

Joint Comments of Environmental and Public Health Organizations on the Air Plan Approval; Iowa; Air Quality Implementation Plan-Muscatine Sulfur Dioxide Nonattainment Area and Start-Up, Shutdown, Malfunction SIP Call Withdrawal

**Docket No. EPA-R07-OAR-2017-0416;
FRL-10011-19-Region 7**

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Environmental and public health organizations¹ Earthjustice, Environmental Integrity Project, Iowa Environmental Council, Natural Resources Defense Council, and Sierra Club hereby submit the following comments on the above-titled proposed rule, 85 Fed. Reg. 37,405 (June 22, 2020).

Earthjustice is the nation's largest nonprofit environmental law organization. It has long worked to close regulatory loopholes like the one EPA proposes to reopen, for it fights for a future where children can breathe clean air, no matter where they live, and where all communities are safer, healthier places to live and work.

The Environmental Integrity Project ("EIP") is a non-profit non-partisan organization that advocates for effective enforcement of environmental laws. EIP has three goals: 1) to provide objective analyses of how the failure to enforce or implement environmental laws increases pollution and affects public health; 2) to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and 3) to help local communities obtain the protection of environmental laws.

The Iowa Environmental Council ("IEC") is a non-profit corporation organized under Iowa law. The IEC is a broad-based environmental policy organization with a mission to create a safe, healthy environment and sustainable future for Iowa. The IEC represents a broad coalition of Iowans including over seventy diverse member and cooperator organizations and businesses ranging from agricultural, conservation, and public health organizations, to educational institutions, businesses and business associations, and churches, along with hundreds of individual members. IEC's work focuses on clean water, clean air, conservation, and clean energy, including the promotion of policies that would facilitate the development of clean energy and clean energy jobs.

Natural Resources Defense Council ("NRDC") is a national nonprofit organization with hundreds of thousands of members nationwide that works to protect and restore air quality. Since its inception in 1970, NRDC has worked on issues relating to clean air. In particular, protecting its members and the public from the substantial adverse health effects caused by exposure to polluted air is central to NRDC's purpose. NRDC's Clean Air Project works on, among other things, EPA rules issued under the Clean Air Act. NRDC members live, work, and recreate in

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areas that are impacted by poor air quality. Our members also include people with respiratory conditions that make them more sensitive to air pollution.

Sierra Club is one of the oldest and largest national nonprofit grassroots environmental organizations in the country, with approximately 782,000 members nationwide dedicated to exploring, enjoying, and protecting the wild places and resources of the earth; practicing and promoting the responsible use of the earth's ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out these objectives.

I. INTRODUCTION

Environmental and Public Health Organizations submit these joint comments strongly opposing the EPA proposal to withdraw the EPA SIP Call previously issued to Iowa concerning startup, shutdown and malfunction (“SSM”) events,² as well as the proposal to approve any state regulation inconsistent with the 2015 EPA SSM SIP Call.

EPA must not finalize its proposal. In a transparent bid to evade D.C. Circuit review, the agency proposes to continue hollowing out its landmark 2015 SSM SIP Call by authorizing Regional Offices to adopt contradictory interpretations of the Clean Air Act specifically precluded by the 2015 action. 85 Fed. Reg. 37,405. EPA began this process in Texas by unlawfully purporting to authorize a state implementation plan (“SIP”) containing an affirmative defense provision for excess emissions during SSM events. It then moved to North Carolina, where it similarly gave polluters another free pass by approving SIP provisions automatically or at the discretion of the air agency's director exempting SSM events from emission limitations. Now it has moved to Iowa, where it proposes to authorize an exemption from emission limitations during SSM periods.

Like the prior ones, the latest proposal flouts the rule of law on multiple levels. It unlawfully and irrationally seeks to override Congress's plain intent in ensuring that emission limitations—whether established by EPA or states—are continuously applied.³ It unlawfully and irrationally seeks without any basis at all to throw out correct conclusions EPA previously reached and to undo a nationally applicable action on a region-by-region, or state-by-state, basis.

² 80 Fed. Reg. 33,840, 33,969 (June 12, 2015) (“SSM SIP Call,” “2015 SIP Call,” or “SIP Call”).

³ We hereby adopt in full the arguments made in the Final Brief of Environmental Intervenors, *Walter Coke Inc. v. EPA*, No. 15-1166 (now captioned *Envtl. Comm. of the Fla. Elec. Power Coordinating Grp. v. EPA*, No. 15-1239) (D.C. Cir. Oct. 31, 2016) (Doc. No. 1643796) (attached) that explain why standards must apply at all times and that exemptions like those EPA proposes to allow here are illegal and arbitrary. Further, we incorporate by reference in full all materials cited therein and all materials cited in these comments.

And, perhaps most egregiously, EPA seeks to unlawfully, irrationally, and immorally authorize polluters to emit deadly air pollution into communities without facing meaningful consequences. These communities bear severe consequences from these emissions, and they are disproportionately low-income communities and communities of color that already struggle with air pollution burdens: precisely the types of environmental justice communities that most need relief.

EPA in the proposal itself makes clear why the proposal is unlawful and why EPA may not finalize it: EPA lacks authority to contradict its 2015 SSM SIP Call. As EPA states, “EPA *must approve* submitted SIP revisions that it determines meet the applicable requirements of the Act.” 85 Fed. Reg. 37,406/1 (emphasis added). The 2015 SSM SIP Call’s continuous compliance interpretation remains EPA’s official, governing interpretation of the “applicable requirements of the Act.” Accordingly, “EPA must approve” the Iowa state regulation concerning SSM events that is consistent with the 2015 SSM SIP Call and EPA’s national continuous compliance interpretation. *Id.* Similarly, EPA *may not* withdraw the SIP Call issued to Iowa for any SIP provisions inconsistent with the SIP Call. Nor may EPA approve any provision of Iowa state regulations that are inconsistent with the 2015 SSM SIP Call. EPA cannot now maintain inherently contradictory, opposing positions regarding the Act’s continuous compliance obligations and SSM exemptions as *simultaneously* consistent with the “applicable requirements of the Act.”

EPA’s responsibility is to protect the environment to serve public health. For EPA to approve its illegal and arbitrary proposal would show how shameless the leadership of the agency is in disregarding that duty. The proposal is unlawful, arbitrary and capricious, and an abuse of EPA’s discretion.

II. HARMS OF EXCESS EMISSIONS

Reinstating Iowa’s automatic exemptions for SSM emission events—and giving states across Region 7 the power to do the same—would be a free pass to pollute with impunity. So long as SSM events escape regulation, polluters have little incentive to invest in fixing known plant issues or improving the equipment necessary to avoid breakdowns and reduce the need for unscheduled maintenance, because they know they will not face consequences for illegal pollution released during these events. This is a problem because emission events and pollution released during unauthorized maintenance is a major threat to public health and the environment.

Allowing excess emissions from SSM events to escape regulation would undermine Iowa’s obligations to protect and maintain safe air quality, both within the state and for downwind neighbors, as EPA itself acknowledges.⁴ Indeed, Iowa contains a designated

⁴ EPA, *Emissions During Periods of Startup, Shutdown, & Malfunction (SSM)*, <https://www.epa.gov/air-quality-implementation-plans/emissions-during-periods-startup-shutdown-malfunction-ssm> (last accessed July 22, 2020) (“Air pollution emitted during [SSM]

nonattainment area for sulfur dioxide, as the proposal reflects. Moreover, Iowa's emissions of harmful air pollution have led to its inclusion in the Cross-State Air Pollution Rule. EPA, *States That Are Affected by the Cross-State Air Pollution Rule (CSAPR)*, <https://www.epa.gov/csapr/states-are-affected-cross-state-air-pollution-rule-csapr> (last updated Apr. 3, 2018). Reviving SSM exemptions in Iowa and in Region 7 would accordingly frustrate the attainment efforts not just of Iowa, but also of nearby states and regions, particularly in the ozone (O₃) nonattainment areas in Illinois, Indiana, Michigan, Wisconsin, and even Texas.⁵

Exempting SSM events from regulation threatens not only maintenance of those standards but also human lives by allowing high concentrations of deadly fine particulate matter (PM_{2.5}), which remains deadly at levels well below the National Ambient Air Quality Standards (“NAAQS”), to form.⁶ Exempting pollution events from regulation will lead to an increase in PM_{2.5} concentrations, which will in turn cause an increase in premature deaths and serious health problems.⁷ And these harms are not felt evenly: low-income communities and communities of

periods may adversely impact the health of people nearby and contribute to smog and other problems in communities that are further downwind.”).

⁵ EPA, *Nonattainment/Maintenance Area Status for Each County by Year for All Criteria Pollutants*, https://www3.epa.gov/airquality/greenbook/anayo_il.html (use the drop-down menu at top to view attainment status for counties in each state) (last accessed July 22, 2020). EPA has modeled projections of ozone monitors that it expects to have attainment problems in 2023, and we relied on that modeling to highlight certain key linkages for states in EPA Region 7. See EPA, *2015 Ozone NAAQS Interstate Transport Assessment Design Values and Contributions* (May 2018), https://www.epa.gov/sites/production/files/2018-05/updated_2023_modeling_dvs_collective_contributions.xlsx.

⁶ EPA acknowledged as much as recently as June 2019. EPA, EPA-452/R-19-003, *Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units* (June 2019), at ES-8, n.13, https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf.

⁷ Johanna Lepeule et al., *Chronic exposure to fine particles and mortality: an extended follow-up of the Harvard Six Cities study from 1974 to 2009*. 120:7 *Environ. Health Perspect.* 965 (2012), <https://doi.org/10.1289/ehp.1104660>. This study is one of two EPA relied upon in a recent regulatory impact analysis, *supra* n.6, to assess and quantify the benefits of decreased ambient PM_{2.5} concentrations. Its authors conclude that “the relationship between chronic exposure to PM_{2.5} and all-cause, cardiovascular, and lung-cancer mortality [has been] found to be linear without a threshold.” *Id.* at 970.

color are more likely to live near point sources that would be automatically exempted from regulation during these emission events.⁸

In EPA's 2015 action, it acknowledged it was "particularly concerned about the potential for *serious adverse consequences for public health* in this interim period during which states, the EPA and sources make necessary adjustments to rectify deficient SIP provisions and take steps to improve source compliance." 80 Fed. Reg. 33,849/2 (emphasis added). EPA has not explained in this rulemaking why those concerns are no longer justified or relevant to this action. It has not addressed or even mentioned the health effects of this proposal in qualitative or quantitative terms.

In sum, SSM exemptions in theory and in practice weaken incentives for polluters to take reasonable steps to prevent emission events. They amount to a free pass for polluters. The rest of society pays the price in health harms, with the most vulnerable bearing the brunt. EPA must not finalize this proposal.

III. THE PROPOSAL IS ILLEGAL AND ARBITRARY.

A. The proposal violates the Clean Air Act's requirement that emission limitations must apply continuously.

EPA illegally and irrationally departs from its 2015 interpretation of the Clean Air Act's continuity requirements by suggesting an alternative interpretation at odds with the text, context and purpose of the relevant provisions of the Clean Air Act. Overall, EPA here proposes to return to a vague approach to statutory interpretation that puts EPA's policy preferences ahead of the plain text Congress enacted and EPA reflected in its SIP Call. That approach ended badly for the agency before,⁹ and it should avoid going down that path once again.

⁸ See, e.g., Center for Democracy at the Union of Concerned Scientists & Texas Environmental Justice Advocacy Services, *Double Jeopardy in Houston, Acute and Chronic Chemical Exposures Pose Disproportionate Risks for Marginalized Communities* 2-3 (Oct. 2016), <https://www.ucsusa.org/sites/default/files/attach/2016/10/ucs-double-jeopardy-in-houston-full-report-2016.pdf>.

⁹ E.g., *NRDC v. EPA*, 643 F.3d 311, 323 (D.C. Cir. 2011) (chiding EPA because it "has once again 'failed to heed the restrictions on its discretion set forth in the [Clean Air] Act'" (alteration in original)); *Sierra Club v. EPA*, 479 F.3d 875, 884 (D.C. Cir. 2007) (chastising EPA for flouting Clean Air Act's text and governing judicial opinions and reminding agency "it must obey the Clean Air Act as written by Congress and interpreted by this court"); *Friends of the Earth v. EPA*, 446 F.3d 140, 144-46 (D.C. Cir. 2006) (rejecting EPA's reliance on policy arguments in effort to override plain meaning of "daily" in Clean Water Act requirement); *New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2005) ("Absent a showing that the policy demanded

1. EPA's statutory interpretation is illegal and irrational.

EPA's proposal contradicts Clean Air Act section 302(k) by allowing "emission limitations" to include automatic and discretionary exemptions for SSM events, violating the Act's requirement that emission limitations be "continuous." 42 U.S.C. § 7602(k). Because Congress has spoken directly to the matter at hand by expressly requiring that these limitations apply continuously, EPA is not entitled to substitute its judgment for the plain intent of Congress. *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

Congress expressly requires both emission standard and emission limitations to apply "on a continuous basis." 42 U.S.C. § 7602(k) (emphasis added). This requirement applies to emission standards and emission limitations "established by the State or the Administrator." *Id.* (emphasis added). EPA has read this provision to exclude SSM exemptions from SIPs "since at least 1982." 80 Fed. Reg. 33,941/1; *see also* EPA, Memorandum to Docket regarding Statutory, Regulatory, and Policy Context for Rulemaking 8-14 (Feb. 4, 2013), EPA-HQ-OAR-2012-0322-0029 (detailing how EPA has consistently taken position from 1982 through 2013 that "excess emissions during SSM events are violations" that cannot be exempted). The D.C. Circuit has held, in a case interpreting the section 302(k) definition of "emission limitations" as it appears in the Act's section 112 MACT standards, that an emission limitation does not apply on a "continuous basis" when it includes SSM exemptions. *Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2008).

But, over 35 years later, EPA now reverses its longstanding position to insist SSM exemptions in SIPs are approvable under Clean Air Act section 110(a)(2)(A), which requires states to implement "enforceable emission limitations."

Under the proposed "alternative" interpretation, EPA believes that although the statutory definition of "emission limitations" prohibits SSM exemptions when applied as a component of the MACT standards pursuant to section 112, it allows them when applied to SIPs approved pursuant to section 110. To that end, EPA chiefly argues that sections 112 and 110 of the Clean Air Act are "fundamentally different" such that section 302(k)'s continuity requirement could be met in the SIP context if the cumulative effect of a state's background provisions (*i.e.*, the "general duty") is sufficient to attain and maintain the NAAQS. 85 Fed. Reg. 37,408/1-2. EPA therefore proposes "it is reasonable to interpret the concept of continuous 'emission limitations' in a SIP to be focused not on implementation of each individual limit, but rather on whether the various components of the approved SIP operate together in a continuous manner to ensure attainment and maintenance of the NAAQS." 85 Fed. Reg. 37,408/3.¹⁰

by the text borders on the irrational, EPA may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'").

¹⁰ Substantively identical language appears in EPA's last SSM proposal, regarding North Carolina. 84 Fed. Reg. 26,031, 26,035/2 (June 5, 2019). The same holds for all the statutory

The proposal's arguments are badly wrong. First, not even the proposal disputes that Clean Air Act section 302(k)'s definition of "emission limitation" and "emission standard" applies to those terms in section 110 SIPs. *See id.* at 37,407-09. For good reason: the definitions in 42 U.S.C. § 7602 are preceded by statutory language noting that the ensuing definitions apply "[w]hen used in this chapter," that is, across the Clean Air Act. And those definitions expressly apply to emission limitations and standards "established by the State"—precisely the type of limitations EPA now wants to say need not apply continuously. 42 U.S.C. § 7602(k). Indeed, the proposal quotes section 110(a)(2)(A), which requires that SIP include "enforceable emission limitations," 85 Fed. Reg. 37,408/3 n.24, incorporating the very term defined in section 302(k). EPA cannot lawfully or rationally transform Congress's express command that "emission limitations" and "emission standards" apply continuously into the completely contrary authorization that they need not apply continuously.

Moreover, EPA *even under the current administration* affirmed that Clean Air Act section 302(k)'s definition of "emission limitation" governs section 110 SIP "emission limitations." *See, e.g.,* 84 Fed. Reg. 20,274, 20,280 (May 9, 2019) (recognizing that a RACT emission limitation in the Pennsylvania SIP is governed by the section 302(k) definition of "emission limitation"). EPA thus is not acting consistently, which is irrational.

The proposal digresses about the "exacting process" for setting section 112 standards, contrasting it with SIPs. 85 Fed. Reg. 37,408/1-2. The process for setting standards under section 112 has no bearing on the question of whether standards may lawfully not limit emissions on a continuous basis. The proposal's reference to section 112 is thus a *non sequitur* meant to distract from the plain statutory language in sections 110(a)(2)(A) and 302(k). The plain language of section 302(k), which expressly applies to state-set standards and governs all emission limitations under the Clean Air Act, coupled with the use of "emission limitation" in section 110(a)(2)(A), controls the relevant statutory interpretation issue here.

Further, EPA's proposal runs counter to longstanding canons of statutory construction under which the same words are presumed to be read and construed the same way across a statute. EPA argues, however, that "principles of statutory construction are not so rigid as to necessarily require that the same terminology has the exact same meaning in different parts of the statute," and that "there is 'no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically.'" *Id.* at 37,408/3 (quoting *Env'tl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574-76 (2007) ("*Duke Energy*").

This is a straw man, an unavailing argument for the agency. First and dispositively, 42 U.S.C. § 7602's definitions are preceded by the congressional instruction that section 302(k)'s definition applies "[w]hen used in this chapter." Accordingly, "EPA may not construe [a] statute

interpretation argument EPA puts forth here, highlighting how the proposals are not distinct and thus, if finalized, review of this SSM action lies in the D.C. Circuit. *See infra* Section IV.

in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Sierra Club*, 551 F.3d at 1028 (quoting *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008)). The proposal completely ignores this statutory language and the limit on EPA’s discretion.

EPA’s analysis of *Duke Energy* is incomplete and misleading. The Court in *Duke Energy* acknowledged that the presumption of consistent usage may be overcome “even when the terms share a common statutory definition, *if it is general enough* . . .” *Duke Energy*, 549 U.S. at 574 (emphasis added). As an example, the Court then cites a case where the statutory definition of “employee” could be applied to people either currently or formerly employed by the employer, depending on context, because the term’s statutory definition did not expressly exclude either meaning. *Id.* at 574-75. Thus, even if a statutory definition may in some circumstances be applied variably depending on context, each application must at least be *made available* by statutory authority. In no case may a term’s application *contradict* the meaning supplied by the statute. *See Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (“As a rule, ‘[a] definition which declares what a term ‘means’ . . . excludes any meaning that is not stated.’” (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978))). Here, the relevant statutory definition is not “general enough” to allow EPA to depart from what Congress has specifically told EPA “emission limitations” and “emission standards” mean. Once again, the Clean Air Act expressly forecloses EPA’s interpretation by speaking directly to the question of continuity and excluding from its definition of “emission limitations” meanings that do not require continuity. The interpretation EPA proposes has not been made available by the statute.

Second, the proposal violates the Act, and is arbitrary, capricious and an abuse of EPA’s discretion, insofar as it suggests that the only, or governing, consideration in acting on and approving a SIP is “whether the various components of the approved SIP operate together in a continuous manner to ensure attainment and maintenance of the NAAQS,” 85 Fed. Reg. 37,408/3, “although the Iowa SIP contains an exemption for SSM.” *Id.* at 37,407/2. Section 110 of the Act makes clear that EPA actions on SIPs—full and partial approvals, disapprovals, SIP calls—must also depend on whether a SIP or submittals “meet[s] all of the applicable requirements of this chapter.” *See, e.g.*, 42 U.S.C. § 7410(k)(3), (k)(5) (“or to otherwise comply with any requirement of this chapter”), & (l) (“or any other applicable requirement of this chapter”). Indeed, Congress went out of its way to separately emphasize a SIP’s obligation to both demonstrate attainment and maintenance of NAAQS and satisfy all other applicable requirements of the Act. *Id.* § 7410(k)(5) & (l). Thus, EPA may *not* accept a SIP, approve a submission or withdraw a SIP Call by asserting that “the various components of the approved SIP operate together in a continuous manner to ensure attainment and maintenance of the NAAQS,” 85 Fed. Reg. 37,408/3, *if* such SIP, submission or withdrawal means the SIP would not meet all the applicable requirements of the Clean Air Act. The proposal dispenses with the independent legal requirement that SIPs, submissions or withdrawals of SIP Call ensure compliance with all applicable requirements of the Act. By ignoring these independent legal obligations and requirements, the proposal contradicts that plain language and plain meaning of the Clean Air Act. *See* 42 U.S.C. § 7410(k)(3), (k)(5) & (l).

Third, EPA’s argument is inconsistent with the plain text of the Clean Air Act in additional respects. Section 302(k) defines an emission limitation as “a requirement established by the State or the Administrator,” unambiguously precluding the distinction the proposal wishes to make between emission limitations directly required by the Act and emission limitations included in state plans. 42 U.S.C. § 7602(k) (emphasis added). And by using a singular, indefinite article—“a requirement”—Congress also makes clear that “emission limitation” must be a discrete, ongoing requirement, not a “broad range of measures ... targeted towards Congress’s broad goal of attainment and maintenance” of NAAQS, as the proposal wrongly suggests. 85 Fed. Reg. 37,408/2. Congress knew how to use language in the Act describing the “broad range of measures” that SIPs must contain, and used nearly two pages of statutory text to describe those measures. See 42 U.S.C. § 7410(a)(2). Among those extensive measures are ‘emission limitations and standards,’ as defined in section 302(k). *Id.* § 7410(a)(2)(A), (a)(2)(D)(i)(I), (a)(2)(H), (a)(2)(K); see also § 7602(k). Congress also defined “the term ‘applicable implementation plan’” to “mean[] the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410...and which implements the relevant requirements of this chapter.” 42 U.S.C. § 7602(q) (emphasis added). Thus, § 302(k)’s terms apply just as much to emission standards or limitations a state establishes as part of its EPA-approved SIP as to those EPA establishes itself.

None of the proposal’s arguments about a “fundamentally different regime” in section 110 SIPs grapples with the plain language of CAA section 302(k), or the D.C. Circuit’s treatment of that language. 85 Fed. Reg. 37,408. That is because the proposal’s arguments contradict the plain language of section 302(k) and the reasoning in the *Sierra Club* decision, both of which extend to section 110 SIPs. Notably, the proposal nowhere cites any EPA precedent or court decision holding that the definition of emission limitation and standard in section 302(k) do *not* extend to section 110 SIPs. Again, that is because *EPA itself* understands that the section 302(k) definition of emission limitation extends to section 110 SIPs. See, e.g., 84 Fed. Reg. 20,280 (recognizing that a RACT emission limitation in the Pennsylvania SIP is governed by the section 302(k) definition of “emission limitation”).

Further, notably, a SIP established under section 110 can include emission limitations that must meet substantive stringency standards, such as a reasonably available control technology (RACT), best available control technology (BACT), best available retrofit technology (BART), or lowest achievable emission rate (LAER) standard, just as a section 112 standard must. Indeed, in this very same proceeding, EPA proposed to find various permit limitations constitute RACM/RACT. 82 Fed. Reg. 40,086, 40,096/1-97/2 & n.17 (Aug. 24, 2017); see also, e.g., Iowa Dep’t of Natural Res., *Monsanto Air Construction Permits*, EPA-R07-OAR-2017-0416-0007 at 6 (PDF 7), 6 (PDF 19). Some limits included in the docket constitute BACT, too. E.g., EPA-R07-OAR-2017-0416-0007 at 6 (PDF 7). Just as *Sierra Club* held that an emission limitation established under section 112 must continuously meet section 112’s stringency requirements, so too must an emission limitation established under RACT, BACT,

BART, or LAER continuously meet the appropriate stringency requirements. But the proposal would undo that, and thus violate the Act.

Finally, faced with plain statutory language in section 302(k) and a statutory structure and cross-references in section 110, EPA may not invent statutory authority where none exists, nor adopt regulations lacking statutory authority, merely because EPA believes its approach to be better policy. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (“EPA must ground its reasons for action or inaction in the statute.”); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“agency ... power to act” is shaped by how “Congress confers power upon it”). Agencies need especially clear congressional delegations of authority to create regulatory exemptions. *See New York v. EPA*, 413 F.3d 3, 41 (D.C. Cir. 2005) (stating that the agency needs “clear congressional delegation” to support an exemption). The “alternative interpretations” EPA has been offering on a purportedly state-by-state basis amount to contradictory, unlawful statutory readings that advance policy preferences for granting states more “flexibilities” for ensuring attainment and maintenance of the NAAQS. *See* 85 Fed. Reg. 37,407-08. Those policy preferences furnish EPA with no statutory authority to withdraw the 2015 SSM SIP Call, or to approve SIPs or submissions inconsistent with the SIP Call, plain statutory language, and the *Sierra Club* SSM decision.

2. SSM exemptions violate the Act’s requirements.

Automatic exemptions violate the bedrock principles of the Act that SIPs must contain “enforceable emission limitations,” 42 U.S.C. § 7410(a)(2)(A), which must apply on a “continuous basis.” *Id.* § 7602(k); *Sierra Club*, 551 F.3d at 1027-28. The requirement for “continuous” emission limitations means that “temporary, periodic, or limited systems of control” do not comply with the Act. *Sierra Club*, 551 F.3d at 1027 (quoting H.R. Rep. No. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170). Yet that is precisely what an exemption from emission limitations allows—temporary, periodic, or limited controls on emissions of air pollution. Congress gave states no authority “to relax emission standards on a temporal basis.” *Id.* at 1028. Exemptions thus are illegal under the Act.

As the Court confirmed in *U.S. Sugar Corp. v. EPA*, “exempt[ing] periods of malfunction entirely from the application of the emissions standards...is [not] consistent with the Agency’s enabling statutes,” 830 F.3d 579, 607, *amended in other part on panel reh’g*, 844 F.3d 268 (D.C. Cir. 2016), and “EPA had no option to exclude these unpredictable periods,” *id.* at 608. The Act’s requirement for continuously enforceable emission limitations is vitally important for protecting public health. *See* Brief for EPA, *Walter Coke Inc. v. EPA*, No. 15-1166 (D.C. Cir. Oct. 28, 2016) (Doc. No. 1643446), at 38-39 (“Without an enforceable emission limitation which will be complied with at all times, there can be no assurance that ambient standards will be attained and maintained.” (quoting 80 Fed. Reg. 33,901/3)) (attached). Indeed, as explained above, SSM events release huge amounts of pollution that can cause exceedances and violations of NAAQS. *See* Final Brief of Environmental Intervenors, *Walter Coke Inc.*, at 1-21; *id.* at 13-14

(e.g., one known event released 165,000 pounds of sulfur dioxide). Because of the limited air quality monitoring network, violations of the NAAQS may escape official notice, *see id.* at 14-15, but the harmful effects of SSM events nonetheless burden the neighboring communities, *id.* at 7-13, 14-15. To prevent these harmful outcomes and to serve the Act’s primary purpose—protecting public health—Congress required that emission standards apply continuously.

Congress further required continuously applicable emission limitations to ensure citizens would have meaningful access to the “remedy provided by [the Act’s citizen-suit provision] to assure compliance with emission limitations and other requirements of the act.” H.R. Rep. No. 95-294, at 92, *as reprinted in* 1977 U.S.C.C.A.N. at 1171. Yet SSM exemptions leave communities without any ability to seek relief from the courts even when large facilities repeatedly release massive amounts of pollution that exceed the normal emission limitations. *See* Final Brief of Environmental Intervenors, *Walter Coke Inc.*, at 7-15.

Congress made clear that these continuous emission limitations must be enforceable by citizens. Indeed, the Clean Air Act expressly authorized citizen suits over violations of “an emission standard or limitation under this chapter.” 42 U.S.C. § 7604(a)(1). It specifically defined “emission standard or limitation” to mean “a schedule or timetable of compliance, emission limitation, standard of performance or emission standard” “which is in effect under ... an applicable implementation plan.” *Id.* § 7604(f) (emphasis added). Congress further defined the “terms ‘emission limitation’ and ‘emission standard’” to “mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis.” *Id.* § 7602(k). Congress also defined “the term ‘applicable implementation plan’” to “mean[] the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 ... and which implements the relevant requirements of this chapter.” *Id.* § 7602(q). Thus, read together, these provisions mean that citizens have the right to bring suits in federal court over violations of EPA-approved, state-established requirements for limiting emissions of air pollutants. *See Lopez v. Gonzalez*, 549 U.S. 47, 56 (2006) (“[O]ur interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them....”); *Sierra Club*, 551 F.3d at 1027 (reading definitions section of Clean Air Act, § 7602, together with other section); *see also* Brief for EPA, *Walter Coke Inc.*, at 91-92. Because exemptions remove citizens’ ability to enforce emission limitations, they contravene the Act.

Given the Clean Air Act’s requirement that emission limitations apply continuously, its health-protective purpose, and Congress’s plain intent to create a right to citizen enforcement of all state-established SIP emission limitations, EPA could not lawfully allow these exemptions to remain.

3. Vague general duty provisions are unlawful because they are not legally or practically enforceable.

In the pending D.C. Circuit litigation in *Environmental Committee of the Florida Electric Power Coordinating Group v. EPA*, No. 15-1239, Petitioners have argued that exempting SSM events from numerical limits is appropriate and lawful because “general duty” SIP provisions provide continuous control during all modes of source operation. Brief of Industry Petitioners, *Walter Coke Inc.* (D.C. Cir. Oct. 31, 2016) (Doc. No. 1643571), at 38-40; Opening Brief of State Petitioners, *Walter Coke Inc.* (D.C. Cir. Oct. 31, 2016) (Doc. No. 1643502), at 22-23. This claim lacks merit, as EPA has explained. See Brief for EPA, *Walter Coke Inc.*, at 68-84. Not only do such generic provisions fail to meet the level of control required by the applicable stringency requirements, such as RACT in nonattainment areas, BACT for certain sources in attainment areas, and BART for sources impacting regional haze, *see id.* at 69-73, general duty provisions are not legally or practically enforceable, as required by the Act. 42 U.S.C. § 7410(a)(2)(A) (SIPs “[shall] include enforceable emission limitations”). Brief for EPA, *Walter Coke Inc.*, at 73-75, 78 n.27.

Congress recognized that protecting public health requires that emission limitations be readily and actually enforceable. In 1970, it explained that “attainment of ambient air quality is possible only through the enforcement of precise and objective emission controls.” S. Rep. No. 91-1196, at 21 (1970). As part of this enforcement scheme, the Act provides for citizens to have easy access to courts to improve the efficacy of the protections established under it. 42 U.S.C. § 7604(a), (f); *see also Train v. NRDC*, 510 F.2d 692, 700 (D.C. Cir. 1975) (“The legislative history of the Clean Air Act Amendments reveals that the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.”). Thus, enforcement of emission limitations, including citizen enforcement of emission limitations, is a cornerstone of the Act’s goal of protecting public health.

Congress, however, carefully cabined citizen suits to violations of clear standards, requiring plaintiffs to allege a violation of “a specific strategy or commitment in the SIP.” *Coal Against Columbus Ctr. v. City of New York*, 967 F.2d 764, 769 (2d Cir. 1992) (citations omitted). Congress intended that a citizen suit “would not require reanalysis of technological or other considerations at the enforcement stage.” S. Rep. No. 91-1196, at 36. Since general duty provisions are not quantifiable or objective, they run afoul of these limitations and thus conflict with congressional intent that citizens be able to enforce emission limitations contained in SIPs.

As EPA explained in its brief in the SSM SIP Call litigation (Brief for EPA, *Walter Coke Inc.*, at 76-78) and State Petitioners there confirm (Opening Brief of State Petitioners, *Walter Coke Inc.*, at 26), no source can ever be held liable for violating many of the general duty provisions at issue in the SIP call rule. When there can be no liability for violating a provision, the provision is not enforceable. It thus is not an enforceable emission limitation, and accordingly, the SIP unlawfully lacks continuous emission limitations. *See U.S. Sugar*, 830 F.3d

at 608-09 (rejecting polluters' argument that EPA should have created a "work-practice ... standard for malfunction periods" because "[a]ny possible standard is likely to be hopelessly generic").

Indeed, because courts refuse to enforce unquantifiable Clean Air Act standards, attempts to enforce general duty and other work practice provisions in SIPs have been unsuccessful. *See Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561, 1566-67 (N.D. Ga. 1994) ("[O]bjective, numerical standards [are] of the type susceptible to citizen suit enforcement."). For example, in *McEvoy v. IEI Barge Services, Inc.*, the court affirmed the dismissal of a suit by community members arguing that coal dust that drifted onto their properties from an outdoor coal pile violated Illinois SIP provisions prohibiting air pollution and visible emissions of fugitive particulate matter beyond the source's property line. 622 F.3d 671, 678 (7th Cir. 2010). The Seventh Circuit found both provisions to be unenforceable, explaining that the prohibition provision "is little more than the commandment 'thou shall not pollute,'" and held that "this broad, hortatory statement" "is not an 'emission limitation' or 'emission standard,' which § 7602(k) tells us must limit 'the quantity, rate, or concentration of emissions.'" *Id.* Thus, the court held "we do not think that this statement of principle is the type of "standard" or "limitation" for which Congress provided a cause of action in § 7604(a)(1)(A)." *Id.* The court also found the fugitive particulate matter regulation lacked "metrics that are susceptible to objective evaluation in court." *Id.* at 680.

Similarly, in *Freeman v. Cincinnati Gas & Electric Co.*, the court dismissed a suit alleging that the coal-fired Zimmer generating station in Moscow, Ohio violated two "general duty" type provisions of the Ohio SIP, O.A.C. §§ 3745-15-07 (prohibiting air pollution nuisance) and 3745-15-06 (requiring source to report malfunctions). 2005 WL 2837466, 2005 U.S. Dist. LEXIS 42525 (S.D. Ohio Oct. 27, 2005). Relying on a previous case holding that "violations of vague emissions prohibitions ... are not subject to redress by means of a citizen suit," the court held plaintiffs could not "enforce such non-objective standards." *Id.* at **4-5 (citing *Helter v. AK Steel Corporation*, No. C-1-96-527, 1997 U.S. Dist. LEXIS 9852 (S.D. Ohio Mar. 31, 1997) (unpublished)). Though subsequent cases analyzing these same provisions held otherwise, *e.g.* *City of Ashtabula v. Norfolk S. Corp.*, 633 F. Supp. 2d 519, 529, n.3 (N.D. Ohio 2009), the inconsistent rulings support EPA's determination that states must clarify ambiguous general duty provisions to avoid "misunderstanding and thereby interfer[ing] with effective enforcement." 80 Fed. Reg. 33,943/3.

Vague and unenforceable general duty provisions are no substitute for continuous emission limitations that apply during all phases of operation. Allowing SSM exemptions just because general duty provisions are in place violates the Act.

4. The proposal is arbitrary, capricious, and an abuse of discretion.

Even if this were a case arising from genuine ambiguity in the statute, which it is not, EPA's interpretation would be arbitrary and capricious and thus fail to satisfy *Chevron's* second

step. See *Chevron*, 467 U.S. at 843 (establishing that statutory interpretations are not entitled to deference when “they are arbitrary, capricious, or manifestly contrary to the statute”).

a) The rescission is arbitrary and capricious under *State Farm* and its progeny.

EPA has not satisfied its obligation under *Motor Vehicles Manufacturers Association of the United States, Inc. v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983) (“*State Farm*”) and its progeny to rationally explain this proposed rescission of its decades-old interpretation of section 302(k). As the Court held in *FCC v. Fox Television*, 556 U.S. 502, 514-16 (2009), a “reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” See also *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (a department’s “current interpretation, being in conflict with its initial position, is entitled to considerably less deference” than it would be otherwise). “An agency may not ... simply disregard rules that are still on the books.” *Fox Television*, 556 U.S. at 514 (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)). Here, EPA is attempting to rescind a well-established interpretation of section 302(k) as applied to exemptions for SSM events. As EPA noted in its preamble to the 2015 SIP Call, the prohibition of SSM exemptions “has been the EPA’s explicitly stated interpretation of the CAA with respect to SIP provisions since the 1982 SSM Guidance, and the Agency has reiterated this important point in the 1983 SSM Guidance, the 1999 SSM Guidance and the 2001 SSM Guidance.” 80 Fed. Reg. 33,889/1 (emphasis added). EPA has not supplied a reasoned analysis of why this change in course is necessary, why it is especially necessary in Region 7 (as well as Region 4 and Region 6) but nowhere else, or even why it might be good policy. It is therefore acting well outside the zone of deference *State Farm* and later cases afford to agencies reversing course in this manner.

EPA has not found new facts or pointed to changing circumstances that would urge a change in position. No court has found in favor of its proposed new position. In fact, EPA largely echoes the arguments raised by opponents of its 2015 SSM SIP Call rulemaking, which EPA then correctly rejected as faulty. For example, EPA now parrots opponents of its 2015 action by arguing the *Train* line of cases provided states with the flexibility to adopt these exemptions. Compare 85 Fed. Reg. 37,408/2-3 (arguing that the *Train* cases allow a construction of section 110 requirements that would permit SSM exemptions in SIPs), with 80 Fed. Reg. 33,876/3-77/1 (explaining why that same argument, though made by “many commenters,” is irrelevant where section 110 actually imposes affirmative requirements). In its 2015 final action, EPA correctly noted that “while states have great latitude to select emission limitations, *Train* explained that those emission limitations must nevertheless be ‘part of a plan which satisfies the standards of § 110(a)(2)’” *Id.* at 33,878/1. EPA has not attempted to show that its prior conclusions were flawed. It is the very definition of arbitrary and capricious for the agency to now rely on legal arguments it had exposed as faulty without explaining why it was wrong to reject those arguments in the first place.

b) EPA’s policy argument is insubstantial and unsupported.

EPA does not now disavow the policy arguments it advanced in support of its plain-text reading of the Clean Air Act in the 2015 SSM SIP Call. And EPA has advanced no policy rationale beyond passing mentions of “flexibility” to address why allowing SIPs to exempt SSM pollution would advance the goals of the Clean Air Act, much less do so better than the status quo. *See, e.g.*, 85 Fed. Reg. 37,408/2. The Act’s purpose and policy is to protect air quality and the public welfare, not to give states or polluters “flexibility” embodied, as here, by exemptions that do not hold polluters directly accountable for excess emissions. 42 U.S.C. § 7401(b)(1).

Even to the extent that flexibility might be a policy goal worth pursuing, EPA’s meager discussion of that policy’s relationship to the proposed action is conclusory and unsupported. It does not explain in qualitative or quantitative terms what benefits of flexibility will be enjoyed if this proposal is approved. Nor does it indicate that it has attempted to collect, locate, or examine data that might support an argument in favor of those benefits. If EPA truly believes flexibility is worth allowing SIPs to contain these exemptions, it must argue that point. But it has not. Because “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself,” EPA may not finalize an action without articulating a basis that a court *could* agree with based on the facts before it. *State Farm*, 463 U.S. at 50 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). In the absence of a good reason to depart from its duly established policy on the matter, and without showing it has even considered the expected benefits from flexibility and the expected costs to health, EPA’s policy argument is arbitrary and capricious.

Finally, EPA arbitrarily fails to consider the importance of having emission limitations that are *enforceable*. That is an important policy of the Clean Air Act—one that is embodied not just in the Act’s express “goal” of “pollution prevention,” 42 U.S.C. § 7401(c), but also in the Act’s robust provisions for EPA and *citizen* enforcement. *Id.* §§ 7413, 7604. Moreover, numerous cases have emphasized that the importance of enforcement, and ensuring meaningful enforcement was possible, were major motivators for Congress. *See generally* Final Brief of Environmental Intervenors, *Walter Coke Inc.*, at 27-28, 30. EPA irrationally ignores how allowing SSM exemptions will undermine Congress’s intent to facilitate agency and citizen enforcement.

c) EPA arbitrarily disregards and discounts layers of protection designed to protect air quality and public welfare.

Lacking any affirmative justification for this action, EPA argues that the interests SIPs are charged with protecting will remain adequately protected, even if SSM exemptions are allowed, because of “backstops” and “overlapping requirements” in the Iowa SIP that purport to limit the scope of excess emissions events that will be shielded from liability. 85 Fed. Reg. 37,409/1. EPA is wrong to point to such “backstops” and “overlapping requirements” to justify its choice to undermine a considered regulatory scheme. As EPA concedes in the notice,

“[O]verlapping requirements enable ... sources to maintain compliant operation, and, if necessary, enforce against sources.” *Id.* Thus, overlapping protections are deliberately implemented to ensure air quality and public welfare are robustly protected, not to provide wiggle room for later deregulatory actions. Exempting facilities from liability for excess emissions during SSM events so long as “cleaning is accomplished expeditiously” and “consistent with good practice for minimizing emissions” is an undeniably arbitrary threshold. *Id.* at 37,406/3 n.8 (quoting Iowa Administrative Code (“IAC”) 567-24.1(1)).

In making this argument, EPA asserts that “the Iowa SIP in its entirety is protective of the NAAQS” due to containing “numerous provisions [] that, when taken as a whole, establish such a basis.” *Id.* at 37,409/1. These include generic provisions requiring various governmental entities to ensure attainment and maintenance of the NAAQS and polluters to keep their controls in good repair. *Id.* at 37,409/2-3, 37,410/2. If this argument had any force, EPA could justify approving a SIP that consisted *only* of that requirement. As EPA itself remarked in its 2015 SIP Call responding to comments on this very question, SIPs must abide by “a framework of *mandatory requirements* within which states may exercise their otherwise considerable discretion to design SIPs” 80 Fed. Reg. 33,877/2 (emphasis added). In other words, a mandatory provision remains mandatory even if it overlaps with other provisions.

EPA also points to various emergency provisions and tools the SIP includes for Iowa to use at its discretion to remediate violations *after* they occur, as well as to regulations outside the SIP. 85 Fed. Reg. 37,409/3-10/2. None of this material helps EPA. The emergency provisions EPA cites, IAC 567-26.1-4, are only triggered by air pollution levels that vastly exceed the NAAQS. IAC 567-26.2(2). The tools EPA cites are discretionary and will not prevent NAAQS violations before they occur, which the removal of the SSM exemption would. And extra-SIP regulations have no bearing whatsoever on the adequacy of the SIP to maintain the NAAQS, even if that were the sole relevant question, as EPA pretends.

Regulated parties are commonly subject to redundant and overlapping requirements under the Clean Air Act and related regulatory schemes. The presence of an overlap does not allow EPA to “shirk its duty” to protect public health or provide a justification for action that, by itself, might satisfy *Chevron’s* second step. *Massachusetts*, 549 U.S. at 501.

Finally, due to the lack of air quality monitors in most communities, the general provision and after-the-fact remedies are also effectively meaningless. Thus, far from being redundant, the requirement that sources continuously limit their emissions is, in reality, often the only way to ensure NAAQS and increment compliance. *See* Final Brief of Environmental Intervenors, *Walter Coke Inc.*, at 14-15, 27.

5. EPA draws incorrect conclusions from *Sierra Club*.

EPA tries in vain to evade the plain holding of *Sierra Club*, which recognized that Congress meant to prohibit SSM exemptions when it defined “emission limitations” to require

continuity. 551 F.3d at 1028. EPA’s proposal irrationally attempts to narrow this holding, proposing that “the court’s reasoning in *Sierra Club* does not extend to CAA section 110.” 85 Fed. Reg. 37,408/1. But no language indicates that the court’s analysis of section 112 is anything more than incidental to the question presented: whether Congress’s definition of “emission limitations,” as supplied in section 302(k), could permit an “emission limitation” to include exemptions for SSM events. Without evidence, EPA asks us to believe the D.C. Circuit’s holding would not apply in section 110 contexts, despite there being no textual basis or good reason, as discussed in III.A.1, *supra*, to understand “emission limitations” to require continuity in one context but not another.

EPA refuses to acknowledge that *Sierra Club* primarily interprets section 302(k), not section 112. It observes in this rulemaking “the court in *Sierra Club* recognized that Congress intended ‘that sources regulated under section 112 meet the strictest standards.’” *Id.* This is correct, but not probative. The petitioners in *Sierra Club* challenged an agency action specifically interpreting section 112; the Court’s engagement with that set of standards (and lack of engagement with the phrase’s meaning in section 110 contexts) had everything to do with the facts of the case and the question placed before it. It had nothing to do with drawing a distinction between those contexts. EPA correctly notes that “the court did not make any statement explicitly applying its finding beyond CAA section 112.” *Id.* at 37,407/3. But it did not need to because, as relevant here, *Sierra Club* focused on section 302(k), not section 112.

For the reasons detailed in III.A.1, *supra*, a defined term’s usage is presumed to be consistent unless multiple interpretations are available and a good reason for adopting a valid alternative interpretation can be advanced. *Sierra Club*’s failure to mention section 110 therefore does more harm than good to EPA’s position that section 110 should be treated differently from section 112. EPA’s argument requires a belief that the *Sierra Club* Court’s silence on section 110 suffices to overcome any presumption that its holding on section 302(k) is generally applicable, or else that a court’s silence creates another presumption *against* applicability in contexts left unmentioned. But a court need not discuss every context in which its construction of a term might be relevant for that holding to presumptively apply in those contexts. Were that the case, statutorily defined terms would be of little use. But EPA’s specific error in interpreting *Sierra Club* should be particularly plain because the text of section 302(k) expressly extends to requirements implemented by states.

Moreover, *Sierra Club* broadly rejects the type of maneuver EPA is attempting here. EPA proposes that SSM exemptions are allowable because a continuous “general duty” would satisfy section 302(k)’s continuity requirement. As the Court noted, however: “[w]hen sections 112 and 302(k) are read together, then, Congress has required that there must be continuous section 112-compliant standards. The general duty is not a section 112-compliant standard,” as the Court recognized EPA had admitted. *Sierra Club*, 551 F.3d at 1027. “Because the general duty is the only standard that applies during SSM events—and accordingly no section 112 standard governs these events—the SSM exemption violates the CAA’s requirement that some section 112

standard apply continuously.” *Id.* at 1028. As explained above, a “general duty” provision is not lawful in the context of this proposal, either. *See supra* III.A.3.

More pointedly still, the Court stated that “EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Id.* (quoting *New Jersey*, 517 F.3d at 583). This language shows the *Sierra Club* Court was keenly aware of and meant to foreclose the faulty structural arguments EPA is now employing in its attempt to bypass the clear mandates of the Clean Air Act. *Sierra Club*’s holding relied on a determination that the general duty provision (or other general guarantees) may not satisfy 302(k)’s continuity requirement—precisely the argument EPA is making in this proposal. As discussed in greater detail at III.A.6, *infra*, EPA is arguing that the power to permit SSM exemptions is implied by the general discretion states enjoy in crafting SIPs (*i.e.*, an “exception” to the direct oversight otherwise required by the Act) so long as they fulfill their general duty to protect the NAAQS. Discretion to grant SSM exemptions would constitute an “additional exception” to the already exceptional SIP regime. In making this argument, EPA is also attempting to nullify “a textually applicable provision meant to limit its discretion,” *i.e.*, Congress’s decision to define “emission limitations” rather than allowing EPA or states to do so for themselves.

Finally, opponents of the 2015 SIP call advanced arguments about *Sierra Club* identical to those EPA is now making here, and EPA rejected those arguments. 80 Fed. Reg. 33,892/3-94/1. EPA, again, has not explained in this action why it was wrong to reject those arguments in its prior action.

6. EPA misinterprets the Act’s SIP approvability standards.

The discretion delegated to states to construct their SIPs does not include the authority to create exemptions inconsistent with the mandates of the Clean Air Act. But EPA misrepresents that standard: it claims that “Iowa’s SSM provision is allowable ... [where] the SIP as a whole is protective of the NAAQS.” 85 Fed. Reg. 37,407/3 (emphasis added). EPA seems to argue approvability depends solely on this quality. But this argument is false. EPA itself acknowledges in the notice that it must issue a SIP call if a state’s SIP “is substantially inadequate to meet certain requirements of the Act, including attaining or maintaining the relevant NAAQS or mitigating interstate pollutant transport,” *id.* at 37,406/1, and EPA omits important statutory text: a SIP call is required when EPA finds the SIP “substantially inadequate ... to otherwise comply with any requirement of this chapter.” 42 U.S.C. § 7410(k)(5).

EPA tries arguing otherwise, relying on entirely inapposite quotes from the Supreme Court’s *Union Electric* and *Train* decisions. *Id.* at 37,408/2-3. These two decisions, indeed the specific quotes that EPA invokes, stand for the uncontested proposition that a state may choose “whatever mix of emission limitations it deems best” in a SIP, in “allocating emission limitations.” *See id.* (citing *Union Elec. Co. v. EPA*, 427 U.S. 246, 250, 267 (1976) & *Train v. NRDC*, 421 U.S. 60, 79 (1975)). Nowhere do these decisions support the conclusion that a state, SIP, or EPA may authorize emission limitations or standards that violate the plain language of

section 302(k) and its “continuous” compliance requirement. Indeed, it is doubly telling that the proposal is unable to find such authority in those decisions, *and* that the proposal cites them for entirely different propositions, namely a state’s ability to adopt its own “mix of emission limitations.” That basic authority is correct, but each of those emission limitations must limit “air pollutants on a continuous basis.” 42 U.S.C. § 7602(k).

EPA’s broader point about states’ discretion is also flawed, because the cases it selectively relies upon hold that SIPs must not only provide for timely attainment and maintenance of NAAQS but “also satisf[y] [§ 7410’s] *other general requirements*.” *Train*, 421 U.S. at 79 (emphasis added); *see Union Elec.*, 427 U.S. at 265; *CleanCOALition v. TXU Power*, 536 F.3d 469, 472-73 (5th Cir. 2008) (describing an additional requirement SIPs must meet). Indeed, the D.C. Circuit has made clear it has avoided suggesting “that under [§ 7410] states may develop their plans free of extrinsic legal constraints,” including those contained in the Act. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1047 (D.C. Cir. 2001).

Further, EPA’s new vision of how the Act operates ignores the history of failures that led to multiple amendments and the plain statutory requirements of the Act as presently constructed. *See S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 886-87 (D.C. Cir. 2006). As the *South Coast* Court explained, “the [pre-1990] approach, which specified the ends to be achieved but left broad discretion as to the means, had done little to reduce the dangers of key contaminants,” leading Congress to amend the Act. *Id.* Congress’s unwillingness to rely on the “old ends-driven approach that had proven unsuccessful,” *id.* at 887, is reflected in the specific minimum requirements added throughout the Act. For example, before the 1990 Amendments, 42 U.S.C. § 7502(b)(3) required state implementation plans to achieve “reasonable further progress [in reducing annual emissions]...including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology.” 42 U.S.C. § 7502(b)(3) (1989). The 1990 Amendments no longer allow such open-ended planning and now specify for moderate and more polluted ozone areas the minimum sources that must be subject to reasonably available control technology, *id.* § 7511a(b)(2), and the minimum emission reductions that must be achieved in the interim years leading up to the attainment deadline. *Id.* § 7511a(b)(1)(A). Congress was no longer willing to give states unfettered “power to determine which sources would be burdened by regulation and to what extent.” *Union Elec.*, 427 U.S. at 269. The 1990 Amendments include a long list of specific measures that certain states must adopt, including vehicle inspection and maintenance programs, fuel requirements, transportation control measures, controls on specific pollutant precursors, and more prescriptive permitting requirements. *See, e.g.*, 42 U.S.C. §§ 7511a(b)(3), (b)(4), (b)(5), (c)(2)(C), (c)(3), (c)(4), (d), (e)(3), (f) (measures for ozone nonattainment areas); 7512a(a)(6), (b)(2), (b)(3) (measures for carbon monoxide areas); 7513a(e) (measures in particulate matter nonattainment areas).

Contrary to EPA’s new understanding, demonstrating compliance with the national standards is not the sole measure for approval. Under the 1990 Amendments, state

implementation plans in nonattainment areas must also “meet the applicable requirements of part D.” *Id.* § 7410(a)(2)(I). EPA, for its part, cannot approve a plan if it “interfere[s] with any applicable requirement concerning attainment ... *or any other applicable requirement of this chapter.*” *Id.* § 7410(l) (emphasis added). This independent obligation to meet Congress’s specified requirements in addition to demonstrating attainment is further highlighted in section 107(d)(3)(E), added by the 1990 Amendments, which now provides that EPA cannot redesignate a nonattainment area as an attainment area unless it finds not only that the area has attained the NAAQS, but also that “the State containing such area has met all [the] requirements applicable to the area under section 7410 of this title and part D of this subchapter.” *Id.* § 7407(d)(3)(E). Even attainment areas are subject to minimum control requirements and not just a general duty to maintain compliance with the national standards. *See, e.g., id.* §§ 7470-7479 (outlining minimum control requirements for permits in attainment areas); § 7491 (requiring minimum controls for visibility protection).

B. EPA cannot lawfully or rationally both withdraw the SIP Call and approve the SO₂ attainment plan.

As a comment already in the docket indicates, Iowa’s modeling for its attainment plan does not simulate hours during SSM events. Anonymous Comment (Jan. 17, 2018), EPA-R07-OAR-2017-0416-0021. Whatever the rationality of assuming in general for modeling purposes that facilities will always comply with their numerical emission limitations because such limitations are binding law, EPA’s proposed withdrawal of the SSM SIP Call for Iowa means such an assumption is entirely baseless. During SSM periods, the otherwise governing emission limitations for relevant facilities do not apply, and the modeling upon which Iowa relies to demonstrate attainment thus cannot rationally rely on those emission limitations at all times. *See* Sierra Club Comments 1-3 (Sept. 25, 2017), EPA-R07-OAR-2017-0416-0019; *see also id.* at 3-12 (highlighting other flaws in modeling); Sierra Club Supplemental Comments (Feb. 8, 2018), EPA-R07-OAR-2017-0416-0043 (same). Accordingly, EPA cannot lawfully or rationally both withdraw the SIP Call for Iowa and ratify Iowa’s SIP’s exemption of SSM events from emission limitations *and* approve Iowa’s attainment plan, which presumes such events will never occur (because it does not model them). Instead, EPA must disapprove Condition 6 of the permits and proceed with removing the SSM exemption from Iowa’s SIP.

C. EPA violates its regional consistency regulations.

Congress has granted EPA no authority in the Clean Air Act, or elsewhere, to authorize inconsistent interpretations of the Clean Air Act among regions so long as a regional office receives a signed concurrence from Headquarters. EPA claims that its regional consistency regulations grant the agency this authority. 85 Fed. Reg. 37,410/3. This claim is false.

40 C.F.R. § 56.5(a) states:

(a) Each responsible official in a Regional Office, including the Regional Administrator, shall assure that actions taken under the act:

(1) Are carried out fairly and in a manner that is consistent with the Act and Agency policy as set forth in the Agency rules and program directives,

(2) Are as consistent as reasonably possible with the activities of other Regional Offices.

The proposal, and EPA’s pretense to be acting pursuant to EPA’s “consistency” regulations, in fact contradict that regulation by proposing actions that are flatly *inconsistent* “with the Act and Agency policy as set forth in the Agency rules and program directives.” 40 C.F.R. § 56.5(a).

The EPA regulations, at 40 C.F.R. § 56.5, are not a license to grant waivers or allow regions to ignore national rulemakings to which they are otherwise bound. These regulations are instead meant to maximize *consistency and uniformity* among regional offices. Thus, even if EPA’s proposal were an appropriate or reasonable interpretation of the Clean Air Act, which it is not, it could not authorize a region to violate EPA’s duly adopted 2015 SSM SIP Call rule by approving a SIP containing an SSM exemption. *See Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (“It has become axiomatic that an agency is bound by its own regulations.”); *U.S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 526 n.20 (D.C. Cir. 1978) (“Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect.”); *see generally Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (explaining that agencies cannot avoid or indefinitely defer judicial review by abusing the rulemaking process). EPA announced in the 2015 rule that EPA was “applying the same legal and policy interpretation to each of these states.” 80 Fed. Reg. 33,883/1; *see also* 78 Fed. Reg. 12,460, 12,540 (Feb. 22, 2013).¹¹ Yet EPA now contradicts its earlier finding and claims that a concurrence granted under EPA’s “regional consistency regulations” authorizes it to create “alternative policy [interpretations]” throughout the country—first in Texas, then North Carolina, and now in Iowa. 85 Fed. Reg. 37,407/2.

Indeed, if these regulations functioned as EPA proposes, the agency could undo or revise any national rulemaking (while avoiding new national rulemakings) by simply “concurring” with as many divergent “regional” interpretations as EPA likes, but this cannot be right. *See infra* IV. EPA has acted to do so in Region 4, Region 6, and now Region 7. In Region 6, EPA approved affirmative defense provisions in the Texas SIP that EPA declared substantially inadequate in its 2015 action. 85 Fed. Reg. 7232 (Feb. 7, 2020). In Region 4, EPA approved director’s discretion provisions in the North Carolina SIP that the Agency itself had rejected as unlawful in the 2015 rule. *See* 85 Fed. Reg. 23,700 (Apr. 28, 2020); 80 Fed. Reg. 33,927-29. EPA has thus reversed

¹¹ *See also, e.g.*, EPA Resp. in Opp. to Mot. to Sever at 6, No. 15-1239 (D.C. Cir. Oct. 1, 2015) (Doc. No. 1576172) (citing same).

the 2015 SIP Call for the more than 123 million people who reside in those regions—over a third of the country—by cloaking that change in the SIP approval process. With its latest proposal in Iowa, EPA demonstrates its intention to continue evading judicial review by “concurring” with alternative interpretations in the remaining regions, until it effectively reverses the entire rule via state-by-state action. Fortunately, the text and regulatory history of EPA’s consistency regulations bar this outcome.

1. EPA’s interpretation of the consistency regulations should not be afforded deference under *Auer* or *Kisor*.

EPA’s proposed use of its regional consistency regulations is both inconsistent with the plain meaning of those regulations and not entitled to judicial deference under the *Auer-Kisor* line of cases. No deference would prevent a court from applying the plain meaning of the EPA regulations to overturn the agency’s contrary interpretation.

EPA invokes § 56.5(b) by claiming that “EPA’s CAA regulations allow EPA Regions to take actions that are inconsistent with national policy when the Region seeks and obtains concurrence from the relevant EPA Headquarters office.” 85 Fed. Reg. 37,410/3. But this is not what the regulation allows.

The provision relevant here reads in part: “A responsible official in a Regional office shall seek concurrence from the appropriate EPA Headquarters office on any interpretation of the Act, or rule, regulation, or program directive when such interpretation may result in application of the act or rule, regulation, or program directive that is *inconsistent with Agency policy*.” 40 C.F.R. § 56.5(b) (emphasis added).

Section 56.5(b)’s text does not allow EPA regions to take actions that interpret the Act in a manner inconsistent with plain statutory language, the agency’s binding interpretation of the statute reflected in a national EPA final action, or caselaw governing that plain statutory language, here, the *Sierra Club* decision. Nor does it allow EPA to concur in those inconsistent actions. Not even the proposal purports to find that authority in the agency’s “consistency regulations”; instead, EPA invokes them meekly to argue it may act “inconsistent with national policy.” *Id.* But EPA cannot use regulations addressing inconsistency with “national policy” to license violating the Clean Air Act, contradicting and reversing a national EPA rulemaking, and contravening the controlling D.C. Circuit decision.

The 2015 SSM SIP Call was a final action by EPA headquarters, signed by then-Administrator Gina McCarthy, a “nationally applicable” action “within the meaning of section 307(b)(1) of the CAA.” 80 Fed. Reg. 33,985/3. Accordingly, the “venue for challenges” lay exclusively in the D.C. Circuit Court of Appeals. *Id.* Moreover, EPA determined that “this rulemaking action [was] subject to the requirements of section 307(d).” *Id.* No EPA region, with or without concurrence from headquarters, possesses legal authority to reverse or withdraw a nationally applicable final action, in whole or in part, signed by the EPA Administrator. The

proposal identifies no such authority in the Clean Air Act, any other statute, any EPA regulation, or caselaw. The agency’s conclusory and inapposite statement that “EPA’s CAA regulations allow EPA Regions to take actions that interpret the CAA in a manner inconsistent *with national policy* when the Region seeks and obtains concurrence from the relevant EPA Headquarters office,” 85 Fed. Reg. 37,410/3 (emphasis added), simply ducks the question of authority to reverse or withdraw a nationally applicable final action, in whole or in part, signed by the EPA Administrator. By straining to locate this bold and broad authority in its regional consistency regulations, EPA gives those regulations far more weight than their text can bear.

Moreover, Congress knew well how to distinguish between “final action” in the Clean Air Act, with the force and effect of law, subject to judicial review, 42 U.S.C. § 7607(b)(1), on one hand, versus mere agency “policy,” on the other hand, which does not have the binding force and effect of law, *see, e.g., id.* §§ 7606(c), 7607(d)(3)(C), & 7609, and which may be changed without notice-and-comment rulemaking. Again, the proposal identifies no authority that allows an EPA region to issue a rule that applies the Clean Air Act in a manner inconsistent with plain statutory language, to reverse or withdraw the agency’s binding interpretation of the statute reflected in a national EPA final action, or to contravene caselaw governing that plain statutory language.

Moreover, even if an EPA region possessed general authority to reverse or withdraw a nationally applicable final action, in whole or in part, signed by the EPA Administrator (which it does not), the region may not do so pursuant to a rulemaking that skirts the procedures used to adopt the original final action, section 307(d). Nor may the region skirt the venue where challenges to the original EPA final action were not just directed, the D.C. Circuit, but where challenges *were actually filed*. As EPA well knows, lawsuits challenging the 2015 SSM SIP Call are pending and are in abeyance in the D.C. Circuit. The plain text of the regional consistency regulations does not supply the authority to evade required procedures and judicial review by concurring with a myriad of “alternative[s] [] to the national policy.” 85 Fed. Reg. 37,407/2.

Section 56.5(b) does not support but forecloses what EPA proposes to do here. Deference is therefore unavailable. “[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Section 56.5(b) is not ambiguous for the purposes of this action. It does not permit EPA to concur with interpretations that explicitly diverge from the Clean Air Act, a national EPA rulemaking, and controlling court decision.

Moreover, “before concluding that a rule is genuinely ambiguous, a court must exhaust all the ‘traditional tools’ of construction,” including “the text, structure, history and purpose of a regulation.” *Kisor*, 139 S. Ct. at 2415. Such an exercise quickly reveals that EPA’s proposed use of its consistency regulations is antithetical to their goal: consistency. An adjacent regulation generally requires that actions taken by regional offices be “as consistent as reasonably possible with the activities of other Regional Offices.” 40 C.F.R. 56.5(a)(2). The regulations’ statutory authority, section 301(a)(2)(A) of the Clean Air Act, requires that the regulations “assure fairness

and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the chapter.” 42 U.S.C. § 7601(a)(2)(A). Part 56 is still more explicit that its policy is to “assure fair and uniform application by all Regional Offices ... in implementing and enforcing the act.” 40 C.F.R. § 56.3(a). Where inconsistencies exist, the agency must “provide mechanisms for identifying and correcting *inconsistencies* by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the act.” *Id.* § 56.3(b) (emphasis added).

In context, then, 40 C.F.R. § 56.5(b)’s concurrence process is clearly meant as a check against the risk of inconsistent outcomes that may arise as a matter of course when, for instance, regions are presented with novel legal questions EPA has not yet answered with one voice. It certainly does not allow EPA to create inconsistency on a region-by-region basis, as it proposes to do here by approving a SIP that otherwise violates EPA’s 2015 SSM SIP Call.

Moreover, EPA’s own regulatory commentary directly addresses EPA’s reading here and rejects it. In promulgating these regulations, EPA explained that the agency “interprets [§] 301(a)(2) of the Act as a mandate to assure *greater consistency* among the Regional Offices in implementing the Act, *certainly not as a license to institutionalize the kind of inconsistencies* that prompted Congress to enact this provision.” 44 Fed. Reg. 13,043, 13,045/1 (Mar. 9, 1979) (emphasis added). In other words, EPA may not simply issue a section 56.5(b) concurrence for any region that requests it—to contradict plain statutory language, a national EPA rule, and controlling D.C. Circuit decision—as it now had for Regions 4, 6, and 7. Instead, EPA has an obligation to “correct[] the inconsistencies by standardizing” the nationally-applicable policies that must be employed by the EPA regional offices implementing and enforcing the Act. 40 C.F.R. § 56.3(b) (emphasis added).

EPA cites no authority or examples supporting its theory of § 56.5(b)’s function. Nor does any caselaw support this construction. The D.C. Circuit has observed that “[these consistency regulations], taken together, strongly articulate EPA’s firm commitment to *national uniformity* in the application of its permitting rules.” *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014) (“*NEDACAP I*”) (emphasis added). *NEDACAP I* and *NEDACAP II* (891 F.3d 1041 (D.C. Cir. 2018)) interpret § 56.5(b) before and after a 2016 amendment that created an exemption to the consistency requirement when divergent interpretations arise from inconsistent judicial decisions, *e.g.*, as the result of an intercircuit split. By cabining judicially created inconsistencies as separate and conceptually distinct from 42 U.S.C. § 7601’s more general “uniformity obligations,” *NEDACAP II* thus clarifies that § 56.5(b) is not a *carte blanche* that EPA regulators may use to circumvent well-established procedural norms. *See* 891 F.3d at 1049-50 (contrasting “court-created inconsistencies” with “regulations governing delegations of the Administrator’s powers”). Any claim to “genuine” ambiguity is thus foreclosed by the regulation’s history, place in the regulatory scheme, and lack of evidence that it has previously been interpreted in this manner.

But even if a court were convinced that some ambiguity remained, EPA’s interpretation would be outside the bounds of whatever deference agencies are owed under *Auer* (and now *Kisor*) to interpret and implement their own regulations. Even in cases of genuine ambiguity, the range of “reasonable” interpretations available to an agency exercising its discretion will be constrained by application of typical interpretive tools. *Kisor*, 139 S. Ct. at 2416. Even if EPA’s use of § 56.5(b) here did not violate the regulation’s unambiguous language, exogenous factors would exclude that use from any range of reasonable interpretations. Most broadly, “we give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to.” *Id.* The plain text of the Clean Air Act demonstrates that Congress would not want *Auer* deference to be granted to an agency using regulations promulgated under the Act’s mandate to “assure . . . uniformity” to undermine the policy of its statutory authority. 42 U.S.C. § 7601(a)(2)(A).

The substantive criteria of *Auer-Kisor* are of even less help to EPA here. Interpreting a consistency regulation does not “in some way implicate [EPA’s] substantive expertise,” as the Court has said it must. *Kisor*, 139 S. Ct. at 2417. “If uncertainty does not exist, there is no plausible reason for deference.” *Id.* at 2415. Here, there is no ambiguity in the regional consistency regulation for EPA to interpret. Rather, “[t]he regulation then just means what it means.” *Id.* The heart of the matter here is not technically difficult or specific to environmental protection and the sciences it implicates. It is a matter of administering a clear regulation and clear statute managing the relationships between an agency’s constituent offices, an “interpretive issue[] [falling] more naturally into a judge’s bailiwick.” *Id.* at 2417.

Finally, the interpretations in the proposal will not receive *Auer* deference because they do not reflect “fair and considered judgment” by the EPA. *Id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). Observed alongside its efforts to roll back the same SIP Call in Region 4 and Region 6, it is clear that EPA for the very first time proposes a contrived application of the regional consistency regulations it hopes will allow it to undo the 2015 SSM SIP Call and circumvent both national rulemaking to reverse the SIP Call and national review of this unlawful action in the U.S. Court of Appeals for the D.C. Circuit.

2. The proposed action is a “special action,” for which EPA has ignored and violated required procedures.

Assuming for the sake of argument that this proposal could be approved under EPA’s consistency regulations, it would have to proceed under an additional provision, 40 C.F.R. § 56.5(c), which EPA has neither invoked nor fulfilled. Once again, “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *State Farm*, 463 U.S. at 50. As such, any finding of approvability under § 56.5(c) would have no bearing on the appropriateness of this action.

Where, as here, “proposed regulatory actions involve inconsistent application of the requirements of the act, the Regional Offices *shall* classify such actions as special actions,” and

“shall follow” the Agency’s guidelines for processing state implementation plans, including EPA’s guidance document State Implementation Plans—Procedures for Approval/Disapproval Actions, OAQPS No. 1.2-005A or revisions. 40 C.F.R. § 56.5(c) (emphasis added). Compliance with EPA’s consistency regulations and guidance is required to give meaning and effect to Congress’s “mandate to assure greater consistency among the Regional Offices in implementing the Act.” 44 Fed. Reg. 13,045/1; *see also* 42 U.S.C. § 7601(a)(2)(A) (directing EPA to establish regulations that “shall be designed” to “assure fairness and uniformity” in the application of the Clean Air Act”).

Although the docket includes a June 12, 2020, letter captioned “Regional Consistency Concurrence Request,” and a “concurrence” signed by the Director of Air Quality Planning and Standards,¹² there is no record evidence that EPA has, in fact, complied with its consistency regulations and mandatory guidance documents in proposing to exempt Iowa and the rest of Region 7 from the national SSM policy. Specifically, EPA’s guidance documents make clear that where a proposed action “would have significant national policy implications (*i.e.*, establish a precedent), a more complete review is required,” including the potential establishment of a steering committee or interagency review. EPA, Guidelines Revisions to State Implementation Plans—Procedures for Approval/Disapproval Actions § 7.2.c (OAQPS No. 1.2-005A) (Apr. 1975), <https://nepis.epa.gov/Exe/ZyPDF.cgi/9100FOQM.PDF?Dockey=9100FOQM.PDF> (hereinafter, “SIP Guidelines”). “The necessity for this review shall be determined through consultation between the [Regional Office] and [the Office of Air and Waste Management]”; and any such review “shall be coordinated through the appropriate section of [the Office of Air and Waste Management].” *Id.* Moreover, a “full concurrence” by each of the affected EPA sections “will be necessary.” *Id.* § 7.2.

EPA’s SIP Guidelines provide additional and detailed requirements for EPA Headquarters review and concurrence for “special actions” like this one, which involves inconsistent application of the requirements of the Clean Air Act. 40 C.F.R. § 56.5(c).¹³ Specifically, although normal actions require minimal Headquarters review, the Guidelines make

¹² Memorandum from James B. Gulliford, Acting Reg’l Adm’r Region VII to Peter Tsirigotis, Dir., Office of Air Quality Planning and Standards (June 12, 2020), Docket No. EPA-R07-OAR-2017-0416-0047.

¹³ As noted, in reviewing SIPs, the Regional Office “shall follow” the provisions of the guideline, revisions to State Implementation Plans—Procedures for Approval/Disapproval Actions, OAQPS No. 1.2-005A, and “[w]here regulatory actions may involve inconsistent application of the requirements of the act, the Regional Offices shall classify such actions as special actions.” *See* 40 C.F.R. § 56.5(c). EPA’s mandatory guidance document, in turn, refers to EPA’s separate “‘Guidelines for Determining the Need for Plan Revisions to the Control Strategy Portion of the Approved SIP,’ OAQPS No. 1.2-011,” which “explains the rationale EPA applies in determining when to call for a plan revision,” and sets out the process the Agency must follow in issuing a “special action.” SIP Guidelines § 7.1.

clear that “special actions” require concurrence at the Assistant Administrator or General Counsel level. SIP Guidelines § 7.2. In other words, concurrence by the Director of Air Quality Planning and Standards is not, by itself, sufficient.

Because the special action category is generally reserved for actions with national policy implications, EPA’s Guidelines specifically require review of such actions and concurrence *prior to* publication in the Federal Register by the Office of the Administrator (including the Office of General Counsel), the Office of Air, Noise, and Radiation, the Office of Enforcement, and the Office of Planning and Management. *Id.* §§ 6.1, 6.3. The “fundamental purpose” of Headquarters review of “special actions” is to ensure that all relevant staff have adequately reviewed issues with national policy implications, or issues that may result in inconsistent litigation positions.

EPA cannot approve a SIP that violates applicable Clean Air Act requirements. 42 U.S.C. § 7410(l). Here, nothing in the record indicates that Region 7 has, in fact, conducted the required consultations and obtained *all* the requisite concurrences for this proposal that might exempt Iowa from the national SSM policy. Because EPA has failed to demonstrate that it complied with the Agency’s own consistency regulations in proposing to exempt Iowa from the national SSM policy, EPA cannot lawfully withdraw its SSM SIP Call for Iowa or approve the state’s previously submitted plan.

D. The proposal fails to demonstrate compliance with Clean Air Act section 110(l).

Clean Air Act section 110(l), 42 U.S.C. § 7410(l), says: “[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.” EPA has failed to show compliance with this requirement and, indeed, the proposal failed to address or even mention it. *See Hall v. EPA*, 273 F.3d 1146 (9th Cir. 2001) (EPA must make a reasonable analysis of whether a revised SIP will actually help get areas to attainment).

Moreover, EPA’s SSM SIP Call disapproval of automatic exemptions rested, in part, on the correct conclusion that even a single emission event could cause a NAAQS violation. EPA’s reversal of position in the proposal is not accompanied by the “reasoned explanation [that] is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy,” *Fox Television*, 556 U.S. at 514-16; *see also Watt*, 451 U.S. at 273 (explaining that a department’s “current interpretation, being in conflict with its initial position, is entitled to considerably less deference” than it would be otherwise). “An agency may not ... simply disregard rules that are still on the books.” *Fox Television*, 556 U.S. at 514 (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)). For the same reasons, the proposal’s failure to even address section 110(l) runs afoul of these same cases. *Id.*

E. EPA may not commandeer the SIP process for its own purposes.

A SIP approval is not the proper or lawful forum for EPA to initiate a change in policy, much less one that violates the Clean Air Act. Nor may EPA hijack a state's SIP submittal to effect a change in policy the submittal in no way requests.

Instead, pursuant to the policy it announced in its 2015 SIP Call, EPA must reject at least a portion of this submittal as substantially inadequate because it includes a prohibited automatic exemption for SSM events. *See* IAC 567-24.1(1) (“Excess emission during a period of startup, shutdown, or cleaning of control equipment is not a violation of the emission standard if the startup, shutdown or cleaning is accomplished expeditiously and in a manner consistent with good practice for minimizing emissions.”). But in this rulemaking, EPA ignores and fails to meaningfully grapple with the plain language of the Clean Air Act, which tightly constrains its range of possible responses in this action.

In the event of a SIP element's substantial inadequacy, such as the inconsistency here between IAC 567-24.1(1) and EPA's 2015 SSM policy, EPA *must not* approve a SIP containing that element. 42 U.S.C. § 7410(l) (“The Administrator *shall not* approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment ... or any other applicable requirement of this chapter.”) (emphasis added). Instead, EPA unlawfully proposes to “*approve*[] state law as meeting Federal requirements,” even though it does not. 85 Fed. Reg. 37,411/2.

EPA fails to identify any source of authority that would allow it to approve an inadequate SIP by simultaneously promulgating a change in the applicable regional policy. That is because the Clean Air Act only allows EPA to (1) approve a SIP, (2) reject a SIP, (3) partially approve a SIP, (4) issue a SIP call, (5) revise a SIP to correct an error, or (6) issue a Federal Implementation Plan (FIP). *See* 42 U.S.C. § 7410(l) (“The Administrator *shall not* approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress ... *or any other applicable requirement of this chapter.*”) (emphasis added), 7410(k)(3) (“If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part.”), 7410(k)(5) (“Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate ... to otherwise comply with *any requirement of this chapter*, the Administrator *shall* require the State to revise the plan as necessary to correct such inadequacies.”) (emphasis added), 7410(k)(6) (“Whenever the Administrator determines that the Administrator's action ... was in error, the Administrator may in the same manner ... revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof *shall be provided to the State and public.*”) (emphasis added), 7410(c)(1)(A)-(B) (“The Administrator *shall* promulgate a Federal implementation plan at any time within 2 years after [a finding of substantial inadequacy

or a disapproval] *unless* the State corrects the deficiency”) (emphasis added). EPA’s own website acknowledges the limits of its role in these actions.¹⁴

The Act’s mandatory language proscribes EPA’s novel response here. EPA has invented a seventh course of action by initiating an *ad hoc* departure from a national final action for the benefit of a particular SIP in a particular region. EPA does not have the authority to expand its role in these matters by unilaterally and arbitrarily proposing a change in regional policy that would allow it to approve a SIP element it is otherwise bound to reject. *Cf. Ala. Env’tl. Council v. EPA*, 711 F.3d 1277, 1290 (11th Cir. 2013) (holding that “the EPA cannot rely on any inherent authority here [to initiate a SIP revision], where Congress has provided specific statutory procedures for revising a SIP.”). If EPA wishes to change its policy such that IAC 567-24.1(1) would not be substantially inadequate, it must undertake a national rulemaking to that end, in the same manner by which it determined automatic SSM exemptions *were* substantially inadequate.

IV. IF FINALIZED, THE PROPOSED ACTION MUST BE SUBJECT TO REVIEW IN THE D.C. CIRCUIT.

As explained above, EPA must not change its SSM policy and withdraw its call of the Iowa SIP regarding the SIP’s provisions providing automatic exemptions for SSM events. If it does so, however, review of its action must occur in the D.C. Circuit together with the still-pending (meritless) challenges to the SSM SIP Call, and any effort by the agency to evade centralized review of EPA’s proposed SSM exemption rule would be arbitrary and contrary to the Clean Air Act’s venue provision. The proposal, on its face, revises EPA’s national, categorical prohibition on SSM exemptions in SIP, declaring an “alternative policy” that such exemptions are “consistent with CAA requirements,” 85 Fed. Reg. 37,409/1, and revising the nationally applicable SIP Call so that it applies to one fewer state. This change to the SIP Call, which EPA has consistently described as nationally applicable, is itself a nationally applicable agency action. To ensure uniform review of national agency actions, Congress designated the D.C. Circuit as the only venue for such actions.

Importantly, the Clean Air Act “evinces a clear congressional intent” to centralize review in the D.C. Circuit of ““matters on which national uniformity is desirable.”” *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *4 (5th Cir. Feb. 24, 2011); *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996); *see also NEDACAP II*, 891 F.3d at 1054 (Silberman, J., concurring) (the Clean Air Act’s venue provision reflects “a clear congressional mandate: uniform judicial review of regulatory issues of national importance”); *NRDC v. EPA*, 512 F.2d 1351, 1357 (D.C. Cir. 1975) (vesting of exclusive review in the D.C. Circuit is designed “to ensure uniformity in decisions concerning issues of more than purely local or regional impact”). The Clean Air Act’s venue provision “facilitat[es] the orderly development of the basic law”; it

¹⁴ EPA, *How EPA Works with States on SIPs*, <http://epa.gov/air-quality-implementation-plans/how-epa-works-states-sips> (last visited July 15, 2020).

ensures the D.C. Circuit reviews “matters on which national uniformity is desirable,” thereby avoiding “piecemeal review of national issues in the regional circuits, which risks potentially inconsistent results.” *Texas*, 2011 WL 710598, at *4. Refusing to accept judicial review in the D.C. Circuit would frustrate Congress’s clear intent.

A. EPA proposes a nationally applicable action.

As EPA recognized in issuing the 2015 SSM SIP Call, the agency’s “legal interpretation of the [Clean Air Act] concerning permissible SIP provisions to address emissions during SSM events,” including those in Iowa’s SIP, was a “nationally applicable” rule. 80 Fed. Reg. 33,864/2. At the core of the SIP Call was EPA’s implementation of “interpretations of the CAA in the SSM Policy that apply to SIP provisions for all states across the nation”—namely, that SIP provisions cannot include exemptions or affirmative defenses for emissions during SSM events. *Id.* at 33,883/1. Accordingly, any petitions for review challenging aspects of EPA’s nationally applicable SSM SIP Call or its SSM policy were required to be filed in the D.C. Circuit, which is where those petitions are indeed still pending.

In yet another attempt to *decentralize* judicial review of EPA’s correct prohibition of SSM exemptions, EPA proposes to exempt Iowa from the nationally applicable SIP Call (and exempt states in Region 7 from the SSM SIP policy established in the final SIP Call rule) in a separate Federal Register notice.¹⁵ But the SSM SIP Call and EPA’s proposal to exempt Iowa are part of the same overarching and “nationally applicable regulation” under 42 U.S.C. § 7607(b)(1), for several reasons.

First, the proposed withdrawal of Iowa from the national SSM SIP Call—and the rest of the states in Region 7 from EPA’s SSM policy established in the SIP Call—explicitly “departs from” and is “inconsistent with” the “policy detailed in EPA’s 2015 SSM SIP Action” and announces a substantive change to determining whether exemptions for SSM events in state implementation plans are approvable. 85 Fed. Reg. 37,405/2, 37,410/3. Specifically, EPA has impermissibly revised its previous, nationally-applicable, adherence to the D.C. Circuit’s ruling in *Sierra Club*, and reversed the national SIP Call rule that SSM exemptions are categorically “not allowable.” *Id.* at 37,407/3. Now, emission limitations need not always apply “on a continuous basis,” 42 U.S.C. § 7602(k), and SSM exemptions are permissible so long as EPA finds “the SIP as a whole is protective of the NAAQS.” 85 Fed. Reg. 37,407/3. EPA claims to identify “two key backstops” in the Iowa SIP “that protect air quality and ensure attainment and maintenance of the NAAQS”: (1) that the SSM maintenance is “accomplished expeditiously”;

¹⁵ EPA has already taken final action purporting to revise the SSM SIP Call to exempt Texas and North Carolina from the national rule prohibiting SSM affirmative defenses and exemptions. 85 Fed. Reg. 23,700; 85 Fed. Reg. 7232. Those actions are currently under review in the D.C. Circuit. *Sierra Club et al. v. EPA*, No. 20-1115 (D.C. Cir. Apr. 7, 2020); *Sierra Club et al. v. EPA*, No. 20-1229 (D.C. Cir. June 29, 2020).

and, (2) the maintenance “is consistent with good practice for minimizing emissions.” *Id.* at 37,409/1-2 (quoting IAC 567-24.1(4)). As noted below, those same kinds of vague, qualitative, and unenforceable “backstops” appear in numerous state SSM exemptions, and EPA’s 2015 SSM SIP Call expressly rejected the argument that those purported backstops complied with the plain text of the Clean Air Act. 80 Fed. Reg. 33,893-94.

Second, although the proposal ostensibly applies to a single state, EPA is using it to announce a substantial change to the Clean Air Act’s SIP requirements. Moreover, the reasoning underlying the proposal necessarily applies to the 29 states that have similarly illegal SSM exemption provisions, which were included in the 2015 SSM SIP Call. The same “two key backstops” in the Iowa SIP that EPA relies on here are, in identical or similar form, in many other states’ SIPs that contain SSM exemptions that EPA correctly called.¹⁶ Yet, EPA fails to articulate any rational principle that would limit its “alternative” Clean Air Act interpretation to Iowa. Indeed, the proposal provides a blueprint for states “like Iowa,” which can supposedly ensure attainment of the NAAQS “despite one or more SSM exemptions in the SIP.” 85 Fed. Reg. 37,407/3.

That EPA chose to promulgate a new SSM policy through a separate Federal Register notice will not preclude courts from looking beyond the agency’s label, and examining the underlying substance and applicability of the rule. Instead, courts assess whether an action is nationally applicable by evaluating the “nature” of the underlying action. *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670 (7th Cir. 2017).

Here, EPA’s proposal, on its face, adopts an “alternative interpretation” of the Clean Air Act that is “inconsistent” with the SSM SIP Call’s categorical prohibition against SSM exemptions. 85 Fed. Reg. 37,408/1, 37,410/3. Moreover, the proposal broadly instructs all states and EPA regional offices as to how they are to determine whether SSM exemption SIP provisions are approvable; and how they may, purportedly consistent with the Clean Air Act, allow for approvable exemption provisions and backstops. The proposal also sets out the circumstances under which EPA will allow an EPA Region to adopt SSM exemptions that are “inconsistent” with the national SIP Call policy. *Id.* at 37,410/3. Thus, “the face of the rulemaking” confirms that the proposal is “nationally applicable.” *Am. Rd. & Transp. Builders Ass’n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (to determine whether a final action is nationally applicable, the Court “need look only to the face of the rulemaking”).

¹⁶ See Sierra Club Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions 17-74 (June 30, 2011), EPA-HQ-OAR-2012-0322-0002 (evaluating SSM exemption provisions in 29 different states) (attached). At least five other SIPs included in the SIP Call allow operators to avoid liability for SSM events provided they are expeditiously addressed and that the facility is operated according to good practices. See, e.g., Ariz. Admin. Code § 18-2-310(B)(2)-(3); 5 Colo. Code Regs. § 1001-2(II.E.1.c); 326 Ind. Admin. Code 1-6-4(a); 401 Ky. Admin. Regs. 50:055 § 1(4); N.M. Code R. § 20.2.7.111(A)(3)-(4).

Additionally, on its face, the proposal revises the national SIP Call by making it inapplicable in a state where it previously applied and laying the groundwork for withdrawal of future states. As the past year of SIP Call withdrawals in Texas, North Carolina, and now proposed in Iowa shows and EPA itself has conceded, the proposal is one of a pattern: dismantling the national SIP Call on a state-by-state basis. EPA Reply in Support of Cross-Mot. to Transfer Venue at 10, *Sierra Club v. EPA*, No. 20-1115 (D.C. Cir. June 10, 2020), Doc. No. 1846642 (admitting EPA’s plan is to “explore and refine alternative interpretations one step at a time”). EPA’s assumption that it can undo a nationally applicable rule piecemeal, without ever taking a nationally applicable action, conflicts with Congress’s intent to “place nationally significant decisions in the D.C. Circuit.” *Tex. Mun. Power Agency*, 89 F.3d at 867.

Just as a litigant may not “transform[] a national standard to a regional or local rule” simply by narrowly focusing on one affected state, *ATK Launch Sys. v. EPA*, 651 F.3d 1194, 1198 (10th Cir. 2011), EPA cannot transform the revision of its national SIP call into a regional or local rule by implementing it one state at a time. *See generally Am. Petroleum Inst.*, 683 F.3d at 388 (explaining that agencies cannot avoid or indefinitely defer judicial review by abusing the rulemaking process). EPA has made clear that, contrary to its nationwide SIP Call, SSM exemptions are now fair game. That change applies nationwide and accordingly must face review in the D.C. Circuit.

EPA’s approach to escape review in the D.C. Circuit would foster exactly the “piecemeal review” and “potentially inconsistent results” that Congress sought to avoid with the Clean Air Act’s venue provision. *Texas*, 2011 WL 710598, at *4. EPA’s “alternative policy” in the proposal is a changed interpretation of the Clean Air Act, one that could just as easily apply in not just the three other states and Tribal nations in Region 7 (covering the Eighth and Tenth Circuits) but any state with SSM exemptions. Indeed, EPA has finalized the same exception to the prohibition against SSM exemptions in North Carolina in Region 4 (covering the Fourth, Fifth, Sixth, and Eleventh Circuits). This action is neither “locally” nor “regionally” applicable under 42 U.S.C. § 7607(b)(1) because there is no single Circuit in which review of EPA’s changed interpretation of the Clean Air Act is “appropriate.” As the Seventh Circuit has recognized, “[o]verlapping, piecemeal, multicircuit review of a single, nationally applicable EPA rule is potentially destabilizing to the coherent and consistent interpretation and application of the Clean Air Act.” *S. Ill. Power Coop.*, 863 F.3d at 674.

EPA’s framing its action as an “alternative” to a national policy is a red herring: allowing an alternative to a nationwide policy that previously did not allow deviations—and under EPA’s interpretation of the Clean Air Act, could not—is itself a new policy. Before issuing the proposal, EPA Region 7 “sought and obtained concurrence from the EPA’s Office of Air and Radiation to propose an action that outlines an alternative policy that is inconsistent with the national EPA policy” in the SIP Call. 85 Fed. Reg. 37,410/3. EPA headquarters likewise concurred in Region 6’s deviation and in Region 4’s deviation. 85 Fed. Reg. 7232; 85 Fed. Reg. 23,718. The national coordination of these actions within EPA’s headquarters confirms the

agency itself views these actions as a revision to a nationally applicable action. Whether at the request of a state (Texas) or on its own initiative (North Carolina and Iowa), EPA has across the country repeatedly proved willing to allow what it previously prohibited nationwide.

B. The proposed withdrawal of Iowa from EPA’s nationally applicable SSM SIP Call and exemption of the states in Region 7 from the SIP Call’s SSM policy are based on a determination of nationwide scope and effect.

Even if the SIP Call withdrawal for Iowa is not “nationally applicable” (it is), EPA must still make and publish a finding that the proposed amendment to the national SSM SIP Call and the SSM exemption policy established in that rule is “based on a determination of nationwide scope and effect.” 42 U.S.C. § 7607(b)(1). The Clean Air Act “gives the Administrator the discretion to move venue to the D.C. Circuit by publishing a finding declaring the Administrator’s belief that the action is based on a determination of nationwide scope or effect.” *Texas*, 829 F.3d at 419-20. While EPA’s venue determination (or lack thereof) is entitled to some deference, it “does not escape review under the APA’s arbitrary and capricious standard.” *NEDACAP II*, 891 F.3d at 1053 (Silberman, J., concurring). Here, it would be arbitrary for EPA to refuse to publish a finding that allowing affirmative defenses is based on a determination of nationwide scope and effect.

Whether a regulation is nationwide in scope and effect focuses on the “‘determination’ that the challenged action is ‘based on.’” *Texas*, 829 F.3d at 419, 422. “These determinations are the justifications the agency gives for the action and they can be found in the agency’s explanation of its action.” *Id.* at 419. Further, “[b]ecause the statute speaks of the determinations the action ‘is based on,’ the relevant determinations are those that lie at the core of the agency action.” *Id.*

The proposal is based on several determinations of nationwide scope and effect, and EPA must so find and publish its finding, directing any challenge to the rule exclusively to the D.C. Circuit. 42 U.S.C. § 7607(b)(1). Any failure to do so would be arbitrary. First, the proposal is indisputably “based on” EPA’s determinations about the nationwide validity of the nationally applicable 2015 SSM SIP Call. As explained above, that 2015 action is based on determinations of national scope and effect, and, perforce, reversing it also is based on determinations of nationwide scope and effect.

Indeed, EPA implicitly recognizes that its proposal to exempt Iowa from the national rule categorically prohibiting SSM exemptions is necessarily *based on* a determination of nationwide scope and effect. EPA acknowledges the proposal is based on a policy and statutory interpretation that is “alternative” to, and “inconsistent with,” EPA’s 2015 “national policy” determinations. 85 Fed. Reg. 37,410/3. By seeking EPA Headquarters concurrence to propose an action “inconsistent with national policy,” *id.*, EPA recognizes that this proposal departs from, and is necessarily based on, EPA’s 2015 rule that such SSM exemptions are categorically “not

allowable.” 85 Fed. Reg. at 37,407/3. Thus, EPA itself has recognized that the proposal is, in fact, based on a determination of nationwide scope and effect.

Second, a determination of nationwide scope and effect is appropriate where, as here, a regionally applicable action “encompasses two or more judicial circuits.” In the 1977 CAA Amendments, Congress explained its revisions to the judicial review provisions. See H.R. Rep. No. 95-294, at 322-24, 1977 U.S.C.C.A.N. at 1401-03. The House Report makes clear that “if an action of the Administrator is found by him to be based on a determination of nationwide scope or effect (*including a determination which has scope or effect beyond a single judicial circuit*), then exclusive venue for review is in the [D.C. Circuit].” *Id.* at 324, 1977 U.S.C.C.A.N. at 1403 (emphasis added); *see also PPG Indus., Inc. v. Harrison*, 587 F.2d 237, 243 n.6 (5th Cir. 1979), *rev’d on other grounds* 446 U.S. 578 (1980) (quoting same). EPA has applied this same rationale in finding that regionally applicable actions were based on determinations of nationwide scope and effect. *See, e.g.*, 79 Fed. Reg. 29,362, 29,368 (May 22, 2014) (determination of nationwide scope and effect made in regional SIP action applying to North Carolina and Florida). Although EPA’s proposed rule ostensibly applies only to Iowa, the revised SSM exemption policy would apply throughout Region 7, which spans four states and two judicial circuits. That the “scope and effect” of the proposal extends across two judicial circuits makes clear that the proposal must be reviewed only in the D.C. Circuit, as illustrated by section 7607(b)(1)’s legislative history and consistent with EPA’s past practice.

For all the reasons discussed above, the proposal is based on a determination of nationwide scope and effect—a determination that EPA’s nationwide SIP Call need not apply nationwide.

Further, EPA made and published such a finding when it issued the SIP Call, explaining that EPA was “applying the same legal and policy interpretation to each of these states” and “the underlying basis for the SIP call has ‘nationwide scope and effect.’” 80 Fed. Reg. 33,883; *see also* 78 Fed. Reg. 12,540.¹⁷ The withdrawal of this nationwide prohibition is necessarily based on a determination of nationwide scope and effect—a determination that the prohibition can have exceptions. EPA further recognized that a “key purpose” of the Clean Air Act’s venue provision is to “minimize instances where the same legal and policy basis for decisions may be challenged in multiple courts of appeals, which instances would potentially lead to inconsistent judicial holdings and a patchwork application of the [Clean Air Act] across the country.” 80 Fed. Reg. 33,883. EPA fails to at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *Fox Television*, 556 U.S. at 515. And in explaining its changed position, an agency must also be cognizant that longstanding policies may have “engendered serious reliance interests that must be taken into account.” *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Here, EPA provided no explanation whatsoever—let alone a reasoned one—for its departure from past practice in determining that the core legal

¹⁷ *See also, e.g.*, EPA Resp. in Opp. to Mot. to Sever at 6, No. 15-1239 (citing same).

interpretations and policy decisions at issue in any SIP calls, including any amendment to those interpretations, are based on determinations of nationwide scope or effect and must therefore be centralized for review in the D.C. Circuit to ensure uniformity in approach. Thus, here, it would be arbitrary for EPA to refuse to make and publish a finding that its proposed action is based on a determination of nationwide scope and effect.

V. CONCLUSION

EPA's proposed action violates the Clean Air Act and contradicts D.C. Circuit precedent. It is arbitrary, capricious, and unreasonable, and attempts to evade lawful procedures and proper judicial review. And it threatens to harm vulnerable communities in Iowa and elsewhere. EPA must not approve this action.