6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 56

[EPA-HQ-OAR-2014-0616; FRL-9929-98-OAR]

RIN 2060-AS53

Amendments to Regional Consistency Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is proposing to revise its Regional Consistency regulations to ensure the EPA has the flexibility necessary to implement Clean Air Act (CAA or Act) programs on a national scale while addressing court rulings that concern certain agency actions under the Act. In addition, the proposed revisions would help to foster overall fairness and predictability regarding the scope and impact of judicial decisions under the CAA.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER**].

Public hearing. If requested by **[INSERT DATE 15 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**, then we will hold a public hearing. Additional information about the hearing, if requested, will be published in a subsequent *Federal Register* document.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2014-0616, to the *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions

for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. If you need to include CBI as part of your comment, please visit *http://www.epa.gov/dockets/comments.html* for instructions. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. For additional submission methods, the full EPA public comment policy, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/comments.html.*

FOR FURTHER INFORMATION CONTACT: For technical information, contact Greg Nizich, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541-3078; fax number (919) 541-5509; email address: *nizich.greg@epa.gov*.

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541-0641; fax number (919) 541-5509; email address: *long.pam@epa.gov*.

SUPPLEMENTARY INFORMATION:

Regulated entities. The Administrator determined that this action is subject to the provisions of CAA section 307(d). *See* CAA section 307(d)(1)(V) (the provisions of CAA section 307(d) apply to "such other actions as the Administrator may determine). These are amendments to existing regulations and could affect your facility if it is the subject of a CAA-related ruling by a

federal court.

The information in this Supplementary Information section of this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

Entities potentially affected directly by this proposal include the EPA and other

governments that are delegated administrative authority to assist the EPA with the implementation of air program federal regulations. Entities potentially affected indirectly by this proposal include owners and operators of sources of air emissions that are subject to CAA regulations.

B. What should I consider as I prepare my comments for the EPA?

1. Submitting CBI

Do not submit this information to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Tiffany Purifoy, OAQPS Document Control Officer (C404-02), Environmental Protection Agency, Research Triangle Park, NC 27711, Attention: Docket ID No. EPA-HQ-OAR-2014-0616.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, *Federal Register* date and page number).
- Follow directions – The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or

section number.

- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposed rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this proposed rule will be posted in the regulations and standards section of our New Source Review (NSR) website, under Regulations & Standards, at *http://www.epa.gov/nsr*.

D. How can I find information about a possible public hearing?

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–0641; fax number (919) 541–5509; email address: *long.pam@epa.gov*.

E. What acronyms, abbreviations and units are used in this preamble?

The following acronyms, abbreviations and units are used in this preamble:

CAA or Act	Clean Air Act
EPA	U.S. Environmental Protection Agency
FIP	Federal Implementation Plan
ICR	Information Collection Request
NSR	New Source Review
NTTAA	National Technology Transfer and Advancement Act
OMB	Office of Management and Budget
PSD	Prevention of Significant Deterioration
RFA	Regulatory Flexibility Act
SBA	Small Business Administration
SIP	State Implementation Plan
UMRA	Unfunded Mandates Reform Act

II. Purpose

The purpose of this rulemaking is to revise the EPA's Regional Consistency regulations – 40 CFR part 56. Specifically, we are proposing to add a provision to the Regional Consistency regulations to accommodate the implications of federal court decisions that result from challenges to locally or regionally applicable actions. As explained more fully below, revising the Regional Consistency regulations to accommodate the implications of such federal court decisions is consistent with general principles of common law, the judicial review provisions of the CAA, and CAA section 301(a)(2). Furthermore, the proposed revisions will help to foster overall fairness and predictability regarding the scope and impact of judicial decisions under the CAA.

III. Background

A. *Purpose of the Regional Consistency Regulations*

The CAA calls for the EPA to implement the Act in partnership with state, local and tribal governments. *See Mountain States Legal Found. v. Costle*, 630 F.2d 754, 757 (10th Cir. 1980). While the roles of that partnership vary depending on the nature of the air pollution problem, generally the EPA issues national standards or federal requirements to address air

pollution, and state, local and tribal air agencies (hereinafter referred to simply as "air agencies") assume primary responsibility for implementing those standards and requirements. For example, the Act requires the EPA to establish, review and revise national ambient air quality standards (NAAQS) for certain common air pollutants. The Act then assigns air agencies responsibility for developing enforceable state implementation plans (SIPs) to meet those standards. The EPA is required to review each SIP to determine if it meets all of the applicable requirements of the CAA. If the SIP is approved, the air agency will implement the SIP in order to provide for attainment and maintenance of the NAAQS in areas under its jurisdiction. The EPA will provide technical and policy assistance to the air agency and also maintain an oversight role to ensure that the program is adequately implemented and enforced. If the EPA finds that an air agency has failed to submit a required SIP, or that an air agency's SIP is incomplete, or if the EPA disapproves a SIP in whole or in part, the CAA requires that the EPA promulgate a federal implementation plan (FIP) to provide for attainment and maintenance of the NAAQS in the corresponding area. The Act also requires preconstruction permits for major new and modified stationary sources of air pollution. In most areas, air agencies serve as the CAA permitting authority under an approved SIP; some air agencies implement the federal program under a delegation agreement; elsewhere, the EPA is the permitting authority under a FIP.

How the EPA carries out its role in this cooperative partnership under the CAA is influenced by how the EPA is organized. The EPA is composed of various headquarters offices, each of which is responsible for nationwide execution of our programs, and ten regional offices, each of which is responsible for the execution of our programs within several states and territories. *See* 40 CFR part 1, subparts A and C (for more information, *see* the EPA Organizational Chart located at *http://www2.epa.gov/aboutepa/epa-organization-chart*). In

carrying out responsibilities under the CAA, the EPA Administrator relies on input from various offices in headquarters, especially those within the Office of Air and Radiation, and in the regional offices. In fact, the CAA provides the EPA Administrator with the authority to delegate powers and duties necessary to carry out the Act to EPA officials in both the headquarters and regional offices (CAA section 301(a)(1)). Returning to the NAAQS example, headquarters offices take the lead in promulgating the NAAQS, while regional offices are primarily responsible for working directly with air agencies to assist them in their SIP submissions and approval or disapproval of such SIPs. In certain circumstances, headquarters and regional offices consult in developing a proposed and/or final decision regarding approval or disapproval of the SIP.

B. Establishing the Regional Consistency Regulations

In the 1977 CAA Amendments, Congress added section 301(a)(2) (42 U.S.C. 7601) in recognition of the role that staff from both headquarters and regions played in carrying out the Act's programs. CAA section 301(a)(2) required the EPA Administrator to promulgate regulations "establishing general applicable procedures and policies" for the EPA regional officers and employees to follow when carrying out activities delegated to them under the Act. Among other things, the CAA stated that these regulations should "assure fairness and uniformity in the criteria, procedures, and policies applied" by the EPA regional offices in their CAA activities and "provide a mechanism" to identify and standardize any inconsistent or varying criteria, procedures, and policies used by the EPA employees.

Thereafter, the EPA took a number of actions to promulgate the Regional Consistency regulations required in CAA section 301(a)(2). In 1978, the EPA issued an Advanced Notice of Proposed Rulemaking seeking comment on a number of consistency issues and inviting

interested persons to participate in a series of public workshops to discuss the development of the Regional Consistency regulations (43 FR 4872). In 1979, after receiving those comments and listening to input provided at the public workshops from representatives of industry, state, and public interest groups, the EPA issued its Notice of Proposed Rulemaking for the Regional Consistency regulations (44 FR 13043). Finally, in 1980, the EPA promulgated its final Regional Consistency regulations in 40 CFR part 56.

As the EPA explained when it finalized the regulations, the "intended effect" of these regulations was "to assure fair and consistent application of rules, regulations and policy throughout the country by assuring that the action of each individual EPA Regional Office is consistent with one another and national policy" (45 FR 85400). Generally, the Regional Consistency regulations: (1) state the EPA policy of assuring "fair and uniform" application of the EPA rules, procedures, and policies necessary to implement and enforce the Act (*see* 56 CFR 56.3); (2) provide mechanisms for such application by headquarters and regional office employees (*see* 56 CFR 56.4 and 56.5, respectively); (3) require various headquarters offices to establish systems to disseminate policy and guidance relating to air programs (*see* 56 CFR 56.6); and (4) utilize the existing grants program for yearly evaluations of state performance in implementing and enforcing the Act (*see* 56 CFR 56.7).

The EPA has been acting under these regulations for more than 30 years to address consistency issues regarding various CAA programs, policy, and guidance. In this document, we are proposing to revise the rules to address a very specific consistency issue – how to treat Federal court decisions regarding locally or regionally applicable actions that may affect consistent application of national programs, policy, and guidance.

C. Reasons for Revising the Regional Consistency Regulations

The EPA is undertaking this proposed revision to the Regional Consistency regulations, in part, as a result of a recent decision of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) in *National Environmental Development Association's Clean Air Project v. EPA*, No. 13-1035 (DC Cir., May 30, 2014). That litigation involved a December 2012 memorandum from EPA headquarters to the EPA regions regarding the limited scope of a court decision issued by the Sixth Circuit Court of Appeals addressing the EPA's interpretation of national permitting regulations as applied to a specific, local permitting decision.[1] *See* Memorandum from Stephen D. Page, Director of the EPA's Office of Air Quality Planning and Standards, to Regional Air Division Directors, titled *Applicability of the Summit Decision to the EPA Title V and NSR Source Determinations* (December 21, 2012; available at *http://www.epa.gov/region7/air/title5/t5memos/inter2012.pdf*) (hereinafter, "December 2012 memorandum"). The December 2012 memorandum reflected the EPA application of a widely recognized legal doctrine referred to as intercircuit nonaquiescence, a practice in which a decision by a federal circuit court is binding only in those areas (in this case, specific states and the associated EPA regions) subject to the direct jurisdiction of the ruling circuit court. Intercircuit nonaquiescence is a practice that the EPA has historically followed with regard to

[1] That decision, *Summit Petroleum Corp. v. EPA et al.*, Consolidated Case Nos. 09-4348 and 10-4572 (6th Cir. Aug. 7, 2012), addressed the scope of the term "adjacent" as used in the EPA's source determination regulations in the title V permitting program, which are similar to the source determination regulations used in the new source review and prevention of significant deterioration permitting programs, *see* 40 CFR 52.21(b)(6) and 71.2. The EPA is currently planning a separate rulemaking to address the term "adjacent" in those permitting regulations, and we direct any commenters wishing to address the *Summit* decision or those regulations to do so in that separate action. *See http://resources.regulations.gov/public/component/main?__dmfClientId=1434045425242&__dmfTzoff=240* for the EPA's Spring 2015 Regulatory Agenda item titled, *Source Determination for Certain Emissions Units in the Oil and Natural Gas Sector*, RIN 2060-AS06.

decisions issued by both circuit and district courts and arising in local, non-nationwide actions.[2] Therefore, in the December 2012 memorandum, the EPA continued that historic practice and noted that while the agency would follow the Sixth Circuit's decision in those states under the jurisdiction of the Sixth Circuit, the agency's longstanding interpretation of the permitting regulations addressed by the Sixth Circuit decision would continue to apply nationwide outside the Sixth Circuit.

On February 19, 2013, the National Environmental Development Association's Clean Air Project (NEDACAP) filed a petition for review with the D.C. Circuit Court on the December 2012 memorandum. NEDACAP alleged that the December 2012 memorandum violated both CAA section 301(a)(2) and the EPA's Regional Consistency regulations by establishing inconsistent permit criteria in different parts of the country.

In May 2014, the D.C. Circuit Court issued a decision vacating the December 2012 memorandum. The D.C. Circuit Court agreed with NEDACAP that the memorandum was inconsistent with the EPA's Regional Consistency regulations located at 40 CFR part 56.[3] The court found that the Regional Consistency regulations "strongly articulate the EPA's firm commitment to national uniformity in the applications of its permitting rules" without any indication that "EPA intended to exempt variance created by a judicial decision." Slip op. at 17. The D.C. Circuit concluded that the EPA's current regulations "preclude EPA's intercircuit nonaquiescence in this instance. . . ." Slip op. at 19.

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[2] While intercircuit nonaquiescence is generally focused on circuit court decisions, the general principle also applies to decisions issued by district courts, which are by their very nature limited in scope, as discussed later in this preamble. For ease of discussion, this preamble will generally use "intercircuit nonaquiescence" to address locally and regionally applicable decisions issued by both circuit and district federal courts.

[3] The D.C. Circuit Court did not reach NEDACAP's argument that the memorandum was also inconsistent with the CAA.

The D.C. Circuit Court presented three options that the EPA could pursue in response to an adverse decision: revise the underlying regulation; appeal the decision; or revise the Regional Consistency regulations. By making the revisions proposed in this rulemaking, the EPA is following one of the options suggested by the court. Slip op. at 18.

First, the court suggested that the EPA consider revising the underlying regulations at issue in the Sixth Circuit decision. *Id* While this approach may resolve the narrow issue that is the subject of the Sixth Circuit decision, and the EPA is in fact in the process of revising the permitting regulations that were the subject of the Sixth Circuit Court decision and the December 2012 memorandum, this approach generally would require a new rulemaking following each adverse court decision regarding an issue of local applicability. Each national rulemaking of this nature would likely take more than a year—and possibly several years—to complete. By revising the EPA's Regional Consistency regulations to fully allow for intercircuit nonaquiescence, the agency can through one rulemaking save the considerable time and resources potentially required by several narrow rulemakings.

Second, the court suggested that the EPA could have appealed the Sixth Circuit decision to the U.S. Supreme Court. Slip op. at 18. However, because the U.S. Supreme Court grants only about one percent of the petitions for certiorari (i.e., a petition requesting review of a lower court's decision) filed each year, there is a strong likelihood that the U.S. Supreme Court would decline to review a lower court's decision.[4] Were we to rely solely on this option, absent review by the U.S. Supreme Court, a single federal court decision regarding an action of local

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[4] *See http://dailywrit.com/2013/01/likelihood-of-a-petition-being-granted/* which cites the following statistics:
Petitions granted overall in the 2011-2012 term: .862 percent, and in the 2012-2013 term: 1.03 percent.

applicability could change the EPA's policy nationwide unless and until the EPA undertook a rulemaking (*see* first option above). As discussed further below, this outcome would be inconsistent with the judicial review provisions of CAA section 307(b)(1).

Third, the court suggested that the EPA could revise the Regional Consistency regulations "to account for regional variances created by judicial decisions or circuit splits." Slip op. at 18. This proposed rulemaking follows this option because we believe it most effectively addresses the issue presented by an adverse federal court decision addressing an action of local or regional applicability. As discussed further below, this proposed revision also would accommodate the EPA's proper and longstanding application of the doctrine of intercircuit nonaquiescence in future cases while eliminating the need for several lengthy, narrow rulemakings or review of a lower court's decision by the U.S. Supreme Court.

IV. Proposed Revisions to the Regional Consistency Rule

This section discusses the proposed revisions to the Regional Consistency regulations and our rationale for proposing those changes. We solicit public comment on the changes being proposed and will consider those comments in developing the final rule.

A. *What are the proposed revisions to the 40 CFR part 56 Regional Consistency Regulations?*

In this action, we propose three specific revisions to the general consistency policy put forward in the existing Regional Consistency regulations, 40 CFR part 56, to accommodate the implications of judicial decisions addressing "locally or regionally applicable" actions. Specifically, we propose to revise 40 CFR 56.3 to add a provision to acknowledge an exception to the "policy" of uniformity to provide that a decision of a federal court that arises from a challenge to "locally or regionally applicable" actions would not apply uniformly nationwide, and that only decisions of the U.S. Supreme Court and decisions of the D.C. Circuit Court that

arise from challenges to "nationally applicable regulations…or final action" would apply uniformly nationwide. We also propose to revise 40 CFR 56.4 to add a provision to clarify that EPA headquarters offices' employees would not need to issue mechanisms or revise existing mechanisms developed under 40 CFR 56.4(a) to address federal court decisions arising from challenges to "locally or regionally applicable" actions. Lastly, we propose to revise 40 CFR 56.5(b) to clarify that EPA regional offices' employees would not need to seek headquarters office concurrence to act inconsistently with national policy or interpretation if such action is required by a federal court decision arising from challenges to "locally or regionally applicable" actions. In other words, through this rulemaking, the agency would be authorizing a region to act inconsistently with nationwide policy or interpretation to the extent that the region must do so in order to act consistently with a decision issued by a federal court that has direct jurisdiction over the region's action.

The manner in which the proposed revisions would affect the EPA's operational consistency may be explained by way of example related to a challenge to the title V applicability determination made by EPA Region 5 for Summit Petroleum's oil and gas operations on tribal land in Michigan. This challenge led to the December 2012 memorandum reviewed in the D.C. Circuit Court's *NEDACAP* decision. In the course of a source-specific title V permitting action, EPA Region 5 had determined that Summit Petroleum's oil and gas production wells and gas sweetening plant should be considered adjacent, based on their proximity and interrelatedness to one another, and thus emissions from these units were aggregated into a single source for title V permitting purposes (*see* 40 CFR 71.2). Summit Petroleum challenged that determination in the Sixth Circuit, and the court ultimately issued a decision that vacated and remanded Region 5's determination. *Summit Petroleum Corp. v. U.S.*

EPA, 690 F3d 733 (6th Cir. 2012). Although the EPA argued that its longstanding interpretation of "adjacent" as used in the source determination regulations included consideration of an activities' functional interrelatedness, *see id.* at 744-75 (noting the EPA's citation to nine such source determinations spanning more than 30 years), the Sixth Circuit found that the term "adjacent" as used in the EPA's source determination regulations was unambiguous and related only to physical proximity, and thus could not include consideration of functional interrelatedness, *see id.* at 741-744. The EPA sought rehearing of the *Summit* case, but the request was ultimately denied on October 29, 2012.

Thereafter, a number of EPA regional offices sought guidance from headquarters offices regarding the impact of the *Summit* decision on various permitting actions, sometimes in an effort to answer questions they were receiving from state permitting authorities and permittees. Accordingly, in December 2012, an official in EPA headquarters issued a memorandum to the Air Division Directors at the EPA's regional offices explaining the applicability of the *Summit* decision to other EPA title V and NSR source determinations.[5] The December 2012 memorandum described briefly the determination at issue in the *Summit* case, and the Sixth Circuit's decision. It explained that under the court's decision, the EPA could no longer consider interrelatedness in determining the adjacency of different emissions units in title V or NSR permitting decisions within the Sixth Circuit's jurisdiction (i.e., Michigan, Ohio, Tennessee and Kentucky). The December 2012 memorandum noted that the agency was "still assessing how to implement this decision in its permitting actions in the 6th Circuit," and explained that outside

[5] Memorandum from Stephen Page, Director of the EPA's Office of Air Quality Planning and Standards to the Air Division Directors. (Titled, *Applicability of the Summit Decision to the EPA Title V and NSR Source Determinations;* available at *http://www.epa.gov/region7/air/title5/t5memos/inter2012.pdf*)

the Sixth Circuit, the EPA intended to continue to apply its longstanding approach of considering both the proximity and interrelatedness of operations in determining whether emissions units are "adjacent" for permitting purposes.

If the proposed revisions to the Regional Consistency regulations had already been in place, this type of memorandum from EPA headquarters would not have been necessary because regions, states, and other potentially affected entities would have had certainty and predictability regarding the application of such a judicial decision – they would have known that this type of permit-specific, local and regional decision would only apply in the areas under the jurisdiction of the Sixth Circuit. Accordingly, with the changes proposed, it would have been clear to everyone that EPA regions would not be bound to apply the findings of the *Summit* decision in states outside the Sixth Circuit, and could continue to apply the longstanding practice that had not been successfully challenged in other federal circuit courts in their regions or decided nationally by the D.C. Circuit Court or U.S. Supreme Court.

If the proposed revisions to the Regional Consistency regulations are finalized, it will be clear that an adverse federal court decision in a case regarding locally or regionally applicable actions does not apply nationwide. As soon as these regulatory changes are effective, the EPA regional offices that are outside of the jurisdiction of a court will be able to apply the agency's nationwide practices in a consistent manner in any actions they take going forward, and they will not need to seek concurrence from headquarters offices for that continued application. Likewise, under the revised regulations, it would be clear that any such adverse decision that is or has been issued would be applied to those areas or parties that are under the issuing court's jurisdiction in any regional actions going forward. Moreover, those regions would not need to seek concurrence from EPA headquarters offices in order to follow the relevant decision, even if doing so would

mean they were acting inconsistently with other EPA regional offices or national policy.

Note that these proposed regulatory changes, if finalized, would only apply to activities conducted at EPA offices (both regional and headquarters) and also to states delegated to implement EPA rules. The proposed revisions would not affect a state implementing its SIP-approved program, as they are bound to follow their own regulations.

B. What is the basis for the EPA's approach?

In this rulemaking action, we are proposing to revise 40 CFR part 56 to "account for regional variances created by a judicial decision or circuit splits" by creating a specific accommodation to the general policy of uniformity of EPA actions. As explained more fully below, revising the Regional Consistency regulations to accommodate federal circuit and district court decisions that result from challenges to locally or regionally applicable actions, and thus providing for intercircuit nonaquiescence, is consistent with general principles of common law, CAA sections 301(a)(2) and 307(b)(1). It will also help to foster overall fairness and predictability regarding the scope and impact of judicial decisions under the CAA, and is a reasonable extension of the EPA's existing part 56 regulations.

1. Accommodating Intercircuit Nonaquiescence in the Regional Consistency Regulations is Consistent with General Principles of Common Law

Federal courts are courts of limited jurisdiction; they have only the authority to hear and decide cases granted to them by Congress. *See generally* U.S. Constitution, Article II, Section 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). Thus, Congress must grant a federal court subject matter jurisdiction over the type of dispute in question.

A court of appeals generally hears appeals from the district courts located within its

circuit, and the circuit is delineated by the states it contains. *See generally* 28 U.S.C. 41 (establishing the number and composition of the thirteen circuits; the composition is denoted by the names of states in a circuit).[6] As a general matter, while an opinion from one circuit court of appeals may be persuasive precedent, it is not binding on other courts of appeals. *See Hart v. Massanari*, 266 F. 3d 1155, 1172-73 (9th Cir. 2001). As the Ninth Circuit explained, "[T]here are also very important differences between controlling and persuasive authority. As noted, one of these is that, if a controlling precedent is determined to be on point, it must be followed. Another important distinction concerns the scope of controlling authority. Thus, an opinion of our court is binding within our circuit, not elsewhere in the country. The courts of appeals, and even the lower courts of other circuits, may decline to follow the rule we announce—and often do. *This ability to develop different interpretations of the law among the circuits is considered a strength of our system. It allows experimentation with different approaches to the same legal problem, so that when the Supreme Court eventually reviews the issue it has the benefit of "percolation" within the lower courts." Id.* (emphasis added). This last point is critical to an effective federal judiciary. By revising the regulations in part 56 to fully accommodate intercircuit nonaquiescence, the EPA is acting consistently with the purpose of the federal judicial system by allowing the robust percolation of case law through the circuit courts until such time as U.S. Supreme Court review is appropriate. The vast majority of cases that the U.S.

[6] The exception is the Federal Circuit, which hears certain types of cases from anywhere in the country.

Supreme Court hears arise from circuit splits.[7] Thus, revising the Regional Consistency regulations to accommodate intercircuit nonaquiescence advances the federal judiciary's ability to experiment with different approaches to similar legal problems, and the development of a circuit split that could eventually lead to U.S. Supreme Court review of important issues under the CAA.

As the U.S. Supreme Court has explained, circuit splits are a common and acknowledged aspect of the federal legal system. *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (there is wisdom in "allowing difficult issues to mature through full consideration by the courts of appeals"). With regard to judicial consideration of the actions and decisions of federal agencies, a judge on the D.C. Circuit Court has noted that "after one circuit has disagreed with its position, an agency is entitled to maintain its independent assessment of the dictates of the statutes and regulations it is charged with administering, in the hope that other circuits, the U.S. Supreme Court, or Congress will ultimately uphold the agency's position." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (J. Rogers, dissenting). Likewise, legal scholars have explained that "compel[ling] an agency to follow the adverse ruling of a particular court of appeals would be to give that court undue influence in the intercircuit dialogue by diminishing the opportunity for other courts of proper venue to consider, and possibly sustain, the agency's position." S. Estreicher & R. Revesz, Nonaquiescence by Federal Administrative Agencies, 98 Yale L. J. 679, 764 (Feb.1989). As the U.S. Supreme Court has noted, preventing the government from addressing an issue in more than one forum "would

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[7] *See* Ryan Stephenson, Federal Circuit Case Selection at the U.S. Supreme Court: An Empirical Analysis, 102 Georgetown L.J. 272, 273 (2013) ("As many as 70% of the cases before the Court where certiorari has been granted present clear conflicts between either the federal courts of appeals or state courts of last resort.").

substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). In light of this important function, the U.S. Supreme Court has sought to preserve government discretion to relitigate an issue across different circuits. *Id.* at 163. Thus, though circuit conflict may undermine national uniformity of federal law to some degree for some period of time, it also advances the quality of decisions interpreting the law over time. *See generally Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 446 (7th Cir. 1994) (J. Easterbrook, concurring) (agencies and courts balance whether "it is more important that the applicable rule of law be settled" or "that it be settled right") (internal quotation and citation omitted).

2. Accommodating Intercircuit Nonaquiescence in the Regional Consistency Regulations Is Consistent with the CAA's Judicial Review Provisions

We are also proposing these revisions to ensure that the Regional Consistency regulations are in harmony with the CAA's judicial review provisions. Congress specifically addressed in the CAA the ability of the various courts of appeals to hear appeals of decisions of the EPA. Congress created a very specific system of judicial review to address how the CAA is implemented. Specifically, Congress granted the authority to review agency actions of nationwide applicability under the CAA only to the D.C. Circuit Court. In 1977, at the same time it added the directive for the EPA to promulgate what would ultimately become the Regional Consistency regulations, Congress amended the Act to ensure that the D.C. Circuit Court, and no other circuit courts, would review nationally applicable regulations. Specifically, CAA section 307(b)(1) states that "A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or

requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under section 113, 119, or under section 120, *or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia."* CAA section 307(b)(1) (emphasis added). Congress then declared that other final CAA actions of the Administrator that are "locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." *Id.* For example, under this system, challenges to the EPA's regulations addressing prevention of significant deterioration (PSD) – which are nationally applicable – would be heard in the D.C. Circuit Court, while challenges to application of those PSD regulations to specific permitting actions – which are locally applicable – would be heard in the appropriate circuit court. *See, e.g., Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) (challenge to the EPA's PSD rules) and *Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007) (challenge to the application of those rules to a specific permitting action).

The Committee Report accompanying the bill that ultimately became the CAA Amendments of 1977 states that the amendments to section 307(b)(1) make "it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeal for the District of Columbia." H.R.Rep. No. 95-294, p. 323 (1977). *See also Harrison v. PPG Industries, Inc. et al*, 100 S.Ct. 1889, 1896 (1980) (noting that the legislative history focused on the proper venue between the D.C. Circuit Court and other federal courts). Only "essentially locally, statewide, or regionally applicable

rules or orders are to be reviewed in U.S. court of appeals for the circuit in which such locality, State or region is located." H.R.Rep. No. 95-294, at 323. The legislative history notes that in adopting this revision, the committee was largely approving portions of recommendation 305.76-4(A) of the Administrative Conference of the United States, which deals with venue, as well as the separate statement of G. William Frick that accompanied the Administrative Conference's views. *Id.* at 324. In his statement, Mr. Frick stated that "Congress intended review in the D.C. Circuit of 'matters on which national uniformity is desirable.' Among the reasons for this are the D.C. Circuit's obvious expertise in administrative law matters and its sensitivity to Congressional mandates." 41 FR 56767, 56769 (1976). Mr. Frick went on to note that the D.C. Circuit Court had become quite familiar with the CAA, while other circuit courts lacked frequent exposure to the Act and its legislative history.

By placing review of nationally applicable decisions in the D.C. Circuit Court alone, Congress struck the balance between the countervailing values of improved development of the law on the one hand and national uniformity on the other. By consolidating review of nationally applicable final agency actions in the D.C. Circuit Court, Congress advanced the objective of "even and consistent national application" of certain EPA regulations (and other "final" actions) that are national in scope. *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 660 (D.C. Cir. 1975) (quoting S. Rep. No. 91-1196, 91st Cong., 2d Sess., 41(1970)). At the same time, Congress left the door open to intercircuit conflicts by granting jurisdiction over locally or regionally applicable "final" actions – like the applicability determination discussed in the example below – to the regionally-based courts of appeal. There is nothing in the legislative history to suggest that at the same time, Congress intended for the Regional Consistency provisions to somehow upset this careful balance and require the EPA to apply a locally or

regionally applicable decision in all regions in order to maintain consistency.

This proposal would firmly reestablish the balance that Congress struck in CAA section 307(b)(1), to the extent the current Regional Consistency regulations upset that balance. Thus, this proposal would ensure that only the U.S. Supreme Court and the D.C. Circuit Court would issue decisions with mandatory nationwide effect, which is consistent with the clear statutory language of CAA section 307(b)(1), as well as its legislative history. As explained below, there is nothing in the language or intent of CAA section 301(a)(2) that trumps the clear statutory directive of CAA section 307(b)(1) establishing which courts have jurisdiction over which final agency actions.[8] Therefore, we believe it is reasonable for the EPA to revise the Regional Consistency regulations to provide a specific accommodation for locally and regionally applicable court decisions.

3. Accommodating Intercircuit Nonaquiescence in the Regional Consistency Regulations is Consistent with CAA Section 301(a)(2)

A specific accommodation for locally and regionally applicable court decisions also is compatible with the statutory language and Congressional intent of CAA section 301(a)(2). As described above, those provisions require the EPA Administrator to develop regulations to "assure fairness and uniformity" of agency actions. Notably, there is nothing in the text of CAA section 301(a)(2) or in the limited legislative history of that provision that would suggest Congress intended for the requirement to promulgate fairness and uniformity regulations under

[8] Moreover, to the extent there is a conflict, a canon of statutory construction states that the specific – such as the language in CAA section 307(b)(1) addressing which courts may rule on issues of national applicability – trumps the general – such as the language in section 301(a)(2) regarding regulations on fairness and uniformity. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012) ("'[I]t is a commonplace of statutory construction that the specific governs the general.'" *quoting Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

CAA section 301 to either upset the balance Congress struck when establishing judicial review provisions in CAA section 307, or disrupt the general principles of common law that have allowed for the percolation of issues up through the various circuit courts, as discussed above. Section 301(a)(2) of the Act does not specifically discuss whether the fairness and uniformity objectives must be applied to all court decisions; nor does it address how the agency should respond to adverse court decisions. Congress also did not include language in CAA section 301 that would expressly prohibit the EPA from promulgating regulations that accommodate intercircuit nonaquiescence, consistent with CAA section 307.

In addition, the text of CAA section 301(a)(2)(A) necessitates a balance between uniformity *and* fairness; however, one does not always guarantee the other in all circumstances. These revisions would ensure the EPA has the flexibility to maintain that balance, as appropriate.

Fairness is defined by one source as "agreeing with what is thought to be right or acceptable; treating people in a way that does not favor some over others" (*http://www.merriam-webster.com/dictionary/fairness*). As we have already discussed, it is generally acceptable to apply a Circuit Court decision only in those states over which the circuit has jurisdiction. And, as explained using an example below, there are circumstances under which applying the decision of a lower court nationwide could favor sources located in the applicable lower court's jurisdiction over those located in other circuits. As such, a standard that would specifically allow for intercircuit nonaquiescence for all CAA decisions other than those issued by the D.C. Circuit Court in response to challenges of nationwide actions would provide a uniform standard for the EPA's application of court decisions that could be anticipated by those who implement the regulations and the regulated community.

It is not clear that the automatic, immediate nationwide application of one court's decision

based on the specific facts of a locally-applicable decision would always be "fair" in the absence of the type of accommodation proposed here. For example, consider widget factories that have been diligently complying with the EPA's longstanding interpretation that the Act supports permit limits of 1.00 ppm or lower (i.e., more stringent) at widget extrusion units at major sources. However, in a challenge by a community group to a single widget factory permit in New England containing a limit of 1.00 ppm for the extrusion units, the First Circuit Court of Appeals issues a ruling with a different interpretation of the Act than the EPA's that supports a limit of 0.50 ppm or lower. A reasonable person might not find it fair to require then that all widget factories nationwide get permit revisions to establish limits of 0.50 ppm. Those factories would have been relying on the 1.00 ppm limit for years when planning budgets and making business decisions, and would likely find complying with the lower limit costly and disruptive. Arguably, fairness might be better served by limiting the impact of the First Circuit decision to the source whose permit was before the First Circuit and any other widget factories within the jurisdiction of the First Circuit, while the EPA determines how best to proceed.

While CAA section 301(a)(2) directed the EPA to create mechanisms for identifying and standardizing various criteria, there is nothing to suggest that such standardization requires exact duplication by all EPA regions in all circumstances, including regional responses to court decisions. CAA section 301 generally relates to procedures to be followed by the EPA employees in carrying out a delegation of authority from the Administrator. Paragraph 301(a)(1) of the Act authorizes the Administrator to delegate certain powers to other EPA officials, while section 301(a)(2) of the Act requires the Administrator to establish "general applicable procedures and policies for regional officers and employees" to follow in carrying out delegated authorities. CAA section 301(a)(1)-(2). While the statute further directs that such regulations

shall be designed to, among other requirements, "assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the chapter," on its face, CAA section 301(a)(2) does not impose a standalone requirement to attain uniformity. *Cf. Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1085 (6th Cir. 1984) (rejecting claim that CAA section 301(a)(2) establishes a substantive standard that requires similar or uniform emission limitations for all sources). In addition, the section does not direct the Administrator to revise an existing regulation following an adverse court decision in a local or regional case, or otherwise constrain the EPA's existing regulatory authority. Instead, the provision requires the EPA to establish *procedures* that apply to its regional officers and employees, but it does not address whether or how the EPA should address judicial decisions in those procedures. To the extent that Congress prioritized judicially-created uniformity, this was expressed in CAA section 307(b)(1) – which, as discussed above, allows for regional divergence among circuit courts – not CAA section 301(a)(2)(A).

4. Accommodating Intercircuit Nonaquiescence in the Regional Consistency Regulations Fosters Overall Fairness and Predictability Regarding the Scope and Impact of Judicial Decisions Under the CAA

Revising the Regional Consistency regulations to include a specific accommodation for intercircuit nonaquiescence in appropriate circumstances would also help to assure fairness and predictability in the implementation of the CAA overall. Such an accommodation would foster predictability by ensuring that, unless there is an affirmative nationwide and deliberate change in the EPA's rules or policies, lower court decisions would apply only in those states/areas within the jurisdiction of the lower court, with the exception of the D.C. Circuit Court reviewing final agency actions of national applicability, consistent with CAA section 307(b)(1). Under the

revised Regional Consistency regulations, as proposed, a source subject to the CAA would, as usual, need to know and follow the law in the circuit where it is located, and the law of the D.C. Circuit Court and the U.S. Supreme Court. It would not be required to follow every CAA case in every court across the country to ensure compliance with the Act.

By revising the regulations, the EPA also accommodates the possibility that a split in the circuits could preclude the EPA from complying with both court decisions at once. Consider the following example: In a case involving a permit issued in New York, the Second Circuit upholds the EPA's longstanding position and, in doing so, confirms that the EPA's interpretation is compelled by the Act under Step One of *Chevron*.[9] As a result, the EPA continues to apply its longstanding interpretation, consistent with the Second Circuit's decision, in a permit issued in Alabama, an Eleventh Circuit state. In an appeal of that permit, however, the Eleventh Circuit holds that not only is the EPA's interpretation not compelled by the CAA, it is prohibited by the CAA. There are now two court decisions with conflicting *Chevron* Step One holdings – how could the EPA apply both of those decisions uniformly across the country? While the U.S. Supreme Court could review the issue, it might not. Further, even if the U.S. Supreme Court eventually resolved the conflict, there could be a multi-year period during which both decisions would remain applicable case law. This proposed revisions would acknowledge and address those instances in which the EPA may not be able to comply with two, conflicting decisions at the same time.

Moreover, sometimes court decisions reviewing a regulation or statute are reversed on appeal. In other cases, a court decision may contain a ruling that appears to invalidate a national

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[9] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984)* (Step one of *Chevron* refers to cases where the intent of Congress is clear, and therefore a court, as well as the agency, must give effect to the unambiguously expressed intent of Congress).

rule in the context of a source-specific action, which is inconsistent with CAA section 307(b)(1), as explained above. When either outcome occurs, intercircuit nonaquiescence allows the EPA to limit the impact of the court's ruling while it undertakes other actions. For example, in *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007), the U.S. Supreme Court reversed the Fourth Circuit's implicit invalidation of the EPA's regulations in the context of an enforcement action. In that case, the U.S. Supreme Court found that the court of appeals had been too rigid in its insistence that the EPA interpret the term "modification" in its PSD regulations in the same way that the agency interpreted that term under the New Source Performance Standards program. *Id.* at 572-577. While it is true the U.S. Supreme Court eventually reversed the lower court, there was a 2-year period during which the Fourth Circuit's decision remained in place. Under the D.C. Circuit Court's interpretation of the existing Regional Consistency regulations, the EPA arguably would have been required to follow that later-reversed Fourth Circuit interpretation of its regulations nationwide during that 2 year period, even though that interpretation "read those PSD regulations in a way that seems to [the Supreme Court] too far a stretch for the language used." *Id*. at 577.

As discussed earlier, since the U.S. Supreme Court only grants a very limited number of petitions for certiorari, it is highly likely that an adverse court of appeals decision could remain in place indefinitely. This possibility is exacerbated if the EPA is prohibited by its own regulations governing consistency from seeking to create a circuit split on the issue by non-acquiescing to the first adverse decision, and maintaining its national position before other courts. Moreover, if the lower court decision is based on an interpretation of the CAA statutory language, the EPA may not be able to "fix" the problem by revising the underlying regulation because the agency could arguably be required to follow the statutory construction set forth in

the lower court's decision. Such a result would be inconsistent with the general structure of the federal judiciary, the specific structure of the Act's judicial review provision, and the general directive to assure both fairness and uniformity in CAA section 301(a)(2).

5. Accommodating Intercircuit Nonaquiescence in the Regional Consistency Regulations is a Reasonable Extension of the EPA's Part 56 Regulations

As noted above, because there is nothing in the statutory text of CAA section 301(a)(2) that would prohibit the EPA from revising the Regional Consistency regulations to specifically accommodate intercircuit nonaquiescence, we wish to evaluate that approach. Nothing in the preambles to the proposed and final Regional Consistency regulations indicates that either commenters or the EPA considered the question whether or how the rules would be applied following judicial decisions (*see generally* 44 FR 13043-048 and 45 FR 85400-405, respectively). In addition, while the D.C. Circuit Court's *NEDACAP* decision relied heavily on the general policy statements contained in 40 CFR 56.3 of the existing regulations – which broadly endorse the fair and uniform application of criteria, policy, and procedures by EPA regional office employees – there is nothing in those general statements or any other provisions of the regulations that mandate that the EPA adopt nationwide the interpretation of the court that first addresses a legal matter in all circumstances. The lack of such a mandate shows that the focused revisions we are proposing in this rulemaking are a natural extension of the agency's existing regulations.

The Regional Consistency regulations generally establish certain mechanisms with the goal of "identifying, preventing, and resolving regional inconsistencies" (45 FR 85400). For the EPA headquarters office employees, the regulations do this by targeting particular aspects of the Act that have the potential to present consistency problems – any rule or regulation proposed or

promulgated under part 51, which sets forth requirements for the preparation, adoption and submittal of state implementation plans, and part 58, which contains requirements for measuring, monitoring, and reporting ambient air quality. However, the consistency regulations do not state a requirement for headquarters offices to apply these parts consistently in all circumstances. Instead the regulations direct headquarters office employees to develop mechanisms to assure that such rules or regulations are implemented and enforced fairly and uniformly by the regional offices. In so doing, the regulations do not state that headquarters employees are required to assure that a decision of one judicial circuit is always applied consistently in all EPA regions.

Likewise, the provisions of the Regional Consistency regulations that apply to the EPA regional office employees also do not contain a requirement that all regional officials act the same way in all circumstances, nor do they address judicial decisions. While the EPA could change any such requirement if it did exist in our regulations, we do not need to make such a change because the narrow revisions we are proposing in this rulemaking are a natural extension of the existing regulations, which state that regional officials must assure that actions are "carried out fairly and in a manner that is *consistent with the Act* and Agency policy" and are "*as consistent as reasonably possible* with the activities of other Regional Offices" 40 CFR 56.5(a)(1)-(2) (emphasis added).

As discussed above, Congress specifically addressed the role of and allowed for regional office divergence among circuit courts in CAA section 307(b)(1), and it would be both reasonable and fair to allow for inconsistencies among the actions of regional officials to respect those directives. Perhaps more importantly, the Regional Consistency regulations already allow for some variation between the regional offices. Specifically, 40 CFR 56.5(b) provides that regional officials "seek concurrence" from the EPA headquarters with respect to any

interpretations of the Act, rule, regulation, or guidance that "may result in inconsistent application among the regional Offices." Thus, the EPA has already acknowledged that certain regions may in some instances act inconsistently with others, and the revisions proposed in this action would simply be identifying and authorizing such inconsistency specifically when necessitated by a federal court decision reviewing an action of local or regional applicability.

In fact, the proposed revisions would further the overall goals of the existing Regional Consistency regulations by specifically identifying the possibility of potential inconsistent actions across the EPA regions, especially where multiple courts have already addressed an issue in different ways, and standardizing a response that can be followed by all the regions, such that regions only have to apply local and regional decisions issued by courts in those areas in which the court has jurisdiction.

6. Accommodating District Court Decisions in the Regional Consistency Regulations is also Appropriate

As we have explained above, revising the Regional Consistency regulations to specifically accommodate circuit court decisions via intercircuit nonaquiescence is consistent with general principles of common law, and CAA sections 307(b)(1) and 301(a)(2). In addition, it will help to foster overall fairness and predictability regarding the scope and impact of judicial decisions under the CAA, and is a reasonable extension of the EPA's existing part 56 regulations. To the extent one could read the *NEDACAP* decision to imply that the Regional Consistency regulations would also require the EPA to apply district court decisions uniformly across the nation, the revisions also appropriately accommodate district court decisions, which are by their very nature even more limited in scope.

The federal district courts are the general trial courts of the federal judiciary system. *See*

generally 28 U.S.C. 81-131 (establishing district courts for each of the 50 states and the District of Columbia). The district courts only have the authority to hear cases in a specific geographic area that raise specific claims for which Congress has granted the court jurisdiction. *See generally* 28 U.S.C. 1390-1431 (discussing the venue of the district courts) and 1330-1369 (discussing the jurisdiction of the district courts). A district court decision is based on the application of the law to the specific facts of a case, involving the parties to the case. Thus, while a decision from a circuit court is binding on those district courts located in the circuit, as a general matter, a decision from a district court is applicable only to those parties in the specific case in which it is issued and has no binding precedential effect on any other parties, courts or even other judges in the same district. *See Hart v. Massanari*, 266 F. 3d at 1174. Given this very limited scope of district court decisions, it is reasonable to revise the Regional Consistency regulations to clearly accommodate district court decisions that result from specific locally or regionally cases in which the EPA is a party. Without such a revision, a party may try to argue that, pursuant to the Regional Consistency regulations, a single district court decision based on the specific facts in one case forms the basis for a uniform nationwide EPA position, elevating the impact of that district court decision well beyond the scope that is usually provided to district court decisions, and thus upsetting the general principles of U.S. common law upon which our federal judiciary is based.

Likewise, as noted above, Congress created a very specific system of judicial review to address how the Act is implemented, and that system is focused on challenges to specific final actions in the circuit courts. There is nothing in CAA section 307(b)(1) or in the statutory language requiring the EPA to promulgate regional consistency rules that would suggest that Congress intended district court decisions in specific cases to have a potentially broad binding

effect on the agency. Not only would such an outcome elevate a district court decision to the same level of a D.C. Circuit Court decision under CAA section 307(b)(1), but it would be directly opposed to the idea of "fairness" put forward by Congress in CAA section 301(a)(2). If the Regional Consistency regulations cannot accommodate various district court decisions, a fundamental unfairness would arise when a district court decision applying its interpretation of an agency rule to the specific facts of one EPA case in Alaska could impact how the agency would address the same rule but with very different facts in Florida. Given the various reasons set forth above for limiting application of circuit court decisions resulting from challenges to locally or regionally applicable actions, and the fact that the scope of district court decisions in the federal court system is even more narrowly defined than that of circuit court decisions, it is only reasonable to revise the Regional Consistency regulations to clearly limit the application of district court decisions only to the specific parties and facts addressed in the decision.

7. Accommodating Intercircuit Nonaquiescence in the Regional Consistency Regulations Maintains EPA's Ability to Exercise Discretion

Although the proposed rule revisions would make clear that the EPA is not obligated to follow judicial decisions of a federal circuit court addressing "locally or regionally applicable" actions in other circuits (or district court decisions in instances that do not involve parties to such decision), the proposal is not intended to preclude anyone from advocating that the agency exercise its discretion to follow such decisions in appropriate cases. The EPA recognizes that national policy can be influenced by insights and reasoning from judicial decisions and we do not mean to imply through this proposal that the agency would ignore persuasive judicial opinions issued in cases involving "locally or regionally applicable" actions. Such opinions may address issues of nationwide importance and could, in appropriate circumstances, lead the

agency to adopt new national policy.

V. Environmental Justice Considerations

This document is proposing a rule revision to give the EPA flexibility to implement court decisions of a limited scope (i.e., those having local or regional applicability) while also allowing us to implement our national program under the CAA. The EPA did not conduct an environmental analysis for this rule because this rule would not directly affect the air emissions of particular sources. Because this rule will not directly affect the air emissions of particular sources, it does not affect the level of protection provided to human health or the environment. Therefore, this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) because it does not result in an impact greater than $100 million in any one year or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The proposed rule would not create any new requirements for regulated entities, but rather provides flexibility to EPA in implementing numerous programs on a national basis.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed action on small entities, small entity is defined as: (1) a small business as defined in the U.S. Small Business Administration size standards at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements directly on small entities. Entities potentially affected directly by this proposal include federal, state, local and tribal governments, none of which qualify as small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local or tribal governments or the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements

of sections 202 and 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As noted previously, the effect of the proposed rule would be neutral or relieve regulatory burden.

E. Executive Order 13132: Federalism

This proposed rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule would revise regulations that apply to the EPA, and any delegated state/local governments, only, and would not, therefore, affect the relationship between the national government and the states or the distribution of power and responsibilities among the various levels of government.

In the spirit of Executive Order 13132 and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed rule from state and local officials.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This proposed rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. This proposed rule only affects our flexibility regarding judicial decisions as they apply to implementing air programs on a national basis. Thus,

Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through the OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The proposed rule would provide flexibility to the EPA in issuing guidance to implement its regulations with respect to judicial decisions. The results of this evaluation are contained in section V of the preamble titled “Environmental Justice Considerations.”

K. Determination under Section 307(d)

Pursuant to section 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine."

VII. Statutory Authority

The statutory authority for this action is provided by section 301 of the CAA as amended (42 U.S.C. 7601).

List of Subjects in 40 CFR Part 56

Environmental protection, Air pollution control.

Dated: August 5, 2015.

Gina McCarthy,
Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 56 –REGIONAL CONSISTENCY

1. The authority citation for part 56 continues to read as follows:

Authority: Sec. 301(a)(2) of the Clean Air Act as amended (42 U.S.C. 7601).

2. Section 56.3 is amended by adding paragraph (d) to read as follows:

§56.3 Policy.

* * * * *

(d) Recognize that only the decisions of the U.S. Supreme Court and decisions of the U.S. Court of Appeals for the D.C. Circuit Court that arise from challenges to "nationally applicable regulations…or final action," as discussed in Clean Air Act section 307(b) (42 U.S.C. 7607(b)), shall apply uniformly, and to provide for exceptions to the general policy stated in paragraphs (a) and (b) of this section with regard to decisions of the Federal courts that arise from challenges to "locally or regionally applicable" actions, as provided in Clean Air Act section 307(b) (42 U.S.C. 7607(b)).

3. Section 56.4 is amended by adding paragraph (c) to read as follows:

§56.4 Mechanisms for fairness and uniformity—Responsibilities of Headquarters employees.

* * * * *

(c) The Administrator shall not be required to issue new mechanisms or revise existing mechanisms developed under paragraph (a) of this section to address the inconsistent application of any rule, regulation, or policy that may arise in response to the limited jurisdiction of either a Federal circuit court decision arising from challenges to "locally or regionally applicable"

actions, as provided in Clean Air Act section 307(b) (42 U.S.C. 7607(b)), or a Federal district court decision.

4. Section 56.5 is amended by adding a sentence at the end of paragraph (b) and paragraphs (b)(1) and (2) to read as follows:

§56.5 Mechanisms for fairness and uniformity—Responsibilities of Regional Office employees.

* * * * *

(b) * * * However, the responsible official in a regional office will not be required to seek such concurrence from the appropriate EPA headquarters office for actions that may result in inconsistent application if such inconsistent application is required in order to act in accordance with a Federal court decision:

(1) Issued by a Circuit Court in challenges to "locally or regionally applicable" actions, as provided in Clean Air Act section 307(b) (42 U.S.C. 7607(b)), if that Circuit Court has direct jurisdiction over the geographic areas that the regional office official is addressing, or

(2) Issued by a District Court in a specific case if the party the regional office official is addressing was also a party in the case that resulted in the decision.

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