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VIA U.S. EPA ELECTRONIC PUBLIC DOCKET AND COMMENT SYSTEM

R04-OAR-2005-GA-0005
Regulatory Development Section, Air Planning Branch
Air, Pesticides and Toxics Management Division
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303-8960

**Re: Comments in Support of the U.S. Environmental Protection Agency
Proposed Rule, dated November 21, 2005, to Revise the Georgia State
Implementation Plan, published November 29, 2005¹**

To Whom it May Concern:

The Georgia Industry Environmental Coalition, Inc. (GIEC)² supports the U.S. Environmental Protection Agency's (EPA's) proposed rule to correct the Georgia State Implementation Plan (SIP) by removing the general nuisance provisions of Ga. Comp. R. & Regs. 391-3-1.02(2)(a)¹ (the "Georgia nuisance provision"). Your consideration of GIEC's comments, which are being submitted during the public comment period, and finalization of the rule as proposed are important to our membership.

The Georgia nuisance provision is a State-specific regulation that was improperly incorporated into Georgia's SIP in 1980.³ EPA's action will correct a longstanding error that contradicts both the language and intent of the Clean Air Act, as well as established EPA policy. This error has not been harmless; indeed, it has prompted at least one claim in a recent federal proceeding

¹ 70 Fed. Reg. 71,446-71,447 (Nov. 29, 2005).

² Formed in 1992, GIEC is a not-for-profit organization of Georgia industries whose member companies are subject to environmental regulations in Georgia. GIEC's mission is to serve as a technically-based advocate for Georgia industry by promoting environmental regulations and policies founded on protection of human health and the environment; sound science; and cost/benefit principles.

Many of our member companies represent the largest employers in Georgia and collectively represent an employee-base that exceeds 55,000 and include: Arizona Chemical Company; AGL Resources; Colonial Terminals, Inc.; DSM Chemicals North America, Inc.; Engelhard Corporation; General Electric Company; General Motors; Georgia-Pacific Corporation; Georgia Power Company; Gold Kist Inc.; International Paper; Kerr-McGee Pigments, Inc.; Lockheed Martin Aeronautics Company; Merck & Company, Inc.; Mohawk Industries; Norfolk Southern Corporation; The NutraSweet Company; Omnova Solutions, Inc.; Southern Aluminum Finishing Company; Southwire; Weyerhaeuser Company; and The William L. Bonnell Co., Inc.

³ 45 Fed. Reg. 780 (Jan. 3, 1980).

involving a Title V permit⁴ and has resulted in compliance concerns and uncertainty among the regulated community. EPA's proposed rule will correct this error and restore the proper focus of Georgia's SIP to readily-ascertainable federal standards.

The Georgia nuisance provision prohibits the creation of "a condition of air pollution in quantities or characteristics or of a duration which is injurious or which unreasonably interferes with the enjoyment of life or use of property."⁵ This language is impermissibly vague and standardless, purporting to apply to any so-called "condition of air pollution." The overly broad language of the Georgia nuisance provision could be construed to reach odor and other airborne releases which are not regulated under the federal Clean Air Act. Clearly, the Georgia nuisance provision is not limited to air pollutants regulated pursuant to the National Ambient Air Quality Standards (NAAQS).

Section 110 of the Clean Air Act identifies those criteria and standards that must be present in a SIP submittal in order for it to receive approval by the EPA Administrator. According to Section 110, each State must submit to EPA for approval, after the promulgation of a NAAQS for any air pollutant, "a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State." 42 U.S.C. § 7410(a)(1). Further, each SIP shall include "enforceable emission limitations and other control measures ... as may be necessary or appropriate to meet the applicable requirements of this chapter." 42 U.S.C. § 7410(a)(2)(A). In short, the statutory purpose of a SIP is to provide for implementation, maintenance, and enforcement of NAAQS as necessary to meet the requirements of the federal Clean Air Act. A provision in a SIP, such as the Georgia nuisance provision, that purports to grant federal enforcement authority to control a State-only "condition of air pollution" not specified by any NAAQS, exceeds the ambit of an approvable SIP and the authority granted to the EPA under the Clean Air Act.

EPA clearly understands and agrees that the proper focus of a SIP is on NAAQS. In the current notice of rulemaking, EPA states that the Georgia nuisance provision is not related to attainment of a NAAQS and, therefore, erroneously was incorporated into the Georgia SIP. This is consistent with past EPA policy. In a February 9, 1979 memorandum, Michael A. James, then-Associate General Counsel for the Air, Noise, and Radiation Division, stated that the General Counsel's office "has always advised the Regions that measures to control non-criteria pollutants may not legally be made part of a SIP. Section 110 of the Clean Air Act makes clear that the SIPs have this limitation." EPA also has affirmatively disclaimed its intent to regulate odor through the Clean Air Act, determining that state and local regulation was sufficient. See George Wahl & U.S. EPA, Regulatory Options for the Control of Odors (1980) U.S. EPA publication 450/5-80/003.

Regrettably, as noted in the Federal Register notice for the subject rulemaking, "EPA did not perform a detailed review of the numerous provisions submitted" in Georgia's initial SIP

⁴ In re Matter of Hercules, Inc. Brunswick, Georgia Gum & Wood Chemicals Petition IV-2003-1.

⁵ Ga. Comp. R. & Regs. 391-3-1.02(2)(a)(1).

submittal, and this improper component of the SIP was included.⁶ The current proposed revision of the Georgia SIP represents a textbook case for the use of EPA's authority under Section 110(k)(6) of the Clean Air Act to correct errors made during the SIP approval process.⁷

While GIEC continues to have concerns about the validity and legality of the Georgia nuisance provision, EPA's proposed action takes those concerns out of the inappropriate realm of federal SIP regulation and returns them to the State arena. Under the plain terms of the Clean Air Act, SIP rules must be directly related to the implementation, maintenance, and enforcement of NAAQS. The Georgia nuisance provision exceeds the scope of this charge by attempting broadly to regulate any and all air pollution conditions, not just air pollutants covered by an applicable NAAQS. EPA should take this decisive action to remove the Georgia nuisance provision from the Georgia SIP.


GIEC appreciates this opportunity to provide input and comments on this important regulatory action.

Sincerely,

GEORGIA INDUSTRY ENVIRONMENTAL COALITION, INC.



William R. Miller, III, Ph.D.
Chair, Air Workgroup



Katie Kirkpatrick, P.E.
Chair, Board of Directors

⁶ See 70 Fed. Reg. 71,447 (Nov. 29, 2005).

⁷ Section 110(k)(6) provides: "Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public."