BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements – Final Rule, 80 Fed. Reg. 12,264 (Mar. 6, 2015)	)	RIN 2060-AR34 EPA-HQ-OAR-2010-0885

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7607(d)(7)(B), Sierra Club, Conservation Law Foundation, Downwinders at Risk, and Physicians for Social Responsibility-Los Angeles ("petitioners") petition the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider the final rule captioned above and published at 80 Fed. Reg. 12,264 (Mar. 6, 2015) ("NFRM" or "final rule"). The grounds for the objections raised in this petition arose after the period for public comment and are of central relevance to the outcome of the rule. The Administrator must therefore "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B).

INTRODUCTION

This petition raises objections to the final rule captioned above. Each objection is "of central relevance to the outcome of the rule," 42 U.S.C. § 7607(d)(7)(B), in that it demonstrates that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 7607(d)(9)(A). With respect to each objection, moreover, the regulatory language and EPA interpretations that render the rule arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law appeared for the first time in the NFRM published on March 6, 2015. 80 Fed. Reg. at 12,288-89, 12,317-18. The Federal Register notice soliciting comment on the rule was published on June 6, 2013, 78 Fed. Reg. 34,178, and the public comment period thereon closed September 4, 2013. *Id.* at 34,178/1. The grounds for the objections raised in this petition thus "arose after the period for public comment." 42 U.S.C. § 7607(d)(7)(B). Because judicial review of the rule is available by the filing of a petition for review within sixty days of the rule's March 6, 2015 publication date – that is, by May 5, 2015 – the grounds for the objections arose "within the time specified for judicial review." *Id.*

OBJECTIONS

I. Interprecursor Offset Substitution

The final rule unlawfully and arbitrarily authorizes interprecursor offsetting[1] (*i.e.*, offsetting of VOC emissions increases by NOx emission decreases, and vice versa) for purposes of meeting the Act's offset requirements for new and modified major sources in ozone nonattainment areas. Provisions authorizing such interprecursor offsetting, and justifications therefor, were added to the rule after the close of the public comment period. Thus, the grounds for our objections arose after the period for public comment, and the raising of those objections during the public comment period was impracticable. *See* 42 U.S.C. § 7607(d)(7)(B). Those objections are of central relevance to the rule, *see id.*, because they go to the core procedural and substantive validity of the interprecursor offsetting provisions of the rule – including the public's opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making.

A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Authorization of Interprecursor Offsetting

Under § 307(d) (which EPA has found applicable to this proceeding), EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3)(C). The same requirement would apply under the Administrative Procedure Act. 5 U.S.C. § 553. Here, EPA unlawfully failed to present the rule authorizing interprecursor offsetting and accompanying rationales to the public for comment. Neither the rule nor the rationale therefor appeared in the rulemaking proposal, nor did EPA otherwise present them to the public for comment. Although the proposal notice contained a very brief reference to the practice of interpollutant offset substitution and the flexibility it can provide, 78 Fed. Reg. at 34,201/2, it did not propose to authorize such substitution or propose any regulatory language on the matter. At the time of the proposal, EPA's rules prohibited interprecursor offsetting except for $PM_{2.5}$, and EPA did not propose any amendment to those prohibitions. 40 C.F.R. § 51.165(a)(11) (2013); 40 C.F.R. Pt. 51, App. S § IV.G.5 (2013).

In the notice of final rulemaking, EPA asserted that the final rule authorizing interprecursor offsetting was a logical outgrowth of the proposal because EPA had issued previous Economic Incentive Program guidance ("EIP Guidance")[2] purportedly allowing for such interprecursor trading, and the proposal purportedly indicated EPA's intent to continue to allow such trading. 80 Fed. Reg. at 12289/1. But the proposal did not cite the referenced guidance as a basis for authorizing such trading, much less assert that EPA intended to codify or follow it. These citations and rationales were presented for the first time in the final rule.[3]

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[1] Throughout this petition, the phrases "interprecursor offsetting," "interprecursor trading," "interpollutant offsetting," "interpollutant offset," and "interpollutant offset substitution" are used interchangeably.

[2] EPA, Improving Air Quality with Economic Incentive Programs (Jan. 2001), *available at* http://www.epa.gov/airquality/advance/pdfs/eipfin.pdf.

[3] A footnote to the notice of final rulemaking also referred the reader to a web link, www.epa.gov/region7/air/nsr/nsrindex.htm, "for additional memoranda and guidance documents." 80 Fed. Reg. at 12,289/1 n.59. Again, the proposal notice did not include this citation as supporting interpollutant offsetting in the

Moreover, contrary to EPA's suggestion, the EIP Guidance did not override the bar on interprecursor trading in EPA's rules. To the contrary, the EIP Guidance made clear that it is "non-binding policy," non-final action and does not supersede the statute or EPA's NSR rules. EIP Guidance at 5, 10, 12. Among other things, the EIP Guidance specifically stated as follows:

> [T]his EIP guidance **does not supersede the established requirements of the *new source Review* (NSR) program**. The CAA and the EPA's rules and guidance describe the kinds of emissions reductions that may be used for *NSR offsets* and *NSR netting* in a number of ways that are different from the requirements for generating and using EIP emissions reductions that are set forth in this guidance. **The NSR requirements continue, and they may not be lifted by the State's adoption of an EIP or by the approval of that EIP into a SIP.**

Id. at 10 (emphasis added). The EIP Guidance reiterated the above point at page 254.

Nor did EPA's proposal otherwise state an intent to adopt a rule authorizing interprecursor offsetting. The proposal stated only the following:

> b. Interpollutant Offset Substitution – States can make it easier for new or modified major sources to satisfy the offset requirements in an area by establishing interpollutant offset substitution provisions. Such provisions create additional flexibility in meeting offset requirements by allowing NOx emissions reductions to satisfy VOC offset requirements and vice versa. The appropriate exchange rate for substitution is determined by the state for each area consistent with the attainment needs of the area and must be approved by the EPA.

78 Fed. Reg. at 34,201/2. At most, the above text merely describes the flexibility that can be provided by interpollutant offset substitution provisions, and existing practices regarding determination of the exchange rate. Nowhere does the text state that EPA is actually proposing to amend its rules so as to authorize such offset substitutions.

Nor did the proposal contain any of the actual rule amendment language included in the final rule. The final rule amended 40 C.F.R. §51.165(a)(11) to read as follows:

> (11) The plan shall require that in meeting the emissions offset requirements of paragraph (a)(3) of this section, the emissions offsets obtained shall be for the same regulated NSR pollutant unless interprecursor offsetting is permitted for a particular pollutant as specified in this paragraph.

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proposal, much less propose to codify the memoranda and guidance documents listed on the referenced web page. Moreover, the cited web page is a listing of more than 670 documents on a wide variety of issues relating to the NSR program. EPA did not identify which, if any, of these hundreds of documents purportedly supported its action. Thus, it is absurd for EPA to imply that this web page somehow put the public on notice that EPA intended to codify any particular rule, memoranda or guidance at all, much less a rule authorizing interpollutant offsetting for ozone precursors.

> (i) The plan may allow the offset requirement in paragraph (a)(3) of this section for emissions of the ozone precursors NOX and VOC to be satisfied by offsetting reductions in emissions of either of those precursors, if all other requirements for such offsets are also satisfied.
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> (ii) The plan may allow the offset requirements in paragraph (a)(3) of this section for direct PM2.5 emissions or emissions of precursors of PM2.5 to be satisfied by offsetting reductions in direct PM2.5 emissions or emissions of any PM2.5 precursor identified under paragraph (a)(1)(xxxvii)(C) of this section if such offsets comply with the interprecursor trading hierarchy and ratio established in the approved plan for a particular nonattainment area.

80 Fed. Reg. at 12,318/1-2 (new language underlined).

An amendment identical in substance was adopted to rule language in 40 C.F.R. Part 51 Appendix S §IV.G.5. *Id.* at 12,317/3 Not only was the new regulatory language completely absent from the proposal, but also the proposal nowhere hinted at vagueness and potential breadth of the language ultimately adopted. As phrased, the new language places no explicit restrictions on interprecursor offsetting other than to require that "all other requirements for such offsets are also satisfied." *Id.* at 12,317/3, 13,318/1. The rule language does not explain what "other requirements" are being referred to: Are they requirements for offsets generally – whether interprecursor or not; provisions in EPA's EIP Guidance document; requirements in other guidance documents or memoranda; or some other requirements? The rule language does not answer these questions. To the extent EPA intends to limit interprecursor offsetting to situations where the ratios of VOC to NOx reductions (or vice versa) assure equivalent or greater ozone reduction benefits, the rule text nowhere so states. To the extent EPA intended to incorporate its EIP Guidance on such offsetting, the rule text itself also does not so state.[4]

Had EPA proposed the above rule language, petitioners and others would have had the opportunity to raise these and other concerns with the language. They would also have had the opportunity to argue (as petitioners do below), that the trading as authorized by the rule language is unlawful and arbitrary. As things stand now, however, the specific rule language that EPA ultimately adopted and the agency's stated rationale therefor has never been subjected to public notice and comment as required by the Act.

For all the foregoing reasons, EPA committed a procedural violation (*see* 42 U.S.C. § 7607(d)(9)(D)) by failing to solicit public comment on its authorization of interprecursor offsetting and on specific rule amendment language to facilitate such offsetting. That procedural

[4] The preamble to the final rule asserts that the changes in the regulatory text "are intended to clarify that interprecursor trading continues to be an option for the ozone precursors VOC and NOx as long as such trades are consistent with existing policy and legal requirements." 80 Fed. Reg. at 12,289/1. But the rule text contains no reference to requiring consistency with "existing policy and legal requirements" – it refers only to "all other requirements" – and, in any event, EPA does not explain what it views the applicable "policy requirements" to be. To the extent EPA means to refer to the EIP Guidance, the rule does not so state, and in any case that document by its terms does not set out "requirements" because it is a non-final, non-binding document. To the extent EPA is referring to other policy statements it may have made on interprecursor trading, the rule does not identify them.

violation meets the criteria set forth in § 307(d)(9)(D) for reversal based on procedural violations. First, EPA's procedural dereliction is arbitrary and capricious. *See id.* § 7607(d)(9)(D)(i). The agency has adopted a final rule authorizing interprecursor offsetting that was not proposed at the time of public notice and comment. EPA has further adopted final regulatory language that was never subjected to public notice and comment, and that differs materially from the pre-existing regulatory language.

Second, via the present petition, petitioners have satisfied the requirements of § 307(d). *See id.* § 7607(d)(9)(D)(ii).

Third, the challenged errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See id.* § 7607(d)(8), *cited in id.* § 7607(d)(9)(D)(iii). Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below – objections that address the lack of statutory basis for the challenged provisions, and those provisions' inconsistency with fundamental principles of reasoned agency decision-making.

B. EPA's Authorization of Interpollutant Offsetting is Unlawful and Arbitrary

The Act unambiguously bars the interprecursor offset trading authorized by EPA's rule. Section 173(c) of the Act provides as follows:

> (c) Offsets. – (1) The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions **of such air pollutant** from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if (A) the other area has an equal or higher nonattainment classification than the area in which the source is located and (B) emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located. Such emission reductions shall be, by the time a new or modified source commences operation, in effect and enforceable and shall assure that the total tonnage of increased **emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant** from the same or other sources in the area.

42 U.S.C. § 7503(c) (emphasis added). The statutory language could not be clearer that the offset requirement can only be satisfied by securing reductions in the same pollutant that will be emitted by the new or modified source. Congress was emphatic on this point: a source can comply with the offset requirement "for increased emissions of any air pollutant **only** by obtaining emission reductions **of such air pollutant**." *Id.* (emphasis added). And there must be assurance that "increased **emissions of the air pollutant**…**shall be offset** by an equal or greater reduction…**in the actual emissions of such air pollutant**…." *Id.* (emphasis added). There is

simply no way that this language can be read as allowing the offset requirement for an air pollutant to be satisfied by anything other than reductions in actual emissions of that same air pollutant.

The Act's ozone-specific provisions likewise make clear that offsetting emission reductions must be of the same pollutant whose emissions are being offset. For example, section 182(a)(4), governing SIP requirements for marginal ozone nonattainment areas, states:

> (4) General offset requirement. – For purposes of satisfying the emission offset requirements of this part, the ratio of **total emission reductions of volatile organic** compounds **to total increased emissions of such air pollutant** shall be at least 1.1 to 1.

42 U.S.C. § 7511a(a)(4) (emphasis added). Pertinent language governing offset requirements for moderate, serious, severe, and extreme areas is substantively identical to the above. *Id.* §§ 7511a(b)(5), 7511a(c)(10), 7511a(d)(2), 7511a(e)(1). In each case, the statute specifies that the offsets to be obtained for increased emissions of an air pollutant must consist of emission reductions "of such air pollutant." Other provisions of the Act relating to NSR offsets likewise require that emissions increases subject to the offset requirement must be offset by emission reductions for the same pollutant. *E.g.*, *id.* §§ 7511a(c)(7), 7511a(c)(8), 7511a(e)(2).

Where Congress has intended to allow substitution of NOx reductions for VOC reductions, it has expressly said so. For 3% annual reasonable further progress plans in serious and above ozone nonattainment areas, section 182(c)(2)(C) of the Act expressly authorizes EPA to provide for such substitution under limited circumstances. *Id.* § 7511a(c)(2)(C). It is therefore particularly telling that Congress provided no such substitution authority for the purpose of satisfying the Act's nonattainment NSR offset requirement. Indeed, EPA itself has cited the substitution authority in § 182(c)(2)(C) as grounds for concluding that EPA does not have discretion to authorize substitution in other circumstances. EPA, Response to Comments on Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements at 188, Feb. 13, 2015, EPA-HQ-OAR-2010-0885-0191 ("RTC").

EPA's final action authorizing interprecursor offsetting also violates the Act's antibacksliding requirements. The rule allows construction of major new sources and modifications under circumstances that were not previously allowed under EPA's rules, and allows increased emissions of a given ozone precursor that are not offset by greater reductions in emissions of that pollutant as required by the Act. The result is to unlawfully and arbitrarily authorize controls for that pollutant that are less stringent than required under the pre-existing NAAQS.

Even if they were not otherwise flatly barred by the Act, EPA's authorization of interprecursor offsetting in the final rule is unlawfully and arbitrarily vague and overbroad. Under the final rule, a SIP "may allow the offset requirement…for emissions of the ozone precursors NOx and VOC to be satisfied by offsetting reductions in emissions of either of those precursors, if all other requirements for such offsets are also satisfied." 80 Fed. Reg. at 12,317/3,

12,318/1. The rule text itself fails to identify any specific requirements for or limitations on such offsetting. For example, the rule text does not specify limitations on setting the ratio of NOx to VOC reductions for such offsetting, and indeed EPA expressly refused to state any such limitations in responding to comments. Thus, states and sources may argue that the rule allows states discretion to set whatever ratios they deem reasonable, even if they result in higher ozone levels than would have been allowed in the absence of such substitution. Such an outcome would arbitrarily flout the purposes of nonattainment NSR. The preamble to the final rule cites the EIP Guidance, but as noted above, that Guidance is by its terms nonbinding and is not cited in the rule text. Moreover, the EIP Guidance is unlawful and arbitrary for reasons including, but not limited to the following:

- The EIP Guidance purports to allow inter-precursor trading if the state shows "that anticipated trades will either reduce emissions, or not increase emissions." EIP Guidance at 243. That authorization conflicts with the Act's offset requirements for ozone nonattainment areas, which expressly require that emissions increases be offset by *greater* reductions in emissions: It is not enough to merely avoid a net increase in emissions. 42 U.S.C. §§ 7511a(b)(5), 7511a(c)(10), 7511a(d)(2), 7511a(e)(1). Further, the above-quoted language from the Guidance fails to comport with the Act's requirement that offsets assure that – by the time the new source is to commence operation – total emissions are sufficiently less than emissions prior to the application for the NSR permit so as to represent reasonable further progress. *Id.* §7503(a)(1)(A). Again, it is not enough to merely require a showing that emissions will not increase.

- The EIP Guidance further states that the "best way" to determine if a plan will reduce emissions or not increase emissions is by using air quality modeling. EIP Guidance 243. The Guidance goes on to say, however, that air quality modeling for individual ozone interprecursor trades is not required if the state includes provisions in its plan that apply to all ozone interprecursor trades. *Id.* These provisions of the Guidance are not rationally explained or supported. Although modeling is almost certainly essential to determine the relative ozone reduction benefits of VOC versus NOx reductions, it does not demonstrate whether *emissions* will be reduced or stay the same. The latter requires a separate comparison of pre-application emissions with emissions at the time the source will commence operation. Moreover, EPA fails to offer any explanation as to why inclusion of provisions in the state's plan applicable to all ozone interprecursor trades justifies foregoing modeling for individual trades. The Guidance fails to specify what sort of provisions in the state's plan would suffice for this purpose, much less explain how such provisions would be sufficient to ensure that each and every trade will reduce emissions as the Act requires.

- The EIP Guidance says that the state needs to perform modeling to determine whether VOC or NOx reductions are most effective and the correct ratio for inter-precursor trades if the state determines that a trade of one ton of VOC (or NOx) for one ton of NOx (or VOC) does not reduce or maintain ozone levels. *Id.* This statement is facially irrational. EPA does not explain how the state can rationally determine – without doing modeling – that a one for one trading ratio will not reduce or maintain ozone levels. As EPA itself acknowledges, the relationship between these pollutants and ozone formation is complex

such that modeling is essential to determining the impacts of reductions of VOCs versus NOx. Moreover, as noted above, to comply with the Act's offset requirements for ozone precursors, it is plainly not sufficient for a trade to merely maintain ozone levels.

- The EIP Guidance asserts that for certain trades in certain areas, the state may assume a reduction or no change in ozone levels by doing minimal or no additional modeling. The guidance says that additional modeling may not be required for: i) sources using VOC reductions to satisfy NOx emission reduction obligations when the user and generator are both located in the same urbanized area if the state shows the area is VOC limited; and ii) sources using NOx emission reductions to satisfy VOC emission reduction obligations when the user and generator are both located in the same rural area if the state shows that the area is NOx limited. *Id.* at 243-44. EPA fails to provide a reasoned justification for these exceptions. First, EPA fails to explain how a state can show without modeling that an area is VOC limited or NOx limited. Second, EPA fails to explain how the state is to determine without modeling the correct trading ratio in areas that meet the criteria for these exceptions. Nor does EPA explain why the exceptions are justified under the conditions stated.

EPA also fails to rationally explain or justify the process for approving trading ratios. In the proposal notice, EPA asserted: "The appropriate exchange rate for substitution is determined by the state for each area consistent with the attainment needs of the area and must be approved by the EPA." 78 Fed. Reg. at 34,201/2. The final rule contains no such language, and EPA fails to state whether formal EPA approval of exchange rates will or will not be required under the final rule, and if so at what stage of the process.

Finally, as noted in Part I.A. above, the final rule is arbitrarily vague as to what specific requirements apply to interpollutant offsetting. The final rule language authorizes such offsetting "if all other requirements for such offsets are also satisfied," without specifying what those "other requirements" are. The failure to specify the "other requirements" not only renders the rule language itself arbitrarily vague, but also leaves the rule without a rational basis. There is no way to determine, and EPA fails to explain, how the "other requirements" EPA refers to are rationally related to ensuring compliance with the Act and consistency with its purposes.

II. Conclusion

For all the foregoing reasons, EPA must reconsider and withdraw the portions of the final rule authorizing interprecursor offsetting.

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