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Re: Petition for Reconsideration and Stay of EPA's Final Rule: Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals (Aug. 8, 2011) (Docket No. EPA-HQ-OAR-2009-0491)

Dear Administrator Jackson and Assistant Administrator McCarthy:

The National Association of Manufacturers (Manufacturers) respectfully requests that the U.S. Environmental Protection Agency (EPA) reconsider and immediately stay the compliance deadline and effective date of EPA's Final Rule titled: Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals (Aug. 8, 2011) (Docket No. EPA-HQ-OAR-2009-0491) (Final Transport Rule). Manufacturers make this request pursuant to Clean Air Act (CAA) Section 307, 42 U.S.C. § 7607, and Section 705 of the Administrative Procedure Act (APA), 5 U.S.C. § 705.

Manufacturers are the largest industrial trade association in the United States, representing over 11,000 small, medium and large manufacturers in all 50 states. Manufacturers are the leading voice in Washington, DC for the manufacturing economy, which provides millions of high wage jobs in the United States and generates more than $1.6 trillion in GDP. In addition, eighty percent of our members are small businesses, which serve as the engine for job growth. Manufacturers' mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. While we support environmental regulations designed to provide real net benefits to the environment and public health, we consistently oppose regulations that create adverse economic impacts and that are not in compliance with the underlying law.

As context for these comments, it is important to consider that manufacturers are attempting to fully recover from the steepest economic downturn since the 1930s and bring back the 2.2 million high-wage jobs lost in recent years. At the same time, our member companies are confronting an avalanche of additional rules and regulations from EPA. Manufacturers strongly urge federal policy makers to create conditions that will lead to economic expansion and not stifle the industrial and manufacturing vitality necessary to create jobs and technologies that will continue to improve the nation's air quality. Imposing additional costs on the manufacturing sector will not accomplish any of these objectives. As discussed below, the Final Transport Rule will harm manufacturers by raising electricity rates and reducing the reliability of the electric grid.

I. RECONSIDERATION IS WARRANTED

Reconsideration is warranted for several reasons, all of which have been expressed by others in their petitions and are summarized below:[1]

- **EPA made significant changes to the rule and the underlying modeling and data used to establish the rule.** EPA did not provide sufficient notice or opportunity to comment on these changes. As the Office of Management and Budget's (OMB) report on interagency review noted, the Final Transport Rule is a "significantly different rule than originally proposed." Given the scope and number of these changes, OMB reported a concern that it is "unclear if states and affected facilities will be prepared for a January 1, 2012 start date."

- **The state budgets in the Final Transport Rule are significantly different from those in the proposed rule.** As is the case with the changed modeling and data that underlie the budgets, EPA did not provide adequate notice or an opportunity to comment on these changed budgets. These significantly reduced budgets will likely increase electricity prices, to the detriment of manufacturers.

- **EPA is requiring emissions reductions for some states that are more than what is necessary to address those states' alleged "significant contribution" to EPA's hypothetical downwind nonattainment.** EPA does not have the statutory authority to require such reductions, as EPA can only require a state to eliminate the "amount" of emissions that "contribute significantly" to downwind nonattainment but cannot require anything more. See *North Carolina v. EPA*, 331 F.3d 896, 921 (D.C. Cir.

[1] *See, e.g.,* petitions for reconsideration filed by Luminant Generation Company LLC and its affiliates (filed August 5, 2011), the State of Texas (filed September 9, 2011), GenOn Energy, Inc. (filed September 13, 2011), Wisconsin Public Service Corporation (filed September 13, 2011) and the operating companies of the American Electric Power System (filed October 3, 2011). Manufacturers agree with and incorporate those petitions and urge EPA to grant the relief they request.

2008) ("[S]ection 110(a)(2)(D)(i)(I) gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions.").

- **EPA's Final Transport Rule is based on flawed data and assumptions that were not adequately subject to vetting through notice and comment.** For example, EPA included in its modeling the availability of some natural gas-fueled electric generating units that have been mothballed, retired or even demolished. Further the rule appears to assume that some facilities will be using environmental controls as of January 1, 2012 that are not currently installed and that would take years to permit and install.

- **EPA relied on Federal Implementation Plans (FIPs) that violate the CAA.** The Clean Air Act requires that states get the first chance to address nonattainment problems and only thereafter can EPA step in and issue a FIP. EPA ignored that process, preemptively issuing FIPs and thereby violating the CAA and the federal-state partnership that Congress required.

- **EPA's last-minute decision to include Texas in the list of states required to address downwind effects related to fine particulate matter was issued without providing fair notice and opportunity to comment.** This decision was an abrupt about-face from EPA's conclusion less than a year ago that Texas emissions have no significant downwind effect on other states. It also is inconsistent with the air monitoring data that shows that the location where Texas is allegedly impacting is already actually in air-quality attainment. Requiring Texas to cut its sulfur dioxide emissions by half and greatly reduce nitrogen oxides emissions in less than five months is unreasonable and will place the state and its electricity generators in an untenable position. It will force them to close facilities and scale back electricity generation, likely resulting in higher electricity prices and reduced electricity reliability for manufacturers.

EPA made a number of fundamental and unforeseeable changes to the scope and basis for the Final Transport Rule without giving stakeholders fair notice and the opportunity to comment. Thus, EPA *must* grant reconsideration, as Section 307(d)(7)(B) of the CAA requires EPA to do so when "it was impracticable to raise [an] objection [during the period for public comment] or if the grounds for such objection arose after the period for public comment … and if such objection is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B).

Further, EPA should grant reconsideration and fix the rule, since the changes to the rule are not a "logical outgrowth" of the proposed rules. *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (stating that "[t]he test is whether a new round

of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule"). Interested parties should not have to "divine the agency's unspoken thoughts," nor should the final rule be "surprisingly distant" from the Agency's proposal. *Id.* (citations omitted). Because the Final Transport Rule fails all of these tests, EPA must grant reconsideration and should stay implementation of the rule.

According to Reginfo.gov, on October 3, 2011 EPA submitted a proposal to revise the Final Transport Rule to the Office of Management and Budget (OMB) for interagency review. This raises further uncertainty regarding a rule that has a compliance date pending in less than three months. Finalizing such a rule even at this stage only reinforces the need to grant a stay given the limited compliance window.

II. EPA HAS AUTHORITY TO GRANT A STAY

As discussed below and in the already-filed administrative petitions for reconsideration and D.C. Circuit motions to stay[2] the Final Transport Rule, manufacturers and others face irreparable harm if the rule is not stayed. A showing of irreparable harm is not necessary, however, as EPA has broad authority and discretion to stay the effectiveness of rules promulgated under the CAA under both Section 307 of the CAA and Section 705 of the APA. The criteria that EPA must apply are significantly less stringent than the criteria generally used by the courts, because a demonstration of irreparable harm is not mandatory:[3]

- First, CAA Section 307(d)(7)(B) provides that EPA may grant a stay if the Agency has decided to reconsider a rule. See 42 U.S.C. § 7607(d)(7)(B).[4] No other criteria or conditions are imposed on the Agency's authority to issue a stay.

[2] A number of petitions for review have already been filed in the United States Court of Appeals for the District of Columbia Circuit and multiple parties have moved to stay the Final Transport Rule.

[3] Nothing in the CAA requires a showing of irreparable harm in order to justify an administrative stay; instead, all that is required are proper grounds for reconsideration. The APA deliberately contrasts what is required for an administrative stay ("justice so requires") and a judicial stay ("conditions as may be required" and "irreparable harm"). 5 U.S.C. § 705. Such differences must be given effect, and therefore there is no irreparable harm requirement for an administrative stay under the APA either.

[4] CAA § 7607(d)(7)(B) provides, in relevant part:

> If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. … The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

- Second, "when justice so requires," EPA may stay the effective date of a CAA rule pending judicial review, under Section 705 the APA, 5 U.S.C. § 705.[5] *See, e.g.,* Final Rule, Amendments of Final Rule To Postpone Requirements, 61 Fed. Reg. 28,508 (June 5, 1996).

Thus, the only express condition imposed on EPA's authority to grant a stay under CAA § 307 is that the Agency must have decided to reconsider the rule. APA § 705 is similarly broad, authorizing EPA to issue a stay: (1) if judicial review is pending; and (2) when "justice so requires." Of course, EPA also has the fundamental obligation to engage in reasoned decision making and must not make arbitrary and capricious determinations. All of these criteria leave EPA with considerable authority to stay the rules – especially under the current circumstances.

III. ABSENT A STAY, MANUFACTURERS WILL BE HARMED

A stay of the Final Transport Rule is clearly warranted, as Manufacturers and others will be irreparably harmed if electricity generators are forced to comply with the rules' provisions come January 1, 2012. The harms include:

- **Increased electricity prices.** Because the Final Transport Rule is likely to result in decreased electricity generation, it is likely to drive up electricity prices. As every manufacturer requires electricity and the Final Transport Rule applies to more than half of the states, the rule will impact many of Manufactures' members, although some energy intensive manufacturing sectors may be disproportionately impacted. Several utility companies have already announced they will shut down facilities as a result of this rule and its associated costs. Further, increased energy costs directly impact manufacturers and their ability to retain and create jobs. Any increase in a fundamental business cost is likely to endanger the economy's fragile ability to climb out of the recent recession and for manufacturers to be able to drive that recovery.

- **Decreased electric reliability.** Some areas of the country are likely to see decreased electric grid reliability as a result of the Final Transport Rule. This will harm the manufacturing sector in those areas, as blackouts do more harm than just causing temporary shutdowns while the power is out. They can also require longer periods of downtime while delicate instruments are recalibrated. In addition, unexpected blackouts can harm manufacturing equipment. This creates

[5] APA § Section 705 reads:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

disincentives for industries to locate or stay in the areas being impacted by the Final Transport Rule, potentially encouraging those industries to relocate to other countries.

- **Impacts to utilities.** Manufacturers' members include a number of utilities that will be harmed by the Final Transport Rule. They will be forced by the rule to shut down facilities, lay off workers and pay more for crucial supplies.

In order to prevent significant harm to the manufacturing sector and to ensure that the Final Transport Rule is based on the best information and complies with the CAA, EPA should reconsider the Final Transport Rule and stay the rule pending reconsideration.

Sincerely,

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