



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-HQ-OAR-2012-0322; FRL-9782-2]**

**RIN 2060-AR68**

**State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing to take action on a petition for rulemaking filed by the Sierra Club with the EPA Administrator on June 30, 2011 (the Petition). The Petition includes interrelated requests concerning the treatment of excess emissions in state rules by sources during periods of startup, shutdown, or malfunction (SSM). The EPA is proposing to grant in part and to deny in part the request in the Petition to rescind its policy interpreting the Clean Air Act (CAA) to allow states to have appropriately drawn state implementation plan (SIP) provisions that provide affirmative defenses to monetary penalties for violations during periods of SSM. The EPA is also proposing either to grant or to deny the Petition with respect to the specific existing SIP provisions related to SSM in each of 39 states identified by the Petitioner as inconsistent with the CAA. Further, for each of those states where the EPA proposes to grant the Petition concerning specific provisions, the EPA also proposes to find that the existing SIP provision is substantially inadequate to meet CAA requirements and thus under CAA authority proposes a "SIP call." For those states for which the EPA proposes a SIP call, the EPA also proposes a

schedule for the states to submit a corrective SIP revision. Finally, the EPA is also proposing to deny the request in the Petition that the EPA discontinue reliance on interpretive letters from states to clarify any potential ambiguity in SIP submissions, even in circumstances where the EPA may determine that this approach is appropriate and has adequately documented that approach in a rulemaking action. This action reflects the EPA's current SSM Policy for SIPs.

**DATES:** *Comments.* Comments must be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

*Public Hearing.* If anyone contacts the EPA requesting a public hearing by **[INSERT DATE 15 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**, we will hold a public hearing on March 12, 2013.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2012-0322, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email:* [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).
- *Fax:* (202) 566-9744.
- *Mail:* Attention Docket ID No. EPA-HQ-OAR-2012-0322, U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue, NW, Mail Code: 6102T, Washington, D.C. 20460. Please include a total of two copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue, Northwest, Room 3334, Washington, D.C. 20004, Attention Docket ID No. EPA-HQ-OAR-2012-0322. Such deliveries are only accepted during the

Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions.* Direct your comments to Docket ID No. EPA-HQ-OAR-2012-0322. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or email. The [www.regulations.gov](http://www.regulations.gov) website is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through [www.regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any CD you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at [www.epa.gov/epahome/dockets.htm](http://www.epa.gov/epahome/dockets.htm). For additional instructions on submitting comments, go to section I.C of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket.* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

*Public Hearing:* If a public hearing is held, it will be held on March 12, 2013, at the EPA Ariel Rios East building, Room 1153, 1301 Constitution Avenue, Washington, D.C. 20460. The public hearing will convene at 9 a.m. (Eastern Standard Time) and continue until the later of 6 p.m. or 1 hour after the last registered speaker has spoken. People interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Ms. Pamela Long, Air Quality Planning Division, Office of Air Quality Planning and Standards (C504-01), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541-0641, fax number (919) 541-5509, email address *long.pam@epa.gov*, at least 5 days in advance of the public hearing (*see DATES*). People interested in attending the public hearing must also call Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposed action. The EPA will make every effort to accommodate all speakers who

arrive and register. A lunch break is scheduled from 12:30 p.m. until 2 p.m. Because this hearing is being held at U.S. government facilities, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. In addition, you will need to obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building, and demonstrations will not be allowed on federal property for security reasons. The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. If a hearing is held on March 12, 2013, written comments on the proposed rule must be postmarked by April 11, 2013. Commenters should notify Ms. Long if they will need specific equipment, or if there are other special needs related to providing comments at the hearing. The EPA will provide equipment for commenters to show overhead slides or make computerized slide presentations if we receive special requests in advance. Oral testimony will be limited to 5 minutes for each commenter. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email or CD) or in hard copy form. The hearing schedule, including lists of speakers, will be posted on the EPA's website at [www.epa.gov/air/urbanair/sipstatus/](http://www.epa.gov/air/urbanair/sipstatus/). Verbatim transcripts of the hearings and written statements will be included in the docket for the rulemaking. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however,

please plan for the hearing to run either ahead of schedule or behind schedule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions concerning the public hearing, please contact Ms. Pamela Long, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Planning Division, (C504-01), Research Triangle Park, NC 27711, telephone (919) 541-0641, fax number (919) 541-5509, email address: *long.pam@epa.gov* (preferred method for registering). Questions concerning this proposed rule should be addressed to Ms. Lisa Sutton, U.S. EPA, Office of Air Quality Planning and Standards, State and Local Programs Group, (C539-01), Research Triangle Park, NC 27711, telephone number (919) 541-3450, email at *sutton.lisa@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

For questions related to a specific SIP, please contact the appropriate EPA

Regional Office:

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<b>EPA Regional Office</b>	<b>Contact for Regional Office (person, mailing address, telephone number)</b>	<b>State</b>
I	Alison Simcox, Environmental Scientist, EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109-3912, (617) 918-1684.	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont.
II	Paul Truchan, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007-1866, (212) 637-3711.	New Jersey, New York, Puerto Rico, and Virgin Islands.
III	Harold Frankford, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103- 2029, (215) 814-2108.	District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.
IV	Joel Huey, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, GA 30303-8960, (404) 562- 9104.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.

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<b>EPA Regional Office</b>	<b>Contact for Regional Office (person, mailing address, telephone number)</b>	<b>State</b>
V	Christos Panos, Air and Radiation Division (AR-18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604-3507, (312) 353-8328.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
VI	Alan Shar (6PD-L), EPA Region 6, Fountain Place 12th Floor, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202-2733, (214) 665-6691.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII	Lachala Kemp, EPA Region 7, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, KS 66219, (913) 551-7214. Alternate contact is Ward Burns, (913) 551-7960.	Iowa, Kansas, Missouri, and Nebraska.
VIII	Adam Clark, Air Quality Planning Unit (8P-AR) Air Program, Office of Partnership and Regulatory Assistance, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129, (303) 312-7104.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX	Lisa Tharp, EPA Region 9, Air Division, 75 Hawthorne Street (AIR-8), San Francisco, CA 94105, (415) 947-4142.	Arizona; California; Hawaii and the Pacific Islands; Indian Country within Region 9 and Nevada.
X	Donna Deneen, Environmental Engineer, Office of Air, Waste and Toxics (AWT-107), EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, (206) 553-6706.	Alaska, Idaho, Oregon, and Washington.

## **I. General Information**

### **A. Does this action apply to me?**

Entities potentially affected by this rule include states, U.S. territories, local authorities, and eligible tribes that are currently administering, or may in the future

administer, the EPA-approved implementation plans ("air agencies").<sup>1</sup> The EPA's action on the Petition is potentially of interest to all such entities because the EPA is evaluating issues related to basic CAA requirements for SIPs. Through this rulemaking, the EPA is both clarifying and applying its interpretation of the CAA with respect to SIP provisions applicable to excess emissions during SSM events. In addition, the EPA may find specific SIP provisions in states identified in the Petition to be substantially inadequate to meet CAA requirements, pursuant to CAA section 110(k)(5), and thus those states will potentially be affected by this rulemaking directly. For example, if a state's existing SIP provision allows an automatic exemption for excess emissions during periods of startup, shutdown, or malfunction, such that these excess emissions do not constitute a violation of the otherwise applicable emission limitations of the SIP, then the EPA may determine that the SIP provision is substantially inadequate because the provision is inconsistent with fundamental requirements of the CAA. This rule may also be of interest to the public and to owners and operators of industrial facilities that are subject to emission limits in SIPs, because it may require changes to state rules covering excess emissions. When finalized, this action will embody the EPA's updated SSM Policy for SIP

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<sup>1</sup> The EPA respects the unique relationship between the U.S. government and tribal authorities and acknowledges that tribal concerns are not interchangeable with state concerns. Under the CAA and EPA regulations, a tribe may, but is not required to, apply for eligibility to have a tribal implementation plan (TIP). For convenience, we refer to "air agencies" in this rulemaking collectively when meaning to refer in general to states, the District of Columbia, U.S. territories, local air permitting authorities, and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans. The EPA notes that the petition under evaluation does not identify any specific provisions related to tribal implementation plans. We therefore refer to "state" or "states" rather than "air agency" or "air agencies" when meaning to refer to one, some, or all of the 39 states identified in the Petition. We also use "state" or "states" rather than "air agency" or "air agencies" when quoting or paraphrasing the CAA or other document that uses that term even when the original referenced passage may have applicability to tribes as well.

provisions relevant to excess emissions during SSM events.

*B. 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 proposal notice will also be available on the World Wide Web. Following signature by the EPA Assistant Administrator, a copy of this notice will be posted on the EPA's website, under SSM SIP Call 2013, at [www.epa.gov/air/urbanair/sipstatus](http://www.epa.gov/air/urbanair/sipstatus). In addition to this notice, other relevant documents are located in the docket, including a copy of the Petition and copies of each of the four guidance documents pertaining to excess emissions issued by the EPA in 1982, 1983, 1999, and 2001, which are discussed in more detail later in this proposal notice.

*C. What should I consider as I prepare my comments?*

1. *Submitting CBI.* Do not submit this information to the EPA through [www.regulations.gov](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 CD that you mail to the EPA, mark the outside of the CD as CBI and then identify electronically within the CD 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: Roberto Morales, OAQPS Document Control Officer (C404-02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA-HQ-OAR-2012-0322.

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.

*D. How is the preamble organized?*

The information presented in this preamble is organized as follows:

- I. General Information
  - A. Does this action apply to me?
  - B. Where can I get a copy of this document and other related information?
  - C. What should I consider as I prepare my comments?
  - D. How is the preamble organized?
  - E. What is the meaning of key terms used in this notice?
- II. Overview of Proposed Rule
  - A. How is the EPA proposing to respond to the Petition?
  - B. What did the Petitioner request?

- C. To which air agencies does this proposed rulemaking apply and why?
  - D. What is the EPA proposing for any state that receives a finding of substantial inadequacy and a SIP call?
  - E. What are potential impacts on affected states and sources?
  - F. What happens if an affected state fails to meet the SIP submission deadline?
  - G. What happens in an affected state in the interim period starting when the EPA promulgates the final SIP call and ending when the EPA approves the required SIP revision?
- III. Statutory, Regulatory, and Policy Background
- IV. Proposed Action in Response to Request to Rescind the EPA Policy Interpreting the CAA to Allow Appropriate Affirmative Defense Provisions
- A. Petitioner's Request
  - B. The EPA's Response
- V. Proposed Action in Response to Request for the EPA's Review of Specific Existing SIP Provisions for Consistency with CAA Requirements
- A. Petitioner's Request
  - B. The EPA's Response
- VI. Proposed Action in Response to Request that the EPA Limit SIP Approval to the Text of State Regulations and Not Rely upon Additional Interpretive Letters from the State
- A. Petitioner's Request
  - B. The EPA's Response
- VII. Clarifications, Reiterations, and Revisions to the EPA's SSM Policy
- A. Applicability of Emission Limitations During Periods of Startup and Shutdown
  - B. Affirmative Defense Provisions During Periods of Malfunction
  - C. Affirmative Defense Provisions During Periods of Startup and Shutdown
  - D. Relationship Between SIP Provisions and Title V Regulations
  - E. Intended Effect of the EPA's Action on the Petition
- VIII. Legal Authority, Process, and Timing for SIP Calls
- A. SIP Call Authority Under Section 110(k)(5)
    - 1. General Statutory Authority
    - 2. Substantial Inadequacy of Automatic Exemptions
    - 3. Substantial Inadequacy of Director's Discretion Exemptions
    - 4. Substantial Inadequacy of Improper Enforcement Discretion Provisions
    - 5. Substantial Inadequacy of Deficient Affirmative Defense Provisions
  - B. SIP Call Process Under Section 110(k)(5)
  - C. SIP Call Timing Under Section 110(k)(5)
- IX. What is the EPA proposing for each of the specific SIP provisions identified in the Petition?

- A. Overview of the EPA's Evaluation of Specific SIP Provisions
  - 1. Automatic Exemption Provisions
  - 2. Director's Discretion Exemption Provisions
  - 3. State-only Enforcement Discretion Provisions
  - 4. Adequacy of Affirmative Defense Provisions
  - 5. Affirmative Defense Provisions Applicable to a "Source or Small Group of Sources"
- B. Affected States in EPA Region I
  - 1. Maine
  - 2. New Hampshire
  - 3. Rhode Island
- C. Affected States in EPA Region II
  - 1. New Jersey
  - 2. [Reserved]
- D. Affected States in EPA Region III
  - 1. Delaware
  - 2. District of Columbia
  - 3. Virginia
  - 4. West Virginia
- E. Affected States and Local Jurisdictions in EPA Region IV
  - 1. Alabama
  - 2. Florida
  - 3. Georgia
  - 4. Kentucky
  - 5. Kentucky: Jefferson County
  - 6. Mississippi
  - 7. North Carolina
  - 8. North Carolina: Forsyth County
  - 9. South Carolina
  - 10. Tennessee
  - 11. Tennessee: Knox County
  - 12. Tennessee: Shelby County
- F. Affected States in EPA Region V
  - 1. Illinois
  - 2. Indiana
  - 3. Michigan
  - 4. Minnesota
  - 5. Ohio
- G. Affected States in EPA Region VI
  - 1. Arkansas
  - 2. Louisiana
  - 3. New Mexico
  - 4. Oklahoma
- H. Affected States in EPA Region VII
  - 1. Iowa
  - 2. Kansas

- 3. Missouri
    - 4. Nebraska
    - 5. Nebraska: Lincoln-Lancaster
  - I. Affected States in EPA Region VIII
    - 1. Colorado
    - 2. Montana
    - 3. North Dakota
    - 4. South Dakota
    - 5. Wyoming
  - J. Affected States and Local Jurisdictions in EPA Region IX
    - 1. Arizona
    - 2. Arizona: Maricopa County
    - 3. Arizona: Pima County
  - K. Affected States in EPA Region X
    - 1. Alaska
    - 2. Idaho
    - 3. Oregon
    - 4. Washington
- X. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132 – Federalism
  - F. Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments
  - G. Executive Order 13045 – Protection of Children from Environmental Health Risks and Safety Risks
  - H. Executive Order 13211 – Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  - I. National Technology Transfer and Advancement Act
  - J. Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
  - K. Determination Under Section 307(d)
  - L. Judicial Review
- XI. Statutory Authority

*E. What is the meaning of key terms used in this notice?*

For the purpose of this notice, the following definitions apply unless the context indicates otherwise:

The terms *Act* or *CAA* mean or refer to the Clean Air Act.

The term *affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. By demonstrating that the elements of an affirmative defense have been met, a source may avoid a civil penalty but cannot avoid injunctive relief.

The terms *air agency* and *air agencies* mean or refer to states, the District of Columbia, U.S. territories, local air permitting authorities with delegated authority from the state, and tribal authorities.

The term *automatic exemption* means a generally applicable provision in a SIP that would provide that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations of the applicable emission limitations.

The term *director's discretion provision* means, in general, a regulatory provision that authorizes a state regulatory official unilaterally to grant exemptions or variances from applicable emission limitations or control measures, or to excuse noncompliance with applicable emission limitations or control measures, in spite of SIP provisions that would otherwise render such conduct by the source a violation.

The term *EPA* refers to the United States Environmental Protection Agency.

The term *excess emissions* means the emissions of air pollutants from a source that exceed any applicable SIP emission limitations.

The term *malfunction* means a sudden and unavoidable breakdown of process or

control equipment.

The term *NAAQS* means national ambient air quality standard or standards. These are the national primary and secondary ambient air quality standards that the EPA establishes under CAA section 109 for criteria pollutants for purposes of protecting public health and welfare.

The term *Petition* refers to the petition for rulemaking titled, "Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions," filed by the Sierra Club with the EPA Administrator on June 30, 2011.

The term *Petitioner* refers to the Sierra Club.

The term *shutdown* means, generally, the cessation of operation of a source for any reason.

The term *SIP* means or refers to a State Implementation Plan. Generally, the State Implementation Plan is the collection of state statutes and regulations approved by the EPA pursuant to CAA section 110 that together provide for implementation, maintenance, and enforcement of a national ambient air quality standard (or any revision thereof) under section 109 for any air pollutant in each air quality control region (or portion thereof) within a state. In some parts of this notice, statements about SIPs in general also apply to tribal implementation plans in general even though not explicitly noted.

The term *SSM* refers to startup, shutdown, or malfunction at a source. It does not include periods of maintenance at such a source. An SSM event is a period of startup, shutdown, or malfunction during which there are exceedances of the applicable emission

limitations and thus excess emissions.

The term *SSM Policy* refers to the cumulative guidance that EPA has issued concerning its interpretation of CAA requirements with respect to treatment of excess emissions during periods of startup, shutdown, and malfunction at a source. The most comprehensive statement of the EPA's SSM Policy prior to this proposed rulemaking is embodied in a 1999 guidance document discussed in more detail in this proposal. When finalized, this action will embody the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events.

The term *startup* means, generally, the setting in operation of a source for any reason.

## **II. Overview of Proposed Rule**

### *A. How is the EPA proposing to respond to the Petition?*

The EPA is proposing to take action on a petition for rulemaking that the Sierra Club (the Petitioner) filed with the EPA Administrator on June 30, 2011 (the Petition). The Petition concerns how air agency rules in EPA-approved SIPs treat excess emissions during periods of startup, shutdown, or malfunction of industrial process or emission control equipment. Many of these rules were added to SIPs and approved by the EPA in the years shortly after the 1970 amendments to the CAA, which for the first time provided for the system of clean air plans that were to be prepared by air agencies and approved by the EPA. At that time, it was widely believed that emission limitations set at levels representing good control of emissions during periods of normal operation could in some cases not be met with the same emission control strategies during periods of startup, shutdown, maintenance, or malfunction. Accordingly, it was common for state

plans to include provisions for special, more lenient treatment of excess emissions during such periods. Many of these provisions took the form of absolute or conditional statements that excess emissions from a source, when they occur outside of the source's normal operations, were not to be considered violations of the air agency rules, *i.e.*, exemptions.

Excess emission provisions for startup, shutdown, maintenance, and malfunctions were often included as part of the original SIPs that the EPA approved in 1971 and 1972. In the early 1970s, because the EPA was inundated with proposed SIPs and had limited experience in processing them, not enough attention was given to the adequacy, enforceability, and consistency of these provisions. Consequently, many SIPs were approved with broad and loosely-defined provisions to control excess emissions. Starting in 1977, however, the EPA discerned and articulated to air agencies that exemptions for excess emissions during such periods were inconsistent with certain requirements of the CAA. The EPA also realized that such provisions allow opportunities for sources to repeatedly emit pollutants during such periods in quantities that could cause unacceptable air pollution in nearby communities with no legal pathway for air agencies, the EPA, or the courts to require the sources to make reasonable efforts to reduce these emissions. The EPA has been more careful after 1977 not to give new approval to SIP rules that are inconsistent with the CAA and has issued several guidance memoranda to advise states

on how to avoid impermissible provisions<sup>2</sup> as they expand and revise their SIPs. The EPA has also found several SIPs to be deficient because of problematic SSM provisions and called upon the affected states to amend their SIPs. However, in light of the other priority work facing both air agencies and the EPA, the EPA has not to date initiated a broad effort to get all states to remove impermissible provisions from their SIPs and to adopt other, approvable approaches for addressing excess emissions when appropriate. Public interest groups, including the Petitioner, have sued the EPA in several state-specific cases concerning SIP issues, and they have been urging the EPA to give greater priority to addressing the issue of SSM provisions in SIPs. In one of these SIP cases, the EPA entered into a settlement agreement requiring it to respond to the Petition from the Sierra Club. A copy of the settlement agreement is provided in the docket for this rulemaking.<sup>3</sup>

As alluded to earlier in this notice, there are available CAA-consistent approaches that can be incorporated into SIPs to address excess emissions during SSM events. While automatic exemptions and director's discretion exemptions from otherwise applicable emission limitations are not consistent with the CAA, SIPs may include criteria and procedures for the use of enforcement discretion by air agency personnel and appropriately defined affirmative defenses. In this action, the EPA is articulating a policy

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<sup>2</sup> The term "impermissible provision" as used throughout this notice is generally intended to refer to a SIP provision identified by the Petitioner that the EPA believes to be inconsistent with requirements of the CAA. As described later in this notice (*see* section VIII.A), the EPA is proposing to find a SIP "substantially inadequate" to meet CAA requirements where the EPA determines that the SIP includes an impermissible provision.

<sup>3</sup> *See*, Settlement Agreement executed Nov. 30, 2011, to address a lawsuit filed by Sierra Club and WildEarth Guardians in the United States District Court for the Northern District of California: *Sierra Club et al. v. Jackson*, No. 3:10-cv-04060-CRB (N.D. Cal.).

that reflects this principle and is reviewing the SIPs from 39 states to determine whether specific provisions identified in the Petition are consistent with the EPA's SSM Policy and the CAA. In some cases, this review involves a close reading of the provision in the SIP and its context to discern whether it is in fact an exemption, a statement regarding enforcement discretion by the air agency, or an affirmative defense. Each state will ultimately decide how to address any SIP inadequacies identified by the EPA once the EPA takes final action. Recognizing that for some states, the EPA's response to this Petition entails reviewing SIP provisions that may date back several decades, the EPA will work closely with each of the affected states to develop approvable SIPs consistent with the guidance articulated in the final action. Section IX of this notice presents the EPA's analysis of each SIP provision at issue. The EPA's review also hinges on interpretation of several relevant sections of the CAA. While the EPA has already developed and has been implementing the SSM Policy that is based on its interpretation of the CAA, this action provides the EPA an opportunity to invite public comment on this SSM Policy and its basis in the CAA. To that end, this notice contains a detailed clarifying explanation of the SSM Policy (including proposed revisions to it). Also, supplementary to this notice, the EPA is providing a memorandum to summarize the legal and administrative context for the proposed action, and the EPA invites public comment on the memorandum, which is available in the docket for this rulemaking.<sup>4</sup> This notice, and the final notice for this action after considering public comment, will also clarify for the affected states how they can resolve the identified deficiencies in their

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<sup>4</sup> See, Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," Feb. 4, 2013.

SIPs, as well as provide all air agencies guidance and model language as they further develop their SIPs in the future.

In summary, the EPA proposes to agree with the Petitioner that many of the identified SIP provisions are not permissible under the CAA. However, in several cases we are proposing to find that an identified SIP provision is actually one of the permissible approaches. Of the 39 states covered by the Petition, the EPA is proposing to make SIP calls for 36 states.

The EPA is aware of other SSM-related SIP provisions that were not identified in the Petition but that may be inconsistent with the EPA's interpretation of the CAA. The EPA may address these other provisions later in a separate notice-and-comment action.

*B. What did the Petitioner request?*

The Petition includes three interrelated requests concerning the treatment in SIPs of excess emissions by sources during periods of startup, shutdown, or malfunction.

First, the Petitioner argued that SIP provisions providing an affirmative defense for monetary penalties for excess emissions in judicial proceedings are contrary to the CAA. Thus, the Petitioner advocated that the EPA should rescind its interpretation of the CAA expressed in the SSM Policy that allows appropriately drawn affirmative defense provisions in SIPs. The Petitioner made no distinction between affirmative defenses for excess emissions related to malfunction, startup, or shutdown. Further, the Petitioner requested that the EPA issue a SIP call requiring states to eliminate all such affirmative defense provisions in existing SIPs. As explained later in this proposal, the EPA is proposing to grant in part and to deny in part this request. The EPA does not agree with the Petitioner that appropriately drawn affirmative defense provisions for violations due

to excess emissions that result from malfunctions are contrary to the CAA, and thus the EPA is proposing to deny the request to revise its interpretation of the CAA concerning affirmative defenses for malfunctions. However, the EPA is proposing to revise its SSM Policy with respect to affirmative defenses for violations due to excess emissions that occur during startup and shutdown, in order to distinguish between planned events that are within the source's control and unplanned events that are not. The EPA believes that SIP provisions should encourage compliance during events that are within the source's control, and thus affirmative defenses for excess emissions during planned startup and shutdown are inappropriate, unlike those for excess emissions during malfunctions.

Second, the Petitioner argued that many existing SIPs contain impermissible provisions, including automatic exemptions from applicable emission limitations during SSM events, director's discretion provisions that provide discretionary exemptions from applicable emission limitations during SSM events, enforcement discretion provisions that appear to bar enforcement by the EPA or citizens for such excess emissions, and inappropriate affirmative defense provisions that are not consistent with the recommendations in the EPA's SSM Policy. The Petitioner identified specific provisions in SIPs of 39 states that it considered inconsistent with the CAA and explained the basis for its objections to the provisions. As explained later in this proposal, the EPA agrees with the Petitioner that some of these existing SIP provisions are legally impermissible and thus proposes to find such provisions "substantially inadequate"<sup>5</sup> to meet CAA requirements. Among the reasons for EPA's proposed action is to eliminate provisions that interfere with enforcement in a manner prohibited by the CAA. Simultaneously, the

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<sup>5</sup> The term "substantially inadequate" is used in the CAA and is discussed in detail in section VIII.A of this notice.

EPA proposes to issue a SIP call to the states in question requesting corrective SIP submissions to revise their SIPs accordingly. For the remainder of the identified provisions, however, the EPA disagrees with the contentions of the Petitioner and thus proposes to deny the Petition with respect to those provisions and to take no further action. The EPA's action on this portion of the Petition will assure that these SIPs comply with the fundamental requirements of the CAA with respect to the treatment of excess emissions during periods of startup, shutdown, or malfunction. The majority of the SIP calls that EPA is proposing in this action implement the EPA's longstanding interpretation of the CAA through multiple iterations of its SSM Policy. In a few instances, however, the EPA is also proposing a SIP call to address the issue of affirmative defenses during periods of planned startup and shutdown, because the EPA is revising its prior interpretation of the CAA to distinguish between violations due to excess emissions that occur during malfunctions and violations due to excess emissions that occur during planned startup and shutdown, which are modes of normal source operation.

Third, the Petitioner argued that the EPA should not rely on interpretive letters from states to resolve any ambiguity, or perceived ambiguity, in state regulatory provisions in SIP submissions. The Petitioner reasoned that all regulatory provisions should be clear and unambiguous on their face and that any reliance on interpretive letters to alleviate facial ambiguity in SIP provisions can lead to later problems with compliance and enforcement. Extrapolating from several instances in which the basis for the original approval of a SIP provision related to excess emissions during SSM events was arguably not clear, the Petitioner contended that the EPA should never use interpretive letters to

resolve such ambiguities. As explained later in this proposal, the EPA acknowledges the concern of the Petitioner that provisions in SIPs should be clear and unambiguous.

However, the EPA does not agree with the Petitioner that reliance on interpretive letters in a rulemaking context is never appropriate. Thus, the EPA is proposing to deny the request that actions on SIP submissions never rely on interpretive letters. Instead, the EPA explains how proper documentation of reliance on interpretive letters in notice-and-comment rulemaking nevertheless addresses the practical concerns of the Petitioner.

The EPA solicits comment on its proposed response to the overarching issues in the Petition, and in particular on its proposed action with respect to each of the specific existing SIP provisions identified in the Petition as inconsistent with the requirements of the CAA. Through this action on the Petition, the EPA is clarifying, restating, and revising its SSM Policy. When finalized, this action will embody the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events.

*C. To which air agencies does this proposed rulemaking apply and why?*

In general, the proposal may be of interest to all air agencies because the EPA is clarifying, restating, and revising its longstanding SSM Policy with respect to what the CAA requires concerning SIP provisions relevant to excess emissions during periods of startup, shutdown, and malfunction. For example, the EPA is denying the Petitioner's request that the EPA rescind its interpretation of the CAA to allow appropriately drawn affirmative defense provisions applicable to malfunctions, as explained in EPA guidance documents on this topic. The EPA is clarifying or revising its prior guidance with respect to several issues in order to ensure that future SIP submissions, not limited to those that affected states make in response to this action, are fully consistent with the CAA. For

example, the EPA is revising its prior guidance concerning whether the CAA allows affirmative defense provisions that apply during periods of planned startup and shutdown. This proposal also addresses the use of interpretive letters for purposes of EPA action on SIPs.

In addition, the proposal is directly relevant to the states with SIP provisions identified in the Petition that the Petitioner alleges are inconsistent with CAA requirements or with the EPA's guidance concerning SIP provisions relevant to excess emissions.

The EPA is proposing either to grant or to deny the Petition with respect to the specific existing SIP provisions in each of 39 states identified by the Petitioner as allegedly inconsistent with the CAA. The 39 states (comprising 46 state and local authorities and no tribal authorities) are listed in table 1, "List of States with SIP Provisions for Which the EPA Proposes Either to Grant or to Deny the Petition, in Whole or in Part." After evaluating the Petition, the EPA is proposing to grant the petition with respect to one or more provisions in 36 states of the 39 states listed, and these are the states for which the proposed action on petition, according to table 1, is either "Grant" or "Partially grant, partially deny." Conversely, the EPA is proposing to deny the petition with respect to all provisions that the Petitioner identified in 3 of the 39 states, and these (Idaho, Nebraska, and Oregon) are the states for which the proposed action on petition, according to table 1, is "Deny."

For each of the states for which the EPA proposes to grant or partially to grant the Petition, the EPA proposes to find that one or more particular provisions in the state's existing SIP identified by the Petitioner are substantially inadequate to meet the

requirements of the CAA. Thus, the EPA also proposes to promulgate a SIP call to each of those states, requiring the state to correct those particular SIP provisions, in accordance with the SIP call process of CAA section 110(k)(5). The SIP calls apply only to those specific provisions, and the scope of each of the SIP calls is limited to those provisions.

For each of the states for which the EPA proposes to deny or to partially deny the Petition, the EPA proposes to find that particular provisions in the existing SIP identified by the Petitioner are consistent with the requirements of the CAA and thus not substantially inadequate to meet the requirements pursuant to CAA section 110(k)(5). Thus, the EPA proposes to take no action with respect to those states for those particular SIP provisions.

**Table 1. List of States with SIP Provisions for Which the EPA Proposes Either to Grant or to Deny the Petition, in Whole or in Part**

EPA Region	State	Proposed action on petition
I	Maine.....	Grant
	New Hampshire.....	Partially grant, partially deny
	Rhode Island.....	Grant
II	New Jersey.....	Partially grant, partially deny
III	Delaware.....	Grant
	District of Columbia.....	Partially grant, partially deny
	Virginia.....	Grant
	West Virginia.....	Grant
IV	Alabama.....	Grant
	Florida.....	Grant
	Georgia.....	Grant
	Kentucky.....	Grant
	Mississippi.....	Grant
	North Carolina.....	Grant
	South Carolina.....	Partially grant, partially deny
Tennessee.....	Grant	
V	Illinois.....	Grant

	Indiana .....	Grant
	Michigan.....	Grant
	Minnesota .....	Grant
	Ohio .....	Partially grant, partially deny
VI	Arkansas .....	Grant
	Louisiana .....	Grant
	New Mexico .....	Grant
	Oklahoma .....	Grant
VII	Iowa .....	Partially grant, partially deny
	Kansas .....	Grant
	Missouri.....	Partially grant, partially deny
	Nebraska .....	Deny
VIII	Colorado .....	Partially grant, partially deny
	Montana.....	Grant
	North Dakota .....	Grant
	South Dakota .....	Grant
	Wyoming .....	Grant
IX	Arizona .....	Partially grant, partially deny
X	Alaska.....	Grant
	Idaho.....	Deny
	Oregon.....	Deny
	Washington.....	Grant

For each state for which the proposed action on the Petition is either "Grant" or "Partially grant, partially deny," the EPA proposes to find that certain specific provisions in each state's SIP are substantially inadequate to meet CAA requirements for the reason that these provisions are inconsistent with the CAA with regard to how the state treats excess emissions from sources during periods of startup, shutdown, and malfunction. The EPA believes that certain specific provisions in these SIPs fail to meet fundamental statutory requirements intended to protect the NAAQS, prevention of significant deterioration (PSD) increments, and visibility. Equally importantly, the EPA believes that the same provisions may undermine the ability of states, the EPA, and the public to enforce emission limitations in the SIP that have been relied upon to ensure attainment or maintenance of the NAAQS or to meet other CAA requirements.

For each state for which the proposed action on the Petition is either "Grant" or "Partially grant, partially deny," the EPA is also proposing in this rulemaking to call for a SIP revision as necessary to correct the identified provisions. The SIP revisions that the EPA is proposing to require will rectify a number of different types of defects in existing SIPs, including automatic exemptions from emission limitations, impermissible director's discretion provisions, enforcement discretion provisions that purport to bar enforcement by the EPA or through a citizen suit, and affirmative defense provisions that are inconsistent with CAA requirements. A corrective SIP revision addressing automatic or impermissible discretionary exemptions will ensure that excess emissions during periods of startup, shutdown, and malfunction are treated in accordance with CAA requirements. Similarly, a corrective SIP revision addressing ambiguity in who may enforce against violations of these emission limitations will also ensure that CAA requirements to provide for enforcement are met. A SIP revision to rectify deficiencies in affirmative defense provisions will assure that such defenses are only available when sources have met the criteria that justify their being shielded from monetary penalties in an enforcement action. The particular provisions for which the EPA is requiring SIP revisions are summarized in section IX of this notice. Many of these provisions were added to the respective SIPs many years ago and have not been the subject of action by the state or the EPA since.

*D. What is the EPA proposing for any state that receives a finding of substantial inadequacy and a SIP call?*

If the EPA finalizes a finding of substantial inadequacy and issues a SIP call for any state, the EPA's final action will establish a deadline by which the state must make a

SIP submission to rectify the deficiency. Pursuant to CAA section 110(k)(5), the EPA has authority to set a SIP submission deadline up to 18 months from the date of the final finding of substantial inadequacy. Accordingly, the EPA is proposing that if it promulgates a final finding of substantial inadequacy and a SIP call for a state, the EPA will establish a date 18 months from the date of promulgation of the final finding for the state to respond to the SIP call. If, for example, the EPA's final findings are signed and disseminated in August 2013, then the SIP submission deadline for each of the states subject to the final SIP call would fall in February 2015. Thereafter, the EPA will review the adequacy of that new SIP submission in accordance with the CAA requirements of sections 110(a), 110(k), 110(l), and 193, including the EPA's interpretation of the CAA reflected in the SSM Policy as clarified and updated through this rulemaking. The EPA believes that states should be provided the maximum time allowable under CAA section 110(k)(5) in order to have sufficient time to make appropriate SIP revisions following their own SIP development process. Such a schedule will allow for the necessary SIP development process to correct the deficiencies yet still achieve the necessary SIP improvements as expeditiously as practicable.

*E. What are potential impacts on affected states and sources?*

The issuance of a SIP call would require an affected state to take action to revise its SIP. That action by the state may, in turn, affect sources as described below. The states that would receive a SIP call will in general have options as to exactly how to revise their SIPs. In response to a SIP call, a state retains broad discretion concerning how to revise its SIP, so long as that revision is consistent with the requirements of the CAA. Some provisions that may be identified in a final SIP call, for example an automatic exemption

provision, would have to be removed entirely and an affected source could no longer depend on the exemption to avoid all liability for excess emissions. Some other provisions, for example a problematic enforcement discretion provision or affirmative defense provision, could either be removed entirely from the SIP or retained if revised appropriately, in accordance with the EPA's interpretation of the CAA as described in the EPA's SSM Policy. The EPA notes that if a state removes a SIP provision that pertains to the state's exercise of enforcement discretion, this removal would not affect the ability of the state to apply discretion in its enforcement program. It would make the exercise of such discretion case-by-case in nature.

In addition, affected states may choose to consider reassessing particular emission limitations, for example to determine whether those limits can be revised such that well-managed emissions during planned operations such as startup and shutdown would not exceed the revised emission limitation, while still protecting air quality. Such a revision of an emission limitation may need to be submitted as a SIP revision for EPA approval if the existing limit to be changed is already included in the SIP or if the existing SIP relies on the particular existing emission limit to meet a CAA requirement. In such instances, the EPA would review the SIP revision for consistency with all applicable CAA requirements. A state that chooses to revise particular emission limitations, in addition to removing the aspect of the existing provision that is inconsistent with CAA requirements, could include those revisions in the same SIP submission that addresses the SSM provisions identified in the SIP call, or it could submit them separately.

The implications for a regulated source in a given state, in terms of whether and how it would potentially have to change its equipment or practices in order to operate

with emissions that comply with the revised SIP, will depend on the nature and frequency of the source's SSM events and how the state has chosen to revise the SIP to address excess emissions during SSM events. The EPA recognizes that after all the responsive SIP revisions are in place and are being implemented by the states, some sources may need to take steps to better control emissions so as to comply with emission limits continuously, as required by the CAA, or to increase durability of components and monitoring systems to detect and manage malfunctions promptly. If a state elects to have appropriately drawn affirmative defense provisions, however, such sources may not be liable for monetary penalties for any exceedances.

The EPA Regional Offices will work with states to help them understand their options and the potential consequences for sources as the states prepare their SIP revisions in response to the SIP calls.

*F. What happens if an affected state fails to meet the SIP submission deadline?*

If, in the future, the EPA finds that a state that is subject to a SIP call has failed to submit a complete SIP revision as required by the final rule, or the EPA disapproves such a SIP revision, then the finding or disapproval would trigger an obligation for the EPA to impose a federal implementation plan (FIP) within 24 months after that date. In addition, if a state fails to make the required SIP revision, or if the EPA disapproves the required SIP revision, then either event can also trigger mandatory 18-month and 24-month sanctions clocks under CAA section 179. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program and restrictions on highway funding. More details concerning the timing and process of the SIP call, and

potential consequences of the SIP call, are provided in section VIII.B of this notice.

*G. What happens in an affected state in the interim period starting when the EPA promulgates the final SIP call and ending when the EPA approves the required SIP revision?*

If the EPA issues a final SIP call to a state, that action alone will not cause any automatic change in the legal status of the existing affected provision(s) in the SIP. During the time that the state takes to develop a SIP revision in accordance with the SIP call and the time that the EPA takes to evaluate and act upon the SIP revision pursuant to CAA section 110(k), the existing affected SIP provision(s) will remain in place. The EPA notes, however, that the state regulatory revisions that the state has adopted and submitted for SIP approval will most likely be already in effect at the state level during the pendency of the EPA's evaluation of and action upon the new SIP submission.

The EPA recognizes that in the interim period, there may continue to be instances of excess emissions that adversely impact attainment and maintenance of the NAAQS, interfere with PSD increments, interfere with visibility, and cause other adverse consequences as a result of the impermissible provisions. However, given the need to resolve these longstanding SIP deficiencies in a careful and comprehensive fashion, the EPA believes that providing sufficient time for these corrections to occur will ultimately be the best course to ensure the ultimate goal of eliminating the inappropriate SIP provisions and replacing them with provisions consistent with CAA requirements.

### **III. Statutory, Regulatory, and Policy Background**

The Petition raised issues related to excess emissions from sources during periods of startup, shutdown, or malfunction, and to the correct approach to these excess

emissions in SIPs. In this context, "excess emissions" are air emissions that exceed the otherwise applicable emission limitations in a SIP, *i.e.*, emissions that would be violations of such emission limitations. The question of how to address excess emissions correctly during startup, shutdown, and malfunction events has posed a challenge since the inception of the SIP program in the 1970s. The primary objective of state and federal regulators is to ensure that sources of emissions are subject to appropriate emission controls as necessary in order to attain and maintain the NAAQS, protect PSD increments, protect visibility, and meet other statutory requirements. Generally, this is achieved through enforceable emission limitations on sources that apply, as required by the CAA, continuously.

Several key statutory provisions of the CAA are relevant to the EPA's evaluation of the Petition. These provisions relate generally to the basic legal requirements for the content of SIPs, the authority and responsibility of air agencies to develop such SIPs, and the EPA's authority and responsibility to review and approve SIP submissions in the first instance, as well as the EPA's authority to require improvements to SIPs if the EPA later determines that to be necessary for a SIP to meet CAA requirements. In addition, the Petition raised issues that pertain to enforcement of provisions in a SIP. The enforcement issues relate generally to what constitutes a violation of an emission limitation in a SIP, who may seek to enforce against a source for that violation, and whether the violator should be subject to monetary penalties as well as other forms of judicial relief for that violation.

The EPA has a longstanding interpretation of the CAA with respect to the treatment of excess emissions during periods of startup, shutdown, or malfunction in

SIPs. This statutory interpretation has been expressed, reiterated, and elaborated upon in a series of guidance documents issued in 1982, 1983, 1999, and 2001. In addition, the EPA has applied this interpretation in individual rulemaking actions in which the EPA: (i) approved SIP submissions that were consistent with the EPA's interpretation;<sup>6</sup> (ii) disapproved SIP submissions that were not consistent with this interpretation;<sup>7</sup> (iii) itself promulgated regulations in FIPs that were consistent with this interpretation;<sup>8</sup> or (iv) issued a SIP call requiring a state to revise an impermissible SIP provision.<sup>9</sup>

The EPA's SSM Policy is a policy statement and thus constitutes guidance. As guidance, the SSM Policy does not bind states, the EPA, or other parties, but it does reflect the EPA's interpretation of the statutory requirements of the CAA. The EPA's evaluation of any SIP provision, whether prospectively in the case of a new provision in a SIP submission or retrospectively in the case of a previously approved SIP submission, must be conducted through a notice-and-comment rulemaking in which the EPA will determine whether or not a given SIP provision is consistent with the requirements of the CAA and applicable regulations.<sup>10</sup>

The Petition raised issues related to excess emissions from sources during periods

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<sup>6</sup> See, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 (Nov. 10, 2010).

<sup>7</sup> See, "Approval and Promulgation of State Implementation Plans; Michigan," 63 FR 8573 (Feb. 20, 1998).

<sup>8</sup> See, "Federal Implementation Plan for the Billings/Laurel, MT, Sulfur Dioxide Area," 73 FR 21418 (Apr. 21, 2008).

<sup>9</sup> See, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 (Apr. 18, 2011).

<sup>10</sup> See, generally, *Catawba County, North Carolina et al. v. EPA*, 571 F.3d 20, 33-35 (D.C. Cir. 2009) (upholding the EPA's process for developing and applying its guidance to designations).

of startup, shutdown, and malfunction, and the consequences of failing to address these emissions correctly in SIPs. In broad terms, the Petitioner expressed concerns that the exemptions for excess emissions and the other types of alleged deficiencies in existing SIP provisions "undermine the emission limits in SIPs and threaten states' abilities to achieve and maintain the NAAQS, thereby threatening public health and public welfare, which includes agriculture, historic properties and natural areas."<sup>11</sup> The Petitioner asserted that such exemptions for SSM events are "loopholes" that can allow dramatically higher amounts of emissions and that these emissions "can swamp the amount of pollutants emitted at other times."<sup>12</sup> In addition, the Petitioner argued that these automatic and discretionary exemptions, as well as other SIP provisions that interfere with the enforcement structure of the CAA, undermine the objectives of the CAA.

The EPA notes that the alleged SIP deficiencies are not legal technicalities. Compliance with the applicable requirements is intended to achieve the air quality protection and improvement purposes and objectives of the CAA. The EPA believes that the results of automatic and discretionary exemptions in SIPs, and of other provisions that interfere with effective enforcement of SIPs, are real-world consequences that adversely affect public health.

As described earlier in this notice, the EPA invites public comment on a memorandum that supplements this notice and provides a more detailed discussion of the statutory, regulatory and policy background for the EPA's proposed action. The

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<sup>11</sup> Petition at 2.

<sup>12</sup> Petition at 12.

memorandum can be found in the docket for this rulemaking.<sup>13</sup>

#### **IV. Proposed Action in Response to Request to Rescind the EPA Policy**

##### **Interpreting the CAA to Allow Appropriate Affirmative Defense Provisions**

###### *A. Petitioner's Request*

The Petitioner's first request was for the EPA to rescind its SSM Policy element interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events.<sup>14</sup> Related to this request, the Petitioner also asked the EPA: (i) to find that SIPs containing an affirmative defense to monetary penalties for excess emissions during SSM events are substantially inadequate because they do not comply with the CAA; and (ii) to issue a SIP call pursuant to CAA section 110(k)(5) to require each such state to revise its SIP.<sup>15</sup> Alternatively, if the EPA denies these two related requests, the Petitioner requested the EPA: (i) to require states with SIPs that contain such affirmative defense provisions to revise them so that they are consistent with the EPA's 1999 SSM Guidance for excess emissions during SSM events; and (ii) to issue a SIP call pursuant to CAA section 110(k)(5) to states with provisions inconsistent with the EPA's interpretation of the CAA.<sup>16</sup> The EPA interprets this latter request to refer to the specific SIP provisions that the Petitioner identified in a separate section of the Petition, titled, "Analysis of Individual States' SSM Provisions," including specific existing affirmative defense provisions.

The Petitioner requested that the EPA rescind its SSM Policy element interpreting

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<sup>13</sup> See, Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," Feb. 4, 2013.

<sup>14</sup> Petition at 11.

<sup>15</sup> *Id.*

<sup>16</sup> Petition at 12.

the CAA to allow SIPs to include affirmative defenses for violations due to excess emissions during any type of SSM events because the Petitioner contended there is no legal basis for the policy. Specifically, the Petitioner cited to two statutory grounds, CAA sections 113(b) and (e), related to the type of judicial relief available in an enforcement proceeding and to the factors relevant to the scope and availability of such relief, that the Petitioner claimed would bar the approval of any type of affirmative defense provision in SIPs.

In the Petitioner's view, the CAA "unambiguously grants jurisdiction to the district courts to determine penalties that should be assessed in an enforcement action involving the violation of an emissions limit."<sup>17</sup> The Petitioner first argued that in any judicial enforcement action in the district court, CAA section 113(b) provides that "such court shall have jurisdiction to restrain such violation, to require compliance, to assess such penalty, . . . and to award any other appropriate relief." The Petitioner reasoned that the EPA's SSM Policy is therefore fundamentally inconsistent with the CAA because it purports to remove the discretion and authority of the federal courts to assess monetary penalties for violations if a source is shielded from monetary penalties under an affirmative defense provision in the approved SIP.<sup>18</sup> The Petitioner concluded that the EPA's interpretation of the CAA in the SSM Policy element allowing any affirmative defenses is impermissible "because the inclusion of an affirmative defense provision in a SIP limits the courts' discretion—granted by Congress—to assess penalties for Clean Air Act violations."<sup>19</sup>

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<sup>17</sup> Petition at 10.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Second, in reliance on CAA section 113(e)(1), the Petitioner argued that in a judicial enforcement action in a district court, the statute explicitly specifies a list of factors that the court is to consider in assessing penalties.<sup>20</sup> That section provides that either the Administrator or the court:

...shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

The Petitioner argued that the EPA's SSM Policy authorizes states to create affirmative defense provisions with criteria for monetary penalties that are inconsistent with the factors that the statute specifies and that the statute explicitly directs courts to weigh in any judicial enforcement action. In particular, the Petitioner enumerated those factors that it alleges the EPA's SSM Policy totally omits: (i) the size of the business; (ii) the economic impact of the penalty on the business; (iii) the violator's full compliance history; (iv) the economic benefit of noncompliance; and (v) the seriousness of the violation. By specifying particular factors for courts to consider, the Petitioner reasoned, Congress has already definitively spoken to the question of what factors are germane in assessing monetary penalties under the CAA for violations. The Petitioner concluded that the EPA has no authority to allow a state to include an affirmative defense provision in a SIP with different criteria to be considered in awarding monetary penalties because "[p]reventing the district courts from considering these statutory factors is not a

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<sup>20</sup> Petition at 11.

permissible interpretation of the Clean Air Act."<sup>21</sup> The Petitioner drew no distinction between affirmative defenses for unplanned events such as malfunctions and planned events such as startup and shutdown.

*B. The EPA's Response*

The EPA has considered the concerns raised by the Petitioner regarding the legal basis under the CAA for any form of affirmative defense for violations due to excess emissions as contemplated in the EPA's SSM Policy. The EPA does not agree with the Petitioner's overarching argument that CAA section 113 prohibits any affirmative defense provisions in SIPs. However, the EPA has evaluated the broader legal basis that supports affirmative defense provisions in general and the specific affirmative defense provisions identified in the Petition in particular. Although the Petitioner did not distinguish between affirmative defense provisions for unplanned events such as malfunctions and affirmative defense provisions for planned events such as startup and shutdown, the EPA's evaluation of the legal basis for affirmative defense provisions indicates that the SSM Policy should differentiate between unplanned and planned events. Accordingly, the EPA is proposing to deny the Petition in part with respect to affirmative defenses for malfunction events and to grant the Petition in part with respect to affirmative defenses for planned startup and shutdown events. To address this issue fully, it is necessary: (i) to explain the legal and policy basis for affirmative defenses for malfunction events; (ii) to explain why that basis would not extend to startup and shutdown events; and (iii) to explain why the Petitioner's arguments with respect to CAA section 113 do not preclude affirmative defense provisions for malfunction events but support the distinction between unplanned

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<sup>21</sup> Petition at 11.

and planned events.

The EPA proposes to deny the Petition with respect to affirmative defense provisions in SIPs applicable to sources during malfunctions. The EPA's SSM Policy has long recognized that there may be limited circumstances in which excess emissions are entirely beyond the control of the owner or operator. Thus, the EPA believes that an appropriately drawn affirmative defense provision recognizes that, despite diligent efforts by sources, such circumstances may create difficulties in meeting a legally required emission limitation continuously and that emission standards may be violated under limited circumstances beyond the control of the source.

In accordance with CAA section 302(k), SIPs must contain emission limitations that "limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis."<sup>22</sup> While "continuous" standards are required, there is also case law indicating that technology-based standards should account for the practical realities of technology. For example, in *Essex Chemical v. Ruckelshaus*, the court acknowledged that in setting standards under CAA section 111, "variant provisions" such as provisions allowing for upsets during startup, shutdown and equipment malfunction "appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force."<sup>23</sup> Though intervening case law and amendments to the CAA call into question the relevance of this line of cases today, they support the EPA's view that a system that incorporates some

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<sup>22</sup> Court decisions confirm that this requirement for continuous compliance prohibits exemptions for excess emissions during SSM events. *See, e.g., Sierra Club v. EPA*, 551 F.3d 1019, 1021 (D.C. Cir. 2008); *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012).

<sup>23</sup> *See*, 486 F.2d 427, 433 (D.C. Cir. 1973); *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

level of flexibility is reasonable and consistent with the overall intent of the CAA. An appropriately drawn affirmative defense provision simply provides for a defense to monetary penalties for violations that are proven to be beyond the control of the source. The EPA notes that the affirmative defense does not excuse a source from injunctive relief, *i.e.*, from being required to take further steps to prevent future upsets or malfunctions that cause harm to the public health. The EPA believes that affirmative defense provisions can supply flexibility both to ensure that emission limitations are "continuous" as required by CAA section 302(k), because any violations remain subject to a claim for injunctive relief, and to provide limited relief in actions for penalties for malfunctions that are beyond the control of the owner where the owner has taken necessary steps to minimize the likelihood and the extent of any such violation. This approach supports the reasonableness of the SIP emission limitations as a whole. SIP emission limitations must apply and be enforceable at all times. A narrow affirmative defense for malfunction events helps to meet this requirement by ensuring that even where there is a malfunction, the emission limitations are still applicable and enforceable through injunctive relief. Several courts have agreed with this approach.<sup>24</sup>

Because the Petitioner questioned the legal basis for affirmative defense provisions in SIPs, the EPA wants to reiterate the basis for its recommendations concerning such provisions. Starting with the 1982 SSM Guidance, the EPA has made a

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<sup>24</sup> See, *Luminant Generation Co. v. EPA*, 699 F.3d 427 (5th Cir. 2012) (upholding the EPA's approval of an affirmative defense applicable during malfunctions in a SIP submission as a permissible interpretation of the statute under *Chevron* step 2 analysis); *Mont. Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174, 1191-93 (9th Cir. 2012) (upholding the EPA's creation of an affirmative defense applicable during malfunctions in a FIP); *Ariz. Public Service Co. v. EPA*, 562 F.3d 1116, 1130 (9th Cir. 2009) (upholding the EPA's creation of an affirmative defense applicable during malfunctions in a FIP).

series of recommendations concerning how states might address violations of SIP provisions consistent with CAA requirements in the event of malfunctions. In the 1982 SSM Guidance, the EPA recommended the exercise of enforcement discretion. Subsequently, in the 1983 SSM Guidance, the EPA expanded on this approach by recommending that a state could elect to adopt SIP provisions providing parameters for the exercise of enforcement discretion by the state's personnel. In the 1999 SSM Guidance, the EPA recognized the use of an affirmative defense as a permissible method for addressing excess emissions that were beyond the control of the owner or operator of the source and recommended parameters that should be included as part of such an affirmative defense in order to ensure that it would be available only in certain narrow circumstances.

The EPA interprets the provisions in CAA section 110(a) to allow the use of narrowly tailored affirmative defense provisions in SIP provisions. In particular, CAA section 110(a) requires each state to have a SIP that provides for the attainment, maintenance, and enforcement of the NAAQS, protects PSD increments, protects visibility, and meets the other requirements of the CAA. These statutory provisions include the explicit requirements that SIPs contain emission limitations in accordance with section 110(a)(2)(A) and that these emission limitations must apply continuously in accordance with CAA section 302(k). The CAA is silent as to whether or not states may elect to create affirmative defense provisions in SIPs. In light of the ambiguity created by this silence, the EPA has interpreted the CAA to allow affirmative defense provisions in certain narrowly prescribed circumstances. While recognizing that there is some ambiguity in the statute, the EPA also recognizes that there are some limits imposed by

the overarching statutory requirements such as the obligation that SIPs provide for the attainment and maintenance of the NAAQS. Thus, the EPA believes that in order for an affirmative defense provision to be consistent with the CAA, it: (i) has to be narrowly drawn to address only those excess emissions that are unavoidable; (ii) cannot interfere with the requirement that the emission limitations apply continuously (*i.e.*, cannot provide relief from injunctive relief); and (iii) cannot interfere with the overarching requirements of the CAA, such as attaining and maintaining the NAAQS.<sup>25</sup>

The EPA believes this interpretation is reasonable because it does not interfere with the overarching goals of title I of the CAA, such as attainment and maintenance of the NAAQS, and at the same time recognizes that, despite best efforts of sources, technology is fallible. The EPA disagrees with the suggestion that an affirmative defense will encourage lax behavior by sources and, in fact, believes the opposite. The potential relief from monetary penalties for violations in many cases may serve as an incentive for sources to be more diligent to prevent and to minimize excess emissions in order to be able to qualify for the affirmative defense. An underlying premise of an affirmative defense provision for malfunctions is that the excess emissions are entirely beyond the control of the owner or operator of the source. First, a malfunction is a sudden and unavoidable event that cannot be foreseen or planned for. As explained in the 1999 SSM Guidance, the EPA considers malfunctions to be "sudden, unavoidable, and unpredictable

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<sup>25</sup> *See, e.g.*, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities; Notice of proposed rulemaking," 75 FR 26892 at 26895 (May 13, 2010). In this proposed rule, the EPA explained 12 specific considerations that justified the proposed approval of the affirmative defense for unplanned events in the state's SIP submission as consistent with the requirements of the CAA.

in nature."<sup>26</sup> In order to establish an affirmative defense for a malfunction, the recommended criteria specify that the source, among other things, must have been appropriately designed, operated, and maintained to prevent such an event, and the source must have taken all practicable steps to prevent and to minimize the excess emissions that result from the malfunction. Through the criteria recommended in the 1999 SSM Guidance for approvable affirmative defense provisions for malfunctions, the EPA reflected its view that approvable provisions should be narrowly drawn and should be restricted to events beyond the control of the owner or operator of the source.<sup>27</sup> The EPA recommends that states consider 10 specific criteria in such affirmative defense provisions.

Unlike the EPA's proposed response to the request to rescind its SSM Policy with respect to affirmative defenses for malfunctions, the EPA proposes to grant the Petition with respect to its interpretation of the CAA concerning affirmative defense for excess emissions during startup and shutdown events. Accordingly, the EPA is also proposing to issue a SIP call for SIP provisions identified in the Petition that provide an affirmative defense for excess emissions during planned events, such as startup and shutdown. The legal and factual rationale for an affirmative defense provision for malfunctions does not translate to planned events such as startup and shutdown. By definition, the owner or operator of a source can foresee and plan for startup and shutdown events. Because these events are planned and predictable, the EPA believes that air agencies should be able to establish, and sources should be able to comply with, the applicable emission limitations or other control measures during these periods of time. In addition, a source can be

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<sup>26</sup> See, 1999 SSM Guidance at Attachment p. 4.

<sup>27</sup> *Id.* at 3-4.

designed, operated, and maintained to control and to minimize emissions during such normal expected events. If sources in fact cannot meet the otherwise applicable emission limitations during planned events such as startup and shutdown, then an air agency can develop specific alternative requirements that apply during such periods, so long as they meet other applicable CAA requirements.

Providing an affirmative defense to sources for violations that they could reasonably anticipate and prevent is not consistent with the theory that supports allowing such affirmative defenses for malfunctions, *i.e.*, that where excess emissions are entirely beyond the control of the owner or operator of the source it is appropriate to provide limited relief to claims for monetary penalties. The EPA has previously made the distinction that excess emissions that occur during maintenance should not be accorded special treatment, because sources should be expected to comply with emission limitations during maintenance activities as they are planned and within the control of the source.<sup>28</sup> The EPA believes that same rationale applies to periods of startup and shutdown.<sup>29</sup>

The EPA acknowledges that its 1999 SSM Guidance explicitly recognized that states could elect to create affirmative defense provisions applicable to startup and shutdown events. However, the EPA has reevaluated the justification that could support

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<sup>28</sup> See, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 at 68992 (Nov. 10, 2010).

<sup>29</sup> *In Luminant Generation Co. v. EPA*, 699 F.3d 427 (5th Cir. 2012), the court upheld the EPA's disapproval of an affirmative defense provision in a SIP submission that pertained to "planned activities," which included startup, shutdown, and maintenance. The EPA disapproved this provision, in part because it provided an affirmative defense for maintenance. The court rejected challenges to the EPA's disapproval of this provision, holding that under *Chevron* step 2, the EPA's interpretation of the CAA was reasonable.

an affirmative defense during these activities and now believes that the ability and obligation of sources to anticipate and to plan for routine events such as startup and shutdown negates the justification for relief from monetary penalties for violations during those events. Moreover, the EPA notes that the various criteria recommended for affirmative defenses for startup and shutdown to a large extent already mirrored those relevant for malfunctions, such as: (i) the event could not have been prevented through careful planning and design; (ii) the excess emissions were not part of a recurring pattern; and (iii) if the excess emissions resulted from bypassing a control measure, they were unavoidable to prevent loss of life, personal injury, or severe property damage.<sup>30</sup> As a practical matter, many startup and shutdown events that could have met these conditions recommended in the 1999 SSM Guidance are likely to have been associated with malfunctions, and the EPA explicitly stated that if the excess emissions "occur during routine startup or shutdown periods due to a malfunction, then those instances should be treated as malfunctions." The key distinction remains, however, that normal source operations such as startup and shutdown are planned and predictable events. For this reason, the EPA is proposing to revise its SSM Policy to reflect its interpretation of the CAA that affirmative defense provisions applicable during startup and shutdown are not appropriate.

Further support for distinguishing between malfunctions and planned events such as startup and shutdown is to be found in the Petitioner's argument that affirmative defense provisions in SIPs usurp the role of courts to decide liability and to assess penalties for violations under CAA section 113. The Petitioner views CAA sections

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<sup>30</sup> *See*, 1999 SSM Guidance at Attachment 5-6.

113(b) and 113(e) as statutory bars to any form of affirmative defense provision, regardless of the nature of the event. Rather than supporting the Petitioner's conclusion, however, the EPA believes that this argument illustrates why it is appropriate to allow affirmative defenses for malfunctions but not for planned events such as startup and shutdown.

At the outset, the EPA disagrees with the Petitioner's view that CAA section 113(b) explicitly precludes air agencies from adopting, and the EPA from approving, SIP emission limitations for sources that distinguish between conduct such that some violations should only be subject to injunctive relief rather than injunctive relief and monetary penalties. Section 110(a)(2)(A) of the CAA requires states to develop SIPs that "include enforceable emission limitations . . . as may be necessary or appropriate to meet the requirements of" the CAA. However, CAA section 302(k) defines "emission limitation" very broadly to require limits on "the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." Significantly, the latter definition does not on its face preclude provisions devised by the state that may distinguish between violations based on the conduct of the source. The CAA is silent on whether or not a state may include an affirmative defense provision in its SIP. The EPA believes that the CAA thus provides states with discretion in developing plans that meet statutory and regulatory requirements, such as providing for attainment and maintenance of the NAAQS, as long

as they are consistent with CAA requirements.<sup>31</sup>

The EPA believes that creating a narrowly tailored affirmative defense for malfunctions is within an air agency's authority, and that approving such a provision to make it part of the SIP is within the EPA's authority. An affirmative defense provision can be a means of striking a reasonable balance between the requirements of the CAA and the realities and limits of technology. Air agencies and the EPA must ensure continuous compliance but also recognize that, despite diligent efforts by sources, there may be limited unforeseen and unavoidable circumstances that create difficulties in meeting applicable emission limitations continuously.

The EPA's SSM Policy recognizes an approach under which air agencies may, if they elect, create two tiers of liability for violations due to excess emissions during periods of malfunction: (i) a lesser level of liability for violations for which the source could only be subject to injunctive relief (where it could meet the requirements for an affirmative defense with respect to penalties); and (ii) a higher level of liability for violations for which the source could be subject to both injunctive relief and monetary penalties (where it could not meet the requirements for an affirmative defense with respect to penalties).

The EPA also disagrees with the Petitioner's argument that the inclusion of

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<sup>31</sup> States have primary responsibility for developing SIPs in accordance with CAA section 107(a). An air agency's discretion to develop SIP provisions is not unbounded, however, and the EPA's responsibility under CAA section 110(k), section 110(l), and section 193, to review SIP submissions prospectively, and under CAA section 110(k)(5) retrospectively, is to determine whether the SIP provisions in fact meet all applicable statutory and regulatory requirements. Thus, for example, the EPA does not believe that an air agency has discretion to create an exemption for excess emissions during SSM events, because such exemption would conflict with fundamental CAA requirements for SIPs.

penalty factors in CAA section 113(e) is a statutory bar to all affirmative defense provisions in SIPs. The EPA believes that these statutory factors apply only for violations for which the regulations approved into the SIP contemplate monetary penalties. A court, in determining whether there is a violation of the SIP provision, and whether the source has met the conditions for an affirmative defense, cannot change the forms of relief for violations provided in the approved SIP. Approval of the regulation into the SIP by the EPA thus affects the availability of monetary penalties for the violation in the first instance. The EPA reiterates, however, that such a provision would not be consistent with the requirements of the CAA if it did not preserve the availability for injunctive relief in the event of violations. Failure to provide in a SIP provision for any form of enforcement for excess emissions during SSM events would be equivalent to the type of provision that excused excess emissions during malfunction from compliance with standards under CAA section 112 that the court rejected in *Sierra Club v. EPA*.<sup>32</sup> The EPA's longstanding position with regard to SIPs is that blanket exemptions from compliance are not consistent with the requirements such as attainment and maintenance of the NAAQS because they eliminate much of the incentive that sources would otherwise have to minimize the likelihood of violations and to minimize the extent of a violation once it occurs. Elimination of potential availability of injunctive relief for violations would be fundamentally inconsistent with the requirement that there may be enforcement to cause the installation of control measures, changes of operation, or other changes necessary at the source in order to bring the source into compliance with the applicable emission limitations to meet CAA requirements.

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<sup>32</sup> 551 F.3d 1019, 1021 (D.C. Cir. 2008).

The EPA likewise disagrees with the Petitioner's claim that the elements for establishing an affirmative defense in a SIP provision supplant the mandatory factors that Congress provided for determining the amount of penalties to be assessed in CAA section 113(e). Under CAA section 110(a)(2), states have the responsibility to devise enforceable emission limitations for sources and to develop a program for their implementation and enforcement. The CAA does not require that air agencies treat all violations equally. In devising its SIP, an air agency has authority to determine what constitutes a violation and to distinguish between different types of violations, within the bounds allowed by the CAA and applicable regulations. As the EPA has long recognized in its SSM Policy, circumstances surrounding a given violation may justify distinguishing between those where injunctive relief is appropriate versus those where both injunctive relief and monetary penalties are appropriate. Providing an affirmative defense to monetary penalties in certain circumstances does not negate the factors that Congress provided in CAA section 113(e). In the event that a source violates its emission limitations and fails to meet the requirements of an available defense in the SIP, then it is the court that determines the level of monetary penalties appropriate using the statutory factors in CAA section 113(e).

The EPA notes that the provisions of CAA section 304 relevant to citizen enforcement provide additional support for the view that air agencies can determine that certain violations should not be subject to monetary penalties. Section 304(a) explicitly provides that the court in an enforcement proceeding has jurisdiction to enforce emission limits, to issue orders, "and to apply any appropriate civil penalties." The EPA believes that monetary penalties that might otherwise be an available response to a violation

cannot be "appropriate" if an air agency has properly created an affirmative defense provision that eliminates such penalties for violations under specified circumstances in the SIP provision that is before the court. The mere fact that CAA section 113(b) includes penalties as a potential form of relief for violations in general does not mean that air agencies must construct SIP requirements that in all instances require monetary penalties.

As with CAA section 110(a) governing SIP provisions in general, neither CAA section 113(b) nor CAA 113(e) expressly addresses the availability of an affirmative defense. Thus, the EPA believes it is reasonable to interpret these specific provisions in light of the need to balance the requirement for continuous compliance with emission limitations in order to meet overarching goals of the statute such as attainment and maintenance of the NAAQS with the fact that even the most diligent source may not be able to meet emission limitations 100 percent of the time. The EPA has recognized that it is permissible for an air agency to provide narrowly drawn affirmative defense provisions in SIPs that provide relief from monetary penalties for violations that occur due to circumstances beyond the control of the source. When a source has been properly designed, operated, and maintained, and has taken action to prevent and to minimize the excess emissions, such relief may be warranted. Also, as with CAA section 110(a), the EPA does not believe that CAA section 113's silence with regard to affirmative defense provisions should be interpreted to allow broad use of such provisions during planned events that are within the control of the source. The enforcement provisions of the CAA must be read in light of the goals and purposes of the provisions with which they are meant to ensure compliance. As provided above, the EPA believes that the use of an affirmative defense is appropriate only in those narrow circumstances where it is

necessary to harmonize the competing interests of the CAA regarding continuous compliance and the limits or fallibility of technology.

In summary, the EPA believes that the CAA provides air agencies in the first instance in their role as the developer of SIPs, and then the EPA in its role as approver of SIPs, some discretion in defining the substantive requirements that are necessary to attain and maintain the NAAQS, protect PSD increments, and protect visibility, or to meet other CAA requirements. Until the air agency takes action to create a SIP, or the EPA takes action to create a FIP, that imposes and defines the applicable emission limitations, there is no standard for a source to violate and thus no conduct for which a court could assess any penalties. The EPA believes that the CAA allows air agencies (or the EPA when it is promulgating a FIP) in defining emission standards to define narrowly drawn affirmative defenses that provide limited relief from monetary penalties but not for injunctive relief in specified circumstances. The EPA emphasizes that affirmative defense provisions for malfunctions need to be appropriately and narrowly drawn, and thus the SSM Policy makes recommendations for the types of criteria that would make such a provision consistent with the requirements of the CAA.

For the foregoing reasons, the EPA is proposing to grant the Petition in part, and to deny the Petition in part, with respect to the Petitioner's request that the EPA rescind its SSM Policy interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events. In addition, the EPA is proposing to grant the Petition in part, and to deny the Petition in part, with respect to the Petitioner's request that the EPA issue SIP calls for those affirmative defense provisions in specific SIP provisions identified in the Petition. The EPA requests comment on this proposed action.

As discussed in section VII.B of this notice, the EPA is also restating its recommended criteria for approvable affirmative defenses for malfunctions in SIP provisions consistent with CAA requirements. Further, as discussed in section IX of this notice, the EPA is proposing to grant or to deny the Petition with respect to the specific SIP provisions identified by the Petitioner as inconsistent with the CAA.

## **V. Proposed Action in Response to Request for the EPA's Review of Specific Existing SIP Provisions for Consistency with CAA Requirements**

### *A. Petitioner's Request*

The Petitioner's second request was for the EPA to find that SIPs "containing an SSM exemption or a provision that could be interpreted to affect EPA or citizen enforcement are substantially inadequate to comply with the requirements of the Clean Air Act."<sup>33</sup> In addition, the Petitioner requested that if the EPA finds such defects in existing SIPs, the EPA "issue a call for each of the states with such a SIP to revise it in conformity with the requirements or otherwise remedy these defective SIPs."<sup>34</sup>

In support of this request, the Petitioner expressed concern that many SIPs contain provisions that are inconsistent with the requirements of the CAA. According to the Petitioner, these provisions fall into two general categories: (1) exemptions for excess emissions by which such emissions are not treated as violations; and (2) enforcement discretion provisions that may be worded in such a way that a decision by the state not to enforce against a violation could be construed by a court to bar enforcement by the EPA under CAA section 113, or by citizens under CAA section 304.

First, the Petitioner expressed concern that many SIPs have either automatic or

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<sup>33</sup> Petition at 14.

<sup>34</sup> *Id.*

discretionary exemptions for excess emissions that occur during periods of startup, shutdown, or malfunction. Automatic exemptions are those that, on the face of the SIP provision, provide that any excess emissions during such events are not violations even though the source exceeds the otherwise applicable emission limitations. These provisions preclude enforcement by the state, the EPA, or citizens, because by definition these excess emissions are defined as not violations. Discretionary exemptions or, more correctly, exemptions that may arise as a result of the exercise of "director's discretion" by state officials, are exemptions from an otherwise applicable emission limitation that a state may grant on a case-by-case basis with or without any public process or approval by the EPA, but that do purport to bar enforcement by the EPA or citizens. The Petitioner argued that "[e]xemptions that may be granted by the state do not comply with the enforcement scheme of title I of the Act because they undermine enforcement by the EPA under section 113 of the Act or by citizens under section 304."

The Petitioner explained that all such exemptions are fundamentally at odds with the requirements of the CAA and with the EPA's longstanding interpretation of the CAA with respect to excess emissions in SIPs. SIPs are required to include emission limitations designed to provide for the attainment and maintenance of the NAAQS and for protection of PSD increments. The Petitioner emphasized that the CAA requires that such emission limitations be "continuous" and that they be established at levels that achieve sufficient emissions control to meet the required CAA objectives when adhered to by sources. Instead, the Petitioner contended, exemptions for excess emissions often result in real-world emissions that are far higher than the level of emissions envisioned and planned for in the SIP. Citing the EPA's own guidance and past administrative actions, the Petitioner

explained that exemptions from otherwise applicable emission limitations can allow large amounts of additional emissions that are not accounted for in SIPs and that exemptions thus "create large loopholes to the Act's fundamental requirement that a SIP must provide for attainment and maintenance of the NAAQS and PSD increments."

Second, the Petitioner expressed concern that many SIPs have provisions that may have been intended to govern only the exercise of enforcement discretion by the state's own personnel but are worded in a way that could be construed to preclude enforcement by the EPA or citizens if the state elects not to enforce against the violation. The Petitioner contended that "any SIP provision that purports to vest the determination of whether or not a violation of the SIP has occurred with the state enforcement authority is inconsistent with the enforcement provisions of the Act." In support of this contention, the Petitioner quoted from the EPA's recent action to rectify such a provision in the Utah SIP:

. . . SIP provisions that give exclusive authority to a state to determine whether an enforcement action can be pursued for an exceedance of an emission limit are inconsistent with the CAA's regulatory scheme. EPA and citizens, and any court in which they seek to file an enforcement claim, must retain the authority to independently evaluate whether a source's exceedance of an emission limit warrants enforcement action.<sup>35</sup>

After articulating these overarching concerns with existing SIP provisions, the Petitioner requested that the EPA evaluate specific SIP provisions identified in the separate section of the Petition titled, "Analysis of Individual States' SSM Provisions."<sup>36</sup>

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<sup>35</sup> See, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision; Notice of proposed rulemaking," 75 FR 70888 at 70892-93 (Nov. 19, 2010) (proposed SIP call, *inter alia*, to rectify an enforcement discretion provision that in fact appeared to bar enforcement by the EPA or citizens if the state decided not to enforce).

<sup>36</sup> Petition at 17.

In that section, the Petitioner identified specific provisions in the SIPs of 39 states that the Petitioner believed to be inconsistent with the requirements of the CAA and explained in detail the basis for that belief. In the conclusion section of the Petition, the Petitioner listed the SIP provisions in each state for which it seeks a specific remedy.

*B. The EPA's Response*

In general, the EPA agrees with key statements of the Petitioner. The EPA's longstanding interpretation of the CAA is that automatic exemptions from emission limitations in SIPs are impermissible because they are inconsistent with the fundamental requirements of the CAA. The EPA has reiterated this point in its guidance documents and in rulemaking actions numerous times. The EPA has also acknowledged that it previously approved some SIP provisions that provide such exemptions in error and encouraged states to rectify them.<sup>37</sup>

The EPA also has a longstanding interpretation of the CAA that does not allow "director's discretion" provisions in SIPs if they provide unbounded discretion to allow what would amount to a case-specific revision of the SIP without meeting the statutory requirements of the CAA for SIP revisions. Moreover, the CAA would not allow approval of a SIP provision that provided director's discretion to create discretionary exemptions for violations when the CAA would not allow such exemptions in the first instance.

In addition, the EPA's longstanding interpretation of the CAA is that SIPs may contain provisions concerning "enforcement discretion" by the air agency's own personnel, but such provisions cannot bar enforcement by the EPA or through a citizen

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<sup>37</sup> See, e.g., 1982 SSM Guidance at 1.

suit.<sup>38</sup> In the event such a provision could be construed by a court to preclude EPA or citizen enforcement, that provision would be at odds with fundamental requirements of the CAA pertaining to enforcement. Although the EPA does not agree with the Petitioner concerning all affirmative defense provisions in SIPs, the EPA does agree that such provisions have to meet CAA requirements.

The EPA also agrees that automatic exemptions, discretionary exemptions via director's discretion, ambiguous enforcement discretion provisions that may be read to preclude EPA or citizen enforcement, and inappropriate affirmative defense provisions can interfere with the overarching objectives of the CAA, such as attaining and maintaining the NAAQS, protection of PSD increments, and protection of visibility. Such provisions in SIPs can interfere with effective enforcement by air agencies, the EPA, and the public to assure that sources comply with CAA requirements, contrary to the fundamental enforcement structure provided in CAA sections 113 and 304.

The EPA's agreement on these broad principles, however, does not necessarily mean that the EPA agrees with the Petitioner's views as to each of the specific SIP provisions identified as problematic in the Petition. The EPA has undertaken a comprehensive review of those specific SIP provisions to determine whether they are consistent with CAA requirements, and if they are not consistent, whether the provisions are substantially inadequate to meet CAA requirements and thus warrant action to rectify.

The EPA has carefully evaluated the concerns expressed by the Petitioner with respect to each of the identified SIP provisions and has considered the specific remedy sought by the Petitioner. In many instances, the EPA tentatively concurs with the

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<sup>38</sup> *See, e.g.*, 1983 SSM Guidance at Attachment p. 2.

Petitioner's analysis of the provision in question and accordingly is proposing to grant the Petition with respect to that provision and simultaneously proposing to make a finding of substantial inadequacy and to issue a SIP call to rectify the SIP inadequacy. In other instances, however, the EPA tentatively disagrees with the Petitioner's analysis of the provision and thus is proposing to deny the Petition with respect to that provision and to take no further action.

The EPA's evaluation of each of the provisions identified in the Petition is summarized in section IX of this notice. For the reasons discussed in section IX of this notice, the EPA is proposing to grant the Petition in part, and to deny the Petition in part, with respect to the specific existing SIP provisions for which the Petitioner requested a remedy. The EPA requests comment on the proposed actions on these specific SIP provisions.

## **VI. Proposed Action in Response to Request that the EPA Limit SIP Approval to the Text of State Regulations and Not Rely upon Additional Interpretive Letters from the State**

### *A. Petitioner's Request*

The Petitioner's third request was that when the EPA evaluates SIP revisions submitted by a state, the EPA should require "all terms, conditions, limitations and interpretations of the various SSM provisions to be reflected in the unambiguous language of the SIPs themselves."<sup>39</sup> The Petitioner expressed concern that the EPA has previously approved SIP submissions with provisions that "by their plain terms" do not appear to comply with the EPA's interpretation of CAA requirements embodied in the

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<sup>39</sup> Petition at 16.

SSM Policy and has approved those SIP submissions in reliance on separate "letters of interpretation" from the state that construe the provisions of the SIP submission itself to be consistent with the SSM Policy.<sup>40</sup> Because of this reliance on interpretive letters, the Petitioner argued that "such constructions are not necessarily apparent from the text of the provisions and their enforceability may be difficult and unnecessarily complex and inefficient."<sup>41</sup>

In support of this request, the Petitioner alleged that past SIP approvals related to Oklahoma and Tennessee illustrate the practical problems that can arise from reliance on interpretive letters. With respect to Oklahoma, the Petitioner asserted that a 1984 approval of a SIP submission from that state addressing SSM provisions required two letters of interpretation from the state in order for the EPA to determine that the actual regulatory text in the SIP submission was sufficiently consistent with CAA requirements pertaining to SSM provisions.<sup>42</sup> The Petitioner conceded that the *Federal Register* notices for the proposed and final actions to approve the Oklahoma SIP submission did quote from the state's letters but expressed concern that those letters were not actually "promulgated as part of the Oklahoma SIP."

With respect to Tennessee, the Petitioner pointed to a more recent action concerning the redesignation of the Knoxville area to attainment for the 1997 8-hour

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<sup>40</sup> Petition at 14.

<sup>41</sup> Petition at 15.

<sup>42</sup> See, "Revision to Oklahoma Regulation 1.5 – Reports Required, Excess Emissions During Startup, Shutdown and Malfunction of Equipment," 49 FR 3084 (Jan. 25, 1984). At the time of the proposed and final action, the operative EPA guidance was the 1983 SSM Guidance.

ozone NAAQS.<sup>43</sup> In this action, the EPA evaluated whether the SIP for that state met requirements necessary for redesignation from nonattainment to attainment in accordance with CAA section 107(d)(3).<sup>44</sup> Again, the Petitioner noted that in order to complete that redesignation action, the EPA had to request that both the state and the local air planning officials confirm officially that the existing SIP provisions do not in fact provide an exemption for excess emissions during SSM events and that the provisions should not be interpreted to do so. The implication of the Petitioner's observation is that if the SIP provisions had been clear and unambiguous in the first instance, interpretive letters would not have been necessary.

By contrast, the Petitioner pointed to the more recent SIP call action for Utah in which the EPA itself noted that it was unclear why the EPA had originally approved a particular SIP provision relevant to SSM events.<sup>45</sup> Specifically, the Petitioner quoted the EPA's own statement that "thirty years later, it is not clear how EPA reached the conclusion that exemptions granted by Utah would not apply as a matter of federal law or whether a court would honor EPA's interpretation . . ."<sup>46</sup> The Petitioner argued that this situation where the EPA itself was unable to ascertain why a SIP provision was previously approved as meeting CAA requirements illustrates the concern that "the state's interpretation of its regulations may (or may not) be known by parties attempting to

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<sup>43</sup> Petition at 15.

<sup>44</sup> See, "Redesignation of the Knoxville 1997 8-Hour Ozone Nonattainment Area to Attainment," 76 FR 12587 (Mar. 8, 2011).

<sup>45</sup> Petition at 15-16.

<sup>46</sup> See, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision; Notice of proposed rulemaking," 75 FR 70888 at 70890 (Nov. 19, 2010).

enforce the SIP decades after the provisions were created."<sup>47</sup>

From these examples, the Petitioner drew the conclusion that reliance on letters of interpretation from the state, even if reflected in the *Federal Register* notice as part of the explicit basis for the SIP approval, is insufficient. The Petitioner argued that such interpretations, if they are not plain on the face of the state regulations themselves, should be set forth in the SIP as reflected in the Code of Federal Regulations. The Petitioner advocated that all parties should be able to rely on the terms of the SIP as reflected in the Code of Federal Regulations, or alternatively on the SIP as shown on an EPA Internet webpage, rather than having to rely on other interpretive letters that may be difficult to locate. The Petitioner's preferred approach, however, was that "all terms, conditions, limitations and interpretations of the various SSM provisions be reflected in the unambiguous language of the SIPs themselves."

*B. The EPA's Response*

The EPA agrees with the core principle advocated by the Petitioner, *i.e.*, that the language of regulations in SIPs that pertain to SSM events should be clear and unambiguous. This is necessary as a legal matter but also as a matter of fairness to all parties, including the regulated entities, the regulators, and the public. In some cases, the lack of clarity may be so significant that amending the regulation may be warranted to

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<sup>47</sup> Petition at 16. The Petitioner assumed that the original SIP action was one in which the EPA must have relied on an interpretive letter from the state as a basis for the prior SIP approval. In fact, however, the EPA recognized that the EPA statement in the prior final action approving the SIP revision in 1980 concerning federal law superseding incorrect state law embodied in the SIP was incorrect. Moreover, subsequent case law has illustrated that courts will not decide that CAA requirements automatically override existing SIP provisions, regardless of whether those SIP provisions met CAA requirements at the time of the approval or since. *See, Sierra Club, et al. v. Georgia Power Co.*, 443 F.3d 1346, 1354 (11th Cir. 2006).

eliminate the potential for confusion or misunderstanding about applicable legal requirements that could interfere with compliance or enforcement. Indeed, as noted by the Petitioner, the EPA has requested that states clarify ambiguous SIP provisions when the EPA has subsequently determined that to be necessary.<sup>48</sup>

However, the EPA believes that the use of interpretive letters to clarify perceived ambiguity in the provisions in a SIP submission is a permissible, and sometimes necessary, approach under the CAA. Used correctly, and with adequate documentation in the *Federal Register* and the docket for the underlying rulemaking action, reliance on interpretive letters can serve a useful purpose and still meet the enforceability concerns of the Petitioner. Regulated entities, regulators, and the public can readily ascertain the existence of interpretive letters relied upon in the EPA's approval that would be useful to resolve any perceived ambiguity. By virtue of being part of the stated basis for the EPA's approval of that provision, the interpretive letters necessarily establish the correct interpretation of any arguably ambiguous SIP provision.

In addition, reliance on interpretive letters to address concerns about perceived ambiguity can often be the most efficient and timely way to resolve concerns about the correct meaning of regulatory provisions. Both air agencies and the EPA are required to follow time- and resource-intensive administrative processes in order to develop and evaluate SIP submissions. It is reasonable for the EPA to exercise its discretion to use interpretive letters to clarify concerns about the meaning of regulatory provisions, rather than to require air agencies to reinitiate a complete administrative process merely to

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<sup>48</sup> See, e.g., "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 at 21648 (Apr. 18, 2011).

resolve perceived ambiguity in a provision in a SIP submission.<sup>49</sup> In particular, the EPA considers this an appropriate approach where reliance on such an interpretive letter allows the air agency and the EPA to put into place SIP provisions that are necessary to meet important CAA objectives and for which unnecessary delay would be counterproductive. For example, where an air agency is adopting emission limitations for purposes of attaining the NAAQS in an area, a timely letter from the air agency clarifying that an enforcement discretion provision is applicable only to air agency enforcement personnel and has no bearing on enforcement by the EPA or the public could help the area reach attainment more expeditiously than requiring the air agency to undertake a time-consuming administrative process to make a minor change in the regulatory text.

Thus, to the extent that the Petitioner intended the Petition on this issue to be a request for the EPA never to use interpretive letters as part of the basis for approval of any SIP submission, the EPA disagrees with the Petitioner and accordingly is proposing to deny the request. The EPA notes that it is already the EPA's practice to assure that any interpretive letters are correctly and adequately reflected in the *Federal Register* and are included in the rulemaking docket for a SIP approval.

There are multiple reasons why the EPA does not agree with the Petitioner with respect to the alleged inadequacy of using interpretive letters to clarify specific ambiguities SIP regulations, provided this process is done correctly. First, under section 107(a), the CAA gives air agencies both the authority and the primary responsibility to

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<sup>49</sup> CAA section 110(k) directs the EPA to act on SIP submissions and to approve those that meet statutory and regulatory requirements. Implicit in this authority is the discretion, through appropriate notice-and-comment rulemaking, to determine whether or not a given SIP provision meets such requirements, in reliance on the information that the EPA considers relevant for this purpose.

develop SIPs that meet applicable statutory and regulatory requirements. However, the CAA generally does not specify exactly how air agencies are to meet the requirements substantively, nor does the CAA specify that air agencies must use specific regulatory terminology, phraseology, or format, in provisions submitted in a SIP submission. Air agencies each have their own requirements and practices with respect to rulemaking, making flexibility toward terminology on the EPA's part appropriate.

As a prime example relevant to the SSM issue, CAA section 110(a)(2)(A) requires that a state's SIP shall include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights) as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of" the CAA. Section 302(k) of the CAA further defines the term "emission limitation" in important respects but nevertheless leaves room for variations of approach:

...a requirement established by the State or Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement related to the operation or maintenance of a source to assure continuous emissions reduction, and any design, equipment, work practice or operational standard promulgated under [the CAA].

Even this most basic requirement of SIPs, the inclusion of enforceable "emission limitations," allows air agencies discretion in how to structure or word the emission limitations, so long as the provisions meet fundamental legal requirements.<sup>50</sup> Thus, by the explicit terms of the statute and by design, air agencies generally have considerable

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<sup>50</sup> The EPA notes that notwithstanding discretion in wording in regulatory provisions, many words have specific recognized legal meaning whether by statute, regulation, case law, dictionary definition, or common usage. For example, the term "continuous" has a specific meaning that must be complied with substantively, however the state may elect to word its regulatory provisions.

discretion in how they elect to structure or word their state regulations submitted to meet CAA requirements in a SIP.

Second, under CAA section 110(k), the EPA has both the authority and the responsibility to assess whether a SIP submission meets applicable CAA and regulatory requirements. Given that air agencies have authority and discretion to structure or word SIP provisions as they think most appropriate so long as they meet CAA and regulatory requirements, the EPA's role is to evaluate whether those provisions in fact meet those legal requirements.<sup>51</sup> Necessarily, this process entails the exercise of judgment concerning the specific text of regulations, with regard both to content and to clarity. Because actions on SIP submissions are subject to notice-and-comment rulemaking, there is also the opportunity for other parties to identify SIP provisions that they consider problematic and to bring to the EPA's attention any concerns about ambiguity in the meaning of the SIP provisions under evaluation.

Third, careful review of regulatory provisions in a SIP submission can reveal areas of potential ambiguity. It is essential, however, that regulations are sufficiently clear that regulated entities, regulators, and the public can understand the SIP requirements. Where the EPA perceives ambiguity in draft SIP submissions, it endeavors to resolve those ambiguities through interactions with the air agency in question even in advance of the SIP submission. On occasion, however, there may still remain areas of regulatory ambiguity in a SIP submission's provisions that the EPA identifies, either

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<sup>51</sup> See, e.g., *Luminant Generation Co. v. EPA*, 699 F.3d 427 (5th Cir. 2012) (upholding the EPA's disapproval in part of affirmative defense provision with unclear regulatory text); *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's issuance of a SIP call to clarify a provision that could be interpreted in a way inconsistent with CAA requirements).

independently or as a result of public comments on a proposed action, for which resolution is both appropriate and necessary as part of the rulemaking action.

In such circumstances, the ambiguity may be so significant as to require the air agency to revise the regulatory text in its SIP submission in order to resolve the concern. At other times, however, the EPA may determine that with adequate explanation from the state, the provision is sufficiently clear and complies with applicable CAA and regulatory requirements. In some instances, the air agency may supply that extra explanation in an official letter from the appropriate authority to resolve any potential ambiguity. When the EPA bases its approval of a SIP submission in reliance on the air agency's official interpretation of the provision, that reading is explicitly incorporated into the EPA's action and is memorialized as the proper intended reading of the provision.

For example, in the Knoxville redesignation action that the Petitioner noted, the EPA took careful steps to ensure that the perceived ambiguity was substantively resolved and fully reflected in the rulemaking record, *i.e.*, through inclusion of the interpretive letters in the rulemaking docket, quoting relevant passages from the letters in the *Federal Register*, and carefully evaluating the areas of potential ambiguity in response to public comments on a provision-by-provision basis.

Finally, the EPA notes that while it is possible to reflect or incorporate interpretive letters in the regulatory text of the CFR, there is no requirement to do so in all actions and there are other ways for the public to have a clear understanding of the content of the SIP. First, for each SIP, the CFR contains a list or table of actions that reflects the various components of the approved SIP, including information concerning the submission of, and the EPA's action approving, each component. With this

information, interested parties can readily locate the actual *Federal Register* notice in which the EPA will have explained the basis for its approval in detail, including any interpretive letters that may have been relied upon to resolve any potential ambiguity in the SIP provisions. With this information, the interested party can also locate the docket for the underlying rulemaking and obtain a copy of the interpretive letter itself. Thus, if there is any debate about the correct reading of the SIP provision, either at the time of the EPA's approval or in the future, it will be possible to ascertain the mutual understanding of the air agency and the EPA of the correct reading of the provision in question at the time the EPA approved it into the SIP. Most importantly, regardless of whether the content of the interpretive letter is reflected in the CFR or simply described in the *Federal Register* preamble accompanying the EPA's approval of the SIP submission, this mutual understanding of the correct reading of that provision upon which the EPA relied will be the reading that governs, should that later become an issue.

The EPA notes that the existence of, or content of, an interpretive letter that is part of the basis for the EPA's approval of a SIP submission is in reality analogous to many other things related to that approval. Not everything that may be part of the basis for the SIP approval in the docket, including the proposal or final preambles, the technical support documents, responses to comments, technical analyses, modeling results, or docket memoranda, will be restated *verbatim*, incorporated into, or referenced in the CFR. These background materials remain part of the basis for the SIP approval and remain available should they be needed for any purpose. To the extent that there is any question about the correct interpretation of an ambiguous provision in the future, an interested party will be able to access the docket to verify the correct meaning of SIP

provisions.

With regard to the Petitioner's concern that either actual or alleged ambiguity in a SIP provision could impede an effective enforcement action, the EPA believes that its current process for evaluating SIP submissions and resolving potential ambiguities, including the reliance on interpretive letters in appropriate circumstances with correct documentation in the rulemaking action, minimizes the possibility for any such ambiguity in the first instance. To the extent that there remains any perceived ambiguity, the EPA concludes that regulated entities, regulators, the public, and ultimately the courts, have recourse to the administrative record to shed light on and resolve any such ambiguity as explained above.

For the foregoing reasons, the EPA is proposing to deny the Petition on this issue concerning reliance on interpretive letters in actions on SIP submissions. The EPA requests comment on this proposed action.

## **VII. Clarifications, Reiterations, and Revisions to the EPA's SSM Policy**

### *A. Applicability of Emission Limitations During Periods of Startup and Shutdown*

The EPA's evaluation of the Petition indicates that there is a need to clarify the SSM Policy with respect to excess emissions that occur during periods of planned startup and shutdown or other planned events. The significant number of SIP provisions identified in the Petition that create automatic or discretionary exemptions from emission limitations during startup and shutdown suggests that there may be a misunderstanding concerning whether the CAA permits such exemptions. Although the EPA's stated position on this issue has been consistent since 1977, ambiguity in some statements in the EPA's guidance documents may have left the misimpression that such exemptions are

consistent with the requirements of the CAA. Recent court decisions have indicated that such exemptions for excess emissions during periods of startup and shutdown are not in fact permissible under the CAA. Thus, in acting upon the Petition the EPA is clarifying its interpretation of the requirements of the CAA to forbid exemptions from otherwise applicable emission limitations for excess emissions during planned events such as startup and shutdown in SIP provisions.

The EPA believes that any misimpression that exemptions for excess emissions are permissible during planned events such as startup and shutdown may have begun with a statement in the 1983 SSM Guidance. In this guidance, the EPA distinguished between excess emissions during unforeseeable events like malfunctions and foreseeable events like startup and shutdown. In drawing distinctions between these broad categories of events, the EPA stated:

Startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods. However, for a few sources there may exist infrequent short periods of excess emissions during startup and shutdown which cannot be avoided. Excess emissions during these infrequent short periods *need not be treated as violations* providing the source adequately shows that the excess could not have been prevented through careful planning and design and that bypassing of control equipment was unavoidable to prevent loss of life, personal injury, or severe property damage (emphasis added).<sup>52</sup>

The phrase "need not be treated as violations" may have been misunderstood to be a statement that the CAA would allow SIP provisions that provide an exemption for the resulting excess emissions, thereby defining the excess emissions as not a violation of the

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<sup>52</sup> See, 1983 SSM Guidance at Attachment p. 3.

applicable emission limitations. The EPA did not intend to suggest that SIP provisions that included an actual exemption for excess emissions during startup and shutdown events would be consistent with the CAA; the EPA made this statement in the context of whether air agencies should exercise enforcement discretion and more specifically whether air agencies could elect to have SIP provisions that embodied their own exercise of enforcement discretion in such circumstances. As with any such SIP provisions addressing parameters of the air agency's own exercise of enforcement discretion, that exercise of discretion cannot purport to bar enforcement by the EPA or through a citizen suit for excess emissions that must be treated as violations to meet CAA requirements. Thus, the use of the phrase "need not be treated as violations" was at a minimum confusing because it seemed to go to the definition of what could constitute a "violation" in a SIP provision rather than to whether the air agency might or might not elect to exercise enforcement discretion in such circumstances.

The EPA believes that additional confusion may have resulted from ambiguity in the 1999 SSM Guidance. That document contained an entire section devoted to "source category specific rules for startup and shutdown." In explaining its intentions in providing that section of the guidance, the EPA stated:

Finally, EPA is clarifying how excess emissions that occur during periods of startup and shutdown should be addressed. In general, because excess emissions that occur during these periods are reasonably foreseeable, they *should not be excused*. However, EPA recognizes that, for some source categories, even the best available emissions control systems might not be consistently effective during startup or shutdown periods. [For certain sources in certain areas] these technological limitations *may be addressed in the underlying standards themselves through narrowly-tailored SIP revisions* that take into account the potential impacts on ambient air quality caused by the inclusion of these allowances (emphasis added).<sup>53</sup>

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<sup>53</sup> See, 1999 SSM Guidance at 3.

The phrase "may be addressed ... in narrowly-tailored SIP revisions" may have been misunderstood to suggest that the CAA would allow SIP provisions that provide an actual exemption for the resulting excess emissions and thus not treat the emissions as a violation of the applicable emission limitations. The EPA did not intend to suggest that an exemption would be permissible; the EPA intended to suggest that the air agency might elect to design special emission limitations or other control measures that applied to the sources in question during startup and shutdown, as indicated by the earlier phrase that the excess emissions "should not be excused."

In addition, Section III.A of the 1999 SSM Guidance recommended very specific criteria that air agencies should consider including as part of any SIP provision that was intended to apply to sources during startup and shutdown in lieu of the otherwise applicable emission limitations.<sup>54</sup> In order to revise the otherwise applicable emission limitation in the SIP, the EPA recommended that in order to be approvable (*i.e.*, meet CAA requirements), the new special requirements applicable to the source during startup and shutdown should be narrowly tailored and take into account considerations such as the technological limitations of the specific source category and the control technology that is feasible during startup and shutdown. However, the 1999 SSM Guidance should have been clearer that the SIP revisions under discussion could not create an exemption for emissions during startup and shutdown, but rather specific emission limitations or control measures that would apply during those periods. Also unstated but implicit was the requirement that any such SIP revision that would alter the existing applicable emission limitations for a source during startup and shutdown would be subject to the

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<sup>54</sup> *See*, 1999 SSM Guidance at Attachment 3-4.

same requirements as any other SIP submission, *i.e.*, compliance with CAA sections 110(a), 110(k), 110(l), 193, and any other CAA provision substantively germane to the SIP revision.

The EPA concludes that the CAA does not allow SIP provisions that include exemptions from emission limitations during planned events such as startup and shutdown. Instead, the CAA would allow special emission limitations or other control measures or control techniques that are designed to minimize excess emissions during startup and shutdown. The EPA continues to recommend the seven specific criteria enumerated in Section III.A of the Attachment to the 1999 SSM Guidance as appropriate considerations for SIP provisions that apply to startup and shutdown. These criteria are:

(1) The revision must be limited to specific, narrowly defined source categories using specific control strategies (*e.g.*, cogeneration facilities burning natural gas and using selective catalytic reduction);

(2) Use of the control strategy for this source category must be technically infeasible during startup or shutdown periods;

(3) The frequency and duration of operation in startup or shutdown mode must be minimized to the maximum extent practicable;

(4) As part of its justification of the SIP revision, the state should analyze the potential worst-case emissions that could occur during startup and shutdown;

(5) All possible steps must be taken to minimize the impact of emissions during startup and shutdown on ambient air quality;

(6) At all times, the facility must be operated in a manner consistent with good practice for minimizing emissions, and the source must have used best efforts regarding

planning, design, and operating procedures to meet the otherwise applicable emission limitation; and

(7) The owner or operator's actions during startup and shutdown periods must be documented by properly signed, contemporaneous operating logs, or other relevant evidence.

The EPA's evaluation of the Petition also indicates that there is a need to reiterate the SSM Policy with respect to excess emissions that occur during other periods of normal source operation in addition to during periods of startup and shutdown. A number of SIP provisions identified in the Petition create automatic or discretionary exemptions from otherwise applicable emission limitations during periods such as "maintenance," "load change," "soot blowing," "on-line operating changes," or other similar normal modes of operation. Like startup and shutdown, the EPA considers all of these to be phases of normal operation at a source, for which the source can be designed, operated, and maintained in order to meet the applicable emission limitations and during which a source should be expected to control and minimize emissions. Accordingly, exemptions for emissions during these periods of normal source operation are not consistent with CAA requirements. Excess emissions during planned and predicted periods should be treated as violations of the applicable emission limitations.

*B. Affirmative Defense Provisions During Periods of Malfunction*

The EPA's evaluation of the Petition indicates that it would be helpful to reiterate the SSM Policy with respect to affirmative defense provisions that would be consistent with CAA requirements for malfunctions. Many of the specific SIP provisions identified in the Petition may have been intended to operate as affirmative defenses, but

nevertheless they have significant deficiencies. In particular, many of the SIP provisions at issue stipulate that if the source meets the conditions specified, then the excess emissions would not be considered violations for any purpose, not merely with respect to monetary penalties. This is contrary to the EPA's interpretation of the CAA. In addition, many of the SIP provisions identified in the Petition that resemble affirmative defense provisions do not have sufficiently robust criteria to assure that the affirmative defense is available only for events that are entirely beyond the control of the owner or operator of the source and events where the owner or operator of the sources has made all practicable efforts to comply.

After consideration of the issues raised by the Petition and the wide variety of existing SIP provisions the Petitioner alleged are deficient, the EPA wants to reiterate the criteria that it considers appropriate for approvable affirmative defense provisions in SIPs. In addition, to provide a clear illustration of regulatory text that embodies these criteria effectively, the EPA also wishes to provide an example of the regulatory provisions that the EPA employs in its own regulations to serve this purpose effectively and consistently with CAA requirements.

The criteria that the EPA recommends for approvable affirmative defense provisions for excess emissions for malfunctions consistent with CAA requirements remain essentially the same as stated in the 1999 SSM Guidance.<sup>55</sup> We repeat them here. Most importantly, a valid affirmative defense for excess emissions due to a malfunction can only be effective with respect to monetary penalties, not with respect to potential injunctive relief. Second, the affirmative defense should be limited only to malfunctions

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<sup>55</sup> *See*, 1999 SSM Guidance at Attachment 3-4.

that are sudden, unavoidable, and unpredictable. Third, a valid affirmative defense provision must provide that the defendant has the burden of proof to demonstrate all of the elements of the defense to qualify. This demonstration has to occur in a judicial or administrative proceeding where the merits of the affirmative defense are independently and objectively evaluated. The specific criteria that the EPA recommends for an affirmative defense provision for malfunctions to be consistent with CAA requirements are:

(1) The excess emissions were caused by a sudden, unavoidable breakdown of technology, beyond the control of the owner or operator;

(2) The excess emissions (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for, and (b) could not have been avoided by better operation and maintenance practices;

(3) To the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;

(4) Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

(5) The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(6) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;

(7) All emission monitoring systems were kept in operation if at all possible;

(8) The owner or operator's actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence;

(9) The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) The owner or operator properly and promptly notified the appropriate regulatory authority.

One refinement to these recommendations from the 1999 SSM Guidance that should be highlighted is the EPA's view concerning whether affirmative defenses should be provided in the SIP in the case of geographic areas and pollutants "where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments." The EPA believes that such affirmative defenses may be permissible if there is no "potential" for exceedances. Such provisions may also be permissible if the affirmative defense alternatively requires the source to make an affirmative after-the-fact showing that the excess emissions that resulted from the violations did not in fact cause an exceedance of the NAAQS or PSD increments. The EPA has previously approved such provisions as meeting CAA requirements on a case-by-case basis in specific actions on SIP submissions, and in this action proposes to continue that approach under proper facts and circumstances.

In addition to the foregoing criteria for appropriate affirmative defense provisions, the EPA also recommends that air agencies consider the following regulatory language that the EPA is currently using for affirmative defense provisions when it issues new

National Emissions Standards for Hazardous Air Pollutants (NESHAP) for purposes of CAA section 112.<sup>56</sup> Air agencies may wish to adapt this sample regulatory text for their own affirmative defense provisions in SIPs.

**§63.456 Affirmative defense for violation of emission standards during malfunction.**

In response to an action to enforce the standards set forth in §§63.443(c) and (d), 63.444(b) and (c), 63.445(b) and (c), 63.446(c), (d), and (e), 63.447(b) or §63.450(d), the owner or operator may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed, however, if the owner or operator fails to meet the burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a standard, the owner or operator must timely meet the reporting requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The violation:

(i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design, or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when a violation occurred. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(4) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and

(6) All emissions monitoring and control systems were kept in

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<sup>56</sup> See, "National Emission Standards for Hazardous Air Pollutants From the Pulp and Paper Industry," final rule, 77 FR 55698 (Sept. 11, 2012). Parameters for the affirmative defense are provided at p. 55712.

operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.

(b) *Report.* The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator with all necessary supporting documentation, [showing] that it has met the requirements set forth in paragraph (a) of this section. This affirmative defense report shall be included in the first periodic compliance [report], deviation report, or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance [report], deviation report, or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance [report], deviation report, or excess emission report due after the initial occurrence of the violation of the relevant standard. (Punctuation adjusted)

The EPA notes that this example regulatory text has some features that are not explicitly among the criteria recommended for SIP provisions in the SSM Policy, such as the requirement for a "root cause analysis" in subsection (a)(9) and an affirmative requirement to report the malfunction to the regulator by a set date and in a particular report, rather than merely a general duty to report the malfunction event to the regulator. The EPA considers such features useful because they serve important purposes related to the analysis, documentation, and memorialization of the facts concerning the malfunction, thereby facilitating better evaluation of the events and better evaluation of the source's qualification for the affirmative defense. The EPA believes that these specific features would be very useful and thus recommends that they be included in SIP

provisions for affirmative defenses. However, these features need not be required, so long as the SIP provision otherwise provides that the owner or operator of the source will: (i) bear the burden of proof to establish that the elements of the affirmative defense have been met; and (ii) properly and promptly notify the appropriate regulatory authority about the malfunction.

The EPA also wants to reiterate its views concerning appropriate affirmative defense provisions as they relate to malfunctions that occur during planned startup and shutdown and as they relate to startup and shutdown that occur as the result of or part of a malfunction. With respect to malfunctions that happen to occur during planned startup or shutdown, as the EPA articulated in the 1999 SSM Guidance, the excess emissions that occur as a result of the malfunction may be addressed by an appropriately drawn affirmative defense provision consistent with the recommended criteria for such provisions.<sup>57</sup> By definition, the malfunction would have been sudden, unavoidable, and unpredictable, and the source could not have precluded the event by better source design, operation and maintenance. The EPA interprets the CAA to allow narrowly drawn affirmative defense provision in SIPs in such circumstances.

Another question is how to treat the excess emissions that occur during a startup or shutdown that is necessitated by the malfunction and are thus potentially components of the malfunction event. The EPA believes that drawing the distinction between what is directly caused by the malfunction itself and what is indirectly caused by the malfunction as a part of non-routine startup and shutdown must always be a case-specific enquiry, dependent upon the facts and circumstances of the specific event. It is foreseeable that a

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<sup>57</sup> See, 1999 SSM Guidance at attachment p. 6.

shutdown necessitated by a malfunction could be considered part of the malfunction event with the appropriate demonstration of the need to shut down differently than during a routine shutdown, during which a source should be expected to comply with applicable emission limitations. It is possible, however, that a routine shutdown may be achievable following a malfunction event, and a source should be expected to strive for this result. With respect to startups after a malfunction event, the EPA believes that such startups should not be considered part of the malfunction, because startups are within the control of the source. Malfunctions should have been resolved prior to startup, and the source should be designed, operated, and maintained so that it would meet emission limitations during startups. As a general matter, the EPA does not anticipate that there would be startups that would follow a malfunction that should be considered part of the malfunction event, but in this action the EPA is requesting that commenters address this issue if there could be circumstances that would justify such treatment.

Finally, the EPA reiterates that an affirmative defense provision in a SIP cannot extend to direct federal regulations such as New Source Performance Standards (NSPS) or NESHAP that the air agency may elect to adopt into its SIP, or to incorporate by reference into its SIP in order to receive delegation of federal authority. To the extent that any affirmative defense is warranted during malfunctions for these technology-based standards, the federal standards contained in the EPA's regulations already specify the appropriate affirmative defense. No additional or different affirmative defense provision applicable through a SIP provision would be warranted or appropriate.

*C. Affirmative Defense Provisions During Periods of Startup and Shutdown*

The EPA's evaluation of the Petition indicates that revisions to the SSM Policy

are necessary with respect to affirmative defense provisions during startup and shutdown periods. In the 1999 SSM Guidance, the EPA explicitly discussed the possibility of affirmative defenses in the context of startup and shutdown, and provided recommended criteria to ensure that any such affirmative defense provisions in a SIP submission would be appropriately narrowly drawn to comply with CAA requirements. As with affirmative defense provisions for malfunctions, the EPA then believed that achieving a balance between the requirement of the statute for emission limitations that apply continuously and the possibility that not all sources can comply 100 percent of the time justified such affirmative defenses during startup and shutdown as a means of providing some flexibility while still supporting the overall objectives of the CAA.

Review of the Petition and reconsideration of this question in light of recent case law concerning emission limitations and affirmative defenses has caused the EPA to alter its view on the appropriateness of affirmative defenses applicable to planned events such as startup and shutdown. The EPA believes that sources should be designed, maintained, and operated in order to comply with applicable emission limitations during normal operations. By definition, planned events such as startup and shutdown are phases of normal source operation. Because these events are modes of normal operation, the EPA believes that sources should be expected to comply with applicable emission limitations during such events.

Unlike malfunctions, startup and shutdown are not unexpected events and are not events that are beyond the control of the owner or operator of the source. Also unlike malfunctions, it is possible for the source to anticipate the amount of emissions during startup and shutdown, to take appropriate steps to limit those emissions as needed, and to

remain in continuous compliance. In the event that a source in fact cannot comply with the otherwise applicable emission limitations during normal modes of source operation due to technological limitations, then it may be appropriate for the state to provide special emission limitations or control measures that apply to the source during startup and shutdown.

The EPA acknowledges that the availability of an affirmative defense for planned startup and shutdown as contemplated in the 1999 SSM Guidance may have provided extra incentive for sources to take extra precautions to minimize emissions during startup and shutdown in order to be eligible for the affirmative defense in the event of a violation. However, sources should not need extra incentive to comply during normal modes of operation such as startup and shutdown, as they should be designed, operated, and maintained in order to comply with applicable emission limitations at all times, and certainly during planned and predictable events. By logical extension, the theory that an affirmative defense should be available during planned startup and shutdown could apply to all phases of normal source operation, which would not be appropriate.

The EPA believes that providing affirmative defenses for violations that occur as a result of planned events within the control of the owner or operator of the source is inconsistent with the requirements of CAA sections 113 and 304, which provide for potential civil penalties for violations of SIP requirements. The distinction that makes affirmative defenses appropriate for malfunctions is that by definition those events are unforeseen and could not have been avoided by the owner or operator of the source, and the owner or operator of the source will have taken steps to prevent the violation and to minimize the effects of the violation after it occurs. In such circumstances, the EPA

interprets the CAA to allow narrowly drawn affirmative defense provisions that may shield owners or operators of sources from civil penalties, when their conduct justifies this relief.

Such is not the case with planned and predictable events, such as startup and shutdown, during which the owners or operators of sources should be expected to comply with applicable emission limitations and should not be accorded relief from civil penalties if they fail to do so. Providing an affirmative defense for monetary penalties for violations that result from planned events is inconsistent with the basic premise that the excess emissions were beyond the control of the owner or operator of the source and thus is diametrically opposed to the intended purpose of such an affirmative defense to encourage better compliance even by sources for which 100-percent compliance is not possible. The EPA notes that enforcement discretion may still be warranted in such circumstances, but the elimination of potential civil penalties is not appropriate. For these reasons, the EPA is proposing to rescind its prior interpretation of the CAA that would allow affirmative defense provisions during planned startup and shutdown.<sup>58</sup>

*D. Relationship Between SIP Provisions and Title V Regulations*

The EPA's review of the Petition has highlighted an area of potential ambiguity or conflict between the SSM Policy applicable to SIP provisions and the EPA's regulations applicable to title V permit provisions. The EPA has promulgated regulations in 40 CFR part 70 applicable to state operating permit programs and in 40 CFR part 71 applicable to

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<sup>58</sup> In accordance with CAA section 113(e), sources retain the ability to seek lower monetary penalties through the factors provided for consideration in administrative or judicial enforcement proceedings. In this context, for example, a violating source could argue that factors such as good faith efforts to comply should reduce otherwise applicable statutory penalties.

federal operating permit programs.<sup>59</sup> Under each set of regulations, the EPA has provided that permits may contain, at the permitting authority's discretion, an "emergency provision."<sup>60</sup> The relationship between such an "emergency provision" in a permit applicable to a source and the SIP provisions applicable to the same source with respect to excess emissions during a malfunction event warrants explanation.

The regulatory parameters applicable to such emergency provisions in operating permits are the same for both state operating permit programs regulations and the federal operating permit program regulations. The definition of emergency is identical in the regulations for each program:

An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation or operator error.<sup>61</sup>

Thus, the definition of "emergency" in these title V regulations is similar to the concept of "malfunctions" in the EPA's SSM Policy for SIP provisions, but it uses somewhat different terminology concerning the nature of the event and restricts the qualifying

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<sup>59</sup> *See*, 40 CFR sections 70.1 – 70.12; 40 CFR sections 71.1 – 71.27.

<sup>60</sup> *See*, 40 CFR 70.6(g); 40 CFR 71.6(g). The EPA also notes that states are not required to adopt the "emergency provision" contained in 40 CFR 70.6(g) into their state operating permit programs, and many states have chosen not to do so. *See, e.g.*, "Clean Air Act Full Approval of Partial Operating Permit Program; Allegheny County; Pennsylvania; Direct final rule," 66 FR 55112 at 55113 (Nov. 1, 2001).

<sup>61</sup> *See*, 40 CFR 70.6(g)(1); 40 CFR 71.6(g)(1).

exceedances to "technology-based" emission limitations.<sup>62</sup> Some SIP provisions may also be "technology-based" emission limitations and thus this terminology in the operating permit regulations may engender some potential inconsistency with the SSM Policy.

If there is an emergency event meeting the regulatory definition, then the EPA's regulations for operating permits provide that the source can assert an "affirmative defense" to enforcement for noncompliance with technology-based standards during the emergency event. In order to establish the affirmative defense, the regulations place the burden of proof on the source to demonstrate through specified forms of evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of either paragraph 40 CFR 70.6(a)(3)(iii)(B) or 40 CFR 71.6(a)(3)(iii)(B). This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.<sup>63</sup>

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<sup>62</sup> 1999 SSM Guidance at Attachment p. 1 and footnote 6. The term "malfunction" means "a sudden and unavoidable breakdown of process or control equipment." The malfunction events that may be suitable for an affirmative defense are those that are "caused by circumstances entirely beyond the control of the owner or operator." The EPA notes that by definition emergencies do not include normal source operation such as startup, shutdown, or maintenance.

<sup>63</sup> 40 CFR 70.6(g)(3); 40 CFR 71.6(g)(3).

The Petitioner did not directly request that the EPA evaluate the existing regulatory provisions applicable to operating permits in 40 CFR part 70 and 40 CFR part 71, and the EPA is not revising those provisions in this action. However, the Petitioner did identify a number of specific SIP provisions that indirectly relate to this issue because the state may have modeled its SIP provision, at least in part, on the EPA's operating permit regulations.<sup>64</sup> In those instances, the state in question presumably intended to create an affirmative defense applicable during malfunctions appropriate for SIP provisions, but by using the terminology used in the operating permit regulations, the state has created provisions that are not permissible in SIPs.

The elements for the affirmative defense in the title V permit regulations are similar to the criteria recommended in the SSM Policy for SIP provisions applicable to malfunctions. However, the elements for the affirmative defense provisions in operating permits do not explicitly include some of the criteria that the EPA believes are necessary in order to make such a provision appropriate in a SIP provision. For example, the EPA recommends that approvable SIP provisions include an affirmative duty for the source to establish that the malfunction was "not part of a recurring pattern indicative of inadequate design, operation, or maintenance."<sup>65</sup> In addition, the regulations applicable to operating permits use somewhat different terminology for the elements of the defense, such as providing that the emergencies were "sudden and reasonably unforeseeable events beyond the control of the source," whereas the EPA's SSM Policy describes malfunctions as events that "did not stem from any activity or event that could have been foreseen and

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<sup>64</sup> *See, e.g.*, Petition at 24. The Petitioner identified a provision in the Arkansas SIP that appears to be closely modeled on 40 CFR 70.6(g).

<sup>65</sup> 1999 SSM Guidance at Attachment pp. 3-4.

avoided, or planned for."<sup>66</sup> Again, the use of somewhat different terminology about the elements the source must establish in order to qualify for an affirmative defense may engender some potential inconsistency with the EPA's SSM Policy.

Although the differing regulatory terminology with respect to the nature of the event or the elements necessary to establish an affirmative defense may not ultimately be significant in practical application in a given enforcement action, there are two additional ways in which incorporation of the text of the regulatory provisions in 40 CFR 70.6(g) and 40 CFR 71.6(g) into a SIP is potentially more directly in conflict with the SSM Policy. First, these provisions do not explicitly limit the affirmative defense only to civil penalties available under the CAA for violations of emission limitations. Each provision states only that an "emergency constitutes an affirmative defense to an action brought for noncompliance" if the source proves that it meets the conditions for the affirmative defense.<sup>67</sup> Given this lack of an explicit limitation, it could be argued that SIP provisions that copy the wording of 40 CFR 70.6(g) and 40 CFR 71.6(g) are not limited to civil penalties.<sup>68</sup> Such a reading would be inconsistent with the EPA's view that affirmative defenses in SIP provisions are only consistent with the CAA if they apply to civil penalties and not to injunctive relief. The EPA believes it is essential for SIPs to ensure

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<sup>66</sup> 1999 SSM Guidance at Attachment p. 3.

<sup>67</sup> 40 CFR 70.6(g)(2); 40 CFR 71.6(g)(2).

<sup>68</sup> Because title V requires that a source have a permit that "assure[s] compliance with applicable [CAA] requirements," CAA section 504(a), it follows that the title V emergency provision itself can best be read to provide only an affirmative defense against civil penalties and not against injunctive relief. *See also*, "National Emission Standards for Hazardous Air Pollutant Emissions for Primary Lead Processing; Final Rule," 76 FR 70834 at 70838/2 (Nov. 15, 2011) (explaining why limiting affirmative defenses to civil penalties conforms with the purposes of the CAA and existing case law).

that injunctive relief is available should a court determine that such relief is necessary to prevent excess emissions in the future.

Second, these operating permit regulatory provisions state that they are "in addition to any emergency or upset provision contained in any applicable requirement."<sup>69</sup> The EPA's view is that federal technology-based standards already include the appropriate affirmative defense provisions, if any, and that creation of additional affirmative defenses via a SIP provision is impermissible.<sup>70</sup> Thus, SIP provisions that add to or alter the terms of any federal technology-based standards would be substantially inadequate to meet CAA requirements.<sup>71</sup>

In this action, the EPA is taking action to evaluate the specific SIP provisions identified in the Petition and is proposing to make a finding of substantial inadequacy and to issue a SIP call for those SIP provisions that include features that are inappropriate for SIPs, regardless of whether those provisions contain terms found in other regulations. First, consistent with its longstanding interpretation of the CAA with respect to SIP requirements, the EPA believes that approvable affirmative defenses in a SIP provision can only apply to civil penalties, not to injunctive relief. Second, approvable affirmative defenses in a SIP provision should reflect the recommended criteria in the EPA's SSM

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<sup>69</sup> 40 CFR 70.6(g)(5); 40 CFR 71.6(g)(5).

<sup>70</sup> 1999 SSM Guidance at Attachment p. 3, footnote 6. The EPA explained that to the extent a state elected to include federal technology-based standards into its SIP, such as NSPS or NESHAPs, the standards should not deviate from those standards as promulgated. Because the EPA has already taken into account technological limitations in setting the standards, additional exemptions or affirmative defenses would be inappropriate.

<sup>71</sup> See, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (Apr. 18, 2011) (the EPA issued a SIP call because, *inter alia*, the SIP provision applied to NSPS and NESHAP); *US Magnesium, LLC v. EPA*, 690 F.3d 1157 (10th Cir. 2012) (upholding the SIP call).

Policy to assure that sources only assert affirmative defenses in appropriately narrow circumstances. Third, approvable affirmative defenses in a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations, such as NSPS or NESHAP. SIPs are comprised of emission limitations that are intended to provide for attainment and maintenance of the NAAQS, protection of PSD increments, protection of visibility, and other CAA objectives. Thus, the EPA believes that only narrowly drawn affirmative defense provisions, as recommended in its SSM Policy, are consistent with these overarching SIP requirements of the CAA.

*E. Intended Effect of the EPA's Action on the Petition*

As in the 2001 SSM Guidance, the EPA is endeavoring to be particularly clear about the intended effect of its proposed action on the Petition, of its proposed clarifications and revisions to the SSM Policy, and ultimately of its final action on the Petition.

First, the EPA only intends its actions on the larger policy or legal issues raised by the Petitioner to inform the public of the EPA's current views on the requirements of the CAA with respect to SIP provisions related to SSM events. Thus, for example, the EPA's proposed disapproval of the Petitioner's request that the EPA disallow all affirmative defense provisions for excess emissions during malfunctions is intended to convey that the EPA has not changed its views that such provisions can be consistent with CAA requirements for SIPs with respect to malfunctions. In this fashion, the EPA's action on the Petition provides updated guidance relevant to future SIP actions.

Second, the EPA only intends its actions on the specific existing SIP provisions

identified in the Petition to be applicable to those provisions. The EPA does not intend its action on those specific provisions to alter the current status of any other existing SIP provisions relating to SSM events. The EPA must take later rulemaking actions, if necessary, in order to evaluate any comparable deficiencies in other existing SIP provisions that may be inconsistent with the requirements of the CAA. Again, however, the EPA's actions on the Petition provide updated guidance on the types of SIP provisions that it believes would be consistent with CAA requirements in future rulemaking actions.

Third, the EPA does not intend its action on the Petition to affect existing permit terms or conditions regarding excess emissions during SSM events that reflect previously approved SIP provisions. In the event that the EPA finalizes a proposed finding of substantial inadequacy and a SIP call for a given state, the state will have time to revise its SIP in response to the SIP call through the necessary state and federal administrative process. Thereafter, any needed revisions to existing permits will be accomplished in the ordinary course as the state issues new permits or reviews and revises existing permits. The EPA does not intend the issuance of a SIP call to have automatic impacts on the terms of any existing permit.

Fourth, the EPA does not intend its action on the Petition to alter the emergency defense provisions at 40 CFR 70.6(g) and 40 CFR 71.6(g), *i.e.*, the title V regulations pertaining to "emergency provisions" permissible in title V operating permits. The EPA's regulations applicable to title V operating permits may only be changed through appropriate rulemaking procedures and existing permit terms may only be changed through established permitting processes.

Fifth, the EPA does not intend its interpretations of the requirements of the CAA

in this action on the Petition to be legally dispositive with respect to any particular current enforcement proceedings in which a violation of SIP emission limitations is alleged to have occurred. The EPA handles enforcement matters by assessing each situation, on a case-by-case basis, to determine the appropriate response and resolution. For purposes of alleged violations of SIP provisions, however, the terms of the applicable SIP provision will continue to govern until that provision is revised following the appropriate process for SIP revisions, as required by the CAA.

Finally, the EPA does intend that the final notice for this action after considering public comments will embody its most current SSM Policy, reflecting the EPA's interpretation of CAA requirements applicable to SIP provisions related to excess emissions during SSM events. In this regard, the EPA is proposing to add to and clarify its prior statements in the 1999 SSM Guidance and to make the specific changes to that guidance as discussed in this action. Thus, the final notice for this action will constitute the EPA's SSM Policy on a going-forward basis.

### **VIII. Legal Authority, Process, and Timing for SIP Calls**

#### *A. SIP Call Authority Under Section 110(k)(5)*

##### 1. General Statutory Authority

The CAA provides a mechanism for the correction of flawed SIPs, under CAA section 110(k)(5), which provides:

##### (5) Calls for plan revisions

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 standards, to mitigate adequately the interstate pollutant transport described in section [176A] of this title or section [184] of this title, or to otherwise comply with any requirement of [the Act], the Administrator shall require the State to revise

the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

By its explicit terms, this provision authorizes the EPA to find that a state's existing SIP is "substantially inadequate" to meet CAA requirements and, based on that finding, to "require the State to revise the [SIP] as necessary to correct such inadequacies." This type of action is commonly referred to as a "SIP call."<sup>72</sup>

Significantly, CAA section 110(k)(5) explicitly authorizes the EPA to issue a SIP call "whenever" the EPA makes a finding that the existing SIP is substantially inadequate, thus providing authority for the EPA to take action to correct existing inadequate SIP provisions even long after their initial approval, or even if the provisions

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<sup>72</sup> The EPA also has other discretionary authority to address incorrect SIP provisions, such as the authority in CAA section 110(k)(6) for the EPA to correct errors in prior SIP approvals. The authority in CAA section 110(k)(5) and CAA section 110(k)(6) can sometimes overlap and offer alternative mechanisms to address problematic SIP provisions. In this instance, the EPA believes that the mechanism provided by CAA section 110(k)(5) is the better approach, because using the mechanism of the CAA section 110(k)(6) error correction would eliminate the affected emission limitations from the SIP potentially leaving no emission limitation in place, whereas the mechanism of the CAA section 110(k)(5) SIP call will keep the provisions in place during the pendency of the state's revision of the SIP and the EPA's action on that revision. In the case of provisions that include impermissible automatic exemptions or discretionary exemptions, the EPA believes that retention of the existing SIP provision is preferable to the absence of the provision in the interim.

only become inadequate due to subsequent events.<sup>73</sup> The statutory provision is worded in the present tense, giving the EPA authority to rectify any deficiency in a SIP that currently exists, regardless of the fact that the EPA previously approved that particular provision in the SIP and regardless of when that approval occurred.

It is also important to emphasize that CAA section 110(k)(5) expressly directs the EPA to take action if the SIP provision is substantially inadequate not just for purposes of attainment or maintenance of the NAAQS, but also for purposes of "any requirement" of the CAA. The EPA interprets this reference to "any requirement" of the CAA on its face to authorize reevaluation of an existing SIP provision for compliance with those statutory and regulatory requirements that are germane to the SIP provision at issue. Thus, for example, a SIP provision that is intended to be an "emission limitation" for purposes of a nonattainment plan for purposes of the 1997 PM<sub>2.5</sub> NAAQS must meet various applicable statutory and regulatory requirements, including requirements of CAA section 110(a)(2)(A) such as enforceability, the definition of the term "emission limitation" in CAA section 302(k), the level of emissions control required to constitute a "reasonably available control measure" in CAA section 172(c)(1), and the other applicable requirements of the implementation regulations for the 1997 PM<sub>2.5</sub> NAAQS. Failure to

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<sup>73</sup> See, e.g., *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (upholding the "NO<sub>x</sub> SIP Call" to states requiring revisions to previously approved SIPs with respect to ozone transport and section 110(a)(2)(D)(i)(I)); "Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 FR 77698 (Dec. 13, 2010) (the EPA issued a SIP call to 13 states because the endangerment finding for GHGs meant that these previously approved SIPs were substantially inadequate because they did not provide for the regulation of GHGs in the PSD permitting programs of these states as required by CAA section 110(a)(2)(C) and section 110(a)(2)(J)); "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (Apr. 18, 2011) (the EPA issued a SIP call to rectify SIP provisions dating back to 1980).

meet any of those applicable requirements could constitute a substantial inadequacy suitable for a SIP call, depending upon the facts and circumstances. By contrast, that same SIP provision should not be expected to meet specifications of the CAA that are completely irrelevant for its intended purpose, such as the unrelated requirement of CAA section 110(a)(2)(G) that the state have general legal authority comparable to CAA section 303 for emergencies.

Use of the term "any requirement" in CAA section 110(k)(5) also reflects the fact that SIP provisions could be substantially inadequate for widely differing reasons. One provision might be substantially inadequate because it fails to prohibit emissions that contribute to violations of the NAAQS in downwind areas many states away. Another provision, or even the same provision, could be substantially inadequate because it also infringes on the legal right of members of the public who live adjacent to the source to enforce the SIP. Thus, the EPA has previously interpreted CAA section 110(k)(5) to authorize a SIP call to rectify SIP inadequacies of various kinds, both broad and narrow in terms of the scope of the SIP revisions required.<sup>74</sup> On its face, CAA section 110(k)(5) authorizes the EPA to take action with respect to SIP provisions that are substantially inadequate to meet any CAA requirements, including requirements relevant to the proper treatment of excess emissions during SSM events.

An important baseline question is whether a given deficiency renders the SIP

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<sup>74</sup> See, e.g., "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 FR 57356 (Oct. 27, 1998) (the EPA issued a SIP call to 23 states requiring them to rectify the failure to address interstate transport of pollutants as required by section 110(a)(2)(D)); "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (Apr. 18, 2011) (the EPA issued a SIP call to one state requiring it to rectify several very specific SIP provisions).

provision "substantially inadequate." The EPA notes that the term "substantially inadequate" is not defined in the CAA. Moreover, CAA section 110(k)(5) does not specify a particular form of analysis or methodology that the EPA must use to evaluate SIP provisions for substantial inadequacy. Thus, under *Chevron* step 2, the EPA is authorized to interpret this provision reasonably, consistent with the provisions of the CAA. In addition, the EPA is authorized to exercise its discretion in applying this provision to determine whether a given SIP provision is substantially inadequate. To the extent that the term "substantially inadequate" is ambiguous, the EPA believes that it is reasonable to interpret the term in light of the specific purposes for which the SIP provision at issue is required, and thus whether the provision meets the fundamental CAA requirements applicable to such a provision.

The EPA does not interpret CAA section 110(k)(5) to require a showing that the effect of a SIP provision that is facially inconsistent with CAA requirements is causally connected to a particular adverse impact. For example, the plain language of CAA section 110(k)(5) does not require direct causal evidence that excess emissions have occurred during a specific malfunction at a specific source and have literally caused a violation of the NAAQS in order to conclude that the SIP provision is substantially inadequate.<sup>75</sup> A SIP provision that purports to exempt a source from compliance with applicable emission limitations during SSM events, contrary to the requirements of the CAA for continuous emission limitations, does not become legally permissible merely because there is not definitive evidence that any excess emissions have resulted from the

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<sup>75</sup> See, *US Magnesium, LLC v. EPA*, 690 F.3d 1157 (10th Cir. 2012) (upholding the EPA's interpretation of section 110(k)(5) to authorize a SIP call when the SIP provisions are inconsistent with CAA requirements).

exemption and have literally caused a specific NAAQS violation.<sup>76</sup>

Similarly, the EPA does not interpret CAA section 110(k)(5) to require direct causal evidence that a SIP provision that improperly undermines enforceability of the SIP has resulted in a specific failed enforcement attempt by any party. A SIP provision that has the practical effect of barring enforcement by the EPA or through a citizen suit, either because it would bar enforcement if an air agency elects to grant a discretionary exemption or to exercise its own enforcement discretion, is inconsistent with fundamental requirements of the CAA.<sup>77</sup> Such a provision also does not become legally permissible merely because there is not definitive evidence that the state's action literally undermined a specific attempted enforcement action by other parties. Indeed, the EPA notes that these impediments to effective enforcement likely have a chilling effect on potential enforcement in general. The possibility for effective enforcement of emission limitations in SIPs is itself an important principle of the CAA, as embodied in CAA sections 113 and 304.

The EPA's interpretation of CAA section 110(k)(5) is that the fundamental integrity of the CAA's SIP process and structure are undermined if emission limitations

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<sup>76</sup> The EPA notes that the GHG SIP call did not require "proof" that the failure of a state to address GHGs in a given PSD permit "caused" particularized environmental impacts; it was sufficient that the state's SIP fails to meet the current fundamental legal requirements for regulation of GHGs in accordance with the CAA. *See*, "Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 FR 77698 (Dec. 13, 2010).

<sup>77</sup> *See*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 at 21641 (Apr. 18, 2011); *see also*, *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1168 (10th Cir. 2012) (upholding the EPA's interpretation of section 110(k)(5) to authorize a SIP call when the state's SIP provision worded so that state decisions whether a given excess emissions event constituted a violation interfered with enforcement by the EPA or citizens for such event).

relied upon to meet CAA requirements related to protection of public health and the environment can be violated without potential recourse. For example, the EPA does not believe that it is authorized to issue a SIP call to rectify an impermissible automatic exemption provision only after a violation of the NAAQS has occurred, or only if that NAAQS violation can be directly linked to the excess emissions that resulted from the impermissible automatic exemption by a particular source on a particular day. If the SIP contains a provision that is inconsistent with fundamental requirements of the CAA, that renders the SIP provision substantially inadequate.

The EPA notes that CAA section 110(k)(5) can also be an appropriate tool to address ambiguous SIP provisions that could be read by a court in a way that would violate the requirements of the CAA. For example, if an existing SIP provision concerning the state's exercise of enforcement discretion is sufficiently ambiguous that it could be construed to preclude enforcement by the EPA or through a citizen suit if the state elects to deem a given SSM event not a violation, then that could render the provision substantially inadequate by interfering with the enforcement structure of the CAA.<sup>78</sup> If a court could construe the ambiguous SIP provision to bar enforcement, the EPA believes that it may be appropriate to take action to eliminate that uncertainty by requiring the state to revise the ambiguous SIP provision. Under such circumstances, it

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<sup>78</sup> Courts have on occasion interpreted SIP provisions to limit the EPA's enforcement authority as a result of ambiguous SIP provisions. *See, e.g., U.S. v. Ford Motor Co.*, 736 F.Supp. 1539 (W.D. Mo. 1990) and *U.S. v. General Motors Corp.*, 702 F. Supp. 133 (N.D. Texas 1988) (the EPA could not pursue enforcement of SIP emission limitations where states had approved alternative emission limitations under procedures the EPA had approved in the SIP); *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 588 (5th Cir. 1981) (the EPA to be accorded no discretion in interpreting state law). The EPA does not agree with the holdings of these cases, but they illustrate why it is reasonable to eliminate any uncertainty about enforcement authority by requiring a state to remove or revise a SIP provision that could be read in a way inconsistent with the requirements of the CAA.

may be appropriate for the EPA to issue a SIP call to assure that the SIP provisions are sufficiently clear and consistent with CAA requirements on their face.<sup>79</sup>

In this instance, the Petition raised questions concerning the adequacy of existing SIP provisions that pertain to the treatment of excess emissions during SSM events. The SIP provisions identified by the Petitioner generally fall into four major categories: (i) automatic exemptions; (ii) exemptions as a result of director's discretion; (iii) provisions that appear to bar enforcement by the EPA or through a citizen suit if the state decides not to enforce through exercise of enforcement discretion; and (iv) affirmative defense provisions that appear to be inconsistent with the CAA and the EPA's SSM Policy. The EPA believes that each of these types of SIP deficiency potentially justifies a SIP call pursuant to CAA section 110(k)(5), if the SIP provision is as the Petitioner describes it.

## 2. Substantial Inadequacy of Automatic Exemptions

The EPA believes that SIP provisions that provide an automatic exemption from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible automatic exemption would provide that a source has to meet a specific emission limitation, except during startup, shutdown, and malfunction, and by definition any excess emissions during such events would not be violations and thus there could be no enforcement based on those excess emissions. The EPA's interpretation of CAA requirements for SIP provisions has been reiterated multiple times through the SSM Policy and actions on SIP submissions that pertain to this issue. The EPA's longstanding view is that SIP provisions

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<sup>79</sup> See, *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's use of SIP call authority in order to clarify language in the SIP that could be read to violate the CAA, even if a court has not yet interpreted the language in that way).

that include automatic exemptions for excess emissions during SSM events, such that the excess emissions during those events are not considered violations of the applicable emission limitations, do not meet CAA requirements. Such exemptions undermine the protection of the NAAQS and PSD increments and fail to meet other fundamental requirements of the CAA.

The EPA interprets CAA sections 110(a)(2)(A) and 110(a)(2)(C) to require that SIPs contain "emission limitations" to meet CAA requirements. Pursuant to CAA section 302(k), those emission limitations must be "continuous." Automatic exemptions from otherwise applicable emission limitations thus render those limits less than continuous as required by CAA sections 110(a)(2)(A) and 110(a)(2)(C), thereby inconsistent with a fundamental requirement of the CAA and thus substantially inadequate as contemplated in CAA section 110(k)(5).

This inadequacy has far-reaching impacts. For example, air agencies rely on emission limitations in SIPs in order to provide for attainment and maintenance of the NAAQS. These emission limitations are basic building blocks for SIPs, often used by air agencies to meet various requirements including: (i) in the estimates of emissions for emissions inventories; (ii) in the determination of what level of emissions meets various statutory requirements such as "reasonably available control measures" in nonattainment SIPs or "best available retrofit technology" in regional haze SIPs; and (iii) in critical modeling exercises such as attainment demonstration modeling for nonattainment areas or increment use for PSD permitting purposes. All of these uses typically assume continuous source compliance with applicable emission limitations.

Because the NAAQS are not directly enforceable against individual sources, air

agencies rely on the adoption and enforcement of these generic and specific emission limits in SIPs in order to provide for attainment and maintenance of the NAAQS, protection of PSD increments, protection of visibility, and other CAA requirements. Automatic exemption provisions for excess emissions eliminate the possibility of enforcement for what would otherwise be clear violations of the relied-upon emission limitations and thus eliminate any opportunity to obtain injunctive relief that may be needed to protect the NAAQS or meet other CAA requirements. Likewise, the elimination of any possibility for penalties for what would otherwise be clear violations of the emission limitations, regardless of the conduct of the source, eliminates any opportunity for penalties to encourage appropriate design, operation, and maintenance of sources and efforts by source operators to prevent and to minimize excess emissions in order to protect the NAAQS or to meet other CAA requirements. Removal of this monetary incentive to comply with the SIP reduces a source's incentive to design, operate, and maintain its facility to meet emission limitations at all times.

### 3. Substantial Inadequacy of Director's Discretion Exemptions

The EPA believes that SIP provisions that allow discretionary exemptions from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements for the same reasons as automatic exemptions, but for additional reasons as well. A typical SIP provision that includes an impermissible "director's discretion" component would purport to authorize air agency personnel to modify existing SIP requirements under certain conditions, *e.g.*, to grant a variance from an otherwise applicable emission limitation if the source could not meet the requirement in certain

circumstances.<sup>80</sup> If such provisions are sufficiently specific, provide for sufficient public process, and are sufficiently bounded, so that it is possible to anticipate at the time of the EPA's approval of the SIP provision how that provision will actually be applied and the potential adverse impacts thereof, then such a provision might meet basic CAA requirements. In essence, if it is possible to anticipate and evaluate in advance how the exercise of enforcement discretion could impact compliance with other CAA requirements, then it may be possible to determine in advance that the pre-authorized exercise of director's discretion will not interfere with other CAA requirements, such as providing for attainment and maintenance of the NAAQS. Most director's discretion-type provisions cannot meet this basic test.

Unless it is possible at the time of the approval of the SIP provision to anticipate and analyze the impacts of the potential exercise of the director's discretion, such provisions functionally could allow *de facto* revisions of the approved provisions of the SIP without complying with the process for SIP revisions required by the CAA. Sections 110(a)(1) and (2) of the CAA impose procedural requirements on states that seek to amend SIP provisions. The elements of CAA section 110(a)(2) and other sections of the CAA, depending upon the subject of the SIP provision at issue, impose substantive requirements that states must meet in a SIP revision. Section 110(i) of the CAA prohibits modification of SIP requirements for stationary sources by either the state or the EPA,

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<sup>80</sup> The EPA notes that problematic "director's discretion" provisions are not limited only to those that purport to authorize alternative emission limitations from those required in a SIP. Other problematic director's discretion provisions could include those that purport to provide for discretionary changes to other substantive requirements of the SIP, such as applicability, operating requirements, recordkeeping requirements, monitoring requirements, test methods, and alternative compliance methods.

except through specified processes.<sup>81</sup> Section 110(k) of the CAA imposes procedural and substantive requirements on the EPA for action upon any SIP revision. Sections 110(l) and 193 of the CAA both impose additional procedural and substantive requirements on the state and the EPA in the event of a SIP revision. Chief among these many requirements for a SIP revision would be the necessary demonstration that the SIP revision in question would not interfere with any requirement concerning attainment and reasonable further progress or "any other applicable requirement of" the CAA to meet the requirements of CAA section 110(l).

Congress presumably imposed these many explicit requirements in order to assure that there is adequate public process at both the air agency and federal level for any SIP revision, and to assure that any SIP revision meets the applicable substantive requirements of the CAA. Although no provision of the CAA explicitly addresses whether a "director's discretion" provision is acceptable by name, the EPA interprets the statute to prohibit such provisions unless they would be consistent with the statutory and

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<sup>81</sup> Section 110(i) of the Act states that "no order, suspension, plan revision or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator" except in compliance with the CAA's requirements for promulgation or revision of a plan, with limited exceptions. *See, e.g.*, "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to Regulation 1; Notice of proposed rulemaking," 75 FR 42342 at 42344 (July 21, 2010) (proposing to disapprove "director discretion" provisions as inconsistent with CAA requirements and noting that "[s]ection 110(i) specifically prohibits States, except in certain limited circumstances, from taking any action to modify any requirement of a SIP with respect to any stationary source, except through a SIP revision"), finalized as proposed at 76 FR 4540 (Jan. 26, 2011); "Corrections to the California State Implementation Plan," 69 FR 67062 at 67063 (Nov. 16, 2004) (noting that "a state-issued variance, though binding as a matter of State law, does not prevent EPA from enforcing the underlying SIP provisions unless and until EPA approves that variance as a SIP revision"); *Industrial Environmental Association v. Browner*, No. 97-71117 at n. 2 (9th Cir. May 26, 2000) (noting that the EPA has consistently treated individual variances granted under state variance provisions as "modifications of the SIP requiring independent EPA approval").

regulatory requirements that apply to SIP revisions.<sup>82</sup> A SIP provision that purports to give broad and unbounded director's discretion to alter the existing legal requirements of the SIP with respect to meeting emission limitations would be tantamount to allowing a revision of the SIP without meeting the applicable procedural and substantive requirements for such a SIP revision.

For this reason, the EPA has long discouraged the creation of new SIP provisions containing an impermissible director's discretion feature and has also taken actions to remove existing SIP provisions that it had previously approved in error.<sup>83</sup> In recent years, the EPA has also recommended that if an air agency elects to have SIP provisions that contain a director's discretion feature consistent with CAA requirements, then the provisions must be structured so that any resulting variances or other deviations from the SIP requirements have no federal law validity, unless and until the EPA specifically approves that exercise of the director's discretion as a SIP revision. Barring such a later ratification by the EPA through a SIP revision, the exercise of director's discretion is only valid for state (or tribal) law purposes and would have no bearing in the event of an

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<sup>82</sup> *See, e.g.*, EPA's implementing regulations at 40 CFR 51.104(d) ("In order for a variance to be considered for approval as a revision to the [SIP], the State must submit it in accordance with the requirements of this section") and 51.105 ("Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.").

<sup>83</sup> *See, e.g.*, "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to Regulation 1," 76 FR 4540 (Jan. 26, 2011) (partial disapproval of SIP submission based on inclusion of impermissible director's discretion provisions); "Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans; Notice of proposed rulemaking," 61 FR 38664 (July 25, 1996) (proposed SIP correction to remove, pursuant to CAA section 110(k)(6), several variance provisions from American Samoa, Arizona, California, Hawaii, and Nevada SIPs), finalized at 62 FR 34641 (June 27, 1997); "Approval and Promulgation of Implementation Plans; Corrections to the Arizona and Nevada State Implementation Plans," 74 FR 57051 (Nov. 3, 2009) (direct final rulemaking to remove, pursuant to CAA section 110(k)(6), variance provisions from Arizona and Nevada SIPs).

action to enforce the provision of the SIP as it was originally approved by the EPA.

The EPA's evaluation of the specific SIP provisions of this type identified in the Petition indicates that none of them provide sufficient process or sufficient bounds on the exercise of director's discretion to be permissible. Most on their face would allow potentially limitless exemptions with potentially dramatic adverse impacts inconsistent with the objectives of the CAA. More importantly, however, each of the identified SIP provisions goes far beyond the limits of what might theoretically be a permissible director's discretion provision by authorizing state personnel to create case-by-case exemptions from the applicable emission limitations from the requirements of the SIP for excess emissions during SSM events. Given that the EPA interprets the CAA not to allow exemptions from SIP emission limitations for excess emissions during SSM events in the first instance, it follows that providing such exemptions through the mechanism of director's discretion provision is also not permissible and compounds the problem.

As with automatic exemptions for excess emissions during SSM events, a provision that allows discretionary exemptions would not meet the statutory requirements of CAA sections 110(a)(2)(A) and 110(a)(2)(C) that require SIPs to contain "emission limitations" to meet CAA requirements. Pursuant to CAA section 302(k), those emission limitations must be "continuous." Discretionary exemptions from otherwise applicable emission limitations render those limits less than continuous, as is required by CAA sections 110(a)(2)(A) and 110(a)(2)(C), and thereby inconsistent with a fundamental requirement of the CAA and thus substantially inadequate as contemplated in section CAA 110(k)(5). Such exemptions undermine the objectives of the CAA such as protection of the NAAQS and PSD increments, and they fail to meet other fundamental

requirements of the CAA.

In addition, discretionary exemptions undermine effective enforcement of the SIP by the EPA or through a citizen suit, because often there may have been little or no public process concerning the exercise of director's discretion to grant the exemptions, or easily accessible documentation of those exemptions, and thus even ascertaining the possible existence of such *ad hoc* exemptions will further burden parties who seek to evaluate whether a given source is in compliance or to pursue enforcement if it appears that the source is not. Where there is little or no public process concerning such *ad hoc* exemptions, or inadequate access to relevant documentation of those exemptions, enforcement by the EPA or through a citizen suit may be severely compromised. As explained in the 1999 SSM Guidance, the EPA does not interpret the CAA to allow SIP provisions that would allow the exercise of director's discretion concerning violations to bar enforcement by the EPA or through a citizen suit. The exercise of director's discretion to exempt conduct that would otherwise constitute a violation of the SIP would interfere with effective enforcement of the SIP. Such provisions are inconsistent with and undermine the enforcement structure of the CAA provided in CAA sections 113 and 304, which provide independent authority to the EPA and citizens to enforce SIP provisions, including emission limitations. Thus, SIP provisions that allow discretionary exemptions from applicable SIP emission limitations through the exercise of director's discretion are substantially inadequate to comply with CAA requirements as contemplated in CAA section 110(k)(5).

#### 4. Substantial Inadequacy of Improper Enforcement Discretion Provisions

The EPA believes that SIP provisions that pertain to enforcement discretion but

could be construed to bar enforcement by the EPA or through a citizen suit if the air agency declines to enforce are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible enforcement discretion provision specifies certain parameters for when air agency personnel should pursue enforcement action, but is worded in such a way that the air director's decision defines what constitutes a "violation" of the emission limitation for purposes of the SIP, *i.e.*, by defining what constitutes a violation, the air agency's own enforcement discretion decisions are imposed on the EPA or citizens.<sup>84</sup>

The EPA's longstanding view is that SIP provisions cannot enable an air agency's decision concerning whether or not to pursue enforcement to bar the ability of the EPA or the public to enforce applicable requirements.<sup>85</sup> Such enforcement discretion provisions in a SIP would be inconsistent with the enforcement structure provided in the CAA. Specifically, the statute provides explicit independent enforcement authority to the EPA under CAA section 113 and to citizens under CAA section 304. Thus, the CAA contemplates that the EPA and citizens have authority to pursue enforcement for a violation even if the air agency elects not to do so. The EPA, citizens, and any court in which they seek to pursue an enforcement claim for violation of SIP requirements must retain the authority to evaluate independently whether a source's violation of an emission limitation warrants enforcement action. Potential for enforcement by the EPA or through

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<sup>84</sup> *See, e.g.*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 75 FR 70888 at 70892 (Nov. 19, 2010). The SIP provision at issue provided that information concerning a malfunction "shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action." This SIP language appeared to give the state official exclusive authority to determine whether excess emissions constitute a violation.

<sup>85</sup> *See*, 1999 SSM Guidance at 3.

a citizen suit provides an important safeguard in the event that the air agency lacks resources or ability to enforce violations and provides additional deterrence. Accordingly, a SIP provision that operated to eliminate the authority of the EPA or the public to pursue enforcement actions because the air agency elects not to, would undermine the enforcement structure of the CAA and would thus be substantially inadequate to meet fundamental requirements in CAA sections 113 and 304.

#### 5. Substantial Inadequacy of Deficient Affirmative Defense Provisions

The EPA believes that SIP provisions that provide inappropriate affirmative defenses for excess emissions during SSM events are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible affirmative defense provision could contain several deficiencies simultaneously, even though it may superficially resemble such a defense and actually contain the term "affirmative defense." There are a number of ways in which such provisions can be deficient, including: (i) extending the affirmative defense to injunctive relief; (ii) not including sufficient criteria to make the affirmative defense appropriately narrow; (iii) imposing the affirmative defense provision on federal technology-based emission limitations in the SIP; and (iv) providing an affirmative defense to startup, shutdown, or other planned and routine modes of source operation.

First, the EPA interprets the CAA to allow only those affirmative defense provisions that provide a potential for relief from civil penalties and not those that provide relief from injunctive relief as well. As explained in more detail in section IV of this notice, the EPA interprets the provisions of CAA section 110(a) to allow affirmative defenses only in certain narrow circumstances, as a means of balancing the obligations of

sources to meet emission limitations continuously as required by CAA section 302(k) with the practical reality that despite the most diligent of efforts, a source may violate emission standards under certain limited circumstances beyond the source's control. For sources that meet the conditions for an affirmative defense, the EPA believes that it is appropriate to provide relief only from monetary penalties. This limitation assures that the EPA and air agencies remain able to meet fundamental CAA requirements such as attainment and maintenance of the NAAQS, protection of PSD increments, protection of visibility, and other CAA requirements.

By contrast, because SIP provisions are intended to meet fundamental CAA objectives including attainment and maintenance of the NAAQS, it would be inappropriate to eliminate the availability of injunctive relief for violations, in order to ensure that the necessary emissions reductions could be obtained through changes at the source or in source operation should that be necessary. In this way, the EPA believes that affirmative defense provisions applicable only to monetary penalties can meet the requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304. Failure to preserve the availability of injunctive relief for violations would thus be substantially inadequate to meet CAA requirements.

Second, the EPA interprets the CAA to allow only those affirmative defense provisions that are narrowly drawn to provide relief under appropriate circumstances where the event was entirely beyond the control of the owner or operator of the source and for which the source must have taken all practicable steps to prevent and to minimize the excess emissions that result from the event. Through the criteria in the 1999 SSM Guidance, the EPA has recommended the conditions that it considers appropriate for an

approvable SIP provision in order to ensure that the affirmative defense is available to sources that warrant relief from monetary penalties otherwise required by the CAA. Affirmative defense provisions that are consistent with these criteria would be appropriately narrowly drawn. Affirmative defense provisions that do not address these criteria adequately, however, would potentially shield a source from CAA statutory penalties in circumstances that are not warranted.

For example, an affirmative defense provision that did not impose a burden upon the source to establish that the violation was not the result of an event that could have been prevented through proper maintenance would not serve to encourage better maintenance. Similarly, an affirmative defense provision that failed to impose a burden upon the source to establish that it took all possible steps to minimize the effect of the violation on ambient air quality, the environment, and human health, would not serve to encourage diligence in rectifying the malfunction as quickly and effectively as possible. By addressing the recommended criteria adequately, a state can develop a narrow provision that appropriately balances the requirement for continuous compliance against the reality that there may be limited circumstances beyond the source's control that justify relief from monetary penalties. The EPA believes that failure to have an affirmative defense provision that is sufficiently narrowly drawn would fail to meet the requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304. Failure to have a sufficiently narrow affirmative defense would thus be substantially inadequate to meet CAA requirements.

Third, the EPA interprets the CAA to preclude SIP provisions that would create affirmative defense provisions applicable to federal regulations that an air agency may

have copied into its SIP or incorporated by reference in order to take credit for resulting emissions reductions for SIP planning purposes or to receive delegation of federal authority, such as NSPS or NESHAP. To the extent that any affirmative defense appropriate for these technology-based standards is warranted, the federal standards contained in the EPA's regulations already specify the appropriate affirmative defense. Creating affirmative defenses that do not exist in such federal technology-based standards, or providing different affirmative defenses in addition to those that do exist, would be inappropriate. Similarly, reliance on inappropriate affirmative defenses in the context of PSD permitting or nonattainment New Source Review (NSR) permitting programs could likewise be problematic.

Fourth, the EPA interprets the CAA to allow only affirmative defense provisions that are available for events that are entirely beyond the control of the owner or operator of the source. Thus, an affirmative defense may be appropriate for events like malfunctions, which are sudden and unavoidable events that cannot be foreseen or planned for. The underlying premise for an affirmative defense provision is that the source is properly designed, operated, and maintained, and could not have taken action to prevent the exceedance. Because the qualifying source could not have foreseen or prevented the event, the affirmative defense is available to provide relief from monetary penalties that could result from an event beyond the control of the source.

The legal and factual basis that supports the concept of an affirmative defense for malfunctions does not support providing an affirmative defense for normal modes of operation like startup and shutdown. Such events are planned and predictable. The source should be designed, operated, and maintained to comply with applicable emission

limitations. Because startup and shutdown periods are part of a source's normal operations, the same approach to compliance with, and enforcement of, applicable emission limitations during those periods should apply as otherwise applies during a source's normal operations. If justified, the state can develop special emission limitations or control measures that apply during startup and shutdown if the source cannot meet the otherwise applicable emission limitations in the SIP.

Even if a source is a suitable candidate for distinct SIP emission limitations during startup and shutdown, however, that does not justify the creation of an affirmative defense in the case of excess emissions during such periods. Because these events are planned, the EPA believes that sources should be able to comply with applicable emission limitations during these periods of time. To provide an affirmative defense for violations that occur during planned and predictable events for which the source should have been expected to comply is tantamount to providing relief from civil penalties for a planned violation. The EPA believes that affirmative defense provisions that include periods of normal source operation that are within the control of the owner or operator of the source, such as planned startup and shutdown, would be inconsistent with the requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304. An affirmative defense provision that expands the availability of the defense to planned events such as startup and shutdown would thus be substantially inadequate to meet CAA requirements.

*B. SIP Call Process Under Section 110(k)(5)*

Section 110(k)(5) of the CAA provides the EPA with authority to determine whether a SIP is substantially inadequate to attain or maintain the NAAQS or otherwise

comply with any requirement of the CAA. Where the EPA makes such a determination, the EPA then has a duty to issue a SIP call.

In addition to providing general authority for a SIP call, CAA section 110(k)(5) sets forth the process and timing for such an action. First, the statute requires the EPA to notify the state of the final finding of substantial inadequacy. The EPA typically provides notice to states by a letter from the Assistant Administrator for the Office of Air and Radiation to the appropriate state officials in addition to publication of the final action in the *Federal Register*.

Second, the statute requires the EPA to establish "reasonable deadlines (not to exceed 18 months after the date of such notice)" for the state to submit a corrective SIP submission to eliminate the inadequacy in response to the SIP call. The EPA proposes and takes comment on the schedule for the submission of corrective SIP revisions in order to ascertain the appropriate timeframe, depending on the nature of the SIP inadequacy.

Third, the statute requires that any finding of substantial inadequacy and notice to the state be made public. By undertaking a notice-and-comment rulemaking, the EPA assures that the air agency, affected sources, and members of the public all are adequately informed and afforded the opportunity to participate in the process. Through this proposal notice and the later final notice, the EPA intends to provide a full evaluation of the issues raised by the Petition and to use this process as a means of giving clear guidance concerning SIP provisions relevant to SSM events that are consistent with CAA requirements.

If the state fails to submit the corrective SIP revision by the deadline that the EPA

finalizes as part of the SIP call, CAA section 110(c) authorizes the EPA to "find[] that [the] State has failed to make a required submission."<sup>86</sup> Once the EPA makes such a finding of failure to submit, CAA section 110(c)(1) requires the EPA to "promulgate a Federal implementation plan at any time within 2 years after the [finding] . . . unless the State corrects the deficiency, and [the EPA] approves the plan or plan revision, before [the EPA] promulgates such [FIP]." Thus, if the EPA finalizes a SIP call and then finds that the air agency failed to submit a complete SIP revision that responds to the SIP call, or if the EPA disapproves such SIP revision, then the EPA will have an obligation under CAA section 110(c)(1) to promulgate a FIP no later than 2 years from the date of the finding or the disapproval, if the deficiency has not been corrected before that time.<sup>87</sup>

The finding of failure to submit a revision in response to a SIP call, or the EPA's disapproval of that corrective SIP revision, can also trigger sanctions under CAA section 179. If a state fails to submit a complete SIP revision that responds to a final SIP call, CAA section 179(a) provides for the EPA to issue a finding of state failure. Such a finding starts mandatory 18-month and 24-month sanctions clocks. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program and restrictions on highway funding. However, section 179 leaves it to the EPA to decide the order in which these sanctions apply. The EPA issued an order of sanctions rule in 1994 but did not specify the order of sanctions where a state fails to submit or submits a

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<sup>86</sup> CAA section 110(c)(1)(A).

<sup>87</sup> The 2-year deadline does not necessarily apply to FIPs following disapproval of a tribal implementation plan.

deficient SIP revision in response to a SIP call.<sup>88</sup> As the EPA has done in other SIP calls, the EPA proposes that the 2-to-1 emission offset requirement will apply for all new sources subject to the nonattainment new source review program 18 months following such finding or disapproval unless the state corrects the deficiency before that date. The EPA proposes that the highway funding restrictions sanction will also apply 24 months following such finding or disapproval unless the state corrects the deficiency before that date. The EPA is proposing that the provisions in 40 CFR 52.31 regarding staying the sanctions clock and deferring the imposition of sanctions would also apply.

Mandatory sanctions under CAA section 179 generally apply only in nonattainment areas. By its definition, the emission offset sanction applies only in areas required to have a part D NSR program, typically areas designated nonattainment. Section 179(b)(1) expressly limits the highway funding restriction to nonattainment areas. Additionally, the EPA interprets the section 179 sanctions to apply only in the area or areas of the state that are subject to or required to have in place the deficient SIP and for the pollutant or pollutants the specific SIP element addresses. For example, if the deficient provision applies statewide and applies for all NAAQS pollutants, then the mandatory sanctions would apply in all areas designated nonattainment for all NAAQS within the state. In this case, the EPA will evaluate the geographic scope of potential sanctions at the time it makes a final determination whether the state's SIP is substantially inadequate and issues a SIP call, as this may vary depending upon the provisions at issue.

*C. SIP Call Timing Under Section 110(k)(5)*

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<sup>88</sup> See, "Selection of Sequence of Mandatory Sanctions for Findings Made Pursuant to Section 179 of the Clean Air Act," 59 FR 39832 (Aug. 4, 1994), codified at 40 CFR 52.31.

If the EPA finalizes a proposed finding of substantial inadequacy and a proposed SIP call for any state, CAA section 110(k)(5) requires the EPA to establish a SIP submission deadline by which the state must make a SIP submission to rectify the identified deficiency. Pursuant to CAA section 110(k)(5), the EPA has authority to set a SIP submission deadline up to 18 months from the date of the final finding of inadequacy.

The EPA is proposing that if it promulgates a final finding of inadequacy and a SIP call for a state, the EPA will establish a date 18 months from the date of promulgation of the final finding for the state to respond to the SIP call. If, for example, the EPA's final findings are signed and disseminated in August 2013, then the SIP submission deadline for each of the states subject to the final SIP call would fall in February 2015. Thereafter, the EPA will review the adequacy of that new SIP submission in accordance with the CAA requirements of sections 110(a), 110(k), 110(l), and 193, including the EPA's interpretation of the CAA reflected in the SSM Policy as clarified and updated through this rulemaking.

The EPA is proposing the maximum time permissible under the CAA for a state to respond to a SIP call. The EPA believes that it is appropriate to provide states with the maximum time allowable under CAA section 110(k)(5) in order to allow states sufficient time to make SIP revisions following their own SIP development process. The EPA considers this a reasonable time period for the affected states to revise their state regulations, provide for public input, process the SIP revision through the state's own procedures, and submit the SIP revision to the EPA. Such a schedule will allow for the necessary SIP development process to correct the deficiencies, yet still achieve the

necessary SIP improvements as expeditiously as practicable. The EPA acknowledges that the longstanding existence of many of the provisions at issue, such as automatic exemptions for SSM events, may have resulted in undue reliance on them as a compliance mechanism by some sources. As a result, development of appropriate SIP revisions may entail reexamination of the applicable emission limitations themselves, and this process may require the maximum time allowed by the CAA. Nevertheless, the EPA encourages the affected states to make the necessary revisions in as timely a fashion as possible and encourages the states to work with the respective EPA Regional Office as they develop the SIP revisions.

The EPA notes that the SIP calls that it is proposing for affected states in this action would be narrow and apply only to the specific SIP provisions determined to be inconsistent with the requirements of the CAA. To the extent that a state is concerned that elimination of a particular aspect of an existing emission limitation, such as an impermissible exemption, will render that emission limitation more stringent than the state originally intended and more stringent than needed to meet the CAA requirements it was intended to address, the EPA anticipates that the state will revise the emission limitation accordingly, but without the impermissible exemption or other feature that necessitated the SIP call.

Finally, the EPA notes that its authority under CAA section 110(k)(5) does not extend to requiring a state to adopt a particular control measure in its SIP in response to the SIP call. Under principles of cooperative federalism, the CAA vests air agencies with substantial discretion to develop SIP provisions, so long as the provisions meet the legal

requirements and objectives of the CAA.<sup>89</sup> Thus, the issuance of a SIP call should not be misconstrued as a directive to the state in question to adopt a particular control measure. The EPA is merely proposing to require that affected states make a SIP revision to remove or revise existing SIP provisions that fail to comply with fundamental requirements of the CAA. The states retain discretion to remove or revise those provisions as they determine best, so long as they bring their SIPs into compliance with the requirements of the CAA.<sup>90</sup>

## **IX. What is the EPA proposing for each of the specific SIP provisions identified in the Petition?**

### *A. Overview of the EPA's Evaluation of Specific SIP Provisions*

In reviewing the Petitioner's concerns with respect to the specific SIP provisions identified in the Petition, the EPA notes that most of the provisions relate to a small number of common issues. As the EPA acknowledges in section II.A of this notice, many of these provisions are as old as the original SIPs that the EPA approved in the early 1970s, when the states and the EPA had limited experience in evaluating the provisions' adequacy, enforceability, and consistency with CAA requirements.

In some instances the EPA does not agree with the Petitioner's reading of the provision in question, or with the Petitioner's conclusion that the provision is inconsistent with the requirements of the CAA. However, given the common issues that arise in the

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<sup>89</sup> See, *Virginia, et al. v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997) (SIP call remanded and vacated because, *inter alia*, the EPA had issued a SIP call that required states to adopt a particular control measure for mobile sources).

<sup>90</sup> Notwithstanding the latitude states have in developing SIP provisions, the EPA is required to assure that states meet the basic legal criteria for SIPs. See, *Michigan, et al. v. EPA*, 213 F.3d 663, 686 (D.C. Cir. 2000) (upholding NOx SIP call because, *inter alia*, the EPA was requiring states to meet basic legal requirement that SIPs comply with section 110(a)(2)(D), not dictating the adoption of a particular control measure).

Petition for multiple states, there are some overarching conceptual points that merit discussion in general terms before delving into the facts and circumstances of the specific SIP provisions in each state. The EPA solicits comment on all aspects of this proposal.

#### 1. Automatic Exemption Provisions

A significant number of provisions identified by the Petitioner pertain to existing SIP provisions that create automatic exemptions for excess emissions during periods of startup, shutdown, or malfunction. Occasionally, these provisions also pertain to exemptions for excess emission that occur during maintenance, load change, or other types of normal source operation. These provisions typically provide that a source subject to a specific SIP emission limitation is exempted from compliance during startup, shutdown, and malfunction, so that the excess emissions are defined as not violations. Often, these provisions are artifacts of the early phases of the SIP program, approved before state and EPA regulators recognized the implications of such exemptions. Whatever the genesis of these existing SIP provisions, however, these automatic exemptions from emission limitations are not consistent with the CAA, as the EPA has stated in its SSM Policy since at least 1982.

After evaluating the Petition, the EPA proposes to determine that a number of states have existing SIP provisions that create impermissible automatic exemptions for excess emissions during malfunctions or during startup, shutdown, or other types of normal source operation. In those instances where the EPA agrees that a SIP provision identified by the Petitioner contains such an exemption contrary to the requirements of the CAA, the EPA is proposing to grant the Petition and accordingly to issue a SIP call to the appropriate state.

## 2. Director's Discretion Exemption Provisions

Another category of problematic SIP provision identified by the Petitioner is exemptions for excess emissions that, while not automatic, are exemptions for such emissions granted at the discretion of state regulatory personnel. In some cases, the SIP provision in question may provide some minimal degree of process and some parameters for the granting of such discretionary exemptions, but the typical provision at issue allows state personnel to decide unilaterally and without meaningful limitations that what would otherwise be a violation of the applicable emission limitation is instead exempt. Because the state personnel have the authority to decide that the excess emissions at issue are not a violation of the applicable emission limitation, such a decision would transform the violation into a non-violation, thereby barring enforcement by the EPA or others.

The EPA refers to this type of provision as a "director's discretion" provision, and the EPA interprets the CAA generally to forbid such provisions in SIPs because they have the potential to undermine fundamental statutory objectives such as the attainment and maintenance of the NAAQS and to undermine effective enforcement of the SIP. As discussed in sections VIII.A and IX of this notice, unbounded director's discretion provisions purport to allow unilateral revisions of approved SIP provisions without meeting the applicable statutory substantive and procedural requirements for SIP revisions. The specific SIP provisions at issue in the Petition (*see* section IX of this notice) are especially inappropriate because they purport to allow discretionary creation of case-by-case exemptions from the applicable emission limitations, when the CAA does not permit any such exemptions in the first instance. The practical impact of such provisions is that in effect they transform an enforcement discretion decision by the state

(*e.g.*, that the excess emission from a given SSM event should be excused for some reason) into an exemption from compliance that also prevents enforcement by the EPA or through a citizen suit. The EPA's longstanding SSM Policy has interpreted the CAA to preclude SIP provisions in which a state's exercise of its own enforcement discretion bars enforcement by the EPA or through a citizen suit. Where the EPA agrees that a SIP provision identified by the Petitioner contains such a discretionary exemption contrary to the requirements of the CAA, the EPA is proposing to grant the Petition and to call for the state to rectify the problem.

### 3. State-only Enforcement Discretion Provisions

The Petitioner identified existing SIP provisions in many states that ostensibly pertain to parameters for the exercise of enforcement discretion by state personnel for violations due to excess emissions during SSM events. The EPA's SSM Policy has consistently encouraged states to utilize traditional enforcement discretion within appropriate bounds for such violations and, in the 1982 SSM Guidance, explicitly recommended criteria that states might consider in the event that they elected to formalize their enforcement discretion with provisions in the SIP. The intent has been that such enforcement discretion provisions in a SIP would be "state-only," meaning that the provisions apply only to the state's own enforcement personnel and not to the EPA or to others.

The EPA has determined that a number of states have SIP provisions that, when evaluated carefully, could reasonably be construed to allow the state to make enforcement discretion decisions that would purport to foreclose enforcement by the EPA under CAA section 113 or by citizens under section 304. In those instances where the

EPA agrees that a specific provision could have the effect of impeding adequate enforcement of the requirements of the SIP by parties other than the state, the EPA is proposing to grant the Petition and to take action to rectify the problem. By contrast, where the EPA's evaluation indicates that the existing provision on its face or as reasonably construed could not be read to preclude enforcement by parties other than the state, the EPA is proposing to deny the Petition, and the EPA is taking comment on this issue in particular to assure that the state and the EPA have a common understanding that the provision does not have any impact on potential enforcement by the EPA or through a citizen suit. This process should serve to ensure that there is no misunderstanding in the future that the correct reading of the SIP provision would not bar enforcement by the EPA or through a citizen suit when the state elected to exercise its own enforcement discretion.

The EPA notes that another method by which to eliminate any potential ambiguity about the meaning of these enforcement discretion provisions would be for the state to revise its SIP to remove the provisions. Because these provisions are only applicable to the state, the EPA's current view is that they need not be included within the SIP. Thus, the EPA supports states that elect to revise their SIPs to remove these provisions to avoid any unnecessary confusion.

#### 4. Adequacy of Affirmative Defense Provisions

In addition to its overarching request that the EPA revise its interpretation of the CAA and forbid any form of affirmative defense, the Petitioner also identified specific existing affirmative defense provisions in SIPs that the Petitioner contended are not consistent with the EPA's SSM Policy. In general, these provisions are structured as

affirmative defense provisions, but the Petitioner expressed concern that they fail to address some or all of the criteria for such provisions that the EPA recommended in the 1999 SSM Guidance.

In reviewing the claims of the Petitioner with respect to this type of alleged SIP inadequacy, the EPA is reevaluating each of the challenged affirmative defense provisions on the merits to determine whether it provides the types of assurances that the EPA has recommended as necessary to meet CAA requirements. As the SSM Policy is guidance, it does not require any particular approach, but it does reflect the EPA's interpretation of the CAA with respect to what could constitute an acceptable affirmative defense provision. For each of these provisions identified by the Petitioner, the EPA proposes to grant or to deny the Petition, based on the EPA's evaluation as to whether the provision at issue provides adequate criteria to provide only a narrow affirmative defense for sources under certain circumstances consistent with the overarching CAA objectives, such as attaining and maintaining the NAAQS.<sup>91</sup> In addition, as discussed in section VII.C of this notice, the EPA is also proposing to grant the Petition with respect to any identified provision that creates an affirmative defense applicable during planned startup and shutdown events, because such provisions are not consistent with the requirements of the CAA.

#### 5. Affirmative Defense Provisions Applicable to a "Source or Small Group of Sources"

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<sup>91</sup> By definition, an affirmative defense provision in a SIP provides a source with a defense to assert in an enforcement proceeding. The source has the ability to establish whether or not it has met the legal and factual parameters for such affirmative defense, and that question will be decided by the trier of fact in the proceeding. The relevant circumstances in such a proceeding would thus include issues relevant to the parameters for affirmative defense provisions, as enumerated in section VII.B of this notice.

The Petitioner specifically objected to existing provisions in SIPs for a few states that allow an affirmative defense for certain categories of sources to be based on an after-the-fact showing that the excess emissions during a particular SSM event did not cause a violation of the NAAQS or PSD increments. The Petitioner argued that these affirmative defense provisions are inconsistent with the CAA and with the EPA's own recommendations for affirmative defenses in the SSM Policy, because the provisions provide the possibility for an affirmative defense to be used by sources that would fall into the category of "a source or small group of sources that has the potential to cause an exceedance of the NAAQS or PSD increments."<sup>92</sup>

The EPA acknowledges that its 1999 SSM Guidance recommended against affirmative defense provisions in SIPs for sources that have the potential, either individually or in small groups, to have excess emissions during SSM events that could cause a violation of the NAAQS or PSD increments. The EPA recommended that states utilize an enforcement discretion approach, rather than create an affirmative defense provision, for such sources. However, the EPA's SSM Policy is guidance, and the facts and circumstances of a particular situation may justify adopting a different approach. The EPA has evaluated each of the affirmative defense provisions identified by the Petitioner on the facts and circumstances of the particular provision. For each of these provisions, the EPA proposes to grant or to deny the Petition, based on an evaluation of whether the specific provision at issue in an individual SIP contains adequate criteria to achieve the objective of providing only a narrow affirmative defense for sources under certain

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<sup>92</sup> See, 1999 SSM Guidance at 4, and Attachment at 2, 3, and 5. Footnote 2 to that document articulates the reasoning behind the EPA's recommendation against such provisions, at least for some sources and for some NAAQS.

circumstances consistent with the overarching CAA objectives, such as attaining and maintaining the NAAQS. The criteria that the EPA recommends for an affirmative defense provision for malfunctions to be consistent with CAA requirements are restated in this notice at section VII.B, which also highlights EPA's view concerning case-by-case approval of affirmative defenses in the case of geographic areas and pollutants "where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."

*B. Affected States in EPA Region I*

1. Maine

a. Petitioner's Analysis

The Petitioner first objected to a specific provision in the Maine SIP that provides an exemption for certain boilers from otherwise applicable SIP visible emission limits during startup and shutdown (06-096-101 Me. Code R. § 3).<sup>93</sup> The provision exempts violations of the otherwise applicable SIP emission limitations for boilers over a certain rated input capacity "during the first 4 hours following the initiation of cold startup or planned shutdown." The Petitioner recognized that this provision might operate as an affirmative defense because the exemption is only available once the person claiming an "exemption" establishes that the facility was being run to minimize emissions. The provision does not make clear who is authorized to determine whether the visible emission limits apply. The Petitioner argued that one plausible interpretation of this provision is that state officials are "authorized to decide that the exemption applies and

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<sup>93</sup> Petition at 43-44.

therefore preclude enforcement by the EPA and by citizens."<sup>94</sup> The Petitioner argued that such an interpretation of this provision precluding enforcement by the EPA or citizens, both for civil penalties and injunctive relief, is forbidden by the EPA's interpretation of the CAA. Accordingly, the Petitioner requested that this provision be eliminated from the SIP.

Second, the Petitioner objected to a provision that empowers the state to "exempt emissions occurring during periods of unavoidable malfunction or unplanned shutdown from civil penalty under section 349, subsection 2" (06-096-101 Me. Code R. § 4). The Petitioner noted that the provision "clearly provides an exemption at the discretion of the department."<sup>95</sup> The Petitioner argued that such a provision provides exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. Further, the Petitioner argued that the provision precludes enforcement by the EPA or citizens, both for civil penalties and injunctive relief, and that the EPA's interpretation of the CAA would forbid such a provision.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission

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<sup>94</sup> Petition at 44.

<sup>95</sup> Petition at 44.

limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that inclusion of such an exemption in 06-096-101 Me. Code R. § 3 from the otherwise applicable SIP emission limitation for violations during the first 4 hours following cold startup or planned shutdown of boilers with a rated input capacity of more than 200 million BTU per hour is a substantial inadequacy and renders this specific SIP provision impermissible.

With respect to the Petitioner's concern that this exemption could preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such a provision is impermissible under the CAA. By having a SIP provision that defines what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

The EPA also believes that even if 06-096-101 Me. Code R. § 3 is interpreted to allow the source to make the required demonstration only in the context of an enforcement proceeding, the conditions set forth in the provision do not render it an acceptable affirmative defense provision. As explained in sections IV and VII.C of this notice, the EPA believes that affirmative defenses are only permissible under the CAA in the case of events that are beyond the control of the source, *i.e.*, malfunctions. Affirmative defense provisions are not appropriate in the case of planned source actions, such as cold startup or planned shutdown, because sources should be expected to comply

with applicable emission limitations during those normal planned and predicted modes of source operation.

Finally, the EPA believes that 06-096-101 Me. Code R. § 4 is impermissible under the CAA as interpreted in the EPA's SSM Policy as an unbounded director's discretion provision. The provision authorizes a state official "to exempt emissions occurring during periods of unavoidable malfunction or unplanned shutdown from civil penalty under section 349, subsection 2." Although the reference to section 349, subsection 2 is to a Maine state penalty provision, the EPA believes that the provision is unclear as written. This provision could be read to mean that once the state official has exempted excess emissions during malfunctions from otherwise applicable SIP limitations, those excess emissions are not subject to any penalties, including penalties under CAA section 113. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that inclusion of an unbounded director's discretion provision in 06-096-101 Me. Code R. § 4 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 06-096-101 Me. Code R. §

3. The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and the public for excess emissions during these events as provided in CAA sections 113 and 304. Even if the EPA were to consider 06-096-101 Me. Code R. § 3 to provide an affirmative defense rather than an automatic exemption, the provision is not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy.

The EPA also proposes to grant the Petition with respect to 06-096-101 Me. Code R. § 4. The EPA believes that this provision, as written, applies only to state penalties. However, the EPA is concerned that the provision could cause confusion among the public, the regulated community, and the courts, who might interpret the provision as applying to both state and federal penalties. Of course, such an interpretation would seem to allow for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of unbounded discretionary authority and therefore be inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. To avoid any such misunderstanding, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

2. New Hampshire

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the New Hampshire SIP that allow emissions in excess of otherwise applicable SIP emission limitations during "malfunction or breakdown of any component part of the air pollution control equipment."<sup>96</sup> The Petitioner argued that the challenged provisions provide an automatic exemption for excess emissions during the first 48 hours when any component part of air pollution control equipment malfunctions (N.H. Code R. Env-A 902.03) and further provide that "[t]he director may ... grant an extension of time or a temporary variance" for excess emissions outside of the initial 48-hour time period (N.H. Code R. Env-A 902.04). The Petitioner argued that N.H. Code R. Env-A 902.03 is an impermissible automatic exemption because it "provides that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations."<sup>97</sup> The Petitioner argued that such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner further argued that both N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 902.04 appear "to authorize the division to allow [exemptions], which could be interpreted to preclude enforcement by EPA or citizens"<sup>98</sup> for the excess emissions that would otherwise be violations of applicable SIP emission limitations.

Second, the Petitioner objected to two specific provisions in the New Hampshire

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<sup>96</sup> Petition at 52-53.

<sup>97</sup> Petition at 52.

<sup>98</sup> Petition at 53.

SIP which provide source-specific exemptions for periods of startup for "any process, manufacturing and service industry" (N.H. Code R. Env-A 1203.05) and for pre-June 1974 asphalt plants during startup, provided they are at 60-percent opacity for no more than 3 minutes (N.H. Code R. Env-A 1207.02).<sup>99</sup> The Petitioner recognized that EPA permits source category-specific emission limitations for startup and shutdown if certain conditions are met. The Petitioner argued, however, that "[o]f the seven criteria EPA considers adequate to justify a source specific emission limit during startup and shutdown, section 1207.02 arguably meets only one of them and section 1203.05 meets none at all."<sup>100</sup> The Petitioner thus requested that EPA require New Hampshire to remove both provisions from the SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The first provision identified by the Petitioner, N.H. Code R. Env-A 902.03,

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<sup>99</sup> Petition at 52-53.

<sup>100</sup> Petition at 53.

explicitly states that "increased emissions shall be allowed" during "malfunction or breakdown of any component part of the air pollution control equipment." The third provision identified by the Petitioner, N.H. Code R. Env-A 1203.05, provides that applicable SIP emission limitations apply "for any process, manufacturing and service industry" "[e]xcept during periods of start-ups and warm-ups." Both of these provisions allow automatic exemptions during periods of startup from otherwise applicable SIP emission limitations for excess emissions and thus are inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy. The EPA believes that inclusion of such exemptions from otherwise applicable SIP emission limitations in these provisions is a substantial inadequacy and renders these SIP provisions impermissible.

Similarly, N.H. Code R. Env-A 1203.05 does not appear to comply with the Act's requirements for source category-specific rules for startup and shutdown as interpreted in the EPA's SSM Policy. N.H. Code R. Env-A 1203.05 establishes a visible emissions limit for "any process, manufacturing and service industry" but further states that this limit does not apply during startups. Automatic exemptions from otherwise applicable SIP emission limitations for excess emissions during periods of startup are not permissible under the CAA. As discussed in section VII.A of this notice, states may elect to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown, but exemptions for excess emissions during such periods are inconsistent with the fundamental requirements of the CAA.

Similarly, N.H. Code R. Env-A 1207.02 provided an alternate opacity limit, "60 percent opacity, No. 3 on the Ringelmann Smoke Chart," for pre-June 1974 asphalt plants during startups. The EPA believes that this alternate emissions limit does not meet the

elements of the EPA's SSM Policy interpreting the CAA for establishing source-specific startup and shutdown alternative limits. However, after the Petitioner filed its Petition, the EPA acted on a SIP revision from New Hampshire correcting N.H. Code R. Env-A 1207.02 and renaming that provision as N.H. Code R. Env-A 2703.02. The N.H. Code R. Env-A 2703.02, as rewritten and submitted by New Hampshire, corrected the deficiencies identified by the Petitioner and removed the alternative limitations applicable during startups for pre-June 1974 asphalt plants. The EPA approved New Hampshire's SIP revision with respect to N.H. Code R. Env-A 2703.02 on August 22, 2012.<sup>101</sup> Thus, the Petitioner's objection to this provision is moot.

Finally, the EPA believes that N.H. Code R. Env-A 902.04 is impermissible under the CAA as interpreted in the EPA's SSM Policy, because it includes an unbounded director's discretion provision. The provision authorizes a state official to grant "an extension of time" to the time-limited exemption provided by N.H. Code R. Env-A 902.03 or a "temporary variance" to an applicable SIP emission limitation during malfunctions of air pollution control equipment. This provision could be read to mean that once the state official has granted a time extension or temporary variance for excess emissions during malfunctions from otherwise applicable SIP limitations, those excess emissions are not violations. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the

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<sup>101</sup> See, 77 FR 50561 at 50608.

provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that inclusion of an unbounded director's discretion provision in N.H. Code R. Env-A 902.03 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 1203.05. The EPA believes that both of these provisions allow for automatic exemptions from otherwise applicable emission limitations and that such outright exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

The EPA proposes to grant the Petition with respect to N.H. Code R. Env-A 902.04. The EPA believes that this provision allows for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is unbounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA

is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to N.H. Code R. Env-A 1207.02. New Hampshire has corrected the inadequacy identified by the Petitioner, and the EPA approved the SIP revision. Therefore, the Petitioner's objection is moot.

### 3. Rhode Island

#### a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Rhode Island SIP that allows for a case-by-case petition procedure whereby a source can obtain a variance from state personnel under R.I. Gen. Laws § 23-23-15 to continue to operate during a malfunction of its control equipment that lasts more than 24 hours, if the source demonstrates that enforcement would constitute undue hardship without a corresponding benefit (25-4-13 R.I. Code R. § 16.2).<sup>102,103</sup> The Petitioner argued that if the state grants the source's petition and provides a variance allowing the source to continue to operate, the facility could be excused from compliance with otherwise applicable SIP emission limitations during malfunction periods. The Petitioner argued that this provision could be read to preclude enforcement by the EPA or citizens in the event that the state elects not to treat the event as a violation of SIP emission limitations. Thus, the Petitioner argued, the provision is inconsistent with the CAA and the EPA's SSM Policy because it allows

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<sup>102</sup> Petition at 63-65.

<sup>103</sup> The EPA notes that the Petitioner also identified several additional provisions, 25-4-13 R.I. Code R. §§ 13.4.1(a), 27.2.3 and 25-4-39 R.I. Code R. §§ 39.5.4, 39.7.5(a), 39.7.6(b), 39.7.7(e), 39.7.8(f), 39.7.9(e), 39.7.11(c)(2), that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

the state to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The EPA believes that 25-4-13 R.I. Code R. § 16.2 is impermissible under the CAA as interpreted in the EPA's SSM Policy, due to an insufficiently bounded director's discretion provision. The provision specifies a mechanism for a variance to be granted "[i]n the event that the malfunction of an air pollution control system is expected or may reasonably be expected to continue for longer than 24 hours." This provision could be read to mean that once a state official has exempted excess emissions during malfunctions from otherwise applicable SIP limitations, those excess emissions are not violations. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation,

which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that inclusion of an insufficiently bounded director's discretion provision in 25-4-13 R.I. Code R. § 16.2 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 25-4-13 R.I. Code R. § 16.2. The EPA believes that this provision allows for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

C. *Affected States in EPA Region II*

1. New Jersey

a. Petitioner's Analysis

The Petitioner objected to two specific provisions in the New Jersey SIP that allow for automatic exemptions for excess emissions during emergency situations.<sup>104</sup> The Petitioner objected to the first provision because it provides industrial process units that

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<sup>104</sup> Petition at 53-54.

have the potential to emit sulfur compounds an exemption from the otherwise applicable sulfur emission limitations where "[t]he discharge from any stack or chimney [has] the sole function of relieving pressure of gas, vapor or liquid under abnormal emergency conditions" (N.J. Admin. Code 7:27-7.2(k)(2)). The Petitioner argued that such an exemption is inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

The Petitioner objected to the second provision because it provides electric generating units (EGUs) an exemption from the otherwise applicable NO<sub>x</sub> emission limitations when the unit is operating at "emergency capacity," also known as a "MEG alert," which is statutorily defined as a period in which one or more EGUs is operating at emergency capacity at the direction of the load dispatcher in order to prevent or mitigate voltage reductions or interruptions in electric service, or both (N.J. Admin. Code 7:27-19.1). The Petitioner argued that this source-specific exemption from the emission limitations "cannot ensure compliance with the NAAQS and PSD increments for NO<sub>x</sub> because ambient air quality is nowhere mentioned as a relevant consideration."<sup>105</sup>

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable

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<sup>105</sup> Petition at 54.

emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during emergency conditions, however defined, are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The first provision identified by the Petitioner explicitly states that emission limitations of sulfur compounds "shall not apply" to emissions coming from a stack or a chimney during "abnormal emergency conditions," when the discharges are solely to relieve pressure of gas, vapor, or liquid. The EPA believes that inclusion of such an exemption from emission limitations in N.J. Admin. Code 7:27-7.2(k)(2) is a substantial inadequacy and renders this specific SIP provision impermissible. The EPA notes that this exemption is impermissible even though the state has imposed the limitation that such exemption would apply only during "abnormal emergency conditions." The core problem remains that the provision provides an impermissible exemption from the sulfur compound emission limitations otherwise applicable under the SIP.

With regard to the second provision raised by the Petitioner (N.J. Admin. Code 7:27-19.1), the EPA disagrees that it is a substantial inadequacy in the SIP, because the exemption from the NO<sub>x</sub> emission limitations ceased to be applicable after November 15, 2005. Because the statute's exemption applies only to those emergency situations, or "MEG alerts," that occur "on or before November 15, 2005" (N.J. Admin. Code 7:27-19.1), the Petitioner's claim is moot.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to N.J. Admin. Code 7:27-

7.2(k)(2). The EPA believes that this provision allows for an exemption from the otherwise applicable emission limitations, and that such an exemption is inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For this reason, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision. The EPA proposes to deny the Petition with respect to N.J. Admin. Code 7:27-19.1, because its effectiveness expired on November 15, 2005, and therefore Petitioner's claim with regard to the impermissibility of this provision is moot.

2. [Reserved]

*D. Affected States in EPA Region III*

1. Delaware

a. Petitioner's Analysis

The Petitioner objected to seven provisions in the Delaware SIP that provide exemptions during startup and shutdown from the otherwise applicable SIP emission limitations.<sup>106</sup> The seven source-specific and pollutant-specific provisions that provide exemptions during periods of startup and shutdown are: 7-1100-1104 Del. Code Regs § 1.5 (Particulate Emissions from Fuel Burning Equipment); 7-1100-1105 Del. Code Regs § 1.7 (Particulate Emissions from Industrial Process Operations); 7-1100-1108 Del. Code Regs § 1.2 (Sulfur Dioxide Emissions from Fuel Burning Equipment); 7-1100-1109 Del. Code Regs § 1.4 (Emissions of Sulfur Compounds From Industrial Operations); 7-1100-1114 Del. Code Regs § 1.3 (Visible Emissions); 7-1100-1124 Del. Code Regs § 1.4

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<sup>106</sup> Petition at 28-29.

(Control of Volatile Organic Compound Emissions); and 7-1100-1142 Del. Code Regs § 2.3.5 (Specific Emission Control Requirements). These provisions provide exemptions to the emission limitations during startup and shutdown when "the emissions . . . during start-up and shutdown are governed by an operation permit issued pursuant to the provisions of 2.0 of 7 DE Admin. Code 1102." (*E.g.*, 7-1100-1104 Del. Code Regs § 1.5.)

The Petitioner objected to these provisions because they provide a state official with the discretion, through the permitting process, to exempt sources from otherwise applicable SIP emission limitations or to set alternative limitations for periods of startup and shutdown. The Petitioner argued that such discretion is not permissible because the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner argued that any alternative limits for periods of startup and shutdown created by the state official through the permitting process do not meet the requirements of the Act and the EPA's SSM Policy, because there is no requirement in the provision that the limits be narrowly tailored, source-specific, created in consultation with the EPA, and approved into the Delaware SIP by the EPA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission

limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup and shutdown could be deemed not a violation of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The EPA believes that the seven provisions raised by the Petitioner are impermissible because they are unbounded director's discretion provisions, created through the state permitting program, in which state officials are provided unbounded discretion to set alternative limits and could therefore provide an outright exemption from the emission limitations. In each of the provisions raised by the Petitioner, an exemption from the SIP's emission limitations during periods of startup and shutdown is automatically granted if the permit to which the source is subject has terms or conditions governing emissions during startup and shutdown. The SIP provisions therefore vest state officials with the unilateral power to establish alternative limits, or to create an exemption altogether, in permits by deeming such periods of excess emissions during startup and shutdown permissible. Were the state to exercise its discretion and decide on a case-by-case basis that such an event was not a violation of the emission limitations, the EPA and citizens could be precluded from enforcement. More importantly, however, an exemption from the emission limitations is impermissible in the first instance, and these provisions purport to authorize state officials in the permitting context to grant such exemptions. These provisions therefore undermine the SIP's emission limitations and the emissions reductions they are intended to achieve and render them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of insufficiently bounded

director's discretion provisions in 7-1100-1104 Del. Code Regs § 1.5, 7-1100-1105 Del. Code Regs § 1.7, 7-1100-1108 Del. Code Regs § 1.2, 7-1100-1109 Del. Code Regs § 1.4, 7-1100-1114 Del. Code Regs § 1.3, 7-1100-1124 Del. Code Regs § 1.4, and 7-1100-1142 Del. Code Regs § 2.3.5 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

In addition, the EPA agrees with the Petitioner that while the CAA, as interpreted in the EPA's SSM Policy, allows states to set source category-specific alternative emission limitations or other forms of enforceable control measures or techniques that apply during periods of startup and shutdown, such alternative limitations are only permitted in a narrow set of circumstances and must be accomplished through the appropriate SIP process (*see* section VII.A of this notice.) Those alternative limitations must be developed in consultation with the EPA and must be approved by the EPA into the SIP. The provisions of Delaware's SIP raised by the Petitioner purport to authorize the state to establish alternative limitations for excess emissions during periods of startup and shutdown (or to exempt those emissions altogether, as discussed above) on a case-by-case basis in the permitting process, and the provisions do not require the state to consult with the EPA or have those alternative limits approved by the EPA into the SIP. The EPA believes that the inclusion of processes to establish alternative limits for some sources and in regard to some pollutants in a manner that does not conform with the requirements of the Act as interpreted in the EPA's SSM Policy in 7-1100-1104 Del. Code Regs § 1.5, 7-1100-1105 Del. Code Regs § 1.7, 7-1100-1108 Del. Code Regs § 1.2, 7-1100-1109 Del. Code Regs § 1.4, 7-1100-1114 Del. Code Regs § 1.3, 7-1100-1124 Del. Code Regs § 1.4, and 7-1100-1142 Del. Code Regs § 2.3.5 is thus a substantial inadequacy and renders

these specific SIP provisions impermissible, in addition to the creation of unbounded discretion in a state official.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 7-1100-1104 Del. Code Regs § 1.5, 7-1100-1105 Del. Code Regs § 1.7, 7-1100-1108 Del. Code Regs § 1.2, 7-1100-1109 Del. Code Regs § 1.4, 7-1100-1114 Del. Code Regs § 1.3, 7-1100-1124 Del. Code Regs § 1.4, and 7-1100-1142 Del. Code Regs § 2.3.5. The EPA believes that these provisions allow for exemptions from otherwise applicable SIP emission limitations, and that such outright exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(C), and 302(k). In addition, the aforementioned provisions each allow for such exemptions through a state official's unilateral exercise of insufficiently bounded discretionary authority in the permitting process, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion in these provisions also allows state officials to establish alternative emission limitations during periods of startup and shutdown through a process that does not conform to the requirements of the Act or the EPA's SSM Policy with regard to establishing alternative emission limitations. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

2. District of Columbia

a. Petitioner's Analysis

The Petitioner objected to five provisions in the District of Columbia (D.C.) SIP

as being inconsistent with the CAA and the EPA's SSM Policy.<sup>107</sup> The Petitioner first objected to a generally applicable provision in the D.C. SIP that allows for discretionary exemptions during periods of maintenance or malfunction (D.C. Mun. Regs. tit. 20 § 107.3). The provision provides the Mayor with the authority to permit continued operation of a stationary source when air pollution controls are shut down due to maintenance or malfunction. The Petitioner argued that this provision could provide an exemption from the otherwise applicable SIP emission limitations, and such an exemption is impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner objected to this discretionary exemption because the Mayor's grant of permission to continue to operate during the period of malfunction or maintenance could be interpreted to excuse excess emissions during such time period and could thus be read to preclude enforcement by the EPA or citizens in the event that the Mayor elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provision is also inconsistent with the CAA as interpreted in the EPA's SSM Policy because it allows the Mayor to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

Secondly, the Petitioner objected to the alternative limitations on stationary sources for visible emissions during periods of "start-up, cleaning, soot blowing, adjustment of combustion controls, or malfunction," (D.C. Mun. Regs. tit. 20 § 606.1)

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<sup>107</sup> Petition at 29-30.

and, for fuel-burning equipment placed in initial operation before January 1977, alternative limits for visible emissions during startup and shutdown (D.C. Mun. Regs. tit. 20 § 606.2). The Petitioner also objected to the exemption from emission limitations for emergency standby engines (D.C. Mun. Regs. tit. 20 § 805.1(c)(2)). The Petitioner argued that these provisions could provide exemptions or deviations from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner argued that the alternative limits do not appear to meet the criteria for a source category-specific rule as permitted under the EPA's SSM Policy interpreting the Act.

Finally, the Petitioner objected to the provision in the D.C. SIP that provides an affirmative defense for violations of visible emission limitations during "unavoidable malfunction" (D.C. Mun. Regs. tit. 20 § 606.4). The Petitioner objected to this provision because the elements of the defense are not laid out clearly in the SIP, because the term "affirmative defense" is not defined in the SIP, and finally, the Petitioner argues, because affirmative defenses for any excess emissions are wholly inconsistent with the CAA and should be removed from the SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be

continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption from the emission limitations in D.C. Mun. Regs. tit. 20 § 107.3 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that D.C. Mun. Regs. tit. 20 § 107.3 is also impermissible due to an unbounded director's discretion provision that purports to make the Mayor the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of D.C. Mun. Regs. tit. 20 § 107.3, the provision authorizes the Mayor to permit continued operation at stationary sources without functioning air pollution control equipment. The Mayor's grant of permission to continue to operate during the period of malfunction or maintenance could be interpreted to excuse excess emissions from that time period, and it could thus be read to preclude enforcement by the EPA or through a citizen suit in the event that the Mayor elects not to treat the event as a violation. In addition, the provision vests the Mayor with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any additional public process at the D.C. or federal level, and without any bounds or parameters to the exercise of this discretion. Most importantly, however, the provision purports to authorize the Mayor to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the

emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an unbounded director's discretion provision in D.C. Mun. Regs. tit. 20 § 107.3 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA notes that while the CAA does not allow for exemptions for excess emissions, it does, as discussed in section VII.A of this notice, allow states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. The EPA believes that emission limitations in SIPs should generally be developed in the first instance to account for the types of normal operation outlined in D.C. Mun. Regs. tit. 20 § 606.1, such as cleaning, soot blowing, and adjustment of combustion controls. The D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 do not appear to comply with the CAA's requirements as interpreted in the EPA's SSM Policy. The alternative limitations on stationary sources for visible emissions during periods of "start-up, cleaning, soot blowing, adjustment of combustion controls, or malfunction," (D.C. Mun. Regs. tit. 20 § 606.1) do not comply with the Act and the EPA's policy interpreting the Act, because, for instance, they do not apply only to "specific, narrowly-defined source categories using specific control strategies."<sup>108</sup> The EPA believes that the inclusion of these alternative limitations, which do not comply with the requirements of the Act, in D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

With respect to the Petitioner's objection to the exemption for emergency standby

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<sup>108</sup> 1999 SSM Guidance Attachment at 4-5.

engines (D.C. Mun. Regs. tit. 20 § 805.1(c)(2)), the EPA disagrees that this provision applies to an exemption from emission limitations during startup, shutdown, or malfunction periods. Instead, this provision applies to a specific source category that is not subject to control under the D.C. SIP. At this point in time, the SIP reflects that regulation of this source category is not necessary in the SIP in order to meet the applicable reasonably available control technology (RACT) requirements or other CAA requirements in this area. The EPA therefore disagrees with Petitioner that D.C. Mun. Regs. tit. 20 § 805.1(c)(2) renders the D.C. SIP substantially inadequate.

Finally, the EPA agrees with the Petitioner that the affirmative defense contained in D.C. Mun. Regs. tit. 20 § 606.4 is not an acceptable affirmative defense provision under the CAA as interpreted by the EPA's SSM Policy. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Furthermore, the SIP provision is deficient because while it appears to create an affirmative defense, it does so with conditions that are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that D.C. Mun. Regs. tit. 20 § 606.4 does not include criteria that are sufficiently robust to qualify as an

acceptable affirmative defense provision. The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, and the insufficiently robust qualifying criteria in D.C. Mun. Regs. tit. 20 § 606.4 are substantial inadequacies and render this specific SIP provision impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to D.C. Mun. Regs. tit. 20 § 107.3. The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, D.C. Mun. Regs. tit. 20 § 107.3 allows for such an exemption through a state official's unilateral exercise of discretionary authority that is unbounded and includes no additional public process at the D.C. or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. For these reasons, the EPA is proposing to find that D.C. Mun. Regs. tit. 20 § 107.3 is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition with respect to D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2. The EPA believes that section 606.1 impermissibly provides an alternative visible emission limitation to stationary sources during periods of malfunction and during planned maintenance events. Furthermore, while sections 606.1 and 606.2 appropriately provide alternative visible emission limitations only during periods of startup and shutdown, both sections apply to a broad category of sources and are not

narrowly limited to a source category employing a specific control strategy, as required by the CAA as interpreted in the EPA's SSM Policy. For these reasons, the EPA is proposing to find that D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 are substantially inadequate to meet CAA requirements and is thus proposing to issue a SIP call with respect to these provisions.

The EPA proposes to deny the Petition with respect to D.C. Mun. Regs. tit. 20 § 805.1(c)(2). The EPA disagrees that this provision applies to an exemption from emission limitations during startup, shutdown, or malfunction periods. Rather, this provision applies to a specific source category that is not subject to control under the D.C. SIP. At this point in time, the SIP reflects that regulation of this source category is not necessary in the SIP in order to meet the applicable RACT requirements or other CAA requirements in this area.

Finally, the EPA proposes to grant the petition with respect to D.C. Mun. Regs. tit. 20 § 606.4 because it is not a permissible affirmative defense provision consistent with the requirements of the CAA and the EPA's recommendations in the EPA's SSM Policy. By purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Thus, this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental

requirements of the CAA. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

3. Virginia

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Virginia SIP that allows for discretionary exemptions during periods of malfunction (9 Va. Admin. Code § 5-20-180(G)).<sup>109</sup> First, the Petitioner objected because this provision provides an exemption from the otherwise applicable SIP emission limitations, and such an exemption is impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

Second, the Petitioner objected to the discretionary exemption for excess emissions during malfunction because the provision gives the state the authority to determine whether a violation "shall be judged to have taken place" (9 Va. Admin. Code § 5-20-180(G)). The Petitioner argued that this provision could be read to preclude enforcement by the EPA or citizens in the event that the state elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provision is also inconsistent with the CAA and the EPA's SSM Policy because it allows the state to make a unilateral decision that the excess

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<sup>109</sup> Petition at 70-71.

emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

Third, the Petitioner argued that while the regulation provides criteria, akin to an affirmative defense, by which the state must make such a judgment that the event is not a violation, the criteria "fall far short of EPA policy" and the provision "fails to establish any procedure through which the criteria are to be evaluated."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions such as 9 Va. Admin. Code § 5-20-180(G) that create exemptions by authorizing the state to determine that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption in 9 Va. Admin. Code § 5-20-180(G) is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that 9 Va. Admin. Code § 5-20-180(G) is also impermissible due to the inclusion of a director's discretion provision that purports to make the state

official the unilateral arbiter of whether the excess emissions in a given malfunction event constitute a violation. In the case of 9 Va. Admin. Code § 5-20-180(G), the provision authorizes the state official to judge that "no violation" has taken place. The provision therefore vests the state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any additional public process at the state or federal level. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or the public who may not agree with that conclusion. Most importantly, however, the provision purports to authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP and the emissions reductions that they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of a director's discretion provision in 9 Va. Admin. Code § 5-20-180(G) is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

Finally, the EPA agrees with Petitioner that although the exemption requires that certain conditions must be met by the source, the conditions set forth in the provision do not render it an acceptable affirmative defense provision. The Petitioner is correct that 9 Va. Admin. Code § 5-20-180(G) is not an acceptable affirmative defense provision under the CAA as interpreted in the EPA's SSM Policy. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such

affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Furthermore, Virginia's SIP provision is deficient because even if it attempts to create an affirmative defense rather than an automatic exemption from the emission limitations, it does so with conditions that are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 9 Va. Admin. Code § 5-20-180(G) does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision under the CAA. The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, and the insufficiently robust qualifying criteria in 9 Va. Admin. Code § 5-20-180(G) are substantial inadequacies and render this specific SIP provision impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 9 Va. Admin. Code § 5-20-180(G). The EPA believes that this provision allows for an exemption from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, 9 Va. Admin. Code § 5-20-180(G) allows for such an exemption through a state official's unilateral exercise of discretionary authority that includes no additional public process at the state or federal

level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions.

Moreover, even if the EPA were to consider 9 Va. Admin. Code § 5-20-180(G) as providing for an affirmative defense rather than an automatic exemption, the provision is not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy. By purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to ensure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Thus, this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA.

For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

#### 4. West Virginia

##### a. Petitioner's Analysis

The Petitioner made four types of objections identifying inadequacies regarding startup, shutdown, and malfunction provisions in West Virginia's SIP.<sup>110</sup> First, the

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<sup>110</sup> Petition at 72-74.

Petitioner objected to three specific provisions in the West Virginia SIP that allow for automatic exemptions from emission limitations, standards, and monitoring and recordkeeping requirements for excess emission during startup, shutdown, or malfunction (W. Va. Code R. § 45-2-9.1, W. Va. Code R. §45-7-10.3, and W. Va. Code R. §45-40-100.8). The Petitioner objected because all three of these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner also objected to all three of these provisions because, by providing an outright exemption from otherwise applicable requirements, the state has defined these excess emissions as not violations, thereby precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations.

Second, the Petitioner objected to seven discretionary exemption provisions because these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner noted that the provisions allow a state official to "grant an exception to the otherwise applicable visible emissions standards" due to "unavoidable shortage of fuel" or "any emergency situation or condition creating a threat to public safety or welfare" (W. Va. Code R. § 45-2-10.1), to permit excess emissions "due to unavoidable malfunctions of equipment" (W. Va. Code R. § 45-3-7.1, W. Va. Code R. § 45-5-13.1, W. Va. Code R. § 45-6-8.2, W. Va. Code R. § 45-7-9.1, and

W. Va. Code R. § 45-10-9.1), and to permit exceedances where the limit cannot be "satisfied" because of "routine maintenance" or "unavoidable malfunction" (W. Va. Code R. §45-21-9.3). The Petitioner argued that these provisions could be read to preclude enforcement by the EPA or citizens in the event that the state official elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the SIP's provisions are also inconsistent with the CAA as interpreted in the EPA's SSM Policy because they allow the state official to make a unilateral decision that the excess emissions were not a violation and thus purport to bar enforcement for the excess emissions by the EPA and citizens.

Third, the Petitioner objected to the alternative limit imposed on hot mix asphalt plants during periods of startup and shutdown in W. Va. Code R. § 45-3-3.2 because it was "not sufficiently justified" under the requirements of source category-specific rules. The Petitioner argued that this provision could provide an unacceptable deviation during periods of startup and shutdown from the otherwise applicable SIP emission limitations, and such deviations are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner argued that the alternative limits do not appear to meet the criteria for a source category-specific rule as permitted under the Act as interpreted in the EPA's SSM Policy.

Fourth, the Petitioner objected to a discretionary provision allowing the state to approve an alternative visible emission standard during startups and shutdowns for manufacturing processes and associated operations (W. Va. Code R. § 45-7-10.4). The Petitioner argued that such a provision "allows a decision of the state to preclude

enforcement by EPA and citizens."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for automatic exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunction are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. Two of the automatic exemption provisions identified by the Petitioner explicitly state that the standards shall not apply or that certain operations "shall be exempt" during periods of startup, shutdown, malfunction, or maintenance (W. Va. Code R. § 45-2-9.1, W. Va. Code R. § 45-7-10.3). The third automatic exemption states that requirements for monitoring, recordkeeping, and reporting will not apply under certain circumstances (W. Va. Code R. § 45-40-100.8). Such an exemption would affect the enforceability of the emission limitations and thus adversely affects the approvability of the emission limitations themselves. Moreover, failure to account accurately for excess emissions at sources during SSM events has a broader impact on NAAQS implementation and SIP planning, because such accounting directly informs the development of emissions inventories and emissions modeling. The exemptions therefore provide that the resulting excess emissions will not be violations,

which is contrary to the requirements of the CAA. The EPA believes that the inclusion of such automatic exemptions from emission limitations in W. Va. Code R. § 45-2-9.1, W. Va. Code R. § 45-7-10.3, and W. Va. Code R. § 45-40-100.8, is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

With respect to the Petitioner's concern that these exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

The EPA also agrees that the CAA does not allow for discretionary exemptions from otherwise applicable SIP emission limitations. As noted above, in accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions such as W. Va. Code R. § 45-2-10.1, W. Va. Code R. §45-3-7.1, W. Va. Code R. §45-5-13.1, W. Va. Code R. §45-6-8.2, W. Va. Code R. §45-7-9.1, W. Va. Code R. §45-10-9.1, and W. Va. Code R. §45-21-9.3 that create exemptions by permitting the state to determine that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of

these discretionary exemptions in the SIP is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA believes that W. Va. Code R. § 45-2-10.1, W. Va. Code R. § 45-3-7.1, W. Va. Code R. § 45-5-13.1, W. Va. Code R. § 45-6-8.2, W. Va. Code R. § 45-7-9.1, W. Va. Code R. § 45-10-9.1, and W. Va. Code R. § 45-21-9.3 are also impermissible because these provisions purport to make a state official the unilateral arbiter of whether the excess emissions in a given malfunction, maintenance, or emergency event constitute a violation. In the case of W. Va. Code R. § 45-2-10.1, the provision allows the state official to "grant an exception to the otherwise applicable visible emissions standards" due to "unavoidable shortage of fuel" or "any emergency situation or condition creating a threat to public safety or welfare." W. Va. Code R. § 45-3-7.1, W. Va. Code R. § 45-5-13.1, W. Va. Code R. § 45-6-8.2, W. Va. Code R. § 45-7-9.1, and W. Va. Code R. § 45-10-9.1 permit excess emissions "due to unavoidable malfunctions of equipment." The provision at W. Va. Code R. §45-21-9.3 permits exceedances where the limit cannot be "satisfied" because of "routine maintenance" or "unavoidable malfunction."

These provisions authorize the state official to judge that violations have not occurred even though the emissions exceeded the applicable SIP emission limitations. The SIP's provisions therefore vest the state official with the unilateral power to grant exemptions from otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. Most importantly, however, the provision purports to authorize the state official to create an exemption from the

otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of director's discretion provisions in W. Va. Code R. § 45-2-10.1, W. Va. Code R. § 45-3-7.1, W. Va. Code R. § 45-5-13.1, W. Va. Code R. § 45-6-8.2, W. Va. Code R. § 45-7-9.1, W. Va. Code R. § 45-10-9.1, and W. Va. Code R. § 45-21-9.3 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA notes that while the CAA does not allow for exemptions for excess emissions, it does, as discussed in section VII.A of this notice, permit states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. W. Va. Code R. § 45-3-3.2 and W. Va. Code R. § 45-2-10.2<sup>111</sup> do not appear to comply with the Act's requirements as interpreted in the EPA's SSM Policy. The alternative smoke and/or particulate matter limitation on hot mix asphalt plants that applies during periods of startup and shutdown (W. Va. Code R. § 45-3-3.2) does not comply with the CAA as interpreted in the EPA's policy because, for instance, it does not apply only to "specific, narrowly-defined source categories using specific control strategies."<sup>112</sup> W. Va. Code R. § 45-2-10.2, which allows fuel-burning units employing flue gas desulphurization systems to bypass such systems during "necessary planned or unplanned maintenance" and provides an alternative limit

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<sup>111</sup> The EPA notes that the Petitioner specifically focused on concern with W. Va. Code R. § 45-2-10.1, but the same issue affects W. Va. Code R. § 45-2-10.2.

<sup>112</sup> 1999 SSM Guidance Attachment at 4-5.

of 20-percent opacity during such periods, also does not comply with the CAA as interpreted in the EPA's SSM Policy. The EPA believes that such special emission limitations or emissions controls may be appropriate during startup or shutdown, but other modes of normal source operation, including maintenance, should be accounted for in the development of the emission limitations themselves. The EPA believes that the inclusion of alternative limits that do not meet the requirements of the CAA as interpreted in the EPA's SSM Policy in W. Va. Code R. § 45-3-3.2 and W. Va. Code R. § 45-2-10.2 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

The EPA also agrees that the discretionary provision allowing a state official to approve an alternative visible emission standard during startups and shutdowns for manufacturing processes and associated operations (W. Va. Code R. § 45-7-10.4) does not comply with the CAA or the EPA's SSM Policy interpreting the CAA. These provisions purport to authorize the state official to establish alternative limits for excess emissions during periods of startup and shutdown (or, potentially, to exempt those emissions altogether) on a case-by-case basis, and these provisions do not require the state official to consult with the EPA or to have those alternative limits approved by the EPA into the SIP, contrary to the EPA's SSM Policy interpreting the requirements of the CAA. The EPA believes that the inclusion of these alternative limitations, which do not comply with the EPA's interpretations of the requirements of the CAA, in W. Va. Code R. § 45-3-3.2 and W. Va. Code R. § 45-7-10.4, is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to W. Va. Code R. § 45-2-9.1, W. Va. Code R. § 45-7-10.3, and W. Va. Code R. § 45-40-100.8. The EPA believes that each of these provisions allows for automatic exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

The EPA proposes to grant the Petition with respect to W. Va. Code R. § 45-2-10.1, W. Va. Code R. § 45-3-7.1, W. Va. Code R. § 45-5-13.1, W. Va. Code R. § 45-6-8.2, W. Va. Code R. § 45-7-9.1, W. Va. Code R. § 45-10-9.1, and W. Va. Code R. § 45-21-9.3. The EPA believes that these provisions allow for discretionary exemptions from otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, these provisions allow for exemptions through a state official's unilateral exercise of discretionary authority that includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions.

The EPA also proposes to grant the Petition with respect to W. Va. Code R. § 45-

3-3.2, W. Va. Code R. § 45-2-10.2, and W. Va. Code R. § 45-7-10.4. The W. Va. Code R. § 45-3-3.2 applies to a broad category of sources and is not narrowly limited to a source category that uses a specific control strategy, as required by the EPA's SSM Policy interpreting the CAA. Similarly, W. Va. Code R. § 45-2-10.2 is inconsistent with the EPA's SSM Policy interpreting the CAA because it is an alternative limit that applies during periods of maintenance, and such alternative limits are only permissible during periods of startup and shutdown. The W. Va. Code R. § 45-7-10.4 allows state officials the discretion to establish alternative visible emissions standards during startup and shutdown upon application. This provision is inconsistent with the EPA's SSM Policy and requirements under the Act because, for example, the emission limitations are required to be developed in consultation with the EPA and must be included in the SIP itself. For these reasons, the EPA is proposing to find that W. Va. Code R. § 45-3-3.2, W. Va. Code R. § 45-2-10.2, and W. Va. Code R. § 45-7-10.4 are substantially inadequate to meet CAA requirements and is thus proposing to issue a SIP call with respect to these provisions.

*E. Affected States and Local Jurisdictions in EPA Region IV*

1. Alabama

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the Alabama SIP that allow for discretionary exemptions during startup, shutdown, or load change (Ala Admin Code Rule 335-3-14-.03(1)(h)(1)), and during emergencies (Ala Admin Code Rule 335-3-14-.03(1)(h)(2)).<sup>113,114</sup> First, the Petitioner objected because both of these

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<sup>113</sup> Petition at 17-18.

provisions provide exemptions from the otherwise applicable emission limitations, and such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

Second, the Petitioner objected to the discretionary exemptions for excess emissions during startup, shutdown, or load change that are also present in Ala Admin Code Rule 335-3-14-.03(1)(h)(1) because the emissions during such events can be reasonably avoided. The Petitioner noted that such events are part of normal source operation and that any special treatment of excess emissions during such events must be justified with a showing that the excess emissions could not be avoided through careful planning and design, and that bypassing controls in such events is necessary to prevent loss of life, personal injury, or severe property damage.

Third, the Petitioner objected to the discretionary emergency exemption provision that also is present in Ala Admin Code Rule 335-3-14-.03(1)(h)(2), because the provision gives the state "sole authority to determine whether or not a violation has occurred." The Petitioner argued that this provision could be read to preclude enforcement by the EPA or citizens in the event that the state elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued that the provision is also inconsistent with the CAA and the EPA's SSM Policy because it allows the state to make a unilateral decision that the excess emissions were

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<sup>114</sup> The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Alabama SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such exemptions from the emission limitations in Ala Admin Code Rule 335-3-14-.03(1)(h)(1) and Ala Admin Code Rule 335-3-14-.03(1)(h)(2) is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

In addition, the EPA agrees that startup, shutdown, and load change are all part of normal source operation and that such events are usually planned for and predictable, and thus emissions during such events are more controllable than those that might occur during an "emergency" or other form of malfunction. Unlike excess emissions in malfunctions, which are by definition presumed to be beyond the reasonable control of the source through proper design, operation, and maintenance, excess emissions that

occur during startup, shutdown, or load change can be anticipated and steps can be taken to minimize them. The Petitioner, citing the 1983 SSM Guidance, argued that the EPA's SSM Policy indicates that there should be "a higher showing to escape enforcement" during such planned events. While such a higher showing may be relevant in the context of whether a state elects to exercise its enforcement discretion, it should not be germane to whether or not the excess emissions constitute a violation of the applicable emission limitations. The EPA notes that the CAA does not allow exemptions for excess emissions during startup, shutdown, or load change, just as it does not allow such exemptions during malfunctions. As discussed in section VII.A of this notice, states may elect to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup and shutdown, but exemptions for excess emissions during such periods are inconsistent with the fundamental requirements of the CAA.

Finally, the EPA believes that both Ala Admin Code Rule 335-3-14-.03(1)(h)(1) and Ala Admin Code Rule 335-3-14-.03(1)(h)(2) are also impermissible as unbounded director's discretion provisions that make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of Ala Admin Code Rule 335-3-14-.03(1)(h)(1), the provision authorizes a state official unilaterally to "[ ], in the Air Permit, exempt on a case by case basis any exceedances of emission limits which cannot reasonably be avoided, such as during periods of start-up, shut-down or load change." This provision vests the state official with the unilateral power to grant in a state air permit, which may not provide any additional public process at the state or federal level, an exemption from the otherwise applicable emission limitations without

any bounds or parameters to the exercise of this discretion. By deciding that an exceedance of the emission limitation will not be a "violation," exercise of this discretion could preclude enforcement by the EPA or the public who may not agree that the emissions in question could not "reasonably be avoided." Most importantly, however, the provision authorizes the state official to create an exemption from the emission limitations, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the SIP emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. As discussed in section VII.A of this notice, such provisions are substantially inadequate to meet CAA requirements.

Similarly, the EPA believes that Ala Admin Code Rule 335-3-14-.03(1)(h)(2) authorizes a state official unilaterally to decide that a given event was an "emergency" and thus to create an exemption from the otherwise applicable emission limitations. In this case, the provision does contain some general parameters for the source to establish that there was an emergency (*e.g.*, the source has to "identify" the cause of the emergency) but nevertheless empowers the state official to make a unilateral determination as to whether the event was an emergency. The provision thus vests the official with the power to grant an exemption from the otherwise applicable SIP emission limitations without any additional public process at the state or federal level, and with insufficient bounds or parameters applicable to the exercise of this discretion. Again, most significantly, this discretion authorizes the creation of an exemption on a case-by-case basis that is not permissible in the first instance. Thus, this provision also may undermine the SIP emission limitations, and the emissions reductions they are intended to

achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Ala Admin Code Rule 335-3-14-.03(1)(h)(1) and Ala Admin Code Rule 335-3-14-.03(1)(h)(2) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason, in addition to the creation of impermissible exemptions.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ala Admin Code Rule 335-3-14-.03(1)(h)(1) and Ala Admin Code Rule 335-3-14-.03(1)(h)(2). The EPA believes that both of these provisions allow for exemptions from the otherwise applicable emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, Ala Admin Code Rule 335-3-14-.03(1)(h)(1) and Ala Admin Code Rule 335-3-14-.03(1)(h)(2) both allow for such exemptions through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations, when such exemptions are not permissible in the first instance. For these reasons, the EPA is proposing to find that Ala Admin Code Rule 335-3-14-.03(1)(h)(1) and Ala Admin Code Rule 335-3-14-.03(1)(h)(2) are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

2. Florida

a. Petitioner's Analysis

The Petitioner objected to three specific provisions in the Florida SIP that allow for generally applicable automatic exemptions for excess emissions during startup, shutdown, or malfunction (Fla. Admin. Code Ann Rule 62-201.700(1)), for fossil fuel steam generators during startup and shutdown (Fla. Admin. Code Ann Rule 62-201.700(2)), and for such sources during boiler cleaning and load change (Fla. Admin. Code Ann Rule 62-201.700(3)).<sup>115,116</sup> The Petitioner objected because all three of these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations.

The Petitioner objected to all three of these provisions because, by stating that the excess emissions during the relevant events and time periods "are permitted," the state has defined these excess emissions as not violations, thereby precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations. The Petitioner also argued that the provision creating exemptions for excess emissions during boiler cleaning and load change in Fla. Admin. Code Ann Rule 62-201.700(3) is impermissible specifically because it creates an exemption for excess emissions during normal source operation that "are not eligible for any relief under EPA guidance."

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<sup>115</sup> Petition at 30-31.

<sup>116</sup> The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Florida SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

After objecting to the three provisions that create the exemptions, the Petitioner noted that the related provision in Fla. Admin. Code Ann Rule 62-201.700(4) reduces the potential scope of the exemptions in the other three provisions if the excess emissions at issue are caused entirely or in part by things such as poor maintenance but that it does not eliminate the impermissible exemptions. Moreover, the Petitioner asserted that none of the four provisions provides any "procedure by which the factual premises of any of these subsections are to be proven."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitations must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, malfunction, boiler cleaning, or load change are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The three provisions identified by the Petitioner explicitly state that the excess emissions "shall be permitted" under certain circumstances and thus provide that the resulting excess emissions will not be violations contrary to the CAA, as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA believes that the inclusion of such exemptions from emission limitations in Fla. Admin. Code Ann Rule 62-201.700(1), Fla. Admin. Code Ann Rule 62-201.700(2) and

Fla. Admin. Code Ann Rule 62-201.700(3), is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA notes that these exemptions are impermissible even though the state has imposed some factual and temporal limitations on their potential scope. For example, in Fla. Admin. Code Ann Rule 62-201.700(1), the state has specified that the excess emissions from startup, shutdown, and malfunction events "shall be permitted" (*i.e.*, allowed and thus not treated as violations) provided: "(1) best operational practices to minimize emissions are adhered to and (2) the duration of excess emissions shall be minimized but in no case exceed two hours in any 24 hour period unless specifically authorized by the Department for longer duration." Similarly, in Fla. Admin. Code Ann Rule 62-201.700(2) with respect to startup and shutdown from certain sources, the state has conditioned the exemption "provided that best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized." In Fla. Admin. Code Ann Rule 62-201.700(3), the state has imposed much more specific limits on the duration of the events and some additional limitations on the excess emissions in the form of specified opacity limits that apply during such events. Although these extra limitations on the scope of the exemptions are helpful features, they nevertheless constitute a variance at a state official's discretion from the otherwise applicable emissions limitations, and the core problem remains that each of the three provisions provides impermissible exemptions from the emission limitations by defining the excess emissions as "permitted" and thus not violations. The CAA does, as discussed in section VII.A of this notice, allow states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or

shutdown. However, the Florida SIP provisions do not appear to comply with the Act's requirements as interpreted in the EPA's SSM Policy because, for instance, they do not apply only to "specific, narrowly-defined source categories using specific control strategies."<sup>117</sup>

With respect to the Petitioner's concern that these exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

In addition, the EPA agrees that the limiting provision of Fla. Admin. Code Ann Rule 62-201.700(4) that curtails the exemptions in the prior provisions if the excess emissions are caused "entirely or in part" by factors within the source's control such as "poor maintenance" does not negate the underlying problem of providing exemptions for the excess emissions in the first instance. The EPA acknowledges that this provision would serve to prevent sources that fail to maintain or operate correctly or otherwise to take action reasonably to prevent excess emissions during SSM events from getting the benefits of the exemption. However, the EPA recommends that these are the types of considerations that should be relevant either in the state's exercise of enforcement discretion for violations, in the state's adoption of a SIP provision concerning that exercise of enforcement discretion by the state, or by an appropriately drawn affirmative defense SIP provision for excess emissions in the case of malfunctions.

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<sup>117</sup> 1999 SSM Guidance Attachment at 4-5.

Finally, the Petitioner expressed concern that the four SIP provisions at issue "do not specify the procedure by which the factual premises are to be proven." Were these provisions authorizing a state official to make discretionary decisions as to whether or not a given event qualified for the (impermissible) exemption, there could be an additional concern that these provisions included a director's discretion problem as well. However, the EPA believes that these regulations are directly enforceable by the state, the EPA, or members of the public in the appropriate forums, and thus the "procedure" for proving the violation would be the normal process in such forums. The fact that the state has established factual requirements that would need to be evaluated in order to prove a violation of the applicable emission limitations is not itself inconsistent with CAA requirements. The EPA believes that providing requisite factual evidence to establish a violation in an enforcement proceeding is entirely appropriate.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Fla. Admin. Code Ann Rule 62-201.700(1), Fla. Admin. Code Ann Rule 62-201.700(2), Fla. Admin. Code Ann Rule 62-201.700(3), and Fla. Admin. Code Ann Rule 62-201.700(4). The EPA believes that each of these provisions allows for exemptions from the otherwise applicable emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing

to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to Fla. Admin. Code Ann Rule 62-201.700(1), Fla. Admin. Code Ann Rule 62-201.700(2), Fla. Admin. Code Ann Rule 62-201.700(3), and Fla. Admin. Code Ann Rule 62-201.700(4).

3. Georgia

a. Petitioner's Analysis

The Petitioner objected to a provision in the Georgia SIP that provides for exemptions for excess emissions during startup, shutdown, or malfunctions under certain circumstances (Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7)).<sup>118</sup> The Petitioner acknowledged that this provision of the Georgia SIP includes some conditions for when sources may be entitled to seek the exemption under state law, such as when the source has used "best operational practices" to minimize emissions during the SSM event.

First, the Petitioner objected because the provision creates an exemption from the applicable emission limitations by providing that the excess emissions "shall be allowed" subject to certain conditions, whereas the CAA and the EPA's interpretation of the CAA in the SSM Policy prohibit any such exemptions. The Petitioner noted that all excess emissions are required to be treated as violations of the applicable emission limitations, even if they would qualify for some other special consideration through other means such as enforcement discretion.

Second, the Petitioner argued that although the provision provides some "substantive criteria," the provision does not meet the criteria the EPA recommends for an affirmative defense provision consistent with the requirements of the CAA in the

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<sup>118</sup> Petition at 32.

EPA's SSM Policy. Third, the Petitioner asserted that the provision is not a permissible "enforcement discretion" provision applicable only to state personnel, because it "is susceptible to interpretation as an enforcement exemption, precluding EPA and citizen enforcement as well as state enforcement."

b. The EPA's Evaluation

At the outset, the EPA notes that the Petitioner failed to include any discussion of the extensive prior litigation and administrative proceedings concerning this specific provision of the Georgia SIP. Nearly 10 years ago, citizen suit plaintiffs including the Petitioner sought to bring an enforcement action against a source for self-reported exceedances of emission limitations in the source's operating permit, and the source asserted that those exceedances were not "violations" through application of a permit provision that mirrored the underlying SIP provision in Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7).<sup>119</sup> In that case, the plaintiffs argued that the provision at issue was an "enforcement discretion" provision applicable to state personnel only and thus that it was not relevant in the event of enforcement actions by other parties. The District Court agreed and held that the provision was merely an enforcement discretion provision applicable to the state and that it provided no affirmative defense in the enforcement action, and thus the court ruled in favor of the plaintiffs on this issue.<sup>120</sup>

On appeal, the Court of Appeals examined the same operating permit language and underlying SIP provision and came to a different conclusion.<sup>121</sup> The Court of Appeals

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<sup>119</sup> See, *Sierra Club, et al. v Georgia Power Co.*, 365 F. Supp 1297 (N.D. Ga. 2004).

<sup>120</sup> *Id.* at 1304. The court also made a series of findings to illustrate that the permit provision was not consistent with the EPA's interpretation of the CAA requirements concerning excess emissions during SSM events embodied in the 1999 SSM Guidance.

<sup>121</sup> See, *Sierra Club, et al. v. Georgia Power Co.*, 443 F.3d 1346 (11th Cir. 2006).

concluded that the provision does provide an affirmative defense and is not an enforcement discretion provision. Moreover, the Court noted that even if the provision is not consistent with the EPA's guidance on permissible affirmative defense provisions in SIPs (*e.g.*, because it creates exemptions for exceedances and purports to allow a complete bar to any liability, not just relief from monetary penalties), the EPA had not taken action through rulemaking to rectify that discrepancy. Because the EPA had not called upon the state to revise the SIP to bring it into compliance with the EPA's current interpretation of the CAA embodied in the 1999 SSM Guidance, the Court held that the exceedances of the applicable emission limitations were not violations and thus ruled against the plaintiffs.

Contemporaneously with this litigation, the Petitioner had also filed a May 23, 2005 petition for rulemaking, requesting that the EPA require the state to revise its SIP "to correct a significant ambiguity" concerning the excess emissions from SSM events.<sup>122</sup> On July 18, 2007, the EPA denied that petition.<sup>123</sup> As a basis for this denial, the EPA reasoned that the opinion of the Court of Appeals had rendered the petition moot as to the issues raised therein. Specifically, the EPA stated that the Court's decision that the existing provision did not create an "automatic exemption" and did constitute an "affirmative defense" resolved any "ambiguity" about the meaning and application of Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7).

At this juncture, the EPA believes that the extensive proceedings concerning Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) in which plaintiffs, defendants, courts, and both

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<sup>122</sup> The petition was filed by Richard M. Watson of the Georgia Center for Law in the Public Interest on behalf of the Georgia Chapter of the Sierra Club.

<sup>123</sup> *See*, Letter from Stephen E. Johnson, Administrator, to Georgia Chapter of the Sierra Club, dated July 18, 2007. A copy of this letter is in the docket for this action.

state and federal agencies examined the same provision and came to different conclusions concerning its meaning illustrates the need to examine this SIP provision again. In particular, the EPA concludes that the provision warrants further evaluation on the merits, because the Petition requests that the EPA consider more specific allegations about deficiencies in the provision than did the 2005 petition. As the 11th Circuit Court of Appeals suggested, the EPA agrees that a formal notice-and-comment rulemaking through CAA section 110(k)(5) is a good mechanism through which to evaluate whether or not Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) meets the substantive requirements of the CAA. Accordingly, the EPA is reevaluating the provision on the merits.<sup>124</sup>

The first concern with this provision is that it does create exemptions from the applicable emission limitations. The provision explicitly states that the "excess emissions resulting from startup, shutdown, malfunction of any source which occur though ordinary diligence is employed shall be allowed," *i.e.*, are exempt and not subject to enforcement for either monetary penalties or injunctive relief. The exemption for these excess emissions is conditioned upon several criteria relevant to minimizing emissions during the startup, shutdown, or malfunction event, which criteria are helpful and are structured as a form of affirmative defense. Even if Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) could otherwise qualify as an affirmative defense provision, however, the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense

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<sup>124</sup> The EPA notes that it is not bound to follow a prior incorrect interpretation of its own policy, nor is it precluded from changing its policy interpretations. *See, e.g., Luminant Generation Co. v. EPA*, 699 F.3d 427 (5th Cir. 2012), and U.S. Supreme Court precedent cited therein for these propositions.

provision that purports to bar any enforcement action for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304.

The EPA's second concern with Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) is that while the provision appears to create an affirmative defense, it does so with conditions that are not consistent with the full range of criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. In particular, the provision does not limit the type of event that qualifies as a malfunction to those that are entirely beyond the control of the source, that were not reasonably foreseeable and avoidable, and that were not part of a recurring pattern indicative of inadequate design, operation, or maintenance. While the EPA continues to believe that affirmative defense provisions applying to malfunctions can be consistent with the CAA as long as the criteria set forth in the SSM Policy are carefully adhered to, as explained in more detail in sections IV.B and VII.B of this notice, the EPA believes that the criteria in Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) should be augmented to assure that the affirmative defense is available only in appropriately narrow circumstances.

The EPA's third concern with Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) is that even if the provision were otherwise construed as an affirmative defense, it extends not just to malfunctions but also to startup and shutdown events. As explained in sections IV.B and VII.C of this notice, the EPA interprets the CAA to allow affirmative defense

provisions applicable to malfunctions but not to other normal modes of source operation, including startup and shutdown. Thus, the provision is not drawn to assure that the affirmative defense is available only in appropriately narrow circumstances, as required by the EPA's interpretation of CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7). The EPA believes that this provision allows for exemptions from the otherwise applicable emission limitations, and that such outright exemptions for excess emissions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. Such a provision is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

In addition, Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) is not a permissible affirmative defense provision consistent with the requirements of the CAA and the EPA's recommendations for such provisions in the EPA's SSM Policy. By creating a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Moreover, Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) currently applies not only to malfunctions but also to startup and shutdown events, contrary to the EPA's interpretation of the CAA. Thus, this provision is not appropriate as an affirmative defense provision

because it is inconsistent with fundamental requirements of the CAA as interpreted in the EPA's SSM Policy. For these reasons, the EPA is proposing to find that Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

4. Kentucky

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision that allows discretionary exemptions from otherwise applicable SIP emission limitations in Kentucky's SIP (401 KAR 50:055 §1(1)).<sup>125,126</sup> The provision provides that "[e]missions which, due to shutdown or malfunctions, temporarily exceed the standard . . . shall be deemed in violation of such standards unless the requirements of this section are satisfied and the determinations specified in subsection (4) . . . are made." The provision requires sources to notify the director that such violations are going to or have occurred. The provision then provides that "[a] source shall be relieved from compliance with the standards . . . if the director determines" that the source has met a number of enumerated criteria.

The Petitioner argued that this provision could provide an exemption from the otherwise applicable SIP emission limitations, and such an exemption is impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM

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<sup>125</sup> Petition at 39-40.

<sup>126</sup> The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in Kentucky's SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner objected to this discretionary exemption because the director's determination that the source has met the specified criteria could be interpreted to excuse excess emissions during such time period and could thus be read to preclude enforcement by the EPA or citizens in the event that the director elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provision is also inconsistent with the CAA as interpreted in the EPA's SSM Policy because it allows the director to make a unilateral decision that the excess emissions were not a violation and thus could bar enforcement for the excess emissions by the EPA and citizens.

The Petitioner noted that the criteria that sources must demonstrate to the director in order to qualify for the exemption "resemble the criteria that are supposed to guide a state's enforcement discretion for malfunctions," but that if the provision is not removed from the SIP, it "must stipulate that all excess emissions are violations and preserve the authority of EPA and citizens to enforce the SIP standards and limitations." Thus, the Petitioner viewed this provision as either an impermissible discretionary exemption mechanism or an impermissible enforcement discretion provision.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be

continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption from the emission limitations in 401 KAR 50:055 §1(1) is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that 401 KAR 50:055 §1(1) is impermissible as an unbounded director's discretion provision that makes a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of 401 KAR 50:055 §1(1), the provision authorizes the state official to make a determination that the source has met the specified criteria, and such a determination could be interpreted to excuse excess emissions during the event and could thus be read to preclude enforcement by the EPA or through a citizen suit. In addition, the provision vests a state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any additional public process at the state or federal level. Most importantly, however, the provision authorizes a state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the SIP emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in 401 KAR 50:055 §1(1) is thus

a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA also notes that after the submission of the Petition, there has been a subsequent regulatory action that touched upon this SIP provision tangentially. In connection with a redesignation of the Kentucky portion of the Cincinnati-Hamilton area for the 1997 PM<sub>2.5</sub> NAAQS, the state submitted an interpretive letter to the EPA explaining the state's reading of 401 KAR 50:055 §1(1).<sup>127</sup> In this November 4, 2011 letter, the Kentucky Division of Air Quality (KDAQ) stated that it has "never formally taken the position that excess emissions under the regulations are not violations" and that a determination by KDAQ "does not limit" the authority of the EPA and citizens to take enforcement action.<sup>128</sup> Based on the state's interpretation of 401 KAR 50:055 §1(1), the EPA at that time concluded that the provision could be construed not to bar enforcement by the EPA or through a citizen suit if the state elects not to pursue enforcement; *i.e.*, it could be construed as an enforcement discretion provision applicable to state personnel. In the context of acting upon the redesignation request under CAA section 107(d)(3), this clarification from the state was sufficient to address the concern raised in comments on that action. Nevertheless, the EPA noted in the redesignation action that it would evaluate 401 KAR 50:055 §1(1) as part of its consideration of issues raised by the Petition.

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<sup>127</sup> See, "Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Kentucky; Redesignation of the Kentucky Portion of the Cincinnati-Hamilton, OH-KY-IN 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment," 76 FR 77903 (Dec. 15, 2011).

<sup>128</sup> A copy of this letter can be found in the docket for this rulemaking.

At this juncture, the EPA believes that the difference of views about the correct reading of 401 KAR 50:055 §1(1) illustrates the need to examine this SIP provision again. The EPA appreciates KDAQ's clarification of its reading of the provision in the November 4, 2011, letter and the EPA considers that interpretation sufficient for purposes of the redesignation action. However, in the course of reevaluating this provision in light of the issues raised in the Petition, the EPA believes that the provision contains regulatory language that is potentially contradictory and requires formal revision to eliminate significant ambiguities. For example, subsection 1 of the provision states that: "[e]missions which, due to shutdown or malfunctions, temporarily exceed the standard . . . shall be deemed in violation of such standards unless the requirements of this section are satisfied." In subsection 4, the provision states that "a source shall be relieved from compliance with the standards . . . if the director determines, upon a showing by the owner or operator of the source, that" certain conditions are met. KDAQ has indicated that it reads these provisions not to bar enforcement by the EPA or through a citizen suit in the event that the state does not pursue enforcement, but the EPA believes that the provision is sufficiently ambiguous on this point that a revision is necessary to ensure that outcome in the event of an enforcement action.

As discussed in section VI.B of this notice, the EPA believes that in some instances it is appropriate to clarify provisions of a SIP through the use of interpretive letters. However, in some cases, there may be areas of regulatory ambiguity in a SIP's provisions that are sufficiently significant for which resolution is both appropriate and necessary. Because the text of Kentucky's SIP provision is not clearly phrased in terms of the state's exercise of enforcement discretion and could be interpreted to allow

discretionary exemptions from the otherwise applicable SIP emission limitations or as an affirmative defense provision inconsistent with the criteria recommended in the EPA's SSM Policy, the EPA believes that the provision is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 401 KAR 50:055 §1(1). The EPA believes that this provision requires clarification to ensure that it meets CAA requirements. The current provision could be read to allow for exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, 401 KAR 50:055 §1(1) could be read to allow exemptions through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the provision could be read to create discretion to allow case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. In light of the potential conflicts between the provision and the differing interpretations that parties or a court might give the provision in an enforcement action, the EPA is proposing to find that 401 KAR 50:055 §1(1) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

5. Kentucky: Jefferson County

a. Petitioner's Analysis

First, the Petitioner objected to a generally applicable provision in the Jefferson County Air Regulations 1.07 because it provides for discretionary exemptions from compliance with emission limitations during startup, shutdown, and malfunction.<sup>129,130</sup> The provision states that "[e]missions due to startup, shutdown, malfunction, or emergency, that temporarily exceed the standards . . . shall be deemed in violation of those standards unless, based upon a showing by the owner or operator of the source and an affirmative determination by the District, the applicable requirements of this regulation are satisfied." The provision requires different demonstrations for exemptions for excess emissions during startup and shutdown (Regulation 1.07 § 3), malfunction (Regulation 1.07 § 4 and § 7), and emergency (Regulation 1.07 § 5 and § 7).

The Petitioner argued that this provision could provide exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations. The Petitioner objected to this provision as allowing discretionary exemptions, because a local official's determination that the source has met the specified criteria could be interpreted to excuse excess emissions during such events and could thus be read to preclude enforcement by the EPA or citizens if the district elects not to treat the event as a violation.

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<sup>129</sup> The Petitioner noted that this regulation was approved into Kentucky's SIP in "Approval and Promulgation of Air Quality Implementation Plans; Kentucky; Approval of Revisions to State Implementation Plan; Revised Format for Materials Being Incorporated by Reference for Jefferson County, Kentucky," 66 FR 53503 at 53660 (Oct. 23, 2001).

<sup>130</sup> Petition at 40-42.

Second, the Petitioner objected to the affirmative defense for emergencies in Jefferson County Air Regulations 1.07. The Petitioner noted that the SIP provision "mirrors the language in 40 C.F.R. § 70.6(g)" in the EPA's own title V regulations. Thus, the Petitioner argued that the provision should not be included in the SIP because it is modeled on the EPA's own title V regulations, and such regulations do not belong in the SIP. The Petitioner also argued that even if the provision were appropriate as a SIP provision, it is deficient because it is not a "true affirmative defense." On the latter point the Petitioner argued that a "true affirmative defense" is a defense to be asserted by the source in the context of a judicial or administrative enforcement proceeding. The Petitioner opined that the emergency affirmative defense in Jefferson County Air Regulations 1.07 "appears to allow the District to decide whether the defense applies."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a government official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes

that the inclusion of such an exemption from the emission limitations in Jefferson County Air Regulations 1.07 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that Regulation 1.07 is also impermissible as an insufficiently bounded director's discretion provision that makes a local official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of Regulation 1.07, the provision authorizes local officials to make a determination that the source has met the specified criteria for each type of event—startup and shutdown (Regulation 1.07 § 3), malfunction (Regulation 1.07 § 4), emergency (Regulation 1.07 § 5), and extended malfunction or emergency (Regulation 1.07 § 7). The local official's "affirmative determination" that such requirements have been met has the effect of excusing the excess emissions (Regulation 1.07 § 2.1). This determination could be interpreted to preclude enforcement by the EPA or through a citizen suit. In addition, the provision vests the local official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. Most importantly, however, the provision authorizes the local official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Regulation 1.07 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA also agrees that Regulation 1.07 provides an impermissible exemption for excess emissions that occur during "emergencies." The provision uses language that is borrowed from the EPA's title V regulations (Regulation 1.07 § 5) but that is not appropriate for a SIP provision (*see* section VII.D of this notice). In addition, because Regulation 1.07 § 2.1 provides that the district may make a determination of whether "applicable requirements" of the regulation are "satisfied," and the affirmative defense for emergencies is defined as one such "applicable requirement," the structure of Regulation 1.07 could be read as providing the district with the unilateral discretion to decide that the source has met the conditions for the affirmative defense. The EPA agrees with the Petitioner that affirmative defenses are only permitted in the context of an enforcement proceeding and cannot be granted unilaterally by a state agency, because this would have the effect of precluding the EPA or the public from taking enforcement action.

Regulation 1.07 also does not explicitly limit the affirmative defense for emergency events to civil penalties. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* sections IV.B and VII.B of this notice), the EPA's interpretation of the CAA is that affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. In addition, the provision does not contain elements for establishing the affirmative defense consistent with all of the recommended criteria in the EPA's SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the

requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Regulation 1.07 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision for purposes of SIP requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Jefferson County Air Regulation 1.07.<sup>131</sup> The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, Regulation 1.07 allows for such exemptions through a local official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations, when such exemptions are not permissible in the first instance. For these reasons, the EPA is proposing to find that Regulation 1.07 is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition because Regulation 1.07 contains an impermissible exemption for excess emissions during emergency events, conditioned upon an affirmative defense provision that is inconsistent with the criteria recommended

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<sup>131</sup> The EPA notes that Kentucky has recently made a SIP submission that includes revisions to the portion of the SIP applicable to Jefferson County that would amend Regulation 1.07. In this action, the EPA is only evaluating Regulation 1.07 as currently approved into the SIP. The EPA is not evaluating the more recent SIP submission as part of this action. The EPA will address the SIP submission in a later action.

in the EPA's SSM Policy. Regulation 1.07 can be read to authorize the district to grant an exemption under § 2.1 and § 5, and such an interpretation could preclude the EPA and the public from bringing an enforcement action. Furthermore, the affirmative defense provision is impermissible because it does not explicitly limit the defense to monetary penalties, and it does not include sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions. The provision therefore also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. For these reasons, the EPA is proposing to find that Regulation 1.07 is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

6. Mississippi

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the Mississippi SIP that allow for affirmative defenses for violations of otherwise applicable SIP emission limitations during periods of upset, *i.e.*, malfunctions (11-1-2 Miss. Code R. § 10.1) and unavoidable maintenance (11-1-2 Miss. Code R. § 10.3).<sup>132</sup> First, the Petitioner objected to both of these provisions based on its assertion that the CAA allows no affirmative defense provisions in SIPs. Second, the Petitioner asserted that even if affirmative defense provisions were permissible under the CAA, the affirmative defenses in these provisions "fall far short of the EPA policy." Specifically, the Petitioner argued that the EPA's guidance for affirmative defenses recommends that they "are not

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<sup>132</sup> Petition at 47-49.

appropriate where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments,"<sup>133</sup> and Mississippi's provisions do not contain a restriction to address this point. Further, the Petitioner argued that the affirmative defenses in Mississippi's SIP are not limited to actions seeking civil penalties and that they fail to meet other criteria "that EPA requires for acceptable defense provisions."<sup>134</sup> Finally, the Petitioner argued that the CAA and the EPA's SSM Policy interpreting it do not allow affirmative defenses for excess emissions during maintenance events under any circumstances.

The Petitioner also objected to a generally applicable provision that provides an exemption from otherwise applicable SIP emission limitations during startup and shutdown (11-1-2 Miss. Code R. § 10.2).<sup>135</sup> Within that provision, 11-1-2 Miss. Code R. § 10.2(a)(2) specifies that emission limitations apply during startup and shutdown except "when a startup or shutdown is infrequent, the duration of the excess emissions is brief in each event, and the design of the source is such that the period of excess emissions cannot be avoided without causing damage to the equipment or persons." The Petitioner argued that such an exemption is inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

b. The EPA's Evaluation

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<sup>133</sup> Petition at 48.

<sup>134</sup> Petition at 47-48.

<sup>135</sup> Petition at 47-49.

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in section IV of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. So long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense provisions for malfunctions.

The EPA agrees, however, that the affirmative defense contained in 11-1-2 Miss. Code R. § 10.1 for upsets is not an acceptable affirmative defense provision under the CAA as interpreted in the EPA's SSM Policy. Section 10.1 provides that "[t]he occurrence of an upset ... constitutes an affirmative defense to an enforcement action brought for noncompliance with emission standards," conditioned upon the source meeting a series of criteria. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the Act for malfunction events (*i.e.*, upsets) (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that an affirmative defense can only shield the source from monetary penalties and cannot be a bar to injunctive relief. The provisions of 11-1-2 Miss. Code R. § 10.1 applicable to upsets appears to create a bar not just to monetary penalties but also to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 204.

In addition, the EPA agrees that 11-1-2 Miss. Code R. § 10.1 creates an affirmative defense for upsets with conditions that are not fully consistent with the

criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 11-1-2 Miss. Code R. § 10.1 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. Although this provision does contain many criteria that are comparable to those the EPA recommends, it does not address several that the EPA believes to be necessary to assure that the affirmative defense is available only in appropriate circumstances. For example, 11-1-2 Miss. Code R. § 10.1 does not contain criteria requiring the source to show that the malfunction event was not part of a recurring pattern indicative of inadequate design, operation, or maintenance. In addition, as discussed in section VII.B of this notice, the EPA believes that affirmative defense provisions should address the issue of single sources or groups of sources that have the potential to have adverse impacts on the NAAQS or PSD increments in one of two recommended ways. On its face, 11-1-2 Miss. Code R. § 10.1 does not appear to address this issue in either way. The EPA believes that the inclusion of the bar to enforcement for injunctive relief and the insufficiently robust qualifying criteria render 11-1-2 Miss. Code R. § 10.1 substantially inadequate to meet CAA requirements.

The EPA also agrees with the Petitioner that the affirmative defense for excess emissions during maintenance provided in 11-1-2 Miss. Code R. § 10.3 is not consistent with CAA requirements. As explained in sections IV and VII.C of this notice, the EPA believes that affirmative defenses are only permissible under the CAA in the case of events that are beyond the control of the source, *i.e.*, malfunctions. Affirmative defense

provisions are not appropriate in the case of planned source actions, such as maintenance, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation. Although this provision does contain parameters to limit its availability, it still provides an affirmative defense that is inconsistent with CAA requirements. The EPA believes that the inclusion of the affirmative defense for excess emissions during maintenance in 11-1-2 Miss. Code R. § 10.3 renders that provision substantially inadequate to meet CAA requirements.

The EPA also agrees that 11-1-2 Miss. Code R. § 10.2(a)(2) contains an exemption for excess emissions during startup and shutdown events that is inconsistent with CAA requirements. The EPA acknowledges that the state has imposed some parameters on the scope of the exemption by requiring that the events be infrequent, of short duration, and required to avoid damage to equipment or people. However, the EPA does not interpret the CAA to allow for exemptions for excess emissions during startup and shutdown. As discussed in section VII.A of this notice, the EPA believes that sources should be designed, operated, and maintained so that they can comply with applicable SIP emission limitations during normal modes of source operation. If appropriate, the state may elect to develop special emission limitations or other control measures that apply during startup and shutdown. The EPA believes that the inclusion of an exemption for excess emissions during startup and shutdown in 11-1-2 Miss. Code R. § 10.2 is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 11-1-2 Miss. Code R. § 10.1, 11-1-2 Miss. Code R. § 10.2, and 11-1-2 Miss. Code R. § 10.3. None of these

provisions is consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy. The EPA believes that 11-1-2 Miss. Code R. § 10.1 and 11-1-2 Miss. Code R. § 10.3 create affirmative defenses that are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, these provisions are inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise these affirmative defenses have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, 11-1-2 Miss. Code R. § 10.1 also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. The comparable affirmative defense for maintenance in 11-1-2 Miss. Code R. § 10.3 is not consistent with CAA requirements because maintenance is a normal mode of source operation during which the source should be expected to comply with the applicable emission limitations. Thus, these provisions are not appropriate as affirmative defense provisions because they are inconsistent with fundamental requirements of the CAA.

The EPA is proposing to find that 11-1-2 Miss. Code R. § 10.2 is substantially inadequate to meet CAA requirements because it provides an exemption for excess emissions that occur during startup and shutdown, which are normal modes of source operation during which sources should comply with applicable emission limitations. Such an exemption provision is inconsistent with the fundamental requirements of the CAA

with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

7. North Carolina

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the North Carolina SIP that provide exemptions for emissions exceeding otherwise applicable SIP emission limitations at the discretion of the state agency during malfunctions (15A N.C. Admin. Code 2D.0535(c)) and during startup and shutdown (15A N.C. Admin. Code 2D.0535(g)).<sup>136</sup> The Petitioner argued that both provisions allow a state official to exempt sources from compliance with otherwise applicable SIP emission limitations, and therefore both provisions allow a state official to decide whether a violation has occurred. This decision would preclude enforcement action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA. The Petitioner noted that the director's discretion provision for malfunctions provided by 15A N.C. Admin. Code 2D.0535(c) is limited to 15 percent of operating time during each calendar year. According to the Petitioner, this temporal limit does not render the provision permissible under the CAA

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<sup>136</sup> Petition at 57-58.

and the EPA's SSM policy interpreting the CAA, because the limit "does nothing to ensure that ambient air quality standards are met."<sup>137</sup>

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) are impermissible as insufficiently bounded director's discretion provisions. The explicit text of 15A N.C. Admin. Code 2D.0535(c) states that "[a]ny excess emissions ... are considered a violation ... unless the owner or operator of the source of excess emissions demonstrates to the Director, that the excess emissions are the result of a malfunction." Similarly, 15A N.C. Admin. Code 2D.0535(g) provides that a state official may determine that excess emissions during startup and shutdown are unavoidable, in which case emissions exceeding the otherwise applicable SIP limitations are not considered violations. These provisions vest the state official with unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any public process at the state or federal level. Such a determination that the

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<sup>137</sup> Petition at 58.

excess emissions in a given event do not constitute a violation could preclude enforcement by the EPA or through a citizen suit. While both provisions contain a list of factors that the state official "shall consider" in making the discretionary determination, they nevertheless empower the state official to create an exemption from the emission limitations, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

Finally, the EPA notes that 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) contain a number of criteria for consideration by the state official when deciding whether the excess emissions should be treated as exempt and thus not as a violation. Superficially, these criteria are similar to those recommended by the EPA for affirmative defense provisions for malfunctions to meet CAA requirements, but they are not presented as criteria for an affirmative defense. Instead, each provision is structured so that if the source has met these criteria, the state official will deem the excess emissions not a violation. Moreover, instead of requiring that the source establish these facts in an administrative or judicial process, the provision appears to authorize the state official to make a unilateral determination whether the emissions are a violation and thus appears to bar enforcement by the EPA or through a citizen suit.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g). The EPA believes that both of these provisions could be read to allow for exemptions from otherwise applicable SIP emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Moreover, the discretion created by this provision could be read to allow case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Such exemption provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

8. North Carolina: Forsyth County

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the Forsyth County Code that provide exemptions for emissions exceeding otherwise applicable SIP emission limitations at the discretion of a local official during malfunctions (Forsyth County Code, ch. 3, 3D.0535(c)) and startup and shutdown (Forsyth County Code, ch. 3,

3D.0535(g)).<sup>138</sup> The Petitioner argued that these "local regulations have the same problems as the [North Carolina] state-wide regulations" addressed in the previous section.<sup>139</sup> The Petitioner argued that both provisions allow the local official to exempt sources from compliance with otherwise applicable SIP emission limitations, and therefore both provisions allow the local official to decide whether a violation has occurred. This decision would preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such a provision is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a government official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) are impermissible as insufficiently bounded director's discretion provisions. Forsyth County Code, ch. 3, 3D.0535(c) states that "[a]ny excess emissions ... are considered a violation ... unless the owner or operator of the source of excess emissions demonstrates to the Director, that the excess emissions are the result of

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<sup>138</sup> Petition at 58.

<sup>139</sup> Petition at 58.

a malfunction." Similarly, Forsyth County Code, ch. 3, 3D.0535(g) provides that a local official may determine that excess emissions during startup and shutdown are unavoidable, in which case emissions exceeding the otherwise applicable SIP limitations are not considered violations. These provisions vest the local official with unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any public process at the local, state, or federal level. Such a determination that the excess emissions in a given event do not constitute a violation could preclude enforcement by the EPA or through a citizen suit. While both provisions contain a list of factors that the local official "shall consider" in making the discretionary determination, they nevertheless empower the local official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

As with the comparable statewide SIP provisions, the EPA notes that Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) also would not qualify as affirmative defense provisions consistent with CAA requirements. The provisions authorize the local official to deem excess emissions exempt and thus not subject to enforcement for injunctive relief. The provisions also appear to authorize the

local official to make a unilateral determination that the emissions are not a violation and thus to bar enforcement by the EPA or through a citizen suit.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g). The EPA believes that both of these provisions could be read to allow for exemptions from otherwise applicable SIP emission limitations through a local official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the local, state, or federal level. Moreover, the discretion created by this provision could be read to allow case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Such exemption provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the air agency has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

9. South Carolina

a. Petitioner's Analysis

The Petitioner objected to three provisions in the South Carolina SIP, arguing that they contained impermissible source category- and pollutant-specific exemptions.<sup>140</sup> The Petitioner characterized these provisions as providing exemptions from opacity limits for fuel-burning operations for excess emissions that occur during startup or shutdown (S.C. Code Ann. Regs. 61-62.5 St 1(C)), exemptions from NO<sub>x</sub> limits for special-use burners that are operated less than 500 hours per year (S.C. Code Ann. Regs. 61-62.5 St 5.2(I)(b)(14)), and exemptions from sulfur limits for kraft pulp mills for excess emissions that occur during startup, shutdown, or malfunction events (S.C. Code Ann. Regs. St 4(XI)(D)(4)). The Petitioner argued that such exemptions violate the fundamental CAA requirement that all excess emissions be considered violations and that they interfere with enforcement by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with CAA sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitation must be considered a violation of such limitation, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, maintenance, or malfunctions are not violations of the applicable SIP emission limitations are inconsistent with the fundamental requirements of the CAA.

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<sup>140</sup> Petition at 65-66.

The first provision identified by the Petitioner states that "[t]he opacity standards set forth above do not apply during startup or shutdown." The EPA agrees with the Petitioner that the effect of this language is to exempt excess emissions that occur during startup or shutdown from otherwise applicable opacity standards, essentially treating such emissions as non-violations. The EPA believes that such automatic exemptions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable SIP emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. Therefore, the EPA believes that the inclusion of such an automatic exemption in S.C. Code Ann. Regs. 61-62.5 St 1(C) is impermissible and renders the provision a substantial inadequacy under the CAA.

With respect to the Petitioner's second objection relating to the exemption for special-use burners, however, the EPA disagrees with the Petitioner's characterization of the provision. S.C. Code Ann. Regs. 61-62.5 St 5.2(I)(b)(14) provides: "The following sources are exempt from all requirements of this regulation unless otherwise specified: . . . (14) Special use burners, such as start-up/shut-down burners, that are operated less than 500 hours a year." The Petitioner argued that this provision provides an exemption from otherwise applicable NO<sub>x</sub> limitations for excess emissions that occur during startup or shutdown. Although this provision superficially resembles an exemption for emissions during startup and shutdown, the EPA interprets this provision merely to define a specific source category—special-use burners—that is not subject to control under S.C. Code Ann. Regs. 61-62.5 St 5.2, *Control of Oxides of Nitrogen (NO<sub>x</sub>)*. In other words, the provision reflects that regulation of special-use burners is not necessary in order to meet

the applicable RACT requirements or any other CAA requirements for NO<sub>x</sub> emissions in this area. Rather than an exemption for NO<sub>x</sub> emissions during startup and shutdown for a source category that is regulated for NO<sub>x</sub>, this provision merely reflects that this category of source is not subject to regulation under S.C. Code Ann. Regs. 61-62.5 St 5.2.

Therefore, the EPA disagrees with the Petitioner that S.C. Code Ann. Regs. 61-62.5 St 5.2(I)(b)(14) renders the South Carolina SIP substantially inadequate.

Finally, the EPA agrees that S.C. Code Ann. Regs. St 4(XI)(D)(4) implicitly includes impermissible exemptions for excess emissions during startup, shutdown, and malfunction events for the affected sources. The provision states that "[t]he Department will consider periods of excess emissions reported under Subpart D(3) of this section to be indicative of a violation if" the emissions from the specified source categories exceed certain limits over certain time periods. For example, for recovery furnaces, S.C. Code Ann. Regs. St 4(XI)(D)(4)(b) specifies that excess emissions will be "indicative of a violation" if "(a) the number of 12 hour exceedances from recovery furnaces is greater than 1% of the total number of contiguous 12 hour periods in a quarter (excluding periods of startup, shutdown, or malfunction . . .)." The parenthetical explicitly excludes the excess emissions that occur during startup, shutdown, and malfunction, automatically treating those emissions as non-violations. The other two source category-specific provisions to be considered in determining whether excess emissions are indicative of a violation contain similar parenthetical exclusions. Therefore, these provisions could reasonably be construed to preclude the EPA and the public from enforcing against violations that occur during these SSM events at these sources. The EPA believes that S.C. Code Ann. Regs. St 4(XI)(D)(4) includes automatic exemptions for excess

emissions during SSM events for the three categories of sources and is thus substantially inadequate to satisfy CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to S.C. Code Ann. Regs. 61-62.5 St 1(C). The EPA believes that S.C. Code Ann. Regs. 61-62.5 St 1(C) allows for an exemption from otherwise applicable SIP emission limitations and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA also proposes to grant the Petition with respect to S.C. Code Ann. Regs. St 4(XI)(D)(4). This provision appears to define violations at three source categories in a way that excludes excess emissions that occur during SSM events. It is unclear whether this provision is intended only to apply to the exercise of enforcement discretion by state personnel, but the EPA believes that it could reasonably be interpreted to preclude the EPA and citizen enforcement as well. Because S.C. Code Ann. Regs. St 4(XI)(D)(4) appears to define violations of the applicable emission limitations in a way that excludes excess emissions during SSM events, it is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that S.C. Code Ann. Regs. 61-62.5 St 1(C) and S.C. Code Ann. Regs. St 4(XI)(D)(4) are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

However, the EPA proposes to deny the Petition with respect to S.C. Code Ann. Regs. 61-62.5 St 5.2(I)(b)(14), which does not exempt excess emissions from an otherwise applicable SIP emission limitation during startup and shutdown but rather excludes a specific source category from regulation under the South Carolina SIP,

because such regulation was deemed unnecessary to meet other applicable CAA requirements. As a consequence, this provision does not constitute a substantial inadequacy in the SIP.

10. Tennessee

a. Petitioner's Analysis

The Petitioner objected to three provisions in the Tennessee SIP.<sup>141</sup> First, the Petitioner objected to two provisions that authorize a state official to "excuse or proceed upon" (Tenn. Comp. R. & Regs. 1200-3-20-.07(1)) violations of otherwise applicable SIP emission limitations that occur during "malfunctions, startups, and shutdowns" (Tenn. Comp. R. & Regs. 1200-3-20-.07(3)). The Petitioner argued that together, these provisions constitute a "blanket exemption from enforcement at the unfettered discretion of" a state official. Further, the Petitioner contended that once a violation has been "excused" by the state official, that decision could preclude enforcement by the EPA or citizens in violation of the CAA.

Second, the Petitioner objected to a provision that excludes excess visible emissions from the requirement that the state automatically issue a notice of violation for all excess emissions (Tenn. Comp. R. & Regs. 1200-3-5-.02(1)). This provision states that "due allowance may be made for visible emissions in excess of that permitted in this chapter which are necessary or unavoidable due to routine startup and shutdown conditions." The Petitioner argued that Tenn. Comp. R. & Regs. 1200-3-5-.02(1) is inconsistent with EPA's interpretation of the CAA because it operates as a blanket exemption for opacity violations.

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<sup>141</sup> Petition at 67-69.

b. The EPA's Evaluation

While the Petitioner suggested that Tenn. Comp. R. & Regs. 1200-3-20-.07(1) and Tenn. Comp. R. & Regs. 1200-3-20-.07(3) combine to operate as an impermissible discretionary exemption, the EPA believes that these provisions are better understood as attempting to provide the state agency with the discretion to decide whether to pursue an enforcement action. As discussed more fully in section IX.A of this notice, the EPA's SSM Policy has consistently encouraged states to utilize traditional enforcement discretion within appropriate bounds for violations relating to excess emissions that occur during SSM events. Moreover, the 1982 SSM Guidance explicitly recommended criteria that states might consider in the event that they elected to formalize their enforcement discretion with provisions in the SIP. However, such enforcement discretion provisions in a SIP must be "state-only," meaning that the provisions apply only to the state's own enforcement personnel and not to the EPA or to others. Here, the Tennessee SIP goes too far because a court could reasonably conclude that the provisions in question preclude the EPA and the public from enforcing against violations that occur during SSM events if the state official chooses to "excuse" such violations. Therefore, the EPA ultimately agrees with the Petitioner that Tenn. Comp. R. & Regs. 1200-3-20-.07(1) and Tenn. Comp. R. & Regs. 1200-3-20-.07(3) are substantially inadequate to satisfy CAA requirements.

In regard to Tenn. Comp. R. & Regs. 1200-3-5-.02(1), the EPA agrees with the Petitioner that this provision operates as an impermissible discretionary exemption because it allows a state official to excuse excess visible emissions after giving "due allowance" to the fact that they were emitted during startup or shutdown events. The EPA believes that this provision is impermissible because it creates unbounded discretion that

purports to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation of otherwise applicable SIP emission limitations. More importantly, the provision purports to authorize the state official to create exemptions from applicable SIP emission limitations when such exemptions are impermissible in the first instance. As discussed in more detail in section VII.A of this notice, these types of director's discretion provisions undermine the purpose of emission limitations and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of such a director's discretion provision in Tenn. Comp. R. & Regs. 1200-3-5-.02(1) is therefore a substantial inadequacy that renders the provision impermissible under the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Tenn. Comp. R. & Regs. 1200-3-20-.07(1) and Tenn. Comp. R. & Regs. 1200-3-20-.07(3). These enforcement discretion provisions could reasonably be interpreted to preclude EPA and citizen enforcement of applicable SIP emission limitations, in violation of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA also proposes to grant the Petition with respect to Tenn. Comp. R. & Regs. 1200-3-5-.02(1). The discretion created by this provision allows for revisions of the applicable SIP emission limitations without meeting the applicable SIP revision requirements of the CAA, and it allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Thus, this provision is also inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that these

provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

11. Tennessee: Knox County

a. Petitioner's Analysis

The Petitioner objected to a provision in the Knox County portion of the Tennessee SIP that bars evidence of a violation of SIP emission limitations from being used in a citizen enforcement action (Knox County Regulation 32.1(C)).<sup>142</sup> The provision specifies that "[a] determination that there has been a violation of these regulations or orders issued pursuant thereto shall not be used in any law suit brought by any private citizen." The Petitioner argued that this provision would prevent reports of SSM conditions, which owners and operators are required to submit per Knox County Regulation 34.1(A), from being used as evidence in citizen suits, thereby undermining the express authorization of citizen enforcement actions under the CAA.

b. The EPA's Evaluation

The EPA agrees with the Petitioner that Knox County Regulation 32.1(C) is inconsistent with the fundamental requirements of the CAA. Section 113(e)(1) of the CAA requires a court to take into consideration "the duration of the violation as established by any credible evidence" in determining penalties in citizen enforcement actions. Moreover, section 114(c) of the CAA states that "[a]ny records, reports or information" obtained from sources "shall be available to the public . . . ." In accordance with these statutory mandates, the EPA promulgated its "credible evidence rule" in 1997. That rule states: "[f]or purpose of . . . establishing whether or not a person has violated or

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<sup>142</sup> Petition at 69.

is in violation of any standard . . . , the [SIP] must not preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements . . ."143

The EPA believes that the Knox County Regulation 32.1(C) runs afoul of these statutory and regulatory provisions. Knox County Regulation 32.1(c) explicitly bars a state official's determination that there has been a violation of a SIP emission limitation from being used as evidence in a citizen enforcement action, even though SIPs are prohibited from precluding the use of such evidence. The provision could also be interpreted to bar citizens from using evidence of a violation used by the state official in making such a determination, including reports of SSM conditions. Consequently, Knox County Regulation 32.1(C) is inconsistent with the fundamental requirements of CAA sections 113(e)(1) and 114(c) and the credible evidence rule. Moreover, by seeking to restrain the ability of private citizens to pursue enforcement actions, the provision is inconsistent with the fundamental enforcement structure created by Congress in CAA section 304. As such, the EPA believes that the Knox County Regulation 32.1(C) constitutes a substantial inadequacy in the Tennessee SIP.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Knox County Regulation 32.1(C). This provision precludes the use of a state determination that a violation has occurred from being used as evidence in a citizen enforcement action, in violation of CAA sections 113(e)(1), 114(c), and 304, and the credible evidence rule. Therefore, the EPA is proposing to find that this provision is substantially inadequate to meet CAA

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<sup>143</sup> 51 CFR 31.212(c); *see also* "Credible Evidence Revisions," 62 FR 8155 at 8314 (Feb. 24, 1997).

requirements and proposes to issue a SIP call with respect to this provision in the Knox County portion of the state's SIP.

12. Tennessee: Shelby County

a. Petitioner's Analysis

The Petitioner objected to a provision in the Shelby County Code (Shelby County Code § 16-87) that addresses enforcement for excess emissions that occur during "malfunctions, startups, and shutdowns" by incorporating by reference the state's provisions in Tenn. Comp. R. & Regs. 1200-3-20.<sup>144</sup> Shelby County Code § 16-87 provides that "all such additions, deletions, changes and amendments as may subsequently be made" to Tennessee's regulations will automatically become part of the Shelby County Code. The Petitioner argued that once Tennessee changes its regulations, those revised provisions will be effective in the Shelby County Code but will not be effective as part of the SIP until they are submitted to the EPA and approved.

b. The EPA's Evaluation

The EPA agrees that because Shelby County Code § 16-87 incorporates by reference provisions in the Tennessee SIP that are substantially inadequate, the Shelby County portion of the Tennessee SIP is likewise substantially inadequate to satisfy the fundamental requirements of the CAA for the same reasons.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Shelby County Code § 16-87. For the same reasons that the EPA has determined that the Tennessee SIP is substantially inadequate to meet CAA requirements, the EPA believes that the Shelby

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<sup>144</sup> Petition at 69-70.

County portion of the Tennessee SIP is substantially inadequate as well. Therefore, the EPA proposes to issue a SIP call with respect to this provision in the Shelby County portion of the state's SIP.

*F. Affected States in EPA Region V*

1. Illinois

a. Petitioner's Analysis

The Petitioner objected to three generally applicable provisions in the Illinois SIP which together have the effect of providing discretionary exemptions from otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.<sup>145,146</sup> The Petitioner noted that the provisions invite sources to request, during the permitting process, advance permission to continue to operate during a malfunction or breakdown, and, similarly to request advance permission to "violate" otherwise applicable emission limitations during startup (Ill. Admin. Code tit. 35 § 201.261). The Illinois SIP provisions establish criteria that a state official must consider before granting the advance permission to violate the emission limitations (Ill. Admin. Code tit. 35 § 201.262). However, the Petitioner asserted, the provisions state that, once granted, the advance permission to violate the emission limitations "shall be a prima facie defense to an enforcement action" (Ill.

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<sup>145</sup> The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Illinois SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

<sup>146</sup> Petition at 33-36.

Admin. Code tit. 35 § 201.265).

The Petitioner noted that Illinois has claimed that its SIP provisions do not provide for advance permission to violate emission limitations but that its SIP provisions instead authorize "case-by-case claims of exemption."<sup>147</sup> The Petitioner argued that despite this explanation, the language in the SIP is not clear and appears to grant advance permission for violations during malfunction and startup events. Furthermore, the Petitioner objected because the effect of granting that permission would be to provide the source with an absolute defense to any later enforcement action, that is, "a defense [would] attach[] at the state's discretion." The Petitioner argued that this approach would violate the fundamental requirement that all excess emissions be considered violations.

Finally, the Petitioner objected to the use of the term "prima facie defense" in Ill. Admin. Code tit. 35 § 201.265, arguing that the term is "ambiguous in its operation." The Petitioner argued that the provision is not clear regarding whether the defense is to be evaluated "in a judicial or administrative proceeding or whether the Agency determines its availability." Allowing defenses to be raised in these undefined contexts, the Petitioner argued, is "inconsistent with the enforcement structure of the Clean Air Act." The Petitioner asserted that "if . . . the "prima facie defense" is anything short of the "affirmative defense" as contemplated in the 1999 SSM Guidance, then "it clearly has the potential to interfere with EPA and citizen enforcement."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for discretionary exemptions from

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<sup>147</sup> Petition at 35 (citing Ill. Env'tl. Prot. Agency, Statement of Basis for a Planned Revision of the CAAPP Permit for U.S. Steel Corp. Granite City Works (Mar. 15, 2011), at 26-27). The EPA notes that the Petitioner appears to have cited the incorrect portion of this document and that the correct citation is to pages 36-37.

otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. The EPA agrees that together Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265<sup>148</sup> can be read to create exemptions by authorizing a state official to determine in the permitting process that the excess emissions during startup and malfunction will not be considered violations of the applicable emission limitations. The language of the SIP on its face appears to permit the state official to grant advance permission to "continue to operate during a malfunction or breakdown" or "to violate the standards or limitations . . . during startup" (Ill. Admin. Code tit. 35 § 201.261(a)).

The EPA notes that the Petitioner's characterization of Illinois's interpretation of its SIP is not accurate. While the Petitioner alleged that Illinois believed its SIP provisions to authorize "case-by-case exemptions," Illinois in fact described the effect of the permission granted under these provisions as providing the source with the:

...opportunity to make a claim of malfunction/breakdown or startup, with the viability of such claim subject to specific review against the requisite requirements. Indeed, 35 IAC 201.265 clearly states that violating an applicable state standard even if consistent with any expression of authority regarding malfunction/breakdown or startup set forth in a permit

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<sup>148</sup> The EPA notes that there are a number of other provisions in the same portion of the Illinois SIP that are integral to the regulation of startups, shutdowns, and malfunctions. Those provisions include Ill. Admin. Code tit. 35 § 201.149, Ill. Admin. Code tit. 35 § 201.263, and Ill. Admin. Code tit. 35 § 201.264. The Petitioner did not object to these provisions in its Petition, but because they are part of a functional scheme in the SIP, the state may elect to revise these provisions in accordance with the EPA's proposal.

shall only constitute a prima facie defense to an enforcement action for violation of said regulation.

(Ill. Env'tl. Prot. Agency, Statement of Basis for a Planned Revision of the CAAPP Permit for U.S. Steel Corp. Granite City Works (March 15, 2011), at 37.) Thus, the state claimed that under its SIP provisions, any excess emissions during periods of startup or malfunction would still constitute a "violation" and that the only effect of the permission granted by the state official in the permit would be to allow a source to assert a "prima facie defense" in an enforcement action. Even in light of this explanation, the EPA agrees that the plain language of the SIP provisions do not make explicit this limitation on the state official's authorization to grant exemptions. Indeed, by expressly granting "permission," the provisions are ambiguous and could be read as allowing the state official to be the unilateral arbiter of whether the excess emissions in a given malfunction, breakdown, or startup event constitute a violation. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. Most importantly, however, the grant of permission would authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emission reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of director's discretion provisions in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

Furthermore, even if the Illinois SIP provisions cited by the Petitioner are intended to provide only an affirmative defense to enforcement, rather than as advance permission to violate the otherwise applicable SIP emission limitations, the EPA agrees that the "prima facie defense" mechanism in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 is not an acceptable affirmative defense provision under the CAA as interpreted in the EPA's SSM Policy. Although the EPA believes that narrowly drawn affirmative defenses are permitted for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. In addition, Illinois's SIP provisions allow sources to obtain a *prima facie* defense for violations that occurred during startup periods, and, as discussed in section VII.C of this notice, the EPA does not believe affirmative defenses for violations of the otherwise applicable SIP emission limitations that occur during startup or shutdown periods is permissible under the CAA.

Significantly, these Illinois SIP provisions are also deficient because, although not defined in the Illinois SIP, a *prima facie* defense typically would shift the burden of proof to the opposing party, in this case the party bringing the enforcement action against the source. The EPA's longstanding interpretation of the CAA is that an affirmative defense provision must be narrowly drawn and must require the source to establish that it has met the conditions to justify relief from monetary penalties for excess emissions in a given

event. Thus, an acceptable affirmative defense under EPA's interpretation of the CAA places the burden on the source to demonstrate that it has met all the appropriate criteria before it is entitled to the defense.

Lastly, the criteria that the Illinois SIP provisions require be met before advance permission and the *prima facie* defense may be granted are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 do not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, the availability of the defense for violations during startup and shutdown, the burden-shifting effect, and the insufficiently robust qualifying criteria in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265, are substantial inadequacies and render these specific SIP provisions impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265. The EPA believes that these provisions allow for exemptions from the otherwise applicable emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code

tit. 35 § 201.265 potentially allow for such an exemption through a state official's unilateral exercise of discretionary authority, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

The EPA is proposing to grant the Petition with respect to these provisions even though the state has stated that the effect of these provisions only provides sources with a *prima facie* defense in an enforcement proceeding. Illinois's SIP provisions do not constitute an affirmative defense provision consistent with the EPA's recommendations in the EPA's SSM Policy interpreting the CAA, for a number of reasons: it is not clear that the defense applies only to monetary penalties, which is inconsistent with the requirements of CAA sections 113 and 304; the defense applies to violations that occurred during startup periods, which is inconsistent with CAA sections 113 and 304; the provisions shift the burden of proof to the enforcing party; and finally, the provisions do not include sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions. Accordingly, even if Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 are interpreted to provide a defense to enforcement rather than an exemption, the EPA is proposing to find that the provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these

provisions.

2. Indiana

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Indiana SIP that allows for discretionary exemptions during malfunctions (326 Ind. Admin. Code 1-6-4(a)).<sup>149,150</sup> The Petitioner objected to the provision because it provides an exemption from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner noted that the provision is ambiguous because it states that excess emissions during malfunction periods "shall not be considered a violation" if the source demonstrates that a number of conditions are met (326 Ind. Admin. Code 1-6-4(a)), but the provision does not specify to whom or in what forum such demonstration must be made. If made in a showing to the state, the Petitioner argued, the provision would give a state official the sole authority to determine that the excess emissions were not a violation and could thus be read to preclude enforcement by the EPA or citizens in the event that the state official elects not to treat the excess emissions as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued that the SIP's provision is also inconsistent with the CAA as interpreted in the EPA's SSM

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<sup>149</sup> The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Indiana SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

<sup>150</sup> Petition at 36-37.

Policy because it allows the state official to make a unilateral decision that the excess emissions were not a violation and thus bar enforcement for the excess emissions by the EPA and citizens.

Alternatively, the Petitioner noted, if the demonstration was required to have been made in an enforcement context, the provision could be interpreted as providing an affirmative defense. The Petitioner argued that even if interpreted in this way, the provision is not permissible because it "appears to confuse an enforcement discretion approach with the affirmative defense approach." Furthermore, the Petitioner argued that 326 Ind. Admin. Code 1-6-4(a) is not an acceptable affirmative defense provision because it "could be interpreted to preclude EPA and citizen enforcement and shield sources from injunctive relief."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for discretionary exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions such as 326 Ind. Admin. Code 1-6-4(a) that can be interpreted to authorize a state official to determine unilaterally that the excess emissions during malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of a provision

that allows discretionary exemptions in the SIP is thus a substantial inadequacy and renders 326 Ind. Admin. Code 1-6-4(a) impermissible.

The EPA believes that 326 Ind. Admin. Code 1-6-4(a) is also impermissible because the provision can be interpreted to make a state official the unilateral arbiter of whether the excess emissions in a given malfunction event constitute a violation. The 326 Ind. Admin. Code 1-6-4(a) provides that if a source demonstrates that four criteria are met, the excess emissions "shall not be considered a violation." Because the provision does not establish who is to evaluate whether the source has made an adequate demonstration, the provision could be read to authorize a state official to judge that violations have not occurred even though the emissions exceeded the applicable SIP emission limitations. These provisions therefore appear to vest the state official with the unilateral power to grant exemptions from otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. Most importantly, however, the provision could be read to authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of a director's discretion provision in 326 Ind. Admin. Code 1-6-4(a) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

The EPA believes that even if 326 Ind. Admin. Code 1-6-4(a) is interpreted to allow the source to make the required demonstration only in the context of an enforcement proceeding, the conditions set forth in the provision do not render it an acceptable affirmative defense provision. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304.

Furthermore, Indiana's SIP provision is deficient because even if it were interpreted to create an affirmative defense rather than an exemption from the applicable emission limitations, it does so with conditions that are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 326 Ind. Admin. Code 1-6-4(a) does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision under the CAA. The conditions in the provision are helpful but are not consistent with all of the criteria recommended in the EPA's SSM Policy. For example, this provision does not contain criteria requiring the source to establish that the malfunction event was not foreseeable and not part of a recurring pattern indicative of inadequate design, operation, or maintenance. Indeed, the explicit limitation that the "malfunctions have not exceeded

five percent (5%), as a guideline, of the normal operational time of the facility" suggests that a source could be granted exemptions for excess emissions even though it was habitually violating the applicable emission limitations over some extended period of time.

The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, and the insufficiently robust qualifying criteria render 326 Ind. Admin. Code 1-6-4(a) substantially inadequate to meet CAA requirements.

Significantly, the EPA notes that the correct meaning of 326 Ind. Admin. Code 1-6-4(a) has been addressed in the past in conjunction with an interpretive letter from the state in 1984, which characterized the provision as an enforcement discretion provision applicable to state personnel rather than as a provision allowing exemptions from the emission limitations. The EPA appreciates Indiana's clarification of its reading of the provision in the 1984 letter, but at this juncture, in the course of reevaluating this provision in light of the issues raised in the Petition, the EPA believes that 326 Ind. Admin. Code 1-6-4(a) contains regulatory language that requires formal revision to eliminate significant ambiguities. For example, the provision states that: "[e]missions temporarily exceeding the standards which are due to malfunctions . . . shall not be considered a violation of the rules provided the source demonstrates" four criteria. Indiana has acknowledged that it reads these provisions not to bar enforcement by the EPA or citizens in the event that the state does not pursue enforcement, but the EPA believes that the provision is sufficiently ambiguous on this point that a revision is necessary to ensure that outcome in the event of an enforcement action.

As discussed in section VI of this notice, the EPA believes that in some instances

it is appropriate to clarify provisions of a SIP submission through the use of interpretive letters. However, in some cases, there may be areas of regulatory ambiguity in a SIP provision that are significant and for which resolution is both appropriate and necessary. Because the text of 326 Ind. Admin. Code 1-6-4(a) provision is not clear on its face that it is limited to the exercise of enforcement discretion by state personnel but rather could be interpreted as a discretionary exemption from the otherwise applicable SIP emission limitations or as an inadequate affirmative defense provision, the EPA believes this SIP provision is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 326 Ind. Admin. Code 1-6-4(a). The EPA believes that this provision appears on its face to allow for discretionary exemptions from otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). This provision allows for exemptions through a state official's unilateral exercise of discretionary authority that includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by this provision allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance.

Even if the EPA were to interpret 326 Ind. Admin. Code 1-6-4(a) to be an affirmative defense applicable in an enforcement context, the provision is not consistent with the EPA's recommendations in the EPA's SSM Policy interpreting the CAA. By

purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, and by including criteria inconsistent with those recommended by the EPA for affirmative defense provisions, this provision is inconsistent with the requirements of CAA sections 113 and 304. For these reasons, the EPA is proposing to find that 326 Ind. Admin. Code 1-6-4(a) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

### 3. Michigan

#### a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in Michigan's SIP that provides for an affirmative defense to monetary penalties for violations of otherwise applicable SIP emission limitations during periods of startup and shutdown.<sup>151</sup> The Petitioner argued that affirmative defenses for excess emissions are inconsistent with the CAA and requested that the provision be removed from Michigan's SIP. Alternatively, if such a provision were to remain in the SIP, the Petitioner asked that the SIP be amended to address two deficiencies.

First, the Petitioner objected to one of the criteria in the affirmative defense provision, Mich. Admin. Code r. 336.1916, which makes the defense available to a single source or small group of sources as long as such source did not "cause[] an exceedance of the national ambient air quality standards or any applicable prevention of significant deterioration increment." The Petitioner argued that this criterion of Michigan's affirmative defense provision is contrary to the EPA's SSM Policy because "[s]ources with *the potential* to cause an exceedance should be more strictly controlled at all times

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<sup>151</sup> Petition at 44-46.

and should not be able to mire enforcement proceedings in the difficult empirical questions of whether or not the NAAQS or PSD increments were exceeded as a matter of fact" (emphasis in original).

Second, the Petitioner objected to the availability of Michigan's affirmative defense provision, Mich. Admin. Code r. 336.1916, for violations of "an applicable emission limitation," which Petitioner pointed out would include "limits derived from federally promulgated technology based standards, such as NSPSs and NESHAPs." The Petitioner argued that according to the EPA's SSM Policy, sources should not be able to seek an affirmative defense for violations of these federal technology-based standards.

b. The EPA's Evaluation

As discussed in more detail in section IV.B of this notice, the EPA does not agree with the Petitioner that affirmative defenses should never be permissible in SIPs. The EPA believes that narrowly drawn affirmative defenses can be permitted under the CAA for malfunction events, because where excess emissions are entirely beyond the control of the owner or operator of the source, it can be appropriate to provide limited relief to claims for monetary penalties (*see* section VII.B of this notice). However, as discussed in section IV.B of this notice, this basis for permitting affirmative defenses for malfunctions does not translate to planned events such as startup and shutdown. By definition, the owner or operator of a source can foresee and plan for startup and shutdown events, and therefore the EPA believes that states should be able to establish, and sources should be able to comply with, the applicable emission limitations or other controls measures during these periods of time. A source can be designed, operated, and maintained to control and to minimize emissions during such normal expected events. If sources in fact

cannot meet the otherwise applicable emission limitations during planned events such as startup and shutdown, then a state may elect to develop specific alternative requirements that apply during such periods, so long as they meet other applicable CAA requirements. The EPA believes that the inclusion of an affirmative defense that applies *only* to violations that occurred during periods of startup and shutdown in Mich. Admin. Code r. 336.1916 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA does not agree with the Petitioner that affirmative defense provisions are, *per se*, impermissible for a "single source or small group of sources." The EPA believes that a SIP provision may meet the overarching statutory requirements through a demonstration by the source that the excess emissions during the SSM event did not in fact cause a violation of the NAAQS. As discussed in section VII B of this notice, the EPA considers this another means by which to assure that affirmative defense provisions are narrowly drawn to justify relief from monetary penalties for excess emissions during malfunction events. Through this alternative approach, sources also have an incentive to comply with applicable emission limitations and thereby to support the larger objective of attaining and maintaining the NAAQS.

The EPA does agree that an approvable affirmative defense provision, consistent with CAA requirements, cannot apply to any federal emission limitations approved into a SIP. Thus, if the state has elected to incorporate NSPS or NESHAP into its SIP for any purpose, such as to obtain credit for the resulting emissions reductions as part of an attainment plan, the SIP cannot have a provision that would extend any affirmative defense to sources beyond what is otherwise provided in the underlying federal

regulation. To the extent that any affirmative defense is warranted during malfunctions for these technology-based standards, the federal standards contained in the EPA's regulations already specify the appropriate affirmative defense. No additional or different affirmative defense provision applicable through a SIP provision is warranted or appropriate. On its face, Mich. Admin. Code r. 336.1916 does not explicitly limit its scope to exclude federal emission limitations approved into the SIP. Thus, this would be an additional way in which the provision is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Mich. Admin. Code r. 336.1916, which provides for an affirmative defense to violations of applicable emission limitations during startup and shutdown events. The availability of an affirmative defense for excess emissions that occur during planned events is contrary to the EPA's interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.*, during malfunctions. For this reason, the EPA is proposing to find that Mich. Admin. Code r. 336.1916 is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

4. Minnesota

a. Petitioner's Analysis

The Petitioner objected to a provision in the Minnesota SIP that provides automatic exemptions for excess emissions resulting from flared gas at petroleum refineries when those flares are caused by startup, shutdown, or malfunction (Minn. R.

7011.1415).<sup>152</sup> The provision states that: "The combustion of process upset gas in a flare, or the combustion in a flare of process gas or fuel gas which is released to the flare as a result of relief valve leakage is exempt from the standards of performance set forth in this regulation." The Petitioner noted that "process upset gas" is defined in the regulation as "any gas generated by a petroleum refinery process unit as a result of start-up, shutdown, upset, or malfunction" (Minn. R. 7011.1400(12)). The Petitioner argued that such an automatic exemption for emissions during startup, shutdown, or malfunction in a SIP provision is a violation of the fundamental requirements of the CAA and the EPA's SSM Policy that all excess emissions be considered violations, and that such an exemption interferes with enforcement by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for automatic exemptions from otherwise applicable SIP emission limitations and requirements. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunction are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The automatic exemption provision identified by the Petitioner explicitly states

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<sup>152</sup> Petition at 46-47.

that "process upset gas," which is defined as gas generated by the affected sources as a result of start-up, shutdown, upset, or malfunction, "is exempt from the standards" (Minn. R. 7011.1415). Any exceedances of the standards during those periods would therefore not be considered a violation under this provision. With respect to the Petitioner's concern that these exemptions could interfere with enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. The EPA believes that the inclusion of such automatic exemptions from SIP requirements in Minn. R. 7011.1415 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Minn. R. 7011.1415. The EPA believes that this provision allows for automatic exemptions from the otherwise applicable SIP emission limitations and requirements, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that Minn. R. 7011.1415 is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this

provision.

5. Ohio

a. Petitioner's Analysis

The Petitioner first objected to a generally applicable provision in the Ohio SIP that allows for discretionary exemptions during periods of scheduled maintenance (Ohio Admin. Code 3745-15-06(A)(3)).<sup>153</sup> The provision provides the state official with the authority to permit continued operation of a source during scheduled maintenance "where a complete source shutdown may result in damage to the air pollution sources or is otherwise impossible or impractical." Upon application, the state official "shall authorize the shutdown of the air pollution control equipment if, in his judgment, the situation justifies continued operation of the sources." The Petitioner also objected to two source category-specific and pollutant-specific provisions that provide for discretionary exemptions during malfunctions (Ohio Admin. Code 3745-17-07(A)(3)(c) and Ohio Admin. Code 3745-17-07(B)(11)(f)).<sup>154</sup>

The Petitioner argued that these provisions could provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the

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<sup>153</sup> Petition at 60-61.

<sup>154</sup> The EPA notes that Petitioner did not categorize these provisions as discretionary exemptions, but both Ohio Admin. Code 3745-17-07(A)(3)(c) and Ohio Admin. Code 3745-17-07(B)(11)(f) provide for exemptions during malfunctions if sources have complied with Ohio Admin. Code 3745-15-06(C), which allows the director to "evaluate" malfunction reports required by the rule and to "take appropriate action upon a determination." The EPA therefore believes that the mechanism by which exemptions are granted under Ohio Admin. Code 3745-17-07(A)(3)(c) and Ohio Admin. Code 3745-17-07(B)(11)(f) is by exercise of the state director's discretion.

Petitioner objected to these discretionary exemptions because the state official's grant of permission to continue to operate during the period of maintenance, or to exempt sources from otherwise applicable SIP emission limitations during malfunctions, could be interpreted to excuse excess emissions during such time periods and could thus be read to preclude enforcement by the EPA or citizens in the event that the state official elects not to treat the events as violations. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provisions are also inconsistent with the CAA as interpreted in the EPA's SSM Policy because they allow the state official to make a unilateral decision that the excess emissions were not a violation and thus bar enforcement for the excess emissions by the EPA and citizens.

The Petitioner also objected to a source category-specific provision in the Ohio SIP that allows for an automatic exemption from applicable emission limitations and requirements during periods of startup, shutdown, malfunction, or regularly scheduled maintenance activities (Ohio Admin. Code 3745-14-11(D)). The Petitioner objected because this provision provides an exemption from the otherwise applicable SIP requirements, and such exemptions are inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations. The Petitioner also objected to this provision because, by providing an outright exemption from otherwise applicable requirements, the state has defined these excess emissions as not violations, thereby precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations.

Finally, the Petitioner objected to provisions that contain exemptions for Hospital/Medical/Infectious Waste Incinerator (HMIWI) sources during startup, shutdown, and malfunction (Ohio Admin. Code 3745-75-02(E), Ohio Admin. Code 3745-75-02(J), Ohio Admin. Code 3745-75-03(I), Ohio Admin. Code 3745-75-04(K), Ohio Admin. Code 3745-75-04(L)). The Petitioner requested that these exemptions be removed entirely from Ohio's SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during startup, shutdown, malfunctions, or maintenance are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such exemptions from the emission limitations in Ohio Admin. Code 3745-15-06(A)(3), Ohio Admin. Code 3745-17-07(A)(3)(c), Ohio Admin. Code 3745-17-07(B)(11)(f), and Ohio Admin. Code 3745-15-06(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA believes that Ohio Admin. Code 3745-15-06(A)(3), Ohio Admin. Code

3745-17-07(A)(3)(c), Ohio Admin. Code 3745-17-07(B)(11)(f), and Ohio Admin. Code 3745-15-06(C) are also impermissible as unbounded director's discretion provisions that make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of Ohio Admin. Code 3745-15-06(A)(3), the provision authorizes the state official to allow continued operation at sources "during scheduled maintenance of air pollution control equipment." The state official's grant of permission to continue to operate during the period of maintenance could be interpreted to excuse excess emissions during that period and could thus be read to preclude enforcement by the EPA or through a citizen suit in the event that the state official elects not to treat the excess emissions as a violation. In addition, the provision vests the state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. Although the provision does require sources to submit a report indicating the expected length of the event and estimated quantities of emissions, among other things, ultimately the state official makes his determination "if, in his judgment, the situation justifies continued operation of the sources." The state official's discretion is therefore not sufficiently bounded and extends to granting a complete exemption from applicable emission limitations that would be impermissible in the first instance.

The EPA believes that Ohio Admin. Code 3745-17-07(A)(3)(c), which exempts sources from visible particulate matter limitations during malfunctions, and Ohio Admin. Code 3745-17-07(B)(11)(f), which exempts sources from fugitive dust limitations during malfunctions, also impermissibly provide exemptions through exercise of a state official's discretion because the provisions authorize exemptions if the source has complied with

Ohio Admin. Code 3745-15-06(C). The Ohio Admin. Code 3745-15-06(C) provides the state official with the discretion to "evaluate" reports of malfunctions submitted by sources and to "take appropriate action upon a determination" that sources have not adequately met the requirements of the provision. Although the Petitioner did not request that the EPA evaluate Ohio Admin. Code 3745-15-06(C), it is the regulatory mechanism by which exemptions are granted in the two provisions to which the Petitioner did object. Similar to Ohio Admin. Code 3745-15-06(A)(3), which is the director's discretion provision discussed earlier in this section of the notice, the EPA finds that Ohio Admin. Code 3745-17-07(A)(3)(c) and Ohio Admin. Code 3745-17-07(B)(11)(f) could be interpreted to excuse excess emissions during malfunction events and could thus be read to preclude enforcement by the EPA or through a citizen suit in the event that the state official elects not to treat the excess emissions as a violation. In addition, the provision vests the state official with the unilateral power to grant an exemption from otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. Although the provision does require the state official to consider the reports filed by sources before making a determination, the provision remains insufficiently bounded.

Most importantly, however, these provisions all purport to authorize the state official to create exemptions from the emission limitations, and such exemptions are impermissible in the first instance. Such director's discretion provisions undermine the emission limitations and the emissions reductions they are intended to achieve and render them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an unbounded director's discretion provision in Ohio Admin. Code 3745-15-

06(A)(3), Ohio Admin. Code 3745-17-07(A)(3)(c), Ohio Admin. Code 3745-17-07(B)(11)(f), and Ohio Admin. Code 3745-15-06(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason, in addition to the creation of impermissible exemptions.

With regard to the Petitioner's objection to the exemption for portland cement kilns from otherwise applicable requirements at Ohio Admin. Code 3745-14-11(D), the EPA agrees that the CAA does not allow for automatic exemptions from otherwise applicable SIP emission limitations and requirements. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, malfunction, or maintenance are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The automatic exemption provision in Ohio Admin. Code 3745-14-11(D) explicitly states that the regulation's requirement that the use of control measures such as low-NO<sub>x</sub> burners during the ozone season and monitoring, reporting, and recordkeeping of ozone season NO<sub>x</sub> emissions "shall not apply" during periods of startup, shutdown, malfunction, and maintenance. The exemptions therefore provide that the excess emissions resulting from failure to run required control measures will not be violations, contrary to the requirements of the CAA. In addition, exemption from monitoring,

recordkeeping, and reporting requirements during these events affects the enforceability of the emission limitation in the SIP provision. Moreover, failure to account accurately for excess emissions at sources during SSM events has a broader impact on NAAQS implementation and SIP planning, because such accounting directly informs the development of emissions inventories and emissions modeling. With respect to the Petitioner's concern that these exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. The EPA believes that the inclusion of such automatic exemptions from SIP requirements in Ohio Admin. Code 3745-14-11(D) is thus substantially inadequate to meet CAA requirements.

Finally, the EPA disagrees that the provisions providing exemptions for HMIWI must be removed from the SIP. Ohio Admin. Code 3745-75-02(E), Ohio Admin. Code 3745-75-02(J), Ohio Admin. Code 3745-75-03(I), Ohio Admin. Code 3745-75-04(K), and Ohio Admin. Code 3745-75-04(L) are not approved into Ohio's SIP, but rather those rules were approved as part of the separate state plan to meet the applicable emissions guidelines under CAA § 111(d) and 40 CFR Part 60. Because those rules are not in the Ohio SIP and are not related to any provisions in the SIP, they do not represent a substantial inadequacy in the SIP.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ohio Admin. Code 3745-

15-06(A)(3), Ohio Admin. Code 3745-17-07(A)(3)(c), and Ohio Admin. Code 3745-17-07(B)(11)(f). The EPA believes that these provisions allow for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, Ohio Admin. Code 3745-15-06(A)(3), Ohio Admin. Code 3745-17-07(A)(3)(c), Ohio Admin. Code 3745-17-07(B)(11)(f), and by extension, Ohio Admin. Code 3745-15-06(C), allow for such exemptions through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. As described in section VII.A of this notice, such provisions are inconsistent with fundamental CAA requirements for SIP revisions. For these reasons, the EPA is proposing to find that Ohio Admin. Code 3745-15-06(A)(3), Ohio Admin. Code 3745-17-07(A)(3)(c), Ohio Admin. Code 3745-17-07(B)(11)(f), and Ohio Admin. Code 3745-15-06(C) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

The EPA also proposes to grant the Petition with respect to Ohio Admin. Code 3745-14-11(D). The EPA believes that this provision allows for automatic exemptions from the otherwise applicable SIP emission limitations and requirements, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by CAA sections 110(a)(2)(A), 110(a)(2)(C),

and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to Ohio Admin. Code 3745-75-02(E), Ohio Admin. Code 3745-75-02(J), Ohio Admin. Code 3745-75-03(I), Ohio Admin. Code 3745-75-04(K), and Ohio Admin. Code 3745-75-04(L). These provisions are not part of the Ohio SIP and thus cannot represent a substantial inadequacy in the SIP.

*G. Affected States in EPA Region VI*

1. Arkansas

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Arkansas SIP.<sup>155</sup> First, the Petitioner objected to a provision that provides an automatic exemption for excess emissions of volatile organic compounds (VOC) for sources located in Pulaski County that occur due to malfunctions (Reg. 19.1004(H)). The provision states that excess emissions "which are temporary and result solely from a sudden and unavoidable breakdown, malfunction or upset of process or emission control equipment, or sudden and unavoidable upset or operation will not be considered a violation . . . ." The

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<sup>155</sup> Petition at 24. The Petitioner cites to 014-01-1 Ark. Code R. §§ 19.1004(H) and 19.602. The EPA interprets these citations as references to Reg. 19.1004(H) and Reg. 19.602 of the Arkansas Pollution Control & Ecology Commission (APC&EC), Regulation No. 19 – Regulations of the Arkansas Plan of Implementation for Air Pollution Control, as approved by the EPA on Apr. 12, 2007 (72 FR 18394) (hereinafter referred to as Reg. 19.1004(H) and Reg. 19.602).

Petitioner argued that this language is impermissible because the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations.

Second, the Petitioner objected to a separate provision that provides a "complete affirmative defense" for excess emissions that occur during emergency conditions (Reg. 19.602). The Petitioner argued that this provision, which the state may have modeled after the EPA's title V regulations, is impermissible because its application is not clearly limited to operating permits.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with CAA sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitation must be considered a violation of such limitation, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions from applicable emission limitations during malfunctions or emergency conditions, however defined, are inconsistent with the fundamental requirements of the CAA.

The first provision identified by the Petitioner explicitly states that excess emissions of VOC "will not be considered a violation" of the applicable emission limitation if they occur due to an "unavoidable breakdown" or "malfunction." This exemption in Reg. 19.1004(H) is impermissible even though the state has limited the exemption to unavoidable breakdowns and malfunctions. The core problem remains that the provision provides an impermissible exemption from the otherwise applicable VOC

emission limitations. In addition, by having a SIP provision that defines what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. The EPA believes that the inclusion of such an automatic exemption in Reg. 19.1004(H) is thus a substantial inadequacy and renders this SIP provision impermissible under the CAA.

The second provision identified by the Petitioner defines "emergency" conditions that may cause a source to exceed a technology-based emission limitation under a permit and provides a "complete affirmative defense" to an action brought for non-compliance with such limitations if certain criteria are met. The EPA believes that Reg. 19.602 is substantially inadequate for three reasons. First, the provision does not explicitly limit the affirmative defense to civil penalties. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* sections IV.B and VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Second, the provision does not contain elements for establishing the affirmative defense consistent with all of the recommended criteria in the EPA's SSM Policy for SIP provisions. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Reg. 19.602 does not include

criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. Finally, the provision can be read to provide additional defenses beyond those already provided in federal technology-based standards. The EPA believes that approvable affirmative defenses in a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations, such as NSPS or NESHAP. For these reasons, the EPA believes that Reg. 19.602 is substantially inadequate to meet the fundamental requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Reg. 19.1004(H) and Reg. 19.602. The EPA believes that Reg. 19.1004(H) allows for an exemption from otherwise applicable SIP emission limitations and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). Additionally, the EPA believes that Reg. 19.602 is an impermissible affirmative defense provision because it does not explicitly limit the defense to monetary penalties, establishes criteria that are inconsistent with those in the EPA's SSM Policy, and can be read to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations. As a consequence, Reg. 19.602 is also inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

2. Louisiana

a. Petitioner's Analysis

The Petitioner objected to several provisions in the Louisiana SIP that allow for automatic and discretionary exemptions from SIP emission limitations during various situations, including startup, shutdown, maintenance, and malfunctions.<sup>156</sup> First, the Petitioner objected to provisions that provide automatic exemptions for excess emissions of VOC from wastewater tanks (LAC 33:III.2153(B)(1)(i)) and excess emissions of NOx from certain sources within the Baton Rouge Nonattainment Area (LAC 33:III.2201(C)(8)).<sup>157</sup> The LAC 33:III.2153(B)(1)(i) provides that control devices "shall not be required" to meet emission limitations "during periods of malfunction and maintenance on the devices for periods not to exceed 336 hours per year." Similarly, LAC 33:III.2201(C)(8) provides that certain sources "are exempted" from emission limitations "during start-up and shutdown . . . or during a malfunction." The Petitioners argued that these provisions are impermissible because the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations.

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<sup>156</sup> Petition at 42-43.

<sup>157</sup> The EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2153(B)(1)(i) as a citation to LAC 33:III.2153(B)(1)(i), as approved by the EPA on June 20, 2002 (67 FR 41840) (hereinafter referred to as LAC 33:III.2153(B)(1)(i)). Similarly, the EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2201(C)(8) as a citation to LAC 33:III.2201(C)(8), as approved by the EPA on July 5, 2011 (76 FR 38977) (hereinafter referred to as LAC 33:III.2201(C)(8)).

Second, the Petitioner objected to provisions that provide discretionary exemptions to various emission limitations.<sup>158</sup> Three of these provisions provide discretionary exemptions from otherwise applicable SO<sub>2</sub> and visible emission limitations in the Louisiana SIP for excess emissions that occur during certain startup and shutdown events (LAC 33:III.1107, LAC 33:III.1507(A)(1), LAC 33:III.1507(B)(1)), while the other two provide such exemptions for excess emissions from nitric acid plants during startups and "upsets" (LAC 33:III.2307(C)(1)(a) and LAC 33:III.2307(C)(2)(a)). For example, LAC 33:III.1107, which deals with the control of emissions from flares, states that exemptions "may be granted by the administrative authority during startup and shutdown periods if the flaring was not the result of failure to maintain and repair equipment." The Petitioner argued that this language effectively allows a discretionary decision by a state official to exempt excess emissions during such events and thereby precludes enforcement by the EPA and citizens for what would otherwise be violations of the applicable SIP emission limitations, contrary to the requirements of the CAA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions for excess emissions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with sections 110(a)(2)(A) and

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<sup>158</sup> The EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:1107 as a citation to LAC 33:III.1107(A), as approved by the EPA on July 5, 2011 (76 FR 38977 (hereinafter referred to as LAC 33:III.1107(A))). Similarly, the EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:1507(A)(1) and (B)(1) as citations to LAC 33:III.1507(A)(1) and (B)(1), as approved by the EPA on July 15, 1993 (58 FR 38060) (hereinafter referred to as LAC 33:III.1507(A)(1) and (B)(1)). Also, the EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2307(C)(1)(a) and (C)(2)(a) as a citation to LAC 33:III.2307(C)(1)(a) and (C)(2)(a), as approved by the EPA on July 5, 2011 (76 FR 38977) (hereinafter referred to as LAC 33:III.2307(C)(1)(a) and (C)(2)(a)).

302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitation must be considered a violation of such limitation, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, maintenance, or malfunctions are not violations of the applicable SIP emission limitations are inconsistent with the fundamental requirements of the CAA.

The first two SIP provisions identified by the Petitioner explicitly state that emission limitations for VOC and NO<sub>x</sub> are either "not required" or "exempted" during specified types of SSM events. The EPA believes that such automatic exemptions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable SIP emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. Therefore, the EPA believes that the inclusion of such automatic exemptions in LAC 33:III.2153(B)(1)(i) and LAC 33:III.2201(C)(8) is a substantial inadequacy that renders these SIP provisions impermissible under the CAA.

The other five provisions identified by the Petitioner all provide the state with the discretion to "grant," "authorize," or "extend" exemptions from the otherwise applicable SIP emission limitations during various SSM events. The EPA believes that these provisions are impermissible as unbounded director's discretion provisions that make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation of otherwise applicable SIP emission limitations. More importantly, the provisions purport to authorize the state official to create exemptions from applicable

SIP emission limitations when such exemptions are impermissible in the first instance. As discussed in more detail in section VII.A of this notice, these types of director's discretion provisions undermine the purpose of emission limitations and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of such a director's discretion provision in LAC 33:III.1107(A), LAC 33:III.1507(A)(1), LAC 33:III.1507(B)(1), LAC 33:III.2307(C)(1)(a), and LAC 33:III.2307(C)(2)(a) is therefore a substantial inadequacy that renders these specific SIP provisions impermissible under the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to LAC 33:III.2153(B)(1)(i) and LAC 33:III.2201(C)(8). The EPA believes that these provisions allow for exemptions from otherwise applicable emission limitations and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA also proposes to grant the Petition with respect to LAC 33:III.1107(A), LAC 33:III.1507(A)(1) & (B)(1), and LAC 33:III.2307(C)(1)(a) & (C)(2)(a). The discretion created by these provisions allows for revisions of the applicable SIP emission limitations without meeting the applicable SIP revision requirements of the CAA, and it allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Thus, these provisions are also inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that each of these provisions is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these specific provisions.

3. New Mexico

a. Petitioner's Analysis

The Petitioner objected to three provisions in the New Mexico SIP that provide affirmative defenses for excess emissions that occur during malfunctions (20.2.7.111 NMAC), during startup and shutdown (20.2.7.112 NMAC), and during emergencies (20.2.7.113 NMAC).<sup>159</sup> The Petitioner objected to the inclusion of these provisions in the SIP based on its view that affirmative defense provisions are always inconsistent with CAA requirements. The Petitioner also argued that each of these affirmative defenses is generally available to all sources, which is in contravention of the EPA's recommendation in the SSM Policy that affirmative defenses should not be available to "a single source or groups of sources that has the potential to cause an exceedance of the NAAQS." Finally, the Petitioner argued that the affirmative defense provision applicable to emergency events is impermissible because it was modeled after the EPA's title V regulations, which are not meant to apply to SIP provisions.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in sections IV.B and VII.B of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. As long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense

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<sup>159</sup> Petition at 54-57. The EPA interprets the Petitioner's reference to N.M. Code R. § 20.2.7.111, N.M. Code R. § 20.2.7.112, and N.M. Code R. § 20.2.7.113, as citations to 20.2.7.111 NMAC, 20.2.7.112 NMAC, and 20.2.7.113 NMAC, as approved by the EPA on Sept. 14, 2009 (74 FR 46910) (hereinafter referred to as 20.2.7.111 NMAC, 20.2.7.112 NMAC, and 20.2.7.113 NMAC).

provisions for malfunctions. By contrast, however, based on evaluation of the legal and factual basis for affirmative defenses in SIPs, the EPA now believes that affirmative defense provisions are not appropriate in the case of planned source actions, such as startup and shutdown, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation. Again, as explained in sections IV.B and VII.C of this notice, the EPA is changing its interpretation of the CAA with respect to affirmative defenses applicable during startup and shutdown events. As a result, 20.2.7.112 NMAC, which provides an affirmative defense to excess emissions that occur during startup or shutdown, is substantially inadequate to meet the requirements of the CAA.

With respect to the Petitioner's second concern, the EPA agrees that the state's inclusion of an affirmative defense for malfunctions that is available to all sources, including single sources or groups of sources with the potential to cause exceedances of the NAAQS or PSD increments, renders the provision inconsistent with the CAA. As explained more fully in section VII.B of this notice, the EPA believes that such affirmative defenses may be permissible if either there is no "potential" for exceedances, or alternatively, if the provision requires that the source make an affirmative showing that any excess emissions did not in fact cause an exceedance of the NAAQS or PSD increments. The EPA has previously approved such provisions as meeting CAA requirements on a case-by-case basis in specific actions on SIP submissions. Here, however, 20.2.7.111 NMAC is not restricted in application to only those sources that do not have the potential to cause an exceedance, nor does it contain any criteria requiring an "after the fact" showing that excess emissions from a single source or group of sources

did not cause an exceedance. Therefore, the provision is substantially inadequate to satisfy the CAA and EPA's interpretation of CAA requirements.

Finally, 20.2.7.113 NMAC provides an affirmative defense for excess emissions that occur during emergencies, a concept borrowed from the EPA's title V regulations. This provision defines "emergency" conditions that may cause a source to exceed a technology-based emission limitation and provides a "complete affirmative defense" to an action brought for non-compliance with such limitations if certain criteria are met. The 20.2.7.113 NMAC is substantially inadequate for three reasons. First, the provision does not explicitly limit the affirmative defense to civil penalties. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* sections IV.B and VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Second, the provision does not contain elements for establishing the affirmative defense consistent with all of the recommended criteria in the EPA's SSM Policy for SIP provisions. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 20.2.7.113 NMAC does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. Finally, the provision can be read to provide additional defenses beyond those already provided in federal technology-based standards. The EPA believes that

approvable affirmative defenses in a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations, such as NSPS or NESHAP. For these reasons, the EPA believes that 20.2.7.113 NMAC is impermissible under the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 20.2.7.112 NMAC, which includes an affirmative defense applicable during startup and shutdown events that is contrary to the EPA's interpretation of the CAA. The EPA believes that this provision is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, this provision is inconsistent with the requirements of CAA sections 113 and 304. The EPA also proposes to grant the Petition with respect to 20.2.7.111 NMAC, which includes an affirmative defense applicable during malfunction events. This provision is inconsistent with the CAA because it neither limits the defense to only those sources that do not have the potential to cause exceedances of the NAAQS or PSD increments nor does it require sources to make an "after the fact" showing that no such exceedances actually occurred. Therefore, the EPA believes that this provision is similarly inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), and with respect to CAA sections 113 and 304. Finally, the EPA proposes to grant the Petition with respect to 20.2.7.113 NMAC. The EPA believes that this provision is an impermissible affirmative defense because it does not explicitly limit the defense to monetary penalties, it establishes criteria that are inconsistent with those in EPA's SSM Policy, and it can be read to create different or additional defenses from those that are provided in underlying federal

technology-based emission limitations. Thus, this provision too is inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), and with respect to CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

4. Oklahoma

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Oklahoma SIP that together allow for discretionary exemptions from emission limitations during startup, shutdown, maintenance, and malfunctions (OAC 252:100-9-3(a) and OAC 252:100-9-3(b)).<sup>160</sup> These provisions state that excess emissions during each of these types of events constitute violations of the applicable SIP emission limitations "unless the owner or operator of the facility has complied with the notification requirements," which consist of a demonstration to the Director of the Air Quality Division that at least one of several criteria have been met. One example of the criteria includes a demonstration that the excess emissions resulted from "either malfunction or damage to the air pollution control or process equipment" or "scheduled maintenance." The Petitioner argued that these provisions empower the director to excuse violations entirely and thereby preclude enforcement by the EPA or citizens. Specifically, if an owner or operator satisfies the director that the regulatory criteria under section 3(b) have been met, then the language of section 3(a) creates an exemption for the source and strongly implies that the excess

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<sup>160</sup> Petition at 61-63. The EPA interprets the Petitioner's reference to Okla. Admin. Code § 252:100-9-3(a) and Okla. Admin. Code § 252:100-9-3(b) as citations to OAC 252:100-9-3(a) and OAC 252:100-9-3(b), as approved by the EPA on Nov. 3, 1999 (64 FR 59629) (hereinafter referred to as OAC 252:100-9-3(a) and (3)(b)).

emissions are not a violation of the applicable SIP emission limitations. Therefore, the Petitioner argued that these provisions are inconsistent with the requirements of the CAA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, even where the exemption is only available at the exercise of a state official's discretion. In accordance with sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitations must be considered a violation of such limitations, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, malfunctions, or maintenance are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA.

The provisions identified by the Petitioner state that excess emissions during SSM events constitute violations "unless" the Director of the Air Quality Division provides an exemption. The EPA believes that OAC 252:100-9-3(a) and OAC 252:100-9-3(b) are impermissible, because they are unbounded director's discretion provisions that purport to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. The provisions authorize the state official to create exemptions from applicable SIP emission limitations on a case-by-case basis when such exemptions are impermissible in the first instance. These types of director's discretion provisions undermine the purpose of emission limitations, and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a

citizen suit. The EPA believes that the inclusion of such a director's discretion provision in OAC 252:100-9-3(a) and OAC 252:100-9-3(b) is therefore a substantial inadequacy and renders these SIP provisions impermissible.

The EPA further notes that the provision allowing exemptions for excess emissions that occur during scheduled maintenance is inconsistent with CAA requirements for the reason that maintenance is a normal mode of source operation, during which sources should be expected to meet applicable SIP emission limitations. Since the 1983 SSM Guidance, the EPA has indicated its view that excess emissions that occur during maintenance should not be excused. Similarly, in the 1999 SSM Guidance, the EPA did not recommend any affirmative defense for excess emissions that occur during maintenance. In this action, the EPA is reiterating its view that the CAA does not permit exemptions or affirmative defenses for excess emissions that occur during such planned events.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to OAC 252:100-9-3(a) and OAC 252:100-9-3(b).<sup>161</sup> The discretion created by these provisions allows for revisions of the applicable SIP emission limitations without meeting the applicable SIP revision requirements of the CAA, and it allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. As a result, these provisions are inconsistent with the fundamental requirements of CAA sections

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<sup>161</sup> The EPA notes that on July 16, 2010, Oklahoma submitted a SIP revision that would remove OAC 252:100-9-3(a) and OAC 252:100-9-3(b) and replace them with affirmative defense provisions. In this action, the EPA is only evaluating these provisions as they are currently found in the EPA-approved Oklahoma SIP. The EPA is not evaluating the July 16, 2010 SIP revision as part of this action. The EPA will address the July 16, 2010 SIP revision in a later action.

110(a)(2)(A), 110(a)(2)(C), and 302(k). Therefore, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

*H. Affected States in EPA Region VII*

1. Iowa

a. Petitioner's Analysis

The Petitioner first objected to a specific provision in the Iowa SIP that allows for automatic exemptions from otherwise applicable SIP emission limitations during periods of startup, shutdown, or cleaning of control equipment (Iowa Admin. Code r. 567-24.1(1)).<sup>162</sup> The Petitioner noted that Iowa Admin. Code r. 567-24.1(1) provides that excess emissions from these periods are not violations of the emissions standard "if the startup, shutdown or cleaning is accomplished expeditiously and in a manner consistent with good practice for minimizing emissions." The Petitioner argued that such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

Second, the Petitioner objected to a provision that empowers the state to exercise enforcement discretion for violations of the otherwise applicable SIP emission limitations during malfunction periods (Iowa Admin. Code r. 567-24.1(4)).<sup>163</sup> The Petitioner noted that this provision—which states that "[d]etermination of *any* subsequent enforcement action will be made following review of [a] report" (emphasis added by Petitioner) submitted by the owner or operator of the source demonstrating certain conditions—

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<sup>162</sup> Petition at 37-38.

<sup>163</sup> Petition at 37-38.

could be interpreted to mean that "no enforcement is warranted at all, by anyone."<sup>164</sup> The Petitioner argued that such an interpretation of this provision could preclude enforcement by the EPA or citizens, both for civil penalties and injunctive relief, and that the EPA's interpretation of the CAA would forbid such a provision. The Petitioner thus requested that Iowa revise this provision to eliminate any confusion that a decision by Iowa state personnel not to enforce against a violation would in any way foreclose enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during startup, shutdown, or control equipment cleaning are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The first provision identified by the Petitioner explicitly states that excess emission during periods of startup, shutdown, and cleaning of control equipment "is not a violation," contrary to the requirements of the CAA. The EPA believes that the inclusion of such an exemption from otherwise applicable SIP emission limitations in Iowa Admin. Code r. 567-24.1(1) is thus a substantial inadequacy and

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<sup>164</sup> Petition at 38.

renders this specific SIP provision impermissible.

The EPA notes that these exemptions are impermissible even though the state has imposed some factual limitations on their potential scope. In Iowa Admin. Code r. 567-24.1(1), the state has conditioned the exemption for excess emissions during periods of startup, shutdown, or cleaning of control equipment, requiring that such activities be "accomplished expeditiously and in a manner consistent with good practice for minimizing emissions." Although this limitation on the scope of the exemptions is a helpful feature, the core problem remains that the provision provides impermissible exemptions from the otherwise applicable SIP emission limitations by defining the excess emission as "not a violation." Such provisions are impermissible under the CAA because the state has effectively negated the ability of the EPA or through a citizen suit to enforce against those violations.

However, the EPA disagrees with Petitioner that Iowa Admin. Code r. 567-24.1(4) is impermissible under the CAA. The EPA believes that this provision is permissible because it defines parameters for the exercise of enforcement discretion by state personnel for violations of emission limitations during malfunctions. According to the EPA's SSM Policy interpreting the CAA, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise of enforcement discretion concerning actions taken by state personnel. The provision at issue clearly states that any excess emission during malfunction "is a violation." The rule also delineates factors that will be considered by state personnel in determining whether to pursue enforcement for those regulatory violations that are due to excess emissions during malfunctions. The listing of these factors does not alter the statement that excess

emissions are violations under the Iowa regulations. The provisions that describe the factors to be considered by state personnel only require that the state personnel consider such factors. The regulations do not state or imply that if a source makes an appropriate showing of meeting the factors, it is exempt from penalties or injunctive relief. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking an enforcement action if the state exercises its discretion not to enforce violations of the emission limitations during malfunctions. Iowa Admin. Code r. 567-24.1(4) expressly identifies excess emissions described in the rule as violations and allows for the exercise of enforcement discretion in addressing malfunctions. This is consistent with the CAA and the EPA's SSM Policy and therefore does not render the SIP provision substantially inadequate.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Iowa Admin. Code. R. 567-24.1(1). The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For this reason, the EPA is proposing to find that Iowa Admin. Code. R. 567-24.1(1) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to Iowa Admin. Code r. 567-24.1(4). The EPA believes that the provision is on its face clearly applicable only to Iowa state enforcement personnel and that the provision could not reasonably be read by a

court to foreclose enforcement by the EPA or through a citizen suit where Iowa state personnel elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Iowa, to assure that there is no misunderstanding with respect to the correct interpretation of Iowa Admin. Code r. 567-24.1(4).

2. Kansas

a. Petitioner's Analysis

The Petitioner objected to three provisions in the Kansas SIP that allow for exemptions for excess emissions during malfunctions and necessary repairs (K.A.R. § 28-19-11(A)), scheduled maintenance (K.A.R. § 28-19-11(B)), and certain routine modes of operation (K.A.R. § 28-19-11(C)).<sup>165</sup> The Petitioner objected because all three of these provisions "state that excess emissions are not violations (or are permitted),"<sup>166</sup> contrary to the fundamental requirement of the CAA that all excess emissions be considered violations. The Petitioner argued that all three of these provisions would thus appear impermissibly to preclude enforcement by the EPA or citizens for the excess emissions that would otherwise be violations.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission

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<sup>165</sup> Petition at 38-39.

<sup>166</sup> Petition at 39.

limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during malfunctions, necessary repairs, and routine modes of operation are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. Two of the provisions identified by the Petitioner explicitly state that excess emissions under certain circumstances will "not be deemed violations," which is contrary to the requirements of the CAA. The EPA believes that the inclusion of such exemptions from the emission limitations in K.A.R. § 28-19-11(A) and the first part of K.A.R. § 28-19-11(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA notes that these exemptions are impermissible even though the state has imposed some factual and temporal limitations on their potential scope. For example, in K.A.R. § 28-19-11(A), the state has specified that excess emissions during malfunctions or necessary repairs "shall not be deemed violations provided that: (1) The person responsible ... notifies the department of the occurrence and nature of such malfunctions, breakdowns, or repairs, in writing, within ten (10) days of noted occurrence." Similarly, in the first part of K.A.R. § 28-19-11(C) with respect to "[e]xcessive contaminant emission from fuel burning equipment used for indirect heating purposes resulting from fuel or load changes, start up, soot blowing, cleaning of fires, and rapping of precipitators," the state has made the exemption available only in such events that "do not exceed a period or periods aggregating more than five (5) minutes during any consecutive one (1) hour period." Although these extra limitations on the scope of the exemptions are helpful features, the core problem remains that both of the provisions provide

impermissible exemptions from the emission limitations by defining the excess emissions as non-violations.

The EPA believes that both K.A.R. § 28-19-11(B) and the second part of K.A.R. § 28-19-11(C) are impermissible as unbounded director's discretion provisions that purport to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of K.A.R. § 28-19-11(B), the provision authorizes a state official unilaterally to grant "prior approval" to permit "[e]missions in excess of the limitations specified in these emission control regulations resulting from scheduled maintenance of control equipment and appurtenances." The provision vests the state official with unilateral power to grant an exemption from the otherwise applicable emission limitation, without any public process at the state or federal level. By deciding that an exceedance of the emission limitation is "permitted," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. K.A.R. § 28-19-11(B) does contain a requirement that the source establish that it was not possible for the scheduled maintenance to occur during periods of shutdown but nevertheless empowers the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit.

Similarly, the EPA believes that the second part of K.A.R. § 28-19-11(C) is impermissible because it allows a state official unilaterally to "authorize, upon request of the operator, an adjusted time schedule for permitting ... excessive emissions" if the

source can demonstrate that the period of "fuel or load changes, start up, soot blowing, cleaning of fires, and rapping of precipitators" is required to extend longer than the five minutes during a consecutive one-hour period allowed by the first part of K.A.R. § 28-19-11(C). Because the K.A.R. § 28-19-11(C) grant of an automatic exemption of excess emissions during these events is impermissible in the first instance, the provision's authorization of the state official to extend the period of exemption for an even longer period upon request from a source is also impermissible. Moreover, the provision permits the state official to extend the time period of exemption without any additional public process at the state or federal level. This discretion authorizes the creation of an extended exemption on a case-by-case basis, where the exemption is not permissible in the first instance. Thus, this provision undermines the SIP emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of director's discretion provisions in K.A.R. § 28-19-11(B) and K.A.R. § 28-19-11(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

The EPA notes that K.A.R. § 28-19-11(C) does condition the state official's authorization of an extended time period in which excess emissions are not considered violations upon a source limiting "visible emissions" to not exceed 60 percent opacity. The CAA does, as discussed in section VII.A of this notice, permit states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. The EPA believes that emission limitations in SIPs should generally be developed in the first instance to account for the types of normal operation outlined in K.A.R. § 28-19-11(C), such as cleaning and soot

blowing. K.A.R. § 28-19-11(C) does not appear to comply with the Act's requirements as interpreted in the EPA's SSM Policy in a number of respects. The provision's exemptions apply to all SIP emission limitations, and the alternative limitation in K.A.R. § 28-19-11(C) restricts only visible emissions and thus, at best, is an alternative emission limitation only for particulate matter. In addition, such alternative emission limitations must be developed in consultation with the EPA and must be narrowly drawn to apply to small groups of sources using specific types of control strategy. To the extent that the requirement limiting the opacity of visible emissions during periods of fuel or load changes, start up, soot blowing, cleaning of fires, and rapping of precipitators in K.A.R. § 28-19-11(C) was intended to function as an alternative emission limitation rather than as an exemption granted at the state official's discretion from the otherwise applicable SIP emission limitations, the terms of the alternative limitation are substantially inadequate and do not render this specific SIP provision permissible under the CAA.

With respect to the Petitioner's concern that the challenged exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that automatically exempt or allow state officials to define what would otherwise be violations of the applicable SIP emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to K.A.R. § 28-19-11(A) and the first part of K.A.R. § 28-19-11(C). The EPA believes that both of these provisions

allow for automatic exemptions from the otherwise applicable emission limitations, and that such outright exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304.

The EPA also proposes to grant the Petition with respect to K.A.R. § 28-19-11(B) and the second part of K.A.R. § 28-19-11(C). The EPA believes both allow for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the requirement that visible emissions not exceed 60-percent opacity during the periods of operation specified in K.A.R. § 28-19-11(C) is not a permissible alternative emission limitation under the EPA's SSM Policy interpreting the CAA.

For these reasons, the EPA is proposing to find that K.A.R. § 28-19-11(A), K.A.R. § 28-19-11(B), and K.A.R. § 28-19-11(C) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

### 3. Missouri

#### a. Petitioner's Analysis

The Petitioner objected to two provisions in the Missouri SIP that could be

interpreted to provide discretionary exemptions.<sup>167,168</sup> The first provides exemptions for visible emissions exceeding otherwise applicable SIP opacity limitations (Mo. Code Regs. Ann. tit 10, § 10-6.220(3)(C)). The second provides authorization to state personnel to decide whether excess emissions "warrant enforcement action" where a source submits information to the state showing that such emissions were "the consequence of a malfunction, start-up or shutdown." (Mo. Code Regs. Ann. tit 10, § 10-6.050(3)(C)). The Petitioner argued that Mo. Code Regs. Ann. tit 10, § 10-6.050(3)(C) "clearly gives the director the authority to decide whether excess emissions occurred during a malfunction, start-up, or shutdown, and whether they 'warrant enforcement action.'"<sup>169</sup> According to the Petitioner, the provision could be interpreted to decide that enforcement is not warranted by anybody, which could preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA. Similarly, the Petitioner argued that Mo. Code Regs. Ann. tit 10, § 10-6.220(3)(C) could be

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<sup>167</sup> Petition at 49-50.

<sup>168</sup> The EPA notes that the Petitioner also identified additional provisions Mo. Code Regs. Ann. tit 10, § 10-6.200(3)(E)(1), Mo. Code Regs. Ann. tit 10, § 10-6.200(3)(E)(3)(C)(I), Mo. Code Regs. Ann. tit 10, § 10-6.200(3)(E)(4)(B), Mo. Code Regs. Ann. tit 10, § 10-6.200(3)(E)(5)(E), Mo. Code Regs. Ann. tit 10, § 10-6.200(3)(E)(6)(F), Mo. Code Regs. Ann. tit 10, § 10-6.200(3)(E)(7)(E), Mo. Code Regs. Ann. tit 10, § 10-6.200(3)(E)(11)(C), which provide for exemptions to HMIWIs, that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address these provisions in its remedy request, and thus the EPA is not addressing these provisions in this action. (This is in contrast to the case of a similar HMIWI provision in Nebraska for which the Petition did specifically make such a request.) The EPA further notes that the provisions enumerated above are not part of Missouri's SIP but were approved as part of the separate state plan to meet the applicable emissions guidelines under CAA § 111(d) and 40 CFR Part 60. Therefore, a SIP call is not appropriate. The EPA may elect to evaluate these provisions in a later action.

<sup>169</sup> Petition at 50.

construed to empower the director to preclude enforcement by the EPA and citizens. The Petitioner noted that the CAA and the EPA's SSM policy forbid such provisions if they would purport to preclude enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Mo. Code Regs. Ann. tit 10, § 10-6.220(3)(C) is impermissible as an insufficiently bounded director's discretion provision. The provision states that "[v]isible emissions over the limitations . . . of this rule are in violation of this rule unless the director determines that the excess emissions do not warrant enforcement action based on data submitted" by sources regarding startup, shutdown, and malfunction events. This provision could be read to mean that once the state official has determined that excess visible emissions do not warrant enforcement action, those excess emissions are not violations. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read

to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Mo. Code Regs. Ann. tit 10, § 10-6.220(3)(C) is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

The EPA believes that Mo. Code Regs. Ann. tit 10, § 10-6.050(3)(C) is permissible because it defines parameters for the exercise of enforcement discretion by state personnel for violations of emission limitations. According to the EPA's SSM Policy, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise of enforcement discretion concerning actions taken by state personnel. The provision only maintains that state enforcement personnel "shall consider" certain factors in determining whether to take an enforcement action under the state statutory enforcement provisions. The regulations do not state or imply that if a source makes an appropriate showing it is exempt from penalties or injunctive relief. The provisions that describe the factors to be considered by a state official only state that the official will consider such factors. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking an enforcement action if the state exercises its discretion not to pursue enforcement. The EPA believes that Mo. Code Regs. Ann. tit 10, § 10-6.050(3)(C) is consistent with the CAA and the EPA's SSM Policy and therefore does not render the SIP provision substantially inadequate.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Mo. Code Regs. Ann. tit

10, § 10-6.220(3)(C). The EPA believes that this provision could be read to allow for exemptions from the otherwise applicable SIP emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Such a provision is inconsistent with the fundamental requirements of the CAA with respect to SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find Mo. Code Regs. Ann. tit 10, § 10-6.220(3)(C) is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10-6.050(3)(C). The EPA believes that the provision is on its face clearly applicable only to Missouri state enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where Missouri state personnel elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Missouri, to assure that there is no misunderstanding with respect to the correct interpretation of Mo. Code Regs. Ann. tit 10, § 10-6.050(3)(C).

#### 4. Nebraska

##### a. Petitioner's Analysis

The Petitioner objected to two provisions in the Nebraska SIP.<sup>170</sup> First, the Petitioner objected to a generally applicable provision that provides authorization to state personnel to decide whether excess emissions "warrant enforcement action" where a

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<sup>170</sup> Petition at 51.

source submits information to the state showing that such emissions were "the result of a malfunction, start-up or shutdown" (Neb. Admin. Code Title 129 § 11-35.001). The Petitioner argued that this provision "clearly gives the Director the authority to decide whether excess emission occurred during a malfunction, startup or shutdown, and whether they 'warrant enforcement action.'"<sup>171</sup> According to the Petitioner, the provision could be interpreted to give a state official the authority to decide that enforcement is not warranted by anybody, which could preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA. The Petitioner thus requested that Nebraska revise the provision to eliminate any confusion that a decision by state personnel not to enforce against a violation would in any way foreclose enforcement by the EPA or citizens.

Second, the Petitioner objected to a specific provision in Nebraska state law that contains exemptions for excess emissions at HMIWI during startup, shutdown, and malfunction (Neb. Admin. Code Title 129 § 18-004.02). The Petitioner requested that these exemptions be removed entirely from Nebraska's SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be

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<sup>171</sup> Petition at 51.

continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Neb. Admin. Code Title 129 § 11-35.001 is permissible because it defines parameters for the exercise of enforcement discretion by state personnel for violations of emission limitations. According to the EPA's SSM Policy, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise enforcement discretion concerning actions taken by state personnel. The provision in question maintains that state enforcement personnel "shall consider" certain factors in determining whether to take an enforcement action under the state statutory enforcement provisions. The regulation does not expressly or implicitly place any limits on the state personnel's ability to exercise discretion, and the enforcement discretion provided by this regulation is not an exemption to the SIP emission limitations. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking enforcement action if the state exercises its discretion not to pursue enforcement. The EPA believes that Neb. Admin. Code Title 129 § 11-35.001 is consistent with the CAA and the EPA's SSM Policy and therefore does not render the SIP substantially inadequate.

The EPA disagrees that the provisions providing exemptions for HMIWI must be removed from the SIP. Nebraska Admin. Code Title 129 § 18-004.02 was not approved into Nebraska's SIP, but rather it was approved as part of the separate state plan to meet the applicable emissions guidelines under CAA § 111(d) and 40 CFR Part 60. Because that rule is not in the Nebraska SIP is not related to any provisions in the SIP, it does not

represent an inadequacy in the SIP.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Neb. Admin. Code Title 129 § 11-35.001. The EPA believes that this provision is on its face clearly applicable only to Nebraska state enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where personnel from Nebraska elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Nebraska, to assure that there is no misunderstanding with respect to the correct interpretation of this provision.

The EPA proposes to deny the Petition with respect to Neb. Admin. Code Title 129 § 18-004.02. This regulation is not part of the Nebraska SIP and thus cannot represent an inadequacy in the SIP.

5. Nebraska: Lincoln-Lancaster

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Lincoln-Lancaster County Air Pollution Control Program (Art. 2 § 35), which governs the Lincoln-Lancaster County Air Pollution Control District of Nebraska, that is parallel "in all aspects pertinent to this analysis" to Neb. Admin. Code Title 129 § 11-35.001.<sup>172</sup> The Lincoln-Lancaster County provision provides authorization to local personnel to decide whether excess emissions "warrant enforcement action" where a source submits information to the county showing that such emissions were "the result of a malfunction, start-up or shutdown." The Petitioner argued that this provision "clearly gives the

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<sup>172</sup> Petition at 51-52.

Director the authority to decide whether excess emission occurred during a malfunction, startup or shutdown, and whether they 'warrant enforcement action.'"<sup>173</sup> According to the Petitioner, the provision could be interpreted to decide that enforcement is not warranted by anybody, which could preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM Policy interpreting the CAA. The Petitioner thus requested that Nebraska or Lincoln-Lancaster County revise the provision to eliminate any confusion that a decision by local personnel not to enforce against a violation would in any way foreclose enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Lincoln-Lancaster County Air Pollution Control Program, Art. 2 § 35 is permissible because it defines parameters for the exercise of enforcement discretion by local personnel for violations of emission limitations. According to the EPA's SSM Policy, as discussed in section IX.A of this notice, a state has authority to

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<sup>173</sup> Petition at 52.

have a SIP provision that pertains to the exercise enforcement discretion concerning actions taken by state personnel. The provision in question maintains that local enforcement personnel "shall consider" certain factors in determining whether to take an enforcement action under the local statutory enforcement provisions. The regulation does not expressly or implicitly place any limits on the local personnel's ability to exercise discretion, and the enforcement discretion provided by the regulation is not an exemption to the SIP emission limitations. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking enforcement action if the county exercises its discretion not to pursue enforcement. The EPA believes that Lincoln-Lancaster County Air Pollution Control Program, Art. 2 § 35 is consistent with the CAA and EPA's SSM Policy and therefore does not render the SIP substantially inadequate.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Lincoln-Lancaster County Air Pollution Control Program, Art. 2 § 35. The EPA believes that this provision is on its face clearly applicable only to Lincoln-Lancaster County enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where personnel from Lincoln-Lancaster County elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Nebraska and from the Lincoln-Lancaster County Air Pollution Control Program, to assure that there is no misunderstanding with respect to the correct interpretation of this provision.

*I. Affected States in EPA Region VIII*

1. Colorado

a. Petitioner's Analysis

The Petitioner objected to two affirmative defense provisions in the Colorado SIP that provide for affirmative defenses to qualifying sources during malfunctions (5 Colo. Code Regs § 1001-2(II.E)) and during periods of startup and shutdown (5 Colo. Code Regs § 1001-2(II.J)).<sup>174</sup> The Petitioner acknowledged that this state has correctly revised its SIP in important ways in order to be consistent with CAA requirements, as interpreted in the EPA's SSM Policy, including providing affirmative defense provisions that are limited to monetary penalties, that do not apply in actions to enforce federal standards such as NSPS or NESHAP approved into the SIP, and that meet "almost word for word" the recommendations of the 1999 SSM Guidance. Nevertheless, the Petitioner had two concerns with these SIP provisions.

First, the Petitioner objected to both of these provisions based on its assertion that the CAA allows no affirmative defense provisions in SIPs. Second, the Petitioner asserted that even if affirmative defense provisions were permissible under the CAA, the state had properly followed EPA guidance in the affirmative defense provision applicable to startup and shutdown events but failed to do so in the affirmative defense provision applicable to malfunctions. Specifically, the Petitioner argued that the EPA's own guidance for affirmative defenses recommended that they "are not appropriate where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."<sup>175</sup> Instead, the state's affirmative defense for malfunction events is potentially available to any source, if it can establish that the excess emissions

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<sup>174</sup> Petition at 25-27.

<sup>175</sup> *Id.* at 25.

during the event did not result in exceedances of ambient air quality standards that could be attributed to the source.<sup>176</sup> The Petitioner objected to this as not merely inconsistent with the EPA's 1999 SSM Guidance but an approach "that does not have the same deterrent effect" on sources and that would not have the same effects on sources to assure that they comply at all times in order to avoid violations. As a practical matter, the Petitioner also argued that including this element to the affirmative defense could "mire enforcement proceedings in the question of whether or not the NAAQS or PSD increments were exceeded as a matter of fact."

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in section IV.B of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. So long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense provisions for malfunctions. However, based on evaluation of the legal and factual basis for affirmative defenses in SIPs, the EPA now believes that affirmative defense provisions are not appropriate in the case of planned source actions, such as startup and shutdown, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation. Again, as explained in section IV.B of this notice, the EPA is changing its interpretation with respect to affirmative defenses for startup and shutdown. The EPA acknowledges that at the time of its

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<sup>176</sup> See, 5 Colo. Code Regs §1001-2(II.E.1.j).

approval of 5 Colo. Code Regs § 1001-2(II.J) into the SIP in 2006, the state had complied with the EPA's then-applicable interpretation of the CAA and had worked with the EPA to develop that provision.<sup>177</sup> However, based on further consideration of this issue prompted by the Petition, the EPA is revising its SSM Policy to interpret the CAA to allow affirmative defenses only in the case of events that are beyond the control of the source, *i.e.*, malfunctions.

With respect to the Petitioner's second concern, the EPA disagrees that the state's inclusion of an affirmative defense available to all sources, including single sources or groups of sources with the "potential" to cause exceedances of the NAAQS or PSD increments, renders the provision inconsistent with the CAA. The EPA's recommendations for appropriate criteria for affirmative defenses in the SSM Policy are guidance, and as guidance, the EPA believes that there can be facts and circumstances in which a state may elect to develop a SIP provision with somewhat different criteria, so long as they still meet the same statutory objectives. Conditioning the affirmative defense on a factual showing that there was no actual violation of air standards attributable to the excess emissions during the malfunction is an acceptable alternative means to the same end. For example, instead of providing no affirmative defense to sources with this "potential" for these impacts on air quality, the state could provide the affirmative defense to sources on the condition that the source must be able to demonstrate that the excess emissions did not have these impacts. The EPA considers this an appropriate means to the same end of providing the affirmative defense to sources in a way that provides relief from monetary penalties for events that were beyond their control, at the

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<sup>177</sup> See, "Approval and Disapproval and Promulgation of Colorado Affirmative Defense Provisions for Startup and Shutdown," 71 FR 8958 (Feb. 22, 2006).

same time providing incentive to the source to prevent the violation and to take all practicable steps to minimize the impacts of the violation in order to qualify for the relief from penalties. As described in more detail in section VII.B of this notice, the EPA is revising its recommendations for affirmative defense provisions for malfunctions with respect to this specific point in this proposal.

Finally, the EPA understands the Petitioner's concern about enforcement proceedings becoming "mired" in various questions of fact that must be established in an enforcement action. However, the EPA notes that all enforcement proceedings turn upon important questions of fact that must be proven, including facts necessary to establish whether there was a violation, the extent of the violation, and whether there are extenuating circumstances that should be taken into consideration in the assessment of monetary penalties or injunctive relief for the violation. Indeed, the statutory factors that Congress provided for the assessment of penalties in CAA section 113(e) explicitly include "the seriousness of the violation," which would encompass the extent and severity of the environmental impact of the violation. Thus, the EPA does not agree that it is unreasonable to include an affirmative defense element that pertains to whether or not the excess emissions in question caused a violation of the NAAQS or PSD increments.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 5 Colo. Code Regs § 1001-2(II.J) because it provides an affirmative defense for violations due to excess emissions applicable during startup and shutdown events, contrary to the EPA's current interpretation of the CAA. The EPA believes that this provision allows for an affirmative

defense that is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, this provision is inconsistent with the requirements of CAA sections 113 and 304. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to 5 Colo. Code Regs § 1001-2(II.E), because this provision includes an affirmative defense applicable to malfunction events that is consistent with the requirements of the CAA, as interpreted by the EPA in the SSM Policy. In particular, the EPA denies the Petition with respect to the claim that this provision is inconsistent with the CAA because it is available to sources or groups of sources that might have the potential to cause violations of the NAAQS or PSD increments. The EPA believes that an acceptable alternative approach is to require the source to establish, as an element of the affirmative defense, that the excess emissions in question did not cause such impacts. Accordingly, the EPA is proposing to find that this provision is consistent with CAA requirements and thus declining to make a finding of substantial inadequacy with respect to this provision.

## 2. Montana

### a. Petitioner's Analysis

The Petitioner objected to an exemption from otherwise applicable emission limitations for aluminum plants during startup and shutdown (Montana Admin. R 17.8.334).<sup>178</sup> The Petitioner argued that an automatic exemption for emissions during startup and shutdown events is inconsistent with the CAA and the EPA's interpretation of

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<sup>178</sup> Petition at 50-51.

the CAA in the SSM Policy. In addition, the Petitioner argued that these exemptions also could not qualify as source-specific alternative limits applicable during startup and shutdown because there "is nothing to indicate that the State addressed the feasibility of control strategies, minimization of the frequency and duration of startup and shutdown modes, worst-case emissions, and impacts on air quality."<sup>179</sup> The Petitioner further objected that this provision would be in contravention of the EPA's recommendation that source-specific emission limitations for startup and shutdown would not be appropriate when a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments.

b. The EPA's Evaluation

The EPA agrees that ARM 17.8.334 (in Administrative Rule of Montana) is inconsistent with the requirements of the CAA. This provision explicitly provides that affected sources are exempted from otherwise applicable SIP emission limitations during startup and shutdown. The relevant part of this SIP provision specifies that "[o]perations during startup and shutdown shall not constitute representative conditions for the purposes of determining compliance with this rule" and further specifies "nor shall emission in excess of the levels required in ARM 17.8.331 and 17.8.332 during periods of startup and shutdown be considered a violation of ARM 17.8.331 and 17.8.332."<sup>180</sup> The latter regulatory cross-references are to emission limits for fluorides and opacity at the source, both of which relate to the attainment and maintenance of the NAAQS and

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<sup>179</sup> *Id.* at 51.

<sup>180</sup> *See*, Montana Admin. R 17.8.334(1).

PSD increments.<sup>181</sup> Moreover, the provision in question also contains ambiguous regulatory text that suggests the exemption extends to other emission limitations applicable to this source category. By stating that operations during startup and shutdown are not representative conditions for determining compliance with "this rule," the provision appears to provide the same exemptions from other emission limitations that may apply to aluminum plants with respect to other air emissions as well. The EPA's longstanding interpretation of the CAA is that SIP provisions containing exemptions during startup and shutdown are not permissible.

The EPA also agrees that ARM 17.8.334 does not qualify as a source-specific emission limitation applicable during startup and shutdown, as recommended in the 1999 SSM Guidance. As explained in section VII.A of this notice, the EPA is clarifying that guidance to eliminate any misperception that exemptions from otherwise applicable emission limitations are permissible during startup and shutdown. States can elect to develop appropriate source-specific alternative emission limitations that apply during startup and shutdown events. The EPA recommended that in order to be approvable (*i.e.*, meet CAA requirements), any new special emission limitations applicable to the source during startup and shutdown should be narrowly tailored and take into account considerations such as the technological limitations of the specific source category and the control technology that is feasible during startup and shutdown. Any such SIP revision that would alter the existing applicable emission limitations for a source during startup and shutdown must meet the same requirements as any other SIP submission, *i.e.*, compliance with CAA sections 110(a), 110(k), 110(l), and 193, and any other CAA

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<sup>181</sup> The EPA notes that the state has elected to control fluoride emissions as a means of addressing particulate matter from the affected sources.

provision substantively germane to the SIP revision. Given the text of ARM 17.8.334, however, the EPA believes the state intended not to create a source-specific emission limitation applicable during startup and shutdown but instead merely an exemption for such emissions. Likewise, the EPA does not believe that the issue of special emission limitations during startup or shutdown for a single source or group of sources was contemplated at the time the state created this SIP provision. Nevertheless, the EPA notes that its current SSM Policy does not interpret the CAA to be a bar to special emission limitations in these circumstances, if the state addresses the concern about impacts on NAAQS and PSD increments in some other comparable way.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to ARM 17.8.334. The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during startup and shutdown and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). It is not necessary to reach the Petitioner's argument that this provision is not an appropriate source-specific emission limitation, because the provision at issue instead provides an impermissible exemption for emissions during startup and shutdown. Similarly, it is not necessary to reach the Petitioner's concern with respect to the issue of a single source or group of sources with the potential to cause an exceedance of the NAAQS or PSD increment, because the provision at issue provides an impermissible exemption. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposes to issue a SIP call with respect to this provision.

3. North Dakota

a. Petitioner's Analysis

The Petitioner objected to two provisions in the North Dakota SIP that create exemptions from otherwise applicable emission limitations.<sup>182</sup> The first provision creates exemptions from a number of cross-referenced opacity limits "where the limits specified in this article cannot be met because of operations and 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" (N.D. Admin. Code § 33-15-03-04(4)). The second provision creates an implicit exemption for "temporary operational breakdowns or cleaning of air pollution equipment" if the source meets certain conditions (N.D. Admin. Code § 33-15-05-01(2)(a)(1)). The Petitioner claimed that both provisions violate the CAA and the EPA's interpretation of the CAA in the SSM Policy because they create exemptions from otherwise applicable emission limitations for excess emissions during these events rather than treating the excess emissions as violations, and because the provisions could be construed to preclude enforcement of the emission limitations for these violations by the EPA and citizens.

b. The EPA's Evaluation

The EPA believes that N.D. Admin. Code 33-15-03-04.4 and N.D. Admin. Code 33-15-03-04.3<sup>183</sup> are inconsistent with the requirements of the CAA. These provisions explicitly allow exemptions from the otherwise applicable emission limitations for

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<sup>182</sup> Petition at 59.

<sup>183</sup> The EPA interprets the Petitioner's reference to N.D. Admin. Code § 33-15-03-04(4) as a citation to N.D. Admin. Code 33-15-03-04.4. The EPA notes also that the Petitioner specifically focused on concern with N.D. Admin. Code 33-15-04.4, but N.D. Admin. Code 33-15-03-04.3 also includes a related problem.

opacity in several other regulations: N.D. Admin. Code 33-15-03-01, N.D. Admin. Code 33-15-03-02, N.D. Admin. Code 33-15-03-03, and N.D. Admin. Code 33-15-03-03.1. The exemption created by N.D. Admin. Code 33-15-03-04.4 is indefinite in scope and has unclear limits, because it is available whenever a source cannot meet the emission limitations "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 [emission limitations]". It is unclear whether the provision is intended to apply only to special circumstances, such as malfunctions, or to a broader range of normal source operations. It is also unclear who determines what operations or processes make compliance impossible or who determines when it again becomes technically feasible to meet the limits. Whatever the parameters of this imprecise provision, however, it is clear that it contemplates outright exemptions from the applicable emission limitations under certain circumstances and at certain times.

The EPA believes that N.D. Admin. Code 33-15-03-04.3 is impermissible under the CAA as interpreted in the EPA's SSM Policy as an unbounded director's discretion provision. The provision states that the otherwise applicable emission limitations for opacity in the several other listed regulations do not apply "where an applicable opacity standard is established for a specific source." In accordance with this provision, a state official could modify the opacity limits in a permit or other document to allow emissions in excess of the otherwise applicable SIP limitations. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the

public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that the inclusion of an unbounded director's discretion provision in N.D. Admin. Code 33-15-03-04.3 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The exemptions provided in N.D. Admin. Code 33-15-03-04.4 are not consistent with CAA requirements, because they would exempt excess emissions that occur during the periods in question. In addition, the provision does not operate to create a source-specific emission limitation that applies during the periods in question, nor does it meet the recommended criteria and parameters for an affirmative defense for violations that occur as a result of a qualifying malfunction. Moreover, the amorphous nature of the provision, in which it is unclear who makes the determination whether the source should be excused from the emission limitations and what the precise parameters are for these exemptions, exacerbates the problem. Thus, the EPA also agrees with the Petitioner's concern that this provision could be interpreted to bar enforcement by the EPA or through a citizen suit, not only because it creates impermissible exemptions but also because of

the inherent ambiguities about: (i) who makes the determination whether the excess emissions are to be considered a violation; and (ii) what constitutes an event during which the excess emissions are to be excused. In its current form, the EPA has concerns not only about the impermissible exemptions created by the provision but also about its practical enforceability as a SIP provision meeting basic CAA requirements for implementation, maintenance, and enforcement of the NAAQS as contemplated in CAA section 110.

The EPA agrees that N.D. Admin. Code 33-15-05-01.2a(1)<sup>184</sup> is also inconsistent with CAA requirements for SIP provisions. This provision creates an implicit exemption for "temporary operational breakdowns or cleaning of air pollution equipment" if the source meets certain conditions. N.D. Admin. Code 33-15-05-01 in general imposes emission limitations for particulate matter from industrial processes, with the limitations stated in terms of the maximum amount of particulate matter allowed in any one hour. Notwithstanding these emission limitations, however, N.D. Admin. Code 33-15-05-01.2a(1) provides that:

[t]emporary operational breakdowns or cleaning of air equipment for any process *are permitted* provided that the owner or operator immediately advises the department of the circumstances and outlines an acceptable corrective program and provided such operations do not cause an immediate public health hazard (emphasis added).

Although N.D. Admin. Code 33-15-05-01.2a(1) does not explicitly state that the exceedances of the emission limitations are not violations, the EPA believes that this is the most reasonable reading of the provision. Moreover, the title for this subsection is "exceptions," and the immediately preceding provisions impose the emission limitations

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<sup>184</sup> The EPA interprets the Petitioner's reference to N.D. Admin. Code § 33-15-05-01(2)(a)(1) as a citation to N.D. Admin. Code 33-15-05-01.2a(1).

on sources. Thus, the provision creates an impermissible exemption from the otherwise applicable SIP emission limitations.

The EPA notes that although the state has imposed some conditions on the exemptions, *e.g.*, the requirement to notify state officials of occurrence of the event, this provision would not qualify as an affirmative defense consistent with CAA requirements. First, the exemptions would negate the availability of monetary penalties or injunctive relief in any enforcement proceeding. Second, the conditions for qualifying for the exemption are not consistent with the criteria that EPA recommends for elements of an affirmative defense for which the source bears the burden of proof in order to assure that they are narrowly drawn and available only in suitable circumstances. Third, the provision extends not just to "breakdowns," which presumably equates to malfunctions, but also extends to "cleaning of air equipment," which clearly encompasses excess emissions during normal source maintenance—events for which sources should be designed, operated, and maintained to comply with emission limitations, and during which sources should be expected to comply.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to N.D. Admin. Code 33-15-03-04.4 (cited in the Petition as N.D. Admin. Code § 33-15-03-04(4)). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during startup and shutdown and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, the EPA believes that this provision is sufficiently ambiguous that it would be difficult for the state, the EPA, or the public to enforce the provision effectively in its

current form, and that this provision is thus inconsistent with the requirements of CAA section 110(a) on this basis as well. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition with respect to N.D. Admin. Code 33-15-03-04.3 (cited in the Petition as N.D. Admin. Code § 33-15-03-04(3)). The EPA believes that this provision allows for discretionary exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations, when such exemptions are not permissible in the first instance. Such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition with respect to N.D. Admin. Code 33-15-05-01.2a(1) (cited in the Petition as N.D. Admin. Code § 33-15-05-01(2)(a)(1)). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during operational breakdowns (*i.e.*, malfunctions) or cleaning of air equipment (*i.e.*, maintenance) and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For

these reasons, the EPA is also proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

4. South Dakota

a. Petitioner's Analysis

The Petitioner objected to a provision in the South Dakota SIP that creates exemptions from otherwise applicable SIP emission limitations (S.D. Admin. R. 74:36:12:02(3)).<sup>185</sup> The Petitioner asserted that the provision imposes visible emission limitations on sources but explicitly excludes emissions that occur "for brief periods during such operations as soot blowing, start-up, shut-down, and malfunctions." The Petitioner argued that such automatic exemptions for excess emissions is contrary to the requirements of the CAA for SIP provisions, as well as contrary to the EPA's 1982 SSM Guidance and 1999 SSM Guidance.

b. The EPA's Evaluation

The EPA agrees that S.D. Admin. R. 74:36:12:02(3) is inconsistent with CAA requirements for SIP provisions. This provision creates an exemption from applicable visible emission limitations from the generally applicable SIP requirements. The S.D. Admin. R. 74:36:12:01 imposes a generally applicable opacity limit on all sources, measured using the EPA's Method 9. However, S.D. Admin. R. 74:36:12:02 provides exceptions to these limits and, in particular, in S.D. Admin. R. 74:36:12:02(3) includes an explicit exemption for emissions for "brief periods during such operations as soot blowing, start-up, shut-down, and malfunctions."

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<sup>185</sup> Petition at 66.

In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, the EPA's SSM Policy has long interpreted the CAA not to permit exemptions for excess emissions during other modes of normal source operation, such as "soot blowing." The EPA notes that by its terms, S.D. Admin. R. 74:36:12:02(3) implies that it also would exempt excess emissions during other modes of normal source operation because it explicitly applies to events "such as" the four listed types, therefore implying it is not an exclusive list and could extend to other types of events as well. The exemptions provided in S.D. Admin. R. 74:36:12:02(3) are not consistent with CAA requirements, because they would exempt excess emissions that occur during the periods in question. Excess emissions must be treated as violations of the applicable emission limitations.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to S.D. Admin. R. 74:36:12:02(3). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during startup, shutdown, and malfunction, as well as during other modes of normal source operations such as "soot blowing." Automatic exemptions from otherwise applicable SIP emission limitations are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A),

110(a)(2)(C), and 302(k). For these reasons, the EPA is also proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

5. Wyoming

a. Petitioner's Analysis

The Petitioner objected to a specific provision in the Wyoming SIP that provides an exemption for excess particulate matter emissions from diesel engines during startup, malfunction, and maintenance (ENV-AQ-1 Wyo. Code R. § 2(d)).<sup>186</sup> The provision exempts emission of visible air pollutants from diesel engines from applicable SIP limitations "during a reasonable period of warmup following a cold start or where undergoing repairs and adjustment following malfunction." The Petitioner argued that this exemption "is contrary to EPA policy for source category-specific rules for startup and shutdown."<sup>187</sup> Accordingly, the Petitioner requested that this provision be eliminated from the SIP.

b. The EPA's Evaluation

The EPA believes that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable

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<sup>186</sup> Petition at 74. The EPA notes that the Petitioner appears to have provided an incorrect citation to this provision; accordingly, in this notice, the EPA replaces that citation with the following: "Wyoming Air Quality Standards and Regulations (WAQSR) Chapter 3, section 2(d)."

<sup>187</sup> *Id.*

emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption in WAQSR Chapter 3, section 2(d) from otherwise applicable SIP emission limitations for violations during cold startup or following malfunction of diesel engines is a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA notes that WAQSR Chapter 3, section 2(d) does not appear to comply with the CAA's requirements for source category-specific rules for startup and shutdown as interpreted in the EPA's SSM Policy. The provision provides that the otherwise applicable emission "limitation shall not apply during a reasonable period of warmup following a cold start." Recent court decisions have made clear that automatic exemptions from otherwise applicable SIP emission limitations for excess emissions during periods of startup are not in fact permissible under the CAA. As discussed in section VII.A of this notice, states may elect to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown, but exemptions for excess emissions during such periods are inconsistent with the fundamental requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to WAQSR Chapter 3, section 2(d) (cited as ENV-AQ-1 Wyo. Code R. § 2(d) in the Petition). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission

limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

*J. Affected States and Local Jurisdictions in EPA Region IX*

1. Arizona

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Arizona Department of Air Quality's (ADEQ) Rule R18-2-310, which provide affirmative defenses for excess emissions during malfunctions (AAC Section R18-2-310(B)) and for excess emissions during startup or shutdown (AAC Section R18-2-310(C)).<sup>188</sup> First, the Petitioner asserted that all affirmative defenses for excess emissions are inconsistent with the CAA and should be removed from the Arizona SIP.

Additionally, quoting from the EPA's statement in the SSM Policy that such affirmative defenses should not be available to "a single source or small group of sources [that] has the potential to cause an exceedance of the NAAQS or PSD increments," the Petitioner contended that "sources with the power to cause an exceedance should be

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<sup>188</sup> Petition at 20-22.

strictly controlled at all times, not just when they actually cause an exceedance."<sup>189</sup>

Although acknowledging that R18-2-310 contains some limitations to address this issue, the Petitioner argued that the limitation in the SIP provision is not the same as entirely disallowing affirmative defenses for these types of sources, which removes the "incentive" for such sources to emit at levels close to those that would violate a NAAQS or PSD increment. Accordingly, the Petitioner requested that the EPA require Arizona either to entirely remove R18-2-310(B) and (C) from the SIP or to revise the rule so that affirmative defenses are not available to a single source or any small group of sources that has the potential to cause an exceedance of the NAAQS.

Second, the Petitioner asserted that the provision applicable to startup and shutdown periods (R18-2-310(C)) does not include an explicit requirement for a source seeking to establish an affirmative defense to prove that "the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance." The Petitioner provided a table specifically comparing the provisions in R18-2-310(C) against the EPA's recommended criteria in the 1999 SSM Guidance to show that R18-2-310(C) does not contain a specific provision to address this recommended criterion and stated that the rule should be revised to require such a demonstration.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in section IV of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. So long as these provisions are narrowly drawn and consistent with the

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<sup>189</sup> Petition at 20.

CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense provisions for malfunctions.

With respect to the potential air quality impacts of a "single source or small group of sources," the EPA believes that R18-2-310 satisfies the statutory requirements as interpreted in the EPA guidance. Rule R18-2-310 specifies five types of standards or limitations for which affirmative defenses are *not* available under the rule and includes among those five types: standards or limitations contained in any PSD or NSR permit issued by the EPA; standards or limitations included in a PSD permit issued by the ADEQ to meet the requirements of R18-2-406(A)(5) (Permit Requirements for Sources Located in Attainment and Unclassifiable Areas); and standards or limitations contained in R18-2-715(F) ("Standards of Performance for Existing Primary Copper Smelters; Site-specific Requirements") (R18-2-310(A)). Thus, no existing primary copper smelter subject to emission standards or limitations under R18-2-715(F) may seek an affirmative defense for any emissions in excess of those provisions, and likewise no major stationary source subject to permit conditions designed to protect the PSD increments in a PSD permit issued by ADEQ or the EPA may seek an affirmative defense for any emissions in excess of those permit conditions. Existing copper smelters are, to the EPA's knowledge, the only sources under ADEQ jurisdiction that have the potential to cause an exceedance of the NAAQS, and requirements to protect the PSD increments are implemented entirely through PSD permits issued by states and the EPA. Accordingly, the clear exclusion of these standards and limitations from the affirmative defense provisions in R18-2-310 adequately addresses the EPA's concerns with respect to potential violations of the

NAAQS or PSD increments.

With respect to other emission standards or limitations (*i.e.*, those not specifically excluded from coverage under the rule), R18-2-310 requires each source seeking to establish an affirmative defense to demonstrate, among other things, that "[d]uring the period of excess emissions there were no exceedances of the relevant ambient air quality standards . . . that could be attributed to the emitting source" (R18-2-310(B)(7), (C)(1)(f)). The state's election to provide such an affirmative defense *contingent upon* a demonstration by the source that there were no exceedances of the relevant ambient air quality standards during the relevant period that could be attributed to the emitting source reasonably assures that these affirmative defense provisions will not create incentives to emit at higher levels or interfere with attainment and maintenance of the NAAQS. As described in section VII.B of this notice, the EPA considers this type of requirement an acceptable alternative approach to address the concern of sources or small groups of sources that could adversely impact the NAAQS or PSD increments through excess emissions.

Second, with respect to the Petitioner's assertion that R18-2-310 should be revised to require a demonstration that excess emissions during startup or shutdown are not part of a recurring pattern indicative of inadequate design, operation, or maintenance, it is not necessary to reach this issue. Instead, the EPA is proposing to modify its interpretation of the CAA with respect to affirmative defenses for startup and shutdown to eliminate the recommended criteria for such provisions as articulated in the 1999 SSM Guidance and to find, instead, that all affirmative defense provisions for planned startup and shutdown periods are not appropriate for SIP provisions under the CAA. As discussed in sections

IV and VII.C of this notice, the EPA believes that affirmative defense provisions are appropriate in SIPs for malfunctions but not for startup and shutdown.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to the arguments concerning ADEQ's affirmative defense provisions for malfunctions in R18-2-310(B). For the reasons provided above and in our previous approval of R18-2-310 into the Arizona SIP,<sup>190</sup> the EPA believes that these affirmative defense provisions are consistent with the requirements of the CAA.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in R18-2- 310(C), however, the EPA proposes to grant the Petition, because R18-2- 310(C) is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), as well as CAA sections 113 and 304. The EPA believes that a SIP provision establishing an affirmative defense for planned startup and shutdown periods is substantially inadequate to comply with CAA requirements. For these reasons, the EPA is proposing to issue a SIP call with respect to R18-2- 310(C).

2. Arizona: Maricopa County

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Maricopa County Air Pollution Control Regulations that provide affirmative defenses for excess emissions during malfunctions (Maricopa County Air Pollution Control Regulation 3, Rule 140, §401) and for excess emissions during startup or shutdown (Maricopa County Air Pollution Control

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<sup>190</sup> See, 66 FR 48085 at 48087 (Sept. 18, 2001) (final rule approving R18-2-310 into Arizona SIP).

Regulation 3, Rule 140, §402).<sup>191</sup> These provisions in Maricopa County Air Quality Department (MCAQD) Rule 140 are similar to the affirmative defense provisions in ADEQ R18-2-310.

First, the Petitioner asserted that the affirmative defense provisions in Rule 140 are problematic for the same reasons identified in the Petition with respect to ADEQ R18-2-310. Specifically, the Petitioner argued that affirmative defenses should not be allowed in any SIP and, alternatively, that to the extent affirmative defenses are permissible, the provisions in Rule 140 addressing exceedances of the ambient standards are "inappropriately permissive and do not comply with EPA guidance."<sup>192</sup> Accordingly, the Petitioner requested that the EPA require Arizona and/or MCAQD either to entirely remove these provisions from the SIP or to revise them so that they are not available to a single source or small group of sources that has the potential to cause a NAAQS exceedance. Second, the Petitioner asserted that the provisions for startup and shutdown in Rule 140 do not include an explicit requirement for a source seeking to establish an affirmative defense to prove that "the excess emissions in question were not part of a recurring pattern indicative of inadequate design, operation, or maintenance." The Petitioner argued that Rule 140 should be revised to require such a demonstration.

b. The EPA's Evaluation

First, with respect to the potential air quality impacts of a "single source or small group of sources," the EPA believes that MCAQD Rule 140 satisfies the statutory requirements as interpreted in the EPA's guidance. Rule 140 specifies four types of standards or limitations for which affirmative defenses are *not* available under the rule,

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<sup>191</sup> Petition at 23.

<sup>192</sup> Petition at 23.

including standards and limitations contained in any Prevention of Significant Deterioration (PSD) or New Source Review (NSR) permit issued by the EPA, and standards and limitations included in a PSD permit issued by MCAQD to meet the requirements of subsection 308.1(e) of Rule 240 (Permit Requirements For New Major Sources And Major Modifications To Existing Major Sources) (Rule 140, sections 103.3, 103.4). Thus, no major stationary source subject to permit conditions designed to protect the PSD increments in a PSD permit issued by MCAQD or the EPA may seek an affirmative defense for any emissions in excess of those permit conditions. These provisions adequately address the EPA's concerns regarding potential violations of the PSD increments.

Rule 140 also requires each source seeking to establish an affirmative defense to demonstrate, among other things, that "[d]uring the period of excess emissions there were no exceedances of the relevant ambient air quality standards . . . that could be attributed to the emitting source" (Rule 140, sections 401.7, 402.1(f)). The state's election to provide such an affirmative defense *contingent upon* a demonstration by the source that there were no exceedances of the relevant ambient air quality standards during the relevant period that could be attributed to the emitting source reasonably assures that these affirmative defenses provisions will not create incentives to emit at higher levels or interfere with attainment and maintenance of the NAAQS. As described in section VII.B of this notice, the EPA considers this type of requirement an acceptable alternative approach to address the concern of sources or small groups of sources that could adversely impact the NAAQS or PSD increments through excess emissions.

Second, with respect to the Petitioner's assertion that MCAQD Rule 140 should

be revised to require a demonstration that excess emissions during startup or shutdown are not part of a recurring pattern indicative of inadequate design, operation, or maintenance, it is not necessary to reach this issue. Instead, the EPA is proposing to modify its interpretation of the CAA with respect to affirmative defenses for startup and shutdown to eliminate the recommended criteria for such provisions as articulated in the 1999 SSM Guidance and to find, instead, that all affirmative defense provisions for planned startup and shutdown periods are not appropriate for SIP provisions under the CAA. As discussed in sections IV and VII.C of this notice, the EPA believes that affirmative defense provisions are appropriate in SIPs for malfunctions but not for startup and shutdown.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to the arguments concerning MCAQD's affirmative defense provisions for malfunctions in Rule 140, section 401. For the reasons provided above and in our previous approval of Rule 140 into the Arizona SIP,<sup>193</sup> the EPA believes that these affirmative defense provisions are consistent with the requirements of the CAA.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in Rule 140, section 402, however, the EPA proposes to grant the Petition, because it is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), as well as CAA sections 113 and 304. The EPA believes that a SIP provision establishing an affirmative defense for planned startup and shutdown periods is substantially inadequate to comply with CAA requirements. For

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<sup>193</sup> See, 67 FR 54957 (Aug. 27, 2002) (final rule approving Rule 140 into Arizona SIP).

these reasons, the EPA is proposing to issue a SIP call with respect to Maricopa County Air Pollution Control Regulation 3, Rule 140, §402.

3. Arizona: Pima County

a. Petitioner's Analysis

The Petitioner objected to a provision in the Pima County Department of Environmental Quality's (PCDEQ) Rule 706 that pertains to enforcement discretion.<sup>194</sup> Quoting from paragraph (D) of Rule 706, which provides that "[t]he Control Officer may defer prosecution of a Notice of Violation issued for an exceedance of a control standard if . . ." certain conditions are met, the Petitioner argued that ambiguity in this provision could be construed to preclude enforcement by the EPA or citizens. The Petitioner requested that the EPA require the PCDEQ and/or Arizona to revise this provision to make clear that a decision by the Pima County Control Officer not to enforce under the rule would in no way affect enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's assertion that Rule 706 creates ambiguity that could be construed to preclude enforcement by the EPA or through a citizen suit. Paragraph (D) of Rule 706 states that "[t]he control officer *may* defer prosecution of a Notice of Violation issued for an exceedance of a control standard *if*" four specific conditions are met (PCDEQ Rule 706, paragraph (D), emphasis added). Rule 706 does not address the EPA or citizen enforcement in any way and on its face does nothing to preclude enforcement by the EPA or through a citizen suit. Even with respect to the PCDEQ's authorities, the rule authorizes but does not require the Control Officer to defer

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<sup>194</sup> Petition at 23-24.

prosecution where the identified criteria are met.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to PCDEQ Rule 706. The EPA believes that the provision regarding enforcement in paragraph (D) of this rule clearly applies only to the PCDEQ Control Officer and could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where the PCDEQ Control Officer elects to exercise enforcement discretion. The EPA solicits comment on this issue, in particular from the State of Arizona and from the PCDEQ, to assure that there is no misunderstanding with respect to the correct interpretation of Rule 706.

K. *Affected States in EPA Region X*

1. Alaska

a. Petitioner's Analysis

The Petitioner objected to a provision in the Alaska SIP that provides an excuse for "unavoidable" excess emissions that occur during SSM events, including startup, shutdown, scheduled maintenance, and "upsets" (Alaska Admin. Code tit. 18 § 50.240).<sup>195</sup> The provision provides: "Excess emissions determined to be unavoidable under this section will be excused and are not subject to penalty. This section does not limit the department's power to enjoin the emission or require corrective action." The Petitioner argued that this provision excuses excess emissions in violation of the CAA and the EPA's SSM Policy, which require all such emissions to be treated as violations of the applicable SIP emission limitations. The Petitioner further argued that it is unclear whether the provision could be interpreted to bar enforcement actions brought by the

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<sup>195</sup> Petition at 18-20.

EPA or citizens, because it is drafted as if the state were the sole enforcement authority. Finally, the Petitioner pointed out, the provision is worded as if it were an affirmative defense, but it uses criteria for enforcement discretion.

b. The EPA's Evaluation

The EPA interprets Alaska Admin. Code tit. 18 § 50.240 as providing an affirmative defense under which excess emissions that occur during certain SSM events may be "excused" if the requisite showing is made by the source. This provision is substantially inadequate for three reasons. First, provisions that allow a state official's decision to bar EPA or citizen enforcement are impermissible under the CAA. Although Alaska Admin. Code tit. 18 § 50.240 states that it "does not limit the *department's* power to enjoin the emission nor require corrective action" (emphasis added), it also states that "[e]xcess emissions determined to be unavoidable under this section will be excused and are not subject to penalty." The net effect of this language appears to bar the EPA and the public from seeking injunctive relief. Moreover, the provision is ambiguous as to whether the EPA or the public could pursue an action for civil penalties if they disagreed with the state official's determination that excess emissions were unavoidable.

Second, as explained more fully in sections IV.B and VII.C of this notice, the EPA believes that affirmative defense provisions that apply to startup, shutdown, or maintenance events are inconsistent with the requirements of the CAA. Consequently, Alaska Admin. Code tit. 18 § 50.240, which applies to excess emissions that occur during startup, shutdown, and scheduled maintenance, is impermissible for this reason as well.

Finally, while the EPA continues to believe that affirmative defense provisions applying to malfunctions can be consistent with the CAA, as long as the criteria set forth

in the SSM Policy are carefully adhered to (as explained in more detail in sections IV.B and VII.B of this notice), the criteria in Alaska Admin. Code tit. 18 § 50.240 are not sufficiently similar to those recommended in the EPA's SSM Policy to assure that the affirmative defense is available only in appropriately narrow circumstances. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Alaska Admin. Code tit. 18 § 50.240 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision for malfunctions (*i.e.*, upsets). For example, the defense available in Alaska Admin. Code tit. 18 § 50.240 is not limited to excess emissions caused by sudden, unavoidable, breakdown of technology beyond the control of the owner or operator. Similarly, the provision contains neither a statement that the defense does not apply in situations where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments nor a requirement that sources make an after-the-fact showing that no such exceedance occurred. Accordingly, the EPA agrees with the Petitioner's contention that the provision is substantially inadequate to satisfy the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Alaska Admin. Code tit. 18 § 50.240. The provision applies to startup, shutdown, and maintenance events, contrary to the EPA's interpretation of the CAA to allow such affirmative defenses only for malfunctions. Additionally, the section of Alaska Admin. Code tit. 18 § 50.240 applying to "upsets" is inadequate because the criteria referenced are not sufficiently

similar to those recommended in the EPA's SSM Policy for affirmative defense provisions applicable to malfunctions. Thus, the provision is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). Moreover, the provision appears to bar the EPA and citizens from seeking penalties and injunctive relief. As a result, Alaska Admin. Code tit. 18 § 50.240 is inconsistent with the fundamental requirements of CAA sections 113 and 304. For these reasons, the EPA is proposing to find that the provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to the provision.

2. Idaho

a. Petitioner's Analysis

The Petitioner objected to a provision in the Idaho SIP that appears to grant enforcement discretion to the state as to whether to impose penalties for excess emissions during certain SSM events (Idaho Admin. Code r. 58.01.01.131).<sup>196</sup> The provision provides that "[t]he Department shall consider the sufficiency of the information submitted and the following criteria to determine if an enforcement action to impose penalties is warranted . . . ." The Petitioner argued that this provision could be interpreted to give the Department authority to decide that enforcement is not warranted by anyone, thereby precluding action by the EPA and citizens for civil penalties or injunctive relief.

b. The EPA's Evaluation

The EPA's SSM Policy interprets the CAA to allow states to elect to have appropriately drawn SIP provisions addressing the exercise of enforcement discretion by state personnel. As the Petitioner recognized, Idaho Admin. Code r. 58.01.01.131 appears

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<sup>196</sup> Petition at 33.

to be a statement of enforcement discretion, and it delineates factors that will be considered by the Department in determining whether to pursue enforcement for violations due to excess emissions. Subsection 101.03 of the provision clearly states that "[a]ny decision by the Department . . . shall not excuse the owner or operator from compliance with the relevant emission standard." There is no language suggesting that the Department's determination to forgo state enforcement against a source would in any way preclude the EPA or the public from demonstrating that violations occurred or from taking enforcement action. Consequently, the EPA believes the provision is consistent with the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Idaho Admin. Code r. 58.01.01.131. The EPA interprets this provision to allow both the EPA and the public to seek civil penalties or injunctive relief, regardless of how the state chooses to exercise its enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Idaho, to assure that there is no misunderstanding with respect to the correct interpretation of Idaho Admin. Code r. 58.01.01.131.

3. Oregon

a. Petitioner's Analysis

The Petitioner objected to a provision in the Oregon SIP that grants enforcement discretion to the state to pursue violations for excess emissions during certain SSM events (Or. Admin. R. 340-028-1450).<sup>197</sup> The provision provides that "[i]n determining if a period of excess emissions is avoidable, and whether enforcement action is warranted,

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<sup>197</sup> Petition at 63.

the Department, based upon information submitted by the owner and or operator, shall consider whether the following criteria are met . . . ." The Petitioner argued that this provision could be interpreted to give the Department authority to decide that enforcement is not warranted by anyone, thereby precluding action by the EPA and citizens for civil penalties or injunctive relief.

b. The EPA's Evaluation

After the Petition was filed, the provision of the Oregon SIP cited by the Petitioner was recodified and revised by the state and was submitted to the EPA as part of a SIP revision. The EPA approved the SIP revision on December 27, 2011.<sup>198</sup> The provision has been recodified and revised at Or. Admin. R. 340-214-0350. The provision as recodified provides that "[i]n determining whether to take enforcement action for excess emissions, the Department considers, based upon information submitted by the owner or operator," a list of factors.

The EPA's SSM Policy interprets the CAA to allow states to elect to have SIP provisions that pertain to the exercise of enforcement discretion by state personnel. As revised by Oregon and approved by the EPA into the SIP, Or. Admin. R. 340-214-0350 is plainly a statement of enforcement discretion, and it delineates factors that will be considered by the Department in determining whether to pursue state enforcement for violations of the applicable SIP emission limitations due to excess emissions. There is no language in this provision suggesting that the Department's determination to forgo enforcement against a source would in any way preclude the EPA or the public from demonstrating that violations occurred and taking enforcement action. Consequently, the

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<sup>198</sup> 76 FR 80725 at 80747.

EPA believes the current SIP provision is consistent with the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Or. Admin. R. 340-028-1450. This provision has since been recodified and approved by the EPA at Or. Admin. R. 340-214-0350. The EPA interprets the recodified provision to allow both the EPA and the public to seek civil penalties or injunctive relief, regardless of how the state chooses to exercise its enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Oregon, to assure that there is no misunderstanding with respect to the correct interpretation of Or. Admin. R. 340-214-0350.

4. Washington

a. Petitioner's Analysis

The Petitioner objected to a provision in the Washington SIP that provides an excuse for "unavoidable" excess emissions that occur during certain SSM events, including startup, shutdown, scheduled maintenance, and "upsets" (Wash. Admin. Code § 173-400-107).<sup>199</sup> The provision provides that "[e]xcess emissions determined to be unavoidable under the procedures and criteria under this section shall be excused and are not subject to penalty." The Petitioner argued that this provision excuses excess emissions in violation of the CAA and the EPA's SSM Policy, which require all such emissions to be treated as violations of the applicable SIP emission limitations. The Petitioner further argued that it is unclear whether the provision could be interpreted to bar enforcement actions brought by the EPA or citizens, because it is drafted as if the state were the sole enforcement authority. Finally, the Petitioner pointed out, the

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<sup>199</sup> Petition at 71-72.

provision is worded as if it were an affirmative defense, but it uses criteria for enforcement discretion.

b. The EPA's Evaluation

The EPA interprets Wash. Admin. Code § 173-400-107 as an affirmative defense under which excess emissions that occur during certain SSM events can be "excused" if the requisite showing is made by the source. This provision is substantially inadequate for four reasons. First, provisions that allow a state official's decision to bar the EPA or citizen enforcement are impermissible under the CAA. The Wash. Admin. Code § 173-400-107 provides that "[t]he owner or operator of a source shall have the burden of proving to Ecology or the authority or the decision-maker in an enforcement action that excess emissions were unavoidable." This language makes clear that the state's determination is not binding on the EPA or the public, because it refers to other authorities and decision-makers besides the state agency. However, the provision also states that "[e]xcess emissions determined to be unavoidable . . . shall be excused and not subject to penalty." This language could be interpreted to preclude those excess emissions deemed "unavoidable" from being considered violations of the applicable SIP emission limitations, and thus it could preclude enforcement by the EPA or through a citizen suit.

Second, it is unclear whether the affirmative defense applies only to actions for monetary penalties or could also be used to bar actions seeking injunctive relief.

Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events, as discussed in sections IV.B and VII.B of this notice, the EPA's interpretation is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief.

Third, as explained more fully in sections IV.B and VII.C of this notice, the EPA believes that affirmative defense provisions that apply to startup, shutdown, or maintenance events are inconsistent with the requirements of the CAA on their face. Consequently, Wash. Admin. Code § 173-400-107, which applies to excess emissions that occur during startup, shutdown, and scheduled maintenance, is impermissible for this reason as well.

Finally, while the EPA continues to believe that affirmative defense provisions applying to malfunctions can be consistent with the CAA as long as the criteria set forth in the SSM Policy are carefully adhered to, as discussed in sections IV.B and VII.B of this notice, the criteria in Wash. Admin. Code § 173-400-107 are not sufficiently similar to those recommended in the EPA's SSM Policy to assure that the affirmative defense is available only in appropriately narrow circumstances. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Wash. Admin. Code § 173-400-107 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision for malfunctions (*i.e.*, "upsets"). For example, the defense available in Wash. Admin. Code § 173-400-107 is not limited to excess emissions caused by sudden, unavoidable, breakdown of technology beyond the control of the owner or operator. Similarly, the provision contains neither a statement that the defense does not apply in situations where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments nor a requirement that sources make an after-the-fact showing that no such exceedance occurred. As a result, the EPA believes that the

provision is substantially inadequate to satisfy the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Wash. Admin. Code § 173-400-107. The provision applies to startup, shutdown, and maintenance events, contrary to the EPA's interpretation of the CAA to allow such affirmative defenses only for malfunctions. Furthermore, the section of Wash. Admin. Code § 173-400-107 applying to "upsets" is inadequate because the criteria referenced are not sufficiently similar to those recommended in the EPA's SSM Policy for affirmative defenses for excess emissions due to malfunctions. Finally, the provision is unclear as to whether the EPA and the public could still seek injunctive relief if a state official made a determination that excess emissions were unavoidable. As a result, the EPA believes that Wash. Admin. Code § 173-400-107 is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that the provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to the provision.

**X. Statutory and Executive Order Reviews**

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

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the

docket for this action.

*B. Paperwork Reduction Act*

This action does not impose any new information collection burden. The EPA's proposed action in response to the Petition merely reiterates the EPA's interpretation of the statutory requirements of the CAA and does not require states to collect any additional information. To the extent that the EPA proposes to grant the Petition and thus proposes to issue a SIP call to a state under CAA section 110(k)(5), the EPA is only proposing an action that requires the state to revise its SIP to comply with existing requirements of the CAA.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure 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.<sup>200</sup>

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. Courts have interpreted the RFA to require a regulatory flexibility analysis only when small entities will be subject to the requirements of the

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<sup>200</sup> Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this notice on small entities, *small entity* is defined as: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (see 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.

rule. *See, e.g., Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985). This proposed rule will not impose any requirements on small entities. Instead, the proposed action merely reiterates the EPA's interpretation of the statutory requirements of the CAA. To the extent that the EPA proposes to grant the Petition and thus proposes to issue a SIP call to a state under CAA section 110(k)(5), the EPA is only proposing an action that requires the state to revise its SIP to comply with existing requirements of the CAA. The EPA's action, therefore, would leave to states the choice of how to revise the SIP provision in question to make it consistent with CAA requirements and determining, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources. 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 rule does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The action may impose a duty on certain state governments to meet their existing obligations to revise their SIPs to comply with CAA requirements. The direct costs of this action on states would be those associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call. Examples of such costs could include development of a state rule, conducting notice and public hearing, and other costs incurred in connection with a SIP submission. These aggregate costs would be far less than the \$100-million threshold in any one year. Thus, this rule is not subject to the requirements of sections 202 or 205 of 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. The regulatory requirements of this action would apply to the states for which the EPA issues a SIP call. To the extent that such states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action would not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

*E. Executive Order 13132 – Federalism*

This action 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 because it will simply maintain the relationship and the distribution of power between the EPA and the states as established by the CAA. The proposed SIP calls are required by the CAA because the EPA is proposing to find that the current SIPs of the affected states are substantially inadequate to meet fundamental CAA requirements. In addition, the effects on the states will not be substantial because where a SIP call is finalized for a state, the SIP call will require the affected state to submit only those revisions necessary to address the SIP deficiencies and applicable CAA requirements. While this action may impose direct effects on the states, the expenditures would not be substantial because they would be far less than \$25 million

in the aggregate in any one year.<sup>201</sup> Thus, Executive Order 13132 does not apply to this action.

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 action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, the EPA is not addressing any tribal implementation plans. This action is limited to states. Thus, Executive Order 13175 does not apply to this action. However, the EPA invites comment on this proposed action from tribal officials.

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

The EPA interprets EO 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 EO has the potential to influence the regulation. This action is not subject to EO 13045 because it merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA.

*H. Executive Order 13211 – Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not a "significant energy action" as defined in Executive Order

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<sup>201</sup> "EPA's Action Development Process-Guidance on Executive Order 13132: Federalism," dated November 2008.

13211 (66 FR 28355(May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA.

*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. NTTAA directs the EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the EPA is not considering 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, Feb. 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 U.S.

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 increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The rule is intended to ensure that all communities and populations across the affected states, including minority, low-income and indigenous populations overburdened by pollution, receive the full human health and environmental protection provided by the CAA. This proposed action concerns states' obligations regarding the treatment they give, in rules included in their SIPs under the CAA, to excess emissions during startup, shutdown, and malfunctions. This proposed action would require 36 states to bring their treatment of these emissions into line with CAA requirements, which would lead to sources' having greater incentives to control emissions during such events.

*K. Determination Under Section 307(d)*

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

*L. Judicial Review*

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final agency actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii)

when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This rule responding to the Petition is "nationally applicable" within the meaning of section 307(b)(1). First, the rulemaking addresses a Petition that raises issues that are applicable in all states and territories in the U.S. For example, the Petitioner requested that the EPA revise its SSM Policy with respect to whether affirmative defense provisions in SIPs are consistent with CAA requirements. The EPA's response is relevant for all states nationwide. Second, the rulemaking will address a Petition that raises issues relevant to specific existing SIP provisions in 39 states across the U.S. that are located in each of the 10 EPA Regions, 10 different federal circuits, and multiple time zones. Third, the rulemaking addresses a common core of knowledge and analysis involved in formulating the decision and a common interpretation of the requirements of the CAA being applied to SIPs in states across the country. Fourth, the rulemaking, by addressing issues relevant to appropriate SIP provisions in one state, may have precedential impacts upon the SIPs of other states nationwide. Courts have found similar rulemaking actions to be of nationwide scope and effect.<sup>202</sup>

This determination is appropriate because in the 1977 CAA Amendments that revised CAA section 307(b)(1), Congress noted that the Administrator's determination that an action is of "nationwide scope or effect" would be appropriate for any action that has "scope or effect beyond a single judicial circuit." H.R. Rep. No. 95-294 at 323 - 324,

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<sup>202</sup> See, e.g., *State of Texas, et al. v. EPA*, 2011 U.S. App. LEXIS 5654 (5th Cir. 2011) (finding SIP call to 13 states to be of nationwide scope and effect and thus transferring the case to the U.S. Court of Appeals for the D.C. Circuit in accordance with CAA section 307(b)(1)).

reprinted in 1977 U.S.C.C.A.N. 1402-03. Here, the scope and effect of this rulemaking extends to numerous judicial circuits because the action on the petition extends to states throughout the country. In these circumstances, section 307(b)(1) and its legislative history authorize the Administrator to find the rule to be of "nationwide scope or effect" and thus to indicate that venue for challenges to be in the D.C Circuit. Thus, any petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit. Accordingly, the EPA is proposing to determine that this will be a rulemaking of nationwide scope or effect.

In addition, pursuant to CAA section 307(d)(1)(V), the EPA is determining that this rulemaking action will be subject to the requirements of section 307(d).

#### **XI. Statutory Authority**

The statutory authority for this action is provided by CAA section 101 *et seq.* (42 U.S.C. 7401 *et seq.*).

**List of Subjects in 40 CFR Part 52**

Affirmative defense, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Environmental protection, Excess emissions, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Startup, shutdown, and malfunction, State implementation plan, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: February 12, 2013

Gina McCarthy,  
Assistant Administrator.

[FR Doc. 2013-03734 Filed 02/21/2013 at 8:45 am; Publication Date: 02/22/2013]