May 13, 2013

U.S. Environmental Protection Agency
EPA West (Air Docket)
1200 Pennsylvania Avenue, N.W.
Mail Code 6102T
Washington, DC 20460

Attention Docket ID No. EPA-HQ-OAR-2012-0322

To Whom It May Concern:

The North Carolina Department of Environment and Natural Resources Division of Air Quality (NCDAQ) submits the following comments on EPA’s proposed rule, “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.” North Carolina was one of the thirty-six states identified as having a deficiency with regard to how excess emissions that occur during startup, shutdown or malfunction (SSM) are treated. The North Carolina rules cited in the proposal were approved by the EPA into our State Implementation Plan (SIP) in 1997. The NCDAQ was surprised by the proposed action since Congress has not amended the Clean Air Act for more than twenty years, and yet EPA now finds the rules invalidate North Carolina’s SIP. After reviewing the proposed action, NCDAQ opposes the SIP Call as it relates to the SIP for North Carolina. The EPA has not made the required demonstration showing that North Carolina’s SIP is substantially inadequate or is inconsistent with the CAA.

The NCDAQ has a long and successful history of implementing the air quality program in North Carolina. Currently all national ambient air quality standards (NAAQS) are being achieved in the state except for the 2008 ozone standard. Only two areas of North Carolina are violating the ozone standard, and NCDAQ is actively working to bring these areas into compliance with the health based standard. The SSM provisions in the SIP have been, and continue to be, part of an effective overall strategy to achieve and maintain ambient air quality that meets the NAAQS. The EPA’s proposed action takes one piece of a complex regulatory program and, without any justification, makes a conclusory finding that North Carolina’s SSM provision is inconsistent with the CAA.

The proposed rule fails to meet the demonstration that is required under the Clean Air Act section 110(k)(5). Nothing in the proposed rule has demonstrated that North Carolina’s SIP is substantially inadequate to attain or maintain the relevant NAAQS or to otherwise comply with any requirement of the CAA. The “justification” not only fails to meet the legal standard
sufficient to support a SIP Call, the justification is based on an incomplete understanding of North Carolina’s air quality program. For example EPA entirely ignored other provisions in North Carolina’s air pollution rules that help provide assurances that air quality and emission standards will be achieved. For example, 15A NCAC 02D .0502 reads, “The purpose of the emission control standards set out in this Section is to establish maximum limits on the rate of emission of air contaminants into the atmosphere. All sources shall be provided with the maximum feasible control”. In addition, the North Carolina rules require sources to operate in a manner that does not cause the ambient air quality standards to be exceeded at any point beyond the premises on which the source is located (15A NCAC 02D .0501(c)). The EPA’s failure to consider the entirety of North Carolina’s air quality program is compounded by EPA’s improper interpretation of “emissions limitation” and “emission standard” under CAA section 302(k). Nothing in the CAA or case law supports EPA’s apparent interpretation that an emissions standard is limited to a numerical standard that applies at all times. Rather, the CAA allows, and states like North Carolina have been highly successful in developing, SIP programs that require continual adherence to numerical emission limits and, when necessary, work practice standards. The EPA has long recognized that not all numerical standards are achievable during all phases of a unit’s operation, since the agency has included SSM provisions in certain New Source Performance Standards (NSPS) and Maximum Achievable Control Technology (MACT) standards. The NCDAQ questions why such a practice is acceptable under the CAA for federal rules, but not for the state rules. Not only did EPA design NSPS and MACT rules that allow for a combination of numerical and work practice standards, the EPA also approved North Carolina’s SIP that relied on those same NSPS provisions. In repeatedly approving North Carolina’s SIP provisions, the EPA affirmatively found that North Carolina’s reliance on NSPS technology standards, including the SSM provisions contained in those rules, to achieve and maintain compliance with the health-based NAAQS was justified. See 15A NCAC 2D .0503, .0504, .0516. The SSM provisions in the North Carolina SIP were approved many years ago, and it seems that EPA now wants to proceed with a SIP call without following appropriate rulemaking. If EPA believes that the CAA precludes exclusion of SSM excess emission events, then the agency should amend 40 CFR Part 51 to clearly articulate this interpretation.

The NCDAQ believes the EPA should also consider the factors defined in 15A NCAC 2D .0535(c) that the Director must consider to determine if excess emissions are the result of a malfunction. In particular EPA should take into account 15A NCAC 2D .0535(c)(3) and (4), which allow the Director to consider whether “[t]he amount and duration of the excess emissions, including any bypass, have been minimized to the maximum extent practicable” and whether “[a]ll practical steps have been taken to minimize the impact of the excess emissions on ambient air quality.” The NCDAQ is not authorizing SSM excursions indiscriminately. It only allows such excursions based on the exacting seven factors in 15A NCAC 02D .0535(c).

The EPA incorrectly asserted that the SIP Call would not have a significant economic impact on a substantial number of small entities for the purposes of the Regulatory Flexibility Act. The EPA has failed to provide any analysis supporting this conclusion. The EPA should, at a very minimum, include in its economic analysis the cost to North Carolina to revise its rule and subsequently revise all air quality permits in North Carolina that contain the alleged improper SSM provisions.
The EPA incorrectly asserted that North Carolina’s SSM provisions are inconsistent with the CAA because they limit the circumstances under which enforcement can be obtained under CAA section 113 and/or section 304. The EPA approved North Carolina’s air program – including the state developed emission standards, NSPS and MACT emission standards, and general and specific SSM provisions under Section 110 of the CAA. These provisions are currently federally enforceable. Nothing in the existing SIP provisions prohibits or restricts in any way the ability of the EPA and/or a citizen to file an action in federal court seeking enforcement of the SIP provisions. The fact that EPA may not like the provisions that they already approved makes them no less federally enforceable under a citizen suit. The EPA’s recent shift in its interpretation of the CAA and the North Carolina SIP is inconsistent with their 30+ year history of developing rules and approving state SIPs with SSM provisions. As such, EPA is not entitled to any legal or factual deference (e.g. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 124, 140 (1944); and/or Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto Insurance Co., 463 U.S. 29 (1983)).

The NCDAQ believes that the federal/state partnership principles envisioned by Congress when the CAA was enacted are being violated by EPA’s actions. The proposed action is inconsistent with precedent from the U.S. Supreme Court that has confirmed the CAA was designed to allow states to design their air quality programs with limited federal EPA involvement. States rely on EPA to use proper judgment in its discretionary decisions involving MACT and NSPS rules. The EPA should trust states to do the same in SIP rules and give states authority and discretion as the primary implementers of the nation’s air pollution control programs.

North Carolina’s SIP, as a whole, provides the state with effective tools to ensure the NAAQS are preserved. The NCDAQ believes the current SIP does that, with the primary evidence being the state’s successful management of air quality and achievement of the various NAAQS. The EPA has not provided any analysis showing that our current SIP is substantially inadequate to meet the NAAQS or otherwise comply with the CAA, and therefore the proposed SIP Call is not justified.

I trust that these comments will be considered before EPA moves forward with this proposed rule. If EPA finalizes the rule as proposed there is a strong likelihood of protracted litigation that would require expenditures of scarce state and federal resources. These same resources would be better used by working collectively to continue North Carolina’s efforts to achieve and maintain compliance with the NAAQS. If you have questions, please contact me at (919) 707-8430 or Sheila.holman@ncdenr.gov.

Sincerely,

Sheila C. Holman