationary sources" within the meaning of section 51.211. "Control strategy" is a defined term and includes "emission limitations."[29] In turn, "emission limitation" is defined as:

> a requirement established by a State, local government, or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirements which limit the level of opacity, prescribe equipment, set fuel specifications, or prescribe operation or maintenance procedures for a source to assure continuous emission reduction.[30]

A 99% removal efficiency for VOC control device is a requirement that limits the quantity or rate of emissions of VOC; alternatively it prescribes equipment. Thus, the rule's standard for removal efficiency is an "emission limitation" and part of the "control strategy." Therefore the SIP must "provide for legally enforceable procedures requiring owners or operators" of pesticide and herbicide manufacturing installations "to maintain records of and periodically report to the State … information as may be necessary to enable the State to determine whether" the installations are in compliance with the 99% removal efficiency requirement.

### *1. The Provisions for Recordkeeping Are Inadequate*

For VOC control devices other than thermal oxidizers, the rule provides:

> Owners or operators using other control technology shall maintain records of all operating parameters and routine or unscheduled maintenance and repairs of air pollution control equipment as may be required by the director to determine compliance.[31]

This is unbounded director discretion. There is no way to "ascertain in advance" that the records required by the director–if any–will be sufficient to determine compliance with the 99% removal efficiency emission limitation.

Furthermore, the provision does not specify whether the records are to be kept on a daily basis. Presumably Missouri requires control of VOCs to address attainment and maintenance of the ozone NAAQS, and potentially the fine particulate matter ("PM2.5")

[28] 40 C.F.R. § 51.211.
[29] 40 C.F.R. § 51.100(n).
[30] *Id.* § 51.100(z).
[31] 10 CSR 10-2.320(4)(B).

NAAQS as well. As the ozone NAAQS is a short-term standard (as is the daily PM2.5 NAAQS), compliance should be assessed daily.[32]

The provisions for recordkeeping for thermal oxidizers are somewhat more specific, but still do not specify whether the records are to be kept on a daily basis, and still rely on unbounded director discretion for operating parameters other than combustion chamber temperature and residence time.[33] EPA must therefore disapprove the rule with respect to recordkeeping requirements.

### 2. *Missouri's Pesticide and Herbicide Rule Does Not Require Periodic Reporting*

The rule provides:

> Records of all information required in subsections (4)(A) and (B) shall be kept for a period of not less than two (2) years and all these records shall be made available to the director upon his/her request.[34]

Absent a commitment by the director to periodically request the records, this does not provide for periodic reporting to the state as required by subpart K.[35] EPA must disapprove the rule with respect to reporting requirements.

## IV. THE ABOVE ISSUES ARE WITHIN THE SCOPE OF THIS RULEMAKING

EPA may try to respond that the submittal merely reorganizes the existing rule, which already contained these flaws, and therefore the issues are outside the scope of EPA's proposal. This fails for three reasons:

1. EPA did not state in its proposal that the submittal was merely a reorganization and EPA was not reopening any substantive issues, thereby inviting comment on these issues;
2. EPA itself submitted substantive comments during the state process;[36] and
3. The submittal letter from the Department of Natural Resources states the submittal would "replace" the currently approved rule.[37]

EPA may even reopen a completely unchanged provision for comment when it holds out the unchanged provision as a proposed regulation and invites comment on its substance.[38] Here, the relevant provisions have been reorganized and are proposed to be

[32] Air Quality Management Division, Office of Air Quality Planning and Standards, "Issues Relating to VOC Regulation Cutpoints, Deviations, and Deficiencies," ("VOC Blue Book") 2-24 (May 25, 1988).
[33] 10 CSR 10-2.320(4)(A).
[34] 10 CSR 10-2.320(4)(C).
[35] 40 C.F.R. § 51.211.
[36] EPA-R07-OAR-2020-0014-0002 at 19 (reprinting Missouri Register, Vol. 43, No. 23 at 3609 (Dec. 3, 2018)).
[37] *Id.* at 2.
[38] *Sierra Club v. EPA*, 551 F.3d 1019, 1024 (D.C. Cir. 2008).

incorporated by reference into the Code of Federal Regulations, and EPA has invited comment on them.

## V. CONCLUSION

EPA must disapprove the submitted revisions to 10 CSR 10-2.320, *Control of Emissions from Production of Pesticides and Herbicides*, because the replacement rule does not clearly state the requirements for use of a VOC emissions control device. EPA must also disapprove the submittal because the replacement rule contains inadequate requirements for monitoring, recordkeeping, and reporting.

Respectfully,

Steve Odendahl
Manager
Air Law for All, Ltd.