BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)
North Dakota SIP Provisions Related to Variances and Exceptions	)

PETITION TO EPA TO REQUIRE REVISION OF NORTH DAKOTA SIP PROVISIONS RELATED TO VARIANCES AND EXCEPTIONS

WildEarth Guardians hereby petitions the Administrator of the Environmental Protection Agency ("Administrator" or "EPA"), pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*; the Clean Air Act, 42 U.S.C. § 7401, *et seq.*; and the Environmental Protection Agency's Clean Air Act implementing regulations, to require the State of North Dakota to revise its State Implementing Plan ("SIP") to eliminate or revise several SIP provisions that are contrary to the Clean Air Act.

Specifically, Petitioners request the EPA require revision of the following North Dakota SIP provisions as set forth in the North Dakota Administrative Code ("NDAC"):

- **NDAC § 33-15-01-07:** This regulation provides that variances to emission limits can be granted once North Dakota "finds that by reason of exceptional circumstances strict conformity with any provisions of this article would cause undue hardship, would be unreasonable, impractical, or not feasible under the circumstances[.]" The EPA has already stated that it "…agrees this rule should be revised[.]" 75 Fed. Reg. 31290, 31301 (June 3, 2010).

- **NDAC § 33-15-01-13(3):** This regulation provides that in the event of a failure of a continuous emission monitoring system, an alternative method acceptable to North Dakota must be undertaken. This provision is contrary to Title IV of the Clean Air Act and EPA regulations implementing Title IV. Importantly, it appears to condone the failure of continuous emission monitoring systems. Furthermore, under Title IV and EPA regulations, only the Administrator may approve alternative monitoring methods for required continuous emission monitoring systems, and even then only upon application by owners or operators of affected units. *See* 40 C.F.R. §§ 75.5(c) (stating that owners or

operators of affected shall not use alternative monitoring systems without "Administrator's prior written approval") and 75.40 (owner or operator of an affected unit "may apply to the Administrator" for approval of alternative monitoring system).

- **NDAC §§ 33-15-03-04(4) and (5):** These regulations provide blanket exemptions from compliance with visible emission limits "[w]here the limits specified…cannot be met because of operations or processes…but only so long as it is not technically feasible to meet said specifications" and "[w]here fugitive emissions are caused by agricultural activities related to the normal operations of a farm." The agricultural exemption is also set forth at NDAC 33-15-17-02(6), which is similarly problematic. The EPA has stated that it, "…does not endorse the exceptions[.]" 75 Fed. Reg. 31290, 31302 (June 3, 2010).

- **NDAC § 33-15-05-01(2)(a):** This regulation allows exceptions to compliance with particulate matter limits in the SIP during "temporary operational breakdowns or cleaning of air pollution equipment for any process." Although the NDAC 33-15-05-01(2)(a)(2) allows North Dakota to prescribe controls during breakdowns or cleaning, the regulation is clear that this requirement is discretionary. The EPA has similarly stated that it, "…does not endorse the exceptions[.]" 75 Fed. Reg. 31290, 31302 (June 3, 2010).

- **NDAC § 33-15-17-02(6):** This regulation explicitly allows "Agricultural activities related to the normal operations of a farm" to emit or cause to be emitted into the ambient air fugitive particulate matter emissions that exceed ambient air quality standards and prevention of significant deterioration increments.

These SIP provisions are, at a minimum, inconsistent with Section 110(l) of the Clean Air Act, which prohibits approval of any SIP provision that would, "interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 172), or any other applicable requirement of this Act." 42 U.S.C. § 7410(l). Therefore, EPA must require revision of the North Dakota SIP pursuant to Section 110(k) of the Clean Air Act, which states that the Administrator must call for the revision of a SIP "[w]henever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard…or to otherwise comply with any requirement of this Act[.]" 42 U.S.C. § 7410(k)(4).

PETITIONER

WildEarth Guardians is a Santa Fe, New Mexico-based conservation group with offices in Denver and Phoenix. WildEarth Guardians is dedicated to protecting and restoring the wildlife, wild rivers, and wild places of the American West. To this end, WildEarth Guardians seeks to safeguard clean air and the climate by promoting cleaner energy, efficiency and conservation, and alternatives to fossil fuels.

PROCEDURAL AUTHORITY

WildEarth Guardians petitions the EPA pursuant to the APA. 5 U.S.C. § 551, *et seq*. The APA specifically requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e).

The SIP is the backbone for protecting and improving a State's air quality. Pursuant to the Clean Air Act, individual States develop SIPs to attain and maintain health and welfare-based National Ambient Air Quality Standards ("NAAQS") promulgated by the EPA and meet other requirements under the Clean Air Act, including Prevention of Significant Deterioration ("PSD") requirements. *See* 42 U.S.C. § 7410(a). The SIP is a living document which the State and EPA can, from time to time, revise as necessary. EPA is authorized pursuant to the Clean Air Act to initiate rulemaking proceedings and to call for SIP revisions when a SIP is inadequate to attain or maintain the NAAQS, or otherwise fails to meet the requirements of the Clean Air Act. *See* 42 U.S.C. § 7410(k)(5). Further, EPA can "***require*** the State to revise the SIP as necessary to correct such inadequacies." *Id* (emphasis added).

The APA requires EPA to conclude the matter raised in this petition within a reasonable time. 5 U.S.C. § 555(b). Petitioner requests EPA expedite resolution of this matter. The EPA

has already identified a need to revise at least one of the SIP provisions at issue in this petition. This petition simply asks the EPA to resolve these inadequacies to ensure full and legally adequate protection of air quality in the State of North Dakota.

REASONS FOR THE ADMINISTRATOR TO CALL FOR A SIP REVISION

As presently worded, the SIP provisions at issue in this petition are inconsistent with the Clean Air Act. NDAC § 33-15-01-07, NDAC § 33-15-03-04(4) and (5), NDAC § 33-15-05-01(2)(a), and NDAC § 33-15-17-02(6) are all contrary to the EPA's position that the Clean Air Act prohibits blanket exemptions to emission limits, particularly health-based emission limits established to ensure protection of the NAAQS and comply with PSD requirements. Furthermore, these SIP provisions are unenforceable in a number of regards, thereby failing ot ensure compliance with the Clean Air Act. NDAC § 33-15-01-13(3) is contrary to Clean Air Act requirements that emissions be continuously monitored in order to facilitate the reduction of pollutants that contribute to acid rain. The Administrator must call for the revision or elimination of these provisions for the reasons that follow.

A. NDAC § 33-15-01-07

NDAC § 33-15-01-07(1) states:

> Where upon written application of the responsible person or persons the department finds that by reason of exceptional circumstances strict conformity with any provision of this article would cause undue hardship, would be unreasonable, impractical, or not feasible under the circumstances, the department may permit a variance from this article upon such conditions and within such time limitations as it may prescribe for the prevention, control, or abatement of air pollution in harmony with the intent of the state and any applicable federal laws.

NDAC § 33-15-01-07.1. The provision goes on to state, "No variance may permit or authorize the creation or continuation of a public nuisance, or a danger to public health or safety." NDAC § 33-15-01-07(2).

This provision suffers from two significant flaws. First, it provides an avenue by which the State of North Dakota can allow polluters to avoid compliance with SIP provisions, as well as underlying permitted emission limits. Second, the provisions is riddled with vagueness and provides virtually unlimited discretion to the State of North Dakota to grant variances. Fundamentally, however, the Clean Air Act requires absolute compliance with SIP provisions and emission limits, and does not provide States the discretion to grant variances to meeting, among other things, the NAAQS and PSD requirements. Indeed, the EPA has already stated it "…agrees this rule should be revised[.]" 75 Fed. Reg. 31290, 31301 (June 3, 2010).

This variance provision is essentially a loophole that allows the State of North Dakota to exempt excess emissions from meeting Clean Air Act requirements. The EPA however, has firmly held that such excess emission policies are wholly inappropriate and contrary to the Clean Air Act.

In 1978, EPA adopted an excess emissions policy which considers ***all*** periods of excess emissions to be violations of the Clean Air Act. In subsequent EPA policy statements, Clean Air Act interpretations, guidance documents, and administrative rules and orders, EPA has consistently and clearly reaffirmed that position. *See Mich. Dep't of Envtl. Quality v. Browner*, 230 F.3d 181, 183 (6th Cir. 2000) (citing 42 Fed. Reg. 21,472 (Apr. 27, 1977)); *see also* Memorandum from Eric Shaeffer, Dir., Office of Regulatory Enforcement, and John S. Seitz, Dir., Office of Air Quality Planning and Standards, to Reg'l Adm'rs, Regions I-X (Dec. 5, 2001); Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement and

Compliance Assurance, to Reg'l Adm'rs, Regions I-X (Sept. 20, 1999); Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air Noise, and Radiation, to Reg'l Adm'rs, Regions I-X (Sept. 29, 1982).

EPA has also stated that exemptions are not be allowed. Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air, Noise, and Radiation, to Reg'l Adm'rs, Regions I-X, 1 (Sept. 28, 1982). An affirmative defense may be permitted only with respect to penalties, not to injunctive relief, and only when no single source or small group of sources has the potential to cause or contribute to an exceedance of NAAQS or PSD requirements, and when there is no violation of federally promulgated performance standards or emission limitations. In those cases, a State director must exercise his or her enforcement discretion and cannot avoid that case-by-case obligation by allowing an exemption or, in this case, a variance.

EPA's policy of identifying all excess emissions as Clean Air Act violations and its disallowance of exemptions is consistent with the Clean Air Act. SIPs protect ambient-based standards. *See* Approval and Promulgation of State Implementation Plans; Michigan 63 Fed. Reg. 8573, 8575 (Feb. 20, 1998). Emissions above the allowable limits may cause or contribute to violations of the NAAQS and are therefore illegal and inexcusable. *Id.* EPA has determined that if there are circumstances preventing sources from complying with the SIP, whether due to hardship, unreasonableness, impracticability, or infeasibility, then the State must address these problems in the underlying rules applicable to those particular sources and "***not through overarching excess emission provisions***." *Id.* (emphasis added). As the EPA has plainly stated:

> ***The CAA does not allow for automatic exemptions from compliance with applicable SIP emission limits during periods of start-up, shutdown, malfunction or upsets***….To the extent that a malfunction provision, or any provision giving substantial discretion to the state agency broadly excuses sources from compliance with emission limitations

> during periods of malfunction or the like, ***it is the Agency's position that it should not be approved as part of the federally approved SIP***.

See In the Matter of Motiva Enterprises, LLC, Petition II-2002-05 (September 24, 2004), at 17 (emphasis added).

EPA has specifically stated that it "has a fundamental responsibility under the Clean Air Act to ensure that SIPs provide for attainment and maintenance of the NAAQS and protection of PSD increments. Thus, a provision that would undermine the fundamental requirement of attainment and maintenance of the NAAQS or any other requirement of the Clean Air Act," is illegal. *See* Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement and Compliance Assurance, to Reg'l Adm'rs, Regions I-X, 3 (Sept. 20, 1999) (citing 42 U.S.C. § 7410(a) and (1)). Pursuant to Section 110(1), EPA may not approve a SIP revision if "the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of this chapter." *Id.*

In this case, NDAC § 33-15-01-07 must clearly be revised because it gives the State of North Dakota the discretion to allow noncompliance with SIP provisions and underlying emission limits, contrary to the Clean Air Act. To the extent that the provision prohibits the granting of variances to prevent the creation or continuation of a "public nuisance, or a danger to public health or safety," this prohibition fundamentally fails to remedy the fact that variances to SIP provisions and emission limits necessary to attain and maintain the NAAQS and to meet PSD requirements cannot be granted in any circumstance. The EPA must call for the revision of the North Dakota SIP to remove or revise NDAC § 33-15-01-07 in order to ensure compliance with the Clean Air Act.

B. NDAC § 33-15-01-13(3)

NDAC § 33-15-01-13(3) states that:

> When a failure of a continuous emission monitoring system occurs, an alternative method, acceptable to the department, for measuring or estimating emissions must be undertaken as soon as possible. Timely repair of the emission monitoring system must be made.

NDAC § 33-15-01-13(3). This regulation is contrary to Title IV of the Clean Air Act and 40 C.F.R. § 75 regulations implementing Title IV, and there therefore the Administrator must call for its revision or elimination pursuant to Section 110(k) of the Clean Air Act. Not only does it condone the failure to continuously monitor emissions, it expressly allows alternative monitoring methods to be utilized without EPA Administrator approval.

Under Title IV and 40 C.F.R. § 75, continuous emission monitoring systems ("CEMS") must be operated at all times at affected sources. The Clean Air Act explicitly states that an affected source, "shall be required to install and operate CEMS [continuous emission monitoring systems] on each affected unit at the source, and to quality assure the data for sulfur dioxide, nitrogen oxides, opacity, and volumetric flow at each unit." 42 U.S.C. § 7651k(a). Only the Administrator of the EPA may approve alternative monitoring methods, and even then only upon application by owners or operators of affected units. *See* 40 C.F.R. §§ 75.5(c) (stating that owners or operators of affected shall not use alternative monitoring systems without "Administrator's prior written approval") and 75.40 (owner or operator of an affected unit "may apply to the Administrator" for approval of alternative monitoring system). Even then, any alternative method approved by the EPA Administrator must provide information "with the same precision, reliability, accessibility, and timeliness as that provided by CEMS[.]" 42 U.S.C. 7651k(a). A failure to operate in accordance with Part 75 is expressly unlawful under Title IV of the Clean Air Act. *See* 42 U.S.C. § 7651k(e).

Despite this, NDAC § 33-15-01-13(3) not only appears to sanction the failure to continuously monitor emissions as required by Title IV and 40 C.F.R. § 75 regulations, but appears to allow the State of North Dakota, rather than the EPA Administrator—to approve alternative monitoring methods at affected sources. This regulation clearly fails to ensure compliance with the Clean Air Act and therefore, the Administrator must call for its revision or elimination.

C. NDAC §§ 33-15-03-04(4) and (5)

NDAC §§ 33-15-03-04(4) and (5) provide blanket exemptions to a number of limits on visible emissions, or opacity, which is an indicator of particulate matter (in fact, NDAC § 33-15-03-04 is explicitly entitled, "Exceptions"). The regulation explicitly states that the provisions of NDAC §§ 33-15-03-01, 33-15-03-02, 33-15-03-03, and 33-15-03-03.1 "shall not apply" where:

> [T]he limits specified in this article cannot be met because of operations or processes such as, but not limited to, oil field service and drilling operations, but only so long as it is not technically feasible to meet said specifications [and] fugitive emissions are caused by agricultural activities related to the normal operations of a farm.

NDAC §§ 33-15-03-04(4) and (5). NDAC § 33-15-03-01 sets a ceiling on the discharge of visible emissions from sources of air pollution and NDAC § 33-15-03-02 establishes additional limits on visible emissions. NDAC § 33-15-03-03 limits the discharge of visible fugitive emissions. Finally, NDAC § 33-15-03-03.1 limits the discharge of visible emissions from flares. Thus, NDAC §§ 33-15-03-04(4) and (5) provides exemptions to compliance with these visible emission limits. Not only that, but NDAC § 33-15-03-04 appears to provide an incredibly broad exception, noting that it applies to every source of air pollution, including oil field service and

drilling operations. The EPA has stated that it, "…does not endorse the[se] exceptions[.]" 75 Fed. Reg. 31290, 31302 (June 3, 2010).

In providing these exceptions, NDAC §§ 33-15-03-04(4) and (5) provides blanket exemptions from compliance with visible emission limits, or opacity, which is used as an indicator of particulate emissions. Indeed, opacity is considered by the EPA to be "a convenient surrogate for assessing mass emissions as a means to assure effective particulate emissions control." EPA, PARTICULATE MATTER AND OPACITY, *available at* http://www.epa.gov/reg5oair/naaqs/opacity.html#use (last visited Sept. 8, 2010). In providing blanket exemptions to opacity limits, such as from flares, the North Dakota SIP therefore provides a blanket exemption to assuring compliance with particulate matter emission limits. As explained earlier, EPA's policy is that ***all*** periods of excess emissions are considered to be violations of the Clean Air Act, a position that has consistently and clearly been reaffirmed on multiple occasions since 1978. Thus, NDAC §§ 33-15-03-04(4) and (5) render the North Dakota SIP substantially inadequate and the Administrator must call for the revision or elimination of these regulations in accordance with the Clean Air Act.

Furthermore, this regulation is vague and appears to be unenforceable, contrary to Section 110(a)(2)(A) of the Clean Air Act. *See* 42 U.S.C. § 7410(a)(2)(A). The term "technically feasible" is not specifically defined to ensure that it is consistently applied, and the terms "agricultural activities," "normal operations" and "farm" are not defined such that they indicate which sources are actually subject to this regulation. These exceptions must be revised or eliminated to assure the North Dakota SIP contains enforceable emission limits in accordance with Section 110(a)(2)(A) of the Clean Air Act.

D. NDAC § 33-15-05-01(2)(a)

NDAC § 33-15-05-01(2)(a) provides an explicit blanket "exception" to compliance with particulate matter emission limits set forth at NDAC § 33-15-05-01, Table 3, stating:

> Temporary operational breakdowns or cleaning of air pollution equipment for any process are permitted provided the owner or operator immediate advises the department of the circumstances and outlines an acceptable corrective program and provided such operations do not cause an immediate public health hazard.

NDAC § 33-15-05-01(2)(a). In providing this blanket exception, the North Dakota SIP again contravenes the Clean Air Act. As explained, EPA's policy is that ***all*** periods of excess emissions are considered to be violations of the Clean Air Act, a position that has consistently and clearly been reaffirmed on multiple occasions since 1978. NDAC § 33-15-05-01(2)(a) clearly allows sources to exceed particulate limits in the event of breakdowns and cleaning of air pollution equipment, in violation of the Clean Air Act. As with other North Dakota SIP provisions, the EPA has stated that it, "…does not endorse the exceptions[.]" 75 Fed. Reg. 31290, 31302 (June 3, 2010). The EPA must therefore call for the revision or elimination of this SIP provision.

Furthermore, this regulation is vague and appears to be unenforceable, contrary to Section 110(a)(2)(A) of the Clean Air Act. *See* 42 U.S.C. § 7410(a)(2)(A). The terms "temporary operational breakdown," "cleaning of air pollution equipment," and "any process" specifically defined to ensure that the rule is consistently applied and indicate which sources are actually subject to this regulation. This exception must be revised or eliminated by the Administrator to assure the North Dakota SIP contains enforceable emission limits in accordance with Section 110(a)(2)(A) of the Clean Air Act.

E. NDAC § 33-15-17-02(6)

NDAC § 33-15-17-02(6) entirely exempts agricultural activities from compliance with limits on fugitive emissions of particulate matter in North Dakota. The regulation states, "Agricultural activities related to the normal operations of a farm shall be exempt from the requirements of this section." NDAC § 33-15-17-02(6). This regulation is severely problematic as it potentially allows agricultural activities to emit fugitive emissions at levels that could violate the NAAQS or PSD increments. North Dakota cannot broadly exempt all agricultural activities without specifying which sources will be affected and how fugitive emissions from such sources will be kept in check to ensure protection of the NAAQS and PSD increments. Furthermore, this regulation is vague and appears to be unenforceable, contrary to Section 110(a)(2)(A) of the Clean Air Act. *See* 42 U.S.C. § 7410(a)(2)(A). Indeed, the regulation does not explain what sources of air pollution "agricultural activities" includes, what "normal operations" entails, and what constitutes a "farm." The Administrator must call for the revision or elimination of this exemption to ensure that agricultural activities are not inappropriately exempted from SIP emission limits and to ensure compliance with the Clean Air Act.

CONCLUSION

EPA is authorized to require the States to revise their SIPs to correct for inadequacies. Section 110(k)(5) of the CAA states: "Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, . . . or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct for

such inadequacies." 42 U.S.C. § 7410(k)(5). For the aforementioned reasons, the North Dakota SIP is substantially inadequate in a number of regards and fails to comply with several requirements of the Clean Air Act. The Administrator must therefore call for its revision, as explained in this Petition. Should the Administrator fail to require revision of the North Dakota SIP with regards to the aforementioned provisions within sixty days, WildEarth Guardians will consider such delay unreasonable.

Dated this 13th day of September 2010.

Respectfully submitted,

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