



November 3, 2015

U.S. Environmental Protection Agency
 Attention: Docket ID No. EPA-HQ-OAR-2014-0616
 Mr. Greg Nizich, Air Quality Policy Division
 Office of Air Quality and Planning Standards
 109 T.W. Alexander Drive, Mail Code C504-03
 Research Triangle Park, NC 27709

Re: Amendments to Regional Consistency Regulations, Proposed Rule, Docket ID No. EPA-HQ-OAR-2014-0616, 80 Fed. Reg. 50250 (Aug. 19, 2015)

The American Chemistry Council, American Coke and Coal Chemicals Institute, American Farm Bureau Federation, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Wood Council, Associated Builders & Contractors, Brick Industry Association, Council of Industrial Boiler Owners, Gas Processors Association, Institute of Shortening and Edible Oils, National Association of Manufacturers, National Oilseed Processors Association, National Rural Electric Cooperative Association, Natural Gas Supply Association, and U.S. Chamber of Commerce (collectively, “the Associations”)¹ appreciate the opportunity to submit the following comments in response to the Environmental Protection Agency’s (“EPA’s”) proposed Amendments to Regional Consistency Regulations, Docket ID No. EPA-HQ-OAR-2014-0616, 80 Fed. Reg. 50,250 (Aug. 19, 2015) (hereinafter, “proposal” or “proposed rule”).

As trade associations whose members are regulated by EPA under the Clean Air Act, the Associations have a strong interest in EPA’s proposed amendments to its regional consistency regulations. Adopting regulations that incorporate intercircuit nonacquiescence under certain

¹ A description of each Association is included in Appendix A.

circumstances would raise serious legal questions and fundamentally change the way that EPA applies adverse judicial decisions outside of the Supreme Court and the D.C. Circuit. Pursuant to Section 301(a)(2) of the Clean Air Act, EPA's regional consistency regulations must promote fairness and uniformity, thereby creating certainty for members of the regulated community.² To the extent EPA finalizes the proposal, the Associations urge EPA to ensure that the regulations promote full and fair processes by providing notice and opportunity for public participation prior to any decision to depart from its regulations on a case-by-case basis, thus limiting unfettered discretion for EPA to pick and choose when to expand or limit the scope of judicial decisions.

At the outset, nothing requires EPA to introduce new complexity to its Clean Air Act regulations by finalizing this proposal. In short, the Agency is under no statutory or judicial obligation to amend the regional consistency regulations and need not make any changes to the existing regulations which promote national uniformity. Further, to the extent EPA finalizes a rule that enables it to limit the scope of certain judicial decisions by applying them locally or regionally while applying others nationally, EPA must avoid arbitrary decision making and promote public participation in that decision making process. Without the opportunity for notice and comment to inform such decisions, EPA's implementation of its Clean Air Act policies in response to important judicial decisions will lack the transparency and certainty that are necessary to provide a fair and level playing field for all stakeholders, and fail to guard against arbitrary decision making.

I. Nothing Compels EPA to Undertake this Rulemaking

EPA's regulatory docket is intensely populated at the moment with numerous rulemakings spanning multiple statutes and programs, creating challenges for the Agency, interested stakeholders, and even the courts to manage the ever changing regulatory agenda. This proposal is a rulemaking that is neither necessary nor constructive and risks adding only further confusion, uncertainty, and burdens to EPA's regulatory framework.

EPA is under no obligation to complete this rulemaking. As EPA acknowledges, it purportedly issued the proposal in response to the D.C. Circuit's decision in *National Environmental Development Association v. EPA*, 752 F.3d 999 (D.C. Cir. 2014) ("*NEDA*"). See 80 Fed. Reg. at 50,252. While the court in *NEDA* ruled that EPA's attempt to apply principles of intercircuit nonacquiescence was inconsistent with EPA's regional consistency regulations, it expressed no opinion or critique regarding the lawfulness of EPA's current regional consistency

² EPA's proposal to incorporate principles of intercircuit nonacquiescence raises a number of significant legal issues under Section 301(a) of the Clean Air Act. The Associations' comments do not address the legality of EPA's proposed amendments to the Regional Consistency regulations. The Associations' comments are focused instead on implementation issues that will arise in the event that EPA adopts the proposed amendments in a final rule. In addressing these implementation issues, the Associations are not endorsing the applicability of intercircuit nonacquiescence under the Clean Air Act.

regulations. As a result, EPA is under no judicial or statutory obligation to amend the regional consistency regulations.

NEDA involved EPA's implementation of an adverse judicial decision in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). In *Summit*, EPA sought to regulate all of Summit Petroleum's operations over 43 square miles as a single source for Title V permitting purposes after concluding that the operations were functionally interrelated and, therefore, adjacent to each other. *Id.* at 740. The Sixth Circuit concluded that EPA's interpretation "that activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them" was contrary to the plain meaning of the word adjacent. *Id.* at 744. In response, EPA issued a directive stating that it would no longer consider functional interrelatedness in states located within the Sixth Circuit, but would continue to apply the functional interrelatedness test in all other jurisdictions. *NEDA* at 1003.

In *NEDA*, petitioners alleged that EPA's directive violated both Section 301(a)(2) of the Clean Air Act and EPA's regional consistency regulations, which implement Section 301(a)(2). *Id.* The D.C. Circuit granted the petition for review on the latter ground, holding that EPA's attempt to apply the doctrine of intercircuit nonacquiescence to the *Summit* decision was contrary to EPA's regional consistency regulations. *Id.* at 1010. However, the court did note three ways in which EPA could attempt to apply its functional interrelatedness test: (1) revising its Title V regulations, (2) appealing to the Supreme Court, or (3) revising its regional consistency regulations to allow for intercircuit nonacquiescence. *Id.*

The proposed rule represents one potential path for EPA's response to the *NEDA* decision.³ However, it is important to note that the D.C. Circuit did not compel EPA to revise the regulations. Nothing in the court's opinion calls into question the legality of EPA's current regional consistency regulations. In fact, the court applied those regulations when it vacated EPA's *Summit* Directive. Moreover, the court's suggestion that EPA could attempt to amend its regional consistency regulations cannot be viewed as a directive to do so or as an endorsement of the legality of such an approach under Section 301(a)(2). First, the court simply listed a revision to EPA's regional consistency regulations among other options available to EPA; it did not direct EPA to do anything. Second, the court expressly reserved judgment on the important and unanswered legal question regarding "whether the [Clean Air Act] allows EPA to adopt different standards in different circuits." *NEDA* at 1011. Thus, the D.C. Circuit has neither directed EPA to undertake this rulemaking nor pre-approved the legal justifications EPA must rely upon to support the proposal.

³ In a separate rulemaking, EPA is also proposing to revise its Title V permitting regulations in response to the *Summit* decision. In the proposal, EPA's preferred option for making adjacency determinations is based on proximity, but the agency is also considering an approach based on functional interrelatedness. See EPA, Source Determination for Certain Emission Units in the Oil and Gas Sector, proposed rule, available at http://www3.epa.gov/airquality/oilandgas/pdfs/sd_prop_081815.pdf.

II. Any Final Regulation Should Not Give EPA Unfettered Discretion Regarding the Implementation of the Clean Air Act’s Regional Consistency Requirements; Public Participation Must Be Provided

In the event that EPA decides to amend the current regional consistency regulations by incorporating principles of intercircuit nonacquiescence into its regional consistency regulations, it is imperative that EPA do so in a manner that reflects, to the fullest extent possible, the purpose and goals of Section 301(a)(2).⁴ To comply with this mandate, EPA must provide a transparent process that provides notice and opportunity to comment to the regulated community, thereby limiting EPA’s unfettered discretion to decide when to depart from its regional consistency regulations. Specifically, the goals of Section 302(a)(2) will be frustrated if EPA adopts and implements the intercircuit nonacquiescence provisions in a manner that leaves EPA with unchecked discretion to deviate from the standards it establishes in any final rule. Instead, to the extent EPA believes it should depart from the final regulations and apply certain judicial decisions more broadly on a case-by-case basis, it must follow traditional notice and comment rulemaking procedures to ensure that all interested stakeholders have a full and fair opportunity to participate in any proposed deviation from EPA’s regional consistency regulations in individual cases.

Section 301(a)(2) requires EPA to ensure that the criteria, procedures, and policies applied by the various EPA regions are applied with “fairness and uniformity.” Such fairness and uniformity is of critical importance to the Associations and their members who are subject to EPA regulation under the Clean Air Act. Uniformity and consistency are key elements of any fair regulatory regime, and necessary to provide stakeholders—including the Associations’ members—the ability to make planning and investment decisions based on established rules and practices. Thus, it is critical that any deviation from EPA’s final policy on a case-by-case basis be accompanied by a transparent process that allows the Associations and their members to participate fully in EPA’s decision making process.

In light of their need for regulatory certainty, consistency, and uniformity, the Associations are concerned that the proposed regulations—as described in the preamble—will give EPA too much discretion to apply arbitrary and unspecified factors in determining when to apply certain judicial decisions from district courts and other circuit courts on a national or regional scale. For example, EPA asserts that “[a]lthough the proposed rule revisions would make clear that EPA is not obligated to follow judicial decisions of a federal circuit court when addressing ‘locally or regionally applicable’ actions in other circuits . . . , the proposal is not intended to preclude anyone from advocating that the agency exercise its discretion to follow such decisions in appropriate cases.” 80 Fed. Reg. at 50,528. EPA also asserts that the proposal

⁴ As explained above, the Associations are not endorsing EPA’s proposed amendments and offer these comments for improvement solely in the event that EPA elects to finalize the proposed rule. As noted above, EPA’s proposed amendments raise significant legal issues under the Clean Air Act that are not addressed in these comments.

includes “a specific accommodation for intercircuit nonacquiescence *in appropriate circumstances* ...” *Id.* at 50,527 (emphasis added). However, EPA fails to explain the process it would use to apply such decisions nationally, and the Associations are concerned that EPA may seek to do so internally and informally, through guidance, memoranda, or other directives such as the informal directive issued in response to the *Summit* case. If EPA can elect to decide whether to apply decisions regionally or nationally based solely on its own discretion, it would undermine the ability for stakeholders to have predictability, certainty, and transparency in the Agency’s implementation of court decisions. Under such circumstances, the Associations and their members never would be able to predict, based on EPA’s regulations, how broadly EPA intends to apply district court and other circuit court decisions.

If EPA were to finalize the regulations as proposed, the Associations do not dispute that there are circumstances in which a judicial decision by a district court or other circuit may address broadly applicable provisions in the Clean Air Act and should be applied uniformly across the nation. However, if EPA amends the existing regulations to incorporate intercircuit nonacquiescence, the decision to apply such cases nationally should itself be subject to public participation and, if necessary, judicial review. Thus, to promote transparency and avoid any confusion or uncertainty, the Associations urge EPA to clarify in any final rule that it will only apply such decisions on a national scale after identifying the criteria upon which EPA is proposing such decision and after completing notice and comment rulemaking for each judicial decision that EPA intends to apply nationally. Such an approach would promote the goals of transparency and fairness by establishing a consistent approach for expanding the scope of locally or regionally applicable actions that ensures the participation of all interested stakeholders. By inviting participation of all interested stakeholders, EPA will gain critical insight in deciding whether to apply such decisions at a national level and avoid any black-box decision making that would be counter to transparent rulemaking. *See* Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, Re: Transparency and Open Government (Jan. 21, 2009) (directing agencies to apply principles of transparency, public participation, and collaboration). Thus, to the extent that EPA moves forward with incorporating intercircuit nonacquiescence into the Clean Air Act’s regional consistency regulations, the Associations urge EPA to make clear that any departure from those regulations will include objective criteria as the basis for such departure and an opportunity for notice and comment by interested stakeholders.

CONCLUSION

The undersigned Associations appreciate the opportunity to comment on this proposal.

Respectfully Submitted,

American Chemistry Council

American Coke and Coal Chemicals Institute

American Farm Bureau Federation

American Forest & Paper Association

American Fuel & Petrochemical Manufacturers

American Wood Council

Associated Builders & Contractors

Brick Industry Association

Council of Industrial Boiler Owners

Gas Processors Association

Institute of Shortening and Edible Oils

National Association of Manufacturers

National Oilseed Processors Association

National Rural Electric Cooperative Association

Natural Gas Supply Association

U.S. Chamber of Commerce

Appendix A

The **American Chemistry Council** (“ACC”) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$812 billion enterprise and a key element of the nation's economy.

The **American Coke and Coal Chemicals Institute** (“ACCCI”), which was founded in 1944, is the international trade association that represents 100% of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100% of the nation’s producers of coal chemicals, who combined have operations in 12 states. It also represents chemical processors, metallurgical coal producers, coal and coke sales agents, and suppliers of equipment, goods and services to the industry.

The **American Farm Bureau Federation** is the nation’s largest general farm organization, representing agricultural producers in all 50 states and Puerto Rico growing commodities in virtually all sectors of agriculture.

The **American Forest & Paper Association** (“AF&PA”) is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing GDP. The industry makes products essential for everyday life from renewable and recyclable resources, producing about \$210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately \$50 billion.

The **American Fuel & Petrochemical Manufacturers** (“AFPM”) (formerly known as NPRA, the National Petrochemical & Refiners Association) is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM’s members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

The **American Wood Council** (“AWC”) is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs more than 360,000 men and women in family-wage jobs.

The **Associated Builders & Contractors, Inc.** (“ABC”) is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers, whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of ABC’s contractor members are classified as small businesses. Its diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through

open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

The **Brick Industry Association** (“BIA”), founded in 1934, is the recognized national authority on clay brick manufacturing and construction, representing approximately 250 manufacturers, distributors, and suppliers that historically provide jobs for 200,000 Americans in 45 states.

The **Council of Industrial Boiler Owners** (“CIBO”) is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations.

The **Gas Processors Association** (“GPA”) has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA is composed of 130 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane and natural gasoline. GPA members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

The **Institute of Shortening and Edible Oils** (“ISEO”) is a trade association representing the refiners of edible fats and oils in the U.S. Its 19 member companies process over 20 billion pounds of edible fats and oils annually, which are used in baking and frying fats, salad and cooking oils, margarines and spreads, confectionary fats and as ingredients in a wide variety of foods.

The **National Association of Manufacturers** (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **National Oilseed Processors Association** (“NOPA”) is a national trade association that represents 12 companies engaged in the production of vegetable meals and vegetable oils from oilseeds, including soybeans. NOPA’s member companies process more than 1.6 billion bushels of oilseeds annually at 63 plants in 19 states, including 57 plants which process soybeans.

The **National Rural Electric Cooperative Association** (“NRECA”) is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to over 42 million people in 47 states or 12 percent of the nation’s electric customers. NRECA is dedicated to representing the national interests of cooperative electric utilities and the consumers they serve. NRECA member electric cooperatives are private, independent electric utilities, owned by the members they serve.

Established in 1965, the **Natural Gas Supply Association** (“NGSA”) encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets, thus encouraging increased supply and the reliable and efficient delivery of natural gas to U.S. customers.

The **U.S. Chamber of Commerce** is the world’s largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America’s free enterprise system.