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Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mail Code 28221T
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Attn: Docket ID No. EPA-HQ-OAR-2014-0616

Re: Comments on the Proposed Rule Entitled "Amendments to Regional Consistency Regulations;" August 19, 2015; 80 *Fed. Reg.* 50250

The American Petroleum Institute ("API")[1] and the Interstate Natural Gas Association of America ("INGAA")[2] are pleased to submit these comments on the proposed rule entitled

[1] API is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. API's more than 625 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 25 million Americans.

[2] INGAA is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA is comprised of 25 members, representing the vast majority of the interstate natural gas transmission pipeline companies in the United States. INGAA's members operate approximately 200,000 miles of pipelines, and serve as an indispensable link between natural gas producers and consumers.

"Amendments to Regional Consistency Regulations," published at 80 Fed. Reg. 50250 (Aug. 19, 2015). The U.S. Environmental Protection Agency's ("EPA's" or "Agency's") proposed revisions to the existing Regional Consistency Regulations, 40 C.F.R., Part 56, are inconsistent with the authority granted to EPA in the Clean Air Act ("CAA" or "Act") § 301(a) and are therefore unlawful and should not be finalized. Congress required EPA to issue regulations that would assure consistency in its national policies and practices and to resolve inconsistencies between EPA regions. By broadly condoning inconsistency, EPA's proposed revisions would do the opposite.

API and INGAA have a strong interest in assuring that EPA's Regional Consistency Regulations promote, and do not detract from, uniform application of nationally applicable policies and interpretations under the CAA. API members own and operate facilities throughout the United States. Many API and INGAA members own and operate facilities in multiple states, and in multiple EPA regions. Assuring national consistency in the interpretation and implementation of CAA requirements is therefore of utmost importance to API and INGAA members.

When EPA interprets and implements applicable requirements differently in different parts of the country, businesses suffer. Inconsistent interpretation and implementation of national requirements present an administrative burden for companies with facilities and operations in different states and different regions. Inconsistency can also create an unlevel commercial playing field. Where regulatory requirements differ from one EPA region to another, some companies can be put at a competitive disadvantage, through no fault of their own.[3]

EPA seeks to ground its proposal in the doctrine of "intercircuit nonacquiescence," which is where an "agency refuses to follow the case law of a court of appeals other than the one that will review its decision."[4] In forty years of CAA jurisprudence, no court has ever supported the proposition that this rather obscure doctrine authorizes EPA to ignore the plain language of § 301(a)(2) of the Act. EPA cannot rely on that doctrine here, where its application conflicts with an express statutory requirement to ensure consistency. "Intercircuit nonacquiescence" promotes the opposite result. Moreover, intercircuit nonacquiescence is fundamentally in conflict with § 307(b)(1) of the Act, through which Congress sought to avoid – not promote – intercircuit disagreement over the meaning of determinations of nationwide scope. In proposing

[3] *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) ("*NEDACAP*").

[4] Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 683 (1989).

to issue these regulations, EPA is acting contrary to those provisions. Recent Supreme Court opinions emphasize the need for EPA to strictly adhere to its obligations under the CAA.[5]

I. CONGRESS RECOGNIZED THE NEED FOR CONSISTENCY IN CLEAN AIR ACT INTERPRETATIONS AND REQUIREMENTS OF NATIONWIDE SCOPE.

When Congress amended the Clean Air Act in 1977, it sought to address a fundamental problem that had arisen since the passage of the Act in 1970. Congress observed problems with "regionalization," where one EPA region had different procedures, policies, practices and legal interpretations from another region. Report by the U.S. House of Representatives Committee on Interstate and Foreign Commerce, H.R. Report No. 95-294 at 319 (May 12, 1977) ("Report No. 95-294"). As a result, the exact same type of source could have different obligations under nationally applicable regulatory requirements, depending on where the source was located.[6] To cure this unfairness, Congress included a provision in the CAA Amendments of 1977 that would "assure consistency in policy and legal interpretations by the Administrator's regional offices." Report No. 95-294, at 27. EPA was not required to delegate authority through regional administration of the CAA. But if the Agency did, there needed to be enhanced mechanisms and procedures in place to assure "reasonable uniformity." *Id.* at 324.

The uniformity mechanisms and procedures are provided in CAA § 301(a)(2), which has remained unaltered since 1977. That provision makes EPA's duty to develop *consistency* regulations explicit:

> (2) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed—
>
> > (A) to assure *fairness* and *uniformity in the criteria, procedures, and policies applied by the various regions* in implementing and enforcing the chapter;

[5] *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *UARG v. EPA*, 134 S. Ct. 2427 (2014).

[6] The Committee report cited one case in particular as "highlight[ing]" these problems. Report No. 95-294, at 319. In *Montana Power Co. v. EPA*, 429 F. Supp. 683, 688-689, 696 (D. Mont. 1977) – the decision cited by the Committee – different EPA regions (Regions VIII and X) interpreted and applied the same prevention of significant deterioration regulations differently over a relatively short period of time.

> (B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this chapter in implementing and enforcing the chapter, particularly in the review of new sources and in enforcement of the chapter; and
>
> (C) to *provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed* by such officers and employees in implementing and enforcing the chapter.

CAA § 301(a)(2) (emphases added). EPA began a rulemaking to develop § 301(a)(2) Regional Consistency Regulations in 1979. As EPA explained in that rulemaking, § 301(a)(2) is "a mandate to assure greater consistency among the Regional Offices in implementing the Act, certainly *not ... a license to institutionalize the kind of inconsistencies* that *prompted Congress to enact* this provision." 44 Fed. Reg. 13043, 13045 (Mar. 9, 1979) (emphases added). The purpose of the Regional Consistency Regulations could not be any more clear.

II. EPA LACKS AUTHORITY UNDER § 301(A)(2) TO ISSUE THE PROPOSED REVISIONS.

EPA proposes to revise three provisions of the existing Regional Consistency Regulations. Under the proposed revision to the first provision, § 56.3, only U.S. Supreme Court decisions and D.C. Circuit decisions related to "'nationally applicable regulations … or final action' would apply uniformly nationwide." 80 Fed. Reg. at 50253. The revision would carve out an "exception to the policy of 'uniformity' to provide that a decision of a federal court that arises from a challenge to 'locally or regionally applicable' actions would not apply uniformly nationwide." Second, the proposal would revise § 56.4 so that EPA headquarters would not have to address inconsistency resulting from court decisions involving locally or regionally applicable actions. *Id*. Thus, any inconsistencies on determinations of nationwide scope and effect could remain indefinitely. Third, EPA proposes to revise § 56.5 so that EPA employees at the regional level do not have to seek concurrence from EPA headquarters in order to act inconsistently with a national policy or interpretation due to a federal court decision on a locally or regionally applicable action. *Id*.

In effect, EPA proposes to issue regulations that would encourage, and codify, inconsistencies in national policies that would directly contradict the plain language of the CAA. Yet, Congress required that EPA must have rules in place that "assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing" the CAA. This specific mandate leaves no room for applying the more general

common law principles that support intercircuit nonacquiescence[7] – principles that would by EPA's own admission "undermine national uniformity."[8]

A. The Proposal Would Not Assure "Uniformity" or "Fairness," as Required by Congress.

"Uniform" is defined as "[o]f one unchanging in form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[9] The proposal would not ensure "uniformity" and instead would allow regional *inconsistency* under the guise of implementing the statutory mandate requiring regional *consistency*. The proposed revisions would condone, for example, differing interpretations of statutory terms in differing parts of the country under § 56.3 *and* remove any requirement to establish mechanisms to resolve those inconsistences in § 56.4 and § 56.5. Moreover, regions in which there had been a locally or regionally applicable judicial action would not have to seek the "concurrence" (*i.e.*, the agreement) of headquarters about how to address the application of the decision, even if those actions addressed determinations of nationwide scope and effect. *See* proposed § 56.5, 80 Fed. Reg. at 50260-61; *see also infra* p. 9 (defining "concurrence"). Inconsistency could therefore indefinitely remain. Tolerating (rather than resolving) inconsistency is at odds with the plain language of § 301(a)(2) and Congress's clear intent.

EPA characterizes its treatment of judicial decisions as a justifiable "exception to the 'policy' of 'uniformity." 80 Fed. Reg. at 50253. This is wrong for two reasons. First, maintaining consistency is a requirement under the law and is not a mere "policy" that EPA can ignore at its discretion. Second, the statute provides no "exception" to the express requirement to maintain consistency. EPA's unconvincing contention is that "Section 301(a)(2) of the Act does not specifically discuss whether the fairness and uniformity objectives must be applied to all court decisions; nor does it address how the agency should respond to adverse court decisions." 80 Fed. Reg. at 50256. In the Agency's view, its approach must be allowable due to

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[7] *Cf. U.S. R.R. Ret. Bd. v. Johnson*, 969 F.2d 1082, 1091 (D.C. Cir. 1992) ("The Board's refusal to acquiesce, in short, undermines all of the advantages of appellate review that the Board insists Congress intended to recognize. To the degree that the Board's policy clashes with the intent of the framers of the Railroad Act, it cannot be sustained. More generally, defenders of nonacquiescence rely heavily on the premise that the 'current administrative landscape' suggests an 'implicit authorization of nonacquiescence,' Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 729 (1989). Evidence that Congress intended the opposite in this case leaves the argument without a foundation.").

[8] *See* 80 Fed. Reg. at 50255 ("[C]ircuit conflict may undermine national uniformity of federal law to some degree for some period of time.…").

[9] "Uniform," THE NEW SHORTER OXFORD ENGLISH DICTIONARY (1993).

the statute's silence on these particular issues. This is simply unfounded. The fact that court decisions are not expressly addressed does not create ambiguity for EPA to exploit. The statute is not silent or ambiguous – it requires EPA to maintain consistency.

The proposed regulations also would not ensure "fairness." "Fair" is defined as "just, unbiased, equitable, impartial."[10] Under EPA's proposal, different regulatory entities could be subject to different statutory and regulatory interpretations for an indefinite period of time on the arbitrary basis of where the facilities are located, at substantial cost. *See, e.g., NEDACAP*, 752 F.3d at 1006. As EPA explained when it promulgated the Regional Consistency Regulations in 1980, the regulations are supposed to "tend to preclude economic inequities because of varying interpretations of the Act's requirements." 45 Fed. Reg. 85400, 85404 (Dec. 24, 1980). EPA's action now would do just the opposite by allowing economic inequities caused by conflicting interpretations and policies to persist without reconciliation. That is patently unfair and therefore inconsistent with Congressional intent.

B. EPA's Reliance on Sixth Circuit Precedent Is Misplaced.

EPA contends that § 301(a) of the Act does not impose any obligations to attain uniformity. As support, EPA cites a Sixth Circuit decision. 80 Fed. Reg. at 50257 (citing *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1085 (6th Cir. 1984)).

That reliance on *Air Pollution Control District* is misplaced. The case says nothing to support EPA's contention that it is authorized to ignore the plain language of the CAA requiring "fairness and uniformity in the criteria, procedures, and policies applied by the various regions." *Air Pollution Control District* involved an entirely different issue, where parties challenged the fact that there were different limitations imposed on sources under State Implementation Plans ("SIPs"). *Id.* at 1085. Differences in SIP limitations are not uncommon, and were in fact foreseen by Congress, which intended to give states flexibility in crafting SIPs. It is therefore unsurprising that the Sixth Circuit found § 301(a) to be irrelevant to the issue presented.

A more careful reading of *Air Pollution Control District* reveals that the court sought consistency in interpretations of the Act, noting a "strong preference to achieve an interpretation of the Act which is consistent among the several circuits."[11]

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[10] "Fair," THE NEW SHORTER OXFORD ENGLISH DICTIONARY (1993).

[11] *Id.* at 1094; *see also id.* at 1088 ("We believe that the need for national uniformity in judicial interpretation of the Act is particularly important where, as here, the relationships between the states are at issue.").

C. EPA's Approach Does Not Promote "Predictability."

EPA repeatedly cites the need to establish "predictability" in CAA implementation. *E.g.*, 80 Fed. Reg. at 50257. EPA asserts that, under its proposal, a regulated party could know that a decision would only apply in the geographic area over which the court that issued it had jurisdiction and that promotes predictability. This objective is misplaced. Section 301(a) requires consistency, not predictability. However worthy it might be to promote predictability, that goal cannot displace the express legal obligation of consistency.

Even if predictability were a relevant factor, EPA's proposal would fail to achieve that goal because EPA states that it might *nonetheless* choose to apply certain decisions issued by circuit courts other than the D.C. Circuit, as well as by district courts, nationwide. 80 Fed. Reg. at 50259. This erodes EPA's contention that there would actually be predictability under its proposed approach. Instead, the Agency could choose to apply court holdings more broadly only when the Agency likes the ruling. This approach fails to achieve predictability, much less uniformity and fairness. As such, it is inconsistent with the law and patently arbitrary.

III. CONGRESS SOUGHT TO ELIMINATE THE POSSIBILITY OF INTERCIRCUIT NONACQUIESCENCE ON DETERMINATIONS OF NATIONWIDE SCOPE AND EFFECT IN § 307(B)(1).

In support of its reliance on intercircuit nonacquiescence in its proposed regulations, EPA cites cases and scholarly work that suggest that the "robust percolation" of conflicting decisions on the same points of law can lead to superior laws in the end.[12] Yet every opinion that EPA cites is *outside* of the Clean Air Act context. EPA thus fails to recognize that in the Clean Air Act, Congress made a clear determination that circuit splits were to be avoided on determinations of nationwide scope and effect, even if those determinations were presented in locally and regionally applicable actions.[13]

Under the statute, actions that impose nationwide requirements, which are listed in the first sentence of CAA § 307(b)(1) (e.g., national ambient air quality standards), are to be reviewed only in the D.C. Circuit. In addition, actions that are locally or regionally applicable must also be heard in the D.C. Circuit if the action "is based on a determination of *nationwide scope or effect* and if in taking such action the Administrator finds and publishes that such action

[12] *See* 80 Fed. Reg. at 50255.

[13] "[U]nder some statutory schemes, Congress has made a judgment that a quick and authoritative resolution is more important than the benefits that might result from intercircuit dialogue. Thus, for example, challenges to many environmental regulations can be brought only in the D.C. Circuit." Estreicher & Revesz, *supra* note 3, at 736 n. 277.

is based on such a determination." Of note, in its analysis of § 307(b)(1) in the proposed rule, EPA ignores this part of the statutory provision.[14] EPA suggests that all locally and regionally applicable actions are reviewed in the circuit court whose jurisdiction geographically covers the action at issue. That is not so. Section 307(b)(1) makes clear that EPA has a duty and the responsibility to assess the nature of the issues presented in actions brought in local circuits and, where issues of national scope and effect are presented, remove such actions to the D.C. Circuit.

If locally and regionally applicable actions based on determinations of nationwide scope and effect are properly heard by the D.C. Circuit, there should be relatively few situations where a circuit court addresses an issue that can create inconsistency in the interpretation or implementation of CAA requirements. In those *limited* cases where a non-D.C. Circuit court reaches such an issue and issues a holding in conflict with agency positions taken elsewhere, EPA must undertake a rulemaking to address the underlying legal issue and thus, consistent with the requirements of § 301(a), reestablish a consistent national approach.[15]

IV. EPA'S PROPOSAL IS ALSO INCONSISTENT WITH THE DELEGATION AUTHORITY ESTABLISHED IN § 301(A)(1).

EPA's approach also does not make sense under § 301(a)(1). As EPA recognizes in its proposal, § 301(a)(2) follows from § 301(a)(1)'s allowance for the Administrator to delegate authority to other Agency officials. 80 Fed. Reg. at 50257. Under CAA § 301(a)(1), the EPA Administrator *can*, but is not required to, delegate her authority to others in the Agency, including regional officers:[16]

> The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient.

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[14] *See* 80 Fed. Reg. at 50255 (examining only the first two sentences of § 307(b)(1)).

[15] For example, in response to the Sixth Circuit's decision in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012), discussed in more detail *infra* V, EPA is undertaking a rulemaking to address the meaning of "adjacent." Source Determination for Certain Emission Units in the Oil and Natural Gas Sector; Proposed Rule, 80 Fed. Reg. 56579 (Sept. 18, 2015).

[16] *See* Report No. 95-294 at 324 ("Section 305(e) of the bill contains measures necessary for rational administration of a regional system. In no way, however, are these provisions intended to require EPA to continue its regional-based system of administration of the act.").

CAA § 301(a)(1). The phrase "necessary or expedient" limits the powers and authorities that should be delegated, and, therefore, underscores that not all are appropriately delegated. If a delegation is not truly needed, or would result in less efficient administration of the Act, the Administrator should not delegate because it would not be "necessary or expedient."

It would be arbitrary and irrational for the Administrator to delegate her authority to Regional Administrators and condone inconsistent decision-making on her behalf when the purpose of delegation is clearly to promote only efficient and sensible administration of the Act. That would be tantamount to the Administrator herself making inconsistent decisions if she had not delegated the authority.

EPA's failure to understand that the Administrator is a unitary authority is illustrated by the Agency's inaccurate description of the regulatory provisions currently in place under § 301(a)(2). EPA states that 40 C.F.R. § 56.5(b) – the current Regional Consistency provision that requires regional officials to "seek concurrence" from headquarters on interpretations and other issues that "may result in inconsistent application among the regional Offices" – condones variation between regional offices. *Id*. at 50258. This is an incorrect reading of the provision. "Concurrence" means "[j]oint action, cooperation … [a]greement, assent."[17] Regional offices must seek *concurrence* with (*i.e.*, agreement with) their interpretation by headquarters if there is any concern that the region's interpretation may be inconsistent. If headquarters does not concur with (*i.e.*, agree with) a region's conclusion, then the region's interpretation cannot be implemented. As EPA explained in the 1980 preamble describing the provision, it is intended as a mechanism to "be effective in assuring consistency" (*i.e.*, uniformity). 45 Fed. Reg. at 85401. The provision was designed to "ensure that the consistency that is to be achieved among Regions is also consistent with the law and with Agency policy…." *Id.* at 85404.

V. THE *NEDACAP* COURT DID NOT BIND EPA TO ISSUE THE REGULATIONS PROPOSED HERE, OR CONFIRM THEIR LEGALITY.

EPA's impetus for this rulemaking is a 2014 decision by the D.C. Circuit where the court held that an EPA directive issued in response to the Sixth Circuit's holding in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012), was inconsistent with EPA's Regional Consistency Regulations. *NEDACAP*, 752 F.3d 999. The Sixth Circuit had held that EPA's interpretation of the term "adjacent" in its Title V permitting regulations was unlawful because the Agency had required grouping of industrial facilities that were "functionally related … irrespective of the distance that separates them." *Summit Petroleum*, 690 F.3d at 744. Because the Agency disagreed with the Sixth Circuit's holding, EPA headquarters issued the *Summit* Directive – a document that stated that the "functional interrelatedness" test should continue to apply to

[17] "Concurrence," THE NEW SHORTER OXFORD ENGLISH DICTIONARY (1993).

affected sources outside of the Sixth Circuit. The D.C. Circuit found that the *Summit* Directive, in allowing inconsistency, gave facilities in the Sixth Circuit a competitive advantage[18] and held that EPA's institutionalization of inconsistency through the policy was inconsistent with the Regional Consistency Regulations.

In reaching its decision, the D.C. Circuit rejected EPA's argument that the only potential response to the Sixth Circuit's decision would have been to apply the holding of that case across the country. The court noted that the Agency had "*several* other alternatives" and listed just a *few* possibilities: (1) revise the regulations that contained the "adjacent" requirement; (2) appeal the Sixth Circuit's decision, which the Agency had failed to do; or (3) revise the Regional Consistency Regulations "to account for regional variance created by a judicial decision or circuit splits." *NEDACAP*, 752 F.3d at 1010 (emphasis added).

The D.C. Circuit specifically did not reach the question of "whether the CAA allows EPA to adopt different standards in different circuits." *Id.* at 1011. While the court mentioned, in general terms, the possibility of EPA's revising the Regional Consistency Regulations, that suggestion in no way authorized EPA to revise the regulations in the specific way that EPA contemplates here. Thus, *NEDACAP* provides no authority for EPA's proposal to enshrine inconsistency in the guise of satisfying its unambiguous statutory obligation to have rules in place that ensure consistency. For the reasons discussed above, EPA does not have the authority to adopt the approach suggested in this proposal.

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[18] *See supra* p. 2 note 2.

In sum, API and INGAA oppose the proposed revisions and request that they be withdrawn in full. The proposed revisions unequivocally violate the plain language of the CAA and exceed EPA's authority under the Act. Please do not hesitate to contact Howard Feldman at (202) 682-8340 or feldman@api.org or Brianne Kurdock at (202) 216-5908 or Bkurdock@ingaa.org if you have questions or need more information. Thank you for your consideration of these comments.

Respectfully submitted,

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