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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2019-0303; FRL-9994-66-Region 4]

SIP Call Withdrawal and Air Plan Approval; NC: Large Internal Combustion Engines NOx Rule Changes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Environmental Protection Agency (EPA) Region 4 (Region 4) is proposing to approve a portion of a State Implementation Plan (SIP) revision submitted by the state of North Carolina, through the North Carolina Division of Air Quality (NC DAQ), in a letter dated June 5, 2017, which changes North Carolina's SIP-approved rule regarding nitrogen oxides (NOx) emissions from large internal combustion engine sources. In so doing, Region 4 is first considering adopting an alternative policy regarding startup, shutdown, and malfunction (SSM) exemption provisions in SIPs that departs from EPA's 2015 national policy on this subject and, accordingly, if that policy is adopted, is also proposing to withdraw the SIP call issued to North Carolina for exemptions contained in the existing SIP-approved provisions for SSM events.

DATES: Comments must be received on or before [**insert date 60 days after date of publication in the Federal Register**].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2019-0303 at https://www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may

publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit https://www2.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT: Joel Huey, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Huey can be reached by phone at (404) 562-9104 or via electronic mail at huey.joel@epa.gov.

SUPPLEMENTARY INFORMATION:

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The following topics are discussed in this preamble:

I. Background on SIPs

Pursuant to Clean Air Act (CAA or Act) section 110, states adopt and periodically revise SIPs with a goal of attaining and maintaining the national ambient air quality standards (NAAQS).[1] A SIP or SIP revision contains state regulatory or statutory requirements and is submitted by the state to EPA for approval. If EPA determines the SIP submission meets the applicable requirements of the CAA, EPA must approve the submission. Upon EPA's approval of the submission, the SIP provisions that EPA approves become federally enforceable.

Certain events trigger the need for a state to revise or update its SIP. For example, "infrastructure" SIP revisions are required after EPA promulgates a new or revised NAAQS. Revisions to the SIP are required after an area is designated or redesignated nonattainment for a NAAQS. A state may be required to revise its SIP after EPA revises its rules to clarify certain requirements of the CAA. A state may also revise its SIP on its own initiative due to revisions to state law or the need to update its regulations. EPA must act on each submitted SIP revision in accordance with applicable CAA requirements.

[1] *See* 40 CFR part 50.

If EPA determines at any time that a SIP is substantially inadequate to attain or maintain the relevant NAAQS, to mitigate interstate pollutant transport, or to otherwise comply with CAA requirements, EPA will issue a "SIP call" pursuant to CAA section 110(k)(5) requiring the state to revise the SIP to address the inadequacy.

In this action, Region 4 is proposing to approve a SIP revision submitted by NC DAQ, through a letter dated June 5, 2017, which seeks to change North Carolina's SIP-approved rule regarding NOx emissions from large internal combustion engine sources at 15A N.C. Admin. Code 02D .1423. Relevant to this action, in 2015 EPA restated its national policy prohibiting the inclusion of provisions in SIPs that exempt excess emissions during periods of SSM and issued a SIP call to North Carolina to address two specific provisions in the State's implementation plan that provide discretion to the state agency to exempt emissions from being considered a violation of an otherwise applicable appropriate rule, in certain circumstances.[2] Also relevant, the June 5, 2017, SIP submission revises a different provision in the NC code that was not included in the 2015 SSM SIP call but which includes a sub-provision that automatically exempts from regulation periods of startup, shutdown and malfunction, not to exceed 36 consecutive hours, and scheduled maintenance activities.[3] Accordingly, in order to approve the June 5, 2017, SIP revision, Region 4 is first considering adopting an alternative policy with respect to SSM exemption provisions in SIPs. If Region 4 adopts an alternative policy, Region 4 is also proposing to withdraw the SIP call issued to North Carolina based on the alternative policy under

[2] *See* 80 FR 33839, 33964 (June 12, 2015). EPA issued a SIP call regarding provisions 15A N.C. Admin. Code 2D .0535(c) and 15A N.C. Admin. Code 2D .0535(g).
[3] 15A N.C. Admin. Code 02D .1423 was not included in the 2015 SSM SIP call because, in that action, EPA elected to review the specific provisions identified by Sierra Club in its petition regarding the SSM SIP call. 80 FR at 33880.

consideration regarding SSM exemptions, the rationale for which is discussed in Section III in this document. Region 4's proposed approval of the NOx emissions SIP revision is described in Section V in this document.

II. EPA's SSM SIP Policy

In the final SSM SIP Call Action of 2015,[4] EPA updated and restated its national policy regarding provisions in SIPs that exempt periods of SSM events from otherwise applicable emission limitations. Referencing previously issued guidance documents and regulatory actions, the Agency expressed its interpretation of the CAA that SIP provisions cannot include exemptions from emission limitations for emissions during SSM events.[5] EPA's position in the 2015 SSM SIP Call was that the general definitions provision of the CAA providing that an emission limitation must apply to a source "continuously" means that an approved SIP cannot include periods during which emissions from sources are legally or functionally exempt from regulation.

In the 2015 SSM SIP Call Action, the Agency defined the term "automatic exemption" as a generally applicable SIP provision that does not consider periods of excess emissions as violations of an applicable emission limitation if certain conditions existed during the exceedance period.[6] The Agency defined a "director's discretion provision" as a regulatory provision that authorizes a state regulatory official to grant exemptions or variances from

[4] *See* 80 FR 33839 (June 12, 2015).
[5] *Id*. at 33976.
[6] *Id*. at 33977.

otherwise applicable emission limitations or to otherwise excuse noncompliance with applicable emission limitations, where the regulatory official's determination would be binding on EPA and the public.[7] The Agency defined "emission limitation" in the SIP context, relying on the general definition set forth in CAA section 302(k), as a legally binding restriction on emissions from a source or source category, such as a numerical emission limitation, a numerical emission limitation with higher or lower levels applicable during specific modes of source operation, a specific technological control measure requirement, a work practice standard, or a combination of these things as components of a comprehensive and continuous emission limitation.[8] As stated in the 2015 SSM SIP Call Action, the Agency took the position that an emission limitation "must be applicable to the source continuously, *i.e.*, cannot include periods during which emissions from the source are legally or functionally exempt from regulation."[9]

Relying substantially on its interpretation of the general definition of emission limitation in CAA section 302(k)—specifically, that that definition provides that emission limitations must limit emissions of air pollutants "on a continuous basis"—the Agency explained its position that exemptions from emission limitations in SIPs, whether automatic or discretionary, were not permissible in SIPs.[10] EPA explained that even a brief exemption from an otherwise applicable limit would render the emission limitation non-continuous.[11]

With respect to discretionary exemptions, the Agency took the position that a regulatory official's grant of an exemption pursuant to a "director's discretion" exemption could result in air

[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.

agency personnel modifying a SIP requirement without going through the CAA statutory process for SIP revisions.[12] In the 2015 SSM SIP Call Action, the Agency did allow that some director's discretion exemptions could be included in SIPs, if those exemptions were structured such that variances or deviations from the otherwise applicable emission limitation or SIP requirement were not valid as a matter of federal law unless and until EPA approved the exercise of the director's discretion as a SIP revision.[13]

In the 2015 SSM SIP Call Action, EPA relied on *Sierra Club v. Johnson*, 551 F.3d 1019 (D.C. Cir. 2008), as further support for the Agency's position on excluding SSM exemption provisions in SIPs.[14] In *Sierra Club*, the D.C. Circuit evaluated the validity of an SSM exemption in a CAA section 112 rule. Reading CAA sections 112 and 302(k) together, the D.C. Circuit found that "the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously."[15] In 2015, EPA interpreted the 2008 *Sierra Club* decision regarding section 112 requirements and applied the reasoning of that decision to the requirements of CAA section 110, specifically CAA section 110(a)(2)(A), which provides that SIPs shall include "enforceable *emission limitations* and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable requirements of this chapter."[16] EPA's application of the *Sierra Club* decision to section 110 SIP requirements was based on an understanding that the D.C. Circuit was interpreting the definition of "emission

[12] *Id*. at 33918 (referencing CAA sections 110(k)(3), which establishes the framework for EPA to fully or partially approve SIP submittals, and 110(l) and 193, which specify that revisions to SIPs must be submitted to EPA and can approved only if the Administrator determines that the revisions meet specific requirements, including non-interference with attainment and reasonable further progress and equivalent or greater emission reductions in nonattainment areas). *See also id*. at 33977–78.
[13] *Id*. at 33978.
[14] *See, e.g., id*. at 33852, 33874, 33892–94.
[15] 551 F.3d at 1027–28.
[16] 42 U.S.C. 7410(a)(2)(A) (emphasis added).

limitation" in CAA section 302(k) that applies generally to the Act. Following this reasoning, EPA determined that *Sierra Club* was consistent with the Agency's position, as expressed in previously issued guidance documents and regulatory actions that prohibited exemption provisions for otherwise applicable emission limits in SIPs (such as automatic exemptions granted for startup, shutdown, and malfunction events).

III. Alternative Policy Under Consideration on Exemption Provisions in SIPs

In reviewing the North Carolina SIP revision at issue, as well as the existing SIP provisions and other SIP revisions pending in the Region, Region 4 is considering the national policy regarding SSM exemptions in SIPs included in the 2015 SSM SIP Call Action, described previously, and is evaluating whether there is a reasonable alternative way to consider SSM provisions in SIPs that allows such exemptions if the SIP considered as a whole is protective of the NAAQS.[17] The compilation of state and federal requirements in the SIP result from the federal-state partnership that is the foundation of the CAA, as well as the various requirements of the Act. Although some SIPs may contain SSM exemptions for limited periods applicable to discrete standards, SIPs are composed of numerous planning requirements that are collectively NAAQS-protective by design. In some cases, these overlapping requirements provide additional protection of the standard that may lead Region 4 to reasonably conclude that the SIP adequately provides for attainment and maintenance of the NAAQS, even if the SIP allows exemptions to specific emissions limits for discrete periods, such as SSM events. Such redundancy helps

[17] The 2015 SSM Action explained that while a SIP may contain provisions that apply during periods of SSM, the applicability of those provisions was not plain on the face of the SIP provision. *See generally* 80 FR at 33943. As explained in this document, EPA Region 4 is considering whether it is reasonable to take a broader perspective of its evaluation of SIPs and provisions that ensure attainment and maintenance of the NAAQS.

ensure that the NAAQS are both attained and maintained, a goal of Congress when it created the SIP adoption and approval process.[18] All of these factors could be appropriate to consider when evaluating whether a SIP is adequate to attain and maintain the NAAQS.

As discussed previously, the 2015 SSM SIP Call Action updated and restated EPA's SSM policy that SIPs containing any type of SSM exemptions were not approvable because exemptions from emission limitations created the possibility that a state could not ensure attainment or maintenance of the NAAQS for one or more criteria pollutants. This policy is predicated on the idea that an emission limitation or standard could not apply continuously if the SIP permitted exemptions for any period of time from the emission limitation or standard. Under this policy, the lack of continuous control was viewed as creating a substantial risk that exemptions could permit excess emissions that could ultimately result in a NAAQS violation. However, as will be discussed further in this section, Region 4 is considering whether the general requirements in CAA section 110 to attain and maintain the NAAQS and the inherent flexibilities of the SIP development process create a framework in which a state may be able to ensure attainment and maintenance of the NAAQS notwithstanding the presence of SSM exemptions in the SIP.

As an initial matter, the D.C. Circuit's decision in *Sierra Club* does not, on its face, apply to SIPs and actions taken under CAA section 110. In the 2015 SSM SIP Call Action at 80 FR 33839, EPA took the position that the legal reasoning of the D.C. Circuit's *Sierra Club* decision applied equally to SSM exemptions contained in CAA section 112 rules and in CAA section 110 approved SIPs and relied on that interpretation to support the Agency's position that SSM

[18] *See, e.g.*, H.R. Rep. 91-1783 at 193–95 (1970).

exemptions were inconsistent with CAA requirements. At the time, the Agency's interpretation was that CAA section 302(k) applied broadly and required that emission limitations under the CAA be continuous as a general matter. *See* 80 FR at 33874. Further consideration of the facts surrounding the SIP revision submitted by the state of North Carolina has shown that an alternative reading of the application of the *Sierra Club* decision to CAA section 110 is possible and appropriate. Simply stated, while the *Sierra Club* decision did not allow sources to be exempt from complying with CAA section 112 emission limitations during periods of SSM, that finding is not necessarily binding on CAA section 110 and EPA's consideration of SIPs under section 110.

The D.C. Circuit in *Sierra Club* specifically referred to CAA section 112 when it framed Petitioners' argument and found that the Agency "constructively reopened consideration of the exemption from section 112 emission standards during SSM events."[19] The court's analysis reads the definition of emission limitation and standard at CAA section 302(k) in the context of CAA section 112: "When sections 112 and 302(k) are read together then, Congress has required that there must be continuous section 112-compliant standards."[20] Further, specific to CAA section 112 rules, the court explained, "[i]n requiring that sources regulated under section 112 meet the strictest standards, Congress gave no indication that it intended the application of MACT standards to vary based on different time periods."[21] In *Sierra Club*, the court found that when EPA promulgates standards pursuant to CAA section 112, CAA section 112-compliant standards must apply continuously. The stringency of section 112 was thus an important element

[19] *Sierra Club*, 551 F.3d at 1026.
[20] *Id*. at 1027.
[21] *Id*. at 1028.

of the court's decision,[22] and the court did not make any statement explicitly applying its holding beyond CAA section 112.

While EPA chose to rely on the *Sierra Club* decision in the 2015 SSM SIP Call Action, the decision itself does not speak to whether the rationale articulated with respect to SSM exemptions in CAA section 112 rules applies to SIPs approved under CAA section 110. As will be discussed below, there may be a reasonable basis to conclude the *Sierra Club* decision does not need to be extended to section 110. CAA section 112 sets forth a prescriptive standard-setting framework; CAA section 110 does not. CAA sections 112 and 110 have different goals and establish different approaches for EPA implementation. Given the *Sierra Club* decision's singular focus on CAA section 112 standards, and the vastly different purposes and implementation approaches between CAA sections 110 and 112, there may be a reasonable basis for interpreting the decision as only applying to CAA section 112.

CAA section 112 is fundamentally different from CAA section 110(a)(2)(A). Importantly, the court in *Sierra Club* recognized that Congress intended "that sources regulated under section 112 meet the strictest standards."[23] Under CAA section 112, once a source category is listed for regulation pursuant to CAA section 112(c), the statute directs EPA to use a specific and exacting process to establish nationally applicable, category-wide, technology-based emissions standards under section 112(d).[24] Under section 112(d), EPA must establish emission standards for major sources that "require the maximum degree of reduction in emissions of the

[22] *See id*. at 1027 ("Section 112(d) provides that '[e]missions standards' promulgated thereunder must require MACT standards.") and 1028 (explaining that Congress intended that "sources regulated under section 112 meet the strictest standards.").
[23] *Id*. at 1028.
[24] EPA can also set work practices under CAA section 112(h).

hazardous air pollutants subject to this section" that EPA determines is achievable taking into account certain statutory factors. EPA refers to these rules as "maximum achievable control technology" or "MACT" standards. The MACT standards for existing sources must be at least as stringent as the average emissions limitation achieved by the best performing 12 percent of existing sources in the category (for which the Administrator has emissions information) or the best performing five sources for source categories with less than 30 sources. *See* CAA section 112(d)(3)(A) and (B). This level of minimum stringency is referred to as the MACT floor. For new sources, MACT standards must be at least as stringent as the control level achieved in practice by the best controlled existing similar source. *See* CAA section 112(d)(3). EPA also must analyze more stringent "beyond-the-floor" control options, which consider not only the maximum degree of reduction in emissions of a hazardous air pollutant (HAP), but must take into account costs, energy, and non-air quality health and environmental impacts when doing so.[25]

In contrast, the CAA sets out a fundamentally different regime with respect to section 110 SIPs, reflecting the principle that SIP development and implementation is customizable for each state's circumstances and relies on the federal-state partnership.[26] The CAA sets forth the minimum requirements to attain, maintain, and enforce air quality standards, while allowing each state to identify and effectuate an approach that is appropriate for the sources and air quality

[25] *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 857–58 (D.C. Cir. 2001).
[26] *See, e.g., Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997) ("EPA 'identifies the end to be achieved, while the states choose the particular means for realizing that end.'") (*quoting Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1074 (D.C. Cir. 1984)). *See also, e.g.*, H.R. Rep. No. 95-294, 95th Cong. 1st Sess. at 213 (explaining that for nonattainment areas, Congress intended to "give the States more flexibility in determining how to protect public health while still permitting reasonable new growth") (May 12, 1977).

challenges specific to each state.[27] It is important to note that the NAAQS are levels EPA has identified as safe concentrations of particular pollutants and serve as the targets for regional air-quality planning; they are fundamentally different in nature than the source-specific standards EPA issues under section 112. It may not be appropriate to directly translate the D.C. Circuit's concern that the latter standards must apply "continuously" to regulate emissions from a particular source to the context of section 110, where a state's plan may contain a broad range of measures, including limits on multiple sources and source categories' emissions of multiple pollutants—all targeted towards attainment and maintenance of a standard that does not itself directly apply to any one source. Importantly, regardless of how a state constructs its SIP, the NAAQS themselves are nationally uniform and continuously applicable.

The Fourth Circuit has acknowledged that "[s]tates are accorded flexibility in determining how their SIPs are structured" to ensure that the state meets the NAAQS.[28] Further, the U.S. Supreme Court has recognized that the CAA gives a state "wide discretion" to formulate its plan pursuant to CAA section 110 and went so far as to say that "the State has virtually absolute power in allocating emission limitations so long as the national standards are met."[29] The U.S. Supreme Court has also explained, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular

[27] *See Virginia v. EPA*, 108 F.3d at 1408.
[28] *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 299 (4th Cir. 2010).
[29] *See, e.g., Union Elec. Co. v. EPA*, 427 U.S. 246, 250 & 267 (1976). *See also id.* at 269 ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.").

situation."[30] State and federal government divide this responsibility, which results in a balance of state and federal rights and responsibilities. States typically have primary responsibility for determining how and to what extent to regulate sources within the state to comply with NAAQS.[31] In fact, EPA has implemented guidance addressing a number of requirements in CAA section 110 and specifically explained that SIPs could satisfy the requirements of CAA section 110(a)(2)(A) by simply "identify[ing] existing EPA-approved SIP provisions or new SIP provisions . . . that limit emissions of pollutants relevant to the subject NAAQS."[32] Given their understanding of emission sources and air quality within their jurisdiction, states are uniquely suited and often well-equipped to determine how best to implement the NAAQS. Just as the environmental and public health concerns faced by each state vary, so too do the requirements in each state's implementation plan.

The statutory text of CAA section 110(a)(2)(A) reflects this cooperative relationship, providing more flexibility than the text of CAA section 112, as outlined earlier in this section. CAA section 110(a)(2)(A) generally requires that each 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 this chapter."[33] EPA has never interpreted this provision to require the type of exacting analysis set forth in CAA section 112, and it may be reasonable for EPA to decide not

[30] *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).
[31] *See, e.g., Mirant Potomac River, LLC v. EPA*, 577 F.3d 223, 227 (4th Cir. 2009) ("Under Title I, states have the primary responsibility for assuring that air quality within their borders meets the NAAQS. Title I requires each state to create a State Implementation Plan . . . to meet the NAAQS.").
[32] *See* September 13, 2013, Memorandum from Stephen D. Page, "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)" at page 18.
[33] 42 U.S.C. 7410(a)(2)(A).

to apply such an interpretation given the flexibility Congress gave states in section 110. The U.S. Supreme Court has recognized that principles of statutory construction are not so rigid as to necessarily require that the same terminology has the exact same meaning in different parts of the same statute.[34] Terms can have "different shades of meaning," reflecting "different implementation strategies" even when used in the same statute.[35] Emphasizing that "[c]ontext counts," the Court explained that "[t]here is . . . no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically."[36] It is reasonable for the distinct purposes of CAA sections 110 and 112 to guide our interpretation of those provisions, the terms used in those provisions and how the statute-wide definition of those terms may be applied in the different context of those two provisions. In other words, the requirement that the "emissions standards" that EPA issues under section 112, *see, e.g.*, section 112(c)(2), apply continuously may, as the D.C. Circuit held, prevent EPA from providing SSM exemptions in those standards. However, at the same time, it may be reasonable to interpret the concept of continuous "emission limitations" in a SIP to not be focused on implementation of each, individual limit, but rather whether the approved SIP, as a whole, operates continuously to ensure attainment and maintenance of the NAAQS.

In addition, CAA section 110(a)(2)(A) requires that SIPs must "include enforceable emission limitations and other control measures, means, or techniques . . . *as may be necessary or appropriate* to meet the applicable requirements of this chapter."[37] Region 4 is considering whether a state may provide exemptions from emission limits, during which times the emission

[34] *See Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).
[35] *Id.* at 574 (citations omitted).
[36] *Id.* at 575–76.
[37] 42 U.S.C. 7410(a)(2)(A) (emphasis added).

limit may not apply continuously because the limit is not in effect, so long as the SIP contains a set of emission limitations, control means, or other means or techniques, which, taken as a whole, meet the requirements of attaining and maintaining the NAAQS under Subpart A. A state may be able to demonstrate that a combination of emission limits that apply "as may be necessary or appropriate" during normal operations but not during SSM periods and "other control measures, means, or techniques" that may exist and remain applicable during periods of SSM in which the exemptions apply—such as general duty provisions in the SIP, work practice standards, best management practices, or alternative emission limits—are protective of the NAAQS. Additionally, SIPs typically include entirely separate provisions, such as minor source and major source new source review provisions regulating construction or modification of stationary sources, that also effectively limit emissions of NAAQS pollutants within the state. Thus, as the U.S. Supreme Court explained in *Duke Energy* that a term may be interpreted differently when used in different parts of the same statute, the CAA definition of an emission limitation in section 302(k), when read in the context of section 110, could mean states may, at their discretion, provide exemptions from specific numerical emission limits during periods when it is not practicable or necessary for such limits to apply, so long as the SIP contains other provisions that remain in effect and ensure the NAAQS are protected. Region 4 is considering whether, in some cases, it may be appropriate to approve SIPs containing such exemption provisions if it is reasonable to conclude that the state's overlapping protective requirements sufficiently ensure overall attainment and maintenance of the NAAQS.

EPA has a statutory duty to approve SIP submissions that meet all applicable CAA requirements. If it is reasonable to conclude that a SIP's approach to exemptions is consistent

with the requirement to protect attainment and maintenance of the NAAQS, Region 4 is considering that states may include, and EPA may approve, such exemptions in their implementation plans. In such cases, it is recognized that exemptions from emission limitations may provide flexibility to states as they develop robust approaches to air quality protection through a set of planning requirements.

In light of these considerations, there may be instances where automatic exemptions from emission limits for SSM events in a state's implementation plan do not preclude attainment and maintenance of the NAAQS, and thus do not preclude approvability; conversely, if the specific details of an SSM exemptions are such that the Agency cannot reasonably determine that the SIP adequately ensures attainment and maintenance of the NAAQS, the subject SIP revision should not be approved. Any such finding regarding automatic exemptions would require an evaluation of the specific SIP at issue. A finding that automatic exemptions do not interfere with attainment and maintenance of the NAAQS would rely on an evaluation of whether the SIP as a whole contains provisions to ensure that the NAAQS will be sufficiently protected while also providing for exempt periods, and a state could submit information for EPA to evaluate when making such a finding. In addition to reviewing any information provided by the state, EPA can consider other available evidence and provide additional analysis, as necessary, when reviewing SSM emission limitation exemptions in SIPs.

If Region 4 adopts the policy outlined in this section, based on the analysis provided in Section IV below, Region 4 is considering changing the finding from the 2015 SSM SIP Call Action at 80 FR 33840 that certain SIP provisions included in the North Carolina SIP are substantially inadequate to meet CAA requirements. If Region 4 adopts this alternative policy,

Region 4 proposes to find that the subject SIP provisions are not inconsistent with CAA requirements.

If adopted, the alternative SSM policy is a policy statement and, thus, would constitute guidance within Region 4. As guidance, this would not bind states, EPA, or other parties, but it would reflect Region 4's interpretation of the CAA requirements. The evaluation of any SIP provision, and that SIP provision's interaction with the SIP as a whole, must be done through notice-and-comment rulemaking.

IV. Region 4's Evaluation of the North Carolina SIP and Proposal with Respect to the North Carolina SIP Call

North Carolina's SIP contains provisions that provide exemptions for emissions exceeding otherwise applicable SIP emission limitations at the discretion of the state agency during malfunctions (15A Admin. Code 2D .0535(c)) and during startup and shutdown (15A Admin. Code 2D .0535(g)). In this action, Region 4 is considering adopting an alternative policy regarding SSM exemptions and proposing to find the North Carolina provisions are not substantially inadequate to meet CAA requirements. Therefore, if Region 4 adopts this policy as described previously, Region 4 also proposes to withdraw the SIP call originally issued to North Carolina and published on June 12, 2015.[38] As explained more fully below, after considering the SIP as a whole, Region 4 has identified numerous provisions in the North Carolina SIP intended to assure that air quality standards will be achieved. Any provisions providing exemptions for periods of SSM do not alter the applicability of these general SIP provisions.

[38] *See* 80 FR at 33964.

On June 12, 2015, EPA found 15A N.C. Admin. Code 2D .0535(c) and 15A N.C. Admin. Code 2D .0535(g) were substantially inadequate to meet CAA requirements because they provide exemptions during malfunctions and during startup and shutdown, respectively, for emissions exceeding otherwise applicable SIP emissions limitations at the discretion of the state agency. EPA therefore issued a SIP call pursuant to section 110(k)(5) to North Carolina with respect to these provisions. Region 4 is considering these provisions in light of the considerations set forth above and proposes to withdraw the SIP call for North Carolina with respect to these two provisions. As explained, a holistic review of a SIP may show that there are protective provisions that ensure attainment and maintenance of the NAAQS even though a SIP includes SSM exemptions, and we believe that this result is not precluded by the D.C. Circuit decision in *Sierra Club v. Johnson*.

In analyzing the air quality protections provided by the entirety of the North Carolina SIP, Region 4 believes there may be a reasonable basis to conclude that the SIP provides numerous overlapping planning requirements that are protective of air quality and each individual criteria pollutant NAAQS. In fact, both of the provisions that were included in the 2015 SSM SIP Call for North Carolina include substantial protection of air quality standards within the SIP-called provision itself.

First, the exemption provided at 2D .0535(g) requires that owners or operators use best available control practices when operating equipment to minimize emissions during start-up and shutdown periods. Specifically, it states:

> Start-up and shut-down excess emissions during start-up and shut-down shall be considered a violation of the appropriate rule if the owner or operator cannot demonstrate

that the excess emissions are unavoidable when requested to do so by the Director. The Director may specify for a particular source the amount, time, and duration of emissions that are allowed during start-up or shut- down. *The owner or operator shall, to the extent practicable, operate the source and any associated air pollution control equipment or monitoring equipment in a manner consistent with best practicable air pollution control practices to minimize emissions during start-up and shut-down*. (Emphasis added).

Even though this provision includes an exemption, it also provides a backstop that requires sources to use the best practicable air pollution control practices to minimize the risk that emissions during startup or shutdown periods that could cause an exceedance or violation of the NAAQS.

Second, the exemption provided at 2D .0535(c) outlines seven criteria that the director will consider when evaluating whether the source qualifies for an emissions limit exemption during a malfunction. Specifically, it states:

> Any excess emissions that do not occur during start-up or shut down shall be considered a violation of the appropriate rule unless the owner or operator of the source of the excess emissions demonstrates to the director, that the excess emissions are the result of a malfunction. To determine if the excess emissions are the result of a malfunction, the director shall consider, along with any other pertinent information, the following:
>
> > (1) The air cleaning device, process equipment, or process has been maintained and operated, to the maximum extent practicable, in a manner consistent with good practice for minimizing emissions;

(2) Repairs have been made in an expeditious manner when the emission limits have been exceeded;

(3) The amount and duration of the excess emissions, including any bypass have been minimized to the maximum extent practicable;

(4) All practical steps have been taken to minimize the impact of the excess emissions on ambient air quality;

(5) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(6) The requirements of Paragraph (f) of the Regulation have been met; and

(7) If the source is required to have a malfunction abatement plan, it has followed that plan.

All malfunctions shall be repaired as expeditiously as practicable. However, the director shall not excuse excess emissions caused by malfunctions from a source for more than 15 percent of the operating time during each calendar year.

The existence of these specific criteria themselves provide additional protections of the NAAQS because factors considered by the director include whether sources minimize emissions and limit the extent of emissions which could occur to the greatest extent practicable. Additionally, the provision itself establishes bounds on a source's ability to employ this exemption, since it prohibits the director from excusing excess emissions from a source due to malfunctions for more than 15 percent of the operating time. This limitation reasonably minimizes the risk that excess emissions from malfunctions would contribute to a NAAQS exceedance or violation.

Apart from the SIP-called provisions discussed previously, the North Carolina SIP also contains numerous overlapping requirements providing for protection of air quality and the NAAQS, which generally control emissions of NAAQS pollutants. First, 15A N.C. Admin. Code 02D .0502, which is included in the North Carolina SIP and addresses emission control standards generally, provides: "The purpose of the emission control standards set out in this Section is to establish maximum limits on the rate of emission air contaminants into the atmosphere. All sources shall be provided with the maximum feasible control." *See* 40 CFR 52.1770(c)(1). The requirement for "maximum feasible control" on all sources applies at all times, including periods of startup and shutdown. Thus, by requiring sources to be subject to emission control standards established at the maximum feasible level of control, the SIP ensures that air quality in the State will be protected to the highest degree possible. This guiding purpose broadly applies to the emission control standards in Section .0500 of the North Carolina SIP. North Carolina confirmed as much in their comment letter on EPA's 2015 SSM policy, explaining that the State's requirement that sources implement "maximum feasible control" is one of the provisions of the SIP that "provide assurances that air quality and emission standards will be achieved." In light of the flexibility in CAA section 110(a)(2)(A) and SIP development generally, we think it is reasonable for North Carolina to develop an overall emissions control approach that requires all sources to implement maximum feasible controls even though sources may be exempt from particular, otherwise applicable emission standards during some smaller subset of SSM periods.

Second, the North Carolina SIP includes general provisions that require sources not to operate in such a way as to cause NAAQS violations. 15A N.C. Admin. Code 02D .0501(e)

directs all sources to operate in a manner that does not cause any ambient air quality standard to be exceeded at any point beyond the premises on which the source is located, despite the SIP containing SSM exemptions for emission limitations. 15A N.C. Admin. Code 2D. 0501(e) states:

> In addition to any control or manner of operation necessary to meet emission standards in this Section, any source of air pollution shall be operated with such control or in such manner that the source shall not cause the ambient air quality standards of Section .0400 of this Subchapter to be exceeded at any point beyond the premises on which the source is located. When controls more stringent than named in the applicable emission standards in this Section are required to prevent violation of the ambient air quality standards or are required to create an offset, the permit shall contain a condition requiring these controls.

Accordingly, even if the SIP contains exemptions from specific emission limits during SSM events, this provision ensures that the source at issue must ensure that none of its emissions cause a NAAQS exceedance or violation.

Third, the North Carolina SIP provides additional assurances that sources will prevent and correct equipment failures that could result in excess emissions by requiring utility boilers (and any source with a history of excess emissions, as determined by the director) to have a malfunction abatement plan approved by the director. Utility boilers in North Carolina

contribute to a significant portion of the point source pollutant emissions in the State.[39] 15A N.C. Admin. Code 02D .0535(d) states:

> All electric utility boiler units subject to a rule in this section shall have a malfunction abatement plan approved by the director. In addition, the director may require any source that he has determined to have a history of excess emissions to have a malfunction abatement plan approved by the director. The malfunction plans of electric utility boiler units and of other sources required to have them shall be implemented when a malfunction or other breakdown occurs. The purpose of the malfunction abatement plan is to prevent, detect, and correct malfunctions or equipment failures that could result in excess emissions. . . .

The provision also identifies minimum requirements for a malfunction abatement plan. Although specific to electric utility boilers (and other sources as required by the Director), this SIP provision ensures that subject units are taking steps to prevent, detect, and correct malfunctions, even if an SSM exemption applies. This provision serves to limit any excess emissions that could result from such events, thus limiting the chance that excess emissions would result in a NAAQS exceedance or violation.

Fourth, the North Carolina SIP provides general provisions to reduce airborne pollutants and to prevent NAAQS exceedances beyond facility property lines, despite the SIP containing SSM exemptions for emission limitations, for particulates from sand, gravel, or crushed stone

[39] For example, utility boilers in North Carolina contribute approximately 24 percent of PM_{10} emissions, 66 percent of SO_2 emissions, and 47 percent of NOx emissions from total point sources in the State. *See* spreadsheet titled "NC 2014 NEI Summary" in the docket for this action.

operations (at 15A N.C. Admin. Code 2D .0510(a)) and from lightweight aggregate operations (at .0511(a)):

> The owner or operator of a [. . .] operation shall not cause, allow, or permit any material to be produced, handled, transported or stockpiled without taking measures to reduce to a minimum any particulate matter from becoming airborne to prevent exceeding the ambient air quality standards beyond the property line for particulate matter, both PM10 and total suspended particulates.

And in a similar manner, the North Carolina SIP includes general provisions to reduce airborne pollutants and to prevent NAAQS exceedances beyond facility property lines for particulates from wood products finishing plants (at 15A N.C. Admin. Code 2D .0512):

> A person shall not cause, allow, or permit particulate matter caused by the working, sanding, or finishing of wood to be discharged from any stack, vent, or building into the atmosphere without providing, as a minimum for its collection, adequate duct work and properly designed collectors, or such other devices as approved by the commission, and in no case shall the ambient air quality standards be exceeded beyond the property line.

Accordingly, even if the SIP contains exemptions from specific emission limits during SSM events, these provisions ensure that the source at issue must ensure that none of its emissions cause a NAAQS exceedance or violation.

Fifth, the North Carolina SIP provides a general requirement at 15A N.C. Admin. Code 2D .0521(g) for sources that operate COMS that "[i]n no instance shall excess [opacity] emissions exempted under this Paragraph cause or contribute to a violation of any emission standard in this Subchapter or 40 CFR part 60, 61, or 63 or any ambient air quality standard in

Section 15A N.C. Admin. Code 2D.0400 or 40 CFR part 50." Each of these provisions ensures that emissions are minimized to protect air quality, independent of an SSM exemption that may also apply. Further, as recognized by this provision, federal standards in 40 CFR parts 60, 61, and 63 applicable to the source apply and regulate sources emissions and operation, regardless of any SSM exemption in the SIP.

Finally, we note that the SIP includes an overall strategy for bringing all areas into compliance with the NAAQS for all pollutants regulated by the CAA. On September 26, 2011 (76 FR 59250), Region 4 approved into the SIP significant NOx and SO_2 emission limitations from the North Carolina Clean Smokestacks Act (NCCSA). This state law became effective in 2007 and set caps on NOx and SO_2 emissions from public utilities operating coal-fired power plants in the State that cannot be met by purchasing emissions credits. *See* 40 CFR 52.1781(h). The NCCSA resulted in permanent emission reductions that helped nonattainment areas in the State achieve attainment of the 1997 Annual $PM_{2.5}$ NAAQS.[40] Thus, even if a source could avail itself of an SSM exemption for certain emissions, its total emissions must fit within the utility-wide cap for the State provided under a law adopted as part of a comprehensive plan for improving air quality in North Carolina.

In addition to the general SSM exemption issues discussed previously, in the 2015 SSM SIP Call Action, EPA also raised concerns that North Carolina's 15A N.C. Admin. Code 2D .0535(c) and 15A N.C. Admin. Code 2D .0535(g) are examples of what EPA referred to as

[40] *See Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; North Carolina: Redesignation of the Hickory-Morganton-Lenoir 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment; Proposed Rule*, 76 FR 58210,58217 (September 20, 2011), and *Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; North Carolina: Redesignation of the Greensboro-Winston Salem-High Point 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment; Proposed Rule*, 76 FR 59345,59352 (September 26, 2011).

"director's discretion" exemptions. These SIP provisions identify between five and seven criteria that the Director of North Carolina Department of Environmental Quality will evaluate to determine whether excess emissions resulting from a malfunction or startup and shutdown, respectively, are a violation of the given standard. In the 2015 SSM SIP Call Action, EPA took the position that these director's discretion provisions were also problematic because they allow air agency personnel to modify existing SIP requirements under certain conditions, which essentially constituted a variance from an otherwise applicable emission limitation. EPA considered director's discretion provisions to effectively permit impermissible SIP revisions by allowing air agency personnel to make unilateral decisions on an *ad hoc* basis regarding excess emissions during SSM events and, thus, as not in compliance with the necessary process required for SIP revisions.[41]

Acknowledging those concerns, we now consider finding that director's discretion SSM exemptions may not necessarily make a SIP substantially inadequate to meet CAA requirements.[42] As explained, *supra* in section III, in certain circumstances, Region 4 is considering adopting a policy that automatic exemptions during periods of SSM may not be inherently inconsistent with CAA section 110(a)(2)(A). Because automatic SSM exemptions may not necessarily render the SIP inadequate, Region 4 is considering also finding that director's discretion exemptions also may not necessarily render the SIP inadequate. Further, consistent with the perspective being evaluated by Region 4 that SIPs can generally protect against NAAQS violations and that SIP provisions containing SSM exemptions may not be

[41] *See* 80 FR at 33977 and 33978.
[42] *See Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012); *Luminant Generation Co. v. EPA*, 675 F.3d 917 (5th Cir. 2012) (vacating and remanding EPA's disapproval of discretionary SIP provisions).

inconsistent with CAA requirements, Region 4 has reviewed EPA's 2015 interpretation and is considering that director's discretion provisions may not constitute an improper SIP revision. If a director's discretion provision establishes a framework for when and how an air agency director may determine that SSM excess emissions do not constitute a violation, and that framework was approved into the SIP after going through a public process, any action by the director consistent with the provision would simply be acting in accordance with the SIP-approved provisions; it would not be an unlawful revision of the SIP.

Given the specific criteria contained within them, director's discretion provisions would likely excuse emissions in more limited circumstances than automatic exemptions. Accordingly, the same reasoning that supports our potential position that automatic exemptions in SIPs may not be inconsistent with the CAA also informs our potential position that the director's discretion provisions in the North Carolina SIP that were SIP-called in the 2015 SSM SIP Call may not be inconsistent with the CAA. This potential finding would be predicated on a holistic finding that included consideration of all of the provisions in the North Carolina SIP. Relevant to this evaluation, as discussed previously, the North Carolina SIP includes provisions that provide for sources to be operated in a manner that does not cause an exceedance or violation of the NAAQS, and that requirement is not displaced by this director's discretion exemption. The North Carolina director's discretion provisions outline the conditions under which air agency personnel can make a factual decision that SSM emissions do not constitute a violation, and that limitation is part of Region 4's holistic consideration of the SIP. The SIP, as approved, provides air agency personnel with the framework and authority to exempt excess emissions from being a violation. Because that allowance is approved into the SIP, and the SIP provisions went through

a public comment period prior to EPA's final action to approve the SIP, Region 4 is evaluating whether acting in accordance with these approved provisions would not constitute unlawful SIP revisions.

As part of the 2015 SSM SIP Call Action, EPA issued CAA section 110(k)(5) SIP calls to a number of states, including North Carolina regarding provisions 15A N.C. Admin. Code 2D .0535(c) and 15A N.C. Admin. Code 2D .0535(g).[43] In the 2015 SSM SIP Call Action, the Agency explained that it would evaluate any pending SIP submission or previously approved submission through notice-and-comment rulemaking and, as part of that action, determine whether a given SIP provision is consistent with CAA requirements and applicable regulations.[44] Proposed re-evaluations on those issues are part of this notice-and-comment action.

As discussed, the North Carolina SIP contains numerous provisions that work in concert and provide redundancy to protect against a NAAQS exceedance or violation, even if an SSM exemption provision also applies. Therefore, based on an analysis of the multiple provisions contained in the North Carolina SIP that are designed to be protective of the NAAQS, Region 4 proposes to conclude that it is reasonable for the North Carolina air agency director to be able to exclude qualifying periods of excess emissions during periods of SSM without posing a significant risk to attainment or maintenance of the NAAQS. Consistent with the alternative policy being considered, set forth above, Region 4 has reviewed the applicability of the SIP call previously issued to North Carolina, including EPA's specific evaluation of the State's subject SIP, and, if that policy is adopted, proposes to withdraw the SIP call that was issued in the 2015

[43] *See* 80 FR at 33964.
[44] *Id*. at 33976.

SSM SIP action with respect to 15A N.C. Admin. Code 2D .0535(c) and 15A N.C. Admin. Code 2D .0535(g).

EPA's CAA regulations allow EPA Regions to take actions that interpret the CAA in a manner inconsistent with national policy when the Region seeks and obtains concurrence from the relevant EPA Headquarters office. Pursuant to EPA's regional consistency regulations at 40 CFR 56.5(b), the Acting Region 4 Regional Administrator sought and obtained concurrence from the relevant office in EPA's Office of Air and Radiation to propose an action that outlines an alternative policy that is inconsistent with the national EPA policy, most recently articulated in the 2015 SSM SIP Action, on provisions exempting emissions exceeding otherwise applicable SIP limitations during periods of unit startup, shutdown and malfunction at the discretion of the state agency and propose action consistent with that alternative policy. The concurrence request memorandum is included in the public docket for this action.

V. Region 4's Proposal to Approve North Carolina's June 5, 2017, SIP Revision

On September 18, 2001, North Carolina submitted a new rule section regarding the control of NOx emissions from large stationary combustion sources to Region 4 for approval into its SIP.[45] The rule section—15A N.C. Admin. Code 02D .1400—contains Rule .1423 ("Large Internal Combustion Engines") as well as other rules not related to today's proposed action. On August 14, 2002, North Carolina submitted to Region 4 a SIP revision with changes to its Section 1400 NOx rules, including several changes to Rule .1423. Region 4 did not act on the August 14, 2002, submittal. However, on December 27, 2002, Region 4 approved the portion of North Carolina's September 18, 2001, SIP revision incorporating Rule .1423. *See* 67 FR 78987.

[45] See Rule .1402 - "Applicability" and the definition of "source" in Rule .1401 for the scope of this rule section.

On June 5, 2017, North Carolina withdrew its August 14, 2002, SIP revision and resubmitted identical changes to Rule .1423 as a SIP revision as well as the changes to the other rules contained in the original 2002 SIP revision.[46, 47] The State provided this resubmission in response to a Region 4 request for a version of the rule that highlights, using redline-strikethrough text, the State's proposed revisions to the federally approved rule. The June 5, 2017, SIP revision relies on the hearing record associated with the August 14, 2002, SIP revision[48] because the revised rule text is the same.

A. Summary of North Carolina's June 5, 2017, SIP Revision Changes to Rule .1423

As mentioned previously, North Carolina's June 5, 2017, SIP revision includes several changes to Rule .1423. These changes relate to the rule paragraphs on Applicability, Emission limitation, Adjustment, Compliance determination and monitoring, Reporting requirements, and Recordkeeping requirements, as described below.

- Rule .1423(a), "Applicability." North Carolina modified Rule .1423(a) by clarifying that Rule .1423 does not apply to an internal combustion (IC) engine of the four specific types listed in the rule if it is subject to prevention of significant deterioration (PSD) or nonattainment new source review (NNSR).
- Rule .1423(b), "Emission limitation." North Carolina corrected Rule .1423(b) by stating that the owner or operator of a stationary IC engine "shall *not* cause" NOx emissions in excess of the rule limits instead of "shall cause" NOx emissions in excess of those limits.

[46] Region 4 is considering the other rule changes through a separate rulemaking.
[47] On June 28, 2018, North Carolina supplemented its June 5, 2017, submittal to acknowledge that Rules .1413 and .1414 are not in the SIP. This supplement is not relevant to this action.
[48] North Carolina held public hearings on May 21, 2001, and June 5, 2001, to accept comments on the rule changes contained in the August 14, 2002, SIP revision.

- Rule .1423(c), "Adjustment." North Carolina corrected Rule .1423(c) by changing the word "Paragraphs" to "Paragraph."
- Rule .1423(d), "Compliance determination and monitoring." North Carolina modified subparagraph (1) of Rule .1423(d) (Rule .1423(d)(1)) and subparagraph (2) of Rule .1423(d) (Rule .1423(d)(2)) as follows:
    - Rule .1423(d)(1) is revised to add that data obtained from a continuous emissions monitoring system (CEMS) and used to determine compliance with this rule must meet the applicable requirements specified in ".1404 of this Section" as well as the applicable part 60 requirements.
    - Rule .1423(d)(2) is revised to change the conditions in which an owner or operator of a subject IC engine may use an alternative compliance determination method. Rather than being based on the State finding that the procedure can "measure emissions of nitrogen oxides as accurately and precisely as the continuous emission monitoring system required under Subparagraph (1) of this Paragraph," the revised language reads "show the compliance status of the engine."
- Rule .1423(e), "Reporting requirements." North Carolina modified Rule .1423(e) by adding the missing word "shall" to clarify that the owner or operator of a subject source must submit NOx emission reports and by revising the language to clarify that the ozone season ends September 30 of each year.
- Rule .1423(f), "Recordkeeping requirements." North Carolina modified Rule .1423(f)(7)(A) to clarify that, when NOx standards are exceeded by a unit equipped with

a CEMS, records must be kept that identify the reason for the "excess emissions," the action taken to correct the "excess emissions," and the action taken to prevent similar future "excess emissions" from occurring.

B. Region 4's Analysis of North Carolina's June 5, 2017, SIP Revision Changes to Rule .1423

Region 4 has reviewed North Carolina's changes to Rule .1423, "Large Internal Combustion Engines," in the State's June 5, 2017, SIP revision and is proposing to approve these changes as discussed below.

- Rule .1423(a), "Applicability." Rule .1423(a) states that Rule .1423 applies to four listed types of IC engines that are subject to Rule .1418 ("New Electric Generating Units, Large Boilers, and Large I/C Engines") and that were permitted after October 30, 2000. North Carolina's June 5, 2017, revision modifies Rule .1423(a) to clarify that Rule .1423 applies to those IC engines which are "not subject to Rule .0530 (prevention of significant deterioration) or Rule .0531 (nonattainment area major new source review)." This revision reflects the current language of Rule .1418, which requires that IC engines subject to PSD/NNSR must, in most cases, comply with those SIP provisions rather than the requirements of Rule .1423.[49]
- Rule .1423(b), "Emission limitations." North Carolina corrected Rule .1423(b) by stating that the owner or operator of a stationary IC engine "shall *not* cause" (rather than "shall

[49] Rule .1418 establishes NOx emission limits for, among other types of units, new large internal combustion engines permitted after October 31, 2000. This rule provides that a new large internal combustion engine must comply with Rule .1423 if it is not covered under Rule .0530 (PSD) or .0531 (NNSR). This rule also stipulates that if a new large internal combustion engine is covered under Rule .0530 (PSD), it shall comply with the Rule .1423 requirements or the best available control technology requirements of .0530 (PSD), whichever requires the greater degree of reduction.

cause") NOx emissions in excess of the specified NOx limits. This change corrects a typographical error and is consistent with applicable requirements of the CAA and its implementing regulations.

- Rule .1423(c), "Adjustment." North Carolina corrected Rule .1423(c) by changing the word "Paragraphs" to "Paragraph." This change corrects a typographical error and is consistent with applicable requirements of the CAA and its implementing regulations.
- Rule .1423(d)(1), "Compliance determination and monitoring." North Carolina modified Rule .1423(d)(1) to ensure that CEMS data used for determination of compliance with this rule meet applicable SIP requirements as well as Federal requirements. Rule .1423(d)(1) of the State's current federally approved SIP provides that the owner or operator of a subject IC engine shall determine compliance using "a [CEMS] which meets the applicable requirements of Appendices B and F of 40 CFR part 60, excluding data obtained during periods specified in Paragraph (g) of this Rule." The rule revision inserts "and .1404 of this Section" following the word "Rule" in this text to ensure that the CEMS used to obtain compliance data must meet the applicable requirements specified in Rule .1404 (in particular, Paragraphs (d)(2) and (f)(2) of Rule .1404) as well as the applicable part 60 requirements since those provisions specify additional federal requirements for obtaining CEMS data. In a letter dated February 22, 2019 (included in the docket for this proposed rulemaking), NC DAQ stated:

> The DAQ's intention in 15A N.C. Admin. Code 02D .1423(D)(1) is to cross-reference 15A N.C. Admin. Code 02D .1404, *Recordkeeping: Reporting:*

Monitoring:, Paragraphs (d)(2) and (f)(2) since these provisions specify additional federal requirements for continuous emissions monitoring systems. The DAQ does not interpret the new cross-reference to 15A N.C. Admin. Code 02D .1404 to be part of the preceding exclusionary language.

Paragraph (g) of Rule .1423 provides that the emission standards therein do not apply during periods of "(1) start-up and shut-down periods and periods of malfunction, not to exceed 36 consecutive hours; (2) regularly scheduled maintenance activities." As discussed in Section IV in this document, Region 4 proposes to find that the provisions of Rule .1423(g), when considered in conjunction with other elements in the North Carolina SIP, are sufficient to provide adequate protection of the NAAQS. North Carolina has bounded the time during which a source can employ this exemption, minimizing the potential that any excess emissions during these periods would cause or contribute to a NAAQS exceedance or violation. Therefore, the exemption, which allows for emission standards of the rule to not apply during periods of startup, shutdown, and malfunction of up to 36 consecutive hours, or maintenance, is not inconsistent with the requirements of the CAA section 110.

- Rule .1423(d)(2), "Compliance determination and monitoring." North Carolina modified Rule .1423(d)(2) to standardize the existing exclusions with those of other rules of the approved SIP. Rule .1423(d)(2) of the State's current federally approved SIP provides, as an alternative to CEMS, that a source may determine compliance using "an alternate calculat[ion] and recordkeeping procedure based on actual emissions testing and correlation with operating parameters." The current rule qualifies this option as follows:

> To use the alternative procedures under Subparagraph (2) of this Paragraph, the owner or operator shall demonstrate to the Director that the alternative procedure can measure emissions of nitrogen oxides as accurately and precisely as the continuous emission monitoring system required under Subparagraph (1) of this Paragraph. The installation, implementation, and use of this alternate procedure shall be approved by the Director before it may be used. The Director may approve the alternative procedure if he finds that it can measure emissions of nitrogen oxides as accurately and precisely as the continuous emission monitoring system required under Subparagraph (1) of this Paragraph.

The rule revision deletes the first sentence of this qualification language and revises the condition of the third sentence to provide that the Director may approve the alternative procedure if he finds that it can "show the compliance status of the engine" (rather than a finding that the alternative procedure can "measure emissions of nitrogen oxides as accurately and precisely as the continuous emission monitoring system required under Subparagraph (1) of this Paragraph"). Region 4 notes that this language revision is consistent with language already approved in the SIP at Rule .1409(e) for certain internal combustion engines.

- Rule .1423(e), "Reporting requirements." North Carolina modified Rule .1423(e) by adding the missing word "shall" to clarify that owner or operator of a subject source must submit NOx emission reports and by revising language to clarify that the ozone season ends September 30 of each year. These changes are needed to correct a typographical

error and to add clarity to the existing provision.

- Rule .1423(f), "Recordkeeping requirements." North Carolina modified subparagraph (7)(A) of Rule .1423(f) by replacing the word "exceedance" with "excess emissions" in three instances. The change clarifies that, when NOx standards are exceeded by a unit equipped with a CEMS, records must be kept that identify the reason for the "excess emissions," the action taken to correct the "excess emissions," and the action taken to prevent similar future "excess emissions" from occurring. This change provides clarification to the regulated community since "excess emissions" is defined in the State's rules on NOx emissions, under Rule .1401 ("Definitions"), and "exceedance" is not.

Region 4 is proposing, if the policy outlined *supra* in section III is adopted, to determine that these changes to the North Carolina SIP are consistent with CAA requirements.

VI. Incorporation by Reference

In this document, Region 4 is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, Region 4 is proposing to incorporate by reference the North Carolina regulation 15 N.C. Admin. Code 02D .1423 - "Large Internal Combustion Engines," modified to clarify applicability, correct typos, standardize exclusions, clarify that alternative compliance methods must show compliance status of the engine, clarify by adding the word "shall" and revising language to better define ozone season, and clarify that CEMS records must identify the reason for, the action taken to correct, and the action taken to prevent excess emissions, state effective on July 15, 2002.

EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 4 office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information).

VII. Proposed Action

Region 4 is proposing to withdraw the SIP call issued to North Carolina for 15A N.C. Admin. Code 2D .0535(c) and 15A N.C. Admin. Code 2D .0535(g) pursuant to CAA section 110(k)(5), originally published on June 12, 2015. In connection with this proposed withdrawal, Region 4 proposes to find that these state regulatory provisions included in the North Carolina SIP are not substantially inadequate to meet CAA requirements.

Pursuant to section 110 of the CAA, Region 4 is proposing to approve the aforementioned changes to Rule .1423 and incorporate these changes into the North Carolina SIP. Region 4 has evaluated the changes to Rule .1423 as included in North Carolina's June 5, 2017, SIP revision, and is proposing to determine that they meet the applicable requirements of the CAA and its implementing regulations.

VIII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided they meet the criteria of the CAA. This action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Results from on a new interpretation and does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: May 20, 2019.

Mary S. Walker,

Acting Regional Administrator,

Region 4.

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