STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REVISIONS TO: **No. EIB 16-03 (R)**
New Mexico's State Implementation Plan

Air Quality Bureau,
Environmental Protection Division of the
New Mexico Environment Department,

Petitioner.

AUG 2016
Received
Environmental Improvement Board

NEW MEXICO ENVIRONMENT DEPARTMENT'S
NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

The Air Quality Bureau within the Environmental Protection Division of the New Mexico Environment Department ("Department") files this Notice of Intent to Present Technical Testimony for the hearing in this matter currently scheduled for September 9, 2016.

1. **Entity for whom the witness will testify:** The New Mexico Environment Department.

2. **Identity of witness:** Robert Spillers is an Environmental Analyst within the Department's Air Quality Bureau. His resume is attached as Exhibit 4. A copy of his written testimony is attached as Exhibit 6. The Department will also provide Rita Bates, Renee Held, and Ted Schooley as panel witnesses for questions related to the proposed SIP revision and its relation to the Department's air quality programs. Their resumes are included herein.

3. **List of Exhibits:** A complete list of exhibits the Department intends to offer into evidence in this matter is attached to this Notice.

4. **Proposed Statement of Reasons:** The Department includes in its Notice of Intent to Present Technical Testimony a Proposed Statement of Reasons as NMED Exhibit 17 for the Environmental Improvement Board's consideration and signature should it approve the SIP revision.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

By: */s/ Christopher N. Atencio*

Christopher N. Atencio
Andrew P. Knight
Assistants General Counsel
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102-3400
(505) 222-9554

CERTIFICATE OF SERVICE

I hereby certify that a copy of this "Department's Notice of Intent to Present Technical Testimony" was sent via the stated methods below to the following parties on August, 19, 2016:

Via hand delivery:

Pam Castañeda, Board Administrator
Environmental Improvement Board
1190 South Saint Francis Drive, Suite 2102
Santa Fe, NM 87505

Via First Class U.S. Mail:

Jennie Lusk
Assistant General Counsel
New Mexico Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504
Counsel for the Environmental Improvement Board

/s/ Christopher N. Atencio
Christopher N. Atencio

SSM SIP Call Exhibit List

NMED Exhibit 1	Rita Bates Resume
NMED Exhibit 2	Renee Held Resume
NMED Exhibit 3	Ted Schooley Resume
NMED Exhibit 4	Robert Spillers Resume
NMED Exhibit 5	Proposed Revisions - 20.2.7 NMAC Excess Emissions
NMED Exhibit 6	Written Testimony of Robert Spillers
NMED Exhibit 7	April 30, 2008 EPA Letter
NMED Exhibit 8	2009 EPA Approval 2008 Rule
NMED Exhibit 9	Sierra Club Petition
NMED Exhibit 10	EPA Proposed Rule (February 22, 2013)
NMED Exhibit 11	Department Comment Letter to EPA proposed Rule (May 9, 2013)
NMED Exhibit 12	Department Interpretive Letter for Excess Emissions (May 9, 2013)
NMED Exhibit 13	*Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014)
NMED Exhibit 14	EPA Final Rule (June 12, 2015)
NMED Exhibit 15	EPA Comment Letter on Department's Proposed Revisions (May 25, 2016)
NMED Exhibit 16	Public Outreach Notices
NMED Exhibit 17	Proposed Statement of Reasons

RITA BATES

EDUCATION

HUMBOLDT STATE UNIVERSITY, ARCATA, CALIFORNIA
B.S., Biology, 1990. Minor in Botany, emphasis in Ecology.

EXPERIENCE

STATE OF NEW MEXICO, ENVIRONMENT DEPARTMENT
AIR QUALITY BUREAU, PLANNING & POLICY SECTION

Section Chief, March 2005 – present
Program Manager (Natural Sciences Manager-2), March 2000 – March 2005
Environmental Specialist, December 1998 – March 2000
Environmental Scientist, August 1998 – December 1998

The Planning & Policy section of the Air Quality Bureau is responsible for the control strategy, dispersion modeling, emission inventory and small business assistance programs in the Air Quality Bureau. The control strategy section of the Air Quality Bureau is responsible for preparing state implementation plans, policies, and regulations for air quality. The modeling section ensures that all air dispersion modeling analyses submitted to our agency are accurate and complete. The Small Business Assistance Program assists small businesses in meeting air quality regulatory requirements.

EMPIRE GROUP, LLC
Empire, Nevada

Environmental Coordinator, June 1996 – July 1998

Empire Group, LLC is the parent company for several entities which own and operate a geothermal power plant, an onion and garlic dehydration plant, several ranches, and a garlic seed operation. In my position as environmental coordinator, I was responsible for permitting at all facilities.

JBR ENVIRONMENTAL CONSULTANTS, INC.
Reno, Nevada

Environmental Analyst IV, Reno Office Coordinator/Manager, July 1994 – July 1996
Environmental Analyst III, July 1993 – July 1994
Environmental Analyst I, June 1990 – July 1993

As the manager of the Reno office, I supervised seven technical staff and one administrative employee. During my employment with JBR, I worked on and managed numerous NEPA, environmental permitting and baseline projects.

525 Camino de los Marquez
Santa Fe, NM 87505-1816

Phone: (505) 476-4365
Fax: (505) 476-4375
E-mail: renae.held@state.nm.us

Renae J. Held

Education

2003 **College of William and Mary (W&M)** **Williamsburg, VA**
M.A. Biology

1998 **University of North Dakota** **Grand Forks, ND**
B.S. Biology

Professional Experience

Staff Manager - Compliance Reporting, New Mexico Air Quality Bureau
December 2014 - Present **New Mexico Environment Department** **Santa Fe, NM**

Environmental Enforcement Specialist - Enforcement, New Mexico Air Quality Bureau
October 2008 – December 2014 **New Mexico Environment Department** **Santa Fe, NM**

Assistant Chief – Non-Game and Endangered Species
April 2007 – October 2008 **New Mexico Department of Game and Fish** **Santa Fe, NM**

Program Coordinator, Tern and Plover Conservation Partnership
April 2002 – April 2007 **University of Nebraska – Lincoln** **Lincoln, NE**

Private Consultant
October 2006- January 2007 **Nebraska Game and Parks Commission** **Lincoln, NE**

Graduate Research Assistant
August 1999 – April 2002 **College of William and Mary** **Williamsburg, VA**

Research Field Technician
2000-2001, summer **U.S. Army Corp of Engineers/W&M** **Norfolk, VA**

Wildlife Area Monitor, Grandview Beach Nature Preserve
2000 - 2001, summer **City of Hampton** **Hampton, VA**

Assistant to the Director of Research/Research Assistant/Research Intern
May 1998 – August 1999 **Wetlands Institute** **Stone Harbor, NJ**

Howard Hughes Apprenticeship/EPSCoR – (Experimental Program to Stimulate Competitive Research)
August 1995 – May 1998 **University of North Dakota** **Grand Forks, ND**

Ted Schooley
Curriculum Vitae

Summary of Qualifications

- Registered Professional Engineer, State of Louisiana (Mechanical)
- 25+ years successful experience in small and medium business management
- Experience in HR management including recruitment, development, and retention of personnel
- Exceptional skills in engineering, business management, customer service, and problem solving
- Solid knowledge of Window software applications, various special purpose software programs (HTML web site design, 3D CAD, desktop publishing, graphics design, video editing, etc.), as well as customization of proprietary software

Management Flexibility and Accomplishments:

- **Entrepreneurial Skills**: Conceptualized, created, and managed **CompServCo**, a successful software development, marketing, and fulfillment company that produced a product MacCAD that won a "Top 100 Macintosh Products" award. CompServCo also won fulfillment contracts (packaging design, packaging, and shipping) for several other engineering software products. These contracts also included co-marketing efforts such as multi-product display ads in national magazines, technical support, packaging and national trade shows.
- **Marketing**: After a few years, CompServCo won the exclusive North American distributorship of a proprietary 3-D CAD kitchen design software product, Planit. To fulfill this contract, CompServCo spun off another software distributing company, **Planit USA**. In return for a lucrative distributing contract, CompServCo though Planit USA, capitalized the marketing and database development of Planit in the USA, and brought this new product from being unknown in this vertical market to a market leader within a few years. Sold the company in 1997.
- **Contract Negotiations**: 11 years experience in upper management level contract negotiations with major manufacturing firms in the United States, Canada, and Europe (i.e. Masco, Woodmode, Aristocraft, Craftmaid, and Merillat).
- **Sales & Marketing**: Over 17 years experience in marketing, sales, and customer service. Responsible for conceptualizing and coordinating a national marketing campaigns for several software products, including personally creating display ads, internet advertising (web site & e-mail campaigns), national trade shows (booth design and marketing focus), and negotiating co-marketing efforts. As VP Sale & Marketing, I grew a commercial print shop to win American Printing Magazine's "Top 50 Fastest Growing Printing Companies" award. I also put systems in place to diversify the sales base and move the company to web-based publishing.
- **Software Development**: Managed software programmers developing various products for CompServCo: MacCAD (3-D graphic engineering templates), Riddler (teaching software that incorporated text-graphics-sounds in a gaming style user interface), My Family Tree (genealogy software that mapped and produced a family book with text and photos), Planit Cut List (produced a cut list of panel parts and sizes from a list of kitchen cabinets).
- **Engineering: Space Shuttle External Tank**: As a facilities design engineer for Martin Marietta, under contract to NASA, building the External Tank for the Space Shuttle I designed and managed construction of a dust collection system for Thermal Protection System (TPS) machining facility, re-designed a faulty lifting hook and insertion mechanism that inserted an umbrella-like washing probe into the interior of the liquid hydrogen portion of the space shuttle external tank, designed and oversaw the TPS application on an emergency basis on the dome of the LOX (liquid oxygen) tank of the External Tank used in the first Space Shuttle flight.

- **Engineering & Manufacturing Management**: Starting as an engineer at Dixie Manufacturing, I co-designed pneumatic instrumentation that sensed emergency conditions at the oil wellhead and shut down all operations using pneumatics only (no electricity or sparks to ignite fuel). After being promoted to General Manager, I was responsible for all aspects of production and marketing of the company's products. In my youth, I started a jewelry manufacturing business that successfully mass produced and marketed silver and gold jewelry before returning to school to obtain my engineering degree.
- **Environmental Regulatory Management**: Almost 10 years experience managing permitting programs (New Source Review and Technical Services Units) of the Air Quality Bureau, New Mexico Environment Department. Responsible for overseeing of constructing permitting (new sources and source modifications) for all applicable sources of air pollution in the State of New Mexico. Under my management there was a marked increase in the quality of permit review, permitting guidance, as well as timeliness and quality of permits issued. Additionally, finding the unit's team spirit and job satisfaction at remarkably low levels, I initiated programs and management style to bring the team spirit to a high degree of harmony and sense of purpose.

Work History

• 8/13 – Present	NMED, AQB Santa Fe, NM	Permit Programs Manager
• 6/01 – 8/13	NMED, AQB Santa Fe, NM	Manager, NSR Permitting Unit Manager, Technical Services Unit
• 5/00 – 5/01	Pre-Paid Legal, Inc. Santa Fe, NM	Independent Associate Executive Director Level
• 6/97 – 5/00	TLC Printing & Copying, Inc Metairie, LA	VP Sales & Marketing
• 1/97 – 6/97	Sabbatical	USA, Europe, Asia
• 5/86 – 1/97	Planit USA Slidell, LA	Owner
• 7/84 – 1/97	CompServCo Slidell, LA	Owner
• 1/82 – 7/84	Dixie Manufacturing, Inc. Harvey, LA	General Manager
• 2/79 – 1/82	Martin Marietta Aerospace, Corp. Metairie, LA	Facilities Design Engineer
• 8/77 – 1/79	LSU at New Orleans New Orleans, LA	Student, engineering
• 2/74 – 7/77	Abraxas Jewelry Manufacturing New Orleans, LA	Owner

Education, Certifications:	Professional Engineer, Louisiana	Mechanical Engineering
	LSU, New Orleans	BS. Mechanical Engineering
	University of Texas at El Paso	BS. Math, Physics

Interests: Gardening, reading, jewelry making (certified gemologist), writing, sailing, and hiking.

Robert Spillers
2261 Calle Cuesta
Santa Fe, NM 87505
Home 505-699-8058 Work 505-476-4324

Education

New Mexico Highlands University, Las Vegas, New Mexico 8/95-5/99
Bachelor of Science, Environmental Science and Management

Employment/Experience

New Mexico Environment Department, Air Quality Bureau Santa Fe, NM
Environmental Analyst September 2005 – Current

- New Mexico Clean Diesel grant program
  - Project lead coordinating project communications and activities between NMED, EPA, vendor and grant recipients
  - Draft and amend grant application work plans for submittal to EPA
  - Provide oversight of grantees' diesel emissions reduction projects
  - Procurement and installation oversight of emission reduction technologies on eligible diesel-fueled fleets with in the State
- Develop rules/guidance for unregulated sources that fall under the jurisdiction of the Bureau
  - Draft regulations
  - Collaborate with legal staff in drafting testimony for regulatory hearing
  - Prepare documents and participate in EIB hearing
  - Draft and file final rules with the NM State Records Center and Archives
- Currently serving as the primary backup to the NMED-AQB/Bureau of Land Management Smoke Desk
- Use applicable Microsoft Office, and other computer based, applications for the execution of job duties
- Provide program support for Bureau activities including:
  - Develop comments for Environmental Assessments
  - Organize and conduct public outreach as it pertains to assigned projects
  - Participate in various workgroups/committees that benefit and ensure a superior work environment.
  - Provide assistance to other Bureau sections as needed

Alex Safety Lane Santa Fe, NM
Shop Foreman/Auto Technician October 1979 – September 2005

- Responsible for oversight, provided expert guidance and instruction to co-workers during the execution of their job duties to ensure a quality product
- Utilized relevant computer, and non computer, based diagnostic tools, equipment, and reference materials.
- Diagnosed and repaired computerized engine management systems, general repairs and completed recommended maintenance
- Communicated effectively with clients, co-workers, and management
- Fabricated necessary repairs that deviated from standard procedures
- This position required critical thinking, multitasking, and the ability to research, comprehend and implement relevant diagnostic instructions obtained from technical repair manuals

Proposed Revisions to the State Implementation Plan (SIP) regarding Startup, Shutdown and Malfunctions

The SIP revision entails removing applicable sections of 20.2.7 NMAC-*Excess Emissions* during Malfunction, Startup, or Scheduled Maintenance from the SIP. The applicable sections to be removed from the SIP are italicized, while underlined text is informative and is not part of the SIP. All other rule language remains part of the SIP.

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 2 AIR QUALITY (STATEWIDE)
PART 7 EXCESS EMISSIONS

20.2.7.1 ISSUING AGENCY. Environmental Improvement Board.
[20.2.7.1 NMAC - Rp, 20.2.7.1 NMAC, 08/01/08]

20.2.7.2 SCOPE. All geographic areas within the jurisdiction of the environmental improvement board.
[20.2.7.2 NMAC - Rp, 20.2.7.2 NMAC, 08/01/08]

20.2.7.3 STATUTORY AUTHORITY. Environmental Improvement Act, NMSA 1978, section 74-1-8(A)(4) and (7), and Air Quality Control Act, NMSA 1978, sections 74-2-1 et seq., including specifically, section 74-2-5(A), (B) and (C).
[20.2.7.3 NMAC - Rp, 20.2.7.3 NMAC, 08/01/08]

20.2.7.4 DURATION. Permanent.
[20.2.7.4 NMAC - Rp, 20.2.7.4 NMAC, 08/01/08]

20.2.7.5 EFFECTIVE DATE. 08/01/08, unless a later date is cited at the end of a section.
[20.2.7.5 NMAC - Rp, 20.2.7.5 NMAC, 08/01/08]
[The latest effective date of any section in this part is 8/1/2008.]

20.2.7.6 OBJECTIVE.

A. Establish requirements for a source whose operation results in an excess emission.

B. *Establish criteria for a source whose operation results in an excess emission to claim an affirmative defense in an administrative or judicial enforcement action from a civil penalty.*

[20.2.7.6 NMAC - Rp, 20.2.7.6 NMAC, 08/01/08]
[Subsection B of 20.2.7.6 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.7 DEFINITIONS. In addition to the terms defined in 20.2.2 NMAC (Definitions), as used in this part, the following definitions apply.

A. **"Air pollution control equipment"** means any apparatus, including acid plants, afterburners, baghouses, cyclones, electrostatic precipitators, flares, incinerators, and particulate or gaseous scrubbers, utilized to control the emission of a regulated air contaminant, including a fugitive emission.

B. **"Air quality regulation or permit condition"** means any regulation adopted by the board, including a federal new source performance standard adopted by reference, or any condition of an air quality permit issued by the department. National emission standards for hazardous air pollutants and maximum achievable control technology standards are not included in this definition.

C. **"Bypass"** means the diversion of a regulated air contaminant around air pollution control equipment or process equipment.

D. **"Excess emission"** means the emission of an air contaminant, including a fugitive emission, in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition.

E. **"Malfunction"** means any sudden and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown. A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable equipment breakdown shall not be considered a malfunction.

F. **"Part"** means an air quality regulation under Title 20, Chapter 2 of the New Mexico Administrative Code.

G. **"Regular business day"** means any day on which state government offices are open for normal business. Saturdays, Sundays, and official federal and state holidays are not regular business days.

H. **"Shutdown"** means the cessation of operation of any air pollution control equipment or process equipment.

I. **"Startup"** means the setting into operation of any air pollution control equipment or process equipment.

[20.2.7.7 NMAC - Rp, 20.2.7.7 NMAC, 08/01/08]

20.2.7.8 **AMENDMENT OR SUPERSESSION OF PRIOR REGULATIONS**. This part supersedes New Mexico Administrative Code ("NMAC") 20.2.7 -- Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance last filed October 30, 1995.

[20.2.7.8 NMAC - Rp, 20.2.7.8 NMAC, 08/01/08]

20.2.7.9 **DOCUMENTS.** No documents are cited in this part.

[20.2.7.9 NMAC - N, 08/01/08]

20.2.7.10 **SEVERABILITY.** If any provision of this part, or the application of such provision to any person or circumstance, is held invalid, the remainder of this part, or the application of such provision to any person or circumstance other than those as to which it is held invalid, shall not be affected thereby.

[20.2.7.10 NMAC - N, 08/01/08]

20.2.7.11 **CONSTRUCTION.** This part shall be liberally construed to carry out its purpose.

[20.2.7.11 NMAC - N, 08/01/08]

20.2.7.12 **SAVINGS CLAUSE.**. Repeal or supersession of a prior version of this part shall not affect any administrative or judicial action initiated under that prior version.

[20.2.7.12 NMAC - N, 08/01/08]

20.2.7.13 **COMPLIANCE WITH OTHER REGULATIONS.** Compliance with this part does not relieve a person from the responsibility to comply with any other applicable federal, state, or local statute or regulation.

[20.2.7.13 NMAC - N, 08/01/08]

20.2.7.14 **REQUIREMENTS REGARDING ROUTINE OR PREDICTABLE EMISSIONS DURING STARTUP, SHUTDOWN, AND MAINTENANCE.**

A. The owner or operator of a source subject to a permit or to the notification requirement under section 15 of this part, shall establish and implement a plan to minimize emissions during routine or predictable startup, shutdown, and scheduled maintenance through work practice standards and good air pollution control practices. This requirement shall not apply to any affected facility defined in and subject to an emissions standard and an equivalent plan under 40 CFR Part 60 (NSPS), 40 CFR Part 63 (MACT), or an equivalent plan under 20.2.72 NMAC - Construction Permits, 20.2.70 NMAC - Operating Permits, 20.2.74 NMAC - Permits - Prevention of Significant Deterioration (PSD), or 20.2.79 NMAC - Permits - Nonattainment Areas.

B. The owner or operator shall maintain the plan at the location authorized by the permit, at the facility, or at the nearest occupied facility, and provide the plan to the department upon written request.

C. This requirement shall become effective 180 days after the effective date of this part.

[20.2.7.14 NMAC - Rp, 20.2.7.14 NMAC, 08/01/08]

20.2.7.15 **TEMPORARY PROVISIONS FOR ROUTINE OR PREDICTABLE EMISSIONS DURING STARTUP, SHUTDOWN, AND SCHEDULED MAINTENANCE.**

A. If the inclusion of emissions during routine or predictable startup, shutdown, or scheduled maintenance in addition to the potential emission rate or potential to emit of a source could exceed an applicable emissions limitation, or would cause the source to exceed an applicability threshold in 20.2.72 NMAC - Construction Permits, 20.2.70 NMAC - Operating Permits, 20.2.74 NMAC - Permits - Prevention of Significant Deterioration (PSD), or 20.2.79 NMAC - Permits - Nonattainment Areas, the owner or operator shall notify the department in writing no later than 180 days after the effective date of this part. The notice shall include a preliminary estimate of emissions by pollutant to the extent practicable and identify the nature of permitting action likely to be required.

B. The owner or operator shall submit the necessary permit application no later than 120 days after receiving a request from the department.

C. If a timely notice is submitted under Subsection A of 20.2.7.15 NMAC for any excess emission during routine or predictable startup, shutdown, or scheduled maintenance, the owner or operator shall comply only with Paragraph (2) of Subsection A of 20.2.7.110 NMAC - Final Report, until the permit is issued or denied.

D. At the request of the department, the owner or operator of a source that does not submit a notification under Subsection A of 20.2.7.15 NMAC shall submit the basis for its determination and supporting analysis.

[20.2.7.15 NMAC - N, 08/01/08]

20.2.7.16 to 20.2.7.107 [RESERVED]

20.2.7.108 APPLICABILITY.

A. Any source:

(1) whose operation results in an emission of an air contaminant, including a fugitive emission, in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition; or

(2) subject to the requirements of 20.2.73 NMAC - Notices of Intent and Emissions Inventory Requirements, 20.2.72 NMAC - Construction Permits, 20.2.70 NMAC - Operating Permits, 20.2.74 - Permits - Prevention of Significant Deterioration (PSD), or 20.2.79 - Permits - Nonattainment Areas.

B. Deviations under 20.2.70 NMAC - Operating Permits that do not result in excess emissions are not subject to the provisions of 20.2.7 NMAC.

C. This part does not create a separate cause of action for failure to obtain a permit under 20.2.72 NMAC - Construction Permits, 20.2.70 NMAC - Operating Permits, 20.2.74 - Permits - Prevention of Significant Deterioration (PSD), or 20.2.79 - Permits - Nonattainment Areas.

[20.2.7.108 NMAC - N, 08/01/08]

20.2.7.109 OPERATION RESULTING IN AN EXCESS EMISSIONS. The emission of an air contaminant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action. The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions.

[20.2.7.109 NMAC - Rp, 20.2.7.109 NMAC, 08/01/08]

20.2.7.110 NOTIFICATION.

A. The owner or operator of a source having an excess emission shall report the following information to the department on forms provided by the department. The department may authorize the submittal of such reports in electronic format.

(1) Initial report: the owner or operator shall file an initial report, no later than the end of the next regular business day after the time of discovery of an excess emission that includes all available information for each item in Subsection B of 20.2.7.110 NMAC.

(2) Final report: the owner or operator shall file a final report that contains specific and detailed information for each item in Subsection B of 20.2.7.110 NMAC, no later than ten (10) days after the end of the excess emission.

B. The report shall include the following information.

(1) The name of the source.

(2) The name of the owner and operator of the source.

(3) The name and title of the person preparing the report.

(4) Identifying information such as permit and database numbers.

(5) The specific date(s) and time(s) the excess emission occurred.

(6) Identification of the equipment involved and the emission point(s) (including bypass) from which the excess emission occurred.

(7) The air quality regulation or permit condition that was exceeded.

(8) Identification of the air contaminant(s) and the magnitude of the excess emission expressed in the units of the air quality regulation or permit condition.

(9) The method for determining the magnitude and duration of the excess emission.

(10) The cause and nature of the excess emission.

(11) The steps taken to limit the duration and magnitude of the excess emission.

(12) The corrective action(s) taken to eliminate the cause of the excess emission. If one or more corrective actions are required, the report shall include a schedule for implementation of those actions, with associated progress reports. If no corrective actions are required, the report shall include a detailed explanation for that conclusion.

(13) The corrective action(s) taken to prevent a recurrence of the excess emission.

(14) Whether the owner or operator attributes the excess emission to malfunction, startup or shutdown.

(15) *Whether the owner or operator will claim an affirmative defense under Sections 111, 112, or 113 of 20.2.7 NMAC. If claiming an affirmative defense, an analysis with and the supporting evidence for each criterion shall be submitted no later than thirty (30) days after submittal of the final report required by this subsection (Subsection B of 20.2.7.110 NMAC). Upon the department's receipt of a written request by the owner or operator no later than thirty (30) days after submittal of the final report, the department may grant an extension to complete the analysis not to exceed thirty (30) additional days.*

(16) The contents of the final report shall contain a signed certification of truth, accuracy, and completeness. This certification shall be signed by the person who is reporting the excess emission.

C. The department may request that the owner or operator of a source provide additional information. This information shall be reported within a time period specified by the department.

D. If the period of an excess emission extends beyond the deadline specified in Paragraph (2) of Subsection A of 20.2.7.110 NMAC, the owner or operator shall notify the department in writing within seventy-two (72) hours of the date and time when the excess emission ceased. This notification shall include all items required in Subsection B of 20.2.7.110 NMAC.

[20.2.7.110 NMAC - Rp, 20.2.7.110 NMAC, 08/01/08]

[Paragraph 15 of Subsection B of 20.2.7.110 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.111 AFFIRMATIVE DEFENSE FOR AN EXCESS EMISSION DURING MALFUNCTION.

A. *The owner or operator of a source subject to this part may claim an affirmative defense for an excess emission during malfunction for a civil penalty in an administrative or judicial enforcement action, except for an action to enforce a federal new source performance standard. There shall be no affirmative defense for an excess emission during malfunction for the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during malfunction shall bear the burden of proof to demonstrate the following criteria.*

(1) *The excess emission was caused by a malfunction.*

(2) *The excess emission:*

(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 emission (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 emission on ambient air quality.*

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

(8) *The excess emission was not part of a recurring pattern indicative of inadequate design, operation, or maintenance.*

(9) *The owner or operator complied with the notification requirements in Section 110 of 20.2.7 NMAC.*

(10) *The owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence.*

B. *The department may request that the owner or operator of a source provide additional information beyond what is required in this section (20.2.7.111 NMAC). This additional information shall be reported within the time period specified by the department.*

[20.2.7.111 NMAC - N, 08/01/08]

[20.2.7.111 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.112 AFFIRMATIVE DEFENSE FOR AN EXCESS EMISSION DURING STARTUP OR SHUTDOWN.

A. *The owner or operator of a source subject to this part may claim an affirmative defense for an excess emission during startup or shutdown for a civil penalty in an administrative or judicial enforcement action, except for an action to enforce a federal new source performance standard. There shall be no affirmative defense for an excess emission during startup or shutdown for the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during startup or shutdown shall bear the burden of proof to demonstrate the following criteria.*

(1) *The excess emission occurred during a startup or shutdown.*

(2) *The duration of the excess emission that occurred during startup and shutdown was short and could not have been prevented through careful planning and design.*

(3) *The excess emission was not part of a recurring pattern indicative of inadequate design, operation, or maintenance.*

(4) *If the excess emission was caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage.*

(5) *At all times, the source was operated in a manner consistent with good practices for minimizing emissions.*

(6) *The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable.*

(7) *All possible steps were taken to minimize the impact of the excess emission on ambient air quality.*

(8) *All emissions monitoring systems were kept in operation if at all possible.*

(9) *The owner or operator complied with the notification requirements in Section 110 of 20.2.7 NMAC.*

(10) *The owner or operator's actions during the period of the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence.*

B. *The department may request that the owner or operator of a source provide additional information beyond what is required in this section (20.2.7.112 NMAC). This additional information shall be reported within the time period specified by the department.*

C. *An excess emission due to malfunction during a period of startup or shutdown which is authorized by permit shall be treated as a malfunction under 20.2.7.111 NMAC.*

[20.2.7.112 NMAC - Rp, 20.2.7.112 NMAC, 08/01/08]

[20.2.7.112 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.113 AFFIRMATIVE DEFENSE FOR AN EMERGENCY.

A. *An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, 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 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 preventive maintenance, or careless or improper operation.*

B. *An emergency constitutes an affirmative defense to an action brought for noncompliance with the technology-based emission limitation if the owner or operator of the source demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:*

(1) *an emergency occurred and that the owner or operator can identify the cause(s) of the emergency;*

(2) *the source was at the time being properly operated;*

(3) *during the period of the emergency the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the technology-based emission limitation; and*

(4) *the owner or operator fulfilled the notification requirements under Subsection A of 20.2.7.110 NMAC, including a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.*

C. *In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof.*

D. *The department may request that the owner or operator of a source provide additional information beyond what is required in this section (20.2.7.113 NMAC). This additional information shall be reported within the time period specified by the department.*

[20.2.7.113 NMAC - N, 08/01/08]

[20.2.7.113 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.114 ROOT CAUSE AND CORRECTIVE ACTION ANALYSIS.

A. The owner or operator of a source having an excess emission, upon written request of the department, shall prepare an analysis that uses appropriate analytical tools and contains the following information.

(1) an analysis describing the root cause and all contributing causes of the excess emission;

(2) an analysis of the corrective actions implemented or available to reduce the likelihood of a recurrence of the excess emission resulting from the causes identified under Paragraph (1) of Subsection A of 20.2.7.114 NMAC, including, as applicable:

(a) identification of implemented or available corrective action alternatives, such as changes in design, operation and maintenance;

(b) the estimated cost associated with each corrective action alternative;

(c) the probable effectiveness of each corrective action alternative;

(d) if no corrective action alternatives are available, a clear explanation providing an adequate justification for that conclusion; and

(e) if one or more corrective actions are identified, a schedule for implementation and progress reports.

B. The department shall make the request no later than ninety (90) days after receipt of the final report under Subsection A of 20.2.7.110 NMAC.

C. The department may request the analysis specified in Subsection A of 20.2.7.114 NMAC after considering relevant factors. Examples of such relevant factors may include but are not limited to the significance of the excess emission, the nature or pattern of excess emissions, or the history of the source, as well as other factors determined to be relevant by the department.

D. The completed analysis shall be submitted to the department no later than sixty (60) days after the request for submittal pursuant to Subsection A of 20.2.7.114 NMAC. The department may grant an extension to submit the analysis for good cause shown.

E. The owner or operator of a source complying with this section may assert a claim for confidential information protection pursuant to 20.2.1.115 NMAC.

[20.2.7.114 NMAC - N, 08/01/08]

20.2.7.115 REVIEW OF THE DEPARTMENT'S DETERMINATIONS UNDER SECTIONS 111, 112, AND 113. *The department may issue a determination regarding an owner or operator's assertion of the affirmative defense under Section 111, 112, or 113 of 20.2.7 NMAC on the basis of any relevant information, including but not limited to information submitted pursuant to this part or obtained through an inspection. Any such determination is not a final action and is not reviewable, shall not be a prerequisite to the commencement of an administrative or judicial enforcement action, does not constitute a waiver of liability pursuant to Section 116 of 20.2.7 NMAC, and shall not preclude an enforcement action by the federal government or a citizen pursuant to the federal Clean Air Act. A source may not assert an affirmative defense under Section 111, 112, or 113 of 20.2.7 NMAC in an administrative or judicial enforcement action unless it asserted such defense pursuant to Subsection B of 20.2.7.110 NMAC.*

[20.2.7.115 NMAC - Rp, N, 08/01/08]

[20.2.7.115 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.116 FUTURE ENFORCEMENT ACTION. *The department may commence an administrative or judicial enforcement action against the owner or operator of a source for an excess emission for which it has made a determination pursuant to Section 115 of 20.2.7 NMAC if the department determines that the excess emission is related to a pattern of excess emission events, poor maintenance, careless or marginal operation, or other appropriate reason.*
[20.2.7.116 NMAC - Rp, 20.2.7.116 NMAC, 08/01/08]
[20.2.7.116 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

HISTORY OF 20.2.7 NMAC:
Pre- NMAC History: The material in this part was derived from that previously filed with the commission of public records - state records center and archives.
HSSD 70-1, Ambient Air Quality Standards And Air Quality Control Regulations, 01/27/70.
ACQR 801, Air Quality Control Regulation 801 - Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, 04/29/81.

History of Repealed Material: 20.2.7 NMAC, Excess Emissions during Malfunction, Startup, Shutdown, or Scheduled Maintenance (filed 10/16/02) repealed 08/01/08/

Other History:
ACQR 801, Air Quality Control Regulation 801 - Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, filed 04/29/81was renumbered into first version of the New Mexico Administrative Code as 20 NMAC 2.7, Air Quality (Statewide) - Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, filed 10/30/95.
20 NMAC 2.7, Air Quality (Statewide) - Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, filed 10/30/95 was renumbered, reformatted and replaced by 20.2.7 NMAC, Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, effective 10/31/02.
Excess Emissions during Malfunction, Startup, Shutdown, or Scheduled Maintenance (filed 10/16/02) was replaced by 20.2.7 NMAC, Excess Emissions, effective 08/01/08.

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REVISIONS TO: **No. EIB 16-03 (R)**
***New Mexico's State Implementation* Plan**

Air Quality Bureau,
Environmental Protection Division of the
New Mexico Environment Department

DIRECT TESTIMONY OF ROBERT SPILLERS

Witness Qualifications:

Robert Spillers is an Environmental Analyst in the Control Strategies Section of the New Mexico Environment Department (NMED or Department) Air Quality Bureau (Bureau). Mr. Spillers' resume is attached as NMED Exhibit 4.

I. INTRODUCTION

Mr. Spillers submits this direct testimony on behalf the Department and in support of the proposed revisions to the State Implementation Plan (SIP). These revisions entail removing certain sections of 20.2.7 NMAC-Excess Emissions (Part 7) from the SIP and leaving the removed sections in the rule as state-only provisions. A "markup" version of the proposed revisions is attached as NMED Exhibit 5.

II. REGULATORY BACKGROUND

The Clean Air Act (CAA) requires New Mexico to adopt and submit a plan for the implementation, maintenance, and enforcement of primary and secondary national ambient air quality standards (NAAQS) to the EPA pursuant to the CAA Section 110(a). Part 7 was

originally adopted as Air Quality Control Regulation 801 in 1970, and was subsequently approved by the U.S. Environmental Protection Agency (EPA) as part of the original SIP for New Mexico. 38 Fed. Reg. 12702, 12704 (May 14, 1973). Reporting requirements were added in 1981.

Since the original adoption of Part 7, EPA has issued several policy statements regarding the type of enforcement discretion that states could exercise for excess emissions without violating the CAA. In 2004, the EPA notified the Department that the 1981 amended rule was inconsistent with the EPA's interpretation of the CAA. In 2007 the Department began a concerted effort with stakeholders and the EPA to create a rule that would conform to EPA's interpretation of the CAA, ultimately proposing repeal and replacement of Part 7. There were several reasons for the repeal and replacement of Part 7 in 2008, including:

- The 1981 rule did not conform to EPA's 1999 guidance;
- The 1981 rule was vague and created uncertainty for the business community; and
- The rule was inadequate to stem the flow of excess emission reports.

The 2008 rule adopted the EPA's criteria issued through the 1999 policy nearly verbatim. In a letter dated April 30, 2008, EPA Region VI stated: "With respect to the proposed addition of 20.2.7.14 NMAC . . . we applaud NMED's efforts to ensure that all emissions from a source are properly permitted, including routine emissions occurring during periods of startup, shutdown, and maintenance activities." *See* NMED Exhibit 7. In the Federal Register notice containing EPA's approval of the 2008 rule, 74 FR 46910, included herein as NMED Exhibit 8, EPA stated that, "We are approving the October 7, 2008 SIP submittal because the revisions to 20.2.7 NMAC are consistent with the [CAA]. This action is in accordance with section 110 of the [CAA]." NMED Exhibit 8, 74 Fed. Reg. 46910, 46910 (Sept. 14, 2009). The EPA recognized

that, “While all excess emissions are violations, …imposition of a penalty for sudden and unavoidable malfunctions, startups, or shutdowns caused by circumstances entirely beyond the control of the owner or operator may not be appropriate. NMED Exhibit 8, 74 Fed. Reg. 74910, 46912.

On June 30, 2011, the Sierra Club filed a petition with EPA concerning treatment of excess emissions during periods of startup, shutdown, and malfunction (SSM) of industrial processes or emission control equipment by air agency rules in EPA-approved SIPs. (Sierra Club Petition) NMED Exhibit 9. In response to the Sierra Club Petition, the EPA issued a proposed rule, 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; Proposed Rule, 78 Fed. Reg. 12459 (Feb. 22, 2015). *See* NMED Exhibit 10.

In response to the EPA’s proposed rule, the Department submitted comments strongly disagreeing with the EPA findings of substantial inadequacy with Part 7. *See* NMED Exhibit 11. The Department also argued that EPA Headquarters did not consult with EPA Region VI prior to issuing its findings. NMED Exhibit 11, pg. 1. The Department’s letter reiterated that during the rule development, the Department worked closely with EPA Region VI, and as a result, the 2008 rule mirrored the 1999 guidance. *Id*. Along with the comment letter, the Department submitted an interpretive letter that detailed how the Department’s rule conformed to the 1999 policy and the CAA. *See* NMED Exhibit 12. On June 12, 2015, the EPA issued its final action on the Sierra Club’s Petition for rulemaking. *See* NMED Exhibit 14, 80 Fed. Reg. 33840 (June 12, 2015).

III. FINAL RULE OVERVIEW

In the final action, EPA clarified, restated, and revised its guidance concerning its interpretation of the CAA requirements with respect to treatment in SIPs of excess emissions that occur during periods of SSM. The EPA specifically evaluated existing SIP provisions in a number of states, including New Mexico, for consistency with the EPA's interpretation of the CAA and in light of recent court decisions addressing this issue. *See* NMED Exhibit 14. The EPA issued a finding that certain New Mexico SIP provisions, found in 20.2.7 NMAC Excess Emissions, are substantially inadequate to meet CAA requirements and, thus, issued a "SIP call" for New Mexico and 35 other states. Specifically, EPA found sections 20.2.7.111, .112, and .113 substantially inadequate. NMED Exhibit 14, 80 Fed. Reg. 33840, 33967- 68. SIP revisions are due no later than eighteen (18) months from the issuance of a SIP call (Nov. 22, 2016). NMED Exhibit 14, 80 Fed. Reg. 33840, 33847. Included in the final action was EPA's updated SSM Policy as it applies to SIP provisions.

EPA's final rule also addressed a 2014 federal court decision finding that the CAA precludes EPA's authority to create affirmative defense provisions applicable to private civil suits, *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), (NRDC) attached herein as NMED Exhibit 13. The federal court found that CAA sections 113 and 304 preclude EPA's authority to create affirmative defense provisions in EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) for sources that manufacture Portland cement because such provisions purport to alter the jurisdiction of federal courts to assess liability and impose penalties for violations of those limits in private civil enforcement cases. NMED Exhibit 13, pp. 15-16; *NRDC*, 749 F.3d at 1063. The EPA believes that the reasoning of the court in *NRDC* indicates that the states also have no authority in SIP provisions to alter the jurisdiction of

federal courts to assess penalties for violations of CAA requirements through affirmative defense provisions. *See* NMED Exhibit 14, 80 Fed. Reg. 33840, 33851. If states lack authority under the CAA to alter the jurisdiction of the federal courts through affirmative defense provisions in SIPs, then the EPA lacks authority to approve any such provision in a SIP. *Id.*

IV. AFFIRMATIVE DEFENSE

The affirmative defense process allows an emitter to claim a defense from civil penalties for an excess emission, i.e., a violation of its emissions limits allowed under the facility permit or under an applicable regulation. For example, an emitter might claim that the excess emissions were due to unavoidable malfunction of equipment at the facility. The Bureau reviews the information submitted by the emitter to determine if the excess emissions meet the criteria for an affirmative defense specified in Part 7. If it does, the Bureau approves the affirmative defense and would not assess a penalty for the excess emission, even though it is still considered a violation of the facility permit. Under the current regulatory process, there is no automatic affirmative defense approval and not all affirmative defenses claims are approved. Only those which meet all the criteria specified in 20.2.7 NMAC for affirmative defense may be approved, and the Bureau retains the ability to enforce compliance pursuant to 20.2.7.116 NMAC.

V. DETERMINATION FOR 20.2.7 NMAC

EPA granted the Sierra Club's Petition regarding the three provisions in the New Mexico SIP that provide affirmative defenses for excess emissions that occur during malfunctions (20.2.7.111 NMAC), startup and shutdown (20.2.7.112 NMAC), and emergencies (20.2.7.113 NMAC). NMED Exhibit 14, 80 Fed. Reg. 33840, 33967 – 68. The Sierra Club objected to the

inclusion of these provisions in the SIP based on its view that affirmative defense provisions are always inconsistent with CAA requirements. NMED Exhibit 9, pp 54-55. The Sierra Club 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." *Id*. Finally, the Sierra Club 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. *Id*. at pg. 55. The EPA found that all three of these provisions are inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C) and 302(k), and with respect to CAA sections 113 and 304. NMED Exhibit 14, 80 Fed. Reg. 33840, 33967 – 68.

The EPA also found that the affirmative defenses for all three sections limited the jurisdiction of the federal court in an enforcement action and limited the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. NMED Exhibit 14, 80 Fed. Reg. 33840, 33846. The EPA believes that each of these provisions interferes with the intended enforcement structure of the CAA through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate. *Id*. Particular to each identified section in Part 7, the EPA stated the following:

20.2.7.111 NMAC: The EPA reasoned that 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 requires sources to make an "after the fact"

showing that no such exceedances actually occurred as an element of the affirmative defense. This section also limits the jurisdiction of the federal court in an enforcement action and limited the authority of the court to impose monetary penalties. NMED Exhibit 10, 78 Fed. Reg. 12460, 12523 (February 22, 2013).

To clarify the Department's intent of Section 111 of Part 7, the Department stated in its interpretive letter to EPA that:

> To the extent section 111 may be interpreted as ambiguous, the AQB hereby clarifies that it will not grant an affirmative defense to a source or group of sources whose excess emissions had the potential to cause an exceedance of the NAAQS or PSD increments. (Nor has the AQB done so in the past.) To verify that the NAAQS and PSD increments were not threatened by an excess emission event, the AQB will, as necessary, (1) use its authority to request additional information, pursuant to 20.2.7.111.B NMAC; (2) base its determination on any relevant information, including but *not limited to* that submitted by the source or obtained through inspection, pursuant to 20.2.7.115 NMAC; and (3) treat an exceedance of a NAAQS or PSD increment as an "appropriate reason" to take an enforcement action pursuant to 20.2.7.116 NMAC, notwithstanding any prior determination regarding an assertion of affirmative defense.
> NMED Exhibit 12, pg. 2.

It has never been, nor will it ever be, the intent of the Department to limit private civil suits or the authority of federal courts to impose penalties with respect to affirmative defenses as stated clearly in 20.2.7.115 NMAC.

20.2.7.112 NMAC: The EPA interpreted this section to allow an affirmative defense for excess emissions that occur during planned events such as startup and shutdown which is contrary to the EPA's current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, i.e., during malfunctions. NMED Exhibit 10, 78 Fed. Reg. 12460, 12523. This section also limits the jurisdiction of the federal court in an enforcement action and limited the authority of the court to impose monetary penalties. NMED Exhibit 14, 80 Fed. Reg. 33840, 33852.

The Department's interpretive letter states with respect to section 112 of Part 7:

> The State of New Mexico's SIP submittal for 20.2.7 NMAC submitted to EPA on October 7, 2008, clearly states that the intent and AQB's interpretation of 20.2.7.112 NMAC is that all routine and predictable emissions resulting from startup, shutdown, and scheduled maintenance must be addressed in the permit process, thus limiting what may be claimed as an excess emission during startups and shutdowns to those emissions that are not predictable or routine.
>
> The permitting requirements for emissions related to predictable or routine startups and shutdowns are outlined under 20.2.7.15 NMAC. Both Sections 15 and 112 were developed based on written and verbal correspondence from EPA Region VI, who advised the AQB that all predictable or routine startup, shutdown and scheduled maintenance emissions should be subject to permit limitations. Sections 15 and 112 provide the AQB with the necessary provisions to ensure that only those excess emissions that occur during unpredictable or non-routine startup and shutdown events are afforded the opportunity to claim an affirmative defense. To the extent that Section 112 is ambiguous, the AQB hereby clarifies that it will not grant an affirmative defense to a source for a planned startup or shutdown, nor has it done so in the past.

NMED Exhibit 12, pp. 2-3.

20.2.7.113 NMAC: The EPA stated 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 the 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. NMED Exhibit 10, 78 Fed. Reg. 12460, 12523. This section also limits the jurisdiction of the federal court in an enforcement action and limited the authority of the court to impose monetary penalties. NMED Exhibit 14, 80 Fed. Reg. 33840, 33852.

In addressing section 113 of Part 7, the Department's interpretive letter states that:

> AQB interprets 20.2.7.113 NMAC as follows: (1) The affirmative defense requirements in Section 113 do not explicitly limit the defense to civil penalties; however, it was not the intent nor has it been the practice of the AQB to extend this defense to injunctive relief. (2) The affirmative defense requirements in Section 113 are not as thorough as those for startup, shutdown and malfunction; however, Subsection C under Section 113 establishes that in any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof. In addition, Subsection D under Section 113 establishes that the AQB has the authority to require additional information if deemed necessary. (3) The New Mexico Environmental Improvement Board is generally prohibited by the New Mexico Air Quality Control Act from adopting regulations that are more or less stringent than comparable federal regulations, thus prohibiting additional defenses beyond those already provided in federal technology based standards. To the extent that Section 113 is ambiguous, the AQB hereby clarifies that it will not grant an affirmative defense to a source for an

> emergency claim for injunctive relief, nor will the AQB consider any additional defenses beyond those already provided in federal technology based standards.
> NMED Exhibit 12, pg. 3.

VI. REGULATORY ALTERNATIVES

The EPA allows the state broad discretion concerning how to revise its SIP. NMED Exhibit 14, 80 Fed. Reg. 33840, 33847. There are several approaches that would be consistent with the CAA. *Id*. at 33844, 47. The EPA suggested some alternatives to addressing the deficiencies including approaches that revolve around repealing and/or revising provisions. Under one approach, the Department could repeal Part 7 in its entirety (both from the SIP and from state-only requirements), thereby eliminating the ability of affected sources to assert an affirmative defense in all types of enforcement actions. Under another approach, the Department could remove Sections 111, 112, and 113 in their entirety from the SIP but retain them as state-only requirements, thereby eliminating the ability of affected sources to assert an affirmative defense in federal proceedings initiated by either the EPA or a citizen. Under a third approach, the Department could replace all references to affirmative defenses in Sections 111,112, and 113 with provisions that provide an enforcement discretion approach. Under this approach, rather than providing an affirmative defense, the same criteria contained in the current sections would be applied on a case-by-case basis to govern the exercise of enforcement discretion by Department staff when considering whether to assess penalties for excess emission during SSM. Finally, under a fourth approach the Department could develop alternative emission limitations — either numerical, work practice standards, or a combination thereof — that apply during SSM events.

Ultimately, in order to be approvable, special provisions regarding the treatment of excess emissions during SSM must not preclude federal courts from determining whether

violations occurred or imposing appropriate penalties. After reviewing the EPA's directive in the SIP Call, the effect on the enforcement program, and public comments, the Department chose an approach that removes the affected sections of Part 7 from the SIP as well as other sections or language that mention affirmative defense or reference any sections that have to do with affirmative defense provisions. *See* NMED Exhibit 5.

VII. REVISIONS TO 20.2.7 NMAC - *EXCESS EMISSIONS*

NMED proposes that the follow sections of 20.2.7 NMAC be removed from the SIP in response to the corrective action as outlined in the SIP Call:

- 111-Affirmative Defense for an Excess Emission During Malfunction
- 112-Affirmative Defense for an excess emission During Startup or Shutdown
- 113-Affirmative defense for an Emergency

In addition to the affected sections above, the Department proposes to remove any language from Part 7 that either mentions or refers to any sections for affirmative defense in Part 7. The following are also proposed to be removed/repealed from the SIP:

- Section 106 subsection B
- Section 110 Subsection B Paragraph 15
- Section 115

The Department maintains that the underlying reasoning behind the sections and their compliance with the 1999 guidance is sound. Enforcement of these provisions establishes a practical procedure for emitters to use when addressing excess emission violations. The only change since these sections were enacted has been EPA's interpretation of the CAA as seen in its Final Action of June 2015. Removing these

sections from the SIP will allow the state to maintain an effective enforcement program for permitted facilities without impeding civil or federal actions for violations associated with SSMs. The Department further proposes to denote which portions of Part 7 have been removed from the SIP through annotations following each section.

The Department submitted the draft Part 7 revisions to EPA for review and comments. On May 25, 2016, the EPA responded that, "As proposed,…an approach of retaining affirmative defense-related provisions of the Excess Emissions Rule as a matter of state law, outside of the SIP…, would be consistent with CAA requirements, and consistent with the EPA's guidance in the [SSM] Policy." NMED Exhibit 15, pg. 1.

VIII. WHAT IF THE EIB DOES NOT ADOPT THE PROPOSED REVISIONS?

Should the EIB choose not to adopt the proposed revisions discussed above, New Mexico runs the risk of failing to maintain consistency with federal requirements and creating regulatory uncertainty for affected sources. If the state fails to submit its corrective SIP revisions by the November 22, 2016, deadline, then the EPA could, after issuing a Finding of Failure, impose a federal implementation plan ("FIP"). NMED Exhibit 14, 80 Fed. Reg. 33840, 33848. In addition, if the State fails to make the required SIP revision, or the EPA disapproves the state's plan, either event can trigger a mandatory 18-month or 24-month sanctions clock pursuant to Section 179 of the CAA. The two sanctions that apply under CAA Section 179(b) are restrictions on highway funding or 2-to-1 emissions offset for all new and modified major sources subject to the nonattainment new source review ("NSR") program.

IX. PUBLIC NOTICE AND OUTREACH

The Department developed the proposed SIP revisions through a stakeholder process. Prior to the draft SIP revisions to Part 7, the Department met with industry and held three public information meetings in December of 2015 to allow the general public and industry the opportunity to provide input on the SIP revisions.

Summary of Initial Public Outreach Comments

- Some stakeholders did not understand the proposal, and others opined that the Department should fight the SIP Call.
- Interested parties asked which direction the Department intended to follow and if there had been any discussions on this point.
- Others asked what the Department would need to do to gain EPA approval for a revised rule.
- If the Department proposed any changes to the rule, would the Department work with industry on guidance for any revisions?
- Some stated that the Department would be doing a disservice to the regulated community if it proposed to remove the affirmative defense provisions.
- Finally, some comments suggested removing the affirmative defense provisions from the SIP and keeping them as state-only provisions.

Once the Department had the draft revisions to Part 7, the Department held three more meetings in April of 2016 to allow the general public and industry the opportunity to provide comments on the draft SIP revisions.

Summary of Public Meeting Comments

Comments received during the public comment meetings on the draft SIP revisions were positive, with those in attendance in favor of the Department's proposal to remove the affected sections from the SIP while maintaining them as state-only provisions. While the Department does not propose a rule change, SIP revisions must still meet the public notice and hearing requirements of the CAA. Therefore, the Department requested this hearing, and a public notice of the proposed SIP revisions was published in the Albuquerque Journal, in both English and Spanish, on July 11, 2016. NMED Exhibit 16.

X. CLOSING

It was never, nor will it ever be, the intent of Part 7 to preclude an enforcement action by the federal government or a citizen suit pursuant to the CAA, as explicitly stated in 20.2.7.115 NMAC. The excess emissions rule essentially affects all regulated sources and the public within the state. Out of the options available to the state to address the SIP Call, the Department decided that removing the affected sections from Part 7 was the best fit for the state. Removing the sections above from the SIP will allow the state to maintain enforcement over the permitted facilities without impeding civil or federal actions for violations associated with SSMs. There will not be any regulatory change associated with the SIP revisions. The proposed revisions to Part 7 will not have adverse effects on small businesses since, practically speaking, nothing is changing; the proposed revisions will not increase the regulatory burden on regulated facilities; they will not cause any increase in emissions from regulated facilities; and technical practicability and economic reasonableness will not be at issue since the regulation itself has not changed. The Department respectfully requests that the Board approves the proposed SIP revisions to Part7. Thank you.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

APR 30 2008

Ms. Mary Uhl
Bureau Chief
Air Quality Bureau
New Mexico Environment Department (NMED)
1301 Siler Road, Building B
Santa Fe, NM 87507

Dear Ms. Uhl:

We are writing this letter in support of the proposed revisions to the New Mexico Administrative Code, Title 20, Chapter 2, Part 7 regulation, dated March 25, 2008, concerning Excess Emissions. After review of the proposed rule, Region 6 would like to offer the following comments on the proposed revisions.

EPA Region 6 fully supports the proposed addition of 20.2.7.113 NMAC titled "Root Cause and Corrective Action Analysis." A root cause analysis, by definition, causes a company to identify the underlying reason(s) for an excess emission event providing the basis for preventing a similar event from occurring in the future. Since excess emissions are violations, a root cause analysis and corrective action plan should provide additional assurance to NMED and the public that a source is taking the necessary steps to improve performance. We have found that the root cause analysis provisions contained in the consent decrees of EPA's National Petroleum Refinery Initiative have been effective in reducing the amount of excess sulfur dioxide emissions at petroleum refineries.

In addition, we believe the addition of a root cause analysis section to the Excess Emissions rule will have the following added benefits: a) the root cause analysis will serve as a framework for the decision-making process associated with the review of excess emissions reports; b) NMED field personnel will know what information to ask or look for, and the owner or operator will know what information he/she is expected to make available when asserting an affirmative defense to a specific excess emissions scenario; c) the NMED can more efficiently tailor its resources to larger or more frequent excess emissions releases for better protection of air quality; d) having sector or location-specific action plans in place for certain pollutants (e.g., plans devised to minimize releases of ozone precursors often associated with the oil and gas operations in the Four Corners area) could assist the area from slipping into nonattainment for ozone, particularly with the recent Federal adoption of a more stringent ozone standard; and e) implementing such measures should bring in consistency and transparency to the review process associated with excess emissions reports.

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on 100% Recycled Paper (40% Postconsumer)

With respect to the proposed addition of 20.2.7.14 NMAC titled "Determination and Requirements Regarding Emissions During Startup, Shutdown, and Maintenance," we applaud NMED's efforts to ensure that all emissions from a source are properly permitted, including routine emissions occurring during periods of startup, shutdown, and maintenance activities. The requirement for all sources to establish, maintain, and implement a plan to minimize emissions during startup, shutdown, and scheduled maintenance should be especially useful for reducing unnecessary emissions during these periods. The rule should require the plans to include emission limitations or other enforceable limitations on operations. We understand that the goal of NMED is to incorporate such plans into source permits in a manner that ensures that the plan requirements are enforceable both as a legal and practical matter. To that end, we would like to discuss with NMED how it intends to accomplish these goals as it implements the new rule.

From our discussions with your staff, we understand that a number of sources may need to apply for and obtain a different type of air permit due to emissions associated with startup, shutdown and maintenance; however, we are concerned that the proposed language of 20.2.7.14.B.1.b.iii. NMAC could be interpreted as providing an exemption from compliance for situations that would otherwise constitute a violation. EPA does not believe it can approve such a limitation on NMED's enforcement authority. We see two options for addressing this problem: (1) removal of this provision from the rule; or (2) rewording the provision to provide for an affirmative defense for the limited purpose and period of time contemplated by the original proposal. Alternative language, which may be considered acceptable, would include changing 20.2.7.14.B.3.b.iii to read:

> "In any action brought by the department for excess emissions occurring during the pendency of the authorization, the owner or operator of such source may assert an affirmative defense to civil penalties for not having originally filed the correct notice or obtained the correct permit under 20.2.73 NMAC – Notices of Intent and Emissions Inventory Requirements, or 20.2.72 NMAC – Construction Permits, 20.2.70 NMAC – Operating Permits, 20.2.74 NMAC – Permits – Prevention of Significant Deterioration (PSD), or 20.2.79 NMAC – Permits – Nonattainment Areas, solely on the basis of excess emissions during startup, shutdown, and schedule maintenance. Nothing is this subsection shall be construed to affect the liability of a source for penalties or injunctive relief associated with excess emissions covered by 20.2.7.109 NMAC."

Should NMED decide to remove 20.2.7.14.B.3.b.iii. NMAC from the proposed rule, we offer our assistance to NMED as it creates policy or guidance related to the appropriate use of enforcement discretion.

Finally, we suggest the addition of the words "implemented or" into 20.2.7.113.A.2. NMAC of the proposed rule, so that the rule would read: "Analysis of the corrective actions *implemented or* available to reduce . . . ." Likewise, we would suggest

the substitution of the word "identified" for "required" in 20.2.7.113.A.2.f. NMAC of the proposed rule, so that the rule would read: "If one or more corrective actions are *identified*, a schedule . . . ." We feel these changes support the intent of the rule and strengthen it.

Thank you for the opportunity to provide comments on this proposed rule and we look for to working with you to ensure its implementation is consistent with both state and federal law. Should you have any questions regarding this letter, please feel free to contact me at (214) 665-7242, or Mr. Alan Shar at (214) 665-6691.

Sincerely,

Guy Donaldson
Chief
Air Planning Section

For the OCS off the . . .	Apply to . . .
(c) States of California, Oregon, Washington, Hawaii, or U.S. territories in the Pacific Ocean.	Regional Supervisor for Resource Evaluation, Minerals Management Service, Pacific OCS Region, 770 Paseo Camarillo, Camarillo, CA 93010.

§ 280.80 [Amended]

■ 33. In § 280.80(e), remove the words ''Mail Stop 4230,'' and add, in their place, ''Mail Stop 5438,''.

PART 291—OPEN AND NON-DISCRIMINATORY ACCESS TO OIL AND GAS PIPELINES UNDER THE OUTER CONTINENTAL SHELF LANDS ACT

■ 34. The authority citation for part 291 is revised to read as follows:

Authority: 31 U.S.C. 9701, 43 U.S.C. 1334.

§ 291.1 [Amended]

■ 35. In § 291.1(e), remove the words ''Mail Stop 4230,'' and add, in their place, ''Mail Stop 5438,''.

§ 291.103 [Amended]

■ 36. In § 291.103 introductory text, remove the words ''Mail Stop 4230,'' and add, in their place, ''Mail Stop 5438,''.

§ 291.106 [Amended]

■ 37. In § 291.106(a), remove the words ''Mail Stop 4230,'' and add, in their place, ''Mail Stop 5438,''.

§ 291.107 [Amended]

■ 38. In § 291.107(a), remove the words ''Mail Stop 4230,'' and add, in their place, ''Mail Stop 5438,''.

[FR Doc. E9–22027 Filed 9–11–09; 8:45 am]
BILLING CODE 4310–MR–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0684]

Drawbridge Operation Regulation; Three Mile Slough, Rio Vista, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the California Route 160 Drawbridge across Three Mile Slough, mile 0.1, near Rio Vista, CA. The deviation is necessary to allow Caltrans to conduct drawbridge maintenance. This deviation allows the bridge to remain in the closed-to-navigation position during the maintenance period.

DATES: This deviation is effective from 7 a.m. on September 14, 2009 through 4:30 p.m. on September 14, 2009.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2009–0684 and are available online by going to *http://www.regulations.gov*, inserting USCG–2009–0684 in the ''Keyword'' box and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516, e-mail *David.H.Sulouff@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: Caltrans requested a temporary change to the operation of the California Route 160 Drawbridge, mile 0.1, Three Mile Slough, near Rio Vista, CA. The drawbridge navigation span provides a vertical clearance of 12 feet above Mean High Water in the closed-to-navigation position. The draw opens on signal as required by 33 CFR 117.5. Navigation on the waterway is commercial and recreational.

The drawspan will be secured in the closed-to-navigation position from 7 a.m. through 4:30 p.m. Monday through Friday, from August 31, 2009 through September 14, 2009, to allow Caltrans to replace the industrial staircase leading to the control house. At all other times during this period, and on September 7, 2009, Labor Day, the drawspan will open on signal as required by 33 CFR 117.5. This temporary deviation has been coordinated with commercial and recreational waterway users. There is no anticipated levee maintenance during this deviation period. No objections to the proposed temporary deviation were raised.

Vessels that can transit the bridge, while in the closed-to-navigation position, may continue to do so at any time.

In the event of an emergency the drawspan can be opened with 4 hours advance notice.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: August 28, 2009.

J.R. Castillo,

Rear Admiral, U.S. Coast Guard Commander, Eleventh Coast Guard District.

[FR Doc. E9–21979 Filed 9–11–09; 8:45 am]
BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2008–0815; FRL–8954–7]

Approval and Promulgation of Implementation Plans; New Mexico; Excess Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving revisions to the New Mexico State Implementation Plan (SIP) submitted by the Governor of New Mexico on behalf of the New Mexico Environment Department (NMED) in a letter dated October 7, 2008 (the October 7, 2008 SIP submittal). The October 7, 2008 SIP submittal concerns revisions to New Mexico Administrative Code Title 20, Chapter 2, Part 7 Excess Emissions (20.2.7 NMAC—Excess Emissions) occurring during startup, shutdown, and malfunction related activities. We are approving the October 7, 2008 SIP submittal because the revisions to 20.2.7 NMAC are consistent with the Clean Air Act (the Act). This action is in accordance with section 110 of the Act.

DATES: This direct final rule will be effective November 13, 2009 without

further notice unless EPA receives relevant adverse comments by October 14, 2009. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2008–0815, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.*
- Follow the online instructions for submitting comments.
- *EPA Region 6 ''Contact Us'' Web site: http://epa.gov/region6/r6comment.htm.* Please click on ''6PD (Multimedia)'' and select ''Air'' before submitting comments.
- *E-mail:* Mr. Guy Donaldson at *donaldson.guy@epa.gov*. Please also send a copy by e-mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), at fax number 214–665–7242.
- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket No. EPA–R06–OAR–2008–0815. 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*, 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* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail 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, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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 in *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection during official business hours, by appointment, at the State Air Agency listed below during official business hours by appointment: NMED, Air Quality Bureau, 1301 Siler Road, Building B, Santa Fe, NM 87507.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6691, fax (214) 665–7263, e-mail address *shar.alan @epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to EPA.

Outline

I. Background
A. What action are we taking in this document?
B. What documents did we use in our evaluation of the October 7, 2008 SIP submittal?
C. Why are we approving the October 7, 2008 SIP submittal?
II. Final Action
III. Statutory and Executive Order Reviews

I. Background

A. What action are we taking in this document?

We are approving revisions to 20.2.7 NMAC—Excess Emissions occurring during startup, shutdown, and malfunction related activities as revisions to the New Mexico SIP. We received this submittal with an October 7, 2008 letter from the Governor of New Mexico on behalf of the NMED.

We are approving the repeal of the existing EPA-approved 20.2.7—Excess Emissions, and replacing it with the revised version of 20.2.7 NMAC as contained in the October 7, 2008 SIP submittal. The existing 20.2.7 NMAC—Excess Emissions rule was approved by EPA on September 26, 1997 (62 FR 50518) at 40 CFR 52.1620(c)(66). See Chapter A of our Technical Support Document (TSD) prepared in conjunction with this rulemaking action for more information. The TSD is a part of the docket and available for public review.

The October 7, 2008 submittal also included proposed revisions to NMAC 20.2.70—Operating Permits. We are not taking action on those revisions as part of today's rulemaking action. The revisions to NMAC 20.2.70 are part of the Title V program approval, and will be handled in a separate rulemaking action.

B. What documents did we use in our evaluation of the October 7, 2008 SIP submittal?

The EPA's interpretation of the Act on excess emissions occurring during periods of startup, shutdown, and malfunction is set forth in the following documents: A memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, entitled ''Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions'' (1982 Policy); EPA's clarification to the above policy memorandum dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation (1983 Policy); EPA's policy memorandum reaffirming and supplementing the above policy, dated September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant

Administrator for Air and Radiation, entitled ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown'' (1999 Policy); EPA's final rule for Utah's sulfur dioxide control strategy (Kennecott Copper), April 27, 1977 (42 FR 21472); EPA's final rule for Idaho's sulfur dioxide control strategy, November 8, 1977 (42 FR 58171); and the latest clarification of EPA's policy issued on December 5, 2001 (2001 Policy). You can find the 2001 Policy at: *http://www.epa.gov/ttn/oarpg/t1pgm.html* (URL dating July 22, 2008). The EPA's interpretation of the Act related to exclusions from emission limitations for sources in certain startup, shutdown, or malfunction situations was upheld by the United States Court of Appeals for the Sixth Circuit in *Michigan Mfrs. Ass'n* v. *Browner*, 230 F.3d 181 (6th Cir. 2000).

C. Why are we approving the October 7, 2008 SIP submittal?

Under section 110(a) of the Act, EPA views all excess emissions as violations of the applicable emission limitation because excess emissions have the potential to interfere with attainment and maintenance of the National Ambient Air Quality Standards, or with the protection of Prevention of Significant Deterioration increments. However, EPA recognizes that imposition of a penalty for sudden and unavoidable malfunctions, startups or shutdowns caused by circumstances entirely beyond the control of the owner or operator may not be appropriate. The EPA has provided guidance on two approaches for addressing excess emissions, the use of enforcement discretion and providing an affirmative defense to actions for civil penalties. Neither approach waives liability or reporting requirements for the violation. Excess emissions occurring during periods of startup, shutdown, maintenance, and malfunction must be included in determining compliance with SIP emission limitations. States are not required to provide an affirmative defense approach, but if they choose to do so, EPA will evaluate the State's SIP rules for consistency with our policy and guidance documents listed in section B of this document. Our reasons for approval of the October 7, 2008 SIP submittal are as follows:

The NMED's October 7, 2008 SIP submittal adopts an affirmative defense approach to address excess emissions. This approach is permissible under the 1999 Policy.

The NMED's October 7, 2008 SIP submittal clearly states that operation resulting in an excess emission is a violation of the air quality regulation or permit, and may be subject to potential enforcement action. This statement is consistent with the 1999 Policy.

The NMED's October 7, 2008 SIP submittal adequately sets forth notification and reporting requirements for the owner or operator of a source having an excess emission. We believe that notification and reporting, including implementation of corrective action(s) when needed, of excess emissions will assist with the management of excess emissions and will enhance the New Mexico SIP by reducing the amount or frequency of future potential excess emissions.

The NMED's October 7, 2008 SIP submittal contains criteria to be considered when asserting an affirmative defense for an excess emission during startup or shutdown to claims for a civil penalty (not injunctive relief) that are similar, if not identical, to those in the 1999 Policy. We believe the criteria for asserting an affirmative defense are consistent with our guidance documents and should be approved.

The NMED's October 7, 2008 SIP submittal contains criteria to be considered when asserting affirmative defense for an excess emission during a malfunction to claims for a civil penalty (but not the injunctive relief) that are similar, if not identical, to those in the 1999 Policy. We believe the criteria for asserting an affirmative defense are consistent with our guidance documents and should be approved.

The NMED's October 7, 2008 SIP submittal clearly states that NMED's determinations concerning an owner or operator's assertion of the affirmative defense shall not preclude EPA or citizens' enforcement authority under the Act. This statement is consistent with 42 U.S.C. 7413 and 7604.

Neither section 20.2.7.111 NMAC nor section 20.2.7.112 NMAC of the October 7, 2008 SIP submittal makes an affirmative defense available to an owner or operator of a source having an excess emission due to maintenance related activities. We believe that maintenance activities are predictable events that are subject to planning to minimize releases, unlike malfunctions or upsets, which are sudden, unavoidable or beyond the control of owner or operator. The owner or operator of a source should be able to plan maintenance that might otherwise lead to excess emissions to coincide with maintenance of production equipment or other facility shutdowns. This position is consistent with EPA's interpretation of section 110 of the Act, and with our guidance documents.

The NMED's October 7, 2008 SIP submittal narrowly defines an emergency situation. An owner and operator may assert an affirmative defense for an emergency if certain criteria are met. See 20.2.7.113(B)(1) through (4) NMAC for these criteria. In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof. In addition, NMED may require additional information reported within the time period specified by the department. See 20.2.7.113(C) and (D) NMAC. We believe this approach is consistent with our guidance documents.

For a section-by-section evaluation of the October 7, 2008 SIP submittal see Chapter B of our TSD. The TSD is a part of the docket and available for public review. For these reasons we are approving 20.2.7 NMAC into New Mexico SIP.

In addition, we are approving the repeal and replacement of the existing EPA-approved 20.2.7 NMAC Excess Emissions rule with the revised 20.2.7 NMAC contained in the October 7, 2008 SIP submittal. The existing EPA-approved 20.2.7 NMAC Excess Emissions rule provided for frequent startup and shutdowns, and exempted certain facilities from notification requirements. See Chapter A of the TSD. The existing EPA-approved 20.2.7 NMAC Excess Emissions rule did not conform with the 1999 Policy. The revised 20.2.7 NMAC contained in the October 7, 2008 SIP submittal conforms with the 1999 Policy, and its approval will enhance the New Mexico SIP. See Chapter B of the TSD.

II. Final Action

Today, we are approving revisions to New Mexico Administrative Code Title 20, Chapter 2, Part 7 Excess Emissions (20.2.7 NMAC—Excess Emissions) occurring during startup, shutdown, and malfunction related activities into New Mexico SIP. We are approving the repeal of the existing 20.2.7 NMAC, and replacing it with the revised 20.2.7 NMAC contained in the October 7, 2008 SIP submittal.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 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 that they meet the criteria of the Clean Air Act. Accordingly, this action merely

approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- 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 (Pub. L. 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 Clean Air Act;
- 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);
- Does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law; and
- Is not a ''major rule'' as defined by 5 U.S.C. 804(2) under the Congressional Review Act, 5 U.S.C. 801 *et seq.,* added by the Small Business Regulatory Enforcement Fairness Act of 1996. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule.'' Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 13, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2) of the Act.)

List of Subjects in 40 CFR Part 52

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

Dated: August 28, 2009.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart GG—New Mexico

■ 2. The table in § 52.1620(c) entitled ''EPA Approved New Mexico Regulations'' is amended by revising the entry for ''Part 7'' to read as follows:

§ 52.1620 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED NEW MEXICO REGULATIONS

State citation	Title/subject	State approval/ submittal date	EPA approval date	Comments
New Mexico Administrative Code (NMAC) Title 20—Environmental Protection				
Chapter 2—Air Quality				
*	*	*	*	*
Part 7	Excess Emissions	7/10/2008	9/14/2009 [Insert *FR* page number where document begins].	
*	*	*	*	*

* * * * *

[FR Doc. E9–21827 Filed 9–11–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–IA–2007–0021; 96100–1671–0000–B6]

RIN 1018–AV21

Endangered and Threatened Wildlife and Plants; Listing the Chatham Petrel, Fiji Petrel, and Magenta Petrel as Endangered Throughout Their Ranges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status for three petrel species (order Procellariiformes)—Chatham petrel (*Pterodroma axillaris*) previously referred to as (*Pterodroma hypoleuca axillaris*); Fiji petrel (*Pseudobulweria macgillivrayi*) previously referred to as (*Pterodroma macgillivrayi*); and the magenta petrel (*Pterodroma magentae*)—under the Endangered Species Act of 1973, as amended (Act). This rule implements the Federal protections provided by the Act for these three species.

DATES: This rule becomes effective October 14, 2009.

ADDRESSES: Comments and materials we receive, as well as supporting information used in the preparation of this rule, are available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Suite 110, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Monica A. Horton, Biologist, Division of Scientific Authority (see **ADDRESSES**); telephone 703–358–1708; facsimile 703–358–2276; e-mail *ScientificAuthority@fws.gov.* If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires us to make a finding (known as a ''90-day finding'') on whether a petition to add a species to, remove a species from, or reclassify a species on the Federal Lists of Endangered and Threatened Wildlife and Plants has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding must be made within 90 days following receipt of the petition and must be published promptly in the **Federal Register.** If we find that the petition has presented substantial information indicating that the requested action may be warranted (a positive finding), section 4(b)(3)(A) of the Act requires us to commence a status review of the species if one has not already been initiated under our internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires us to make a finding within 12 months following receipt of the petition (''12-month finding'') on whether the requested action is warranted, not warranted, or warranted but precluded by higher priority listing. Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petitioned species should be treated as having been resubmitted on the date of the warranted but precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we publish a proposal to list or a finding that the petitioned action is not warranted. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

Previous Federal Actions

On November 28, 1980, we received a petition (1980 petition) from Dr. Warren B. King, Chairman of the International Council for Bird Preservation (ICBP), to add 60 foreign bird species to the List of Endangered and Threatened Wildlife (50 CFR 17.11(h)), including two species (the Chatham petrel and magenta petrel) that are the subject of this final rule. Two of the foreign species identified in the petition were already listed under the Act; therefore, in response to the 1980 petition, we published a substantial 90-day finding on May 12, 1981 (46 FR 26464), for 58 foreign species and initiated a status review. On January 20, 1984 (49 FR 2485), we published a 12-month finding within an annual review on pending petitions and description of progress on all pending petition findings. In that notice, we found that all 58 foreign bird species from the 1980 petition were warranted but precluded by higher priority listing actions. On May 10, 1985, we published the first annual notice (50 FR 19761) in which we continued to find that listing all 58 foreign bird species from the 1980 petition was warranted but precluded. We published additional annual notices on the 58 species included in the 1980 petition on January 9, 1986 (51 FR 996), July 7, 1988 (53 FR 25511), December 29, 1988 (53 FR 52746), April 25, 1990 (55 FR 17475), November 21, 1991 (56 FR 58664), and May 21, 2004 (69 FR 29354). These notices indicated that the Chatham petrel and the magenta petrel, along with the remaining species in the 1980 petition, continued to be warranted but precluded.

On May 6, 1991, we received a petition (1991 petition) from ICBP to add an additional 53 species of foreign birds to the List of Endangered and Threatened Wildlife, including the Fiji petrel. In response to the 1991 petition, we published a substantial 90-day finding on December 16, 1991 (56 FR 65207), for all 53 species, and initiated a status review. On March 28, 1994 (59 FR 14496), we published a 12-month finding on the 1991 petition, along with a proposed rule to list 30 African birds under the Act (15 each from the 1980 petition and 1991 petition). In that document, we announced our finding that listing the remaining 38 species from the 1991 petition, including the Fiji petrel, was warranted but precluded by higher priority listing actions. We made a subsequent warranted-but-precluded finding for all outstanding foreign species from the 1980 and 1991 petitions, including the three species that are the subject of this final rule, as published in our annual notice of review (ANOR) on May 21, 2004 (69 FR 29354).

Per the Service's listing priority guidelines (September 21, 1983; 48 FR 43098), in our April 23, 2007, Annual Notice on Resubmitted Petition Findings for Foreign Species (72 FR 20184), we determined that listing six seabird species of the family Procellariidae, including the three species that are the subject of this final rule, was warranted. In selecting these six species from the list of warranted-but-precluded species, we took into consideration the magnitude and immediacy of the threats to the species, consistent with the Service's listing priority guidelines.

On December 17, 2007 (72 FR 71298), we published in the **Federal Register** a proposal to list the Chatham petrel, Fiji petrel, and the magenta petrel as endangered under the Act, and the Cook's petrel, Galapagos petrel, and the Heinroth's shearwater as threatened under the Act. We implemented the Service's peer review process and opened a 60-day comment period to solicit scientific and commercial

June 30, 2011

Hon. Lisa P. Jackson, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Via Certified Mail (return receipt requested) and via e-mail: Jackson.lisa@epa.gov and Jackson.lisa@epamail.epa.gov

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

Pursuant to the Clean Air Act ("CAA" or "the Act"),[1] the Administrative Procedure Act[2] and the First Amendment of the Constitution of the United States of America, Sierra Club files this petition with the Administrator of the United States Environmental Protection Agency ("EPA") and requests her to take the following actions:

1) Pursuant to CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5), notify the states listed below of the substantial inadequacies in their state implementation plans and finalize a rule requiring the states to revise their plans as described below;
2) Or, alternatively, pursuant to CAA § 110(k)(6), 42 U.S.C. § 7410(k)(6), determine that the Administrator's action approving the implementation plan provisions listed below was in error and revise those approvals so that the SIPs are brought into compliance with the requirements of the CAA, or promulgate a Federal Implementation Plan (FIP) to do the same, as described below.

INTRODUCTION

State Implementation Plans ("SIPs") are required under the Act to ensure attainment and maintenance of the health- and welfare-based National Ambient Air Quality Standards ("NAAQS"). But in some states, emissions in excess of SIP limitations during periods of startup, shutdown, malfunction[3] and/or scheduled maintenance ("SSM")[4] are exempt from

[1] 42 U.S.C. §§ 7401 et seq.
[2] 5 U.S.C. §§ 500 et seq.
[3] As used by EPA, the term "malfunction" refers to "sudden and unavoidable breakdown of process or control equipment." Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, U.S. EPA on State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown to Regional Administrators, Regions I – X (Sep. 20, 1999) [hereinafter 1999 Memorandum], Attachment at 1 n.1. Some states use terms such as "upset" and "breakdown" to denote substantially similar occurrences. *See, e.g.*, Alaska Admin. Code tit. 18 § 50.240(f) *and* 401 Ky. Admin. Regs. 50:055 § 1(4)(e).
[4] The acronym "SSM" is most commonly used to denote startup, shutdown and malfunction but not scheduled maintenance. However, several states have included provisions that allow special treatment for excess emissions during scheduled maintenance and those provisions are included in this petition.

compliance. These SSM exemptions undermine the emission limits in SIPs and threaten states' abilities to achieve and maintain compliance with NAAQS, thereby threatening public health and public welfare, which includes agriculture, historic properties and natural areas. Despite the Act's requirements and EPA's view that SSM exemptions have no place in SIPs, many of these provisions remain effective and enforceable as a matter of federal law due to prior EPA SIP approvals. EPA has encouraged the Regional Administrators to work with the states in their regions to remove or fix the SSM provisions in their SIPs.[5] EPA recently required Utah to revise the excess emissions provisions in its SIP in order to comply with the Clean Air Act and longstanding EPA guidance.[6] Nevertheless, many states still have SSM provisions that are inconsistent with the Act. SSM exemptions continue to undermine the NAAQS, Prevention of Significant Deterioration ("PSD") increments, and visibility requirements of the Act. EPA should act now to close these loopholes, some of which have shielded sources from compliance for decades.

[5] 1999 Memorandum at 4.

[6] Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision, 76 Fed. Reg. 21,639 (Apr. 18, 2011).

Table of Contents

Introduction 1
Legal Background 5
I. Clean Air Act Requirements for State Implementation Plans 5
II. Prior EPA Guidance 5
A. Bennett Memoranda in 1982 and 1983 6
B. Hermann & Perciasepe Memorandum in 1999 7
Argument 10
I. Affirmative defenses for excess emissions in judicial proceedings are contrary to the Clean Air Act. EPA should revise its policy to disallow them in SIPs, and issue a SIP call requiring states to eliminate them. 10
II. SSM exemptions undermine the ability of states, EPA, and citizens to protect the NAAQS, PSD increments, and visibility. They must be removed from all SIPs. 12
III. Interpretations of regulations that form the basis of EPA's SIP approval should be included in the text of state regulations rather than, or in addition to, being memorialized in correspondence. 14
Analysis of Individual States' SSM Provisions 17
Alabama 17
Alaska 18
Arizona 20
Arkansas 24
Colorado 25
Delaware 28
District of Columbia 29
Florida 30
Georgia 32
Idaho 33
Illinois 33
Indiana 36
Iowa 37
Kansas 38
Kentucky 39
Louisiana 42
Maine 43
Michigan 44
Minnesota 46
Mississippi 47
Missouri 49
Montana 50
Nebraska 51
New Hampshire 52
New Jersey 53
New Mexico 54
North Carolina 57
North Dakota 59
Ohio 60

Oklahoma 61
Oregon 63
Rhode Island 63
South Carolina 65
South Dakota 66
Tennessee 67
Virginia 70
Washington 71
West Virginia 72
Wyoming 74
Conclusion 75

LEGAL BACKGROUND

I. Clean Air Act Requirements for State Implementation Plans

Section 110 of the Clean Air Act requires states to submit SIPs to ensure that each state attains and maintains compliance with each of the NAAQS promulgated by EPA.[7] The plans must include "enforceable emission limitations" sufficient to meet the Act's requirements.[8] The plans must also prohibit the emission of air pollution that contributes to nonattainment or interference with maintenance of the NAAQS in any other state.[9] The states must have adequate authority to carry out their implementation plans.[10] In areas that have not attained the NAAQS, the plan must provide for attainment and include enforceable emissions limitations to that end.[11]

In addition to the states' authority to enforce their SIPs, sections 113 and 304 of the Act create enforcement mechanisms for EPA and citizens.[12] The Administrator is empowered to determine whether a person has violated or is violating any SIP provision and issue an order to comply or assess civil penalties.[13] The district courts, upon complaint by the Administrator or by a citizen, have jurisdiction to assess relief whenever a person has violated or is violating a SIP or permit.[14]

II. Prior EPA Guidance

EPA has long held that exemptions for excess emissions[15] due to SSM are inconsistent with the Act and should not be included in SIPs. In the late 1970s, EPA first publically noted unacceptable SSM exemptions and explained that these exemptions should not be allowed in SIPs.[16] At least two circuit courts of appeals have upheld EPA's interpretation of the Clean Air Act.

> The longstanding policy makes clear that excess emissions resulting from malfunctions are violations of the Clean Air Act, for such emissions can interfere with attainment of the national air standards. … We defer to the EPA's

[7] 42 U.S.C. § 7410(a)(1).
[8] *Id.* § 7410(a)(2)(A).
[9] *Id.* § 7410(a)(2)(D)(i).
[10] *Id.* § 7410(a)(2)(E).
[11] *Id.* § 7502(c)(1), (c)(2).
[12] *Id.* §§ 7413; 7604.
[13] *Id.* § 7413(a)(1), (d)(1).
[14] *Id.* §§ 7413(b), 7604(a).
[15] According to EPA's 1982 policy statement, " 'excess emission' means an air emission rate which exceeds any applicable emission limitation." Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, U.S. EPA on Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions to Regional Administrators, Regions I – X, U.S. EPA (Sep. 28, 1982) [1982 Memorandum], Attachment at 1.
[16] Approval and Promulgation of Utah SO_2 Control Strategy, 42 Fed. Reg. 21,472 (Apr. 27, 1977); Approval and Promulgation of Idaho SO_2 Control Strategy, 42 Fed. Reg. 58,171 (Nov. 8 1977). The Administrator believed that "the issuance of an administrative order or the initiation of judicial action following a period of excess emissions caused by circumstances beyond the control of the operator may not be appropriate." But "the automatic granting of a regulatory exemption for these periods of excess emissions is not a suitable remedy." Approval and Promulgation of Utah SO2 Control Strategy, 42 Fed. Reg. at 21,472.

> longstanding policy, for the policy is a reasonable interpretation of the Clean Air Act.

Ariz. Pub. Serv. Co. v. U.S. EPA, 562 F.3d 1116, 1129 (10th Cir. 2009); *see also* Mich. Dep't of Envtl. Quality v. Browner, 230 F.3d 181 (6th Cir. 2000).

A. Bennett Memoranda in 1982 and 1983

EPA further explained its policy on SSM provisions in SIPs in two memoranda, issued by then Assistant Administrator for Air, Noise and Radiation, Kathleen M. Bennett in 1982 and 1983.[17] The foundation of EPA's policy was – and continues to be – that all excess emissions must be considered violations of the applicable standards.[18] All excess emissions should be treated as violations because any excess emission may "cause or contribute to violations of the [NAAQS]."[19]

States usually have the inherent authority to decide whether or not they will proceed to enforce limitations. Thus, a state need not adopt any SSM provision at all in its SIP.[20] EPA distinguishes excess emissions during malfunctions from excess emissions during startup, shutdown and scheduled maintenance. If the state decides to codify its approach to excess emissions during malfunctions, EPA policy allows an "enforcement discretion approach."[21]

> Such an approach can require the source to demonstrate to the appropriate State agency that the excess emissions, though constituting a violation, were due to an unavoidable malfunction. Any malfunction provision must provide for the commencement of a proceeding to notify the source of its violation and to determine whether enforcement action should be undertaken for any period of excess emissions.[22]

---

[17] 1982 Memorandum; Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, U.S. EPA on Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions to Regional Administrators, Regions I – X, U.S. EPA (Feb. 15, 1983) [1983 Memorandum].

[18] 1982 Memorandum at 1.

[19] *Id.* EPA stated:

> Without clear definition and limitations, these automatic exemption provisions could effectively shield excess emissions arising from poor operation and maintenance or design, thus precluding attainment. Additionally, by establishing an enforcement discretion approach and by requiring the source to demonstrate the existence of an unavoidable malfunction on the source, good maintenance procedures are indirectly encouraged.

Id.

[20] *Id.*, Attachment at 1.

[21] *Id.*

[22] *Id.* The state should consider five criteria in deciding whether or not to pursue enforcement action for excess emissions allegedly due to a malfunction:

1. To the maximum extent practicable the air pollution control equipment, process equipment, or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;
2. 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

In no case, however, should excess emissions during predictable events be eligible for non-enforcement under this policy. According to the policy in the 1982 and 1983 Memoranda, "[a]ny activity or event which can be foreseen and avoided or planned, falls outside of the definition of sudden and unavoidable breakdown of equipment."[23] Startup and shutdown of the source and scheduled maintenance are all predictable events that either occur during normal operation or can be planned.[24]

EPA noted that scheduled maintenance can generally be planned to coincide with shutdown of the source. "Consequently, excess emissions during periods of scheduled maintenance should be treated as a violation unless a source can demonstrate that such emissions could [not] have been avoided through better scheduling for maintenance or through better operation and maintenance practices."[25]

B. Hermann & Perciasepe Memorandum in 1999

In 1999, EPA reaffirmed and clarified the approaches to SSM SIP provisions it had endorsed in the 1982 and 1983 memoranda.[26] EPA also outlined another approach – an affirmative defense – that at that time EPA believed states could include in their SIPs to address excess emissions caused by SSM.[27]

EPA reiterated that, in its view, enforcement discretion is the best approach to excess emissions caused by SSM conditions.[28] In the 1999 memorandum, EPA clarified that SIP provisions – whether they codify a state's inherent enforcement discretion or implement an affirmative defense – must not impede the ability of EPA or citizens independently to bring enforcement actions.[29]

---

utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

3. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
4. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality; and
5. The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

Id., Attachment at 1-2.

[23] *Id.*, Attachment at 2; 1983 Memorandum, Attachment at 2.

[24] 1983 Memorandum. Attachment at 3.

[25] *Id.* The original text omitted the word "not," however the context clearly indicates that it was intended.

[26] 1999 Memorandum.

[27] *Id.* at 2.

[28] *Id.* ("The best assurance that excess emissions will not interfere with NAAQS attainment, maintenance, or increments is to address excess emissions through enforcement discretion.").

[29] *Id.* at 3 ("[EPA] does not intend to approve SIP revisions that would enable a State director's decision to bar EPA's or citizens' ability to enforce applicable requirements. Such an approach would be inconsistent with the regulatory scheme established in Title I of the Clean Air Act."); *see also id.*, Attachment at 2 ("[A] determination by the state not to take enforcement action would not bar EPA or citizen action."); Approval and Disapproval and Promulgation of Colorado Affirmative Defense Provisions for Startup and Shutdown, 71 Fed. Reg. 8958, 8959-60 (Feb. 22, 2006) (disapproving section II.J.5 because it could be interpreted to preclude EPA and citizen enforcement).

EPA allowed states, in consultation with EPA, to address certain excess emissions during startup and shutdown with "narrowly-tailored SIP revisions that take … technological limitations into account … ."[30] These narrow provisions may not apply "where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."[31] What has the potential to cause an exceedance of a NAAQS or PSD increment has changed over time as revised NAAQS have become more protective, *e.g.* ozone, lead, SO_2, NOx, or new standards have been added, *e.g.* $PM_{2.5}$ NAAQS and $PM_{2.5}$ increments. This is especially true in the context of the revised SO_2 and NOx NAAQS which are now based on a one-hour averaging time, making them very susceptible to violation during SSM events. Thus, SIP provisions that in the past did not risk violating NAAQS and increments may now do so and thus, even according to EPA's past policy, no longer be acceptable.

In any event, EPA's past policy provided that these types of revisions were only appropriate when several criteria were met:

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.[32]

In addition to the enforcement discretion approach and "narrowly-tailored" alternative limitations, the 1999 memorandum specified the situations in which, in EPA's view at that time, a state can provide an affirmative defense for excess emissions due to SSM.[33] Many states have SIP provisions, resembling affirmative defenses, that offer relief to sources which have exceeded emissions limitations based upon a certain showing but without specifying the procedure by which the showing is made and judged.[34] A true affirmative defense, though, is "raised in the

[30] 1999 Memorandum, Attachment at 4-5.
[31] *Id.*, Attachment at 5.
[32] *Id.*
[33] *Id.* at 2.
[34] *See*, *e.g.*, Alaska Admin. Code tit. 18 § 50.240; 326 Ind. Admin. Code 1-6-4; Utah Admin. Code r. R307-107.

context of an enforcement proceeding before an independent trier of fact," and is not determined by the state.[35]

EPA guidance set forth several limitations to the potential use of such affirmative defenses. They may never apply to requests for injunctive relief, but must be limited to requests for civil penalties.[36] This is because "EPA has a fundamental responsibility under the Clean Air Act to ensure that SIPs provide for attainment and maintenance of the [NAAQS] and protection of the [PSD] increments."[37] Further, affirmative defenses may not be available "[w]here a single source or small group of sources *has the potential* to cause an exceedance of the NAAQS or PSD increments … ."[38] In these situations, "an affirmative defense approach will not be adequate to protect public health and the environment…," and enforcement discretion is the only appropriate approach to excess emissions.[39] And finally, affirmative defenses should not apply to any limitations "that derive from federally promulgated performance standards or emission limits, such as new source performance standards (NSPS) and national emissions standards for hazardous air pollutants (NESHAPS)."[40]

EPA has enumerated additional elements that should be included if a state chooses to adopt an affirmative defense for excess emissions due to malfunctions or startup and shutdown. EPA's guidance states that an affirmative defense to excess emissions during malfunctions must consist of the following elements, on which the defendant must have the burden of proof:

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;

[35] 1999 Memorandum, Attachment at 2 n.4; Approval and Disapproval and Promulgation of Colorado Affirmative Defense Provisions for Startup and Shutdown, 71 Fed. Reg. 8958, 8960 n.3; Envtl. Prot. Agency, *Excess Emissions during SSM Meeting: EPA Presentation*, 6 (presented Jan. 19, 2005), Document ID EPA-R08-OAR-2010-0909-0031.
[36] 1999 Memorandum at 2; *id.*, Attachment at 3 (malfunction), 6 (startup and shutdown).
[37] *Id.* at 2 (citing 42 U.S.C. § 7410(a), (*l*)).
[38] *Id.* at 3 (emphasis added).
[39] *Id.*
[40] *Id.*, Attachment at 3.

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.[41]

EPA guidance likewise states that an affirmative defense for excess emissions for startup and shutdown must have similar, but distinct, elements:

1. The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design;
2. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
3. If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
4. At all times, the facility was operated in a manner consistent with good practice for minimizing emissions;
5. The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;
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 during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and
9. The owner or operator properly and promptly notified the appropriate regulatory authority.[42]

ARGUMENT

I. Affirmative defenses for excess emissions in judicial proceedings are contrary to the Clean Air Act. EPA should revise its policy to disallow them in SIPs, and issue a SIP call requiring states to eliminate them.

The Clean Air Act unambiguously grants jurisdiction to the district courts to determine the penalties that should be assessed in an enforcement action involving the violation of an emission limit. The Act states that, in civil actions brought by EPA in the district courts, "such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, …

[41] *Id.*, Attachment at 3-4.
[42] *Id.*, Attachment at 6.

and to award any other appropriate relief."[43] In actions brought by citizens, "[t]he district court shall have jurisdiction, … to enforce such emission standard or limitation, or such an order, … and to apply any appropriate civil penalties … ."[44]

Congress also specified in the Act the list of factors that the district courts are to consider in assessing penalties:

> the Administrator or the court, as appropriate, 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.[45]

EPA's policy on affirmative defenses is inconsistent with these provisions of the Clean Air Act 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. In the CAA Congress imposed strict liability for violations,[46] and specified how the size of the penalty should be determined.[47] However, the inclusion of an affirmative defense in a SIP could enable a defendant to avoid any penalty. The elements of the affirmative defenses that EPA allows ignore some of the penalty criteria that the Act instructs the district courts to weigh when assessing penalties for violations. The affirmative defenses omit assessment of "the size of the business," "the economic impact of the penalty on the business," "the violator's full compliance history …," the economic benefit of noncompliance," and "the seriousness of the violation."[48] The affirmative defense also prevents courts from considering "other factors as justice may require."[49] Preventing the district courts from considering these statutory factors is not a permissible interpretation of the Clean Air Act. Congress has spoken to the precise issue of what factors are relevant for assessing penalties and EPA therefore has no authority to supplant that Congressional intent.

Petitioner requests, first, that EPA rescind its policy allowing states to include in their SIPs affirmative defenses to excess emissions. Second, petitioner requests EPA to find that all SIPs containing an affirmative defense to penalties for excess emissions are substantially inadequate

---

[43] 42 U.S.C. § 7413(b).
[44] *Id.* § 7604(a).
[45] *Id.* § 7413(e)(1).
[46] *See, e.g.*, United States v. Dell'Aquilla, 150 F.3d 329, 332 (3d Cir.1998); United States v. B & W Inv. Props., 38 F.3d 362, 367 (7th Cir.1994).
[47] For example, in no case should polluters be able to "obtain an economic benefit vis-à-vis their competitors due to their non-compliance with environmental laws." Pub. Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 79 (3d Cir.1990); *see also* United States v. Mun. Auth. of Union Twp., 150 F.3d 259, 265 (3d Cir.1998).
[48] 42 U.S.C. § 7413(e)(1).
[49] *Id.*

to comply with the requirements of the Clean Air Act, and issue a call for each of the states with such a SIP to revise it in conformity with the requirements of the Act.

Alternatively, in the event that EPA denies this request, petitioner requests that EPA require states with affirmative defenses to revise them so that they are consistent with EPA's policy by finding that noncompliant affirmative defenses are substantially inadequate to comply with the requirements of the Clean Air Act, as EPA has interpreted it, and issue a call for each of the states with such a SIP to revise it in conformity with the requirements of the Act.

II. SSM exemptions undermine the ability of states, EPA, and citizens to protect the NAAQS, PSD increments, and visibility. They must be removed from all SIPs.

Beyond affirmative defenses discussed above, SIPs have two basic types of impermissible SSM exemptions. Automatic exemptions are those that create categories of excess emissions that are not violations of the SIP. Florida's SIP, for example, provides that "[e]xcess emissions resulting from startup, shutdown or malfunction of any source *shall be permitted* providing …" that certain criteria are met.[50] Such automatic exemptions cannot ensure that the SIP meets the requirements of CAA § 110.

Discretionary exemptions, on the other hand, create categories of excess emissions that may be excused by the state enforcement authority. North Carolina's SIP, for instance, provides that "[a]ny 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."[51] Exemptions 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 EPA under section 113 of the Act or by citizens under section 304.

SIPs must include emission limitations designed to ensure attainment and maintenance of the NAAQS and PSD increments. Because the Act does not directly prohibit a source from causing or contributing to exceedances of the NAAQS or PSD increments, these emission limitations in SIPs are a crucial mechanism by which these ambient standards are met and maintained. SSM regulations that provide exemptions to these limitations interfere with this mechanism and thereby undermine attainment and maintenance of the NAAQS, protection of PSD increments and other CAA requirements.[52] The amount of excess emissions during SSM can be exceptionally large – many times above the limits. In fact, excess emissions can swamp the amount of pollutants emitted at other times.[53] SSM exemptions create large loopholes to the

[50] Fla. Admin. Code Ann. r. 62-210.700(1) (emphasis added).
[51] 15A N.C. Admin. Code 2D.0535(c) (emphasis added).
[52] Finding of Substantial Inadequacy and Call for Utah State Implementation Plan Revision, 75 Fed. Reg. 70,888, 70,891 (proposed Nov. 19, 2010) [Proposed Utah SIP Call].
[53] *See, e.g.*, Envtl. Integrity Project, *Gaming the System* 7, 8 (2004) , *available at* http://www.environmentalintegrity.org/news_reports/Report_Gaming_System.php. The Environmental Integrity Project ("EIP") defines upsets as "non-routine events, such as equipment breakdowns, startup, shutdown and maintenance, at industrial facilities that cause them to emit more pollution than allowed by their permits and applicable rules." *Id.* at 1. EIP found that upset emissions at several natural gas plants were between 35 and 163 *times* other reported annual emissions and that upset emissions at some refineries are two and a half to three times other reported annual emissions. *Id.* at 7, 8.

Act's fundamental requirement that a SIP must provide for attainment and maintenance of the NAAQs and PSD increments.

SIP provisions that automatically exempt emissions during SSM conditions prevent the SIP's emission limits from serving as "enforceable emission limitations" that meet section 110 requirements. This undermines the Clean Air Act's requirement that each SIP must include "enforceable emission limitations and other control measures … to meet the applicable requirements of [the Act]."[54] The Act defines "the terms 'emission limitation' and 'emission standard' [to] mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis* … ."[55] SSM exemptions preclude anyone, including the states, from enforcing limitations that can ensure ambient air standards are met. Further, emission limits subject to such exemptions do not constrain emissions "on a continuous basis," as the Act requires.

Since the 1970s, EPA has held the view that automatic exemptions for SSM interfere with the requirements of the Clean Air Act. According to EPA, "[i]t is our interpretation that the fundamental integrity of the CAA's SIP process and structure are undermined if emission limits relied on to meet CAA requirements related to protection of public health and the environment can be violated without potential recourse."[56]

In addition, 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. Section 113 allows EPA to ensure compliance by three methods: the Agency may issue an order of compliance, assess civil penalties in an administrative proceeding, or file a civil judicial action.[57] These options are available when "the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable plan or permit … ."[58] The Act therefore reserves the power of the Administrator to use her own judgment in deciding whether a violation has occurred. The Act also vests jurisdiction in the courts to grant relief in civil actions, whether brought by EPA or by citizens.[59] Thus citizens must also retain the ability to independently decide whether enforcement is warranted. Citizen enforcement is not merely a peripheral or interstitial measure, according to the Supreme Court, but an important aspect of enforcement.[60] The Court found that "Congress enacted § 304 specifically to encourage citizen participation in the enforcement of standards and regulations established under this Act, and intended the section to afford citizens very broad opportunities to participate in the effort to prevent and abate air pollution."[61] The power of the courts to adjudicate these cases, under the CAA, requires that they be able to determine whether or not violations have occurred. The Act does not allow decisions by state authorities to cut off any of these statutory enforcement mechanisms.

---

[54] 42 U.S.C. § 7410(a)(2)(A).
[55] *Id.* § 7602(k) (emphasis added).
[56] Proposed Utah SIP Call, 75 Fed. Reg. at 70,892.
[57] 42 U.S.C. § 7413(a)(1). The Act also authorizes criminal enforcement. 42 U.S.C. § 7413(c).
[58] *Id.*
[59] *Id.* §§ 7413(b), 7604(a).
[60] Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 560 (1986).
[61] *Id.* (citations omitted).

In 1999, EPA clarified that this was also its interpretation of the Act:

> 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.[62]

Exemptions that excuse violations or otherwise interfere with injunctive relief directly prevent EPA and citizens (and sometimes the states) from ensuring compliance with the Act.[63] Indirectly, these exemptions reduce the incentive of sources to operate in accordance with best practices and to invest in controls and equipment that protect health and the environment.[64]

Petitioner requests that EPA find that all 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 and issue a call for each of the states with such a SIP to revise it in conformity with the requirements of the Act or otherwise remedy these defective SIPs.

The analysis below of individual states' SSM provisions that follows includes generally-applicable provisions, those that apply to all pollutants and all source categories. Many states also have SIP-approved SSM provisions that pertain to specific pollutants and/or source categories. The same arguments that apply to the general SSM provisions also apply to those narrower provisions. Some pollutant and source category specific provisions have been identified, but this is not intended to be an exhaustive list as we did not read every line of every SIP provision in the country.

The analysis below of individual states' SSM provisions addresses state regulations that EPA has approved for inclusion in the states' federally-enforceable SIPs. Several states have submitted to EPA revisions to their SSM regulations; this petition generally does not address revised state regulations that are pending before EPA but have not been approved for SIP inclusion.

III. Interpretations of regulations that form the basis of EPA's SIP approval should be included in the text of state regulations rather than, or in addition to, being memorialized in correspondence.

In some cases, EPA has approved SIP provisions that, by their plain terms, do not comply with the requirements of the Clean Air Act, or even meet the various EPA policies on SSM provisions. EPA has sometimes rationalized these approvals by first obtaining letters of interpretation from the state authorities that construe the state's SSM provisions in a manner that complies with EPA guidance. However, such constructions are not necessarily apparent from

---

[62] Proposed Utah SIP Call, 75 Fed. Reg. at 70,893.
[63] *Id.* at 70,891.
[64] *Id.*; *see, also*, Approval and Promulgation of Utah SO_2 Control Strategy, 42 Fed. Reg. 21,472, 21,472-73 (Apr. 27, 1977); Approval and Promulgation of Idaho SO_2 Control Strategy, 42 Fed. Reg. 58,171 (Nov. 8 1977).

the text of the provisions and their enforceability may be difficult and unnecessary complex and inefficient.

When EPA approved Oklahoma's SSM provisions in 1984, for instance, it compared them, factor-by-factor, with its recently issued SSM guidance.[65] At first, EPA was unable to determine whether the regulations on their face complied with EPA's guidance.[66] EPA therefore requested clarification from Oklahoma about how the State intended to interpret and administer its regulations. After receiving two letters of clarification from Oklahoma, EPA concluded that the SSM provisions, as Oklahoma intended to execute them, did comply with EPA guidance.[67] Thus, EPA and Oklahoma purported to resolve several ambiguities in the existing SSM provisions through correspondence that was never promulgated as part of the Oklahoma SIP. Oklahoma's letters of clarification are quoted, but not reproduced, in the Federal Register notice of EPA's SIP approval.[68]

EPA recently took a similar approach to ambiguous SSM provisions in the Tennessee SIP. In an action redesignating to attainment the Knoxville 1997 8-hour ozone nonattainment area, EPA was faced with SIP provisions whose ambiguities arguably undermine the enforceability of the applicable requirements.[69] To address these ambiguities, "EPA contacted Tennessee and Knox County, requesting their interpretations of their respective rules … ."[70] In response, both Tennessee and Knox County stated that they interpret their regulations in a manner that does not preclude enforcement of emissions limitations and standards.[71] EPA accepted these interpretations for the purpose of the redesignation, but stated:

> Although EPA interprets the SIP in the same manner as indicated by the State and the County, EPA recognizes that the cited language is not as clear as would be ideal. EPA would encourage the State and County to clarify the language in any future revisions to these provisions of the SIP.[72]

In another context, EPA has recognized that statements made during the SIP approval process are not a substitute for clearly worded provisions in the SIP itself. When EPA proposed a call for Utah to revise its SSM provisions, it reviewed the original approval in which EPA had purported to limit its approval of the unacceptable SSM provision.[73] EPA now recognizes that this was not appropriate:

---

[65] Revision to Oklahoma Regulation 1.5 – Reports Required; Excess Emissions During Startup, Shutdown and Malfunction of Equipment, 49 Fed. Reg. 3084, 3084 (Jan. 24, 1984).
[66] *Id.*
[67] *Id.* at 3084-85.
[68] *Id.*
[69] Redesignation of the Knoxville 1997 8-Hour Ozone Nonattainment Area to Attainment, 76 Fed. Reg. 12,587, 12,589-90 (Mar. 8, 2011).
[70] *Id.* at 12,590.
[71] *Id.* at 12,590-91.
[72] *Id.* at 12,591 n.2.
[73] Proposed Utah SIP Call, 75 Fed. Reg. 70,888, 70,890 (stating that "any exemptions granted by the Utah Executive Secretary 'are not applicable as a matter of federal law.' ") (citing Approval and Promulgation of Nonattainment Area Plan for Utah, 44 Fed. Reg. 28,688, 28,691 (May 16, 1979)).

> However, 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; the Utah rule itself makes no reference to a reservation of federal authority. Instead, the rule merely states that information submitted by a source regarding a breakdown event would be "used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action."[74]

Difficult to find interpretations of SIP language should not form the basis of EPA approval. The problem with this approach is that the state's interpretation of its regulations may (or may not) be known by parties attempting to enforce the SIP decades after the provisions were created. State agency opinions not explicitly set forth in the SIP itself (i.e., in the Code of Federal Regulations), even when published in the Federal Register, are insufficient to correct shortcomings in the plain language of the SIP. The regulations themselves should always reflect and ensure their intended operation. In order to ensure swift and accurate resolution of these actions, parties need to be able to rely on the accessible SIP language in the C.F.R. or at least on EPA's web page rather than a letter that may or may not be in a file somewhere.

Petitioner requests that, when it considers SIP revisions, EPA require all terms, conditions, limitations and interpretations of the various SSM provisions be reflected in the unambiguous language of the SIPs themselves.

[74] *Id.*

> "MEG alert" means a period in which one or more electric generating units are operated 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. A MEG alert begins and ends as follows: 1. An alert begins when one or more electric generating units are operated at emergency capacity after receiving notice from the load dispatcher, directing the electric generating unit to do so; and 2. An alert ends when the electric generating unit ceases operating its electric generating units at emergency capacity.

Id. § 7:27-19.1.

Analysis

The exemption for discharges during abnormal emergency conditions is inconsistent with EPA policy. The fact that these discharges occur through stacks or chimneys that are used only in emergency conditions does not change the nature of the emissions themselves. Under EPA policy, section 7:27-7.2(k)(2) is either an automatic exemption, *see* 1999 Memorandum, Attachment 1 n.2, or a source specific exemption, *see id.*, Attachment at 4-5. In either case, it should be removed.

The MEG alert exemption for electric generating units cannot ensure compliance with the NAAQS and PSD increments for NO_X because ambient air quality is nowhere mentioned as a relevant consideration.

Remedy

New Jersey should remove the two source-specific exemptions in N.J. Admin. Code §§ 7:27-7.2(k)(2) and 7:27-19.24 from its SIP.

New Mexico

SIP Provisions

The New Mexico SIP contains affirmative defenses for excess emissions due to malfunction, N.M. Code R. § 20.2.7.111, due to startup and shutdown, *id.* § 20.2.7.112, and due to emergencies, *id.* § 20.2.7.113, that EPA approved in 2009. Approval and Promulgation of Revision to New Mexico Implementation Plan for Excess Emissions, 74 Fed. Reg. 46,910 (Sep. 14, 2009). The regulations state that the department's determination with respect to any of the defenses "shall not preclude an enforcement action by the federal government or a citizen pursuant to the federal Clean Air Act." *Id.* § 20.2.7.115. As shown in the tables below, the elements of the affirmative defenses for excess emissions during malfunction and startup and shutdown have criteria that closely mirror EPA's policy. The emergency defense reflects the defense in the Title V regulations at 40 C.F.R. § 70.6(g). None of the defenses mention situations where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS. *See* N.M. Code R. §§ 20.2.7.111, 20.2.7.112, 20.2.7.113.

Analysis

Affirmative defenses for excess emissions are inconsistent with the Clean Air Act, as explained above in section I of the Argument, and should be removed from the New Mexico SIP. Alternatively, the affirmative defense provisions should be revised to ensure that they are not available when a single source or small group of sources has the potential to cause exceedances of the NAAQS or PSD increments. 1999 Memorandum at 2-3, 4 & Attachment at 1.

The emergency defense of 40 C.F.R. § 70.6(g) is a Title V regulation and should not appear in the SIP. When EPA approved these provisions, it expressly delayed consideration of the Title V program. Approval and Promulgation of New Mexico Implementation Plan, Excess Emissions, 74 Fed. Reg. at 46,911. At that time, EPA believed the approach of the emergency affirmative defense "is consistent with our guidance documents," despite the fact that none of the cited guidance documents say anything about the Title V emergency defense. *Id.* at 46,911-12.

Table comparing elements of the EPA policy on affirmative defenses for malfunctions to the New Mexico defense.

Elements of Affirmative Defense for Excess Emissions caused by Malfunctions as Discussed in 1999 Memorandum	**Elements of New Mexico's Affirmative Defense for Malfunctions**
1. The excess emissions were caused by a sudden, unavoidable breakdown of technology, beyond the control of the owner or operator;	"The excess emission was caused by a malfunction." N.M. Code R. § 20.2.7.111(A)(1). " 'Malfunction' means any sudden and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown. A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable equipment breakdown shall not be considered a malfunction." *Id.* § 20.2.7.7(E)
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;	"The excess emission: (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." *Id.* § 20.2.7.111(A)(2).
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;	"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." *Id.* § 20.2.7.111(A)(3).
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;	"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." *Id.* § 20.2.7.111(A)(4).
5. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;	"The amount and duration of the excess emission (including any bypass) were minimized to the maximum extent practicable during periods of such emissions." *Id.* § 20.2.7.111(A)(5).

Elements of Affirmative Defense for Excess Emissions caused by Malfunctions as Discussed in 1999 Memorandum	**Elements of New Mexico's Affirmative Defense for Malfunctions**
6. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;	"All possible steps were taken to minimize the impact of the excess emission on ambient air quality." *Id.* § 20.2.7.111(A)(6).
7. All emission monitoring systems were kept in operation if at all possible;	"All emission monitoring systems were kept in operation if at all possible." *Id.* § 20.2.7.111(A)(7).
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;	"The owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence." *Id.* § 20.2.7.111(a)(10).
9. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and	"The excess emission was not part of a recurring pattern indicative of inadequate design, operation, or maintenance." *Id.* § 20.2.7.111(A)(8).
10. The owner or operator properly and promptly notified the appropriate regulatory authority.	"The owner or operator complied with the notification requirements in Section 110 of 20.2.7 NMAC." *Id.* § 20.2.7.111(a)(9).

Table comparing elements of the EPA policy on affirmative defenses for startup and shutdown to the New Mexico defense.

Elements of Affirmative Defense for Excess Emissions caused by Startup or Shutdown as Discussed in 1999 Memorandum	**Elements of New Mexico Affirmative Defense for Startup and Shutdown**
1. The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design;	"The excess emission occurred during a startup or shutdown." N.M. Code R. § 20.2.7.112(A)(1). "The duration of the excess emission that occurred during startup and shutdown was short and could not have been prevented through careful planning and design." *Id.* § 20.2.7.112(A)(2).
2. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;	"The excess emission was not part of a recurring pattern indicative of inadequate design, operation, or maintenance." *Id.* § 20.2.7.112(A)(3).
3. If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;	"If the excess emission was caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage." *Id.* § 20.2.7.112(A)(4).
4. At all times, the facility was operated in a manner consistent with good practice for minimizing emissions;	"At all times, the source was operated in a manner consistent with good practices for minimizing emissions." *Id.* § 20.2.7.112(A)(5).
5. The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;	"The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable." *Id.* § 20.2.7.112(A)(6).
6. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;	"All possible steps were taken to minimize the impact of the excess emission on ambient air quality." *Id.* § 20.2.7.112(A)(7).
7. All emission monitoring systems were kept in operation if at all possible;	"All emissions monitoring systems were kept in operation if at all possible." *Id.* § 20.2.7.112(A)(8).
8. The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant	"The owner or operator's actions during the period of the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant

evidence; and	evidence." *Id.* § 20.2.7.112(A)(10).
9. The owner or operator properly and promptly notified the appropriate regulatory authority.	"The owner or operator complied with the notification requirements in Section 110 of 20.2.7 NMAC." *Id.* § 20.2.7.112(A)(9).

Remedy

The affirmative defense provisions of N.M. Code R. §§ 20.2.7.111 and 20.2.7.112 should be removed as inconsistent with the Clean Air Act, as explained above in section I of the Argument. Alternatively, if the affirmative defenses in sections 20.2.7.111 and 20.2.7.112 are to remain in the SIP, they should not be available where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments. The emergency affirmative defense of N.M. Code R. § 20.2.7.113 should be removed from the SIP.

North Carolina

SIP Provisions

The North Carolina SIP contains an exemption for excess emissions during malfunctions in the discretion of the director:

> 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.

15A N.C. Admin. Code 2D.0535(c) (emphasis added), *available at* http://www.epa.gov/region4/air/sips/nc/2D%20.0501-.0542%20updated%20101105.pdf. The regulation does not allow excuses "for more than 15 percent of the operating time during each calendar year." *Id.* 2D.0535(c)(7). Excess emissions during startup and shutdown are treated in a similar fashion:

> 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.

Id. 2D.0535(g) (emphasis added). In addition, "[t]he Director may specify for a particular source the amount, time, and duration of emissions that are allowed during start-up or shutdown." *Id.*

Analysis

The North Carolina SIP is inconsistent with the Act and EPA policy because a decision of the director can exempt sources from compliance. Both provisions allow the director to decide whether a violation has occurred, contrary to the fundamental requirement that all excess emissions be considered violations. 1982 Memorandum at 1; 1999 Memorandum at 1 & Attachment at 1-2. This decision appears to preclude enforcement of the limitations by EPA and citizens. 1999 Memorandum at 3; Approval and Disapproval and Promulgation of Colorado

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

FEDERAL REGISTER

Vol. 78 Friday,
No. 36 February 22, 2013

Part III

Environmental Protection Agency

40 CFR Part 52
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; Proposed Rule

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 March 25, 2013.

Public Hearing. If anyone contacts the EPA requesting a public hearing by March 11, 2013, 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.*
- *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, DC 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, DC 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,* 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* or email. The *www.regulations.gov* Web site 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,* 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.* 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, DC 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 thereare otherspecialneeds relatedto providingcomments at the hearing. The EPA will provide equipment for commenters toshowoverheadslides 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 Web site at *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:

EPA regional office	Contact for regional office (person, mailing address, telephone No.)	State
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.
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").[1] 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

[1] 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 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 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 Web site, under SSM SIP Call 2013, at *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* 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 [2] 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.[3]

As alluded to earlier in this notice, thereareavailable 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 emissionlimitations are not consistent with the CAA, SIPs may include criteria and procedures for the use of enforcement discretionbyairagency personnel and appropriately defined affirmative defenses. In this action, the EPA is articulating a policy 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 discretionbytheair 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.[4] 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 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

[2] 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.

[3] *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.).

[4] *See,* Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," Feb. 4, 2013.

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'' [5] 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 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

[5] The term ''substantially inadequate'' is used in the CAA and is discussed in detail in section VIII.A of this notice.

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; [6] (ii) disapproved SIP submissions that were not consistent with this interpretation; [7] (iii) itself promulgated regulations in FIPs that were consistent with this interpretation; [8] or (iv) issued a SIP call requiring a state to revise an impermissible SIP provision.[9]

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.[10]

The Petition raised issues related to excess emissions from sources during periods 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.'' [11] 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.'' [12] 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 memorandum can be found in the docket for this rulemaking.[13]

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

[6] *See,* ''Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities,'' 75 FR 68989 (Nov. 10, 2010).

[7] *See,* ''Approval and Promulgation of State Implementation Plans; Michigan,'' 63 FR 8573 (Feb. 20, 1998).

[8] *See,* ''Federal Implementation Plan for the Billings/Laurel, MT, Sulfur Dioxide Area,'' 73 FR 21418 (Apr. 21, 2008).

[9] *See,* ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 76 FR 21639 (Apr. 18, 2011).

[10] *See, generally, Catawba County, North Carolina et al.* v. *EPA,* 571 F.3d 20, 33–35 (DC Cir. 2009) (upholding the EPA's process for developing and applying its guidance to designations).

[11] Petition at 2.

[12] Petition at 12.

[13] *See,* Memorandum, ''Statutory, Regulatory, and Policy Context for this Rulemaking,'' Feb. 4, 2013.

element interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events.[14] 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.[15] 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.[16] 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 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 jurisdictionto thedistrictcourts todeterminepenalties that should be assessed in an enforcement action involving the violation of an emissions limit.'' [17] 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.[18] 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.'' [19]

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.[20] 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 otherthan the applicabletestmethod), 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 statutespecifiesandthatthestatute 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 toconsider, 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 permissible interpretation of the Clean Air Act.'' [21] 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 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

[14] Petition at 11.
[15] *Id.*
[16] Petition at 12.
[17] Petition at 10.
[18] *Id.*
[19] *Id.*
[20] Petition at 11.
[21] Petition at 11.

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.'' [22] 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.'' [23] 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 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.[24]

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 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.[25]

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 in nature.'' [26] 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

[22] 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).

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

[24] *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).

[25] *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.

[26] *See,* 1999 SSM Guidance at Attachment p. 4.

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.[27] 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 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.[28] The EPA believes that same rationale applies to periods of startup and shutdown.[29]

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 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.[30] 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 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.[31]

The EPA believes that creating a narrowly tailored affirmative defense for malfunctions is within an air agency's

[27] *Id.* at 3–4.

[28] *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).

[29] *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.

[30] *See,* 1999 SSM Guidance at Attachment 5–6.

[31] 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.

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 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*.[32] 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.

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

[32] 551 F.3d 1019, 1021 (D.C. Cir. 2008).

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.'' [33] 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.'' [34]

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 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.[35]

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.'' [36] 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

[33] Petition at 14.

[34] *Id.*

[35] *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).

[36] Petition at 17.

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.[37]

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 suit.[38] 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 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.''[39] 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 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.[40] 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.''[41]

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.[42] 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 ozone NAAQS.[43] 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).[44] 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

[37] *See, e.g.,* 1982 SSM Guidance at 1.

[38] *See, e.g.,* 1983 SSM Guidance at Attachment p. 2.

[39] Petition at 16.

[40] Petition at 14.

[41] Petition at 15.

[42] *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.

[43] Petition at 15.

[44] *See,* ''Redesignation of the Knoxville 1997 8-Hour Ozone Nonattainment Area to Attainment,'' 76 FR 12587 (Mar. 8, 2011).

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.[45] 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 * * *''[46] 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 enforce the SIP decades after the provisions were created.''[47]

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 Web page, 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 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.[48]

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 resolve perceived ambiguity in a provision in a SIP submission.[49] 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 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

[45] Petition at 15–16.

[46] *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).

[47] 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).

[48] *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).

[49] 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.

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.[50] Thus, by the explicit terms of the statute and by design, air agencies generally have considerable 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.[51] 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 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

[50] 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.

[51] *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).

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).[52]

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 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).[53]

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.[54] 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

[52] *See,* 1983 SSM Guidance at Attachment p. 3.

[53] *See,* 1999 SSM Guidance at 3.

[54] *See,* 1999 SSM Guidance at Attachment 3–4.

revision that would alter the existing applicable emission limitations for a source during startup and shutdown would be subject to the 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 emissionlimitations 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.[55] 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 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 matter 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,

[55] *See,* 1999 SSM Guidance at Attachment 3–4.

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.[56] 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 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.[57] 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

[56] *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.

[57] *See,* 1999 SSM Guidance at attachment p. 6.

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 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.[58]

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 federal operating permit programs.[59] Under each set of regulations, the EPA has provided that permits may contain, at the permitting authority's discretion, an ''emergency provision.'' [60] 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.[61]

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 restrictsthequalifyingexceedancesto ''technology-based'' emission limitations.[62] 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.[63]

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.[64] 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 aresimilartothecriteriarecommended in the SSM Policy for SIP provisions applicable to malfunctions. However, theelementsfortheaffirmative 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.'' [65] 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 avoided, or planned for.'' [66] Again, the use of somewhat different terminology about theelementsthesource 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

[58] 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.

[59] *See,* 40 CFR sections 70.1–70.12; 40 CFR sections 71.1–71.27.

[60] *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 theirstateoperating permitprograms, 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).

[61] *See,* 40 CFR 70.6(g)(1); 40 CFR 71.6(g)(1).

[62] 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.

[63] 40 CFR 70.6(g)(3); 40 CFR 71.6(g)(3).

[64] *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).

[65] 1999 SSM Guidance at Attachment pp. 3–4.

[66] 1999 SSM Guidance at Attachment p. 3.

''emergency constitutes an affirmative defense to an action brought for noncompliance'' if the source proves that it meets the conditions for the affirmative defense.[67] 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.[68] 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 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.'' [69] 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.[70] Thus, SIP provisions that add to or alter the terms of any federal technology-based standards would be substantially inadequate to meet CAA requirements.[71]

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 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

[67] 40 CFR 70.6(g)(2); 40 CFR 71.6(g)(2).

[68] 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).

[69] 40 CFR 70.6(g)(5); 40 CFR 71.6(g)(5).

[70] 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.

[71] *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).

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.'' [72]

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 only become inadequate due to subsequent events.[73] 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 $PM_{2.5}$ 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 $PM_{2.5}$ NAAQS. Failure to 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.[74] 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 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

[72] 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.

[73] *See, e.g., Michigan* v. *EPA,* 213 F.3d 663 (D.C. Cir. 2000) (upholding the ''NO_X SIP Call'' to states requiring revisions to previously approved SIPs with respect to ozone transport and section 110(a)(20)(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).

[74] *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).

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.[75] 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 exemption and have literally caused a specific NAAQS violation.[76]

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.[77] 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 foreffectiveenforcement ofemission 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 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.[78] 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 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.[79]

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 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

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

[76] 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).

[77] *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).

[78] 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.

[79] *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).

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 another wise applicable emission limitation if the source could not meet the requirement in certain circumstances.[80] 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, except through specified processes.[81] 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 regulatory requirements that apply to SIP revisions.[82] A SIP provision that

[80] 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.

[81] 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'').

[82] *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

Continued

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.[83] 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 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.[84]

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.[85] 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

such revisions have been approved by the Administrator in accordance with this part.'').

[83] *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).

[84] *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.

[85] *See,* 1999 SSM Guidance at 3.

warrants enforcement action. Potential for enforcement by the EPA or through 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 and 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.'' [86] 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.[87]

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 deficient SIP revision in response to a SIP call.[88] 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

[86] CAA section 110(c)(1)(A).

[87] The 2-year deadline does not necessarily apply to FIPs following disapproval of a tribal implementation plan.

[88] *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.

may vary depending upon the provisions at issue.

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

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.[89] 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.[90]

[89] *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 requiredstates to adoptaparticularcontrolmeasure for mobile sources).

[90] 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 NO_X 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).

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 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.[91] In addition, as discussed in section VII.C of this

[91] 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.

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''

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.'' [92]

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 circumstances consistent with the overarching CAA objectives, such as attaining and maintaining the NAAQS. The criteria that the EPA recommends for anaffirmative defense provisionfor malfunctions to be consistent with CAA requirements are restated in this notice at section VII.B, which also highlights EPA's view concerningcase-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).[93] 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 therefore preclude enforcement by the EPA and by citizens.'' [94] 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.'' [95] 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 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

[92] *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.

[93] Petition at 43–44.

[94] Petition at 44.

[95] Petition at 44.

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.''[96] 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.''[97] 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''[98] 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 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).[99] 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.''[100] 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

[96] Petition at 52–53.

[97] Petition at 52.

[98] Petition at 53.

[99] Petition at 52–53.

[100] Petition at 53.

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, 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.[101] 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 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).[102] [103] 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

[101] *See,* 77 FR 50561 at 50608.

[102] Petition at 63–65.

[103] 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.

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 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.[104] The Petitioner objected to the first provision because it provides industrial process units that 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_X 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_X because ambient air quality is nowhere mentioned as a relevant consideration.'' [105]

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 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_X emission limitations ceased to be applicable after November 15, 2005. Because the statute's exemption applies only to those emergency situations, or

[104] Petition at 53–54.

[105] Petition at 54.

''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.[106] 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 (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

[106] Petition at 28–29.

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.[107] 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) 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

[107] Petition at 29–30.

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." [108] 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 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 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

[108] 1999 SSM Guidance Attachment at 4–5.

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)).[109] 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 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

[109] Petition at 70–71.

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.[110] First, the 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

[110] Petition at 72–74.

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 [111] 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." [112] 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 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

[111] 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.

[112] 1999 SSM Guidance Attachment at 4–5.

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)).[113] [114] First, the Petitioner objected because both of these 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 betreated asviolations.

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 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 allowforexemptionsfromotherwise applicable emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAAsection 110(a)(2)(A), SIPsmust contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emissionlimitationsmust be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be consideredviolations, whetheror 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

[113] Petition at 17–18.

[114] 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.

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)).[115] [116] The Petitioner objected because all three of these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are

[115] Petition at 30–31.

[116] 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.

inconsistent withtherequirementsof 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 betreated asviolations.

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.''

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.'' [117]

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.

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

[117] 1999 SSM Guidance Attachment at 4–5.

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)).[118] 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 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).[119] 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.[120]

On appeal, the Court of Appeals examined the same operating permit language and underlying SIP provision and came to a different conclusion.[121] The Court of Appeals 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.[122] On July 18, 2007, the EPA denied that petition.[123] 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 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 though 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,

[118] Petition at 32.

[119] *See, Sierra Club, et al.* v. *Georgia Power Co.,* 365 F. Supp 1297 (N.D. Ga. 2004).

[120] *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.

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

[122] 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.

[123] *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.

the EPA is reevaluating the provision on the merits.[124]

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 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)).[125] [126] 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 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

[124] 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.

[125] Petition at 39–40.

[126] 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.

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 tri-state Cincinnati-Hamilton area for the 1997 $PM_{2.5}$ NAAQS, the state submitted an interpretive letter to the EPA explaining the state's reading of 401 KAR 50:055 § 1(1).[127] 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.[128] 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.

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.

[127] *See,* ''Approval and Promulgation of Implementation Plansand 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).

[128] A copy of this letter can be found in the docket for this rulemaking.

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.[129] [130] 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.

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

[129] 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).

[130] Petition at 40–42.

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.[131] 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 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).[132] 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 appropriate where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments,'' [133] 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.'' [134] 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).[135] 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

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,

[131] 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.

[132] Petition at 47–49.

[133] Petition at 48.

[134] Petition at 47–48.

[135] Petition at 47–49.

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)).[136] 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 and the EPA's SSM policy interpreting the CAA, because the limit ''does nothing to ensure that ambient air quality standards are met.''[137]

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 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)).[138] The Petitioner argued that these ''local regulations have the same problems as the [North Carolina] state-wide regulations'' addressed in the previous section.[139] 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

[136] Petition at 57–58.

[137] Petition at 58.

[138] Petition at 58.

[139] Petition at 58.

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 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.[140] 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 NOx 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.

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

[140] Petition at 65–66.

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 NOx 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_X)*. 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_X emissions in this area. Rather than an exemption for NO_X emissions during startup and shutdown for a source category that is regulated for NO_X, 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.[141] 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.

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

[141] Petition at 67–69.

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)).[142] 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 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 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.[144] 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

[142] Petition at 69.

[143] 51 CFR 31.212(c); *see also* ''Credible Evidence Revisions,'' 62 FR 8155 at 8314 (Feb. 24, 1997).

[144] Petition at 69–70.

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 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.[145] [146] 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. 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." [147] 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 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 [148] 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 shall only constitute a prima facie defense to an enforcement action for violation of said regulation.

(Ill. Envtl. 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

[145] 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.

[146] Petition at 33–36.

[147] Petition at 35 (citing Ill. Envtl. 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.

[148] 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.

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)).[149] [150] The Petitioner

[149] 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.

Continued

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 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.

The EPA may elect to evaluate those provisions in a later action.

[150] Petition at 36–37.

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.[151] 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 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.

[151] Petition at 44–46.

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).[152] 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 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)).[153] 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

[152] Petition at 46–47.

[153] Petition at 60–61.

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)).[154]

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 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–

[154] 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.

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-NOx burners during the ozone season and monitoring, reporting, and recordkeeping of ozone season NOx 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.[155] 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 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.[156] 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)).[157] The

[155] 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).

[156] Petition at 42–43.

[157] The EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2153(B)(1)(i) as a

Continued

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.

Second, the Petitioner objected to provisions that provide discretionary exemptions to various emission limitations.[158] Three of these provisions provide discretionary exemptions from otherwise applicable SO_2 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 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 NOx 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).[159] The Petitioner objected to the inclusion of these provisions in the SIP based on its view that affirmative defense provisions

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)).

[158] 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)).

[159] 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).

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 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)).[160] 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 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).[161] 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 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)).[162] 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)).[163] 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—could be interpreted to mean that ''no enforcement is warranted at all, by anyone.'' [164] 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

[160] 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)).

[161] 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.

[162] Petition at 37–38.

[163] Petition at 37–38.

[164] Petition at 38.

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 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 totheexerciseofenforcement discretionconcerning actionstakenby 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 bystate 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 Iowaregulations. 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)).[165] The Petitioner objected because all three of these provisions ''state that excess emissions are not violations (or are permitted),'' [166] 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 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

[165] Petition at 38–39.

[166] Petition at 39.

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.[167] [168] 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.' " [169] 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 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.

[167] Petition at 49–50.

[168] 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)(l), 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.

[169] Petition at 50.

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.[170] 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 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.' '' [171] 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 CAAsection 110(a)(2)(A), SIPsmust contain emission limitations and, in accordance with the definition of ''emission limitations'' in CAA section 302(k), such emissionlimitationsmust be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be consideredviolations, whetheror 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.[172] 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 Director the authority to decide whether excess emission occurred during a malfunction, startup or shutdown, and whether they 'warrant enforcement action.' '' [173] 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 allowforexemptionsfromotherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In

[170] Petition at 51.

[171] Petition at 51.

[172] Petition at 51–52.

[173] Petition at 52.

accordance with the requirements of CAAsection 110(a)(2)(A), SIPsmust contain emission limitations and, in accordance with the definition of ''emission limitations'' in CAA section 302(k), such emissionlimitationsmust be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be consideredviolations, whetheror 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 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)).[174] 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.'' [175] Instead, the state's affirmative defense for malfunction events is potentially available to any source, if it can establish that the excess emissions during the event did not result in exceedances of ambient air quality standards that could be attributed to the source.[176] 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 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.[177] 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

[174] Petition at 25–27.

[175] *Id.* at 25.

[176] *See,* 5 Colo. Code Regs § 1001–2(II.E.1.j).

[177] *See,* ''Approval and Disapproval and Promulgation of Colorado Affirmative Defense Provisions for Startup and Shutdown,'' 71 FR 8958 (Feb. 22, 2006).

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 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).[178] 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 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.'' [179] 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.'' [180] 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 PSD increments.[181] 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

[178] Petition at 50–51.

[179] *Id.* at 51.

[180] *See,* Montana Admin. R 17.8.334(1).

[181] The EPA notes that the state has elected to control fluoride emissions as a means of addressing particulate matter from the affected sources.

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 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.[182] 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[183] are inconsistent with the requirements of the CAA. These provisions explicitly allow exemptions from the otherwise applicable emission limitations for 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

[182] Petition at 59.

[183] 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.

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'sconcernthatthisprovision could be interpreted to bar enforcement by the EPA or through a citizen suit, not only because it createsimpermissible 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 bythe provision but also about its practical enforceability as a SIP provision meeting basic CAA requirements for implementation, maintenance, andenforcement ofthe NAAQS as contemplated in CAA section 110.

The EPA agrees that N.D. Admin. Code 33–15–05–01.2a(1)[184] isalso 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 emissionlimitationsforparticulate matter from industrial processes, with the limitations stated in terms of the maximum amount ofparticulatematter 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 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)).[185] 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.

[184] 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).

[185] Petition at 66.

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.''

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)).[186] 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.'' [187] 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 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)).[188] First, the Petitioner asserted

[186] 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).''

[187] *Id.*

[188] Petition at 20–22.

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 strictly controlled at all times, not just when they actually cause an exceedance.'' [189] 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'scontentionthat 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.

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 Requirementsfor 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 Petitionwithrespect totherarguments 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,[190] the EPA believes that these affirmative defense provisionsareconsistent withthe 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).

[189] Petition at 20.

[190] *See,* 66 FR 48085 at 48087 (Sept. 18, 2001) (final rule approving R18–2–310 into Arizona SIP).

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 Regulation 3, Rule 140, § 402).[191] 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.'' [192] 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, 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,[193] 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 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.[194] 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

[191] Petition at 23.

[192] Petition at 23.

[193] *See,* 67 FR 54957 (Aug. 27, 2002) (final rule approving Rule 140 into Arizona SIP).

[194] Petition at 23–24.

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 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).[195] 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 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.

[195] Petition at 18–20.

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).[196] 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

[196] Petition at 33.

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 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).[197] The provision provides that ''[i]n determining if a period of excess emissions is avoidable, and whether enforcement action is warranted, 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.[198] 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 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).[199] 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 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

[197] Petition at 63.

[198] 76 FR 80725 at 80747.

[199] Petition at 71–72.

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.[200]

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 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

[200] 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) asmallgovernmental 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.

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.[201] 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 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 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

[201] ''EPA's Action Development Process-Guidance on Executive Order 13132: Federalism,'' dated November 2008.

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.[202]

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, 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).

[202] *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)).

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 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

State of New Mexico
ENVIRONMENT DEPARTMENT

Office of the Secretary

Harold Runnels Building
1190 Saint Francis Drive, PO Box 5469
Santa Fe, NM 87502-5469
Telephone (505) 827-2855 Fax (505) 827-2836
www.nmenv.state.nm.us

SUSANA MARTINEZ
Governor
JOHN A. SANCHEZ
Lieutenant Governor

RYAN FLYNN
Secretary-Designate
BUTCH TONGATE
Deputy Secretary

May 9, 2013

U.S. Environmental Protection Agency
Air Docket
Docket # EPA-HQ-OAR-2012-0322
1200 Pennsylvania Avenue, NW
Mail Code: 6102T
Washington, DC 20460

RE: Docket # EPA-HQ-OAR-2012-0322, **Proposed Rule, 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**

The New Mexico Environment Department (NMED) provides the following comments on the Proposed Rule for 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 (Proposed Rule).

The NMED disagrees with the U.S. Environmental Protection Agency's (EPA) findings of "Substantial Inadequacies" with New Mexico's state regulation 20.2.7 New Mexico Administrative Code (NMAC) – *Excess Emissions*.

It appears from our review of the Proposed Rule that EPA Headquarters did not conduct a complete review of NMED's state implementation plan (SIP) revision or consult with EPA Region VI prior to the issuance of the Proposed Rule. The NMED worked very closely with Region VI on the revocation of the previous version of 20.2.7 NMAC and the development of the current version in 2008. The resulting language in 20.2.7 NMAC is very similar, if not identical, to that in EPA's 1999 Policy on Startup, Shutdown and Malfunctions (1999 Policy). Region VI made it very clear to NMED from the onset of the development of the current 20.2.7 NMAC that their interpretation of the 1999 Policy was that all excess emissions are considered violations under the Clean Air Act (CAA) and that only excess emissions that were the result of unplanned or non-routine activities could possibly be granted an affirmative defense from civil penalties. *See* Letter of August 1, 2007 from Carl Young, Acting Chief, Air Planning Section, Region VI, to Mary Uhl, Chief, NMED Air Quality Bureau, with Enclosure ("August 1, 2007 Letter"), Attachment 1 hereto.

Moreover, as discussed further below, Region VI properly approved 20.2.7 NMAC based on precisely that interpretation. *See* 74 Fed. Reg. 46,910 (Sept. 14, 2009).

The EPA's evaluation in the proposed rule seems to equate the opportunity to assert an affirmative defense with an automatic exemption. That has never been the intent of the NMED, nor has that been our practice. In fact, by our estimates, a substantial majority of the affirmative defense claims evaluated to date have been rejected by the NMED.

Affirmative Defense for Excess Emissions During Malfunction

Section 111 of 20.2.7 NMAC affords facilities the opportunity to submit an affirmative defense claim for excess emissions that are the result of a malfunction. As previously noted, the submittal of an affirmative defense claim does not mean that the NMED will automatically concur with the claim.

The EPA's evaluation states that 20.2.7.111 NMAC is substantially inadequate because it "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" of the National Ambient Air Quality Standards (NAAQS) or Prevention of Significant Deterioration (PSD) increments. 78 Fed. Reg. at 12,523.

The NMED concurs that an affirmative defense should not be granted when emissions from single sources or groups of sources have the potential to cause exceedances of the NAAQS or PSD increments.

Paragraph 6 of Subsection A of 20.2.7.111 NMAC requires that the facility demonstrate that "all possible steps were taken to minimize the impact of the excess emission on ambient air quality standards." This language was taken verbatim from the 1999 Policy regarding affirmative defenses for excess emissions resulting from a malfunction. As part of the demonstration process for an affirmative defense, a facility must also provide an explanation as to why the facility believes that the excess emissions did not cause an exceedance of ambient air quality standards (NMED's Instructions for Affirmative Defense Demonstration Form, July 2008) (Attachment 2). In addition, the NMED is also authorized under Subsection B of 20.2.7.111 NMAC to request additional information from a facility if it is deemed necessary. Finally, Sections 115 and 116 of 20.2.7 NMAC provide the NMED with the authority to initiate an after–the-fact enforcement action on a facility that was granted an affirmative defense, if new information on an excess emission event becomes available.

The NMED has never intended nor has it ever granted an affirmative defense to a source or group of sources that had the potential to cause an exceedance of the NAAQS or PSD increments. Sections 111, 115 and 116 of 20.2.7 NMAC provide NMED with the necessary provisions to ensure that a single source or a group of sources are not afforded an affirmative defense for an excess emission that would have the potential to cause an exceedance of the NAAQS or PSD increments.

As Region VI stated in its 2009 approval of New Mexico's SIP, 20.2.7 NMAC contains "criteria to be submitted when asserting affirmative defense for an excess emission during a malfunction … that are similar, if not identical, to those in the 1999 policy." 74 Fed. Reg. at 46,912. That 1999 policy expressly provided that affirmative defenses based on malfunctions are "appropriate only when the respective contributions of individual sources to pollutant concentrations in the ambient air are such *that no single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."* 1999 Policy at p. 2 (emphasis added), *see also* 1999 Policy, Attachment 3 at p. 3 (same). The Proposed Rule offers no explanation as to why EPA now believes Region VI was incorrect in finding that New Mexico's SIP conformed to this aspect of the 1999 Policy.

Affirmative Defense for Excess Emissions During Startup or Shutdown

Section 112 of 20.2.7 NMAC affords facilities the opportunity to submit an affirmative defense claim for excess emissions that are the result of a startup or shutdown. As discussed previously, the submittal of an affirmative defense claim does not mean that the NMED will automatically concur with the claim.

The NMED agrees with EPA's position that an affirmative defense should not be granted for planned startups and shutdowns. As stated above, in the development of 20.2.7 NMAC, it was clear to NMED that all excess emissions are considered a violation under the CAA, but an affirmative defense for civil penalties could possibly be afforded for those excess emissions that are the result of unpredictable or non-routine startups and shutdowns. It is the intent of Section 112 of 20.2.7 NMAC, as stated in the State of New Mexico's SIP submittal for 20.2.7 NMAC submitted to EPA on October 7, 2008, that all routine and predictable emissions resulting from startup, shutdown, and scheduled maintenance must be addressed in the permit. Therefore, affirmative defenses related to excess emission during startup and shutdown are limited to those emissions that are not predictable or routine. *See* Transcript of June 2, 2008 Hearing of the New Mexico Environmental Improvement Board ("EIB") to adopt revisions to 20.2.7 NMAC, ("Hearing Transcript") enclosed as Attachment 4, at p.20. [1]

Section 15 of 20.2.7 NMAC, entitled *Temporary* Provisions for Routine or Predictable Emissions During Startup, Shutdown, and Scheduled Maintenance (emphasis added) was expressly designed to ensure that all routine or predictable startups and shutdowns would be addressed by permit limits. Under Section 15 of 20.2.7 NMAC, all facilities whose permit limits could be exceeded by the inclusion of startup and shutdown emissions are required to notify the NMED no later than 180 days after the effective date of 20.2.7 NMAC (August 1, 2008). The facility is then required to submit a permit application within 120 days of a request by the Department. In the interim between the time that the facility notifies the Department that a permit modification is needed and the time the permit is issued or denied, a facility that

[1] Testimony of Debra McElroy, then-Enforcement Chief in NMED's Air Quality Bureau, stating that: "There is no defense for emissions during scheduled maintenance and routine or predictable emissions during startup and shutdown, and scheduled maintenance should be addressed through planning, design and operating procedures. So these types of routine and predictable emissions should be included in the source's permit . . ."

submitted proper notification is allowed to submit 10-day final reports alone (without submitting next-day initial reports) for excess emissions during routine or predictable startups or shutdowns. However, such emissions are still considered excess emissions, and nothing in Section 15 provides or allows for an affirmative defense for these routine or predictable events. In contrast, Section 112, which does provide for affirmative defense for startups and shutdowns, does not cover "routine or predictable" emissions.

Both Sections 15 and 112 were developed based on written and verbal correspondence from EPA Region VI, who advised NMED that all predictable or routine startup, shutdown and scheduled maintenance emissions should be subject to permit limitations. In fact, in comments supporting adoption of proposed 20.2.7 NMAC, Region VI lauded NMED's approach, stating: "With respect to the proposed addition of 20.2.7.14[2] NMAC . . . we applaud NMED's efforts to ensure that all emissions from a source are properly permitted, including routine emissions occurring during periods of startup, shutdown, and maintenance activities." *See* Letter of April 30, 2008, from Guy Donaldson, Chief, Air Planning Section, Region VI, to Mary Uhl, Attachment 5 hereto.

Sections 15 and 112 provide NMED with the necessary provisions to ensure that only those excess emissions that occur during unpredictable or non-routine startup and shutdown events are afforded the opportunity to claim an affirmative defense. The NMED has never intended to grant nor has it ever granted an affirmative defense to a source for a planned startup or shutdown.

Again, as with the malfunction provisions, Region VI found in its 2009 approval of New Mexico's SIP that the SIP's provisions for affirmative defenses for excess emissions during startup or shutdown are "similar, if not identical, to those in the 1999 Policy." 74 Fed. Reg. at 46,912. And, again, the 1999 policy was consistent with the rationale on which EPA is now purportedly basing its proposed finding of substantial inadequacy. Specifically, the 1999 Policy had already clarified that with respect to startup and shutdowns, "excess emissions that occur during these periods are reasonably foreseeable [and] should not be excused." 1999 Policy at p. 3.

Region VI was fully cognizant of this policy when it evaluated and approved New Mexico's SIP, explaining that "EPA recognizes that imposition of a penalty for *sudden and unavoidable* malfunctions, startups and shutdowns caused by circumstances entirely beyond the control of the owner or operator may not be appropriate." 74 Fed. Reg. at 46,912 (emphasis added). *See also* Attachment 1 (August 1, 2007 Letter) at p. 2.[3] It was with this understanding in mind that Region VI approved New Mexico's startup and shutdown affirmative defense provisions.

---

[2] The references to permitting emissions during routine or predictable startup, shutdown, or scheduled maintenance were moved from Section 14 in the draft to Section 15 in the final rule.

[3] "Enforcement discretion may be appropriate for infrequent periods of startup, shutdown, or malfunction emissions where circumstances are *entirely beyond the control of the owner/operator and which could not have been prevented through careful planning and design*. . . .States may go beyond enforcement discretion approach and provide an affirmative defense to civil penalties for SIP violations due to excess emissions if the source can meet certain defined criteria." (emphasis added).

Therefore, the reason cited for the proposed finding of substantial inadequacy of New Mexico's startup and shutdown provisions – that "the EPA *now* believes that affirmative defense provisions are not appropriate in the case of planned source actions, such as startup and shutdown," 78 Fed. Reg. at 12,523 (emphasis added) – does not withstand scrutiny. EPA's position on planned startup and shutdowns is not new. Region VI's 2009 approval of the SIP *already* took the distinction between planned and unplanned startups and shutdowns into account, and EPA does not explain in the Proposed Rule why it now believes that Region VI's determination was incorrect. Moreover, to the extent that EPA is now changing its nomenclature such that "startup" and "shutdown" are by definition planned events, EPA's new terminology should not be read into 20.2.7 NMAC. Instead, those terms as used in 20.2.7 NMAC must be interpreted as they were intended at the time of the adoption of the rule and its approval by Region VI.

Finally, the provisions of section 112 are readily distinguishable from those at issue in *Luminent Generation Co. LLC v. EPA*, 699 F.3d 427 (5th Cir. 2012), a case EPA points to in the proposed rule for the proposition that EPA may disapprove an affirmative defense provision applicable to planned activities including startup, shutdown, and maintenance. 78 Fed. Reg. at 12,471, n. 29. Unlike 20.2.7.112 NMAC, the Texas regulation disapproved in that case explicitly applied to "*planned* maintenance, startup, or shutdown activity." 30 Tex. Admin. Code § 101.222(h) (emphasis added). New Mexico's provision at Section 112 does not suffer this fatal flaw, and to the extent it may be interpreted to apply to planned activities, NMED has clarified that such is not the case in the State of New Mexico's SIP submittal for 20.2.7 NMAC. *See* Hearing Transcript at, p. 20, quoted in footnote 1 above, see also interpretive letter at Attachment 6. Therefore, 20.2.7.112 NMAC is not "substantially inadequate" under the CAA.

<u>Affirmative Defense for an Emergency</u>

Section 113 of 20.2.7 NMAC affords facilities the opportunity to submit an affirmative defense claim for excess emissions that are the result of an emergency. During stakeholder negotiations, the regulated community requested the inclusion of an emergency provision that would be available to minor sources.

The intent of the emergency provision is to provide sources with the ability to claim an affirmative defense for excess emissions that are not the result of a malfunction, or an unplanned startup or shutdown, but are due to circumstances that are clearly beyond the control of the source. There are occasions where excess emissions are due to an event, such as a severe thunderstorm, which would not qualify as a malfunction or unplanned startup or shutdown.

The EPA's evaluation states, in relevant part, (1) "the provision does not explicitly limit the affirmative defense to civil penalties," (2) "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," and (3) "the provision can be read to provide additional defenses beyond those already provided in federal technology based standards." 78 Fed. Reg. at 12,523.

The NMED acknowledges that the affirmative defense requirements in Section 113 do not explicitly limit the defense to civil penalties. However, it was not the intent nor has it been the practice of the NMED to extend this defense to injunctive relief.

In addition, the NMED acknowledges that the affirmative defense requirements in Section 113 are not as thorough as those for startup, shutdown and malfunction. However, Subsection C of Section 113 establishes that in any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof. In addition, Subsection D under Section 113 establishes that the NMED has the authority to require additional information if deemed necessary.

Finally, the New Mexico Environmental Improvement Board is generally prohibited by the New Mexico Air Quality Control Act from adopting regulations that vary in stringency from comparable federal regulations. More specifically, with respect to performance standards such as NSPS or NESHAPs, New Mexico Regulations must be at least as stringent as, but no more stringent than, federal performance standards. *See* NMSA 1978 § 74-2-5(C). The NMED interprets this statutory provision as prohibiting additional defenses beyond those already provided in federal technology based standards. The NMED has never intended nor has it ever granted an affirmative defense to a source for an emergency claim for injunctive relief, nor have we ever considered any additional defenses beyond those already provided in federal technology based standards.

Conclusion

NMED disputes EPA's proposed determination that Sections 111, 112 and 113 of 20.2.7 NMAC are "substantially inadequate" under the CAA. In fact, 20.2.7 NMAC was developed based on the same interpretation of the 1999 policy that EPA now reiterates. EPA's speculation that these provisions of 20.2.7 NMAC *might* be applied in a manner that would grant an affirmative defense even in the case of contribution to an exceedance of a NAAQS or PSD increment, or in the case of a planned startup, shutdown or maintenance event, is not evidence that New Mexico's SIP is substantially inadequate under the CAA, which is a prerequisite to a "SIP Call" under CAA § 110(k)(5). New Mexico has expressly repudiated, within the SIP itself, any interpretation of 20.2.7 NMAC that would allow affirmative defenses in such cases. The NMED has included as attachments with our comments a letter of interpretation for Sections 111, 112 and 113 (Attachment 6). NMED does not agree that regulatory revisions to 20.2.7 NMAC are required to ensure compliance with the CAA and to meet the 1999 Guidance and EPA's current interpretation of that guidance.

Thank you for this opportunity to provide comments. If you have any questions, please contact Richard Goodyear of my staff, at (505) 476-4305.

Sincerely,

Butch Tongate

for Ryan Flynn
Cabinet Secretary-Designate

cc: Tom Diggs, Region VI, EPA
Butch Tongate, Deputy Secretary
Mary Rose, Division Director (Acting), Environmental Protection Division
Richard Goodyear, Chief, Air Quality Bureau

State of New Mexico
ENVIRONMENT DEPARTMENT
Air Quality Bureau
525 Camino de los Marquez, Suite 1
Santa Fe, New Mexico 87505-1816
Telephone (505) 476-4300
Fax (505) 476-4375
www.nmenv.state.nm.us/aqb

SUSANA MARTINEZ
GOVERNOR

JOHN A. SANCHEZ
LIEUTENANT GOVERNOR

RYAN FLYNN
SECRETARY-DESIGNATE

BUTCH TONGATE
DEPUTY SECRETARY

May 9, 2013

Mr. Thomas Diggs
Associate Director for Air Programs
U.S. EPA Region 6 (6-PD)
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

RE: Interpretive Letter Providing Clarification of the Applicability of the Affirmative Defense Provisions at 20.2.7.111, 112 and 113 NMAC

Dear Mr. Diggs:

On February 12, 2013, the State of New Mexico Environment Department (NMED) Air Quality Bureau (AQB) was notified by the U.S. EPA (EPA) of proposed findings of substantial inadequacy with respect to the affirmative defense provisions at 20.2.7 NMAC, in Docket # EPA-HQ-OAR-2012-0322, Proposed Rule, 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; Proposed Rule ("proposed rule"). NMED is submitting comments to the docket of the proposed rule, objecting to the proposed findings of inadequacy.

The purpose of this interpretive letter is to clarify the AQB's position regarding the intent and implementation of 20.2.7 NMAC, consistent with EPA's statement in the preamble to the proposed rule, that "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." 78 Fed. Reg.12,460, 12,475 (Feb. 22, 2013). In the event that, in spite of NMED's adverse comments on the proposed rule, EPA determines that formal rulemaking pursuant to CAA § 110(k) is necessary to clarify any parts of 20.2.7 NMAC, NMED requests that EPA conduct notice and comment rulemaking to confirm its approval of existing 20.2.7 NMAC as clarified by this letter. This would allow this interpretive letter to be made part of the "docket of the underlying rulemaking action." *Id.*

The AQB provides the following clarifications with respect to each of the affirmative defense provisions that were addressed in the Findings of Substantial Inadequacy.

<u>Affirmative Defense for Excess Emissions During Malfunction (20.2.7.111 NMAC)</u>

Section 111 of 20.2.7 NMAC affords facilities the opportunity to claim an affirmative defense for excess emissions that are the result of a malfunction.

To be afforded an affirmative defense under 20.2.7.111 NMAC, a source must demonstrate that "all possible steps were taken to minimize the impact of the excess emission on ambient air quality standards," which includes providing an explanation as to why the facility believes that the excess emissions did not cause an exceedance of ambient air quality standards (AQB's Instructions for Affirmative Defense Demonstration Form, July 2008) (Attachment 1). The affirmative defense requirements under 20.2.7.111 NMAC were taken verbatim from EPA's 1999 Policy on Startup, Shutdown and Malfunctions (1999 Policy) regarding affirmative defenses for excess emissions resulting from a malfunction.

This interpretation of 20.2.7.111 NMAC was confirmed by EPA Region VI in the 2009 approval of New Mexico's SIP. In the approval of 20.2.7 NMAC, Region VI states that the regulation contains "criteria to be submitted when asserting affirmative defense for an excess emission during a malfunction … that are similar, if not identical, to those in the 1999 policy." 74 Fed. Reg. at 46,912. That 1999 policy expressly provided that affirmative defenses based on malfunctions are "appropriate only when the respective contributions of individual sources to pollutant concentrations in the ambient air are such that *no single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments.*" (1999 Policy at p. 2; emphasis added.)

To the extent section 111 may be interpreted as ambiguous, the AQB hereby clarifies that it will not grant an affirmative defense to a source or group of sources whose excess emissions had the potential to cause an exceedance of the NAAQS or PSD increments. (Nor has the AQB done so in the past.) To verify that the NAAQS and PSD increments were not threatened by an excess emission event, the AQB will, as necessary, (1) use its authority to request additional information, pursuant to 20.2.7.111.B NMAC; (2) base its determination on any relevant information, including but *not limited to* that submitted by the source or obtained through inspection, pursuant to 20.2.7.115 NMAC; and (3) treat an exceedance of a NAAQS or PSD increment as an "appropriate reason" to take an enforcement action pursuant to 20.2.7.116 NMAC, notwithstanding any prior determination regarding an assertion of affirmative defense.

<u>Affirmative Defense for Excess Emissions During Startup or Shutdown (20.2.7.112 NMAC)</u>

Section 112 of 20.2.7 NMAC affords facilities the opportunity to claim an affirmative defense for excess emissions that are the result of a startup or shutdown.

The State of New Mexico's SIP submittal for 20.2.7 NMAC submitted to EPA on October 7, 2008, clearly states that the intent and AQB's interpretation of 20.2.7.112 NMAC is that all routine and predictable emissions resulting from startup, shutdown, and scheduled maintenance must be addressed in the permit process, thus limiting what may be claimed as an excess emission during startups and shutdowns to those emissions that are not predictable or routine. The permitting requirements for emissions related to predictable or routine startups and shutdowns are outlined under 20.2.7.15 NMAC.

Both Sections 15 and 112 were developed based on written and verbal correspondence from EPA Region VI, who advised the AQB that all predictable or routine startup, shutdown and scheduled maintenance emissions should be subject to permit limitations.

Sections 15 and 112 provide the AQB with the necessary provisions to ensure that only those excess emissions that occur during unpredictable or non-routine startup and shutdown events are afforded the opportunity to claim an affirmative defense. To the extent that Section 112 is ambiguous, the AQB hereby clarifies that it will not grant an affirmative defense to a source for a planned startup or shutdown, nor has it done so in the past.

Affirmative Defense for an Emergency (20.2.7.113 NMAC)

Section 20.2.7.113 NMAC affords facilities the opportunity to submit an affirmative defense claim for excess emissions that are the result of an emergency. The intent of the emergency provision is to provide sources with the ability to claim an affirmative defense for excess emissions that are not the result of a malfunction, or an unplanned startup or shutdown, but are due to circumstances that are clearly beyond the control of the source.

AQB interprets 20.2.7.113 NMAC as follows: (1) The affirmative defense requirements in Section 113 do not explicitly limit the defense to civil penalties; however, it was not the intent nor has it been the practice of the AQB to extend this defense to injunctive relief. (2) The affirmative defense requirements in Section 113 are not as thorough as those for startup, shutdown and malfunction; however, Subsection C under Section 113 establishes that in any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof. In addition, Subsection D under Section 113 establishes that the AQB has the authority to require additional information if deemed necessary. (3) The New Mexico Environmental Improvement Board is generally prohibited by the New Mexico Air Quality Control Act from adopting regulations that are more or less stringent than comparable federal regulations, thus prohibiting additional defenses beyond those already provided in federal technology based standards.

To the extent that Section 113 is ambiguous, the AQB hereby clarifies that it will not grant an affirmative defense to a source for an emergency claim for injunctive relief, nor will the AQB consider any additional defenses beyond those already provided in federal technology based standards.

Conclusion

This interpretive letter should make it clear that the AQB has consistently maintained and interpreted the affirmative defense provisions at 20.2.7.111, 112 and 113 NMAC in a manner consistent with the Clean Air Act, and will continue to do so.

The AQB requests that EPA accept this interpretive letter as demonstration of how we implement 20.2.7 NMAC consistently with EPA guidance and EPA's current interpretation of that guidance.

If you have any other questions regarding this issue, please contact Rita Bates of my staff at (505) 476-4304 or via email at rita.bates@state.nm.us.

Sincerely,

Richard L. Goodyear, PE
Bureau Chief

cc: Guy Donaldson, EPA R6

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 24, 2013 Decided April 18, 2014

No. 10-1371

NATURAL RESOURCES DEFENSE COUNCIL,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY AND GINA MCCARTHY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

CEMEX, INC., ET AL.,
INTERVENORS

Consolidated with 10-1378, 13-1112

On Petitions for Review of Final Actions of the
United States Environmental Protection Agency

James S. Pew and *Seth L. Johnson* argued the causes for petitioners. With them on the briefs were *John Walke*, *Meleah Geertsma*, and *Avinash Kar*.

Matthew R. Oakes, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were

NMED Exhibit 13

Robert G. Dreher, Acting Assistant Attorney General, and *Steven E. Silverman*, Attorney, U.S. Environmental Protection Agency. *Daniel R. Dertke* and *T. Monique Peoples*, Attorneys, U.S. Department of Justice, entered appearances.

Carter G. Phillips argued the cause for intervenors. With him on the briefs were *Roger R. Martella Jr.*, *Timothy K. Webster*, *Ryan C. Morris*, *William M. Bumpers*, *Debra J. Jezouit*, *Michael B. Schon*, *Deborah E. Jennings*, *Chet M. Thompson*, *Beth S. Ginsberg*, *Jason T. Morgan*, *Ashley C. Parrish*, *Cynthia A.M. Stroman*, and *Richard G. Stoll*.

Russell S. Frye and *Richard G. Stoll* were on the brief for *amici curiae* SSM Coalition, et al. in support of respondents.

Before: KAVANAUGH and SRINIVASAN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: Portland cement is the key ingredient in concrete. The basic process for making Portland cement is much the same today as it was when the material was first developed nearly 200 years ago. Cement manufacturers pulverize limestone and minerals, and then heat those raw materials to several thousand degrees. The resulting substance, called clinker, is then cooled and ground into a fine gray powder. This powder – called Portland cement – is later combined with sand, rocks, and water to make concrete.

The grinding and heating involved in cement manufacturing has an unfortunate side effect: It releases into the air a number of hazardous air pollutants, most notably

mercury, hydrochloric acid, hydrocarbons, and particulate matter. This case concerns EPA's efforts to develop rules under the Clean Air Act to limit emissions of those pollutants from cement plants.

In a previous decision, we considered EPA's first attempt to create emission standards for the cement industry, and we found the agency's action arbitrary and capricious. *See Portland Cement Association v. EPA*, 665 F.3d 177 (D.C. Cir. 2011). Following our ruling, EPA went back to the drawing board and developed the emission standards at issue here, the 2013 Rule.

Several environmental organizations, including the Natural Resources Defense Council and the Sierra Club, have petitioned for review of the 2013 Rule, arguing primarily that certain aspects of the Rule contravene the Clean Air Act. They also challenge EPA's decision to create an affirmative defense for private civil suits in which plaintiffs sue sources of pollution and seek penalties for violations of emission standards. EPA's affirmative defense would be available to defendants in cases where an "unavoidable" malfunction had resulted in impermissible levels of emissions.

We conclude that the emissions-related provisions of EPA's 2013 Rule are permissible but that the affirmative defense for private civil suits exceeds EPA's statutory authority. We therefore grant the petitions in part and vacate the portion of the Rule pertaining to the affirmative defense. We deny the petitions in all other respects.

I

Section 112 of the Clean Air Act, 42 U.S.C. § 7412, requires EPA to establish technology-based emission standards for major sources of certain hazardous air

pollutants. Emission standards must reflect "the maximum degree of reduction in emissions" that EPA determines is "achievable," taking into consideration "the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements." 42 U.S.C. § 7412(d)(2). The resulting standards are commonly known as the "maximum achievable control technology," or "MACT" standards. *See National Lime Association v. EPA*, 233 F.3d 625, 630 (D.C. Cir. 2000).

EPA uses a two-step process for establishing MACT standards. The agency begins by setting a minimum stringency level, or "floor," based on the results achieved by the best-performing similar sources. *See* 42 U.S.C. § 7412(d)(3). Once EPA sets the statutory floor, it then determines, considering cost and the other factors listed in Section 112(d)(2), whether a more restrictive standard is "achievable," and if so then adopts that standard. EPA calls these stricter requirements "beyond-the-floor" standards. *Sierra Club v. EPA*, 479 F.3d 875, 877 (D.C. Cir. 2007).

When EPA sets an emission standard, it also determines a schedule for compliance with that standard. For existing sources, EPA must "provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date" of the emission standard. 42 U.S.C. § 7412(i)(3)(A).

In 2010, pursuant to its Section 112 authority, EPA promulgated National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 75 Fed. Reg. 54,970 (Sept. 9, 2010). That 2010 Rule set or revised emissions limits for mercury, hydrogen chloride, total hydrocarbons (a surrogate for organic hazardous air pollutants

such as benzene and formaldehyde), and particulate matter (a surrogate for certain non-mercury metals). Cement plants would be required to comply with the new standards beginning in September 2013. 75 Fed. Reg. at 54,993.

In addition to establishing emission standards, the 2010 Rule created an affirmative defense in private civil suits when violations of the standards occurred because of "unavoidable" malfunctions. *See id.* at 54,993, 55,053. The affirmative defense replaced a previous EPA policy creating an exemption from emissions limitations during malfunction events. In a prior decision, this Court struck down that exemption because it was inconsistent with the requirement that emission standards apply continuously. *See Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008).

Industry groups petitioned this Court for review and we found the 2010 Rule arbitrary and capricious and remanded to EPA. We ruled specifically that, in calculating the floor for MACT purposes, EPA had arbitrarily included in its dataset information from cement kilns properly classified as commercial incinerators, which are regulated under a separate provision of the Act. *See Portland Cement Association v. EPA*, 665 F.3d 177, 186-89 (D.C. Cir. 2011).

In our 2011 decision, however, we did not vacate the emission standards set forth in the 2010 Rule or stay its implementation pending EPA's reconsideration process, stating that "it is unlikely that significant changes will be made to the standards upon reconsideration." *Id.* at 189.

On remand, however, EPA made several relevant changes to the Portland cement emission standards. *See* National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of

Performance for Portland Cement Plants, 78 Fed. Reg. 10,006 (Feb. 12, 2013) (the 2013 Rule).

First, consistent with our *Portland Cement* opinion, EPA revised its dataset to exclude commercial incinerators. When recalculated using the revised data, the maximum emissions level for particulate matter – the floor – was ultimately revised from 0.04 lb/ton to 0.07 lb/ton of clinker for existing kilns. *See id.* at 10,017-19. And EPA declined to re-adopt the more stringent, 0.04 lb/ton limit of the 2010 Rule as a beyond-the-floor standard. The agency reasoned that achieving that additional increment of particulate reduction would not be cost effective on a cost-per-ton basis. *See id.* at 10,020-21.

Second, citing additional compliance strategies afforded cement manufacturers by the revised particulate standard, EPA established a new compliance date of September 2015 for that standard. *See id.* at 10,014. EPA further concluded that although the emissions limits for mercury, hydrochloric acid, and hydrocarbons remained the same as in the 2010 Rule, the new September 2015 compliance date would also apply to those emission standards. According to EPA, coordinating the compliance date for particulate matter, mercury, hydrochloric acid, and hydrocarbons was essential because the latter standards "all typically involve some element of [particulate matter] generation and capture and so the controls must be integrated with [particulate matter] control strategies." *Id.* at 10,022.

The 2013 Rule also retained the affirmative defense for private civil suits when the defendant violated emission standards due to an unavoidable malfunction. EPA explained that in its view, the affirmative defense was necessary to resolve a "tension" between the Clean Air Act's requirement

that emission standards apply at all times and the fact that emission limits may sometimes be exceeded for reasons beyond the control of the source. *See id.* at 10,014.

NRDC, the Sierra Club, and other environmental organizations have petitioned for review of various aspects of the 2013 Rule. In Part II of this opinion, we address petitioners' arguments regarding the emission standards for particulate matter. In Part III, we address petitioners' challenge to the compliance schedule implementing some of the 2013 Rule's emission standards. In Part IV, we consider whether EPA's decision to create the affirmative defense to civil penalties for certain malfunction-related events exceeds the agency's statutory authority.

II

We first consider petitioners' challenges to the emission standards for particulate matter.

A

The 2013 Rule ultimately set the emissions level for particulate matter at 0.07 lb/ton of clinker for existing kilns. The 2010 Rule had set the level at 0.04 lb/ton of clinker. Petitioners argue that the 2013 Rule weakens the particulate matter standard in violation of Section 112(d)(7) of the Clean Air Act, 42 U.S.C. § 7412(d)(7). That provision, titled "Other requirements preserved," states:

> No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied *to diminish or replace the requirements of a more stringent emission limitation* or other applicable requirement established pursuant to

> section 7411 of this title, part C or D of this subchapter, *or other authority* of this chapter or a standard issued under State authority.

(emphases added). Petitioners maintain that EPA violated Section 112(d)(7) because the 2013 Rule's particulate matter standards "diminish or replace" the more stringent standards in the 2010 Rule.

EPA responds that such a reduction does not violate Section 112(d)(7). In EPA's view, the most natural reading of Section 112(d)(7) is that "other authority" refers to authority other than Section 112 and other than the parts of the Clean Air Act specifically enumerated in Section 112(d)(7). Stated another way, EPA suggests that Section 112(d)(7) is simply a savings clause that makes clear that Section 112 does not supersede the requirements of other, more restrictive provisions of the Act.

By contrast, petitioners say that "other authority" of the Act includes Section 112 itself, as well as other provisions in the Act. Petitioners read the statute as an anti-backsliding restriction on EPA's ability to voluntarily reduce the stringency of any emission standard issued under Section 112.

As EPA points out, however, when Congress has sought to include that sort of anti-backsliding provision in the Clean Air Act, it has done so directly and explicitly. *Cf., e.g.*, 42 U.S.C. § 7410(*l*) ("The Administrator shall not approve a revision of a [State Implementation Plan] if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress"); *id.* § 7502(e) (specifying pollution control requirements if "the Administrator relaxes a national primary ambient air quality standard"). Section 112(d)(7) contains no such language. Furthermore, EPA argues that petitioners' interpretation of

Section 112(d)(7) would mean that any change to a rule issued under Section 112 – even a necessary change made just for technical reasons or because there was a calculation error – would be impermissible if the change made the standard less stringent. EPA says that it would be extraordinary if the statute precluded that kind of necessary change.

In wading through this back-and-forth, we ultimately need not decide whether EPA's reading is the better or only reading of this statutory provision, but simply whether it is a permissible reading. EPA administers the Clean Air Act, and we must defer to its reasonable interpretation of any ambiguities in the statute. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984). Here, even if the statute does not compel EPA's reading, and indeed even if EPA's reading is not the better reading, the statute at a minimum is sufficiently ambiguous on this point to permit EPA's reading of "other authority." Because EPA's reading is at least reasonable, we reject petitioners' argument and rule for EPA at *Chevron* step two.

B

Petitioners also contend that EPA should have set a more restrictive particulate matter standard when considering whether to set "beyond-the-floor" standards. Petitioners argue in particular that EPA misinterpreted the statute to allow it to consider cost-effectiveness when setting beyond-the-floor standards.

Under Section 112(d), EPA must require "the maximum degree of reduction in emissions" that EPA determines is "achievable." 42 U.S.C. § 7412(d)(2). To determine that emission level, EPA first establishes a minimum stringency level, or "floor," based on the emission results achieved by

the best-performing sources in the category at issue. *See id.* § 7412(d)(3). Once EPA sets the statutory floor, it then determines, based on cost and the other factors listed in Section 112(d)(2), whether a more restrictive, beyond-the-floor standard is achievable.[1]

When it promulgated the 2013 Rule, EPA rejected petitioners' argument to set a 0.04 lb/ton limit as a beyond-the-floor standard. 78 Fed. Reg. at 10,020. EPA estimated that a beyond-the-floor standard set at the 0.04 lb/ton level would result in a reduction of 138 tons of particulate matter per year, at a cost of $37 million. *Id.* Based on those estimates, EPA noted that the cost-effectiveness of the potential beyond-the-floor standard – $268,000 per ton of particulate matter removed – was substantially lower than the cost-effectiveness of other emission standards previously rejected by EPA. *See* 78 Fed. Reg. at 10,021.

Petitioners take issue with EPA's consideration of cost-effectiveness as a component of the Section 112(d)(2) cost analysis. Petitioners contend that "cost" for purposes of the statute only concerns whether "the standard is too expensive for industry to achieve," in essence, whether the standards would bankrupt the industry. Pet'rs Br. 34.

---

[1] In relevant part, the statute reads: "Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, *taking into consideration the cost of achieving such emission reduction*, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory . . . ." 42 U.S.C. § 7412(d)(2) (emphasis added).

EPA says that Congress afforded it wide latitude in deciding how to balance cost and other considerations when determining that maximum achievable reduction in emissions. According to EPA, Section 112 does not command EPA to use a particular form of cost analysis. In taking cost into account, EPA contends that it may determine whether the proposed emission levels would be cost-effective. Indeed, EPA notes that this Court has previously recognized EPA's authority to consider cost-effectiveness in setting standards under nearly identical provisions of the Clean Air Act. *See, e.g.*, *Husqvarna AB v. EPA*, 254 F.3d 195, 200 (D.C. Cir. 2001) ("Because section 213 does not mandate a specific method of cost analysis, we find reasonable the EPA's choice to consider costs on the per ton of emissions removed basis."); *National Association of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1156-57 (D.C. Cir. 2013) (citing *Husqvarna*; EPA could consider cost-effectiveness in setting a beyond-the-floor standard under Section 129(a)(2) of the Act).

Again on this issue as with the first, we need not decide whether EPA's reading is the only reading of this provision. Even if the statute does not compel EPA's approach, and even if EPA's reading is not the better reading, we conclude that it is still at least a reasonable reading given the various potential meanings of "cost" in this context. Therefore, we reject petitioners' argument that EPA was required to exclude consideration of cost-effectiveness and to set a beyond-the-floor standard of 0.04 lb/ton of clinker.

III

Next, we consider petitioners' claim that EPA acted unreasonably in setting a compliance date of September 2015

for the emission standards for particulate matter, mercury, hydrochloric acid, and hydrocarbons.

Under Section 112(i)(3)(A) of the Clean Air Act, EPA must require compliance with emission standards for existing sources "as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard." 42 U.S.C. § 7412(i)(3)(A). Petitioners here contend that EPA violated this timing provision by "extending" the compliance deadline for the 2010 Rule from September 2013 to September 2015.

As applied to the particulate matter standard, there is a basic flaw in petitioners' argument: The 2013 Rule did not simply "extend" the deadline for complying with the 2010 Rule. Rather, the 2013 Rule established new particulate matter standards with a new effective date of February 2013, and a new compliance date of September 2015. EPA concluded that any earlier date of compliance would not be practicable because of the multi-year timeline for upgrading the technology necessary to ensure compliance. *See* 78 Fed. Reg. at 10,024. As we have ruled before, EPA may reset the compliance date for an emission standard when it introduces a new standard with a new effective date, as was the case for particulate matter in the 2013 Rule. *See NRDC v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007).

According to petitioners, even if EPA could change the compliance date for the particulate matter standard, the agency could not do the same for the mercury, hydrochloric acid, and hydrocarbon standards. The 2010 Rule set the emission levels for those pollutants, and the 2013 Rule did not alter the emission levels for those pollutants. This situation does indeed present a bit of a conundrum. On the one hand, we know under the terms of the statute that EPA has set a

compliance date of 2015 as the date that is as expeditious as practicable for particulate matter. On the other hand, our prior decision did not vacate the prior 2010 Rule, and the compliance date for the other pollutants as set forth in that Rule would otherwise be 2013.

This conundrum is resolved when one realizes that it would be irrational and even absurd to have different compliance dates for the different pollutants. EPA explained that the technology is such that it would be senseless to have different compliance dates. *See* 78 Fed. Reg. at 10,024. Even petitioners do not deny that the compliance date for all the pollutants should be the same. To be sure, they want 2013 not 2015 as the compliance date. But they recognize the general undesirability of a compliance date of 2013 for some of the pollutants and of 2015 for other pollutants. *See* Tr. of Oral Argument at 10-11. Finally and perhaps most importantly, our prior decision in this case also recognized, at least implicitly, that there must be a single compliance date for all of the pollutants. *See Portland Cement Association*, 665 F.3d at 189. Our decision necessarily relied on an assumption that if EPA did not alter the level for any of the pollutants, the date would be 2013. But if EPA changed the level for one of the pollutants, the compliance date for all the pollutants would move together. Petitioners' argument for a 2013 compliance date would be inconsistent with our prior decision.

In short, we reject petitioners' argument about the 2015 compliance date.

IV

We next consider petitioners' challenge to the affirmative defense that EPA created for cases of "unavoidable" malfunctions.

Section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a), allows individuals to file citizen suits in federal district court against sources that violate emission standards. Under the law as originally enacted, a court could order only injunctive relief as a remedy for a violation. But as part of the 1990 amendments to the Act, Congress expanded the citizen suit provision to give district courts authority to impose "any appropriate civil penalties," which may include monetary penalties. 42 U.S.C. § 7604(a).

In the 2010 Rule, EPA created an affirmative defense to Section 304(a) for certain emissions violations caused by "unavoidable" malfunctions. Under the affirmative defense, the district court may assess penalties only if violators "fail to meet [their] burden of proving all of the requirements in the affirmative defense." 78 Fed. Reg. at 10,039. EPA retained the affirmative defense when it promulgated the 2013 Rule. *See* 40 C.F.R. § 63.1344.

Petitioners now argue that the affirmative defense exceeds EPA's statutory authority and that it is for the courts to decide whether to create an affirmative defense in these private civil suits, not EPA. We agree.

The threshold question is whether petitioners have standing to challenge EPA's adoption of the affirmative defense. Petitioners are environmental associations with individual members across the country. EPA's affirmative defense would immunize certain emissions that petitioners contend should be penalized. Some of petitioners' members will suffer from those higher emissions, according to their affidavits. A ruling in their favor would prevent those emissions and help alleviate that harm. That's good enough. Petitioners have shown injury-in-fact, causation, and redressability, and they thus have standing under Article III.

We turn, then, to the substance of petitioners' challenge to the affirmative defense.

Section 304(a) grants "any person" the right to "commence a civil action" against any person "who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of" an emission standard or limitation under the Clean Air Act. 42 U.S.C. § 7604(a). The statute further provides that the federal district courts "shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation . . . and to apply any appropriate civil penalties." *Id.*

When determining whether civil penalties are appropriate, district courts look to Section 113(e)(1) of the Act, which directs courts to "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 . . . , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation." 42 U.S.C. § 7413(e)(1).

Section 304(a) creates a private right of action, and as the Supreme Court has explained, "the Judiciary, not any executive agency, determines 'the scope' – *including the available remedies* – 'of judicial power vested by' statutes establishing private rights of action." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013) (emphasis added) (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)). Section 304(a) is in keeping with that principle. By its terms, Section 304(a) clearly vests authority over private

suits in the *courts*, not EPA. As the language of the statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are "appropriate." By contrast, EPA's ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court. *See* 42 U.S.C. § 7413(d)(2)(B) (Administrator may "compromise, modify, or remit, with or without conditions, any administrative penalty"). To the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor. *See id.* § 7604(c)(2). EPA also of course could seek to participate as an amicus curiae.

EPA argues that its proposed affirmative defense simply fleshes out the statutory requirement that penalties be applied only when "appropriate." But under this statute, deciding whether penalties are "appropriate" in a given private civil suit is a job for the courts, not for EPA. When a private suit is filed, the defendant can argue that penalties should not be assessed, based on the factors in Section 113(e)(1) such as the defendant's "full compliance history and good faith efforts to comply." *Id.* § 7413(e)(1). EPA can support that argument as intervenor or amicus, to the extent such status is deemed appropriate by the relevant court. But under the statutory scheme, the decision whether to accept the defendant's argument is for the court in the first instance, not for EPA.

EPA alternatively contends that it is permitted to create the affirmative defense because of Section 301(a)(1) of the Clean Air Act. *See* 78 Fed. Reg. at 10,014. That provision authorizes EPA's Administrator to "prescribe such regulations as are necessary to carry out his functions under" the Act. 42 U.S.C. § 7601(a)(1). But we have consistently held that EPA's authority to issue ancillary regulations is not open-ended, particularly when there is statutory language on point.

See, e.g., *American Petroleum Institute v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) ("the general grant of rulemaking power to EPA cannot trump specific portions of the CAA"); *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (EPA cannot use its general rulemaking authority as justification for adding to a statutorily specified list); *Sierra Club v. EPA*, 719 F.2d 436, 453 (D.C. Cir. 1983) (same); *see also Gonzales v. Oregon*, 546 U.S. 243, 264-65 (2006) ("It would go . . . against the plain language of the text to treat a delegation for the 'execution' of [the Attorney General's] functions as a further delegation to define other functions well beyond the statute's specific grants of authority."). Those precedents establish a simple and sensible rule: EPA cannot rely on its gap-filling authority to supplement the Clean Air Act's provisions when Congress has not left the agency a gap to fill. So it is here.

On a different tack, EPA notes that Section 304(a)(1) does not expressly deny EPA the ability to create an affirmative defense, and EPA emphasizes that this Court has frequently recognized the need for flexibility in the administrative process. EPA Br. 46. That's true. But the suggestion implicit in EPA's argument – that we should "*presume* a delegation of power absent an express *withholding* of such power" – is "plainly out of keeping with *Chevron* . . . ." *Railway Labor Executives' Association v. National Mediation Board*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

Finally, EPA suggests that an affirmative defense for malfunctions is necessary to account for the tension between requirements that emissions limitations be "continuous" and the practical reality that control technology can fail unavoidably. *See* 78 Fed. Reg. at 10,014. That is a good argument for EPA to make to the courts – and for the courts

to then consider – in future civil cases when this issue arises. But it does not suffice to give EPA authority to create an affirmative defense.[2]

* * *

We grant the petitions for review with regard to EPA's affirmative defense and vacate those portions of the 2013 Rule pertaining to the defense. We deny the petitions in all other respects.

So ordered.

[2] The Fifth Circuit recently upheld EPA's partial approval of an affirmative defense provision in a State Implementation Plan. *See Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013). We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

FEDERAL REGISTER

Vol. 80 Friday,
No. 113 June 12, 2015

Part IV

Environmental Protection Agency

40 CFR Part 52
State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2012–0322; FRL–9924–05–OAR]

RIN 2060–AR68

State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; 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: Final action.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action on a petition for rulemaking filed by the Sierra Club (Petitioner) that concerns how provisions in EPA-approved state implementation plans (SIPs) treat excess emissions during periods of startup, shutdown or malfunction (SSM). Further, the EPA is clarifying, restating and revising its guidance concerning its interpretation of the Clean Air Act (CAA or Act) requirements with respect to treatment in SIPs of excess emissions that occur during periods of SSM. The EPA evaluated existing SIP provisions in a number of states for consistency with the EPA's interpretation of the CAA and in light of recent court decisions addressing this issue. The EPA is issuing a finding that certain SIP provisions in 36 states (applicable in 45 statewide and local jurisdictions) are substantially inadequate to meet CAA requirements and thus is issuing a ''SIP call'' for each of those 36 states. Further, the EPA is establishing a due date for states subject to this SIP call action to submit corrective SIP revisions. Finally, this final action embodies the EPA's updated SSM Policy as it applies to SIP provisions. The SSM Policy provides guidance to states for compliance with CAA requirements for SIP provisions applicable to excess emissions during SSM events.

DATES: This final action shall become applicable on May 22, 2015. The deadline for each affected state to submit its corrective SIP revision is November 22, 2016.

ADDRESSES: The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2012–0322. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information 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 *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, EPA Docket Center, William Jefferson Clinton 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 Office of Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: 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 address: *sutton.lisa@epa.gov*.

SUPPLEMENTARY INFORMATION: For information related to a specific SIP, please contact the appropriate EPA Regional Office:

EPA Regional Office	Contact for Regional Office (person, mailing address, telephone number)	State
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	Karl Mangels, Chief, Air Planning Section, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–4078.	New Jersey, New York, Puerto Rico and Virgin Islands.
III	Amy Johansen, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–2156.	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.
V	Mary Portanova, Air and Radiation Division (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3507, (312) 353–5954.	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 66219–9601, (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, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–7104.	Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming.
IX	Andrew Steckel, EPA Region 9, Air Division, 75 Hawthorne Street (AIR–4), San Francisco, CA 94105–3901, (415) 947–4115.	Arizona, California, Hawaii, Nevada and the Pacific Islands.
X	Dave Bray, Office of Air, Waste and Toxics (AWT–150), EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101–3140, (206) 553–4253.	Alaska, Idaho, Oregon, and Washington.

I. General Information

A. Does this action apply to me?

Entities potentially affected by this action include states, U.S. territories, local authorities and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans (''air agencies'').[1] The EPA's action on the petition for rulemaking filed by the Sierra Club with the EPA Administrator on June 30, 2011 (the Petition), is potentially of interest to all such entities because the EPA is addressing issues related to basic CAA requirements for SIPs. The particular issues addressed in this rulemaking are the same issues that the Petition identified, which relate specifically to section 110 of the CAA. Pursuant to section 110, through what is generally referred to as the ''SIP program,'' the states and the EPA together provide for implementation, maintenance and enforcement of the national ambient air quality standards (NAAQS). While recognizing similarity to (and in some instances overlap with) issues concerning other air programs, *e.g.,* concerning SSM provisions in the EPA's regulatory programs for New Source Performance Standards (NSPS) pursuant to section 111 and National Emission Standards for Hazardous Air Pollutants (NESHAP) pursuant to section 112, the EPA notes that the issues addressed in this rulemaking are specific to SSM provisions in the SIP program. 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 general. In addition, the EPA is issuing findings that some of the specific SIP provisions in some of the states identified in the Petition and some SIP provisions in additional states are substantially inadequate to meet CAA requirements, pursuant to CAA section 110(k)(5), and thus those states (named in section II.C of this document) are directly affected by this rulemaking. For example, where a state's existing SIP includes an affirmative defense provision that would purport to alter the jurisdiction of the federal courts to assess monetary penalties for violations of CAA requirements, then the EPA is determining that the SIP provision is substantially inadequate because the provision is inconsistent with fundamental requirements of the CAA. This action may also be of interest to the public and to owners and operators of industrial facilities that are subject to emission limitations in SIPs, because it will require changes to certain state rules applicable to excess emissions during SSM events. This action embodies the EPA's updated SSM Policy concerning CAA requirements for SIP provisions relevant to excess emissions during SSM events.

[1] 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, the EPA refers 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. This final action does not include action on any provisions in any TIP. The EPA therefore refers to ''state'' or ''states'' rather than ''air agency'' or ''air agencies'' when meaning to refer to the District of Columbia and/or one, some, or all of the states at issue in this rulemaking. The EPA also uses ''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.

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 document will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this document will be posted on the EPA's Website, under ''State Implementation Plans to Address Emissions During Startup, Shutdown and Malfunction,'' at *http://www.epa.gov/air/urbanair/sipstatus*. The EPA's initial proposed response to the Petition in the February 2013 proposal, the EPA's revised proposed response to the Petition in the September 2014 supplemental notice of proposed rulemaking (SNPR) and the EPA's Response to Comments document may be found in the docket for this action.

C. 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. How is the preamble organized?
- D. What is the meaning of key terms used in this document?

II. Overview of Final Action and Its Consequences
- A. Summary
- B. What the Petitioner Requested
- C. To which air agencies does this rulemaking apply and why?
- D. What are the next steps for states that are receiving 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 is the status of SIP provisions affected by this SIP call action 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. Final Action in Response to Request To Rescind the EPA Policy Interpreting the CAA To Allow Affirmative Defense Provisions
- A. What the Petitioner Requested
- B. What the EPA Proposed
- C. What Is Being Finalized in This Action
- D. Response to Comments Concerning Affirmative Defense Provisions in SIPs

V. Generally Applicable Aspects of the Final Action in Response to Request for the EPA's Review of Specific Existing SIP Provisions for Consistency With CAA Requirements
- A. What the Petitioner Requested
- B. What the EPA Proposed
- C. What Is Being Finalized in This Action
- D. Response to Comments Concerning the CAA Requirements for SIP Provisions Applicable to SSM Events

VI. Final 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. What the Petitioner Requested
- B. What the EPA Proposed
- C. What Is Being Finalized In This Action
- D. Response to Comments Concerning Reliance on Interpretive Letters in SIP Revisions

VII. Clarifications, Reiterations and Revisions to the EPA's SSM Policy
- A. Applicability of Emission Limitations During Periods of SSM
  - 1. What the EPA Proposed
  - 2. What Is Being Finalized in This Action
  - 3. Response to Comments
- B. Alternative Emission Limitations During Periods of Startup and Shutdown
  - 1. What the EPA Proposed
  - 2. What Is Being Finalized in This Action
  - 3. Response to Comments
- C. Director's Discretion Provisions Pertaining to SSM Events
  - 1. What the EPA Proposed
  - 2. What Is Being Finalized in This Action
  - 3. Response to Comments
- D. Enforcement Discretion Provisions Pertaining to SSM Events
  - 1. What the EPA Proposed
  - 2. What Is Being Finalized in This Action
  - 3. Response to Comments
- E. Affirmative Defense Provisions in SIPs During Any Period of Operation
- F. Relationship Between SIP Provisions and Title V Regulations
- G. 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 Affirmative Defense Provisions
B. SIP Call Process Under Section 110(k)(5)
C. SIP Call Timing Under Section 110(k)(5)
D. Response to Comments Concerning SIP Call Authority, Process and Timing
IX. What is the EPA's final action for each of the specific SIP provisions identified in the Petition or by the EPA?
A. Overview of the EPA's Evaluation of Specific SIP Provisions
B. Affected States in EPA Region I
C. Affected State in EPA Region II
D. Affected States in EPA Region III
E. Affected States and Local Jurisdictions in EPA Region IV
F. Affected States in EPA Region V
G. Affected States in EPA Region VI
H. Affected States in EPA Region VII
I. Affected States in EPA Region VIII
J. Affected States and Local Jurisdictions in EPA Region IX
K. Affected States in EPA Region X
X. Implementation Aspects of EPA's SSM SIP Policy
A. Recommendations Concerning Alternative Emission Limitations for Startup and Shutdown
B. Recommendations for Compliance With Section 110(l) and Section 193 for SIP Revisions
XI. Statement of the EPA's SSM SIP Policy as of 2015
A. Definitions
B. Emission Limitations in SIPs Must Apply Continuously During All Modes of Operation, Without Automatic or Discretionary Exemptions or Overly Broad Enforcement Discretion Provisions That Would Bar Enforcement by the EPA or by Other Parties in Federal Court Through a Citizen Suit
C. Emission Limitations in SIPs May Contain Components Applicable to Different Modes of Operation That Take Different Forms, and Numerical Emission Limitations May Have Differing Levels and Forms for Different Modes of Operation
D. Recommendations for Development of Alternative Emission Limitations Applicable During Startup and Shutdown
E. Enforcement Discretion Provisions
F. Affirmative Defense Provisions in SIPs
G. Anti-Backsliding Considerations
XII. Environmental Justice Consideration
XIII. References
XIV. 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 (PRA)
C. Regulatory Flexibility Act (RFA)
D. Unfunded Mandates Reform Act (UMRA)
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 (NTTAA)
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Determination Under Section 307(d)
L. Congressional Review Act (CRA)
XV. Judicial Review
XVI. Statutory Authority

D. What is the meaning of key terms used in this document?

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

The terms *Act* or *CAA* or *the statute* 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. The term *affirmative defense provision* means more specifically a state law provision in a SIP that specifies particular criteria or preconditions that, if met, would purport to preclude a court from imposing monetary penalties or other forms of relief for violations of SIP requirements in accordance with CAA section 113 or CAA section 304.

The term *Agency* means or refers to the EPA. When not capitalized, this term refers to an agency in general and not specifically to the EPA.

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 with appropriate CAA jurisdiction.

The term *alternative emission limitation* means, in this document, an emission limitation in a SIP that applies to a source during some but not all periods of normal operation (*e.g.,* applies only during a specifically defined mode of operation such as startup or shutdown). An alternative emission limitation is a component of a continuously applicable SIP emission limitation, and it may take the form of a control measure such as a design, equipment, work practice or operational standard (whether or not numerical). This definition of the term is independent of the statutory use of the term ''alternative means of emission limitation'' in sections 111(h)(3) and 112(h)(3), which pertain to the conditions under which the EPA may pursuant to sections 111 and 112 promulgate emission limitations, or components of emission limitations, that are not necessarily in numeric format.

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 otherwise applicable emission limitations or control measures, or to excuse noncompliance with otherwise applicable emission limitations or control measures, which would be binding on the EPA and the public.

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

The term *emission limitation* means, in the context of a SIP, 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 in a SIP provision. In this respect, the term *emission limitation* is defined as in section 302(k) of the CAA. By definition, an emission limitation can take various forms or a combination of forms, but in order to be permissible in a SIP it 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. Regardless of its form, a fully approvable SIP emission limitation must also meet all substantive requirements of the CAA applicable to such a SIP provision, *e.g.,* the statutory requirement of section 172(c)(1) for imposition of reasonably available control measures and reasonably available control technology (RACM and RACT) on sources located in designated nonattainment areas.

The term *excess emissions* means the emissions of air pollutants from a source that exceed any applicable SIP emission limitation. In particular, this term includes those emissions above the otherwise applicable SIP emission limitation that occur during startup, shutdown, malfunction or other modes of source operation, *i.e.,* emissions that would be considered violations of the applicable emission limitation but for an impermissible automatic or discretionary exemption from such emission limitation.

The term *February 2013 proposal* means the notice of proposed rulemaking that the EPA signed on February 12, 2013, and published in the **Federal Register** on February 22, 2013. The February 2013 proposal comprises the EPA's initial proposed response to the Petition. The EPA subsequently issued the September 2014 SNPR that updated and revised the EPA's February 2013 proposal with respect to affirmative defense provisions in SIPs.

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 *practically enforceable* means, in the context of a SIP emission limitation, that the limitation is enforceable as a practical matter (*e.g.,* contains appropriate averaging times, compliance verification procedures and recordkeeping requirements). The term uses ''practically'' as it means ''in a practical manner'' and not as it means ''almost'' or ''nearly.'' In this document, the EPA uses the term ''practically enforceable'' as interchangeable with the term ''practicably enforceable.''

The term *shutdown* means, generally, the cessation of operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In individual SIP provisions it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

The term *SIP* means or refers to a State Implementation Plan. Generally, the SIP 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) promulgated under section 109 for any air pollutant in each air quality control region (or portion thereof) within a state. In some parts of this document, statements about SIPs in general would also apply to tribal implementation plans in general even though not explicitly noted.

The term *SNPR* means the supplemental notice of proposed rulemaking that the EPA signed and posted on the Agency Web site on September 5, 2014, and published in the **Federal Register** on September 17, 2014. Supplementing the February 2013 proposal, the SNPR comprises the EPA's revised proposed response to the Petition with respect to affirmative defense provisions in SIPs.

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 may be exceedances of the applicable emission limitations and thus excess emissions.

The term *SSM Policy* refers to the cumulative guidance that the EPA has issued as of any given date concerning its interpretation of CAA requirements with respect to treatment of excess emissions during periods of startup, shutdown and malfunction at a source in SIP provisions. The most comprehensive statement of the EPA's SSM Policy prior to this final action is embodied in a 1999 guidance document discussed in more detail in this final action. That specific guidance document is referred to as the *1999 SSM Guidance.* The final action described in this document embodies the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events. In section XI of this document, the EPA provides a statement of the Agency's SSM SIP Policy as of 2015.

The term *startup* means, generally, the setting in operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In an individual SIP provision it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

II. Overview of Final Action and Its Consequences

A. Summary

The EPA is in this document taking final action on a petition for rulemaking that the Sierra Club filed with the EPA Administrator on June 30, 2011. The Petition concerns how air agency rules in EPA-approved SIPs treat excess emissions during periods of SSM of industrial source 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 so-called ''normal'' operation (which, until no later than 1982, was meant by the EPA to refer to periods of operation other than during startup, shutdown, maintenance or malfunction) could in some cases not be met with the same emission control strategies during periods of startup, shutdown, maintenance or malfunction.[2] Accordingly, it was common for state plans to include provisions for special, more lenient treatment of excess emissions during such periods of startup, shutdown, maintenance or malfunction. Many of these provisions took the form of absolute or conditional statements that excess emissions from a source, when they occur during startup, shutdown, malfunction or otherwise outside of the source's so-called ''normal'' operations, were not to be considered violations of the air agency rules; *i.e.,* these emissions were considered exempt from legal control.

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.[3] The EPA also realized that such provisions allow opportunities for sources to emit pollutants during such periods repeatedly and in quantities that could cause unacceptable air pollution in nearby communities with no legal pathway within the existing EPA-approved SIP for air agencies, the EPA, the public or the courts to require the sources to make reasonable efforts to reduce these emissions. The EPA has attempted to be more careful after 1977 not to approve SIP submissions that contain illegal SSM provisions and has issued several guidance memoranda to advise states on how to avoid impermissible provisions[4] 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 high-priority work facing both air agencies and the EPA,

[2] Since at least 1982, however, the EPA has used the term ''normal'' in the SSM Policy in the ordinary sense of the word to distinguish between predictable modes of source operation such as startup and shutdown and genuine ''malfunctions,'' which are by definition supposed to be unpredictable and unforeseen events and which could not have been precluded by proper source design, maintenance and operation. *See, e.g.,* 1982 SSM Guidance, Attachment at 2, in which the EPA states, ''[s]tart-up and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the design and implementation of the operating procedure for the process and control equipment.'' The 1982 SSM Guidance is in the rulemaking docket at EPA–HQ–OAR–2012–0322–0005.

[3] In 1977, the EPA took actions related to specific sources located in Utah and Idaho in which the EPA expressed its views regarding issues such as automatic exemptionsfromapplicableemission limitations. *See* Memorandum, ''Statutory, Regulatory, and Policy Context for this Rulemaking,'' at n.2, February 4, 2013, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0029.

[4] The term ''impermissible provision'' as used throughout this document is generally intended to refer to a SIP provision that the EPA now believes to be inconsistent with requirements of the CAA. As described later in this document (*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.

the EPA had not until the February 2013 proposal initiated a broader effort to require a larger number of states to remove impermissible provisions from their SIPs and to adopt other, approvable approaches for addressing excess emissions when appropriate. Public interest in the issue of SSM provisions in SIPs is evidently high, on the basis of the large number of public submissions made to the rulemaking docket in response to the February 2013 proposal (representing approximately 69,000 unique commenters) and the SNPR (over 20,000 commenters, some of whom had also made submissions in response to the earlier proposal). The EPA has attempted to further count commenters according to general categories (state and local governments, industry commenters, public interest groups and individual commenters), as described in section V.D.1 of this document. 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 generally 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.[5]

The EPA emphasizes that there are other approaches that would be consistent with CAA requirements for SIP provisions that states can use to address 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. Similarly, SIPs may, rather than exempt emissions during SSM events, include emissionlimitationsthat subjectthose emissions to alternative numerical limitationsorothertechnological control requirements or work practice requirements during startup and shutdown events, so long as those components of the emission limitations meet applicable CAA requirements. In this action, the EPA is again articulating its interpretation of the CAA in the SSM Policy that reflects these principles and is applying this interpretation to issue a SIP call for specific existing provisions in the SIPs of 36 states. In some cases, the EPA's review involved a close reading of the provision in the SIP and its context to discern whether it was in fact an exemption, a statement regarding exercise of enforcement discretion by the air agency or an affirmative defense. Each state will ultimately decide how to address the SIP inadequacies identified by the EPA in this final action. The EPA acknowledges that for some states, this rulemaking entailed the EPA's evaluation of SIP provisions that may date back several decades. Aware of that fact, the EPA is committed to working closely with each of the affected states to develop approvable SIP submissions consistent with the guidance articulated in the updated SSM Policy in this final action. Section IX of this document presents the EPA's analysis of each specific SIP provision at issue in this action. The EPA's review also involved 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 for SIP provisions, this action provides the EPA an opportunity to update the SSM Policy and its basis in the CAA through notice and comment. To that end, section XI of this document contains a restatement of the EPA's SSM Policy for SIP provisions as revised and updated for 2015. Also, supplementary to the February 2013 proposal, the EPA provided a background memorandum to summarize the legal and administrative context for this action which is available in the docket for this rulemaking.[6] This final document is intended to clarify how states can resolve the identified deficiencies in their SIPs as well as to provide all air agencies guidance as they develop SIPs in the future.

In summary, the EPA is agreeing with the Petitioner that many of the identified SIP provisions are not permissible under the CAA. However, in some cases the EPA is instead concluding that an identified SIP provision is actually consistent with CAA requirements. In addition, the EPA notes, this final action does not include a final finding of substantial inadequacy and SIP call for specific SIP provisions included in the February 2013 proposal for several air agencies, because of SIP revisions made subsequent to that proposal. The state of Kentucky has already submitted, and the EPA has approved, SIP revisions that corrected the problematic provisions applicable in the Jefferson County (Louisville, Kentucky) area.[7] The state of Wyoming has already submitted, and the EPA has approved, SIP revisions that corrected the problematic provisions applicable statewide.[8] The state of North Dakota has likewise already submitted, and the EPA has approved, SIP revisions that corrected a portion of the problematic provisions applicable statewide.[9]

Of the 41 states for which SIP provisions were identified by the Petition or identified independently by the Agency in the SNPR, the EPA is issuing a SIP call 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. For SIP provisions that have potential defects other than an impermissible affirmative defense, the EPA elected to focus on the provisions specifically raised in the Petition. The EPA may address these other provisions later in a separate notice-and-comment action. States are encouraged to consider the updated SSM Policy laid out in this final action in reviewing their own SIP provisions. With respect to affirmative defense provisions, however, the EPA elected to identify some additional provisions not included in the Petition. This is necessary to minimize potential confusion relating to other recent rulemakings and court decisions that pertain generally to affirmative defense provisions. Therefore, in order to give updated and comprehensive guidance with respect to affirmative defense provisions, the EPA has also addressed additional affirmative defense provisions in 17 states in the SNPR and in this final action. See section V.D.3 of this document for further explanation as to which SSM-related SIP provisions the

[5] *See* Settlement Agreement executed November 30, 2011, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0039, 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.). A subsequent Modification to the Settlement Agreement specifies a deadline of May 22, 2015, for signature on the final action to respond to the Petition.

[6] *See* Memorandum, ''Statutory, Regulatory, and Policy Context for this Rulemaking,'' February 4, 2013, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0029. The EPA notes that with respect to the legal basis for affirmative defense provisions in SIPs, the Agency has revised its views as a result of a court decision, as explained in more detail in the SNPR. Thus, the portions of that background memorandum that concern affirmative defense provisions are no longer germane to this action.

[7] *See* ''Approval and Promulgation of Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; Emissions During Startups, Shutdowns, and Malfunctions,'' 79 FR 33101 (June 10, 2014).

[8] *See* ''Approval and Promulgation of Implementation Plans; Wyoming; Revisions to the Air Quality Standards and Regulations,'' 79 FR 62859 (October 21, 2014).

[9] *See* ''Approval and Promulgation of Implementation Plans; North Dakota; Revisions to the Air Pollution Control Rules,'' 79 FR 63045 (October 22, 2014).

EPA reviewed for consistency with CAA requirements as part of this rulemaking.

B. What the Petitioner Requested

The Petition includes three interrelated requests concerning the treatment in SIPs of excess emissions by sources during periods of SSM.

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 and those related to 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 final document, the EPA has decided to fully grant this request. Although the EPA initially proposed to grant in part and to deny in part this request in the February 2013 proposal, a subsequent court decision concerning the legal basis for affirmative defense provisions under the CAA caused the Agency to reexamine this question. As a result, the EPA issued the SNPR to present its revised interpretation of the CAA with respect to this issue and to propose action on the Petition and on specific existing affirmative defense provisions in the SIPs of 17 states consistent with the reasoning of that court decision. In this final action, the EPA is revising its SSM Policy with respect to affirmative defenses for violations of SIP requirements. The EPA believes that SIP provisions that function to alter the jurisdiction of the federal courts under CAA section 113 and section 304 to determine liability and to impose remedies are inconsistent with fundamental legal requirements of the CAA, especially with respect to the enforcement regime explicitly created by statute.

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 in particular 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 CAA or 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 final document, the EPA agrees with the Petitioner that some of these existing SIP provisions are legally impermissible and thus finds such provisions "substantially inadequate" [10] to meet CAA requirements. Among the reasons for the EPA's action is to eliminate SIP provisions that interfere with enforcement in a manner prohibited by the CAA. Simultaneously, where the EPA agrees with the Petitioner, the EPA is issuing a SIP call that directs the affected state to revise its SIP accordingly. For the remainder of the identified provisions, however, the EPA disagrees with the contentions of the Petitioner and is thus denying the Petition with respect to those provisions and taking no further action. The EPA's action issuing the SIP calls 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 SSM. The majority of the state-specific provisions affected by this SIP call action are inconsistent with the EPA's longstanding interpretation of the CAA through multiple iterations of its SSM Policy. With respect to SIP provisions that include an affirmative defense for violations of SIP requirements, however, the EPA has revised its prior interpretation of the statute that would have allowed such provisions under certain very limited conditions. Based upon an evaluation of the relevant statutory provisions in light of more recent court decisions, the EPA is issuing a SIP call to address existing affirmative defense provisions that would operate to alter or eliminate the jurisdiction of courts to assess liability and impose remedies and that would thereby contradict explicit provisions of the CAA relating to judicial authority.

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. Without the ability to rely on a state's interpretive letter that can in a timely way clarify perceived ambiguity in a provision in a SIP submission, however small that ambiguity may be, the EPA may have no recourse other than to disapprove the state's SIP submission. Thus, the EPA is denying 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.

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

In general, the final action 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 SSM. For example, the EPA is granting the Petitioner's request that the EPA rescind its prior interpretation of the CAA that, as stated in prior guidance in the SSM Policy, allowed appropriately drawn affirmative defense provisions applicable to malfunctions. The EPA is also reiterating, clarifying or revising its prior guidance with respect to several other issues related to SIP provisions applicable to SSM events 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 reiterating and clarifying its prior guidance concerning how states may elect to replace existing exemptions for excess emissions during SSM events with properly developed alternative emission limitations that apply to the affected sources during startup, shutdown or other normal modes of source operation (*i.e.,* that apply to excess emissions during those normal modes of operation as opposed to during malfunctions). This action also

[10] The term "substantially inadequate" is used in the CAA and is discussed in detail in section VIII.A of this document.

addresses the use of interpretive letters for purposes of resolving an actual or perceived ambiguity in a SIP submission during the EPA's evaluation of the SIP revision at issue.

In addition, this final action is directly relevant to the states with SIP provisions relevant to excess emissions that the EPA has determined are inconsistent with CAA requirements or with the EPA's interpretation of those requirements in the SSM Policy. In this final action, the EPA is either granting or denying 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 (for which the Petitioner identified SIP provisions applicable in 46 statewide and local jurisdictions and no tribal areas) [11] are listed in table 1, ''List of States with SIP Provisions for Which the EPA Either Grants or Denies the Petition, in Whole or in Part.'' After evaluating the Petition, the EPA is granting the Petition with respect to one or more provisions in 34 of the 39 states listed, and these are the states for which the action on the Petition, according to table 1, is either ''Grant'' or ''Partially grant, partially deny.'' Conversely, the EPA is denying the petition with respect to all provisions that the Petitioner identified in 5 of the 39 states, and these (Idaho, Nebraska, New Hampshire, Oregon and Wyoming) are the states for which the final action on the Petition, according to table 1, is ''Deny.''

TABLE 1—LIST OF STATES WITH SIP PROVISIONS FOR WHICH THE EPA EITHER GRANTS OR DENIES THE PETITION, IN WHOLE OR IN PART

EPA region	State	Final action on petition
I	Maine	Grant.
	New Hampshire	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	Partially grant, partially deny.
	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	Grant.
	Montana	Grant.
	North Dakota	Partially grant, partially deny.
	South Dakota	Grant.
	Wyoming	Deny.
IX	Arizona	Partially grant, partially deny.
X	Alaska	Grant.
	Idaho	Deny.
	Oregon	Deny.
	Washington	Grant.

For each state for which the final action on the Petition is either ''Grant'' or ''Partially grant, partially deny,'' the EPA finds 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 SSM. With respect to the affirmative defense provisions identified in the Petition, the EPA finds that they improperly impinge upon the statutory jurisdiction of the courts to determine liability and impose remedies for violations of SIP emission limitations. The EPA believes that certain specific provisions in these SIPs fail to meet fundamental statutory requirements intended to attain and maintain the

[11] The state has the primary responsibility to implement SIP obligations, pursuant to CAA section 107(a). However, as CAA section 110(a)(2)(E) allows, a state may authorize and rely on a local or regional government, agency or instrumentality to carry out the SIP or a portion of the SIP within its jurisdiction. As a result, some of the SIP provisions at issue in this rulemaking apply to specific portions of a state. Thus, in certain states, submission of a corrective SIP revision may involve rulemaking in more than one jurisdiction.

NAAQS, protect prevention of significant deterioration (PSD) increments and improve 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 final action on the Petition is either ''Grant'' or ''Partially grant, partially deny,'' the EPA is also in this final action calling for a SIP revision as necessary to correct the identified deficient provisions. The SIP revisions that the states are directed to make 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 have the effect of barring 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 SSM 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 remove affirmative defense provisions will assure that the SIP provision does not purport to alter or eliminate the jurisdiction of federal courts to assess liability or to impose remedies consistent with the statutory authority provided in CAA section 113 and section 304. The particular provisions for which the EPA is requiring SIP revisions are summarized in section IX of this document. 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.

For each of the states for which the EPA is denying or is partially denying the Petition, the EPA finds that the particular provisions identified by the Petitioner are not substantially inadequate to meet the requirements pursuant to CAA section 110(k)(5), because the provisions: (i) Are, as they were described in the Petition and as they appear in the existing SIP, consistent with the requirements of the CAA; or (ii) are, as they appear in the existing SIP after having been revised subsequent to the date of the Petition, consistent with the requirements of the CAA; or (iii) have, subsequent to the date of the Petition, been removed from the SIP. Thus, in this final action, the EPA is taking no action to issue a SIP call with respect to those states for those particular SIP provisions.

In addition to evaluating specific SIP provisions identified in the Petition, the EPA has independently evaluated additional affirmative defense provisions in the SIPs of six states (applicable in nine statewide and local jurisdictions).[12] As explained in the SNPR, the EPA determined that this approach was necessary in order to take into consideration recent judicial decisions concerning affirmative defense provisions and CAA requirements. As the result of this evaluation, the EPA finds that specific affirmative defense provisions in 17 states (applicable in 23 statewide and local jurisdictions) are substantially inadequate to meet CAA requirements for the reason that these provisions impinge upon the statutory jurisdiction of the federal courts to determine liability and impose remedies for violations of SIP emission limitations.[13] By improperly impinging upon the jurisdiction of the federal courts, the EPA believes, these provisions fail to meet fundamental statutory requirements intended to attain and maintain the NAAQS, protect PSD increments and improve visibility. As with the affirmative defense provisions identified in the Petition, the EPA believes that these 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.

In this final action, the EPA is issuing a SIP call to each of 36 states (for provisions applicable in 45 statewide and local jurisdictions) with respect to these provisions. The 36 states are listed in table 2, ''List of All States With SIP Provisions Subject to SIP Call.'' The EPA emphasizes that this SIP call action pertains to the specific SIP provisions identified and discussed in section IX of this document. The actions required of individual states in response to this SIP call action are discussed in more detail in section IX of this action.

TABLE 2—LIST OF ALL STATES WITH SIP PROVISIONS SUBJECT TO SIP CALL

EPA region	State	Area
I	Maine	State.
	Rhode Island	State.
II	New Jersey	State.
III	Delaware	State.
	District of Columbia	State.
	Virginia	State.
	West Virginia	State.
IV	Alabama	State.
	Florida	State.
	Georgia	State.
	Kentucky	State.

[12] The six states in which the EPA independently evaluated affirmative defense provisions are: California; South Carolina, New Mexico, Texas, Washington and West Virginia. The EPA evaluated the New Mexico SIP with respect to provisions applicable to the state and Albuquerque-Bernalillo County. The EPA evaluated the Washington SIP with respect to provisions applicable to the state, the Energy Facility Site Evaluation Council and the Southwest Clean Air Agency.

[13] The 17 states for which the EPA finds that specific affirmative defense provisions are substantially inadequate to meet CAA requirements are counted as follows: The EPA evaluated affirmative defense provisions identified by the Petitioner for 14 states: Alaska; Arizona; Arkansas; Colorado; District of Columbia; Georgia; Illinois; Indiana; Kentucky; Michigan; Mississippi; New Mexico; Virginia; and Washington. The EPA evaluated affirmative defense provisions that it independently identified among two states identified by the Petitioner: South Carolina; and West Virginia. Further, the EPA independently identified and evaluated affirmative defense provisions in two states that were not included in the Petition: California; and Texas. In the final action, the EPA is finding one or more affirmative defense provisions to be substantially inadequate in all but one of the 18 states for which the EPA evaluated affirmative defense provisions; for one state, Kentucky, the affirmative defense provision, which was applicable in Jefferson County, was corrected prior to the EPA's issuing its SNPR.

TABLE 2—LIST OF ALL STATES WITH SIP PROVISIONS SUBJECT TO SIP CALL—Continued

EPA region	State	Area
	Mississippi	State.
	North Carolina	State and Forsyth County.
	South Carolina	State.
	Tennessee	State, Knox County and Shelby County.
V	Illinois	State.
	Indiana	State.
	Michigan	State.
	Minnesota	State.
	Ohio	State.
VI	Arkansas	State.
	Louisiana	State.
	New Mexico	State and Albuquerque-Bernalillo County.
	Oklahoma	State.
	Texas	State.
VII	Iowa	State.
	Kansas	State.
	Missouri	State.
VIII	Colorado	State.
	Montana	State.
	North Dakota	State.
	South Dakota	State.
IX	Arizona	State and Maricopa County.
	California	Eastern Kern APCD, Imperial County APCD and San Joaquin Valley Unified APCD.
X	Alaska	State.
	Washington	State, Energy Facility Site Evaluation Council and Southwest Clean Air Agency.

D. What are the next steps for states that are receiving a finding of substantial inadequacy and a SIP call?

The EPA is finalizing a finding of substantial inadequacy and issuing a SIP call for the states listed in table 2 (*see* section II.C of this document). The EPA is also establishing a deadline by which these states must make a SIP submission to rectify the specifically identified deficiencies in their respective SIPs. Pursuant to CAA section 110(k)(5), the EPA has authority to set a SIP submission deadline that is up to 18 months from the date of the final finding of substantial inadequacy. After considering comment on this issue, the EPA is in this final action establishing a deadline of November 22, 2016, by which each affected state is to respond to the SIP call. The deadline falls 18 months from the date of signature and dissemination of this final finding of substantial inadequacy. Thereafter, the EPA will review the adequacy of that new SIP submission in accordance with the CAA requirements of sections 110(a), 110(k)(3), 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 consistent with the maximum time allowed by statute.

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

The issuance of a SIP call requires an affected state to take action to revise its SIP. That action by the state may, in turn, affect sources as described later in this document. The states that are receiving a SIP call in this final action 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 are affected by this SIP call, for example an automatic exemption provision, have to be removed entirely and an affected source could no longer depend on the exemption to avoid all liability for excess emissions during SSM events. Some other provisions, for example a problematic enforcement discretion provision, could either be removed entirely from the SIP or retained if revised appropriately to apply only to state enforcement personnel, 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 its traditional enforcement discretion in its enforcement program. It would merely make the exercise of such discretion case-by-case in nature, as is the normal form of such discretion.

In addition, affected states may choose to consider reassessing particular emission limitations, for example to determine whether those emission limitations 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 and meeting other applicable CAA requirements. Such a revision of an emission limitation will need to be submitted as a SIP revision for the EPA's approval if the existing limitation to be changed is already included in the SIP or if the existing SIP relies on the particular existing emission limitation 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 or revising the aspect of the existing SIP 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 did not conduct an analysis that would indicate, *e.g.,* how many owners or operators of sources in each affected state would likely change any procedures or processes for control of emissions from those sources during periods of SSM. The impacts of revised SIP provisions will be unique to each affected state and its particular mix of affected sources, and thus the EPA cannot predict what those impacts might be. Furthermore, the EPA does not believe the results of such analysis, had one been conducted, would significantly affect this rulemaking that pertains to whether SIP provisions comply with CAA requirements. 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 control emissions better so as to comply with emission limitations continuously, as required by the CAA, or to increase durability of components and monitoring systems to detect and manage malfunctions promptly.

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 this SIP call.

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 this SIP call action has failed to submit a complete SIP revision as required, 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. That FIP obligation would be discharged without promulgation of a FIP only if the state makes and the EPA approves the called-for SIP submission. 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 (NSR) 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 of this document.

G. What is the status of SIP provisions affected by this SIP call action in the interim period starting when the EPA promulgates the final SIP call and ending when the EPA approves the required SIP revision?

When the EPA issues a final SIP call to a state, that action alone does 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 response to the SIP call and the time that the EPA takes to evaluate and act upon the resulting SIP submission from the state 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 affect 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. The EPA is particularly concerned about the potential for serious adverse consequences for public health in this interim period during which states, the EPA and sources make necessary adjustments to rectify deficient SIP provisions and take steps to improve source compliance. However, given the need to resolve these longstanding SIP deficiencies in a careful and comprehensive fashion, the EPA believes that providing sufficient time consistent with statutory constraints for these corrections to occur will ultimately be the best course to meet 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 SSM and the correct treatment of 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 SSM 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, improve 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 a previously approved SIP 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 SSM 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; [14] (ii) disapproved SIP submissions that were not consistent with this interpretation; [15] (iii) itself promulgated regulations in FIPs that were consistent

[14] *See* ''Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities,'' 75 FR 68989 (November 10, 2010).

[15] *See* ''Approval and Promulgation of State Implementation Plans; Michigan,'' 63 FR 8573 (February 20, 1998).

with this interpretation;[16] or (iv) issued a SIP call requiring a state to revise an impermissible SIP provision.[17]

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 a given SIP provision is consistent with the requirements of the CAA and applicable regulations.[18]

The Petition raised issues related to excess emissions from sources during periods of SSM, 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."[19] 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."[20] 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 types of SIP deficiencies identified in the Petition 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 SIP provisions, and of other provisions that interfere with effective enforcement of SIPs, are real-world consequences that adversely affect public health. Commenters on the February 2013 proposal provided illustrative examples of impacts that these types of SIP provisions have on the communities located near sources that rely on automatic or discretionary exemptions for excess emissions during SSM events, rather than by designing, operating and maintaining their sources to meet the applicable emission limitations.[21] These comments also illustrated the ways in which such exemptions, incorrect enforcement discretion provisions and affirmative defense provisions have interfered with the enforcement structure of the CAA by raising inappropriate impediments to enforcement by states, the EPA or citizens.

The EPA's memorandum providing a detailed discussion of the statutory, regulatory and policy background for this action can be found in the docket for this rulemaking.[22]

IV. Final Action in Response To Request To Rescind the EPA Policy Interpreting the CAA To Allow Affirmative Defense Provisions

A. What the Petitioner Requested

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.[23] 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.[24] Alternatively, if the EPA denies these two related requests, the Petitioner asked 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.[25]

The Petitioner requested that the EPA rescind its SSM Policy element interpreting 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 Agency's interpretation. Specifically, the Petitioner cited to two statutory grounds, CAA sections 113(b) and 113(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. The Petitioner drew no distinction between affirmative defense provisions for malfunctions versus affirmative defense provisions for startup and shutdown or other normal modes of operation; in the Petitioner's view all are equally inconsistent with CAA requirements.

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."[26] The Petitioner first argued that in any judicial enforcement action in a 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 district courts to assess monetary penalties for violations if a source is shielded from monetary penalties under an affirmative defense provision in the approved SIP.[27] 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."[28]

[16] *See* "Federal Implementation Plan for the Billings/Laurel, MT [Montana], Sulfur Dioxide Area," 73 FR 21418 (April 21, 2008).

[17] *See* "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 (April 18, 2011).

[18] *See generally Catawba County, North Carolina* v. *EPA,* 571 F.3d 20, 33–35 (D.C. Cir. 2009) (upholding the EPA's process for developing and applying its guidance for designations).

[19] Petition at 2.

[20] Petition at 12.

[21] The EPA notes that a number of commenters described the impacts of SIP provisions of these types. *See, e.g.,* comments of *Sierra Club, et al.,* EPA–HQ–OAR–2012–0322–0622, pp. 28–35 (describing impacts on several specific communities); comments of American Bottom Conservancy, EPA–HQ–OAR–2012–0322–0579 (describing impacts on one specific community); and comments of Citizen for Envt'l Justice and Env'l Integrity Project, EPA–HQ–OAR–2012–0322–0621, pp. 8–17 (discussing impacts of such provisions on enforcement more generally).

[22] *See* Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," February 4, 2013, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0029.

[23] Petition at 11.

[24] *Id.*

[25] Petition at 12.

[26] Petition at 10.

[27] *Id.*

[28] *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.[29] 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. 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 permissible interpretation of the Clean Air Act.'' [30] A more detailed explanation of the Petitioner's arguments appears in the 2013 February proposal.[31]

B. What the EPA Proposed

In the February 2013 proposal, consistent with its interpretation of the Act at that time, the EPA proposed to deny in part and to grant in part the Petition with respect to this overarching issue. As a revision to the SSM Policy as embodied in the 1999 SSM Guidance, the EPA proposed a distinction between affirmative defenses for unplanned events such as malfunctions and planned events such as startup and shutdown. The EPA explained the basis for its initial proposed action in detail, including why the Agency then believed that there was a statutory basis for narrowly drawn affirmative defense provisions that met certain criteria applicable to malfunction events but no such statutory basis for affirmative defense provisions applicable to startup and shutdown events. In the February 2013 proposal, the EPA also proposed to deny in part and to grant in part the Petition with respect to specific affirmative defense provisions in the SIPs of various states identified in the Petition consistent with that interpretation. With respect to these specific existing SIP provisions, the EPA distinguished between those provisions that were consistent with the Agency's interpretation of the CAA as set forth in 1999 SSM Guidance and were limited to malfunction events and other affirmative defense provisions that were not limited to malfunctions or otherwise not consistent with the Agency's interpretation of the CAA and included one or more deficiencies.

Subsequent to the February 2013 proposal, however, a judicial decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *NRDC* v. *EPA* concerning the legal basis for affirmative defense provisions in the EPA's own regulations caused the Agency to reconsider the legal basis for any affirmative defense provisions in SIPs, regardless of the type of events to which they apply, the criteria they may contain or the types of judicial remedies they purport to limit or eliminate.[32] Thus, the EPA issued an SNPR to revise its proposed response to the Petition with respect to whether affirmative defense provisions in SIPs are consistent with fundamental legal requirements of the CAA.[33] In the SNPR, the EPA also revised its proposed response related to each of the specific affirmative defense provisions identified in the Petition. Changes to the proposed response included revision of the basis for the proposed finding of substantial inadequacy for many of the provisions (to incorporate the EPA's revised interpretation of the CAA into that basis). Other changes to the proposed response included reversal of the proposed denial of the Petition for some provisions that the Agency previously believed to be consistent with CAA requirements but subsequently determined were not authorized by the Act under the analysis prompted by the *NRDC* v. *EPA* decision. In order to provide comprehensive guidance to all states concerning affirmative defense provisions in SIPs and to avoid confusion that may arise due to recent court decisions relevant to such provisions under the CAA, the EPA also addressed additional existing SIP affirmative defense provisions of which it was aware although the provisions were not specifically identified in the Petition. The EPA initially examined the specific affirmative defense provisions identified by the Petitioner in 14 states but subsequently broadened its review to include additional provisions in four states, including two states that were not included in the Petition. Most importantly, the EPA provided a detailed explanation in the SNPR as to why it now believes that the logic of the court in the *NRDC* v. *EPA* decision vacating the affirmative defense in an Agency emission limitation under CAA section 112 likewise extends to affirmative defense provisions in SIPs.

C. What Is Being Finalized in This Action

The EPA is taking final action to grant the Petition on the request to rescind its SSM Policy element that interpreted the CAA to allow states to elect to create affirmative defense provisions in SIPs. The EPA is also taking final action to grant the Petition on the request to make a finding of substantial inadequacy and to issue SIP calls for specific existing SIP provisions that include an affirmative defense as identified in the SNPR. The specific SIP provisions at issue are discussed in section IX of this document. These existing affirmative defense provisions include some provisions that the EPA had previously determined were consistent with the CAA as interpreted in the 1999 SSM Guidance and other provisions that were not consistent even with that interpretation of the CAA. As explained in the SNPR, the EPA has now concluded that the enforcement structure of the CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. These provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain or what forms of remedy they purport to limit or eliminate.

The EPA is revising its interpretation of the CAA with respect to affirmative defenses based upon a reevaluation of the statutory provisions that pertain to enforcement of SIP provisions in light of recent court opinions. Section 113(b) provides courts with explicit jurisdiction to determine liability and to impose remedies of various kinds, including injunctive relief, compliance orders and monetary penalties, in judicial enforcement proceedings. This grant of jurisdiction comes directly from Congress, and the EPA is not authorized to alter or eliminate this jurisdiction under the CAA or any other law. With respect to monetary penalties, CAA section 113(e) explicitly includes the factors that courts and the EPA are required to consider in the event of judicial or administrative enforcement for violations of CAA requirements, including SIP provisions. Because Congress has already given federal courts the jurisdiction to determine

[29] Petition at 11.

[30] Petition at 11.

[31] *See* February 2013 proposal, 78 FR 12459 at 12468 (February 22, 2013).

[32] *See NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014).

[33] *See* SNPR, 79 FR 55919 (September 17, 2014).

what monetary penalties are appropriate in the event of judicial enforcement for a violation of a SIP provision, neither the EPA nor states can alter or eliminate that jurisdiction by superimposing restrictions on that jurisdiction and discretion granted by Congress to the courts. Affirmative defense provisions by their nature purport to limit or eliminate the authority of federal courts to determine liability or to impose remedies through factual considerations that differ from, or are contrary to, the explicit grants of authority in section 113(b) and section 113(e). Accordingly, pursuant to section 110(k) and section 110(l), the EPA cannot approve any such affirmative defense provision in a SIP. If such an affirmative defense provision is included in an existing SIP, the EPA has authority under section 110(k)(5) to require a state to remove that provision.

States have great discretion in how to devise SIP provisions, but they do not have discretion to create provisions that contradict fundamental legal requirements of the CAA. The jurisdiction of federal courts to determine liability and to impose statutory remedies for violations of SIP emission limitations is one such fundamental requirement. The court in the recent *NRDC* v. *EPA* decision did not remand the regulation to the EPA for better explanation of the legal basis for an affirmative defense; the court instead vacated the affirmative defense and indicated that there could be no valid legal basis for such a provision because it contradicted fundamental requirements of the CAA concerning the jurisdiction of courts in judicial enforcement of CAA requirements. A more detailed explanation of the EPA's basis for determining that affirmative defense provisions in SIPs are similarly contrary to the requirements of the CAA appears in the SNPR.[34]

Couching an affirmative defense provision in terms of merely defining whether the emission limitation applies and thus whether there is a ''violation,'' as suggested by some commenters, is also problematic. If there is no ''violation'' when certain criteria or conditions for an ''affirmative defense'' are met, then there is in effect no emission limitation that applies when the criteria or conditions are met; the affirmative defense thus operates to create an exemption from the emission limitation. As explained in the February 2013 proposal, the CAA requires that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise. This interpretation is consistent with the decision in *Sierra Club* v. *Johnson* concerning the term ''emission limitation'' in section 302(k).[35] Characterizing the exemptions as an ''affirmative defense'' runs afoul of the requirement that emission limitations must apply continuously.

The EPA recognizes that the original policy objectives behind states' affirmative defense provisions were likely well-intentioned, *e.g.,* to encourage better source design, maintenance and operation through the incentive of being shielded from certain statutory remedies for violations under certain specified conditions. Nevertheless, creation of SIP provisions that would operate to limit or eliminate the jurisdiction of courts to determine liability or to impose remedies provided for by statute is inconsistent with the enforcement structure of the CAA. The EPA emphasizes that the absence of an affirmative defense provision in a SIP, whether as a freestanding generally applicable provision or as a specific component of a particular emission limitation, does not mean that all exceedances of SIP emission limitations will automatically be subject to enforcement or automatically be subject to imposition of particular remedies. Pursuant to the CAA, all parties with authority to bring an enforcement action to enforce SIP provisions (*i.e.,* the state, the EPA or any parties who qualify under the citizen suit provision of section 304) have enforcement discretion that they may exercise as they deem appropriate in any given circumstances. For example, if the event that causes excess emissions is an actual malfunction that occurred despite reasonable care by the source operator to avoid malfunctions, then each of these parties may decide that no enforcement action is warranted. In the event that any party decides that an enforcement action is warranted, then it has enforcement discretion with respect to what remedies to seek from the court for the violation (*e.g.,* injunctive relief, compliance order, monetary penalties or all of the above), as well as the type of injunctive relief and/or amount of monetary penalties sought.[36] Further, courts have the discretion under section 113 to decline to impose penalties or injunctive relief in appropriate cases as explained below.

Similarly, the absence of an affirmative defense provision in a SIP does not alter the legal rights of sources under the CAA. In the event of an enforcement action for an exceedance of a SIP emission limit, a source can elect to assert any common law or statutory defenses that it determines is supported, based upon the facts and circumstances surrounding the alleged violation. Under section 113(b), courts have explicit authority to impose injunctive relief, issue compliance orders, assess monetary penalties or fees and impose any other appropriate relief. Under section 113(e), courts are required to consider the enumerated statutory factors when assessing monetary penalties, including ''such other factors as justice may require.'' For example, if the exceedance of the SIP emission limitation occurs due to a malfunction, that exceedance is a violation of the applicable emission limitation, but the source retains the ability to defend itself in an enforcement action and to oppose the imposition of particular remedies or to seek the reduction or elimination of monetary penalties, based on the specific facts and circumstances of the event. Thus, elimination of a SIP affirmative defense provision that purported to take away the statutory jurisdiction of the court to exercise its authority to impose remedies does not disarm sources in potential enforcement actions. Sources retain all of the equitable arguments they could previously have made under an affirmative defense provision; they must simply make such arguments to the reviewing court as envisioned by Congress in section 113(b) and section 113(e). Congress vested the courts with the authority to judge how best to weigh the evidence in an enforcement action and determine appropriate remedies.

Removal of such impermissible SIP affirmative defense provisions is necessary to preserve the enforcement structure of the CAA, to preserve the jurisdiction of courts to adjudicate questions of liability and remedies in judicial enforcement actions and to preserve the potential for enforcement by states, the EPA and other parties under the citizen suit provision as an effective deterrent to violations. In turn, this deterrent encourages sources to be properly designed, maintained and operated and, in the event of violation of SIP emission limitations, to take appropriate action to mitigate the impacts of the violation. In this way, as intended by the existing enforcement structure of the CAA, sources can mitigate the potential for enforcement actions against them and the remedies

[34] *See* 79 FR 55919 at 12931–34 (September 17, 2014).

[35] 551 F.3d 1019 (D.C. Cir. 2008).

[36] The EPA notes that only the state and the Agency have authority to seek criminal penalties for knowing and intentional violation of CAA requirements. The EPA has this explicit authority under section 113(c).

that courts may impose upon them in such enforcement actions, based upon the facts and circumstances of the event.

D. Response to Comments Concerning Affirmative Defense Provisions in SIPs

The EPA received numerous comments concerning the portion of the Agency's proposed response to the Petition in the February 2013 proposal that addressed the question of whether affirmative defense provisions are consistent with CAA requirements for SIPs. As explained in the SNPR, those particular comments submitted on the original February 2013 proposal are no longer germane, given that the EPA has substantially revised its initial proposed action on the Petition and its basis, both with respect to the overarching issue of whether such provisions are valid in SIPs under the CAA and with respect to specific affirmative defense provisions in existing SIPs of particular states. Accordingly, as the EPA indicated in the SNPR, it considers those particular comments on the February 2013 proposal no longer relevant and has determined that it is not necessary to respond to them. Concerning affirmative defense provisions, the appropriate focus of this rulemaking is on the comments that addressed the EPA's revised proposal in the SNPR.

With respect to the revised proposal concerning affirmative defense provisions in the SNPR, the EPA received numerous comments, some supportive and some critical of the Agency's proposed action on the Petition as revised in the SNPR. Many of these comments raised conceptual issues and arguments concerning the EPA's revised interpretation of the CAA with respect to affirmative defense provisions in SIPs in light of the *NRDC* v. *EPA* decision and concerning the EPA's application of that interpretation to specific affirmative defense provisions discussed in the SNPR. For clarity and ease of discussion, the EPA is responding to these overarching comments, grouped by issue, in this section of this document.

1. Comments that the EPA is misapplying the decision of the D.C. Circuit in *NRDC* v. *EPA* to SIP provisions because the decision only applies to the Agency's own regulations pursuant to CAA section 112.

Comment: Many commenters stated that the EPA's reliance on the D.C. Circuit's decision in *NRDC* v. *EPA* is misplaced in the SNPR because the opinion is limited to disapproval of a Maximum Achievable Control Technology (MACT) standard's affirmative defense for unavoidable malfunctions. The commenters noted that the *NRDC* v. *EPA* decision did not address the issue of affirmative defense provisions in SIPs. The commenters argued that the D.C. Circuit's opinion only stands for the narrow proposition that the EPA may not include an affirmative defense to civil penalties in a NESHAP [37] under CAA section 112.

One commenter noted that the EPA, in the SNPR, stated that the *NRDC* v. *EPA* decision did not turn on any factors specific to CAA section 112 as support for the EPA applying the decision to SIPs. However, the commenter argued that this fact is not probative because neither party raised any argument specific to CAA section 112 and it is reasonable for a court to limit its analysis to the arguments presented before it.

One commenter also noted that the EPA is not bound to apply D.C. Circuit law to actions reviewable in other circuits.

Response: As explained in the SNPR, the EPA believes the reasoning of the court in the *NRDC* v. *EPA* decision indicates that states, like the EPA, have no authority in SIP provisions to alter the jurisdiction of federal courts to assess penalties for violations of CAA requirements through affirmative defense provisions.[38] If states lack authority under the CAA to alter the jurisdiction of the federal courts through affirmative defense provisions in SIPs, then the EPA lacks authority to approve any such provision in a SIP.

The EPA agrees with the commenters' statement that the *NRDC* v. *EPA* decision pertained to a challenge to the EPA's NESHAP regulations issued pursuant to CAA section 112 to regulate hazardous air pollutants (HAPs) from sources that manufacture Portland cement. However, the EPA disagrees with the commenters' contention that, because the *NRDC* v. *EPA* decision was based on a NESHAP, it is somehow inappropriate for the EPA to rely on the reasoning of the D.C. Circuit's decision as a basis for this action.

As acknowledged by a commenter, the EPA explained in the SNPR that the *NRDC* v. *EPA* decision did not turn on the specific provisions of CAA section 112.[39] However, the commenter missed the importance of this point. Although the *NRDC* v. *EPA* decision analyzed the legal validity of an affirmative defense provision created by the EPA in conjunction with a specific NESHAP, the court based its decision upon the provisions of sections 113 and 304. Sections 113 and 304 pertain to enforcement of the CAA requirements more broadly, including to enforcement of SIP requirements. The court addressed section 112 and not sections germane specifically to SIPs, as only that section was before it. The EPA has applied the *NRDC* court's analysis to sections 113 and 304 with respect to SIPs and has concluded that the *NRDC* court's analysis is the better reading of the statutory provisions.

The affirmative defense provision in the Portland Cement NESHAP required the source to prove, by a preponderance of the evidence in an enforcement proceeding, that the source met specific criteria concerning the nature of the event. These specific criteria required to establish the affirmative defense in the Portland Cement NESHAP are functionally the same as the criteria that the EPA previously recommended to states for SIP provisions in the 1999 SSM Guidance and that the EPA repeated in the February 2013 proposal document. Accordingly, the EPA believes that the opinion of the court in *NRDC* v. *EPA* has significant impacts on the Agency's SSM Policy with respect to affirmative defense provisions. The reasoning by the *NRDC* court, as logically extended to SIP provisions, indicates that neither states nor the EPA have authority to alter either the rights of other parties to seek relief or the jurisdiction of federal courts to impose relief for violations of CAA requirements in SIPs. The EPA believes that the court's decision in *NRDC* v. *EPA* compelled the Agency to reevaluate its interpretation of the CAA as described in the SNPR.

The EPA also disagrees with commenters who suggested that a decision of the D.C. Circuit should have no bearing on actions that affect states in other circuit courts. The CAA vests authority with the D.C. Circuit to review nationally applicable regulations and any action of nationwide scope or effect. Accordingly, any decision of the D.C. Circuit in conducting such review is binding nationwide with respect to the action under review, and the D.C. Circuit's reasoning is also binding with respect to review of future EPA actions raising the same issues that will be subject to review within that Circuit. Given that the EPA has determined that this action has nationwide scope and effect, it is subject to exclusive review in the D.C. Circuit, so the EPA believes it is appropriate to apply the reasoning

[37] The NESHAPs are found in 40 CFR part 61 and 40 CFR part 63. The NESHAPs promulgated after the 1990 CAA Amendments are found in 40 CFR part 63. These standards require application of technology-based emissions standards referred to as Maximum Achievable Control Technology (MACT). Consequently, these post-1990 NESHAPs are also referred to as MACT standards.

[38] *See* 79 FR 55929–30; 55931–34.

[39] SNPR, 79 FR 55919 at 55932.

of the *NRDC* court, which interprets CAA sections 113 and 304, to determine the legality of affirmative defense provisions in this national action.[40]

2. Comments that the EPA is misapplying the decision of the D.C. Circuit in *NRDC* v. *EPA* to SIP provisions because the court did not address the legality of affirmative defense provisions in SIPs.

Comment: Many commenters alleged that the EPA inappropriately relied on the D.C. Circuit's decision in *NRDC* v. *EPA* in the SNPR because the court specifically stated that its decision did not address whether affirmative defense provisions in SIPs were appropriate. The commenters pointed to the second footnote in the decision, in which the court explicitly stated: ''We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan.'' [41] Accordingly, the commenters argued that the *NRDC* v. *EPA* decision is ''non-binding'' with respect to SIP provisions.

Response: The EPA disagrees that the footnote relied upon by commenters renders application of the legal interpretation of the *NRDC* court to SIP provisions improper. The EPA specifically acknowledged and discussed the footnote in the *NRDC* v. *EPA* decision in the SNPR. The EPA explained its view of the significance of the footnote: ''footnote 2 in the opinion does not signify that the court intended to take any position with respect to the application of its interpretation of the CAA to SIP provisions, let alone to suggest that its interpretation would not apply more broadly.'' As discussed in the SNPR in detail, the EPA believes the logic of the court's decision in *NRDC* v. *EPA* regarding the interpretation of sections 113 and 304 concerning affirmative defenses does extend to SIP provisions.

3. Comment that the EPA is inappropriately relying on the *NRDC* v. *EPA* decision because the DC Circuit's decision was decided in error.

Comment: One commenter alleged that the EPA's reliance on the *NRDC* v. *EPA* decision is misplaced because the court in that decision mistakenly relied on section 304(a) when holding that the EPA cannot restrict the jurisdiction of thecourts withaffirmative defense provisions. The commenter allegedthat Congress did not intend to give the judiciary ''fully-unfettered discretion'' insection 304(a) because sucha reading cannot be squared with section 304(b), which provides that ''[n]o action can be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States.''

Response: The EPA does not agree with the commenter's premise that the *NRDC* court erred by not considering section 304(b) as well as section 304(a). As the court correctly reasoned, section 304(a) authorizes any person to bring an enforcement action for violations of emission limitations. Section 304(f) defines the term ''emission limitation'' for this purpose very broadly. Section 304(b) does not alter the rights of any person who has given proper notice to bring such an action under section 304(a), unless the EPA or the state is diligently prosecuting a civil action to require compliance. The fact that section 304(b) limits the ability of any person to bring an enforcement action (as opposed to intervening in such action) if the EPA or the state is pursuing enforcement has no bearing upon whether the EPA or a state could seek to alter or eliminate the jurisdiction of the courts to determine liability or to impose remedies for violations of SIP emission limitations in judicial enforcement. The EPA also does not believe that this rulemaking is the appropriate forum in which to challenge the court's decision.

4. Comments that the court's reasoning in the *NRDC* v. *EPA* decision does not apply to affirmative defenses in SIP provisions because if a source qualifies for an affirmative defense, then there has been no violation.

Comment: Several commenters stated that the D.C. Circuit's analysis in the *NRDC* v. *EPA* opinion is based on statutory language that indicates Congress intended the courts, not the EPA, to decide what constitutes an appropriate penalty once a violation has occurred. The commenters argued that if a SIP provision contains an affirmative defense, and if a source meets the requirements to qualify for that affirmative defense, then there is no violation of the SIP requirements. One commenter contended that if there is no violation, then the courts have no jurisdiction to award any remedies and thus there can be no concern that the affirmative defense provision alters or eliminates the jurisdiction of the courts. Another commenter argued that affirmative defense provisions in the context of a SIP can be described as limitations on the application of an emission limitation to the conditions under which the emission reduction technology can be effectively operated. The commenters stated that the *NRDC* court did not address the EPA's or states' authority to establish requirements that determine, in the first instance, whether a violation has occurred.

Response: The EPA disagrees with the commenters' arguments that affirmative defense provisions are appropriate in SIPs if they merely define what constitutes a violation. As explained in detail in the SNPR, the EPA believes that SIP provisions with affirmative defenses that operate to limit or eliminate the jurisdiction of the courts to determine liability and to impose remedies are not consistent with CAA requirements. Under the commenters' theory, such provisions would not improperly impinge on the jurisdiction of the courts to impose remedies for violations by redefining what constitutes a ''violation.''

First, the EPA does not agree that all affirmative defense provisions in the SIPs at issue in this action are constructed in this way. Some, including those that the EPA previously approved as consistent with the Agency's 1999 SSM Guidance, explicitly provide that the excess emissions that occur are still violations, but a source could be excused from monetary penalties if the source met the criteria for the affirmative defense. Under the EPA's prior interpretation of the CAA, the legal basis for any affirmative defense started with the fact that the excess emissions still constituted a violation and injunctive relief would still be available as appropriate. As explained in the SNPR and this document, the EPA no longer interprets the CAA to allow even narrowly drawn affirmative defense provisions in SIPs, let alone those advocated by the commenters that would provide a complete bar to any type of judicial remedy provided for in section113(b).

Second, even if a specific affirmative defense provision were worded in the way that the commenters' claim, then that provision would be deficient for other reasons. Under the commenters' premise, if certain criteria are met then there is no ''violation'' for excess emissions during SSM events. The EPA's view is that this formulation of an affirmative defense in effect means that there is no emission limitation that applies when the criteria are met, *i.e.,* the affirmative defense operates to create a conditional exemption for emissions from the source during SSM events. Such an approach would be inconsistent with the decision in *Sierra Club* v. *Johnson* concerning the term ''emission limitation'' in section 302(k).[42] Exemptions for emissions during SSM events, whether automatic

[40] CAA section 307(b)(1).

[41] 749 F.3d 1055, 1064, n.2.

[42] 551 F.3d 1019 (D.C. Cir. 2008).

or conditional based upon the criteria of an affirmative defense, are inconsistent with the requirement for continuous controls on sources.

Finally, the EPA believes that the commenters' premise that an affirmative defense provision merely defines what a violation is also runs afoul of other fundamental requirements for SIP provisions. To the extent any such provision would allow state personnel to decide, unilaterally, whether excess emissions during an SSM event constitute a violation (*e.g.,* through application of an ''affirmative defense''), this would interfere with the ability of the EPA or other parties to enforce for violations of SIP requirements. The EPA interprets the CAA to prohibit SIP provisions that impose the enforcement discretion decisions of a state on other parties. This includes provisions that are structured or styled as an affirmative defense but in effect allow *ad hoc* conditional exemptions from emission limitations and preclude enforcement for excess emission during SSM events.

5. Comments that the *NRDC* v. *EPA* decision, which concerned an emission limitation under section 112, does not apply in the context of section 110, because section 110 affords states flexibility in how to develop emission limitations in SIP provisions.

Comment: Commenters argued that the EPA's extension of the logic of the *NRDC* v. *EPA* decision to affirmative defenses in SIP provisions is incorrect because the EPA's NESHAP standards are governed by section 112, whereas SIP provisions are governed by section 110. Under the latter, commenters asserted, states are afforded wide discretion in how to develop emission limitations.[43] The commenters stated that section 110 governs the development of state SIPs to satisfy the NAAQS, which may address many different types of sources, major and minor, industrial and non-industrial, small and large, and old and new. The commenters alleged that states have independent authority to include affirmative defenses in SIP provisions, so long as the provisions are otherwise approvable, because the state has met its section 110 planning responsibilities and the SIP is enforceable.

Response: The EPA agrees with the commenters that section 110 governs the development of state SIPs and that states are accorded great discretion in determining how to meet CAA requirements in SIPs. However, as explained in the February 2013 proposal, the SNPR and sections IV.D.13 and V.D.2 of this document, states are obligated to develop SIP provisions that meet fundamental CAA requirements. The EPA has the responsibility to review SIP provisions developed by states to ensure that they in fact meet fundamental CAA requirements. As explained in the SNPR and this document, the EPA no longer believes that affirmative defense provisions meet CAA requirements. Based on the logic of the court in the *NRDC* v. *EPA* decision, the better reading of the statute is that such provisions have the effect of limiting or eliminating the statutory jurisdiction of the courts to determine liability or impose remedies.

The EPA also disagrees with the commenters' arguments that ''emission limitations'' under section 112 and section 110 are not comparable with respect to meeting fundamental CAA requirements. As an initial matter, both section 112 MACT standards and section 110 SIP emission limitations can be composed of various elements that include, among other things, numerical emission limitations, work practice standards and monitoring and recordkeeping requirements. However, whether there are other components that are part of the emission limitation to make it apply continuously is not relevant for purposes of determining whether an affirmative defense provision that provides relief from penalties for a violation of either a MACT standard under section 112 or a SIP provision under section 110 is consistent with the CAA.

As explained in the SNPR, the EPA has revised its interpretation of the CAA with respect to affirmative defense provisions in SIPs, based upon the logic of the court in the *NRDC* v. *EPA* decision. Section 304(a) sets forth the basis for a civil enforcement action and section 113(a)(1) does the same for administrative or judicial enforcement actions brought by the EPA. Sections 113(b) and 304(a) provide the federal district courts with jurisdiction to hear civil enforcement cases. Furthermore, section 113(e) confers jurisdiction on the district court in a civil enforcement case to determine the amount of penalty to be assessed where a violation has been established.

6. Comments that the *NRDC* v. *EPA* decision does not pertain to the appropriateness of affirmative defense provisions in the context of state administrative or civil enforcement.

Comment: Some commenters noted that the *NRDC* court only reviewed whether affirmative defense provisions could be used to limit CAA citizen suit remedies in judicial enforcement actions. The commenters alleged that the use of an affirmative defense in a citizen suit under federal regulations does not dictate the appropriateness of similar provisions in the context of state administrative or civil actions. According to the commenters, a SIP represents an air quality management system and the state administrative process is distinct from federal citizen suits. Similarly, the commenters believed that SIP emission limitations are enforceable via state regulation penalty provisions that are separate from the CAA civil penalty provisions. Because the *NRDC* court spoke only to the appropriateness of affirmative defense provisions in the context of federal citizen suits, the commenters asserted, the decision is inapplicable in the EPA's SIP call action.

Response: The EPA agrees that the court in the *NRDC* v. *EPA* decision did not speak directly to the issue of whether states can establish affirmative defenses to be used by sources exclusively in state administrative enforcement actions or in judicial enforcement in state courts. The reasoning of the *NRDC* court indicates only that such provisions would be inconsistent with the CAA in the context of judicial enforcement of SIP requirements in federal court. Indeed, the *NRDC* court suggested that if the EPA elected to consider factors comparable to the affirmative defense criteria in its own administrative enforcement proceedings, it may be able to do so. The implication of the commenters, however, is that the EPA should interpret the CAA to allow affirmative defenses in SIP provisions, so long as it is unequivocally clear that sources cannot assert the affirmative defenses in federal court enforcement actions and cannot assert the affirmative defenses in enforcement actions brought by any party other than the state.

The EPA of course agrees that states can exercise their own enforcement discretion and elect not to bring an enforcement action or seek certain remedies, using criteria analogous to an affirmative defense. It does not follow, however, that states can impose this enforcement discretion on other parties by adopting SIP provisions that would apply in federal judicial enforcement, or in enforcement brought by the EPA or other parties. To the extent that the state developed an ''enforcement discretion'' type provision that applied only in its own administrative enforcement actions or only with respect to enforcement actions brought by the state in state courts, such a provision may be appropriate. This authority is not unlimited because the state could not create affirmative defense provision that in effect undermines its legal authority

[43] *See, e.g., Train* v. *NRDC,* 421 U.S. 60, 79 (1975).

to enforce SIP requirements. Section 110(a)(2)(C) requires states to have a program that provides for enforcement of the state's SIP, and enforcement discretion provisions that unreasonably limit the state's own authority to enforce the requirements of the SIP would be inconsistent with section 110(a)(2)(C). The EPA's obligations with respect to SIPs include determining whether states have adequate enforcement authority.

7. Comments that the EPA's proposal is inappropriate because it runs counter to previous court decisions, including the decision of the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) in *Luminant Generation* v. *EPA*.

Comment: Many commenters on the SNPR argued that the decision of the Fifth Circuit in *Luminant Generation* v. *EPA* precludes the EPA's proposed action concerning affirmative defenses in SIP provisions, in general and with respect to the provisions in the Texas SIP in particular. The commenters noted that the court upheld the EPA's approval of an affirmative defense provision for unavoidable excess emissions during unplanned SSM events in the Texas SIP.[44] The commenters argued that the Fifth Circuit ruled that in approving the Texas SIP affirmative defense provision, the EPA ''acted neither contrary to law nor in excess of its statutory authority.'' [45] According to the commenters, the court specifically considered and rejected arguments by litigants concerning sections 113 and 304. Somecommenters argued thatthe court also considered and ''decisively rejected'' the legal arguments articulated by the EPA in the SNPR. The commenters allegedthat the *Luminant Generation* v. *EPA* decision demonstrates that affirmative defenses for malfunctions are permissible in SIP provisions. The commenters contended that, because the Fifth Circuit in *Luminant Generation* v. *EPA* specifically considered whether an affirmative defense provision applicable to malfunctions included in a SIP violates the CAA, unlike the D.C. Circuit in *NRDC* v. *EPA,* the EPA should follow the *Luminant Generation* v. *EPA* decision rather than the D.C. Circuit decision in *NRDC* v. *EPA*.

Some commenters also pointed out that the D.C. Circuit, in the recent *NRDC* v. *EPA* decision, mentioned and cited the *Luminant Generation* v. *EPA* opinion and did not expressly disagree with the Fifth Circuit's holding. One commenter noted that if the *NRDC* court believed that the issue it was deciding was the same as the issue decided in *Luminant Generation* v. *EPA,* the D.C. Circuit would have explicitly stated that it was declining to follow the Fifth Circuit on the issue instead of acknowledging that the issue upon which the Fifth Circuit ruled was not before the D.C. Circuit.

Several commenters also argued that, because the Fifth Circuit previously determined in *Luminant Generation* v. *EPA* that the Texas SIP affirmative defense provision at issue in this SIP call action is consistent with CAA sections 113 and 304, the EPA does not have any legal authority under the CAA to finalize the action proposed in SNPR. Some commenters further stated that the EPA lacks authority to disagree with the Fifth Circuit's determination of the law as applied to a state within the Fifth Circuit's jurisdiction. These commenters believed that if the EPA were to finalize the action discussed in the SNPR with respect to the affirmative defense for malfunctions in the Texas SIP, this action would violate the mandate rule. Some commenters also alleged that courts outside the Fifth Circuit, including the D.C. Circuit, will apply principles of claim preclusion, or *res judicata,* to give effect to the Fifth Circuit's prior adjudication on the legal basis for the affirmative defense in the Texas SIP. One commenter claimed that the EPA's ''failure'' to address how the holdings in *Luminant Generation* v. *EPA* will no longer apply and how the EPA is exempt from the court's mandate render the theories presented in the SNPR unsupported as a basis for the SIP call action.

Some commenters alleged that the EPA is bound by its own prior representations before the Fifth Circuit, in which it asserted and defended its approval of the affirmative defense provision for malfunctions in the Texas SIP, under the doctrine of judicial estoppel.[46] Similarly, the commenters alleged that under the doctrine of issue preclusion, or collateral estoppel, the EPA is precluded from re-litigating the issues previously considered and determined by the Fifth Circuit, regardless of where any subsequent challenge to this final action is brought.

Some commenters also cited to other circuit court decisions that have upheld the EPA's approvals of affirmative defense provisions for malfunctions.[47] The commenters allegedthat otherthan calling the *NRDC* v. *EPA* decision a newer decision, the EPA did not explain its justification for relying on the *NRDC* v. *EPA* opinion instead of following the three circuit court decisions that are directly on point.

Response: The EPA disagrees with the commenters' arguments concerning the application of the court's decision in *Luminant Generation* v. *EPA* to this SIP call action. As explained in the SNPR, the EPA acknowledges that it has previously approved affirmative defenses in SIP provisions or, when appropriate, promulgated affirmative defenses in FIPs. The EPA also acknowledged that its approval of an affirmative defense provision applicable to ''unplanned events'' (*i.e.,* malfunctions) in a Texas SIP submission was upheld in 2012 by the U.S. Court of Appeals for the Fifth Circuit. In that litigation, the EPA argued that sections 113 and 304 do not preclude appropriately drawn affirmative defense provisions for malfunctions in SIPs. Importantly, in upholding the EPA's approval of the affirmative defense, the Fifth Circuit determined that *Chevron* step 1 was not applicable to this case and ''turn[ed] to step two of *Chevron*'' [48] in holding that the Agency's interpretation of the CAA at that time was a ''permissible interpretation of section [113], warranting deference.'' [49] The Fifth Circuit did not determine that the EPA's interpretation at the time of the *Luminant Generation* v. *EPA* decision was the only or even the best permissible interpretation. It is clearly within the EPA's legal authority to now revise its interpretation to a different, but still permissible, interpretation of the statute.[50] The EPA has explained at length in the SNPR, and elsewhere in this final rulemaking, its reasons for changing its previous interpretation of

[44] 714 F.3d 841 (5th Cir. 2013).

[45] *Id.* at 853. The EPA notes that the Fifth Circuit also upheld the Agency's disapproval of the affirmative defense provisions that the state sought to create for ''planned'' events.

[46] *See, e.g., New Hampshire* v. *Maine,* 532 U.S. 742, 749 (2001).

[47] *See Montana Sulphur & Chemical Co.* v. *EPA,* 666 F.3d 1174 (9th Cir. 2012); *Arizona Public Service Co.* v. *EPA,* 562 F.3d 1116 (10th Cir. 2009).

[48] 714 F.3d at 852.

[49] *Id.* at 853.

[50] *See, e.g., Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967 (2005) and *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502 (2009). The Agency also notes that commenters' position, that the EPA cannot now change its interpretation of the CAA, is at odds with the SIP call provision established by Congress in section 110(k)(5). That provision provides the EPA with authority to issue a SIP call ''whenever'' it determines that an existing SIP is substantially inadequate to meet CAA requirements. In other words, section 110(k)(5) expressly envisions cases where the EPA has previously approved a SIP provision as meeting CAA requirements, and one that the EPA may have even defended in court, but later determines that the provision no longer meets CAA requirements, and section 110(k)(5) gives the EPA authority to issue a SIP call in these situations.

the CAA to permit narrowly drawn affirmative defenses applicable only to penalties and has explained why it now believes that the reasoning of the court in the *NRDC* v. *EPA* decision is the better reading of the CAA.

Some commenters allege that the Fifth Circuit considered and rejected the legal arguments articulated by the EPA in the SNPR to support the Agency's new interpretation that affirmative defenses in SIP provisions are inconsistent with the Act. The EPA disagrees with commenters' assertions. As explained above, in the *Luminant Generation* v. *EPA* decision the Fifth Circuit analyzed the EPA's former interpretation of the CAA under step 2 of *Chevron* and found that the Agency's position was reasonable. The Fifth Circuit held that the CAA did not dictate the outcome put forth by environmental petitioners in the *Luminant Generation* v. *EPA* case; the court did not hold that the Agency could not reasonably interpret the CAA provisions at issue to come to the new position articulated in the SNPR and other sections of this document. In fact, the Fifth Circuit upheld the EPA's reading of the statute to preclude affirmative defense provisions for planned events in the same decision as a reasonable interpretation of the CAA.

In the SNPR, the EPA also addressed the discussion in the *NRDC* v. *EPA* decision that referred to the earlier *Luminant Generation* v. *EPA* decision and explained its view that the court in *NRDC* v. *EPA* did not suggest that its interpretation of the CAA would not apply more broadly to SIP provisions. Rather, the court simply declined to address that issue. As to commenters' allegation that the EPA should follow the *Luminant* court's reasoning because that court addressed the specific issue of affirmative defenses in SIP provisions, the EPA has explained in detail in the SNPR and section IV.D.1 of this document why it now believes that the *NRDC* court's reasoning is applicable here and why it believes this is the better interpretation of sections 113 and 304.

The EPA acknowledges that other circuit courts have also upheld affirmative defense provisions promulgated by the Agency in FIPs.[51] Those decisions were also based upon an interpretation of the CAA that the Agency no longer holds. The EPA further notes that the affirmative defense provisions at issue in the other court decisions cited by the commenters are not at issue in this action. However, the EPA may elect to address these provisions in a separate rulemaking.

The EPA also disagrees with commenters' allegations that this final SIP call action violates the mandate rule. The mandate rule generally governs how a lower court handles a higher court's decision on remand. The Agency believes that the mandate rule is inapplicable here. Similarly, the Agency believes that the principles of *res judicata,* judicial estoppel and collateral estoppel (issue preclusion) raised by commenters are all inapplicable in this situation. For reasons the EPA has fully explained in this rulemaking, the Agency is adopting a revised interpretation of the CAA. This necessarily changes the issues or claims that may be raised in any future litigation concerning the Agency's action here or subsequent Agency actions taken pursuant to this changed interpretation. As noted previously, the Agency's ability to change its interpretation of the statute is well established, even if courts have previously upheld the Agency's former interpretation as reasonable under step 2 of the *Chevron* analysis.

8. Comments that affirmative defense provisions are needed or appropriate because sources cannot control malfunctions or the excess emissions that occur during them.

Comment: Several commenters claimed that by requiring states to remove affirmative defense provisions, the EPA will create a situation where sources have no potential relief from liability for exceedances resulting from excess emissions during malfunctions. The commenters argued that this will effectively expose sources to penalties for emissions that are not within the sources' control. The commenters alleged that the EPA's proposal is unreasonable because it fails to consider the infeasibility of controlling emissions during malfunction periods. The commenters believe that because malfunction events are uncontrollable by definition, removing affirmative defense provisions applicable to malfunctions will not reduce emissions but instead will only expose facilities to potential enforcement for uncontrollable exceedances.

Response: The EPA disagrees that without affirmative defense provisions, sources will have no ''relief'' from liability for violations during actual malfunctions. To the extent that sources have an actual malfunction, sources retain the ability to raise this fact in the event of an enforcement action related to the malfunction. Congress has already provided courts with explicit jurisdiction and authority to determined liability and to impose appropriate remedies, based on the facts and circumstances surrounding the violation. To the extent that there are extenuating circumstances that justify not holding a source responsible for a violation or not imposing particular remedies as a result of a violation, sources retain the ability to raise these facts to the court. In addition, the absence of an affirmative defense provision in the SIP does not impede a violating source from taking appropriate actions to minimize emissions during a malfunction, so as to mitigate the potential remedies that a court may impose as a result of the violation.

Furthermore, the EPA disagrees with the commenters' premise that states have authority to create affirmative defense provisions in SIPs because some sources may otherwise be subject to enforcement actions for emissions during malfunctions. As explained in the SNPR in detail, the EPA has concluded that there is no legal basis for affirmative defenses in SIP provisions, including affirmative defenses applicable to malfunction events. Because such affirmative defense provisions purport to alter or eliminate the statutory jurisdiction of courts to determine liability and to assess appropriate remedies for violations of SIP requirements, these provisions are not permissible.

9. Comments that there will not be any reduction in overall emissions from the EPA's SIP call action because states will need to revise emission limitations to allow more emissions if affirmative defense provisions are removed from the SIPs.

Comment: Commenters on the SNPR questioned whether the elimination of affirmative defenses in SIP provisions would result in any reductions of emissions from sources. Several commenters asserted that affirmative defense provisions allow states to lower emission limitations overall. Thus, the commenters claimed that elimination of the affirmative defense provisions would obligate states to raise affected emission limitations so that sources could comply with them continuously. Another commenter criticized the EPA's approach as requiring each state to reframe the existing episodic emissions provisions of its SIP as alternative emission limitations rather than as more limited and conditional affirmative defenses. This commenter asserted that structuring the provisions as an affirmative defense allows a state to impose more stringent numerical limitations without penalizing sources for unavoidable emissions when those

[51] *See Montana Sulphur & Chemical Co.* v. *EPA,* 666 F.3d 1174 (9th Cir. 2012); *Arizona Public Service Co.* v. *EPA,* 562 F.3d 1116 (10th Cir. 2009).

emissions do not compromise the underlying air quality objectives.

Several commenters also disagreed with the EPA's belief that removal of affirmative defense provisions would reduce emissions. One commenter noted that some affirmative defense provisions require a source to evaluate impacts on NAAQS compliance as part of asserting the affirmative defense; the commenter contended that forgoing these provisions would thus reduce the incentive for owners and operators to minimize emissions during malfunctions so that they could qualify for the affirmative defense. Several commenters noted that many sources immediately investigate excess emissions events and implement measures intended to prevent recurrence. Nevertheless, those commenters asserted that because malfunction events are uncontrollable by definition, removing an affirmative defense applicable to malfunctions will not reduce emissions. Commenters also argued that an assumption that elimination of the affirmative defense provisions will reduce emissions is flawed because, given the stringent applicability criteria for a ''narrowly drawn'' affirmative defense, a facility has no assurance that an affirmative defense will apply to any particular malfunction event and that even if the affirmative defense was available, it would not shield the facility from compliance orders or other injunctive relief (or from criminal prosecution).

Response: The commenters' arguments concerning whether elimination of affirmative defense provisions will or will not reduce emissions during SSM events and will or will not reduce incentives for sources to minimize emissions during SSM events do not address the legal basis for any such affirmative defense provisions. As the commenters correctly observed, the EPA's 1999 SSM Guidance reflected the Agency's prior interpretation of the CAA to permit such affirmative defense provisions, so long as they were sufficiently narrowly drawn, applied only to monetary penalties and required the source to prove that it met the applicable criteria to the trier of fact in an enforcement proceeding. The EPA's arguments for why appropriate affirmative defense provisions could be consistent with CAA requirements included that they could provide an incentive for sources to be properly designed, maintained and operated to minimize emissions at all times.

As explained in the SNPR, however, the EPA has determined that affirmative defenses are impermissible in SIP provisions because they operate to alter or eliminate the statutory jurisdiction of the courts. The EPA has reached this conclusion in light of the court's decision in *NRDC* v. *EPA*. Because affirmative defense provisions are inconsistent with the enforcement structure of the CAA, the EPA is making the finding that such provisions are substantially inadequate to meet legal requirements of the CAA. In order to make the finding that these provisions fail to meet legal requirements of the CAA, the EPA is not required to determine or estimate emission reductions that will or will not result from the removal of such provisions from the affected SIPs. The EPA believes this action is necessary to provide environmental protection. However, the EPA's obligation as a legal matter would not change even if commenters were correct in their view that emissions reductions will not result from the removal of the impermissible affirmative defense provisions. The EPA's interpretation of its authority under section 110(k)(5) is discussed in detail in section VIII.A of this document.

The EPA agrees that in response to this SIP call directing the removal of affirmative defense provisions, the affectedstates mayelect torevise affected SIP emission limitation. In so doing, the states may determine that it isappropriate torevise theemission limitations in other respects, so long as they do so consistent with CAA requirements. For example, affected statesmayelecttocreatealternative emission limitations that apply to sources during startupandshutdown. The EPA's guidance for this approach is discussed in detail in VII.B.2 of this document. Alternatively, statesmay elect to overhaul an affected SIP emission limitation entirely to account for the removal of the affirmative defense in some other way. However, states will need to comply with the applicable substantive requirements for the type of SIP provision at issue and the EPA will review those SIP revisions inaccordance withtherequirements of the CAA, including sections 110(k)(3), 110(l) and 193.

10. Comments that the elimination of affirmative defense provisions will result in sources' facing inconsistent treatment by courts or states when excess emissions are emitted during malfunction events.

Comment: Commenters claimed that the concept and framework for affirmative defense provisions are consistent from state to state and that by removing these provisions, sources will be subject to inconsistent treatment of excess emissions during SSM in different states. The commenters noted that the EPA recognized in the February 2013 proposal and SNPR that states may elect to revise their deficient SIP provisions differently in response to the SIP call and thus the commenters expressed concern that the potential difference in treatment among states will lead to ''inconsistent regulation of air pollution across the country.''

Commenters further argued that without the consistent regulatory framework provided by an affirmative defense provision, each court is likely to evaluate SSM events differently in the context of enforcement actions. The commenters suggested that allowing each court to consider the facts and circumstances of the emission event in its penalty evaluation without a governing framework could lead to inconsistent enforcement throughout the country.

Response: The EPA disagrees that it is inappropriate to allow states to determine how best to revise their SIPs in response to this SIP call, consistent with CAA requirements. As discussed in this document, and as many commenters have also noted, the structure of the CAA is based upon cooperative federalism. Under this structure, Congress gave states broad discretion to develop SIP provisions as necessary to attain and maintain the NAAQS and meet other CAA objectives, so long as the SIPs also meet statutory requirements. The very nature of the SIP program is that similar sources can be treated differently in different states, because the states have discretion with respect to developing their SIP provisions consistent with CAA requirements. Thus, whether the affirmative defense provisions at issue in this action added some level of ''consistent'' treatment of sources across the nation (a statement with which the EPA does not agree) is not relevant for purposes of this SIP call.[52] Rather, for the reasons explained in the SNPR and in this document, the EPA has determined that affirmative defense provisions are inconsistent with the fundamental legal requirements of the CAA. For that reason, the EPA is requiring the affected states to revise their SIPs to remove the affirmative defense provisions identified in this action. States have discretion in how

[52] The EPA notes that the actual affirmative defense provisions at issue in this action are very dissimilar; some are based on the EPA's interpretation of the CAA in the 1999 SSM Guidance, but the majority of the provisions are relatively unique from state to state. Accordingly, the EPA disagrees with the commenters' basic premise that the affirmative defense provisions are consistent from state to state.

they revise their SIPs in this context as in all other contexts.

As to the concern that different courts might evaluate liability for violations during SSM events differently in the absence of affirmative defense provisions, the EPA notes that this is not the relevant question. The potential for inconsistent treatment by the courts is not a basis for allowing states to retain SIP provisions that are inconsistent with the legal requirements of the CAA. In any event, the EPA disagrees that elimination of affirmative defenses in SIP provisions make it more likely that there would be ''inconsistent enforcement'' because of a lack of a ''regulatory framework.'' The enforcement structure of the CAA embodied in section 113 and section 304 already provides a structure for enforcement of CAA requirements in federal courts. For example, the CAA already provides uniform criteria for courts to apply, based upon the facts and circumstances of individual enforcement actions. Similar to an affirmative defense provision, section 113(e) already enumerates the factors that courts are required to consider in determining appropriate penalties for violations and thus there is a consistent statutory framework. In essence the commenters object to the fact that in any judicial enforcement case, the court will determine liability and remedies based on the facts and circumstances of the case. However, this is an inherent feature of the enforcement structure of the CAA, regardless of whether there is an affirmative defense provision at issue.

11. Comments that the EPA should have acted in a single, comprehensive rulemaking rather than issuing the supplemental notice of proposed rulemaking.

Comment: Commenters asserted that the EPA's issuance of two separate proposals instead of one proposal has prevented states and industry from knowing the entire proposed regulatory action. The commenters claimed that if the EPA is going to issue a SIP call to states concerning the treatment of emissions during SSM events, then it should do so in a single comprehensive rulemaking. The commenters argued this is necessary because states consider different options when revising SIP provisions and that thereafter states will have to work with affected sources to revise permits.

Response: The EPA disagrees with the argument that states, industry, individuals and other interested parties have not had an opportunity to know and comment upon the Agency's entire action. The EPA's February 2013 proposal was intended to cover a broad range of issues related to the correct treatment of emissions during SSM events in SIP provisions comprehensively. Because of an intervening court decision that affected the substance of the EPA's initial proposed action, it was necessary to issue a supplemental proposal. The EPA disagrees that the issuance of the SNPR adversely affected the ability of interested parties to understand the Agency's proposed action, because the SNPR only affected one aspect of the original proposed action. As the EPA explained in the SNPR: ''In this SNPR, we are supplementing and revising what we earlier proposed as a response to the Petitioner's requests but only to the extent the requests narrowly concern affirmative defense provisions in the SIPs. We are not revising or seeking further comment on any other aspects of the February 2013 proposed action.''[53]

As to the commenters' concern that the EPA should take action in a single comprehensive rulemaking, the Agency is doing so. This SIP call action addresses all aspects of the Petition and it is based upon both the February 2013 proposal and the SNPR. As advocated by the commenters, the EPA's objective in this SIP call action is to provide states with comprehensive and up-to-date guidance concerning the correct treatment of emissions during SSM events in SIP provisions, consistent with CAA requirements as interpreted by recent court decisions. The EPA agrees with the commenters that providing states comprehensive guidance in this rulemaking is important to assist states in revising their SIP provisions consistent with CAA requirements. Any necessary changes to permits to reflect the removal of affirmative defense provisions from the underlying SIP will occur later, after the SIP provisions have been revised.

12. Comments that the EPA has not proven that the existence of affirmative defense provisions in SIPs is resulting in specific environmental impacts or interference with attainment and maintenance of the NAAQS.

Comment: Several commenters argued that the EPA has failed to demonstrate that the affirmative defense provisions at issue in this action have contributed to a specific NAAQS violation or otherwise caused harm to public health or the environment. The commenters contend that, because of the narrow scope of affirmative defense provisions, it is unlikely that their existence would cause or contribute to any violations of the NAAQS. Some commenters further noted that some states have experienced improved ambient air quality conditions, despite having SIPs in place with affirmative defense provisions at issue in this action.

The commenters alleged that without providing specific record-based evidence of the impacts caused by affirmative defense provisions, it is unreasonable for the EPA to determine that existing provisions are substantially inadequate or otherwise not in compliance with the CAA. Some commenters further alleged that the EPA has no authority to issue a SIP call without ''find[ing] that the applicable implementation plan . . . is substantially inadequate to attain or maintain the relevant [NAAQS].''

Response: As explained in the February 2013 proposal, the SNPR and this document, the EPA does not interpret its authority under section 110(k)(5) to require proof that a deficient SIP provision caused a specific violation of the NAAQS at a particular monitor on a particular date, or that a deficient SIP provision undermined a specific enforcement action. Section 110(k)(5) explicitly authorizes the EPA to make a finding that a SIP provision is substantially inadequate to ''comply with any requirement of'' the CAA, in addition to the authority to do so where a SIP is inadequate to attain and maintain the NAAQS or to address interstate transport. In light of the court's decision in *NRDC* v. *EPA,* the EPA has reexamined the question of whether affirmative defenses are consistent with CAA requirements for SIP provisions. As explained in this action, the EPA has concluded that such provisions are inconsistent with the requirements of section 113 and section 304. Accordingly, the EPA has the authority to issue SIP calls to states, requiring that they revise their SIPs to eliminate the specific affirmative defense provisions identified in this action. Issues related to the EPA's authority under section 110(k)(5) are discussed in more detail in section VIII.A of this document.

13. Comments that the EPA is violating the principles of cooperative federalism through this action.

Comment: Several commenters stated that the EPA's action with respect to affirmative defenses in SIP provisions is inconsistent with the system of cooperative federalism contemplated by the CAA. The commenters alleged that this action is at odds with established CAA and judicial precedents indicating that states have broad discretion in developing SIP provisions, with the EPA's role being limited. Some commenters further alleged that the

[53] 79 FR 55919 at 55923.

EPA's action has the effect of unlawfully directing states to impose a particular control measure. The commenters argued that the EPA must defer to a state's choices on how to meet the relevant NAAQS, through whatever SIP provisions the state elects to develop. One commenter argued that states have independent authority to include affirmative defense policies in their SIPs, even if the DC Circuit has held that the EPA may not include affirmative defense provisions in federal regulations.

Response: The EPA agrees that the CAA is based upon the principle of cooperative federalism but disagrees with the commenters' characterization of the respective authorities and responsibilities of states and the Agency. As explained in the February 2013 proposal, and in section V.D.2 of this document, the EPA has the authority and the obligation to ensure that SIP provisions meet fundamental CAA requirements, when initially submitted and later. In the case of affirmative defenses in SIP provisions, the EPA has determined that such provisions do not comply with CAA requirements because they operate to alter or eliminate the statutory jurisdiction of the courts, contrary to section 113 and section 304. The states have broad discretion in how to create SIP provisions but must do so consistent with CAA requirements. By issuing this SIP call, the EPA is not in any way compelling states to impose any specific SIP control measure on any specific source but merely requiring states to revise their SIP provisions to make them consistent with CAA requirements.

14. Comments that the EPA failed to account adequately for the amount of time and resources that will be required to revise state SIPs.

Comment: Many commenters asserted that the SNPR did not recognize that removal of affirmative defense provisions from SIPs will impose enormous burdens on states because they will need to revise SIPs to create alternative emission limitations in lieu of the affirmative defenses. Commenters contended that removal of the affirmative defense provisions will necessarily require state air agencies to make extensive revisions to SIPs and that in many states, such changes will have to be reviewed by the state legislature. Commenters explained that such an effort could not reasonably be completed in many states within the 18 months the EPA proposed to provide for SIP revisions in response to the final SIP call. Commenters also stated that the SSM provisions that the EPA proposed to require states to remove from their SIPs have been incorporated into thousands of title V operating permits and that those title V permits would, in turn, need to be modified if the affirmative defense provisions are removed from the approved SIPs. Commenters indicated that states might also need to amend an even larger number of minor source permits.

Commenters also indicated that in conjunction with removal of affirmative defenses, states will also have to reevaluate the emission limitations currently contained in their SIPs to determine if those limitations are still are consistent with federal and state law (*e.g.,* represent reasonably available control technology). Some commenters expressed the view that the EPA must indicate that states will not be required to remove the identified affirmative defense provisions from their SIPs until the state has had time to consider whether emission limitations in state regulations and in construction and operating permits need to be modified and to obtain any necessary EPA approval for the modified requirements. Commenters also argued that the EPA's suggestion that states subject to a SIP call could simply remove an existing affirmative defense provision and rely on enforcement discretion to address ''unavoidable'' exceedances is wrong and that states adopt emission limitations under state administrative rules that require the agency to provide a record to support the level of the emission limitation.

Response: The EPA has acknowledged that correction of the deficient SIP provisions at issue in this action will take time and resources. For this reason, the EPA is providing states with the maximum time (18 months) permitted by section 110(k)(5) to respond to this SIP call. In addition, the EPA is endeavoring to provide states with clear and comprehensive guidance concerning the proper treatment of excess emissions during SSM events in SIP provisions in order to make this process more efficient.

The EPA acknowledges that some states, in conjunction with removal of affirmative defense provisions, may elect to undertake a more comprehensive revision of affected SIP emission limitations. In so doing, the states may need to undertake a more resource intensive approach than those states that merely elect to eliminate the affirmative defense provisions. In addition, the EPA also recognizes that states may eventually need to revise permits to reflect the elimination of affirmative defense provisions from underlying SIP provisions that may have been reflected in permits. The EPA discussed these issues in the both the February 2013 proposal and in the SNPR. A summary of comments concerning revisions to operating permits to reflect the revised SIP provisions appears, with the EPA's response to comments, in section VIII.D.28 of this document.

Despite the potential burden on states, as the EPA explained in the February 2013 proposal and the SNPR, the Agency believes that it is obligated and authorized to issue this SIP call action to affected states to require the removal of affirmative defense provisions. The EPA is not in this action evaluating or determining whether SIP emission limitations should or should not be revised in light of the removal of affirmative defenses and is not required to do so. The states have discretion to determine how best to revise the deficient SIP provisions identified in this action, so long as they do so consistent with the CAA requirements.

Further, the EPA does not agree that enforcement discretion cannot substitute for an affirmative defense for malfunctions. For example, the EPA has taken the position that the CAA does not require malfunction emissions to be factored into development of section 112 or section 111 standards and that case-by-case enforcement discretion provides sufficient flexibility.[54] Moreover, the EPA believes that Congress has already provided for such flexibility in section 113, by providing the courts with jurisdiction to determine liability and to impose remedies. For example, in section 113(e), Congress provided specific criteria for courts to consider in imposing monetary penalties, including consideration of such factors as justice may require.

With respect to the potential need to amend permits, as explained in the February 2013 proposal, ''the EPA does not intend its action on the Petition to affectexisting permittermsor conditions regarding excess emissions during SSM events that reflect previously approved SIP provisions. . . . [A]ny 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.'' [55] Thus, these permit revisions that commenters expressed concern about need not occur during the 18-

[54] *See, e.g.,* ''Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards; Proposed rule,'' 79 FR 41752 at 41762–63 (July 17, 2014).

[55] *See* February 2013 proposal, 78 FR 12459 at 12482 (February 22, 2013).

month SIP development timeframe but may proceed thereafter according to normal permit revision requirements.

Finally, the EPA notes, the burdens associated with SIP revisions and permit revisions are burdens imposed by the CAA. The states have both the authority and the responsibility under the CAA to have SIPs and permit programs that meet CAA requirements. It is inherent in the structure of the CAA that states thus have the burden to revise their SIPs and permits when that is necessary, whether because of changes in the CAA, changes in judicial interpretations of the CAA, changes in the NAAQS, or a host of other potential events that necessitate such revisions. Among those is the obligation to respond to a SIP call that identifies legal deficiencies in specific provisions in a state's SIP.

15. Comments that the EPA is being inconsistent because rules promulgated by the EPA provide affirmative defense provisions for malfunction events.

Comment: A number of commenters claimed that the EPA cannot interpret the CAA to prohibit affirmative defenses in SIP provisions because the Agency itself has issued regulations that include affirmative defenses for excess emissions during malfunction events. The commenters claim that the EPA is being inconsistent on this point and thus cannot require states to remove affirmative defenses from SIPs.

Other commenters alleged that the EPA is being inconsistent because it has not adequatelyexplained the reversal of its ''decades-old'' policy interpreting the CAA to allow affirmative defenses in SIP provision. The commenters cited to SIP provisions that the EPA previously approved in eight states between 2001 and 2010 that they believed would be affected by this SIP call. The commenters claimed that these prior actions were consistent with the EPA's SSM policy memoranda. Additionally, thecommenters citedtofederal regulations that the EPA has previously promulgated that include affirmative defense provisions. The commenters claimedthat these prior actions are ''inconsistent with EPA's proposed disallowance of affirmative defenses.''

Response: The EPA has acknowledged that it has previously approved some SIP provisions with affirmative defenses that were consistent with its interpretation of the CAA in the 1999 SSM Guidance at the time it acted on those SIP submissions. However, since that time, two decisions from the D.C. Circuit have addressed fundamental interpretations of the CAA related to the legally permissible approaches for addressing excess emissions during SSM events.[56] In light of those decisions, as explained in detail in the February 2013 proposal, the SNPR and this document, the EPA has concluded that certain aspects of its prior interpretation of the CAA, as set forth in the SSM Policy, were not the best interpretation of the CAA. As a result, certain SIP provisions that the EPA previously approved are also not consistent with the requirements of the CAA. In particular, this includes the EPA's prior interpretation of the CAA to allow affirmative defense provisions in SIPs in the 1999 SSM Guidance.

The EPA has also acknowledged that it has in the past taken a similar approach regarding affirmative defense provisions in federal regulations addressing hazardous air pollution and in new source performance standards. Indeed, the EPA's inclusion of an affirmative defense provision in a federal regulation resulted in the court decision in *NRDC* v. *EPA,* in which the court rejected the Agency's interpretation of the CAA to allow affirmative defenses that limit or eliminate the jurisdiction of the courts. Just as the EPA is calling on states to revise their SIPs to remove affirmative defense provisions, the Agency is also taking action to correct such provisions in federal regulations.[57] The continued existence of such provisions in the EPA regulations that have not yet been corrected does not mean that such provisions are authorized either in state or federal regulations.

As to the claim that the EPA has not adequately explained the basis for changing its interpretation of the CAA regarding affirmative defenses in SIP provisions, the Agency disagrees. The SNPR set forth in detail the basis for the EPA's revised interpretation of the CAA, in light of the court's decision in *NRDC* v. *EPA*.[58] The commenters failed to specify why this explanation was ''inadequate.''

16. Comments that existing affirmative defense provisions do not preclude parties from filing enforcement actions or hinder parties from seeking injunctive relief for violations of SIP requirements.

Comment: One state commenter asserted that the existing affirmative defense provisions in the state's SIP do not prevent the state or the EPA from pursuing injunctive relief or mitigation of environmental impacts in the event of violations. Thus, the commenter supported the EPA's prior interpretation of the CAA to allow affirmative defense provisions, so long as courts can still award injunctive relief for violations. The commenter did not articulate how this prior statutory interpretation is consistent with the reasoning of the court in *NRDC* v. *EPA* concerning the same statutory provisions.

By contrast, an environmental group commenter cited a citizen suit enforcement case in Texas in which the commenter claimed that the affirmative defense provision in that state's SIP operated as a *de facto* shield against any enforcement. The commenter stated that the EPA's approval of the affirmative defense was premised upon its only applying to civil penalties and not to injunctive relief and that the Agency's approval of the SIP provision was explicitly upheld on this basis by the Fifth Circuit. Nevertheless, the commenter asserted, the state agency has implemented this provision such that if the affirmative defense criteria are met, there is ''no violation'' and thus no potential for injunctive relief.

Response: The EPA agrees that some of the affirmative defense provisions at issue in this action are expressly limited to monetary penalties and not to injunctive relief. This approach was consistent with the EPA's prior interpretation of the CAA concerning affirmative defense provisions in SIPs but also consistent with the arguments that the D.C. Circuit rejected in the *NRDC* v. *EPA* decision. Thus, the fact that some of the affirmative defense provisions addressed in this action preserve the possibility for injunctive relief, even if the court could award no monetary penalties, is no longer a deciding factor.

The EPA also agrees that some agencies or courts may not apply the affirmative defense provisions in the manner intended at the time the EPA approved them into the SIP. Incorrect application of SIP affirmative defense provisions by sources, regulators or courts is a matter of concern. However, even perfect implementation of a SIP affirmative defense provision does not cure the underlying and now evident absence of a legal basis for such provisions. Again, the fact that a given affirmative defense provision is being implemented correctly or incorrectly is no longer a deciding factor for purposes of this SIP call action.

These issues are not pertinent to the EPA's decision in this action to require states to remove the affirmative defense provisions from the previously approved SIPs. Rather, as explained in

[56] *See Sierra Club* v. *Johnson,* 551 F.3d 1019 (D.C. Cir. 2008), in the rulemaking docket at EPA–HQ–OAR–2012–0322–0048; *seealso NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014), in the rulemaking docket at EPA–HQ–OAR–2012–0322–0885.

[57] *See, e.g.,* 79 FR 60897 (October 8, 2014); 79 FR 72914 (December 8, 2014).

[58] 79 FR 55919 at 55929–30.

detail in the SNPR and this final action, the EPA is requiring the affected states to remove these SIP provisions because they are inconsistent with CAA requirements. As explained in the SNPR, the EPA has concluded that such affirmative defenses in SIP provisions are inconsistent with section 113 and section 304, in light of the reasoning of the court in *NRDC* v. *EPA*.

17. Comments that the EPA is changing its policy on affirmative defenses, and this change is arbitrary and capricious and thus an impermissible basis for a SIP call.

Comment: Several commenters stated that the EPA's action with respect to affirmative defense provisions marks a change in the EPA's approach to these provisions. The commenters alleged that this SIP call action is not mandated by judicial precedent, and therefore the SNPR simply reflected a ''policy change'' by the EPA. The commenters argued that, while the EPA is permitted to change its policy or interpretation of the law, this specific change is arbitrary and capricious and forces unreasonably difficult and burdensome requirements on states and sources. The commenters asserted that the EPA failed to explain adequately this change in policy or to document reasons for the change in the administrative record. Some commenters further alleged that the EPA does not have authority to impose its policy preferences on states.

Response: The EPA disagrees that the basis for this SIP call action is a change of ''policy'' as alleged by the commenters. The EPA's guidance to states concerning the proper treatment of excess emissions during SSM events in SIP provisions is provided in the SSM Policy, but this guidance reflects the Agency's interpretation of statutory requirements. As explained in detail in the SNPR and in this document, the EPA is changing its interpretation of the CAA with respect to affirmative defenses in SIP provisions based on the logic of the court in *NRDC* v. *EPA*. Further, as acknowledged by commenters, the EPA is permitted to change its interpretation of the statute provided that it clearly explains the basis for the change. The EPA clearly explained the basis for the changed interpretation in the SNPR based on its analysis of the legal rationale respecting sections 113 and 304 in the *NRDC* v. *EPA* decision.

18. Comments that emissions during malfunction periods are not ''excess'' or ''violations'' but rather are part of the established SIP emission limitations.

Comment: Commenters cited the EPA's brief filed in the Fifth Circuit *Luminant Generation* v. *EPA* case in support of an argument that states are not required to attach a penalty or any certain amount of penalty to a violation of a SIP emission limitation. The commenters noted that in the brief, the EPA stated that under section 110 of the CAA, states are authorized ''to determine what constitutes a violation, and to distinguish both quantitatively and qualitatively between different types of violations.'' Further, the commenter noted, the EPA argued in the brief that because the violation is defined by the state, an affirmative defense does not impinge on the court's jurisdiction. The commenters contended that nothing has changed since the brief was filed to justify a change in interpretation of the CAA and that the EPA failed to explain why its prior interpretation is no longer correct.

Other commenters claimed that the EPA takes the position that affirmative defenses in SIP provisions conflict with the court's jurisdiction over enforcement actions and stated that this position is flawed because enforcement is limited to violations as defined in the context of the SIP. The commenters asserted that section 304 does not apply when there is no SIP requirement being violated and that the state has the authority to define what constitutes such a violation. Similarly, commenters argued that an affirmative defense provision may provide that emissions will not be ''violations'' if criteria are met and that it therefore does not interfere with a court's ability to determine appropriate penalty amounts under section 113. The commenters contended that, because the state has the authority to define what constitutes a violation, SIP provisions that include an affirmative defense do not infringe on a court's authority to penalize a source because the CAA does not provide a court with jurisdiction to impose remedies in the absence of liability.

Response: The EPA explained in detail the rationale for its change in interpretation of the CAA regarding affirmative defenses in the SNPR. The EPA acknowledges that in the *Luminant Generation* v. *EPA* case, the Agency argued that states are authorized to determine what constitutes a violation and to distinguish between different types of violations. As the EPA explained in the SNPR, the court in *Luminant Generation* v. *EPA* held that the Agency's interpretation of the CAA to permit affirmative defenses applicable to malfunctions at that time was a ''permissible interpretation of section [113], warranting deference.'' The same court also upheld the EPA's interpretation of the CAA to preclude affirmative defenses for planned events on the same basis that it was a reasonable interpretation of the CAA. However, the EPA has reevaluated this interpretation of the CAA requirements in light of the more recent *NRDC* v. *EPA* decision, and the Agency now believes that its prior interpretation of the CAA with respect to the approvability of affirmative defense provisions in SIPs is no longer the best reading of the statute. Thus, the Agency's view now is that a ''violation'' cannot be defined in a manner that interferes with the court's role in assessing remedies. It is irrelevant that the EPA had argued for a different interpretation in the past as the Agency now believes that the court's analysis in *NRDC* v. *EPA* is the better reading of the provisions of the statute concerning affirmative defenses. The EPA has authority to revise its prior interpretation of the CAA when further consideration indicates to the Agency that its prior interpretation of the statute is incorrect. The EPA fully explained the basis for this change in its interpretation of the CAA in the SNPR.

The EPA agrees that in some cases, affirmative defense provisions at issue in this SIP call action are structured as a complete defense to any liability, not merely a defense to monetary penalties. The EPA has also determined that affirmative defense provisions of this type are substantially inadequate to meet CAA requirements. Although such affirmative defenses may not present the same concerns as affirmative defenses applicable only to penalties, such affirmative defenses may create a different concern because they in effect provide a conditional exemption from otherwise applicable emission limitations. If there is no ''violation'' when the criteria of such an ''affirmative defense'' are met and no legitimate alternative emission limitation applies during that event, then such an affirmative defense in effect operates to create a conditional exemption from applicable emission limitations. This form of ''affirmative defense'' provision therefore runs afoul of different CAA requirements for SIP provisions. Under section 302(k) of the CAA, emissions standards or limitations must be continuous and cannot include SSM exemptions, automatic or otherwise. Regardless of whether the commenters believe that this form of ''affirmative defense'' should be allowed, the EPA believes that provisions of this form are inconsistent with the decision of the court in *Sierra Club* v. *Johnson*.[59] In that case, the court held that emission limitations under the CAA must impose

[59] 551 F.3d 1019 (D.C. Cir. 2008).

continuous controls and cannot include exemptions for emissions during SSM events. The EPA concludes that making the exemptions from emission limitations conditional does not alter the fact that once exercised they are illegal exemptions.

19. Comments that the definition of ''emission limitation'' in CAA section 302(k) does not support this SIP call action.

Comment: Several commenters noted that while the EPA depends on the definition of ''emission limitation'' in the CAA section 302(k) for this action, that CAA provision does not support this SIP call action, including that the CAA does not require that SIPs contain continuous emissions standards in the form asserted by the EPA. The commenters alleged that the definition in the CAA and supporting materials interpreting that definition do not support the EPA's requiring one emission limitation to apply in all circumstances at all times. Some commenters further alleged that states subject to the EPA's SIP call action have implementation plans that provide emission limitations that apply continuously through a combination of numerical emission limitations, the general duty to minimize emissions and the affirmative defense criteria for excess emissions during malfunctions.

Several commenters questioned why, even if the challenged affirmative defense provisions do not qualify as ''emission limitations'' or ''emissions standards'' under the first part of the definition, they are not approvable as ''design, equipment, work practice or operational standards'' promulgated under the second part of the definition. Some commenters argued that, to the extent that affirmative defense provisions in SIPs do not satisfy the definition of ''emission limitation,'' they would still be approvable elements of a SIP as ''other control measures, means, or techniques'' allowed under CAA section 110(a)(2). Further, some commenters believe that the legislative history cited in the SNPR does not support the EPA's position but rather is only intended to preclude the use of dispersion techniques, such as intermittent controls.

One commenter stated that the Portland Cement NESHAP, at issue in the *NRDC* v. *EPA* decision, was classified by statute as an ''emissions standard,'' a term defined by the CAA and defined as applying ''on a continuous basis.'' The commenter stated that SIP provisions involve more than ''emissions standards'' and need not be ''emissions standards.'' [60] Thus, according to the commenter, the *NRDC* v. *EPA* decision does not apply to SIP rules.

Response: The commenters alleged that the EPA's interpretation of the CAA section 302(k) definition of ''emission limitation'' in this action was inappropriate and that section 302(k) does not support this SIP call action. The EPA notes that it is not the Agency's position that all emission limitations in SIP provisions must be set at the same numerical level for all modes of source operation or even that they must be expressed numerically at all. To the contrary, the EPA intended in the February 2013 proposal and the SNPR to indicate that states may elect to create emission limitations that include alternative emission limitations, including specific technological controls or work practices, that apply during certain modes of source operation such as startup and shutdown. However, this comment is not relevant to the issue of affirmative defense provisions in SIPs. It is not for the reason that affirmative defense provisions do not meet the definition of an ''emission limitation'' in section 302(k) that the EPA is promulgating this SIP call action for affirmative defense provisions. The EPA has concluded that affirmative defense provisions are substantially inadequate to meet CAA requirements concerning enforcement, in particular the requirements of section 113 and section 304.

As to commenters' argument that affirmative defense provisions can be appropriately considered to be ''design, equipment, work practice or operational standards'' under CAA section 302(k), the critical aspect of an emission limitation in general is that it be a ''requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis . . . .'' These provisions operate to *excuse* sources from liability for emissions under certain conditions, not to *limit* the emissions in question. The affirmative defense provisions at issue in this final action do not themselves, or in combination with other components of the emission limitation, limit the quantity, rate or concentration of air pollutants on a continuous basis. These affirmative defense provisions, therefore, do not themselves meet the statutory definition of an emission limitation under section 302(k).

The EPA notes that the definition of ''emission limitation'' in section 302(k) is relevant, however, with respect to those affirmative defense provisions that commenters claim are merely a means to define what constitutes a ''violation'' of an applicable SIP emission limitation. As previously explained, the EPA believes that an ''affirmative defense'' structured in such a fashion is deficient because it in effect creates a conditional exemption from the SIP emission limitations. By creating such exemptions, conditional or otherwise, an affirmative defense of this type would render the emission limitations less than continuous.

The EPA disagrees with commenters' remaining points because the EPA's position on what appropriately qualifies as an emission limitation is consistent with the CAA, relevant legislative history and case law. These issues are addressed in more detail in sections VII.A.3.i through 3.j of this document.

20. Comments that the EPA has failed to show that state SIPs are substantially inadequate, as is required to promulgate a SIP call.

Comment: Several commenters noted that before the EPA can issue a SIP call under section 110(k)(5) with respect to affirmative defense provisions, the EPA must determine that a SIP provision is ''substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter.'' The commenters further stated that Congress employed a high bar in the language of CAA section 110(k)(5) in requiring the EPA to find ''substantial'' inadequacies, as opposed to other CAA provisions that permit the Agency to act based on ''discretion'' or when it ''may be appropriate.'' The commenters alleged that the EPA has not demonstrated a ''substantial inadequacy'' with respect to the affirmative defense provisions at issue in the SNPR, as required to issue a SIP call.

Some commenters also argued that the EPA has failed in its SNPR to define or interpret ''substantially inadequate'' or provide any standards for assessing the adequacy of a SIP with respect to affirmative defense provisions. The commenters also alleged that, if the EPA is required to rely on data and evidence in evaluating SIP revisions, it follows that the EPA should produce at least the same level of data and evidence, if not more, to support a SIP call that is based on the more stringent substantial inadequacy standard of section 110(k)(5).

Response: The EPA disagrees with the commenters' arguments that the Agency has failed to establish that the

[60] *See* CAA section 110(a)(2)(A).

affirmative defense provisions identified in the SNPR are ''substantially inadequate'' as required by section 110(k)(5). As explained in the SNPR and this action, the EPA has determined that affirmative defense provisions at issue in this action are substantially inadequate because they are inconsistent with applicable legal requirements of the CAA. The commenters raised similar arguments with respect to the EPA's authority to issue a SIP call to address other forms of deficient SIP provisions, such as automatic or discretionary exemptions from emission limitations. The EPA responds to these broader arguments in sections VIII.D.46 through D.48 of this document.

21. Comments that this action is not national in scope, and therefore the D.C. Circuit is not the sole venue for review of this action.

Comment: Several commenters claimed that the EPA is incorrect in stating that this SIP call action is a single nationally applicable action and of nationwide scope or effect. The commenters alleged that review of all affected SIP provisions in a single action in the D.C. Circuit would inappropriately limit the scope of review by obscuring distinctions between the various states' regulatory programs and practical concerns. The commenters asserted that none of the various state SIP provisions addressed in the SNPR were the same, and the EPA analyzed each separately and provided case-by-case justification for its proposed action as to each. Further, the commenters argued that although the EPA has packaged the SIP calls in one **Federal Register** document, any final action that the EPA takes with respect to a single state's affirmative defense provision is only locally applicable and therefore should be reviewed in the individual circuits with jurisdiction over the affected state. One commenter further contended that, while the EPA's revised SSM Policy may be of interest to states to which the SIP call does not directly apply, that does not make the action ''nationally applicable.''

The commenters acknowledged that the EPA cited *Texas* v. *EPA* in support of its assertion, but the commenters allege that the Fifth Circuit in that case never reached the issue of nationwide scope and effect.[61] The commenters claimed that this SIP call action is distinct from the rule at issue in *Texas* v. *EPA* because this final action turns on the particulars of the SIP call action's impact on each individual state's SIP. One commenter also claimed that the EPA has failed to provide authority or a legal basis to support its determination that this rulemaking is of ''nationwide scope or effect.'' Such failure, according to the commenter, violated the requirements of section 307(d)(3) and did not allow for full and meaningful comment on this issue.

One commenter alleged that the EPA has waived its challenge to venue for those circuits that have already weighed in regarding individual state SIP provisions at issue in this action, including Texas's affirmative defense provisions. Another commenter claimed that the discussion over appropriate venue in the February 2013 proposal and SNPR presupposes that the EPA's issuance of a revised SSM Policy is a ''final agency action'' subject to judicial review under section 307(b)(1) but argued that the EPA has failed to determine that its issuance of the SSM Policy, in and of itself, constitutes ''final agency action.''

Response: The EPA disagrees with the commenters' theories concerning the scope of the Agency's action. These comments on the SNPR questioning the EPA's determination of ''nationwide scope and effect'' for this action largely repeat similar comments on the February 2013 proposal. As with those prior comments, commenters on the SNPR made the basic argument that this action is not of nationwide scope and effect because the EPA is reviewing individual SIP provisions and directing states to correct their respective deficient SIP provisions. The EPA disagrees with commenters because, as explained in more detail in its response in section V.D.6 of this document, this rulemaking action applies the same ''process and standard'' to numerous areas across the country. While it is correct that the SIP submissions that states make in response to this SIP call will be reviewed separately by the EPA and subsequently subject to potential judicial review in various circuits, the EPA's legal interpretation of the CAA concerning permissible SIP provisions to address emissions during SSM events in this action is nationally applicable to all states subject to the SIP call. The EPA provided a full explanation of its basis for this determination of nationwide scope and effect in the February 2013 proposal and the SNPR.

The EPA also disagrees with the argument that the Agency has waived venue regarding challenges to this SIP call action concerning the affirmative defense provisions in the Texas SIP. Evidently, the commenter believes that because a prior challenge to another EPA rulemaking concerning the affirmative defense provisions occurred in the Fifth Circuit, it necessarily follows that any other rulemaking related to such provisions can only occur in the Fifth Circuit. The EPA believes that this interpretation of its authority under section 307(b)(1) is simply incorrect. Under section 307(b)(1), the EPA is explicitly authorized to make a determination that a specific rulemaking action is of ''nationwide scope and effect.'' The statute does not specify the considerations that the EPA is to take into account when making such a determination, let alone provide that the Agency cannot invoke this because some aspect of the rulemaking at issue might previously have been addressed in one or more other circuit courts. To the contrary, the EPA believes that section 307(b)(1) explicitly provides authority for the Agency to determine that a given rulemaking should be reviewed in the D.C. Circuit in situations such as those presented in this action that affects important questions of statutory interpretation that affect states nationwide.

The EPA likewise disagrees with the argument that its action is not a final agency action. Within this action, the EPA is taking final agency action to respond to the Petition, updating its interpretations of the CAA in the SSM Policy and applying its interpretations of the CAA in the SSM Policy to specific SIP provisions in the SIPs of many states. The EPA is conducting this action through notice-and-comment rulemaking to assure full consideration of the issues. As stated elsewhere in this document, the revised SSM Policy is a nonbinding policy statement that does not, in and of itself, constitute ''final'' action. However, the EPA is taking ''final'' action by responding to the Petition and issuing the resulting SIP call action. To the extent that interpretations expressed in the revised SSM Policy are also relied on to support this ''final'' action, then the EPA's interpretations of the CAA requirements for SIP provisions applicable to emissions during SSM events are part of the final agency action and are subject to judicial review. To the extent the commenters are otherwise arguing that the issuance of the updated SSM Policy in and of itself is not final agency action subject to judicial review under the CAA, the EPA agrees with this assertion. The EPA notes that the commenters are at liberty to adopt this position and waive their opportunity to challenge the SSM Policy because they do not consider it final agency action.

[61] *See* No. 10–60961, 2011 WL 710598 (5th Cir. Feb. 24, 2011).

22. Comments that the EPA should clarify that SIPs can include work practice standards or general-duty clauses to apply during malfunction periods in place of affirmative defense provisions.

Comment: Several commenters stated that the EPA should announce in this final action that in lieu of affirmative defenses, states may elect to revise their SIP provisions to include work practice standards or general-duty clauses that are modeled on existing affirmative defense provisions and that would apply during malfunctions. Most of these commenters advocated that the EPA's previously recommended criteria for an ''affirmative defense'' for malfunctions should simply be changed into criteria for a ''work practice'' provision instead. One commenter made the same suggestion but also advocated that the EPA eliminate six of the nine criteria and rephrase the remaining criteria, in order to ''improve the standards, reduce uncertainty, and reduce wasteful litigation.'' This commenter advocated that the EPA also redefine the term ''malfunction'' to much more broadly mean any ''sudden and unavoidable breakdown of process or control equipment.'' Specifically, the commenter advocated, the EPA should no longer recommend that a malfunction be defined as an event that: (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; (ii) could not have been prevented through careful planning, proper design or better operation and maintenance practices; (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. By changing the ''affirmative defense'' provisions for malfunctions into ''work practice'' or ''general duty'' provisions for malfunctions, the commenters argued, the revised provisions would be consistent with CAA requirements. Under this approach, the commenters asserted that compliance with these new requirements would mean that any emissions during a malfunction event could not be considered ''excess'' or result in any violation if the source had complied with the ''work practice'' criteria.

Response: As an initial matter, the EPA has not established a regulatory definition of ''malfunction'' that is binding on states when developing SIPs. States have the flexibility in their SIPs to define that term. Thus, the EPA is not addressing here the comments requesting that EPA ''redefine'' the definition of malfunction.

Regarding the more general concern of the commenters, that states be allowed to establish an alternative emission limitation in the form of a work practice standard that applies during malfunctions, the EPA notes two points. First, the CAA does not preclude that emissions during malfunctions could be addressed by an alternative emission limitation. The EPA's general position in the context of standards under sections 111, 112 and 129 is that: (i) The applicable emission limitation applies at all times including during malfunctions; (ii) the CAA does not require the EPA to take into account emissions that occur during periods of malfunction when setting such standards; and (iii) accounting for malfunctions would be difficult, if not impossible, given the myriad types of malfunctions that can occur across all sources in a source category and given the difficulties associated with predicting or accounting for the frequency, degree and duration of various malfunctions that might occur. Although the EPA has not, to date, found it practicable to develop emission standards that apply during periods of malfunction in place of an otherwise applicable emission limitation, this does not preclude the possibility that a state may determine that it can do so for all or some set of malfunctions. Second, states are not bound to establish any specific definition of ''malfunction'' in their SIPs. Thus, it is difficult to judge at this time whether any particular alternative emission limitation in a SIP for malfunctions, including any specific work practice requirements in place of another wise applicable emission limitation, would be approvable.

With regard to the specific comment that the affirmative defense criteria could be converted into a work practice requirement to apply during malfunctions in place of an otherwise applicable emission limitation, the EPA is unsure at this time whether the criteria previously recommended for an affirmative defense provision would serve to meet the obligation to develop an appropriate alternative emission limitation. Existing affirmative defense criteria (which include, among other things, making repairs expeditiously, taking all possible steps to minimize emissions and operating in a manner consistent with good practices for minimizing emissions) were developed in the context of helping to determine whether a source should be excused from monetary penalties for violations of CAA requirements and were not developed in the context of establishing an enforceable alternative emission limitation under the Act. The EPA would need to consider this approach in the context of a specific SIP regulation for a specific type of source and emission control system.

Finally, the EPA notes that any emission limitation, including an alternative emission limitation, that applies during a malfunction must meet the applicable stringency requirements for that type of SIP provision (*e.g.,* would need to meet RACT for sources subject to the RACT requirement) and must be legally and practically enforceable. Thus, the SIP provision would need to: (i) Clearly define when the alternative emission limitation applied and the otherwise applicable emission limitation did not; (ii) clearly spell out the requirements of that standard; and (iii) include adequate monitoring, recordkeeping and reporting requirements in order to make it enforceable. In addition, the state would need to account for emissions attributable to these foreseen events in emissions inventories, modeling demonstrations and other regulatory contexts as appropriate.

23. Comments that the EPA has failed to account adequately for the cost of this SIP call action and is therefore in violation of the Regulatory Flexibility Act, the Unfunded Mandates Reform Act and Administration policy.

Comment: Two commenters argued that the SNPR lacks sufficient analysis of what this action will cost states, stationary sources and the public. The commenters allege that this absence of economic impact analysis is contrary to the Regulatory Flexibility Act, the Unfunded Mandates Reform Act and Administration policy. One of the commenters also noted that imposing substantial ''unfunded mandates'' on state regulatory agencies and forcing stationary sources to absorb additional costs should be evaluated carefully.

Response: The EPA disagrees with the commenters' allegation that the EPA has failed to comply with relevant statutes and Administration policy in accounting for the cost of the actions proposed in the SNPR. The EPA did in fact properly consider the costs imposed by this action. These issues are addressed in more detail in section V.D.7 of this document.

24. Comments that states should not be required to eliminate affirmative defense provisions but rather should be allowed to revise them to be appropriate under CAA requirements.

Comment: One state commenter claimed that it should be allowed to revise its existing affirmative defense

provisions rather than remove them. The commenter asserted that the state should be allowed to revise the provision to make clear that it does not apply to private enforcement actions under CAA section 304(a), which was the only issue specifically before the court in *NRDC* v. *EPA*. Relying on the court's decision, the commenter claimed that the state should be allowed to revise the affirmative defense provisions to apply only in administrative enforcement proceedings. The commenter also argued that there may be other options for appropriately tailoring the state's existing affirmative defense provisions rather than removing them from the SIP.

Response: The EPA agrees that the court in *NRDC* v. *EPA* did not directly address whether states have authority to create affirmative defense provisions that apply exclusively to state personnel in the context of state administrative enforcement actions. Statements by the court concerning the EPA's own authority in the context of administrative enforcement, however, indicate that the court did not intend to foreclose the Agency from exercising its own enforcement discretion with respect to remedies in federal administrative enforcement actions. However, the EPA has reevaluated its interpretation of CAA requirements in light of the court's decision in *NRDC* v. *EPA* and the EPA now interprets the CAA to preclude state SIP provisions creating affirmative defenses that sources could assert in the context of judicial enforcement in federal court, whether initiated by states, the EPA, or other parties pursuant to section 304.

The EPA agrees that states may elect to revise their existing deficient affirmative defense provisions to make them ''enforcement discretion''-type provisions that apply only in the context of administrative enforcement by the state. Such revised provisions would need to be unequivocally clear that they do not provide an affirmative defense that sources can raise in a judicial enforcement context or against any party other than the state. Moreover, such provisions would have to make clear that the assertion of an affirmative defense by the source in a state administrative enforcement context has no bearing on the additional remedies that the EPA or other parties may seek for the same violation in federal administrative enforcement proceedings or judicial proceedings.

In this action, the EPA is not determining whether any such revisions would meet applicable CAA requirements. The EPA would need to consider the precise wording of any such revised provisions in evaluating whether the state has adequate enforcement authority to meet the requirements of section 110(a)(2)(C) and also whether application of such a provision in a state administrative proceeding could interfere with the ability of a citizen or the EPA to bring a federal enforcement action.

25. Comments that states' ability to use enforcement discretion is not an adequate replacement for affirmative defense provisions.

Comment: Several commenters argued that exercise of enforcement discretion is not an adequate substitute for an affirmative defense, particularly where the emissions at issue resulted from an inevitable and unavoidable malfunction. In any individual case, the commenters were concerned that even if a state elects not to enforce against a violation, the EPA or others might elect to bring an enforcement action. One commenter contended that it is inappropriate for the EPA to encourage states to use enforcement discretion instead of encouraging them to create alternative emission limitations to replace affirmative defenses in SIP provisions. The commenters also alleged that reliance on judicial discretion to determine the appropriateness of penalties is similarly inadequate.

The commenters contended that, although it is reasonable for a state to exercise enforcement discretion under circumstances when an emission limitation cannot be met, it is not reasonable to adopt SIP provisions with emission limitations that put some sources in the position of ''repeated noncompliance.''

Response: These comments addressing whether an enforcement discretion approach is sufficient are similar to comments received on the February 2013 proposal to which the EPA responds in section VII.A.3.p of this document. Through this SIP call, the EPA is not requiring states to rely on enforcement discretion in place of achievable SIP emission limitations. Rather, the EPA is requiring states to ensure that emission limitations are consistent with the definition of that term in section 302(k), and specifically that emission standards provide for continuous compliance. If emission limitations that apply during routine operations cannot be met by a source during periods of startup or shutdown, states have authority to establish alternative emission standards. The EPA disagrees that an affirmative defense for penalties for excess emissions for periods of malfunctions is an adequate substitute for an enforceable continuous emission limitation and concludes that such an approach is inconsistent with the CAA as interpreted by the court in *NRDC,* as explained in the SNPR.

The EPA also disagrees that affirmative defense provisions would have been appropriate to address the ''repeated noncompliance'' concerns of the commenters. The EPA's prior interpretation of the CAA was that states could create narrowly tailored affirmative defense provisions applicable to malfunctions. However, to the extent that there are malfunctions that put a source in the position of ''repeated noncompliance,'' the form of affirmative defense that the EPA previously believed was consistent with the CAA would not have provided relief because several of the criteria could not be met. Specifically, the EPA believes repeated noncompliance is typically a result of inadequate design, is part of a ''recurring pattern,'' and thus likely could have been ''foreseen and avoided.'' In short, an affirmative defense would not have been appropriate for such a source.

26. Comments that the EPA should establish specific rules to govern how states set alternative limitations that apply in lieu of affirmative defense provisions.

Comment: Commenters urged the EPA to clarify in this final action that states may establish alternative emission limitations applicable to startup and shutdown only if the source meets all applicable CAA requirements, including but not limited to BACT/LAER, and the state also demonstrates through modeling that potential worst-case emissions from startup and shutdown would not interfere with attainment and reasonable further progress. Other commenters stated that any changes to SIP emission limitations must be made as part of a SIP revision process, which would include a demonstration that higher levels of emissions during startup and/or shutdown would not lead to violations of the NAAQS or PSD increments.

Commenters also argued that any such alternative emission limitation should ''sunset'' each time the EPA promulgates a new NAAQS and that the Agency should require the state to demonstrate again that an alternative emission limitation applicable during startup and/or shutdown does not interfere with attainment or other applicable requirements of the CAA for the revised NAAQS. In support of their arguments that the EPA should impose specific requirements of this type, the commenters indicated that a state has issued permits for sources that establish particulate matter (PM) emission limitations less stringent than existing

permit terms and without requiring a BACT/LAER/ambient impacts analysis and has done so without public notice and comment. Commenters urged the EPA to require states to follow public notice-and-comment processes before issuing any permits for sources with alternative limitations less stringent than those imposed by the SIP and claimed such process is required under the CAA.

In addition, some commenters stated that if the EPA allows states to set ''new, higher, or alternate limits'' applicable during startup and shutdown, the EPA should set clear parameters. According to commenters, the EPA at a minimum should require, for emissions that have not previously been authorized or considered part of a source's potential to emit, that: (i) Limitations must meet BACT/LAER; (ii) there should be clear, enforceable rules for when alternate limitations apply; (iii) there should be a demonstration that worst-case emissions will not cause or contribute to a violation of the NAAQS or PSD increments; and (iv) proposed limitations should be subject to public notice and comment and judicial review. The commenter pointed to a letter from the EPA to Texas in which, the commenter claims, the Agency indicated that these parameters must be met.

A commenter stated that the EPA should unequivocally state in this final action that: (i) All potential to emit emissions, including quantifiable emissions associated with startup and shutdown, must be included in federal applicability determinations and air quality permit reviews; (ii) authorization of these emissions must include technology reviews and impacts analyses; and (iii) the above requirements must be included in the permit that authorizes routine emissions from the applicable units and must be subject to public notice, comment and judicial review.

A commenter recognized that there may be a variety of ways in which states can authorize different limits to apply during startup and shutdown but argued that, no matter the method chosen, the emissions need to be fully accounted for by the state in the relevant SIP, including a demonstration that the additional emissions authorized during startup and shutdown will not violate any NAAQS.

Response: The EPA understands the concerns raised by the commenters but does not agree that further regulatory action such as issuance of regulatory text is necessary at this time. Through this action, the EPA is providing comprehensive guidance to states concerning issues related to the proper treatment of emissions during SSM events in SIP provisions. For example, the EPA is addressing the concern raised by commenters that states will need to ensure that any SIP revisions in response to this SIP call will meet applicable CAA requirements. Under section 110(k)(3), the EPA has authority to approve SIP revisions only if they comply with CAA requirements. Moreover, under section 110(l), the EPA cannot approve SIP revisions if they would ''interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any otherapplicablerequirement'' ofthe CAA. The EPA believes that both states and the Agency can address these issues in SIP rulemakings without the need for anyadditionalfederal regulations as suggested by the commenters.

The EPA agrees with the concerns raised by the commenters regarding instances where a state has issued source permits that impose less stringent emission limitations than otherwise established in the SIP. Using a permitting process to create exemptions from emission limitations in SIP emission limitations applicable to the source is tantamount to revising the SIP without meeting the procedural and substantive requirements for a SIP revision. The Agency's views on this issue are described in more detail in section VII.C.3.e of this document.

The EPA does not agree with the comment that suggests ''worst-case modeling'' would always be needed to show that a SIP revision establishing alternative emission limitations for startup and shutdown would not interfere with attainment or reasonable further progress. The nature of the technical demonstration needed under section 110(l) to support approval of a SIP revision depends on the facts and circumstances of the SIP revision at issue. The EPA will evaluate SIP submissions that create alternative emission limitations applicable to certain modes of operation such as startup and shutdown carefully and will work with the states to assure that any such limitations are consistent with applicable CAA requirements. Under certain circumstances, there may be alternative emission limitations that necessitate a modeling of worst-case scenarios, but those will be determined on a case-by-case basis.

The EPA also does not agree that existing SIP provisions with alternative emission limitations should automatically ''sunset'' upon promulgation of a new or revised NAAQS. Such a process could result in gaps in the state's regulatory structure that could lead to backsliding. When the EPA promulgates new or revised NAAQS, it has historically issued rules or guidance to states concerning how to address the transition to the new NAAQS. In this process, the EPA typically addresses how states should reexamine existing SIP emission limitations to determine whether they should be revised. With respect to technology-based rules, the EPA has typically taken the position that states need not adopt new SIP emission limitations for sources where the state can demonstrate that existing SIP provisions still meet the relevant statutory obligations. For example, the EPA believes that states can establish that existing SIP provisions still represent RACT for a specific source or source category for a revised NAAQS. In making this determination, states would need to review the entire emission limitation, including any alternative numerical limitations, control technologies or work practices that apply during modes of operation such as startup and shutdown, and ensure that all components of the SIP emission limitation meet all applicable CAA requirements.

27. Comments that the EPA should closely monitor states' SIP revisions in response to this SIP call.

Comment: Commenters urged the EPA to monitor states' efforts to revise SIPs in response to the SIP call closely in order to assure that the revisions meet all applicable requirements. The commenters indicated concern that states and industry may weaken emission limitations through this process. The commenter alleged that one state has issued permits for sources with emission limitations applicable during SSM events that are less stringent than the emission limitations approved in the SIP. Furthermore, the commenter alleged, the state issued these permits without public notice and comment. As support for this contention, the commenter detailed the differences between the requirements of a permit issued for a source and the requirements in the SIP. The commenter also claimed that the state has issued permits for other facilities similar to the one it described in detail in the comments.

Response: The EPA understands the concerns expressed by the commenter that SIP revisions made in response to this SIP call need to be consistent with CAA requirements. As explained in this document, the states and the EPA will work to assure that the SIP revisions will meet applicable legal requirements. The EPA will evaluate these SIP submissions consistent with its

obligations under sections 110(k)(3), 110(l) and 193 andunder any other substantive provisions of the CAA applicable to specific SIP submissions.

To the extent that the commenters are concerned about whether the SIP revisions meet applicable requirements, they will have the opportunity to participate in the development of those revisions. States must submit SIP revisions following an opportunity for comment at the state level. Additionally, the EPA acts on SIP submissions through its own notice-and-comment process. As part of these administrative processes, both the state and the EPA will need to evaluate whether the proposed revision to the SIP meets applicable CAA requirements. In the context of those future rulemaking actions, the public will have a chance to review the substance of the specific SIP revisions in response to this SIP call, as well as the state's and the EPA's analysis of the SIP submissions for compliance with the CAA.

28. Comments that the EPA does not have authority to take this action without Congressional authorization.

Comment: A commenter contended that the EPA does not have the authority to write law and that the EPA should be required to seek changes to the applicable law through Congress, before eliminating affirmative defense and due process provisions from SIPs.

Response: Through this action the EPA is not attempting to rewrite the CAA. Rather, the EPA is requiring states to revise specific SIP provisions to comply with the existing requirements of the CAA, as interpreted by the courts. As explained in detail in the SNPR and this document, the EPA has determined that affirmative defense provisions at issue in this action are inconsistent with the existing requirements of the CAA.

29. Comments that affirmative defense provisions are needed to ensure sources' Constitutional right to due process in the event of violations.

Comment: A number of commenters argued that by requiringthe removal of affirmative defense provisions from SIPs, the EPA is impinging on the Constitutional rights of sources that may havewanted toassert suchaffirmative defenses in an enforcement action. A commenter claimed that affirmative defense provisions are not ''loop holes,'' as alleged by the EPA, but instead are fundamental due process provisions which should be retained at all levels for the protection of the public. Another commenter cited *State Farm Mut. Auto Ins. Co.* v. *Campbell,* for the proposition that a monetary penalty that is ''grossly excessive . . . constitutes an arbitrary deprivation of property.'' [62] Other commenters claimed that excessive penalties constitute an arbitrary deprivation of property. The commenters assertedthatapenaltyis excessive where it applies severe punishment to an act that is unavoidable.

Response: The commenters' due process concerns suggest that without anaffirmativedefenseprovision,any penalty assessed for violation of a SIP would be *per se* ''excessive'' or ''arbitrary.'' Though not expressly stated, someofthesecommentsappear to suggest that the existing CAA enforcement provisionsarefacially unconstitutional.TheEPAdisagrees. The CAA does not mandate that any penalty is automatically assessed for a violation. Rather the CAA establishes a maximum civil penalty in section 113(b) but then expressly provides in section 113(e) the criteria that the EPA or the courts (as appropriate in administrative or judicial enforcement) ''shall take into consideration (in addition toother factorsasjustice mayrequire).'' These criteria explicitly include consideration of ''good faith efforts to comply.'' Thus, the CAA on its face does not mandate the imposition of any penalty automatically, much less one that is *per se* excessive. Notably, the commenters do not elaborate on how or why they believethestatutory penaltyprovisions of the CAA are facially unconstitutional, instead making generalized claims.

To the extent that the commenters are raising an ''as applied'' claim of unconstitutionality, any such claim can be raised in the future in the context of a specific application of the statute in an enforcement action. Such was the case in the *State Farm* case cited by the commenters. In that case, a court had awarded punitive damages of $145 million in addition to $1 million compensatory damages in an automobile liability case. A statutory penalty provision was not at issue in that case and thus there were no statutory criteria for the lower court to consider in determining the appropriate penalty amount. Rather, in its review of whether the punitive damage award was excessive, and thus violated due process, the Court looked at three factors it has instructed lower courts to consider in assessing punitive damages. Such would be the case with any claim that a CAA penalty violated due process, where a reviewing court would consider whether the court appropriately considered the relevant penalty factors in assessing a penalty claimed as unconstitutional ''as applied.''

30. Comments that the EPA's action eliminating affirmative defense provisions from SIPs violates the Eighth Amendment of the Constitution.

Comment: Several commenters asserted that relying on judicial discretion to determine the appropriateness of penalties is arguably unconstitutional under the Eighth Amendment's prohibition on excessive fines and punishments by allowing potentially significant penalties that are disproportionate to the offense. The commenter stated that an affirmative defense provision ''helps guard against infringement of the Eighth Amendment's protections.'' Other commenters argued that the U.S. Supreme Court has held that Eighth Amendment protections apply to government action in a civil context as well as in a criminal context. The commenters claimed that significant penalties are not proportional to an offense caused by unavoidable events, such as excess emissions during malfunction events. The commenters concluded that unless the EPA allows states to accommodate unavoidable emissions through changes to applicable emission limitations before affirmative defenses are removed, the EPA's proposal would ''run afoul of Constitutional limitations.''

One commenter stated that an affirmative defense is the ''minimum protection EPA or the state must provide to avoid infringing constitutional rights.'' The commenter also argued that the EPA itself has relied on the existence of an affirmative defense to defend against a challenge to the achievability of an emission limitation in a FIP. To support this argument, the commenter quoted from the court's opinion in *Montana Sulphur.*[63]

Response: For the reasons provided above regarding commenters' due process claims, the EPA also disagrees with their claims that eliminating affirmative defense provisions in SIPs would result in the penalty provisions of the CAA being facially in violation of the Eighth Amendment. Similarly, if a party believesthatthepenalties assessed in any civil enforcement action do violate the Eighth Amendment, they can raise a challenge that the specific SIP provision at issue ''as applied'' in that instance violates the U.S. Constitution. As with the commenters'

[62] *See* 538 U.S. 408, 417 (2003).

[63] *See* 666 F.3d at 1192–93 (''EPA acknowledges that violations are likely inevitable, but relies on the provision of an affirmative defense to compensate for infeasibility problems.'').

due process arguments, the EPA believes that Congress has already adequately addressed their concerns about potential unfair punishment for violations by authorizing courts to consider a range of factors in determining what remedies to impose for a particular violation, including the explicit factors for consideration in imposition of civil penalties as well as other factors as justice may require.

The EPA acknowledges that is has previously relied on affirmative defense provisions as a mechanism to mitigate penalties where a violation was beyond the control of the owner or operator. These actions, however, predated the court's decision in *NRDC* v. *EPA* and the EPA has since revised its approach to affirmative defense provisions in its own rulemaking actions. In addition, the EPA believes that the penalty criteria in section 113(e) provide a similar function and the commenters do not explain why they believe these explicit statutory factors do not provide sufficient relief from the imposition of an allegedly unconstitutionally excessive penalty.

31. Comments that the EPA should impose a deadline of 12 months for states to respond to this SIP call with respect to affirmative defense provisions.

Comment: An environmental organization commented that the EPA should require affected states to make the required SIP revisions within 12 months, rather than the 18 months proposed in the February 2013 proposal and the SNPR. The commenter claimed that communities near large sources have been suffering for decades and individuals are suffering adverse health effects because of the emissions from sources that are currently allowed by deficient SIP provisions. The commenter also stated that the EPA has recognized that excess emissions allowed by the SIP provisions subject to the SIP call are continuing to interfere with attainment and maintenance of the NAAQS and that this justifies imposing a shorter schedule for states to respond to the SIP call.

Response: The EPA acknowledges the concerns expressed by the commenters and the importance of providing environmental protection. However, as explained in the February 2013 proposal and in section IV.D.14 of this document, the EPA believes that providing states with the full 18 months authorized by section 110(k)(5) is appropriate in this action. The EPA is taking into consideration that state rule development and the associated administrative processes can be complex and time-consuming. This is particularly true where states might elect to consider more substantial revision of a SIP emission limitation, rather than merely removal of the impermissible automatic or discretionary exemption or the impermissible affirmative defense provision. In addition, the EPA believes that providing states with the full 18 months will be more likely to result in timely SIP submissions that will meet CAA requirements and provide the ultimate outcome that the commenters seek. Some states subject to the SIP call may be able to revise their deficient SIP provisions more quickly, and the EPA is committed to working with states to revise these provisions consistent with CAA requirements in a timely fashion. For these reasons, the EPA does not agree that it would be reasonable to provide less than the 18-month maximum period allowed under the CAA for states to submit SIP revisions in response to the SIP call.

32. Comments that the EPA should encourage states to add reporting and notification provisions into their SIPs.

Comment: A commenter urged the EPA to encourage states to make information about excess emissions events easily and quickly accessible to the public. The commenter claimed that it is unacceptable to make it difficult for members of the public to obtain information about potential harmful exposure to pollutants and that state ''open-record'' request laws are inadequate, particularly when the public is not informed that an event occurred. The commenter also asserted that reporting provisions enhance compliance and cited to the Toxic Release Inventory program's success in driving pollution reduction. The commenter argued that contemporaneous reporting of the conditions surrounding a violation, the cause and the measures taken to limit or prevent emissions ensure that stakeholders can respond in real time and also target enforcement efforts to violations where further action is warranted. As support for this approach, the commenter pointed to Jefferson County, Kentucky, as a local air quality control area that has already corrected problematic regulations in advance of this SIP call and also noted that the County included notification and reporting requirements, recognizing that they would reduce the burden on the government in trying to calculate the level of excess emissions and also help in responding to citizen inquiries about such events.

Response: The EPA agrees with the commenter that reporting and notification provisions can ease the burden on government agencies by placing the burden on the entity that is in the best position to calculate the level of excess emissions and also provide other relevant information regarding such events. In addition, to make this information available to the public quickly allows for a timely response if there is any health concern. An increased level of communication between industry and residents also serves to build a better community relationship and partnership. The EPA also supports such requirements as components of SIP emission limitations because they facilitate effective compliance assurance. However, the EPA does not believe that the Agency should create a separate federal requirement addressing this issue beyond general CAA requirements at this time.

33. Comments that this SIP call action concerning affirmative defense provisions is being taken pursuant to sue-and-settle tactics.

Comment: One commenter alleged that the action proposed in the EPA's SNPR has an ''impermissible sue-and-settle genesis'' and that the EPA is attempting to grant as much of Sierra Club's petition as it can ''regardless of the wisdom or permissibility of doing so.''

Response: The EPA disagrees with the commenter's allegation that the EPA's proposed action in the SNPR is inappropriate because it is the result of ''sue-and-settle'' actions. This is a rulemaking in which the EPA is taking action to respond to a petition for rulemaking, and it has undergone a full notice-and-comment rulemaking process as provided for in the CAA. This issue is addressed in more detail in section V.D.1 of this document.

34. Comments that affirmative defense provisions do not alter or eliminate federal court jurisdiction and therefore do not violate CAA sections 113 or 304.

Comment: Two commenters argued that SIP affirmative defense provisions do not in fact interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of CAA section 304, because plaintiffs have the right to bring a citizen suit despite the existence of affirmative defense provisions. One commenter cited at least four instances in the last few years in which environmental groups filed enforcement actions against sources in federal district court based on alleged emissions events for which the companies asserted affirmative defenses. The commenters stated that courts applied the affirmative defense provision criteria and the criteria of section 113(e) to determine

whether penalties were appropriate for alleged violations and did not dismiss plaintiffs' claims for lack of jurisdiction. According to the commenters, affirmative defense provisions place additional burden on the sources, not plaintiffs, to demonstrate that the criteria of an affirmative defense are met.

Response: The commenters argued that affirmative defense provisions are not inconsistent with the statutory requirements of section 304, because citizen groups still bring enforcement actions for events where companies may raise an affirmative defense. Even if this were so, the EPA disagrees with the commenters that this establishes that affirmative defense provisions are consistent with CAA requirements. The mere existence of enforcement actions does not negate the fact that affirmative defense provisions interfere with effective enforcement of SIP emission limitations according to CAA section 304. More to the point, affirmative defense provisions purport to alter or eliminate the statutory jurisdiction of courts to determine liability or to impose remedies for violations, which makes the provisions inconsistent with the grant of authority in sections 113 and 304. The court's decision in *NRDC* v. *EPA* was not based on the question of whether plaintiffs could still try to bring an enforcement case for violations of the EPA regulation at issue; the case was decided on the grounds that the EPA when creating regulations has no authority to limit or eliminate the jurisdiction of the courts. As explained in the SNPR and this document, the EPA believes that the same principle applies to states when creating SIP provisions.

35. Comments that this action may increase the chance of catastrophic failure at facilities.

Comment: One commenter expressed a concern that eliminating affirmative defense provisions applicable to emissions during SSM events could increase the potential for environmental harm caused by catastrophic failure by outlawing and penalizing the emissions during SSM events that have previously been allowed or shielded from liability through affirmative defense provisions. As an example, the commenter argued that refineries and gas plants must be allowed to vent VOCs to the atmosphere on the rare occasion that there is an equipment malfunction that could otherwise cause an explosion that might destroy the plant and surrounding neighborhood. The commenter speculated that the threat of costly new fines inherent with the removal of affirmative defense provisions could cloud plant operators' thinking when they make safety decisions. The commenter contended that allowing rare, safely controlled releases of emissions would invariably be better for both the natural and human environment than the damage from a catastrophic explosion.

Response: Although the comment refers to SSM events generally, the only specific concern raised by the commenter concerning affirmative defense provisions is that if they are not allowed in SIPs, this may lead to an increase in malfunction-related catastrophic events. The EPA does not agree with the commenter's view that removal of affirmative defense provisions may increase environmental harm related to catastrophic events. The EPA believes that it is unlikely the availability or unavailability of an affirmative defense will affect a responsible and competent source operator's response to a risk of explosion. First, an explosion presents much more serious and more certain adverse economic consequences for the source than does the specter of a potential enforcement action for a CAA violation, especially because enforcement agencies and courts are likely to exercise leniency if the violation was the result of an unpreventable malfunction. Second, even if an affirmative defense were available, it is only used after initiation of an enforcement proceeding, and successful assertion of such a defense in an enforcement proceeding depends on meeting all affirmative defense criteria and is not guaranteed. The EPA does not believe that a responsible and competent source operator's actions in an emergency situation would be influenced by speculation that if the source is subject to an enforcement action in the future, there may be a defense to penalties available.

Moreover, as explained in detail in the SNPR and this document, the court's decision in *NRDC* v. *EPA* held that section 113 and section 304 preclude EPA authority to create affirmative defense provisions in the Agency's own regulations imposing emission limitations on sources, because such provisions purport to alter the jurisdiction of federal courts to assess liability and impose penalties for violations of those limits in private civil enforcement cases. The EPA believes that the reasoning of the court in that decision indicates that the states, like the EPA, have no authority in SIP provisions to alter the jurisdiction of federal courts to assess penalties for violations of CAA requirements through affirmative defense provisions. If states lack authority under the CAA to alter the jurisdiction of the federal courts through affirmative defense provisions in SIPs, then the EPA lacks authority to approve any such provision in a SIP. The EPA notes that the court in *NRDC* v. *EPA* did not indicate that the statutory provisions should be interpreted differently based on speculation that a given source operator might allow a catastrophic explosion because of the absence of an affirmative defense.

36. Comments that the SNPR did not meet the procedural requirements of section 307(d) because the EPA failed to provide its legal interpretations or explain the data relied upon in this rulemaking.

Comment: Commenters claimed that the EPA violated the procedural requirements of the CAA in the SNPR. The commenters asserted that the EPA designated this rulemaking a section 307(d) action, and the commenters claimed that the EPA did not follow the procedures required in section 307(d). The commenters claimed that the EPA failed to provide a statement of basis and purpose that includes ''the major legal interpretations and policy consideration underlying the proposed rule.''

In particular, the commenters argued that the EPA did not provide required information with regard to its proposed SIP call concerning the affirmative defense provisions in the Texas SIP. Commenters claimed that the SNPR is deficient because it does not address: (i) Why the Fifth Circuit decision in *Luminant Generation* v. *EPA* does not control the present action; (ii) on what basis the EPA believes it may disregard the judgment in *Luminant Generation* v. *EPA;* (iii) why the DC Circuit decision, which does not address the Texas SIP, should take precedence over the *Luminant Generation* v. *EPA* decision; (iv) on what basis the EPA believes that the DC Circuit may reach a different result than the Fifth Circuit as to the affirmative defenses in the Texas SIP; and (v) the grounds for ''acquiescing'' to the DC Circuit decision in *NRDC* v. *EPA,* which specifically states that it does not apply to SIP revisions, and ignoring the relevant holding in the Fifth Circuit. Commenters cited several cases claiming that the DC Circuit has held that, unlike under the Administrative Procedure Act (APA), under CAA section 307(d) the EPA is required to give a detailed explanation of its reasoning and that commenters should not be required to ''divine the agency's unspoken thoughts.''

Response: The EPA disagrees with the commenters' premise. The EPA did

discuss the *Luminant Generation* v. *EPA* decision in the SNPR and also explained in detail why it believes that the logic of the DC Circuit's decision in *NRDC* v. *EPA* supports this SIP call action for affirmative defense provisions. Specifically, the EPA recognized that both the Fifth Circuit and the DC Circuit were evaluating the same fundamental question—whether section 113 and section 304 preclude the creation of affirmative defense provisions that alter or eliminate the jurisdiction of federal courts to determine liability and impose remedies for violations of CAA requirements in judicial enforcement actions. The EPA explained that, after reviewing the *NRDC* v. *EPA* decision and the *Luminant Generation* v. *EPA* decision, the Agency determined that its prior interpretation of the CAA, as advanced in both courts, is not the best reading of the statute. Indeed, it is significant that the *Luminant* court upheld the EPA's approval of affirmative defense provisions for unplanned events (*i.e.,* malfunctions) and the disapproval of affirmative defenses for planned events (*i.e.,* startup, shutdown and maintenance) specifically because the court deferred to the Agency's reasonable interpretation of ambiguous statutory provisions in the case at hand. In the SNPR, the EPA explained point by point why it now believes that the decision of the DC Circuit in *NRDC* v. *EPA* reflected the better reading of section 113 and section 304 and thus that the Agency no longer interprets the CAA to permit affirmative defenses in SIP provisions. Therefore, the EPA believes the Fifth Circuit could also take a different view of the reasonableness of the EPA's resolution of ambiguous provisions after reviewing the EPA's current interpretation of the statute.

37. Comments that the EPA has recently approved affirmative defense provisions through various SIP actions and, therefore, these provisions are proper under the EPA's interpretation of the CAA.

Comment: One commenter noted that the EPA has never taken issue with the affirmative defense provisions in states' SIPs across the many instances where the EPA has reviewed the states' later SIP submissions. The implication of the commenters' argument is that if the EPA has previously approved a SIP submission and directly or indirectly reapproved an affirmative defense provision in the past, this means that the affirmative defense provision still meets CAA requirements.

Response: The EPA disagrees with this comment. As explained in the EPA's response in section VIII.D.18 of this document, when the EPA takes final action on a state's SIP submission, this does not necessarily entail reexamination and reapproval of every provision in the existing SIP. The EPA often only examines the specific SIP provision the state seeks to revise in the SIP submission, which may not include any affirmative defense provisions. To the extent the EPA did review and approve any affirmative defense provision consistent with its prior interpretation of the CAA that narrowly tailored affirmative defenses were appropriate, the EPA has fully explained why it is now revising that interpretation such that past action based on the earlier interpretation would no longer provide precedent for the EPA's actions. As part of this final action, applying its revised SSM Policy, the EPA is taking action to address affirmative defense provisions in SIPs. Since the issuance of the court's opinion in *NRDC* v. *EPA,* the EPA has similarly taken steps in its own ongoing NSPS and NESHAP rulemakings to ensure that any existing affirmative defense provisions are removed and that no affirmative defenses are proposed or finalized.[64]

38. Comments that affirmative defense provisions function as structured state ''enforcement discretion'' and are an important tool for states to prioritize enforcement activities.

Comment: A state commenter characterized the affirmative defense contained in the state's SIP as an ''enforcement discretion'' tool that supports the state's regulation of excess emissions during malfunction events and promotes preventive measures, proper monitoring and reporting by sources. The state asserted that removal of the affirmative defense provision from the SIP would require the state to address and track violations that are not a high priority to the state agency. The state argued that the affirmative defense provision provides certainty to the regulated community by providing structure to how the state will exercise its enforcement discretion. The state expressed concern that without the affirmative defense, there will be uncertainty for the regulated community and less incentive for sources to make repairs and submit excess emissions reports promptly. The commenter explained that state law requires reporting of emission events that exceed an established ''reportable'' quantity and that this prompt reporting allows the state agency to evaluate each event reported quickly. In investigating reports of emission events, the state claimed, it ''exercises enforcement discretion only in cases in which it determines that each affirmative defense criteria is met,'' and the state claimed that elimination of the affirmative defense provision would result in an increase of unavoidable emissions being treated as violations. In general, the state objected to the elimination of the affirmative defense provision because it would strain the state agency's enforcement resources.

Response: These comments concerning the state's use of affirmative defense criteria in structuring the exercise of its enforcement discretion (*e.g.,* determining whether to bring an enforcement action or to further investigate an emissions events) appear to be based on a misunderstanding of the SNPR. This SIP call action directing states to remove affirmative defense provisions from SIPs would not prevent the state from applying such criteria in the exercise of its own enforcement discretion. For example, the state is free to consider factors such as a facility's efforts to comply and the facility's compliance history in determining whether to investigate an excess emissions event or whether to issue a notice of violation or otherwise pursue enforcement. Application of such criteria may well be useful and appropriate to the state in determining the best way to allocate its own enforcement resources. So long as a state does not use the criteria in such a way that the state fails to have a valid enforcement program as required by section 110(a)(2)(C), the state is free to use criteria like those of an affirmative defense as a way to ''structure'' its exercise of its own enforcement discretion.

However, as explained in the SNPR, the EPA's view is that SIPs cannot include affirmative defense provisions that alter the jurisdiction of the federal court to assess penalties in judicial enforcement proceeding for violation of CAA requirements. The EPA has determined that the specific affirmative

[64] *See, e.g.,* ''National Emission Standards for Hazardous Air Pollutants Residual Risk and Technology Review for Flexible Polyurethane Foam Production; Final rule,'' 79 FR 48073 (August 15, 2014) (announcing decision not to finalize the proposed affirmative defense); ''National Emission Standards for Hazardous Air Pollutants: Generic Maximum Achievable Control Technology Standards; and Manufacture of Amino/Phenolic Resins; Final rule,'' 79 FR 60897 (October 8, 2014) (announcing decision not to finalize the proposed affirmative defense); ''Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards; Final rule,'' 79 FR 79017 (December 31, 2014) (removing affirmative defense from regulations); and ''National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Proposed rule,'' 80 FR 3089 (January 21, 2015) (proposing to remove affirmative defense from regulations).

defense provisions at issue in the SIP of the state commenter are inconsistent with CAA requirements for SIP provisions. In addition, the EPA interprets the CAA to bar ''enforcement discretion'' provisions in SIPs that operate to impose the enforcement discretion decisions of the state upon the EPA or any other parties who may seek to enforce pursuant to section 304. Pursuant to the requirements of sections 110(k), 110(l) and 193, the EPA has both the authority and the responsibility to evaluate SIP submissions to assure that they meet the requirements of the CAA. Pursuant to section 110(k)(5), the EPA has authority and discretion to take action to require states to revise previously approved SIP provisions if they do not meet CAA requirements.

39. Comments that requiring states to adopt emissions standards that are not achievable at all times and then expecting courts to render those standards lawful by employing discretion in the assessment of penalties is contradictory to CAA section 307(b)(2), which mandates pre-enforcement review.

Comment: Commenters claimed that courts have consistently held that regulators cannot rely on enforcement discretion to establish the achievability of emission limitations. The commenters referred to a 1973 case addressing NSPS regulations in which they claimed the court remanded the standard to the EPA to support an ''at all times'' standard.

Commenters further asserted that reliance on the discretion of judges to decide whether and to what extent penalties are appropriate is also not lawful. The commenters claimed that if a state establishes an emission limitation on the basis that it is achievable, then the standard must be achievable under all circumstances to which it applies. The commenters argued that if a state adopts an emission limitation that is not achievable under all conditions, then the state must explain how the standard can be reasonably enforced. The commenters concluded that a numerical emission limitation that cannot be achieved by sources at all times is not enforceable because no amount of penalty can deter the violating conduct. The commenters recognized that it is reasonable for states to exercise enforcement discretion under circumstances when an emission limitation cannot be met but argued that it is not reasonable to adopt a SIP that puts sources in a state of repeated noncompliance.

Commenters further claimed that the decision in *NRDC* v. *EPA,* while allowingsources toargue unjust punishment should not be imposed, conflicts with the CAA's requirements for pre-enforcement review. The commenters stated that emission limitations that could have been challenged at the time of promulgation are not subject to judicial review in an enforcement proceeding. Thus, the commenters claimed that any challenges to the achievability of a SIP emission limitation must be made at the time the emission limitation is promulgated and that judges will not consider such arguments in the context of an enforcement action. The commenters argued that forcing states to adopt unachievable standards and then prohibiting them from including an affirmative defense for penalties for unavoidable exceedances creates a dilemma Congress sought to avoid.

Response: A number of the arguments that the commenters are raising appear to go beyond the scope of the affirmative defense issues in the SNPR. In the SNPR, the EPA revised its prior proposal with respect to issues related exclusively to affirmative defense provisions in SIPs. These comments are similar to an argument that any period during which an emission limitation cannot be met must be deemed not to be a violation of the standard. The EPA is addressing these types of issues, to the extent that they were raised in comments on the February 2013 proposal. The EPA does note, however, that the Agency is not requiring states toadopt standardsthat cannot be met and then providing that states rely only on enforcement discretion to address periods of noncompliance. As the EPA has already noted, states may choose to adopt standards that are different from theunderlyingstandards for periods wheretheunderlyingstandards cannot otherwise be met.

The EPA also disagrees with the comments that the holding in *NRDC* v. *EPA* is inconsistent with section 307(b)(2) that provides that regulations that could have been challenged at promulgation cannot later be challenged in an enforcement action. Nothing in section 307(b) limits the ability of the court to consider the criteria of section 113(e), such as good faith efforts of a source to comply in assessing penalties. Neither the decision in *NRDC* v. *EPA* nor this SIP call action requires states to adopt standards that cannot be met. Moreover, the public, including regulated sources, will be able to comment on the revised emission limitations developed by states in response to this SIP call. If an interested party believes that the state has adopted unachievable emission limitations, that party can challenge such standards at the time of adoption.

40. Comments that the EPA should announce that it no longer recognizes existing affirmative defense provisions, effective immediately.

Comment: Commenters claimed that because the court held in *NRDC* v. *EPA* that the EPA was without authority to interpret the CAA to allow affirmative defenses, the EPA should explicitly state that it no longer recognizes such provisionsimmediately. The commenters argued that by proceeding under its authority under section 110(k)(5), the EPA isprovidingstates 18 months toremove theaffirmative defense provisions and that thereafter the EPA will take additional time to act upon those SIP revisions under section 110(k). The commenters argued that this in effect allows sources to continue relyingonaffirmativedefense provisions that are not consistent with CAA requirements for a period of years into the future. Because the EPA did not haveauthoritytoapprove the affirmative defense provisions in the first instance, the commenters contended that the Agency should simply declare that the affirmative defense provisions are now null and void.

Response: The EPA understands the concerns raised by the commenters but does not agree that it is inappropriate for the Agency to proceed under section 110(k)(5). The affirmative defense provisions at issue in this action are part of the EPA-approved SIPs for the affected states. The EPA, as well as states, cannot unilaterally change provisions of the approved SIP without following appropriate notice-and-comment procedures. To the extent that the commenters were advocating that the EPA should have proceeded under its authority to do error corrections under section 110(k)(6) rather than a SIP call under section 110(k)(5), the Agency has explained in detail in the February 2013 proposal and this document why it is more appropriate to proceed via SIP call instead. Under the SIP call process, the EPA cannot declare approved SIP provisions null and void prior to state submission and Agency approval of revised SIP provisions.

41. Comments that instead of acting through a nationwide SIP call action, the EPA should have worked individually with states to correct any deficient SIP provisions.

Comment: One commenter stated that rather than using a SIP call to address SSM issues in existing SIPs, the EPA should work with each state's air agency individually to identify and address SIP deficiencies and work through the

normal rulemaking and SIP revision processes to correct any identified problems.

Response: The CAA provides a mechanism specifically for the correction of flawed SIPs. Section 110(k)(5) provides: ''Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to . . . comply with any requirement of [the Act], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies.'' This type of action is commonly referred to as a ''SIP call.'' The EPA, in this action, is using a SIP call to notify states of flawed provisions in SIPs and initiate a process for correction of those provisions.

The EPA, largely through its Regional Offices, has individually reviewed each state provision subject to the SIP call. The EPA will work closely with each state, during future rulemaking actions taken by states to adopt SIP revisions and then subsequent actions by the EPA, to determine whether these adopted SIP revisions meet the mandate of the SIP call and are consistent with CAA requirements. As part of these actions, each individual state will work closely with the EPA to address the SIP deficiencies identified in this action.

42. Comments that the EPA should not consider those comments on the February 2013 proposal that concern affirmative defense provisions in SIPs to no longer be relevant.

Comment: One commenter disagreed with the EPA's decision not to respond to certain comments submitted on the February 2013 proposal, to the extent the comments applied to issues related to affirmative defense provisions in SIPs generally or to issues related to specific affirmative defense provisions identified by the Petitioner, on a basis that those comments are no longer relevant if the EPA finalizes its action as proposed in the SNPR. According to the commenter, the EPA's interpretation of the CAA has not changed so as to exclude the other SSM provisions in the proposed action, and this alone shows that the comments submitted on the February 2013 proposal are still relevant.

Response: The EPA's proposed action on the Petition in the SNPR superseded the February 2013 proposal with respect to the issues related to affirmative defense provisions in SIPs. As explained in detail in the SNPR, after the February 2013 proposal, a federal court ruled that the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits in its own regulations. As a result, the EPA issued the SNPR to propose applying a revised interpretation of the CAA to affirmative defense provisions in SIPs consistent with the reasoning of court's decision in *NRDC* v. *EPA*. The EPA supplemented and revised its proposed response to the issues raised in the Petition to the extent they concern affirmative defenses in SIPs, and the EPA solicited comment on its revised proposed response. Because the EPA's interpretation of the CAA with respect to the legal basis for affirmative defense provisions in SIPs changed from the time of the February 2013 proposal to the SNPR, comments on the February 2013 proposal, to the extent they concern affirmative defenses in SIPs, are not relevant to the EPA's revised proposed action. For example, comments on the February 2013 proposal that argue that the EPA was wrong to interpret the CAA to allow affirmative defense provisions for malfunction events but not for startup or shutdown events are not relevant when the Agency's interpretation of the CAA is now that no such affirmative defense provisions are valid. Similarly, comments that the criteria that the EPA previously recommended for valid affirmative defense provisions were too many, too few, too stringent or too lax simply have no relevance when the EPA does not interpret the CAA to allow any such affirmative defense provisions regardless of the number, nature or stringency of the criteria for qualifying for the affirmative defense. The EPA believes that it is reasonable for the Agency to determine that comments that have no bearing on the proposed action concerning affirmative defense provisions in the SNPR are not relevant. Because the EPA is finalizing the action on the Petition as proposed in the SNPR concerning affirmative defense provisions in SIPs, it is doing so based on evaluation of the comments that are relevant to the SNPR.

V. Generally Applicable Aspects of the Final Action in Response to Request for the EPA's Review of Specific Existing SIP Provisions for Consistency With CAA Requirements

A. What the Petitioner Requested

The Petitioner's second request was for the EPA to find as a general matter 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.'' [65] 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.'' [66]

The Petitioner argued that many SIPs currently 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 federal 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 discretionary exemptions for excess emissions that occur during periods of SSM. 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 have the effect of barring 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

[65] Petition at 14.

[66] *Id.*

to by sources. Instead, the Petitioner contended, exemptions for excess emissions through ''loopholes'' in SIP provisions often result in real-world emissions that are far higher than the level of emissions envisioned and planned for in the SIP.

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.''

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.'' [67] 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. A more detailed explanation of the Petitioner's arguments appears in the 2013 February proposal.[68]

B. What the EPA Proposed

In its February 2013 proposal, the EPA proposed to deny in part and to grant in part the Petition with respect to this two-part request. The EPA explained its longstanding interpretations of the CAA with respect to SIP provisions that apply to excess emissions during SSM events. The EPA also agreed that automatic exemptions, discretionary exemptions via director's discretion, ambiguous enforcement discretion provisions that may be read to preclude EPA or citizen enforcement and affirmative defense provisions can interfere with the overarching objectives of the CAA, such as attaining and maintaining the NAAQS, protecting PSD increments and improving 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, and such interference is contrary to the fundamental enforcement structure provided in CAA sections 113 and 304.

Accordingly, the EPA evaluated each of the specific SIP provisions that the Petitioner identified to determine whether it is consistent with CAA requirements for SIP provisions. The EPA conducted this evaluation in light of its interpretations of the CAA reflected in the SSM Policy and recent court decisions pertaining to relevant issues. In section IX of the February 2013 proposal, the EPA provided its proposed view with respect to each of these SIP provisions. The EPA solicited comment on its proposed grant or denial of the Petition for each of the specific SIP provisions and its rationale for the proposed action. Through consideration of the overarching issues raised by the Petition, and informed by the evaluation of the specific SIP provisions identified in the Petition as a group, the EPA also determined that it was necessary to reiterate, clarify and amend its SSM Policy. The EPA thus took comment on its interpretations of the CAA set forth in the SSM Policy in order to assure that it provides comprehensive and up-to-date guidance to states concerning SIP provisions applicable to emissions from sources during SSM events.

C. What Is Being Finalized in This Action

The EPA is taking final action to deny in part and to grant in part the Petition with respect to the request to find specific SIP provisions inconsistent with the CAA as interpreted by the Agency in the SSM Policy. The EPA is also taking final action to grant the Petition on the request to make a finding of substantial inadequacy and to issue a SIP call for specific existing SIP provisions. The basis for the SIP call is that these provisions include an automatic exemption, a discretionary exemption, an inappropriate enforcement discretion provision, an affirmative defense provision, or other form of provision that is inconsistent with CAA requirements for SIP provisions. For those SIP provisions that the EPA has determined to be consistent with CAA requirements, however, the Agency is taking final action to deny the Petition and taking no further action with respect to those provisions. The specific SIP provisions at issue are discussed in detail in section IX of this document.

As a result of its review of the issues raised by the Petition, the EPA is also through thisactionclarifying, reiterating and updating its SSM Policy to make certain that it provides comprehensive and up-to-date guidance to air agencies concerning SIP provisions to address emissions during SSM events, consistent with CAA requirements. With respect toautomaticexemptions from emission limitations in SIPs, the EPA's longstandinginterpretation ofthe CAA is that such exemptions are impermissible because they are inconsistent with thefundamental requirements of the CAA. The EPA has reiteratedthispoint innumerous guidance documents andrulemaking actionsandisreaffirmingthat interpretation in this final action. By exemptingemissionsthatwould otherwise constitute violations ofthe applicable emission limitations, such exemptions interferewiththeprimary air quality objectives of the CAA (*e.g.,* attainment andmaintenance ofthe NAAQS), undermine the enforcement structure of the CAA (*e.g.,* the requirement that all SIP provisions be legally and practically enforceable by states, the EPA and parties with standing under the citizen suit provision), and eliminate the incentive for emission sources to comply at all times, not solely during normal operation (*e.g.,* incentives to be properly designed, maintained and operated so as to minimize emissions of air pollutants during startup and shutdown or to take prompt steps torectify malfunctions).

The court's decision in *Sierra Club* v. *Johnson* concerning exemptions for SSM events in the EPA's own regulations has reemphasized the fact that emission limitations under the CAA are required to be continuous. The court held that this statutory requirement precludes emission limitations that would allow periods during which emissions are exempt. Moreover, from a policy perspective, the EPA notes that the existence of impermissible exemptions in SIP provisions has the potential to lessen the incentive for development of control strategies that are effective at reducing emissions during certain modes of source operation such as startup and shutdown, even while such strategies could become increasingly helpful for various purposes, including attaining and maintaining the NAAQS. The issue of automatic exemptions for SSM events in SIP provisions is discussed in more detail in section VII.A of this document.

With respect to discretionary exemptions from emission limitations in SIPs, the EPA also has a longstanding interpretation of the CAA that prohibits ''director's discretion'' provisions in SIPs if they provide unbounded discretion to allow what would amount to a case-specific revision of the SIP

[67] Petition at 17.

[68] *See* February 2013 proposal, 78 FR 12459 at 12473–74 (February 22, 2013).

without meeting the statutory requirements of the CAA for SIP revisions. In particular, the EPA interprets the CAA to preclude SIP provisions that provide director's discretion authority to create discretionary exemptions for violations when the CAA would not allow such exemptions in the first instance. As with automatic exemptions for excess emissions during SSM events, discretionary exemptions for such emissions interfere with the primary air quality objectives of the CAA, undermine the enforcement structure of the CAA and eliminate the incentive for emission sources to minimize emissions of air pollutants at all times, not solely during normal operations. Through this action, the EPA is reiterating its interpretation of the provisions of the CAA that preclude unbounded director's discretion provisions in SIPs. The EPA is also explaining two ways in which air agencies may elect to correct a director's discretion type of deficiency. The issue of director's discretion in SIP provisions applicable to SSM events is discussed in more detail in section VII.C of this document.

With respect to enforcement discretion provisions in SIPs, the EPA also has a longstanding interpretation of the CAA that SIPs may contain such provisions concerning the exercise of discretion by the air agency's own personnel, but such provisions cannot bar enforcement by the EPA or by other parties through a citizen suit.[69] In the event such a SIP 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. Such provisions in SIPs can interfere with effective enforcement by the EPA and the public to assure that sources comply with CAA requirements, and this interference is contrary to the fundamental enforcement structure provided in CAA sections 113 and 304. The issue of enforcement discretion in SIP provisions applicable to SSM events is discussed in more detail in section VII.D of this document.

The EPA has 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. Through evaluation of comments on the February 2013 proposal and the SNPR, the EPA has taken into account the perspective of other stakeholders concerning the proper application of the CAA and the Agency's preliminary evaluation of the specific SIP provisions identified in the Petition. In many instances, the EPA has concluded that the Petitioner's analysis is correct and that the provision in question is inconsistent with CAA requirements for SIPs. For those SIP provisions, the EPA is granting the Petition and is simultaneously making a finding of substantial inadequacy and issuing a SIP call to the affected state to rectify the specific SIP inadequacy. In other instances, however, the EPA disagrees with the Petitioner's analysis of the provision, in some instances because the analysis applied to provisions that have since been corrected in the SIP. For those provisions, the EPA is therefore denying the Petition and taking no further action. In summary, the EPA is granting the Petition in part, and denying the Petition in part, with respect to all of the specific existing SIP provisions for which the Petitioner requested a remedy. The EPA's evaluation of each of the provisions identified in the Petition and the basis for the final action with respect to each provision is explained in detail in section IX of this document.

D. Response to Comments Concerning the CAA Requirements for SIP Provisions Applicable to SSM Events

The EPA received numerous comments, both supportive and adverse, concerning the Agency's decision to propose action on the Petition with respect to the overarching issues raised by the Petitioner. A number of these comments also raised important issues concerning the rights of citizens to petition their government, the process by which the EPA evaluated the issues raised in the Petition and the relative authorities and responsibilities of states and the EPA under the CAA. Many commenters raised the same conceptual issues and arguments. For clarity and ease of discussion, the EPA is responding to these overarching comments, grouped by topic, in this section of this document. The responses to more specific substantive issues raised by commenters on the EPA's interpretation of the CAA in the SSM Policy appear in other sections of this document that focus on particular aspects of this action.

1. Comments that the EPA should not have responded to the petition for rulemaking or that the EPA was wrong to do so.

Comment: Some commenters opposed the EPA's proposed action on the Petition in the February 2013 proposal entirely and alleged that it is ''sue-and-settle rulemaking'' or ''regulation by litigation.'' Commenters stated that the ''proposed rule and corresponding aggressive deadline schedule stem from'' a settlement of litigation brought by Sierra Club to respond to the Petition.

Some commenters expressed concern that the EPA's proposed action was made in response to a settlement agreement, through a process that, the commenters alleged, did not permit any opportunity for participation by affected parties. Other commenters, believing that the EPA's proposed action was taken to fulfill a consent decree obligation, argued that consent decree deadlines ''often do not allow EPA enough time to write quality regulations'' or would not allow ''opportunity to properly research and investigate the effect of State SSM provisions or the State's ability to meet the NAAQS, or to determine whether the SSM provisions are somehow inconsistent with the CAA.'' The commenters alleged that the process ''bypasses the traditional rulemaking concepts of transparency and effective public participation'' and ''sidesteps the proper rulemaking channels and undercuts meaningful opportunities for those affected by the proposed rule to develop and present evidence that would support a competing and fully informed viewpoint on the substantive issues during the rulemaking process.''

Response: The EPA believes that these comments reflect fundamental misunderstandings about this action. This is a rulemaking in which the EPA is taking action to respond to a petition for rulemaking, and it has undergone a full notice-and-comment rulemaking process as provided for in the CAA. In the February 2013 proposal, the EPA proposed to take action on the Petition. Under the CAA, the APA and the U.S. Constitution, citizens have the right to petition the government for redress. For example, the APA provides that ''[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.'' [70] When citizens file a petition for rulemaking, they are entitled to a response to such petition—whether that response is to grant the petition, to deny the petition, or to partially grant and partially deny the petition as has occurred in this rulemaking action.

Some of these commenters expressed concern that the EPA's action on the Petition was the result of the Agency's obligations under a consent decree or settlement agreement and that this fact in some way invalidates the substantive action. First, the EPA notes that the action was undertaken not in response to a consent decree but rather in

[69] *See, e.g.,* 1983 SSM Guidance at Attachment p. 2.

[70] 5 U.S.C. 553(e).

response to a settlement agreement. Second, the EPA notes that this settlement agreement was entered into by the Agency and the Sierra Club in order to resolve allegations that the EPA was not correctly evaluating and acting upon SIP submissions from states. In particular, the Sierra Club claimed that the EPA was illegally ignoring existing deficiencies in the SIPs of many states, including existing allegedly deficient provisions concerning the treatment of excess emissions during SSM events, when acting on certain SIP submissions. As a result, the Sierra Club alleged, the EPA was acting in contravention of its obligations under the CAA and various consent decrees and thus should be held in contempt for failure to address these issues. In order to resolve these allegations, the EPA agreed only to take action on a petition for rulemaking and to take the action that it deemed appropriate after evaluation of the allegations in the petition. The terms of the settlement agreement underwent public comment and are a matter of public record and are in the docket for this rulemaking.[71]

The EPA does not enter into settlement agreements lightly, nor does the EPA enter into settlement agreements without following the full public process required by CAA section 113(g), which the Agency followed in this case.[72] The EPA solicited comment on the draft settlement agreement as required bysection 113(g). In nocase does the EPA enter into a settlement agreement that has not been officially reviewed not only by the Agency but also by the Department of Justice. Thus, contrary to the commenters' implications, this rulemaking is the result of an appropriate settlement agreementthat did undergo public comment and is legitimate.

In acting on the Petition the EPA has followed all steps of a notice-and-comment rulemaking, as governed by applicable statutes, regulations and executive orders, including a robust process for public participation. When the EPA initially proposed to take action on the Petition, in February 2013, it simultaneously solicited public comment on all aspects of its proposed response to the issues in the Petition and in particular on its proposed action with respect to each of the specific existing SIP provisions identified by the Petitioner as inconsistent with the requirements of the CAA. In response to requests, the EPA extended the public comment period for this proposal to May 13, 2013, which is 80 days from the date the proposed rulemaking was published in the **Federal Register** and 89 days from the date the proposed rulemaking was posted on the EPA's Web site.[73] The EPA deemed this extension appropriate because of the issues raised in the February 2013 proposal. The EPA also held a public hearing on March 12, 2013. In response to this proposed action, the EPA received approximately 69,000 public comments, including over 50 comment letters from state and local governments, over 150 comment letters from industry commenters, over 25 comment letters from public interest groups and many thousands of comments from individual commenters. Many of these comment letters were substantial and covered numerous issues.

Similarly, when the EPA ascertained that it was necessary to revise its proposed action on the Petition with respect to affirmative defenses in SIP provisions, the Agency issued the SNPR. In that supplemental proposal, in September 2014, the EPA fully explained the issues and took comment on the questions related to whether affirmative defense provisions are consistent with CAA requirements concerning the jurisdiction of courts in enforcement actions, and thus whether such provisions are consistent with fundamental CAA requirements for SIP provisions. The EPA provided a public comment period ending November 6, 2014, which is 50 days from the date the SNPR was published in the **Federal Register** and 62 days from the date the SNPR was posted on the EPA's Web site. The EPA believes that the comment period was sufficient given that the subject of the SNPR was limited to the narrow issue of whether affirmative defense provisions are consistent with CAA requirements. The EPA also held a public hearing on the SNPR on October 7, 2014 on the specific topic of the legitimacy of affirmative defense provisions in SIPs. In response to the SNPR, the EPA received over 20,000 public comments, including at least 9 comment letters from states and local governments, over 40 comment letters from industry commenters, at least 6 comment letters from public interest groups, and many thousands of comments from individual commenters.

2. Comments that EPA's action on the Petition violates ''cooperative federalism.''

Comment: Many commenters asserted that the EPA's proposed action on the Petition and the issuance of this SIP call violate principles of cooperative federalism because they impermissibly substitute the EPA's judgment for that of the states in the development of SIPs. This argument was raised by both air agency and industry commenters.

These commenters described the relationship between states and the EPA with respect to SIPs in general. The commenters stated that Congress designed the CAA as a regulatory partnership between the EPA and the states, *i.e.,* a relationship based on ''cooperative federalism.'' Under cooperative federalism, the commenters noted, the EPA has the primary responsibility to identify air pollutants that endanger the public health and welfare and to set national standards for those pollutants. By contrast, the states have primary responsibility to determine how to achieve those national standards by developing federally enforceable measures through SIPs. According to these commenters, however, once a state has made a SIP submission, the EPA's role is relegated exclusively to the ministerial function of reviewing whether the SIP submission will result in compliance with the NAAQS. Similarly, the commenters claim that when EPA is evaluating in the context of a SIP call whether a state's existing SIP continues to meet applicable CAA requirements, the only relevant question is whether the existing SIP will result in compliance with the NAAQS. Thus, the commenters claimed that by finding certain existing SIP provisions substantially inadequate because they are legally deficient to meet CAA requirements for SIP provisions, the EPA is usurping state authority under the cooperative-federalism structure of the CAA.

To support this view, many commenters cited to the ''*Train-Virginia* line of cases,'' named for the U.S. Supreme Court case *Train* v. *Natural Resources Defense Council, Inc.,*[74] and to the D.C. Circuit case *Virginia* v. *EPA*.[75] The D.C. Circuit has described these cases as defining a ''federalism bar'' that constrains the EPA's authority with respect to evaluation of state SIPs

[71] *See* Settlement Agreement executed November 30, 2011, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0039.

[72] *See* ''Proposed Settlement Agreement, Clean Air Act Citizen Suit'' (notice of proposed settlement agreement; request for public comment), 76 FR 54465 (September 1, 2011).

[73] *See* ''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; Notice of extension of public comment period,'' 78 FR 20855 (April 8, 2013), in the rulemaking docket at EPA–HQ–OAR–2012–0322–0126.

[74] 421 U.S. 60 (1975).

[75] 108 F.3d 1397 (D.C. Cir. 1997).

under section 110.[76] Many commenters asserted that this federalism bar limits the EPA's oversight of state SIPs exclusively to whether a SIP will result in compliance with the NAAQS. The commenters evidently construe ''compliance with the NAAQS'' very narrowly to mean the SIP will factually result in attainment of the NAAQS, regardless of whether the SIP provisions in fact meet all applicable CAA requirements (*e.g.,* the requirement that the SIP emission limitations be continuous and enforceable). Accordingly, most of these commenters selectively quoted or cited a passage in *Train,*[77] and similar passages in circuit court opinions following *Train,* for the proposition that the EPA cannot issue a SIP call addressing the SIP provisions at issue in this SIP call action. Some of these commenters asserted that if the EPA were to finalize this action, the states would have ''nothing left'' of their discretion in SIP development and implementation in the future.

Response: The EPA agrees that the CAA establishesa framework for state-federal partnership based on cooperative federalism. The EPA does not, however, agree with the commenters' characterization of that relationship. The EPA explained its view of the cooperative-federalism structure in the February 2013 proposal, especially the fact that under this principle both states and the EPA have authorities and responsibilities with respect to implementing the requirements of the CAA.[78] The EPA believes that the commenters fundamentally misunderstand or inaccurately describe this action, as well as the '''division of responsibilities' between the states and the federal government'' in section 110 that is described in the *Train-Virginia* line of cases.[79]

In CAA section 110(a)(1), Congress imposed the duty upon all states to have a SIP that provides for ''the implementation, maintenance, and enforcement'' of the NAAQS. In section 110(a)(2), Congress clearly set forth the basic SIP requirements that ''[e]ach such plan *shall*'' satisfy.[80] By using the mandatory ''shall'' in section 110(a)(2), Congress established a framework of mandatory requirements *within which* states may exercise their otherwise considerable discretion to design SIPs to provide for attainment and maintenance of the NAAQS and to meet other CAA requirements. In other sections of the Act, Congress also imposed additional, more specific SIP requirements (*e.g.,* the requirement in section 189 that states impose RACM-level emission limitations on sources located in $PM_{2.5}$ nonattainmentareas).

In particular, this SIP call action concerns whether SIP provisions satisfy section 110(a)(2)(A), which 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.''

As explained in the February 2013 proposal, the automatic and discretionary exemptions for emissions from sources during SSM events at issue in this action fail to meet this most basic SIP requirement and are also inconsistent with the enforcement requirements of the CAA. Similarly, the enforcement discretion provisions at issue in this action that have the effect of barring enforcement by EPA or citizens fail to meet this requirement for enforceable emission limitations by interfering with the enforcement structure of the CAA as established by Congress. The affirmative defense provisions at issue are similarly inconsistent with the requirement that SIPs provide for enforcement of the NAAQS and also contravene the statutory jurisdiction of courts to determine liability and to impose remedies for violations of SIP requirements. Each of these types of deficient SIP provisions is thus inconsistent with legal requirements of the CAA for SIP provisions. Contrary to the claims of many commenters, the EPA has authority and responsibility to assure that a state's SIP provisions in fact comply with fundamental legal requirements of the CAA as part of the obligation to ensure that SIPs protect the NAAQS.[81]

The *Train-Virginia* line of cases affirms the plain language of the Act—that in addition to providing generally for attainment and maintenance ofthe NAAQS, all state SIPs must satisfy the specific elements outlined in section 110(a)(2). Even setting aside that *Train* predated substantive revisions to the CAA that strengthened section 110(a)(2)(A) in ways relevant here,[82] the *Train* Court clearly stated that section 110(a)(2) imposes additional requirements for state submissions to be accepted, independent of the general obligation to meet the NAAQS. Many commenters on the February 2013 proposal selectively quoted or cited only portions of the following excerpt from *Train,* omitting or ignoring the portions emphasized here:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, *and which also satisfies that section's other general requirements.* The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations *if they are part of a plan which satisfies the standards of § 110(a)(2) . . . . Thus* [*i.e.,* provided the state plan satisfies the basic requirements of § 110(a)(2)], 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 situation.[83]

[76] *See, e.g., Michigan* v. *EPA,* 213 F.3d 663, 687 (D.C. Cir. 2000).

[77] *See* 421 U.S. at 79.

[78] *See* 78 FR 12459 at 12468; Background Memorandum at 1–3.

[79] *See Virginia* v. *EPA,* 108 F.3d 1397, 1407 (D.C. Cir. 1997) (quoting *Train,* 421 U.S. at 79).

[80] Section 110(a)(2) (emphasisadded); *see EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. 1584, 1600 (2014) (holding that section 110(a)(2) ''speaks without reservation'' regarding what ''components'' a SIP '' 'shall' include''); H. Rept. 101–490, at 217 (calling the provisions of section 110(a)(2)(A) through (M) ''the basic requirements of SIPs'').

[81] The EPA notes that many of the specific SIP elements required in section 110(a)(2) are not themselves statedin terms ofattainmentand maintenance of the NAAQS. Instead, these requirementsarepartof the SIP structure that Congress deemed necessary to support implementation, maintenance andenforcementof the NAAQS, as well as to meet other objectives such as protection of PSD increments and visibility.

[82] For example, to the extent the *Train* Court was construing section 110(a)(2)'s emission limitation provision, it is important to note that while that statutory section before the *Train* Court required approvable SIPs to include certain controls ''necessary to insure compliance with [the] primary or secondary standards'' (*i.e.,* the NAAQS), *see* CAA of 1970, Pub. L. 91–604, section 4(a), 84 Stat. 1676, 1680 (December 31, 1970), that section now more broadly speaksofcontrols''necessary or appropriate *to meet the applicable requirements of this chapter*'' (*i.e.,* the CAA). Section 110(a)(2)(A) (emphasisadded). Among the other relevanttextual changes are the qualification that emission limitations and other controls be ''enforceable,'' *id.;* a statutory definition of ''emission limitation'' that addsrequirements not contemplated by *Train, compare* Section 302(k), *with Train,* 421 U.S. at 78; as well as a recharacterization of section 110(a)(2)'s emission limitation requirement from one bearing on whether ''[t]he Administrator shall approve such plan,'' *see* Pub. L. 91–604, section 4(a), 84 Stat. at 1680, to a requirement expressly directed at what ''[e]ach plan shall'' include.

[83] 421 U.S. at 79 (emphasis added) (footnotes omitted).

When read in its entirety, without omitting the portions italicized above, *Train* clearly does not stand for the proposition that SIPs must be judged exclusively on the basis of whether they will ensure attainment and maintenance of the NAAQS. To the contrary, the Court made clear that approvable SIP submissions must not only provide for attainment and maintenance of the NAAQS but must also satisfy section 110(a)(2)'s "*other* general requirements . . . ."[84] Furthermore, while states have great latitude to select emission limitations, *Train* explained that those emission limitations must nevertheless be "part of a plan which satisfies the standards of § 110(a)(2) . . . ."[85] Finally, the EPA notes that many commenters quoting the final sentence excerpted above typically excluded the word "Thus," which references the preceding sentence stating that SIPs must "satisfy [section 110(a)(2)]'s other general requirements."[86] By omitting the word "thus," and the passages concerning the obligation of states to comply with section 110(a)(2) and other obligations of the CAA, the commenters disregard the critical point that the EPA has the statutory responsibility to assure that state SIPs meet the specific requirements of the CAA, not merely that they provide for attainment of the NAAQS regardless of whether they meet other mandatory legal requirements.[87] In short, the *Train* Court did not hold that SIPs must merely provide for attainment of the NAAQS even under the 1970 Act, much less the text of the CAA applicable today. To the contrary, the U.S. Supreme Court indicated that approvable state plans were also required to meet other legal specifications of the CAA for SIPs such as those in section 110(a)(2) and that the EPA's responsibility is to determine whether they do so. The EPA's own obligations with respect to evaluating SIPs under sections 110(k)(3), 110(l) and 193 continue to provide this authority and responsibility today.

After *Train,* one of the cases most frequently cited by commenters for its discussion of cooperative federalism was the D.C. Circuit's decision in *EME Homer City Generation, L.P.* v. *EPA,* a case since overturned by the U.S. Supreme Court.[88] In that case arising under section 110(a)(2), the D.C. Circuit vacated the EPA's Cross-State Air Pollution Rule for two reasons, one being related to statutory interpretation of section 110(a)(2)(D)(i), the other being "a second, entirely independent problem" based on the EPA's purported overstep of the federalism bar identified in the *Train-Virginia* line of cases.[89] After recounting a list of decisions that recognize the cooperative-federalism structure of the CAA, the D.C. Circuit concluded that even though states have the "primary responsibility" for implementing the NAAQS, in this case the states had no responsibility to address interstate transport until the EPA first quantified the obligations of the states. The dissent described the majority's application of the *Train-Virginia* cases as "a redesign of Congress's vision of cooperative federalism in implementing the CAA . . . ."[90] The commenters approvingly cited to the D.C. Circuit's *EME Homer City* decision, evidently to illustrate the importance of states' role under section 110. That states are given the first opportunity to develop a SIP that complies with section 110 is not in dispute. What is in dispute are the authority and the responsibility of the EPA to take action when states fail to comply with all of the requirements for SIP provisions under the CAA, whether that requirement is to address interstate transport or to meet other specific legal requirements of the Act applicable to SIP provisions.

The U.S. Supreme Court reversed the *EME Homer City* decision in June 2014,[91] rendering suspect the D.C. Circuit's interpretation of the *Train-Virginia* line of cases, as well as rendering suspect the commenters' even broader characterization of that interpretation as *per se* authorizing the states to create provisions such as the SSM exemptions and affirmative defenses at issue in this SIP call. The U.S. Supreme Court held that the touchstone for identifying the division of responsibility between the EPA and the states is the text of section 110(a)(2) itself.[92] Although this SIP call involves different requirements of section 110(a)(2) than the one at issue in *EME Homer City* – there, the interstate transport obligations of 110(a)(2)(D)(i)(I)—the Court expressly held that "[n]othing in the Act differentiates the Good Neighbor Provision from the several other matters a State must address in its SIP."[93] After the U.S. Supreme Court's ruling, the EPA's role under section 110's cooperative-federalism framework—as the agency charged with reasonably interpreting the fundamental requirements of section 110(a)(2), and applying those reasonably interpreted requirements to state SIPs—cannot reasonably be in doubt.[94]

The touchstone of the cooperative-federalism concept outlined in the *Train-Virginia* line of cases is that, under the authority of section 110, the EPA may not legally or functionally require a state to adopt a specific control measure in its SIP in response to a SIP call.[95] On this point, the DC Circuit's opinion in *EME Homer City* was largely in line with *Train, Virginia,* and other DC Circuit cases. In that decision, the court described the *Train-Virginia* federalism bar as prohibiting the EPA "from using the SIP process to adopt *specific* control measures."[96] The *EME Homer City* court did not more broadly hold that section 110(a)(2) imposes no independent limits on state discretion

[84] *See id.* (emphasis added).

[85] *See id.* The EPA notes that section 110(a)(2) and other sections relevant to SIPs in fact contain numerous procedural and substantive requirements that air agencies must meet. Section 110(a) is not composed of a single sentence that directs states merely to attain the NAAQS; it is replete with legal requirements applicable to SIPs that help to assure that a SIP will successfully meet that objective.

[86] *See id.*

[87] As a related point, the EPA notes that commenters claiming that the proposed SIP call was a violation of cooperative federalism likewise typically did not address the existence or significance of sections 110(k), 110(l) and 193. All of these provisions indicate that the EPA has statutory authority and responsibility to approve or disapprove SIP submissions, based upon whether they meet applicable requirements of the CAA. The EPA fully explained its views concerning its authority and responsibility under these provisions in the February 2013 proposal. *See* 78 FR 12459 at 12471, 12477–78, 12483–89; Background Memorandum at 2–3.

[88] 696 F.3d 7, 29 (D.C. Cir. 2012) *rev'd,* 134 S. Ct. 1584 (2014).

[89] *Id.* at 28.

[90] *Id.* at 38 (Rogers, J., dissenting).

[91] *See EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. 1584 (2014).

[92] *Id.* at 1600–01.

[93] *Id.* at 1601 (citing, *inter alia,* section 110(a)(2)).

[94] *See id.* at 1593 (citing *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). *See, e.g., Oklahoma* v. *EPA,* 723 F.3d 1201, 1208 (10th Cir. 2013), *cert. denied,* 134 S. Ct. 2662 (2014) (applying *Chevron* to uphold EPA's disapproval of a SIP for noncompliance with regional haze requirements in section 110(a)(2)(J)); *North Dakota* v. *EPA,* 730 F.3d 750 (8th Cir. 2013), *cert. denied,* 134 S. Ct. 2662 (2014) (applying *Chevron* to uphold EPA's disapproval of a SIP for noncompliance with interstate visibility requirements in section 110(a)(2)(D)(i)(II)); *Luminant Generation* v. *EPA,* 714 F.3d 841, 856 (5th Cir. 2013), *cert. denied,* 134 S. Ct. 387 (2013); *Mont. Sulphur & Chem. Co.* v. *United States EPA,* 666 F.3d 1174, 1180, 1189 (9th Cir. 2012), *cert. denied,* 133 S. Ct. 409 (2012) ("The Clean Air Act gives the EPA significant national oversight over air quality standards, to be exercised pursuant to statutory specifications, and provides EPA with regulatory discretion in key respects relevant to SIP calls and determinations about the attainment of the NAAQS"); *Mich. Dep't of Envtl. Quality* v. *Browner,* 230 F.3d 181, 184–85 (6th Cir. 2000) ("Although states are given broad authority to design programs, the EPA has the final authority to determine whether a SIP meets the requirements of the CAA.").

[95] 78 FR 12459 at 12489 & nn.89–90.

[96] *See EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d at 29 (citing *Michigan,* 213 F.3d at 687; *Virginia,* 108 F.3d at 1410) (emphasis added).

by requiring the states to meet legal requirements for SIP provisions, or that the EPA is prohibited from either interpreting 110(a)(2)'s basic requirements or reviewing state SIPs for compliance with those requirements. Accordingly, the EPA believes that to the extent that the DC Circuit's *EME Homer City* decision is relevant to this action, the decision in fact supports the basic principle that the EPA has authority and responsibility to assure that states comply with legal requirements of the CAA applicable to SIP provisions.

This view of what cooperative federalism prohibits is consistent with *Train,* where the U.S. Supreme Court stated that the EPA ''is relegated by the [1970] Act to a secondary role in the process of determining and enforcing the *specific, source-by-source emission limitations* which are necessary if the national standards it has set are to be met.'' [97] It is also consistent with the *Virginia* decision, where the DC Circuit held that the EPA cannot under section 110 functionally require states to ''adopt[] particular control measures'' in a SIP but must rather ensure that states have a meaningful choice among alternatives.[98] Moreover, it is consistent with the court's view in *Michigan* v. *EPA,*[99] a case involving a SIP call, in which the DC Circuit interpreted and applied those precedents:

> Given the *Train* and *Virginia* precedent, the validity of the NOx budget program underlying the SIP call depends in part on whether the program in effect constitutes an EPA-imposed control measure or emission limitation triggering the *Train-Virginia* federalism bar: In other words, on whether the program constitutes an *impermissible source-specific means rather than a permissible end goal*. However, the program's validity also depends on whether EPA's budgets *allow the covered states real choice with regard to the control measure options available to them* to meet the budget requirements.[100]

Clearly, in this SIP call the EPA is leaving the states the freedom to correct the inappropriate provisions in any manner they wish as long as they comply with the constraints of section 110(a)(2).

Finally, this view is consistent with *Appalachian Power Co.* v. *EPA,* where the DC Circuit reiterated that *Virginia* ''disapproved the EPA's plan to reject SIPs that did not incorporate *particular limits* upon emissions from new cars.'' [101] The specific controls discussed in these cases are quite different, both as a legal matter and functionally, from the statutory constraints on the states' exercise of discretion that the EPA is interpreting and applying in this action.[102]

As explained in the February 2013 proposal, in this action the EPA is not requiring states to adopt any particular emission limitation or to impose a specific control measure in a SIP provision; the EPA is merely directing the states to address the fundamental statutory requirements that all SIP provisions must meet.[103] This SIP call outlines the principles and framework for how states can revise the existing deficient SIP provisions to meet a permissible end goal [104]—compliance with the Act. In so doing, the EPA is merely acting pursuant to its supervisory role under the CAA's cooperative-federalism framework, to ensure that SIPs satisfy those broad requirements that section 110(a)(2) mandates SIPs ''shall'' satisfy. With respect to section 110(a)(2)(A), this means that a SIP must at least contain legitimate, enforceable emission limitations to the extent they are necessary or appropriate ''to meet the applicable requirements'' of the Act. SIPs cannot contain unbounded director's discretion provisions that functionally subvert the requirements of the CAA for approval and revision of SIP provisions. Likewise, SIPs cannot have enforcement discretion provisions or affirmative defense provisions that contravene the fundamental requirements concerning the enforcement of SIP provisions. Accordingly, the EPA believes that this SIP call fully accords with the federal-state partnership outlined in section 110, by providing the states meaningful latitude when developing SIP submissions, while '''nonetheless subject[ing] the States to strict minimum compliances requirements' and giv[ing] EPA the authority to determine a state's compliance with those requirements.'' [105]

The EPA emphasizes that this action also allows states ''real choice'' concerning their SIP provisions, so long as the provisions are consistent with applicable requirements. For example, this SIP call does not establish any specific, source-by-source limitations. To the contrary, as described in section VII.A of this document, emission limitations meeting the requirements of section 110(a)(2)(A) may take a variety of forms. Under section 110(a)(2)(A), states are free to include in their SIPs whatever emission limitations they wish, provided the states comply with applicable legal requirements. Among those requirements are that an emission limitation in a SIP must be an ''emission limitation'' as defined in section 302(k) and that all controls—emission limitations and otherwise—must be sufficiently ''enforceable'' to ensure compliance with applicable CAA requirements. The SSM provisions at issue in this SIP call subvert both of these legal requirements.

3. Comments that the EPA should expand the rulemaking to include additional SIP provisions that the commenters consider deficient with respect to SSM issues.

Comment: Some commenters requested that the EPA expand its February 2013 proposed action to include additional SIP provisions that the commenters consider deficient with respect to SSM issues. Specifically, commenters identified additional SIP provisions in Wisconsin (a state not identified by the Petitioner) and New Hampshire (a state for which the Petitioner did specifically identify other SIP provisions).

One commenter argued that ''[i]t would substantially ease the administrative burden on EPA as well on public commenters'' and ''ensure that companies in all states are treated equally'' if the EPA were to include ''all SIPs with faulty SSM provisions in [a] consolidated SIP call.'' Another commenter noted that ''the interests of regulatory efficiency will be served'' by adding additional SIP provisions to the SIP call because ''all changes required by the policy underlying this rulemaking'' to state SIPs would then be made at once.

Response: The EPA acknowledges the requests made by the commenters concerning additional SIP provisions that may be inconsistent with CAA

[97] 421 U.S. at 79 (emphasis added).

[98] *Virginia* v. *EPA,* 108 F.3d 1397, 1415 (D.C. Cir. 1997) (holding that functionally, in that case, ''EPA's alternative is no alternative at all''); *see also Appalachian Power Co.* v. *EPA,* 249 F.3d 1032, 1047 (D.C. Cir. 2001) (citing *Virginia,* 108 F.3d at 1406, 1410) (''We did not suggest [in *Virginia*] that under § 110 states may develop their plans free of extrinsic legal constraints. Indeed, SIP development . . . commonly involves decisionmaking subject to various legal constraints.'').

[99] 213 F.3d 663 (D.C. Cir. 2000).

[100] *Id.* at 687 (emphasis added).

[101] 249 F.3d 1032, 1047 (D.C. Cir. 2001) (citing *Virginia,* 108 F.3d at 1410) (emphasis added).

[102] *See id.*

[103] 78 FR 12459 at 12489.

[104] *See, e.g., Michigan,* 213 F.3d at 687.

[105] *Michigan* v. *EPA,* 213 F.3d 663, 687 (D.C. Cir. 2000) (quoting *Union Elec. Co.* v. *EPA,* 427 U.S. 246, 256–57 (1976)); *see Mont. Sulphur & Chem. Co.* v. *United States EPA,* 666 F.3d 1174, 1181 (9th Cir. 2012), *cert. denied,* 133 S. Ct. 409 (2012) (''The Clean Air Act gives the EPA significant national oversight power over air quality standards, to be exercised pursuant to statutory specifications, and provides the EPA with regulatory discretion in key respects relevant to SIP calls and determinations about the attainment of NAAQS.'').

requirements. The EPA also agrees with the points made by the commenters concerning the potential benefits of expanding the rulemaking to include evaluation of additional provisions. However, in the February 2013 proposal the EPA elected to review the specific SIP provisions identified by the Petitioner in the SIPs of only the 39 states (and jurisdictions) identified by the Petitioner to determine whether they were consistent with the CAA as interpreted in the EPA's SSM Policy as requested in the Petition.[106] Although there may be additional SIP provisions that are deficient, the EPA determined that it would first focus its review on the SIP provisions for which possible deficiencies had already been identified by the Petitioner.[107] Accordingly, the February 2013 proposal addressed only those states identified in the Petition, in order to use EPA and state resources most efficiently.

With respect to the specific additional SIP provisions identified by the commenters on the February 2013 proposal, the EPA also notes that it cannot take final action on any additional SSM-related SIP provisions without first providing an opportunity for public notice and comment with respect to those additional SIP provisions. The EPA agrees that an important objective of its action on the Petition is to provide complete, comprehensive and up-to-date guidance to all air agencies concerning SIP provisions that apply to emissions during SSM events. The EPA is endeavoring to do this by responding to the Petition fully and by updating its interpretation of the CAA in the SSM Policy to reflect the relevant statutory requirements and recent court decisions. All states should feel free to apply this revised guidance in reviewing their own SIP provisions and revising them as appropriate. The EPA may address other SSM-related provisions that may be inconsistent with EPA's SSM Policy and the CAA in a later separate notice-and-comment action(s). The EPA has authority to address those provisions separately.[108]

The EPA notes that with respect to the issue of affirmative defenses in SIP provisions, the Agency determined that it was necessary to amend its February 2013 proposal to take into consideration a subsequent court decision concerning the legal basis for such provisions. As explained in the SNPR and also in section IV of this document, the DC Circuit in the *NRDC* case decided that the CAA precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. Thus, the EPA issued the SNPR to address this development in the law. Because of recent EPA actions and court decisions on this subject, the Agency determined that it was important to address not only the affirmative defense provisions identified in the Petition but also affirmative defense provisions that the EPA independently identified in six states' SIPs.[109] The SNPR was explicitly limited to the narrow concern of affirmative defense provisions, which was one of the types of issued specifically identified by the Petitioner. The EPA issued the SNPR with the same intention as that with which it issued the February 2013 proposal—so that the final action would provide guidance that reflects the EPA's updated interpretation of the CAA and would respond to the Petitioner's request that ''EPA find that all 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 and issue a call for each of the states with such a SIP to revise it in conformity with the requirements of the Act or otherwise remedy these defective SIPs.'' [110] The EPA included these six states' affirmative defense provisions in order to provide comprehensive guidance to all states concerning affirmative defense provisions in SIPs and to avoid confusion that may arise due to recent rulemakings and court decisions relevant to such provisions under the CAA.

The SIP call promulgated by the EPA in this action applies only to the particular SIP provisions identified in this document, and the scope of the SIP call for each state is limited to those provisions. However, if states of their own accord wish to revise SIP provisions, beyond those identified in this SIP call, that they believe are inconsistent with the SSM Policy and the CAA, the EPA will review and act on those SIP revisions in accordance with CAA sections 110(k), 110(l) and 193.

4. Comments that the EPA should create regulatory text in 40 CFR part 51 to forbid SSM exemptions in SIP provisions if the CAA precludes them.

Comment: Commenters argued that the EPA, before issuing a SIP call requiring states to revise SIP provisions containing exemptions for emissions during SSM events, should first have promulgated specific regulations articulating that such exemptions are precluded by the CAA. According to commenters, taking this approach would have given states more certainty and clarity and provided states with more time to develop SIP revisions consistent with those regulatory requirements. Commenters also asserted that it is not appropriate for the EPA to proceed with a SIP call to states without prior rulemaking to create regulatory provisions explicitly prohibiting SSM exemptions in SIPs, given that the Agency has previously approved the SIP provisions at issue.

Response: The EPA disagrees with the commenters' argument that the Agency must first promulgate regulations to make clear that exemptions for emissions during SSM events are not permissible in SIPs, prior to issuing this SIP call. The EPA likewise disagrees with the implication that its authority to promulgate a SIP call is restricted only to those issues for which there is specifically applicable regulatory text, as opposed to requirements related to statutory provisions, court decisions or other legal or factual bases for a determination that an existing SIP provision is substantially inadequate to meet CAA requirements. The EPA disagrees with the commenters for several reasons.

First, the CAA does not impose a general obligation upon the Agency to promulgate regulations applicable to all SIP requirements. Although the EPA has elected to promulgate regulations to address a broad variety of issues relevant to SIPs,[111] the Agency is not obligated to promulgate regulations

[106] February 2013 proposal, 78 FR 12459 (February 22, 2013).

[107] The SIP provisions for which the EPA proposed SIP calls in its February 2013 proposal were further limited to those for which the Petitioner specifically requested action, with three exceptions; the EPA proposed SIP calls for additional SIP provisions in Ohio, North Dakota and West Virginia (one each), for reasons explained in section IX of the February 2013 proposal.

[108] The EPA notes that it has received a separate petition for rulemaking requesting it to evaluate SIP provisions in the State of Wisconsin. The EPA is not taking action on that separate petition as part of this action but will take action on that petition in a future rulemaking.

[109] Of these six states in which the EPA independentlyidentifiedaffirmative defense provisions, two states (California and Texas) were not identified in the Petition. For another two of these states (New Mexico and Washington), the EPA had already reviewed other affirmative defense provisions specifically identified in the Petition and had already proposed SIP calls in the February 2013 proposal. For the other two states (South Carolina and West Virginia), the EPA had already reviewed and proposed SIP calls for provisions that were identified by the Petitioner but that did not include affirmative defenses.

[110] Petition at 14.

[111] *See, generally,* 40 CFR part 51 (including regulations applicable to many aspects of SIPs.

unless there is a specific statutory mandate that it do so.[112] In addition, the EPA has authority under section 301 to promulgate such regulations as it deems necessary to implement the CAA (*e.g.,* to fill statutory gaps left by Congress for the EPA to fill or to clarify ambiguous statutory language). With respect to SIP requirements, however, the EPA has elected to promulgate regulations or to issue guidance to states to address different requirements, as appropriate.[113] In short, there is no specific statutory requirement that the EPA promulgate regulations with respect to the types of deficiencies in SIP provisions at issue in this action prior to issuing a SIP call.

Second, the EPA has historically elected to address the key issues relevant to this SIP call action in guidance. Through a series of guidance documents, issued in 1982, 1983, 1999 and 2001, the EPA has previously explained its interpretations of the CAA with respect to SIP provisions that contain automatic SSM exemptions, discretionary SSM exemptions, the exercise of enforcement discretion for SSM events and affirmative defenses for SSM events. Starting in the 1982 SSM Guidance, the EPA explicitly acknowledged that it had previously approved some SIP provisions related to emissions during SSM events that it should not have, because the provisions were inconsistent with requirements for SIPs. In addition, the EPA has in rulemakings applied its interpretation of the CAA with respect to issues such as exemptions for emissions during SSM events, and these actions have been approved by courts.[114] Under these circumstances, the EPA does not agree that promulgation of generally applicable regulations was necessary to put states on notice of the Agency's interpretation of the CAA with respect to these issues, prior to issuance of a SIP call.

Finally, the EPA's authority under section 110(k)(5) is not limited, expressly or otherwise, solely to inadequacies related to regulatory requirements. To the contrary, section 110(k)(5) refers broadly to attainment and maintenance of the NAAQS, adequate mitigation of interstate transport and compliance with ''any requirement of'' the CAA. In addition, section 110(k)(5) specifically contemplates situations such as this one, ''whenever'' the EPA finds previously approved SIP provisions to be deficient. Nothing in the CAA requires the EPA to conduct a separate rulemaking clarifying its interpretation of the CAA prior to issuance of this SIP call. For the types of deficiencies at issue in this action, the EPA believes that the statutory requirements of the CAA itself and recent court decisions concerning those statutory provisions provide sufficient basis for this SIP call.

For the foregoing reasons, the EPA disagrees that before requiring states to revise SIPs that contain provisions with SSM exemptions, the EPA first must promulgate regulations explicitly stating that such exemptions are impermissible under the CAA. In addition, the EPA notes that although it is not promulgating generally applicable regulations in this action, it is nonetheless revising its guidance in the SSM Policy through rulemaking and has thereby provided states and other parties the opportunity to comment on the Agency's interpretation of the CAA with respect to this issue.

5. Comments that the EPA did not provide a sufficiently long comment period on the proposal in general or as contemplated in Executive Order 13563.

Comment: A number of commenters argued that the comment period provided by the EPA for the February 2013 proposal was ''at odds with'' Executive Order 13563. The commenters alleged that the comment period was ''unconscionably short,'' even so short as to be ''arbitrary and capricious'' because, in order to provide comments, ''impacted States and industries must perform the data collection and analysis necessary to evaluate the need for the proposed rule and its impacts.'' Further, the commenters alleged, the ''EPA's failure and refusal to perform any technical analyses of the feasibility of source operations after the elimination of SSM provisions or the likely capital and operating costs of additional control equipment required to meet numeric standards during all operational periods has denied the States, the affected parties, and the public a meaningful opportunity to evaluate and comment upon the proposed rule.'' Finally, one commenter asserted that Executive Order 13563 requires that ''[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected.''[115] The commenter claimed that because the EPA allegedly ''failed to seek the views of those who are likely to be affected and those who are potentially subject to such rulemaking, EPA's actions ignore the requirements of the Executive Order.''

Response: The EPA disagrees that it has not provided sufficiently long comment periods to address the specific issues relevant to this action. As described in section IV.D.1 of this document, the EPA has followed all steps of a notice-and-comment rulemaking, as governed by applicable statutes, regulations and executive orders, including a robust process for public participation. When the EPA initially proposed to take action on the Petition, in February 2013, it simultaneously solicited public comment on all aspects of its proposed response to the issues in the Petition and in particular on its proposed action with respect to each of the specific existing SIP provisions identified by the Petitioner as inconsistent with the requirements of the CAA. In response to requests, the EPA extended the public comment period for this proposal to May 13, 2013, which is 80 days from the date the proposed rulemaking was published in the **Federal Register** and 89 days from the date the proposed rulemaking was posted on the EPA's Web site.[116] The EPA deemed this extension appropriate because of the issues raised in the February 2013 proposal. The EPA also held a public hearing on March 12, 2013. In response to this proposed action, the EPA received approximately 69,000 public comments, including over 50 comment letters from state and local governments, over 150 comment letters from industry commenters, over 25 comment letters from public interest groups and many thousands of comments from individual commenters. Many of these comment

[112] *See, e.g.,* CAA section 169A(a)(4) (requiring the EPA to promulgate regulations governing the requirements relevant to SIP requirements for purposes of regional haze reduction).

[113] *See, e.g.,* ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992) (the ''General Preamble'' that continues to provide guidance recommendations to states for certain attainment plan requirements for various NAAQS); 40 CFR part 51, subpart Z (imposing regulatory requirements for certain attainment plan requirements for the 1997 $PM_{2.5}$ NAAQS).

[114] *See, e.g., Michigan* v. *EPA,* 213 F.3d 663 (D.C. Cir. 2000) (upholding the ''NO_X SIP Call'' to states requiring revisions to previously approved SIPs with respect to ozone transport and section 110(a)(2)(D)(i)(I));''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 74 FR 21639 (April 18, 2011) (the EPA issued a SIP call to rectify SIP provisions dating back to 1980).

[115] *See* E.O. 13563 section 2(c).

[116] *See* ''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; Notice of extension of public comment period,'' 78 FR 20855 (April 8, 2013), in the rulemaking docket at EPA–HQ–OAR–2012–0322–0126.

letters were substantial and covered numerous issues.

Similarly, when the EPA ascertained that it was necessary to revise its proposed action on the Petition with respect to affirmative defenses in SIP provisions, the Agency issued the SNPR. In that supplemental proposal, in September 2014, the EPA fully explained the issues and took comment on the questions related to whether affirmative defense provisions are consistent with CAA requirements concerning the jurisdiction of courts in enforcement actions, and thus whether such provisions are consistent with fundamental CAA requirements for SIP provisions. The EPA provided a public comment period ending November 6, 2014, which is 50 days from the date the SNPR was published in the **Federal Register** and 62 days from the date the SNPR was posted on the EPA's Web site. The EPA believes that the comment period was sufficient given that the subject of the SNPR was limited to the narrow issue of whether affirmative defense provisions are consistent with CAA requirements. The EPA also held a public hearing on the SNPR on October 7, 2014 on the specific topic of the legitimacy of affirmative defense provisions in SIPs. In response to the SNPR, the EPA received over 20,000 public comments, including at least 9 comment letters from states and local governments, over 40 comment letters from industry commenters, at least 6 comment letters from public interest groups, and many thousands of comments from individual commenters.

Executive Order 13563 provides that each agency should ''afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be *at least 60 days*.'' [117] The length of the Agency's comment period for the original proposed rulemaking well-exceeded this standard. The EPA also facilitated comment on the action by providing a full and detailed evaluation of the relevant issues in the February 2013 proposal, the background memorandum supporting the proposal and the SNPR.

When considering whether an agency has provided for adequate public input, reviewing courts are generally most concerned with the overall adequacy of the opportunity to comment. This, in turn, typically depends on steps the agency took to notify the public of information that is important to this action. Comment period length is only one factor that courts consider in this analysis, and courts have regularly found that comment periods of significantly shorter length than the 80 days provided here on the February 2013 proposal were reasonable in various circumstances.[118] Given the nature of the issues raised by the Petition, the EPA believes that the comment period was appropriate and sufficient to allow for full analysis of the issues and preparation of comments. The number of comments received on the February 2013 proposal, and the breadth of issues and level of detail provided by the commenters, both supportive and adverse, serve to support the EPA's view on this point.

The EPA also disagrees with respect to the claims of commenters that the comment period was insufficient because the EPA should provide time for commenters to evaluate and analyze fully the possible ultimate impacts of the SIP call upon particular sources, to determine what type of SIP revision by a state is appropriate in response to a SIP call, or to ascertain what specific new emission limitation or control measure requirement states should impose upon sources in such a future SIP revision. The EPA's action on the Petition concerning specific existing SIP provisions is focused upon whether those existing provisions meet fundamental legal requirements of the CAA for SIP provisions. The EPA is not required to provide a comment period for this action that allows states actually to determine which of the potential forms of SIP revision they may wish to undertake, or to complete those SIP revisions, as part of this rulemaking. The subsequent state and EPA rulemaking processes on the SIP revisions in response to this SIP call action will provide time for further evaluation of the issues raised by commenters.

As explained in the February 2013 proposal, the EPA does not interpret section 110(k)(5) to require it to ''prove causation'' concerning what precise impacts illegal SIP provisions are having on CAA requirements, such as attainment and maintenance of the NAAQS and enforcement of SIP requirements.[119] Nor is the EPA directing states to adopt a specific control measure in response to the SIP call; the decision as to how to revise the affected SIP provisions in response to the SIP call is left to the states. The state's response to the SIP call will be developed in future rulemaking actions at both the state and federal level which will similarly be subject to full notice-and-comment proceedings. In electing to proceed by SIP call under section 110(k)(5), rather than by error correction under section 110(k)(6), the EPA is providing affected states with the maximum time permitted by statute to determine how best to revise their SIP provisions, consistent with CAA requirements. During this process, the commenters and other stakeholders will have the opportunity to participate in the development of the SIP revision, including decisions such as how the state elects to revise the deficient SIP provisions (*e.g.,* merely to eliminate an exemption for SSM events or to impose an alternative emission limitation applicable to startup and shutdown).

The questions posed by the commenters about what specific emission limitations should apply during startup and shutdown events, what control measures will meet applicable CAA legal requirements, what control measures will be effective and cost-effective to meet applicable legal standards and other similar questions are exactly the sorts of issues that states will evaluate in the process of revising affected SIP provisions. Moreover, these are the same sorts of questions that the EPA will be evaluating when it reviews state SIP submissions made in response to the SIP call. The EPA is not required, by Executive Order 13563 or otherwise, to provide a comment period that would allow for all future actions in response to the SIP call to occur before issuing the SIP call. The EPA anticipates that the commenters will be able to participate actively in the actions that will happen in due course in response to this SIP call.

Finally, the EPA disagrees that it did not adequately seek the views of potentially affected entities prior to issuance of the February 2013 proposal. The EPA alerted the public to the existence of the Petition by soliciting comment on the settlement agreement that obligated the Agency to act upon it, in accordance with CAA section 113(g). Subsequently, EPA personnel communicated about the Petition and the issues it raised in various standing

[117] *See* E.O. 13563 section 2(b) (emphasis added).

[118] *See, e.g., Omnipoint Corp.* v. *Fed. Commc'ns Comm'n,* 78 F.3d 620, 629 (D.C. Cir. 1996) (approving a 7-day comment period); *Florida Power & Light Co.* v. *United States,* 846 F.2d 765, 772 (D.C. Cir. 1988) (holding a 15-day comment period to not be unreasonable under the governing circumstances); *Conn. Light & Power Co.* v. *NRC,* 673 F.2d 525, 534 (D.C. Cir. 1982) (holding 30 days not unreasonable in the particular situation); *Am. Farm Bureau Fedn* v. *United States EPA,* 984 F.Supp.2d 289, 333 (M.D. Pa. 2013) (holding that a 45-day comment period was adequate despite ''technical complexities of the regulations and issues raised'').

[119] This issue is addressed in more detail in section VIII.A.1 of this document.

meetings and conference calls with states and organizations that represent state and local air regulators.

6. Comments that this action is not ''nationally applicable'' for purposes of judicial review.

Comment: Commenters alleged that the SSM SIP call is not ''nationally applicable'' for purposes of judicial review. One state commenter cited *ATK Launch Systems* for the proposition that the specific language of the regulation being challenged indicates whether an action is nationally or locally/regionally applicable. Because a SIP provision subject to this SIP call is state-specific, the commenter argued, it is of concern only for that state and thus the SIP call is a locally applicable action.[120]

Response: The EPA disagrees with the commenter that the SIP call is not a nationally applicable action. In this action, the EPA is responding to a Petition that requires the Agency to reevaluate its interpretations of the CAA in the SSM Policy that apply to SIP provisions for all states across the nation. In so doing, the EPA is reiterating its interpretations with respect to some issues (*e.g.,* that SIP provisions cannot include exemptions for emissions during SSM events) and revising its interpretations with respect to others (*e.g.,* so that SIP provisions cannot include affirmative defenses for emissions during SSM events). In addition to reiterating and updating its interpretations with respect to SIP provisions in general, the EPA is also applying its interpretations to specific existing provisions in the SIPs of 41 states. Through this action the EPA is establishing a national policy that it is applying to states across the nation. As with many nationally applicable rulemakings, it is true that this action also has local or regional effects in the sense that EPA is requiring 36 individual states to submit revisions to their SIPs. However, through this action the EPA is applying the same legal and policy interpretation to each of these states. Thus, the underlying basis for the SIP call has ''nationwide scope and effect'' within the meaning of section 307(b)(1) as explained by the EPA in the February 2013 proposal. A key purpose of the CAA in channeling to the D.C. Circuit challenges to EPA rulemakings that have nationwide scope and effect is to minimize instances where the same legal and policy basis for decisions may be challenged in multiple courts of appeals, which instances would potentially lead to inconsistent judicial holdings and a patchwork application of the CAA across the country. We note that in the *ATK Launch* case cited by commenters, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) in fact transferred to the D.C. Circuit challenges to the designation of two areas in Utah that were part of a national rulemaking designating areas across the U.S. for the $PM_{2.5}$ NAAQS. In transferring the challenges to the D.C. Circuit, the Tenth Circuit noted that the designations rulemaking ''reached areas coast to coast and beyond'' and that the EPA had applied a uniform process and standard.[121] Significantly, in support of its decision to transfer the challenges to the D.C. Circuit, the Tenth Circuit stated: ''The challenge here is more akin to challenges to so-called 'SIP Calls,' which the Fourth and Fifth Circuits have transferred to the D.C. Circuit . . . Although each of the SIP Call petitions challenged the revision requirement as to a particular state, the SIP Call on its face applied the same standard to every state and mandated revisions based on that standard to states with non-conforming SIPs in multiple regions of the country.'' [122]

7. Comments that the EPA was obligated to address and justify the potential costs of the action and failed to do so correctly.

Comment: Several commenters alleged that the EPA has failed to address the costs associated with this rulemaking action appropriately and consistent with legal requirements. In particular, commenters alleged that the EPA is required to address costs of various impacts of this SIP call, including the costs that may be involved in changes to emissions controls or operation at sources and the costs to states to revise permits and revise SIPs in response to the SIP call.

Commenters also alleged that the EPA has failed to comply with Executive Order 12291, Executive Order 12866, Executive Order 13211, the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.

One commenter supported the EPA's approach with respect to cost.

Response: The EPA disagrees with commenters concerning its compliance with the Executive Orders and statutes applicable to agency rulemaking in general. The EPA maintains that it did properly consider the costs imposed by this SIP call action, as required by law. As explained in the February 2013 proposal, to the extent that the EPA is issuing a SIP call to a state under section 110(k)(5), the Agency is only requiring a 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 of determining, among other things, which of several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources. Therefore, the EPA considers the only direct costs of this rulemaking action to be those to states associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call.[123] 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. The EPA notes that it did not consider the costs of potential revisions to operating permits for sources to be a direct cost imposed by this action, because, as stated elsewhere in this document, the Agency anticipates that states will elect to delay any necessary revision of permits until the permits need to be reissued in the ordinary course after revision of the underlying SIP provisions.

The commenters also incorrectly claim that the EPA failed to comply with Executive Order 12291. That Executive Order was explicitly revoked by Executive Order 12866, which was signed by President Clinton on September 30, 1993.

The commenters are likewise incorrect that the EPA did not comply with Executive Order 12866. This action was not deemed ''significant'' on a basis of the cost it will impose as the commenters claimed. The EPA has already concluded that this action will not result in a rule that may have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, of state, local or tribal governments or communities. The EPA instead determined that, as noted in both the February 2013 proposal (section X.A) and the SNPR (section VIII.A), this action is a ''significant regulatory action'' as that term is defined in Executive Order 12866 because it raises novel legal or policy issues. Accordingly, it was on that basis that the EPA submitted the February 2013 proposal, the SNPR and the final action to the Office of Management and Budget (OMB) for review. Changes made

[120] *See ATK Launch Systems, Inc.* v. *EPA,* 651 F.3d 1194 (10th Cir. 2011).

[121] *Id.,* 651 F.3d at 1197.

[122] *Id.,* 651 F.3d at 1199.

[123] *See* Memorandum, ''Estimate of Potential Direct Costs of SSM SIP Calls to Air Agencies,'' April 28, 2015, in the rulemaking docket.

in response to OMB review are documented in the docket for this action. The EPA believes it has fully complied with Executive Order 12866.

As stated in the February 2013 proposal, the EPA does not believe this is a ''significant energy action'' as defined in Executive Order 13211, because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. As described earlier, this action merely requires that states revise their SIPs to comply with existing requirements of the CAA. States have the choice of how to revise the deficient SIP provisions that are the subject of this action; there are a variety of different ways that states may treat the issue of excess emissions during SSM events consistent with CAA requirements for SIPs. This action merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA, and therefore it is not a ''significant energy action'' under Executive Order 13211.

With respect to the Regulatory Flexibility Act (RFA), as the EPA explained in the February 2013 proposal, courts have interpreted the RFA to require a regulatory flexibility analysis only when small entities will be subject to the requirements of the rule.[124] This action will not impose any requirements on small entities. Instead, it merely reiterates the EPA's interpretation of the statutory requirements of the CAA. To the extent that the EPA is issuing a SIP call to a state under section 110(k)(5), the EPA is only requiring the state to revise its SIP to comply with existing requirements of the CAA. In turn, the state will determine whether and how to regulate specific sources, including any small entities, through the process of deciding how to revise a deficient SIP provision. The EPA's action itself will not have a significant economic impact on a substantial number of small entities.

As the EPA explained in the February 2013 proposal, this action is not subject to the requirements of the Unfunded Mandates Reform Act (UMRA) because it 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. With respect to the impacts on sources, the EPA's action in this rulemaking is not directly imposing costs on any sources. The EPA's action is merely directing states to revise their SIPs in order to bring them into compliance with the legal requirements of the CAA for SIP provisions. In response to the SIP call, the states will determine how best to revise their deficient SIP provisions in order to meet CAA requirements. It is thus the states that will make the decisions concerning how best to revise their SIP provisions and will determine what impacts will ultimately apply to sources as a result of those revisions.

8. Comments that the EPA's action violates procedural requirements of the CAA or the APA, because the EPA is acting on the Petition, updating its SSM Policy and applying its interpretation of the CAA to specific SIP provisions in one action.

Comment: Commenters argued that the EPA's proposed action on the Petition, which includes simultaneous updating of its interpretations of the CAA in the SSM Policy and application of those revised interpretations to existing SIP provisions, is in violation of procedural requirements of the CAA and the APA. According to the commenters, the EPA's combination of actions is a ''subterfuge'' to avoid notice and comment on the proposed actions in the February 2013 proposal. The commenters claimed that the EPA could only take these actions through two or more separate rulemaking actions. By proposing to update its interpretation of the CAA in the SSM Policy through notice-and-comment rulemaking and proposing to apply its interpretation of the CAA through notice-and-comment rulemaking to existing SIP provisions, the commenters claimed, the EPA has prejudged the outcome of this action.

Response: The EPA does not agree that it was required to take this action in multiple separate rulemakings as claimed by the commenters. First, the EPA notes, the fact that the commenters' allegation—that the Agency failed to proceed by notice and comment—was raised in a comment letter submitted on the February 2013 proposal belies the commenters' overarching procedural argument that the EPA is failing to subject its interpretations of the CAA to notice-and-comment rulemaking. Second, although the EPA could elect to undertake two or more separate notice-and-comment rulemakings in order to answer the Petition, to revise its interpretations of the CAA in the SSM Policy and to evaluate existing provisions in state SIPs against the requirements of the CAA, there is no requirement for the Agency to do so. To the contrary, the EPA believes that it is preferable to take these interrelated actions in a combined rulemaking process. This combined approach allows the EPA to explain its actions comprehensively and in their larger context. The combined approach allows commenters to participate more meaningfully by considering together the proposed action on the Petition, the proposed interpretations of the CAA in the SSM Policy and the proposed application of the EPA's interpretation to specific SIP provisions. By addressing the interrelated actions together and comprehensively, the EPA is striving to be efficient with the resources of both regulators and regulated parties. Most importantly, by combining these actions the EPA is being responsive to the need for prompt evaluation of the SIP provisions at issue and for correction of those found to be legally deficient in a timely fashion. Far from ''prejudging'' the issues, the EPA explicitly sought comment on all aspects of the February 2013 proposal andsoughtadditional comment onissues relatedto affirmative defense provisions in the SNPR. Naturally, the EPA's proposal and supplemental proposal reflected its best judgments on the proper interpretations of the CAA and application of those interpretationstotheissues raisedby the Petition, as of the time of the February 2013 proposal and the SNPR.

VI. Final 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. What the Petitioner Requested

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.'' [125] 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 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.[126] 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

[124] *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).

[125] Petition at 16.

[126] Petition at 14.

inefficient.'' [127] The Petitioner cited various past rulemaking actions to illustrate how EPA approval of ambiguous SIP provisions can inject unintended confusion for regulated entities, regulators, and the public in the future, especially in the context of future enforcement actions. Accordingly, the Petitioner requested that the EPA discontinue reliance upon interpretive letters when approving state SIP submissions, regardless of the circumstances. A more detailed explanation of the Petitioner's arguments appears in the 2013 February proposal.[128]

B. What the EPA Proposed

In the February 2013 proposal, the EPA proposed to deny the Petition with respect to this issue. The EPA explained the basis for this proposed disapproval in detail, including a discussion of the statutory provisions that the Agency interprets to permit this approach, an explanation of why this approach makes sense from both a practical and an efficiency perspective under some circumstances, and a careful explanation of the process by which EPA intends to rely on interpretive letters in order to assure that the concerns of the Petitioner with respect to potential future disputes about the meaning of SIP provisions should be alleviated.

C. What is being finalized in this action?

The EPA is taking final action to deny the Petition on this request. The EPA believes that it has statutory authority to rely on interpretive letters to resolve ambiguity in a SIP submission under appropriate circumstances and so long as the state and the EPA follow an appropriate process to assure that the rulemaking record properly reflects this reliance. To avoid any misunderstanding about the reasons for this denial or any misunderstandings about the circumstances under which, or the proper process by which, the EPA intends to rely interpretive letters, the Agency is repeating its views in this final action in detail.

As stated in the February 2013 proposal, 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 state's regulation may be warranted to 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.[129]

However, the EPA believes that the use of interpretive letters to clarify ambiguity or 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. So long as the interpretive letters and the EPA's reliance on them is properly explained and documented, 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 in a SIP submission, the interpretive letters necessarily establish the correct interpretation of any arguably ambiguous SIP provision. In other words, the rulemaking record should reflect the shared state and EPA understanding of the meaning of a provision at issue at the time of the approval, which can then be referenced should any question about the provision arise in a future enforcement action.

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 resolve perceived ambiguity in a provision in a SIP submission.[130] 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 to assure that the provision is approved into the SIP promptly and thus allow the area to reach attainment more expeditiously than requiring the air agency to undertake a time-consuming administrative process to make a minor clarifying change in the regulatory text.

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 in a SIP submission and the SIP provisions that may ultimately result from approval of such a submission, provided this process is done correctly. First, under section 107(a), the CAA gives air agencies both the authority and the primary responsibility to 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 respecting terminology on the EPA's part appropriate, so long as CAA requirements are met.

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

[127] Petition at 15.

[128] *See* February 2013 proposal, 78 FR 12459 at 12474 (February 22, 2013).

[129] *See, e.g.,* ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 76 FR 21639 at 21648 (April 18, 2011).

[130] 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 a given SIP provision meets such requirements, in reliance on the information that the EPA considers relevant for this purpose.

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, stating that it is ''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 relating to the operation or maintenance of a source to assure continuous emission 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 of the CAA.[131] Thus, by the explicit terms of the statute and by design, air agencies generally have considerable 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 the SIP provisions meet CAA and regulatory requirements, the EPA's role is to evaluate whether those provisions in fact meet those legal requirements.[132] 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 all understand the SIP requirements. Where the EPA perceives ambiguity in draft SIP submissions, it endeavors to resolve those ambiguities through interactions with the relevant air agency 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 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 associated regulatory requirements. In some instances, the air agency may supply the explanation necessary to resolve any potential ambiguity in a SIP submission by sending an official letter from the appropriate authority. 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. In other words, the state and the EPA will have a shared understanding of the proper interpretation of the provision, and that interpretation will provide the basis for the approval of that provision into the SIP. The interpretation will also be clearly identified and presented for the public and regulated entities in the **Federal Register** document approving the SIP submission.

For example, in the Knoxville redesignation action that the Petitioner noted in the Petition, the EPA took careful steps to ensure that the perceived ambiguity raised by commenters 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. By discussing the resolution of the perceived ambiguity explicitly in the rulemaking record, the EPA assured that the correct meaning of that provision should be evident from the record, should any question concerning its meaning arise in a future dispute.

Finally, the EPA notes that while it is possible to reflect interpretive letters in the Code of Federal Regulations (CFR) or incorporate them into the regulatory text of the CFR in appropriate circumstances, 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** document 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

[131] 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.

[132] *See, e.g., Luminant Generation* v. *EPA,* 714 F.3d 841 (5th Cir. 2013) (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).

approval and remain available should they be needed in the future 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 use the administrative record to shed light on and resolve any such ambiguity as explained earlier in this document.

The EPA emphasizes that it is already the Agency'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. Should the Petitioner or any other party have concerns about any ambiguity in a provision in a SIP submission, the EPA strongly encourages that they bring this ambiguity to the Agency's attention during the rulemaking action on the SIP submission so that it can be addressed in the rulemaking process and properly reflected in the administrative record. Should an ambiguity come to light later, the EPA encourages the Petitioner or any other party to bring that ambiguity to the attention of the relevant EPA Regional Office. If the Agency agrees that there is ambiguity in a SIP provision that requires clarification subsequent to final action on the SIP submission, then the EPA can work with the relevant air agency to resolve that ambiguity by various means.

D. Response to Comments Concerning Reliance on Interpretive Letters in SIP Revisions

The EPA received relatively few comments, both supportive and adverse, concerning the Agency's overarching decision to deny the Petition with respect to this issue. For clarity and ease of discussion, the EPA is responding to these comments, grouped by whether they were supportive or adverse, in this section of this document.

1. Comments that supported the EPA's interpretation of the CAA to allow reliance on interpretive letters to clarify ambiguities in state SIP submissions.

Comment: A number of state and industry commenters agreed with the EPA that the use of interpretive letters to clarify perceived ambiguity in the provisions in a SIP is a permissible, and sometimes necessary, approach to approving SIP submissions under the CAA when done correctly. Those commenters who supported the EPA's proposed action on the Petition did not elaborate upon their reasoning, but generally supported it as an efficient and reasonable approach to resolve ambiguities.

Response: The EPA agrees with the commenters who expressed support of the proposal based on practical considerations such as efficiency. These commenters did not, however, base their support for the proposed action on the EPA's interpretation of the CAA in the February 2013 proposal, nor did they acknowledge the parameters that the EPA itself articulated concerning the appropriate situations for such reliance and the process by which such reliance is appropriate. Thus, the EPA reiterates that reliance on interpretive letters to resolve ambiguities or perceived ambiguities in SIP submissions must be weighed by the Agency on a case-by-case basis, and such evaluation is dependent upon the specific facts and circumstances present in a specific SIP action and would follow the process described in the proposal.

2. Comments that opposed the EPA's interpretation of the CAA to allow reliance on interpretive letters to clarify ambiguities in state SIP submissions.

Comment: Other commenters disagreed with the EPA's proposed response to the Petition on this issue. One commenter opposed the Agency's reliance on interpretive letters under any circumstances and did not draw any factual or procedural distinctions between situations in which this approach might or might not be appropriate or correctly processed. This commenter argued that citizens should not be required "to sift through a large and complex rulemaking docket in order to figure out the meaning and operation of state regulations." The commenter asserted that simply as a matter of "good government," all state regulations approved as SIP provisions should be clear and unambiguous on their face. This commenter also expressed concern that courts could not or would not accord legal weight to interpretive letters created after state regulations were adopted and submitted to the EPA, or after the EPA's approval of the SIP submission occurred, and would view such letters as *post hoc* interpretations of no probative value. Another commenter added its view that reliance on interpretive letters is appropriate only when affected parties have the right to comment on the interpretive letters and the EPA's proposed use of them during the rulemaking in which the EPA relies on such letters to resolve ambiguities and before the Agency finally approves the SIP revision.

Response: As a general matter, the commenter opposing the EPA's reliance on interpretive letters in any circumstances because citizens would be required "to sift through" the docket did not provide specific arguments regarding the EPA's interpretation of the statute as stated in the February 2013 proposal. Consistent with the EPA's interpretation of the CAA, and as explained earlier in this document, the EPA agrees with the core principle that the language of regulations in SIPs that pertain to SSM events should be clear and unambiguous. A commenter argued that "a fundamental principle of good government is making sure that all people know what the applicable law is. Having the applicable law manifest in a letter sitting in a filing cabinet in one office clearly does not qualify as good government." The EPA generally agrees on this point as well. As explained earlier in this document, the EPA allows the use of interpretive letters to clarify perceived ambiguity in the provisions of a SIP submission only when used correctly, with adequate documentation in both the **Federal Register** and the docket for the underlying rulemaking action. Section VI.B of this document explains how interested parties can use the list or table of actions that appears in the CFR and that reflects the various components of the approved SIP, to identify the **Federal Register** document wherein the EPA has explained the basis for its decision on any individual SIP provision. As such, the EPA does not envision a scenario whereby a citizen or a court would be unable to determine how the air agency and the EPA interpreted a specific SIP provision at the time of its approval into the SIP. Assuming there is any ambiguity in the provision, the mutual understanding of the state and the EPA as to the proper interpretation of that provision would be clear at the time of the approval of the SIP revision, as reflected in the **Federal Register** document for the final rule and the docket supporting that rule, which should answer any question about the correct interpretation of the term.

The same commenter also questioned whether "courts can or will give any

legal weight to interpretative letters created after state regulations are adopted or SIP approvals occurred, in the face of industry defendant arguments that the SIP provisions do not accord with those *post hoc* interpretive letters.'' This commenter asserted that by not requiring all interpretations of the SSM provisions in the ''unambiguous language of the SIPs,'' the EPA is accepting ''great legal uncertainty'' as to whether judges will consider interpretive letters in enforcement actions. As a preliminary matter, as explained earlier in this document, this action does not apply to ''*post hoc*'' interpretive letters, *i.e.,* to situations where a state would submit an interpretive letter after the EPA's approval of the SIP. Through this action the EPA is confirming its view that it may use interpretive letters to clarify ambiguous SIP provisions only when those letters were submitted to the EPA during the evaluation of the SIP submission and before final approval of the SIP revision and were included in the final rulemaking docket and explicitly discussed in the **Federal Register** document announcing such final action.

In addition, as explained earlier in this document, once the EPA approves a SIP revision, it becomes part of the state's SIP identified in the CFR and thus becomes a federally enforceable regulation. In cases where the substance of the interpretive letter is provided in the CFR itself, either by copying the interpretation *verbatim* into the regulatory text or by incorporating the letter by reference, courts need not look further for the state and the Agency's agreed upon interpretation. The EPA's interpretation will be clearly reflected in the CFR. The EPA recognizes that actual or perceived regulatory ambiguity may become an issue in instances where the interpretive letter is reflected in the preamble to the final rulemaking but is not copied or incorporated by reference in the CFR text itself. It is important to note, however, that once included in the preamble to the final rule, the air agency's interpretation of the SIP provision, as reflected in the interpretive letter, becomes the EPA's promulgated interpretation as well. While the EPA recognizes that an agency's preamble guidance generally does not have the binding force of an agency's regulations, courts do view it as informative in understanding an agency's interpretation of its own regulation,[133] and courts accord an agency's interpretation of its own regulations a '' 'high level of deference,' accepting it 'unless it is plainly wrong.' '' [134] When reviewing a purportedly ambiguous agency regulation, courts have found that the agency's interpretation of its own regulation is ''controlling unless 'plainly erroneous or inconsistent with the regulation.' '' [135] Based on these settled legal principles, the EPA would expect a court in an enforcement action to look not only to the text of the regulation at issue but also to the preamble to the final rule. The preamble would contain an explanation of any interpretive letter from the state upon which the EPA relied in order to interpret any ambiguous SIP provisions.[136] As such, the EPA disagrees that it is ''accepting an unreasonable amount of legal uncertainty'' in future enforcement actions by allowing the use of interpretive letters to clarify SIP provisions where such letters are specifically discussed in the final rulemaking. The EPA reiterates that reliance on such interpretive letters is not appropriate in all circumstances, such as instances in which the state's SIP submission is so significantly ambiguous that it is necessary to request that the state revise the regulatory text before the EPA can approve it into the SIP.

Finally, a commenter stated its view that reliance on interpretive letters may be appropriate, but only when affected parties have the right to comment on the letter and the EPA's reliance on it during the rulemaking in which the letter is relied upon. The EPA has explained earlier in this document the proper circumstances under which such reliance may be appropriate and the proper process to be followed when reliance upon such letters is appropriate, but the EPA also notes that the process does not require that the letters always be made available for public comment. As explained earlier in this document, the EPA makes every attempt to identify ambiguities in state-submitted SIPs and requests states to submit interpretive letters to explain any ambiguities, before putting the proposed action on the SIP submission out for public notice and comment. On occasion, however, ambiguous provisions may inadvertently remain and are not identified until the notice-and-comment period has begun. As explained earlier in this document, sometimes these ambiguities are so significant that the EPA requires the state to resubmit its SIP submission altogether, which would entail another notice-and-comment period. When the EPA does not deem the ambiguity to be so significant as to warrant a revision to the state's regulatory text in the SIP submission, the Agency believes that resolution of the ambiguity through the submission of an interpretive letter, which then is incorporated into the EPA's action, reflected in the administrative record and memorialized as the proper intended reading of the provision, is appropriate.

This approach comports with well-established principles applicable to notice-and-comment rulemaking generally. One purpose of giving interested parties the opportunity to comment is to provide these parties the opportunity to bring areas of potential ambiguity in the proposal to an agency's attention so that the concerns may be addressed before the agency takes final action. If the APA did not allow the agency to consider comments and provide clarification when issuing its final action as necessary, this purpose would be defeated. Courts have held that so long as a final rule is a ''logical outgrowth'' of the proposed rule, adequate notice has been provided.[137] It is the EPA's practice to neither require a state to resubmit a SIP submission nor repropose action on the submission, so long as the clarification provided in the interpretive letter is a logical outgrowth of the proposed SIP provision. If an interested party believes that the EPA is incorrect in not requiring the state to revise its SIP submission or that the EPA should repropose action on a submission, including the clarification provided by the interpretive letter in the plain language of the SIP submission itself, that party does have recourse. The APA gives that party the opportunity to petition the EPA for rulemaking to reconsider the decision under 5 U.S.C. 553(e). For these reasons, the EPA believes that its process for using interpretive letters to clarify SIP

[133] *See, e.g., Howmet Corp.* v. *EPA,* 614 F.3d 544, 552 (D.C. Cir. 2010) (using preamble guidance to interpret an ambiguous regulatory provision); *Wyo. Outdoor Council* v. *U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (''Although the preamble does not 'control' the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent.'').

[134] *Howmet* at 549 (quoting *Gen Elec. Co.* v. *EPA,* 53 F.3d 1324, 1327 (D.C. Cir. 1990)).

[135] *Auer* v. *Robbins,* 519 U.S. 452, 461 (1997) (quoting *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 359 (1989)).

[136] Indeed, the APA requires agencies to ''incorporate in the rules adopted a concise general statement of their basis and purpose,'' 5 U.S.C. 553(c), often referred to as the regulatory preamble. It would not make sense for a court to attempt to interpret the text of a regulation independently from its statutorily mandated statement of basis and purpose.

[137] *See, e.g., Shell Oil Co.,* 950 F.2d 741; *NRDC* v. *Thomas,* 838 F.2d 1224 (D.C. Cir. 1988); *South Terminal Corp.* v. *EPA,* 504 F.2d 646.

provisions, as articulated in this rulemaking, is appropriate.

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

A. Applicability of Emission Limitations During Periods of SSM

1. What the EPA Proposed

In the February 2013 proposal, the EPA reiterated its longstanding interpretation of the CAA that SIP provisions cannot include exemptions from emission limitations for excess emissions during SSM events. This has been the EPA's explicitly stated interpretation of the CAA with respect to SIP provisions since the 1982 SSM Guidance, and the Agency has reiterated this important point in the 1983 SSM Guidance, the 1999 SSM Guidance and the 2001 SSM Guidance. 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.'' Court decisions confirm that this requirement for continuous compliance prohibits exemptions for excess emissions during SSM events.[138]

2. What Is Being Finalized in This Action

For the reasons explained in the February 2013 proposal, in the background memorandum supporting that proposal and in the EPA's responses to comments in this document, the EPA interprets the CAA to prohibit exemptions for excess emissions during SSM events in SIP provisions. This interpretation has long been reflected in the SSM Policy. The EPA acknowledges, however, that both states and the Agency have failed to adhere to the CAA consistently with respect to this issue in some instances in the past, and thus the need for this SIP call action to correct the existing deficiencies in SIPs. In order to be clear about this important point on a going-forward basis, the EPA is reiterating that emission limitations in SIP provisions cannot contain exemptions for emissions during SSM events.

Many commenters wrongly asserted that the EPA declared in the February 2013 proposal that all emission limitations in SIPs must be established as numerical limitations, or must be set at the same numerical level at all times. The EPA did not take this position. In the case of section 110(a)(2)(A), the statute does not include an explicit requirement that all SIP emission limitations must be expressed numerically. In practice, it may be that numerical emission limitations are the most appropriate from a regulatory perspective (*e.g.,* to be legally and practically enforceable) and thus the limitation would need to be established in this form to meet CAA requirements. The EPA did not, however, adopt the position ascribed to it by commenters, *i.e.,* that SIP emission limitations must always be expressed only numerically and must always be set at the same numerical level during all modes of source operation.

The EPA notes that some provisions of the CAA that govern standard-setting limit the EPA's own ability to set non-numerical standards.[139] Section 110(a)(2)(A) does not contain comparable explicit limits on non-numerical forms of emission limitation. Presumably, however, some commenters misunderstood the explicit statutory requirement for emission limitations to be ''continuous'' as a requirement that states must literally establish SIP emission limitations that would apply the same precise numerical level at all times. Evidently these commenters did not consider the explicit recommendations that the EPA made in the February 2013 proposal concerning creation of alternative emission limitations in SIP provisions that states may elect to apply to sources during startup, shutdown or other specifically defined modes of source operation.[140] As many of the commenters acknowledged, the EPA itself has recently promulgated emission limitations in NSPS and NESHAP regulations that impose different numerical levels during different modes of source operation or impose emission limitations that are composed of a combination of a numerical limitation during some modes of operation and a specific technological control requirement or work practice requirement during other modes of operation. In light of the court's decision in *Sierra Club* v. *Johnson,* the EPA has been taking steps to assure that its own regulations impose emission limitations that apply continuously, including during startup and shutdown, as required.[141]

Regardless of the reason for the commenters' apparent misunderstanding on this point, many of the commenters used this incorrect premise as a basis to argue that ''continuous'' SIP emission limitations may contain total exemptions for all emissions during SSM events. Therefore, in this final action the EPA wishes to be very clear on this important point, which is that SIP emission limitations: (i) Do not need to be numerical in format; (ii) do not have to apply the same limitation (*e.g.,* numerical level) at all times; and (iii) may be composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements, with each component of the emission limitation applicable during a defined mode of source operation. It is important to emphasize, however, that regardless of how the air agency structures or expresses a SIP emission limitation—whether solely as one numerical limitation, as a combination of different numerical limitations or as a combination of numerical limitations, specific technological control requirements and/or work practice requirements that apply during certain modes of operation such as startup and shutdown—the emission limitation as a whole must be continuous, must meet applicable CAA stringency requirements and must be legally and practically enforceable.[142]

Another apparent common misconception of commenters was that SIP provisions may contain exemptions for emissions during SSM events, so long as there is some other generic regulatory requirement of some kind somewhere else in the SIP that coincidentally applies during those exempt periods. The other generic regulatory requirements most frequently referred to by commenters are ''general duty'' type requirements, such as a general duty to minimize emissions at all times, a general duty to use good engineering judgment at all times, or a

[138] *See, e.g., Sierra Club* v. *Johnson,* 551 F.3d 1019, 1021 (D.C. Cir. 2008) (interpreting the definition of emission limitation in section 302(k) and section 112); *Mich. Dep't of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000) (upholding disapproval of SIP provisions because they contained exemptions applicable to SSM events); *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's issuance of a SIP call to a state to correct SSM-related deficiencies).

[139] *See, e.g.,* CAA section 112(h)(1) (authorizing design, equipment, work practice, or other operational emission limitations under certain conditions); 40 CFR 51.308(e)(1)(iii) (regulations applicable to regional haze plans).

[140] *See* February 2013 proposal, 78 FR 12459 at 12478 (February 22, 2013) (the recommended criteria for consideration in creation of SIP provisions that apply during startup and shutdown).

[141] 551 F.3d 1019 (D.C. Cir. 2008).

[142] The EPA notes that CAA section 123 explicitly prohibits certain intermittent or supplemental controls on sources. In a situation where an emission limitation is continuous, by virtue of the fact that it has components applicable during all modes of source operation, the EPA would not interpret the components that applied only during certain modes of operation, *e.g.,* startup and shutdown, to be prohibited intermittent or supplemental controls.

general duty not to cause a violation of the NAAQS at any time. To the extent that such other general-duty requirement is properly established and legally and practically enforceable, the EPA would agree that it may be an appropriate separate requirement to impose upon sources in addition to the (continuous) emissionlimitation. The EPAitselfimposesseparategeneral duties of this type in appropriate circumstances.[143] The existence of these generic provisions does not, however, legitimizeexemptionsforemissions during SSM events in a SIP provision that imposes an emission limitation.

In accordance with the definition of section 302(k), SIP emission limitations must be continuous and apply at all times. SIP provisions may be composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements, but those must be components of a continuously applicable SIP emission limitation. In addition, the SIP emission limitation must meet applicable stringency requirements during all modes of source operation (*e.g.,* be RACT for stationary sources located in a nonattainment area) and be legally and practically enforceable. General-duty requirements that are not clearly part of or explicitly cross-referenced in a SIP emission limitation cannot be viewed as a component of a continuous emission limitation. Even if clearly part of or explicitly cross-referenced in the SIP emission limitation, however, a given general-duty requirement may not be consistent with the applicable stringency requirements for that type of SIP provision during startup and shutdown. The EPA's recommendations for developing appropriate alternative emission limitations applicable during certain modes of source operation are discussed in section VII.B.2 of this document. In general, the EPA believes that a legally and practically enforceable alternative emission limitation applicable during startup and shutdown should be expressed as a numerical limitation, a specific technological control requirement or a specific work practice requirement applicable to affected sources during specifically defined periods or modes of operation.

3. Response to Comments

The EPA received a substantial number of comments, both supportive and adverse, concerning the issue of exemptions in SIP provisions for excess emissions during SSM events. Many of these comments raised the same core issues, albeit using slight variations on the arguments or variations on the combination and sequence of arguments. For clarity and ease of discussion, the EPA is responding to these comments, grouped by issue, in this section of this document.

a. Comments that the EPA's proposed action on the Petition is incorrect because some of the Agency's own regulations contain exemptions for emissions during SSM events.

Comment: Many commenters argued that the EPA is misinterpreting the CAA to preclude SIP provisions with exemptions for emissions during SSM events because some of the Agency's own existing NSPS and NESHAP rules contain such exemptions. Some commenters provided a list of existing NSPS or NESHAP standards that they claimedcurrently contain exemptions for emissions during SSM events. Commenters also noted that the NSPS general provisions at 40 CFR 60.11(d) excuse noncompliance with many NSPS during periods of startup and shutdown. Other commenters asserted that the EPA's interpretations in the February 2013 proposal are inconsistent with its longstanding interpretation of the Act because the EPA itself has a long history of adopting exceptions to numerical emission limitations for emissions during SSM events, citing to the NSPS general provisions at 40 CFR 60.8, the NSPS for Fossil-Fuel-Fired Steam Generators and for Electric Utility Steam Generating Units (40 CFR part 60, respectively subparts D and Da) and the NSPS for Industrial-Commercial-Institutional Steam Generating Units and for Small Industrial-Commercial-Institutional Steam Generating Units (40 CFR part 60, respectively subparts Db and Dc). Commenters claimed that recent revisions to 40 CFR part 60, subpart Da excluded periods of startup and shutdown from new PM standards. The commenters pointed to these facts or alleged facts as evidence that the EPA is interpreting the term ''emission limitation'' or other provisions of the statute inconsistently to preclude SSM exemptions in SIP provisions.

Response: Commenters are correct that many of the EPA's existing NSPS and NESHAP standards still contain exemptions fromemissionlimitations during periods of SSM. The exemptions in these EPA regulations, however, predated the 2008 issuance of the D.C. Circuit decision in *Sierra Club* v. *Johnson,* in which the court held that emissionlimitations must be continuous and thus cannot contain exemptions for emissions during SSM events. Likewise, the NSPS general provisions in 40 CFR 60.8 that commenters identified as inconsistent also predate that 2008 court decision. Although these other EPA regulations that include exemptions for emissions during SSM events were not before the court in the *Sierra Club* case, the EPA's view is that the legal reasoning of the *Sierra Club* decision applies equally to these exemptions and that the exemptions are thus inconsistent with the CAA.

Consequently, since the *Sierra Club* decision, the EPA has eliminated exemptions in many existing federal emission limitations as these standards are revised or reviewed pursuant to CAA requirements, such as CAA sections 111(b)(1)(B), 112(d)(6) and 112(f)(2).[144] Similarly, the EPA has established emission standards that apply at all times, including during SSM events, when promulgating new NSPS and NESHAP standards to be consistent with the *Sierra Club* decision.[145] The EPA recognizes that the NSPS general provisions regulations also include exemptions for emissions during SSM events, but in promulgating new NSPS since the *Sierra Club* decision, the EPA has established emission limitations in the new NSPS that apply at all times thereby superseding those general provisions. Therefore, the EPA's action in this rulemakingis consistent with other actions that the EPA has taken since the *Sierra Club* decision concerning the issue of SSM exemptions.

The fact that the EPA has not completed the process of updating its own regulations to bring them into compliance with respect to CAA requirements concerning proper treatment of emissions during SSM events does not render this SIP call action arbitrary or capricious. The existence of a deficiency in an existing EPA regulation that has not yet been corrected does not alter the legal requirements imposed by the CAA upon states with respect to SIP provisions. Thus, for example, the EPA does not agree with commenters that the continued existence of SSM exemptions

[143] *See, e.g.,* ''Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews; Final rule,'' 77 FR 49489 at 49570, 49586 (August 16, 2012) (added general standards to apply at all times).

[144] *See, e.g.,* ''New Source Performance Standards Review for Nitric Acid Plants; Final rule,'' 77 FR 48433 (August 14, 2012) (example of NSPS emission limitation that no longer includes exemption for periods of startup or shutdown).

[145] *See, e.g.,* ''Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews; Final rule,'' 77 FR 49489 (August 16, 2012) (consistent with *Sierra Club* v. *Johnson,* the EPA has established standards in both rules that apply at all times).

in the general provisions applicable to the emission limitations in the Agency's own NSPS for Fossil-Fuel-Fired Steam Generators in 40 CFR part 60, subpart D, is evidence that exemptions for emissions during SSM events are permitted by the CAA.

The EPA acknowledges that correction of longstanding regulatory deficiencies by proper rulemaking procedures requires time and resources, not only for the EPA but also for states and affected sources. Hence, the EPA has elected to proceed via its authority under section 110(k)(5) and to provide states with the full 18 months allowed by statute for compliance with this action. This SIP call is intended to help assure that state SIP provisions are brought into line with CAA requirements for emission limitations, just as the EPA is undertaking a process to update its own regulations.

The EPA also specifically disagrees with the commenters' implication that 40 CFR 60.11(d) completely excuses noncompliance during periods of startup and shutdown. Rather, that provision imposes a separate affirmative obligation to maintain and operate the affected facility, including associated air pollution control equipment, in a manner consistent with good air pollution control practices at all times. The existence of this separate duty to minimize emissions, however, does not justify or excuse the existence of an exemption for emissions during SSM events from the emission limitations of an EPA NSPS. It is a separate obligation that sources must also meet at all times.

The EPA also disagrees with the commenters who argued that the Agency has recently created new exemptions for PM emissions during startup and shutdown events in the NSPS for Electric Utility Steam Generating Units in 40 CFR part 60, subpart Da. The EPA has not created new exemptions for emissions during startup and shutdown. To the contrary, the EPA has taken steps to assure that these regulations are consistent with the statutory definition of emission limitation and with the logic of the *Sierra Club* decision on a going-forward basis. In accordance with that decision, the revised emission limitations in subpart Da NSPS apply continuously. In revising subpart Da to establish requirements for sources on which construction, modification or reconstruction commenced after May 3, 2011, the EPA determined that it was appropriate to provide that the exemptions for emissions during SSM events in the General Provisions do not apply.[146] Although the *Sierra Club* v. *Johnson* decision specifically addressed the validity of SSM exemptions in NESHAP regulations, the EPA concluded that the court's focus on the definition of "emission limitation" in section 302(k) applied equally to any such SSM exemptions in NSPS regulations. Thus, for affected sources on which construction, modification or reconstruction starts after May 3, 2011, the General Provisions do not provide an exemption to compliance with the applicable emission limitations during SSM events.

For such sources, the emission limitation for PM in 40 CFR 60.42Da(a) imposes a numerical level of 0.03 lb/MMBtu that applies at all times except during startup and shutdown and specific work practices that apply during startup and shutdown.[147] The related emission limitation for opacity from such sources in 40 CFR 60.42Da(b) is 20 percent opacity at all times, except for one 6-minute period per hour of not more than 27 percent, and it applies at all times except during periods of startup and shutdown when the work practices for PM limit opacity. Commenters alleged that the EPA created an "exemption" from the PM emission limitations in subpart Da applicable to post-May 3, 2011, affected sources. That is simply incorrect. The revised regulations in subpart Da impose a numerical emission limitation that applies at all times except during startup and shutdown and impose specific work practice requirements that apply during startup and shutdown as a component of the emission limitation. Specifically, 40 CFR 60.42Da(e)(2) explicitly requires post-May 3, 2011, affected sources to comply with specific work practice standards in part 63, subpart UUUUU. The numerical emission limitation and the work practice requirement together comprise a continuous emission limitation and there is no exemption for emissions during startup and shutdown. The fact that the EPA has established different requirements for different periods of operation does not constitute creation of an exemption. These emission limitations have numerical limitations that apply during most periods and specific technological control requirements or work practice requirements that apply during startup and shutdown, but all periods of operation are subject to controls and no periods of operation are exempt from regulation. States are similarly able to alter their regulations, in response to this SIP call, to provide for emission limitations with different types of controls applicable during different modes of source operation, so long as those controls apply at all times and no periods are exempt from controls. As explained in section VII.A of this document, the EPA interprets section 110(a)(2)(A) to permit SIP provisions that are composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements, so long as the resulting emission limitations are continuous, meet applicable stringency requirements (*e.g.,* are RACT for sources in nonattainment areas) and are legally and practically enforceable.

The EPA also notes that the provisions of 40 CFR 60.42Da(b)(1) do not provide an "exemption" from the opacity standard. That section merely provides that the affected sources do not need to meet the opacity standard of the NSPS (at any time), if they have installed a PM continuous emission monitoring system (PM CEMS) to measure PM emissions continuously instead of relying on periodic stack tests to assure compliance with the PM emission limitation. One reason for the imposition of opacity standards on sources is to provide an effective means of monitoring for purposes of assuring source compliance with PM emission limitations and proper operation of PM emission controls on a continuous basis. If a source is subject to a sufficiently stringent PM limitation and has opted to install, calibrate, maintain and operate a PM CEMS to measure PM emissions, then it is reasonable for the EPA to conclude that an opacity emission limitation is not needed for that particular source for those purposes. The direct measurement of PM, in conjunction with an appropriately stringent PM emission limitation that[148]

[146] *See* 40 CFR 60.48Da(a). For affected facilities for which construction, modification, or reconstruction commenced after May 3, 2011, the applicable SO_2 emissions limit under § 60.43Da, NO_X emissions limit under § 60.44Da, and NO_X plus CO emissions limit under § 60.45Da apply at all times.

[147] The EPA notes that the emission standards for SO_2 in 40 CFR 60.43Da and for NO_X in 40 CFR 60.44Da, applicable to sources on which construction, modification or reconstruction commenced after May 3, 2011, also apply continuously and contain no exemptions for emissions during SSM events.

[148] For example, for NSPS regulations under subparts D, Da, Db and Dc of 40 CFR part 60, the EPA has deemed 0.030 lb/MMBtu to be a sufficiently stringent PM limitation for certain sources operating PM CEMS to conclude that an opacity emission limitation is not needed, on the basis that the contribution of filterable PM to opacity at PM levels of 0.030 lb/MMBtu or less is generally negligible, and sources with mass limits at this level or less will operate with little or no visible emissions (*i.e.,* less than 5 percent opacity). *See* 74 FR 5072 at 5073 (January 28, 2009).

applies continuously, is an appropriate means to assure adequate control of PM emissions on a continuous basis. States evaluating how best to replace impermissible SSM exemptions from opacity standards may wish to consider a similar approach, conditioned upon the use of PM CEMS and a sufficiently stringent PM emission limitation.

Finally, the EPA emphasizes that what is at issue in this action is the question of whether emission limitations in SIP provisions can include exemptions for emissions during SSM events. The EPA is reiterating its longstanding interpretation of the CAA with respect to this question, in the process of responding to the Petition, updating its SSM Policy and applying its current interpretations of the CAA to the specific SIP provisions at issue in this SIP call action. To the extent that commenters intend to point out that the EPA needs to address exemptions for emissions during SSM events in its own existing regulations, the Agency is already aware of that need due to recent judicial decisions and is proceeding to correct those regulations in due course.

b. Comments that the EPA's proposed action on the Petition is incorrect because the Agency has previously allowed the inclusion of exemptions for emissions during SSM events through approval of NSPS or NESHAP requirements into SIPs.

Comment: Commenters asserted that the EPA is being inconsistent because it has previously approved SIP submissions that rely on NSPS rules, including the SSM exemptions in those existing rules. The commenters argued that the EPA's current interpretation of the CAA to preclude SSM exemptions in SIP provisions is thus at odds with past guidance and practice.

Response: The EPA disagrees with the argument that past approval of SIP submissions that relied upon an NSPS or NESHAP with an SSM exemption is evidence that such exemptions should be permissible in SIP provisions in the future. In the 1999 SSM Guidance, the EPA addressed the related issue of whether states could create affirmative defenses in SIP provisions that would alter or add to the requirements of an existing EPA NSPS or NESHAP.[149] At that time, the EPA clearly stated that it would be inappropriate for a state to seek to ''deviate'' from the specific requirements of an NSPS or NESHAP when adopting that standard as a SIP provision, stating that ''[b]ecause EPA set these standards taking into account technological limitations, additional exemptions would be inappropriate.'' Thus, so long as a state did not alter the requirements of the existing NSPS or NESHAP by including additional affirmative defenses or exemptions, the EPA indicated that it would approve a SIP submission that included an NSPS or NESHAP.

The commenters' argument has brought to the EPA's attention that past guidance on this issue is in fact inconsistent with more recent legal developments. At the time of the 1999 SSM Guidance, the EPA was still of the belief that its own NSPS and NESHAP regulations could legitimately include exemptions for emissions during SSM events. In that light, recommending to states that they could rely on an EPA NSPS or NESHAP as an emission limitation in a SIP provision so long as they did not alter the NSPS or NESHAP in any fashion was logical. At that time, the reasoning was that NSPS and NESHAP standards were technology-based standards that, although neither designed nor intended to meet the separate legal requirements for SIP provisions, could be used to provide emission reductions creditable in SIPs. Since the 2008 D.C. Circuit decision in *Sierra Club* v. *Johnson,* however, it has been clear that NSPS and NESHAP standards themselves cannot contain such exemptions. The reasoning of the court was that exemptions for SSM events are impermissible because they contradict the requirement that emission limitations be ''continuous'' in accordance with the definition of that term in section 302(k). Although the court evaluated this issue in the context of EPA regulations under section 112, the EPA believes that this same logic extends to SIP provisions under section 110, which similarly must contain emission limitations as defined in the CAA. Section 110(a)(2)(A) requires states to have emission limitations in their SIPs to meet other CAA requirements, and any such emission limitations would similarly be subject to the definition of that term in section 302(k).

Accordingly, the EPA concludes that, prospectively, a state should not submit an NSPS or NESHAP for inclusion into its SIP as an emission limitation (whether through incorporation by reference or otherwise), unless that NSPS or NESHAP does not include an exemption for SSM events or unless the state otherwise takes action to exclude the SSM exemption from the standard as part of the SIP submission. Because SIP provisions must apply continuously, including during SSM events, the EPA can no longer approve SIP submissions that include any emission limitations with such exemptions, even if those emission limitations are NSPS or NESHAP regulations that the EPA has not yet revised to make consistent with CAA requirements. Alternatively, states may elect to adopt an existing NSPS or NESHAP as a SIP provision, so long as the state provision excludes the SSM exemption.[150] States may also wish to replace the SSM exemption with appropriately developed alternative emission limitations that apply during startup and shutdown in lieu of the SSM exemption. Otherwise, the EPA's approval of the deficient SSM exemption provisions into the SIP would contravene CAA requirements for SIP provisions and would potentially result in misinterpretation or misapplication of the standards by regulators, regulated entities, courts and members of the public. The EPA emphasizes that the inclusion of an NSPS or NESHAP as an emission limitation in a state's SIP (which approach, as noted in section VII.B.3 of this document, would be at the state's option) is different and distinct from reliance on such standards indirectly, such as sources of emission reductions that may be taken into account for SIP planning purposes in emissions inventories or attainment demonstrations. For these uses (*i.e.,* other than as direct emission limitations), states may continue to rely on EPA NSPS and NESHAP regulations, even those that have not yet been revised to remove inappropriate exemptions, in accordance with the requirements applicable to those SIP planning functions.

c. Comments that the EPA is misinterpreting the *Sierra Club* case because it applies only to MACT regulations and not to SIP provisions.

Comment: Many commenters claimed that the EPA incorrectly applies the holding in the *Sierra Club* decision to preclude exemptions for emissions during SSM events in SIP provisions and that the *Sierra Club* decision does not apply in this context. The commenters argued that the *Sierra Club* decision was directly dependent on the structure of CAA section 112 and cannot be extended to the different regulatory

[149] *See* 1999 SSM Guidance at Attachment p. 3.

[150] Under CAA section 116, states have the explicit general authority to regulate more stringently than the EPA. Indeed, under section 116 states can regulate sources subject to EPA regulations promulgated under section 111 or section 112 so long as they do not regulate them less stringently. Accordingly, the EPA believes that states may elect to adopt EPA regulations under section 111 or section 112 as SIP provisions and expressly eliminate the exemptions for emissions during SSM events.

structure that governs SIPs under CAA section 110.

The commenters further contended that in the SIP context, the underlying air quality pollution control requirement for SIPs is to attain NAAQS and no specific level of stringency is required, unlike section 112, and Congress gave states broad discretion in the design of their SIPs. Commenters asserted that the *Sierra Club* decision held only that the general-duty requirement in the section 112 regulations did not meet the stringency requirements of CAA section 112 and that this holding does not apply in the SIP context because in the SIP context no specific level of stringency is required.

Commenters also asserted that a general-duty requirement is an appropriate alternative standard for SSM events in the SIP context because CAA sections 302(k) and 110(a)(2)(A) give states broad authority to develop the mix of controls necessary and appropriate to implement the NAAQS. Other commenters contended that the *Sierra Club* decision does not preclude states from constructing a compliance regime that uses multiple methods to limit emissions as long as the overall compliance regime to minimize emissions is enforceable.

Commenters also suggested that the decision in *Kamp* v. *Hernandez* relied upon in the *Sierra Club* case affirmed EPA's approval of a state emission limitation in a SIP that specifically allowed and even expected a certain number of annual exceedances of the emission limit.[151] Some commenters argued that the *Sierra Club* decision should not be read to impose a ''continuous emissions limitation'' requirement and that to the extent it does, it was incorrectly decided.

Response: The EPA disagrees that the court's decision in *Sierra Club* v. *Johnson* has no relevance to this action. Of course that decision specifically addressed the validity of exemptions for emissions during SSM events in the Agency's own regulations promulgated under section 112. Naturally, that decision turned, in part, on the specific provisions of section 112 and the specific arguments that each of the litigants raised in that case. However, the decision also turned in large part on the explicit statutory definition of the term ''emission limitation'' in section 302(k), which requires such limitations to be ''continuous.''

In that litigation, the EPA itself had argued that the exemptions from the otherwise applicable MACT standards during SSM events were consistent with CAA requirements because the MACT standards and the separate ''general duty'' requirements ''together form an uninterrupted, *i.e.,* continuous'' emission limitation, because either the numerical limitation or the general duty applied at all times.[152] The *Sierra Club* court rejected this argument, in part because the general duty that EPA required sources to meet during SSM events was not itself consistent with section 112(d) and the EPA did not purport to act under section 112(h). Thus, the EPA agrees that the court in *Sierra Club* explicitly found that the SSM exemption in EPA's NESHAP general provision rules violated the CAA because the general duty to minimize emissions was not a section 112(d)-compliant standard and had not been justified by the EPA as a 112(h)-compliant standard. The court reasoned that when sections 112 and 302(k) are read together, there must be a continuous section 112-compliant standard. It is important to note that if the otherwise applicable numerical MACT standards had themselves applied at all times consistent with section 302(k), then there would have been no question that they were in fact continuous.

The EPA has concluded that the reasoning of the *Sierra Club* decision is correct and further supports the Agency's interpretations of the CAA with respect to SIP provisions. As explained in the February 2013 proposal, the EPA's longstanding SSM guidance has interpreted the CAA to prohibit exemptions for emissions during SSM events since at least 1982. The EPA has long explained that exemptions for emissions during SSM events are not permissible in SIP provisions, because they interfere with attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility, and because they are inconsistent with the enforcement structure of the CAA. The EPA also noted that the definition of emission limitation in section 302(k) was part of the basis for its interpretation concerning SIP provisions.[153] In the February 2013 proposal, the EPA explained that the *Sierra Club* court's emphasis on the definition of the term emission limitation in section 302(k) further bolsters the Agency's basis for interpreting the CAA to preclude such exemptions in SIP provisions. In other words, under the CAA and the court's decision, emission limitations in SIP provisions as well as in NSPS and NESHAP regulations must be continuous, although they can impose different levels or forms of control during different modes of source operation.

The EPA also disagrees with the argument that the *Sierra Club* decision does not apply because section 110, unlike section 112, does not impose any specific level of ''stringency'' for SIP provisions. In accordance with section 110(a)(1), states are required to have SIPs that provide for attainment, maintenance and enforcement of the NAAQS in general. Pursuant to section 110(a)(2), states are required to have SIP provisions that meet many specific procedural and substantive requirements, including but not limited to, the explicit requirements of section 110(a)(2)(A) for emission limitations necessary to meet other substantive CAA requirements. In addition, however, states must have SIP provisions that collectively meet a host of other statutory requirements that also impose more specific stringency requirements. Merely by way of example, section 110(a)(2)(I) requires states with nonattainment areas to have SIP provisions that collectively meet part D requirements.[154] In turn, the different subparts of part D applicable to each NAAQS impose many requirements that require emission limitations in SIPs that meet various levels of stringency. Again, merely by way of example, states with nonattainment areas for PM under part D subpart 4 must have SIPs that include emission limitations that meet either the RACM and RACT level of stringency (if the nonattainment area is classified Moderate) or meet the BACM and BACT level of stringency (if the area is classified Serious).[155] There are similar requirements for states to impose emission limitations that must meet various levels of stringency for each of the NAAQS. Likewise, states must impose SIP emission limitations that meet BART and reasonable progress levels of stringency for regional haze program purposes [156] and must ensure that emission limitations meet BACT or LAER levels of stringency for PSD or nonattainment NSR permitting program

[151] 752 F.2d 1444 (9th Cir. 1985).

[152] *See* 551 F.3d 1019, 1026 (D.C. Cir. 2008).

[153] *See* 1999 SSM Guidance at 2, footnote 1 (citing the section 302(k) definition of emission limitations and emission standards).

[154] Sections 171–193 of CAA title I comprise part D.

[155] *See* CAA section 172(c)(2) (generally applicable attainment plan requirements including RACM and RACT); CAA section 189(a)(1) (requirements for areas classified Moderate); section 189(b) (requirements for areas classified Serious).

[156] *See* CAA section 169A(b)(2)(A).

purposes.[157] The EPA agrees that states have broad discretion in how to devise SIP provisions under section 110, but states nevertheless are required to devise SIP provisions that meet applicable statutory stringency requirements. In short, the argument that the *Sierra Club* decision is not germane because there are no comparable ''stringency'' requirements applicable to SIP provisions is simply in error. While it is true that SIP provisions do not need to meet section 112 levels of stringency, they must still be continuous under section 302(k) and meet applicable NAAQS, PSD and visibility requirements and stringency levels. In short, they cannot contain exemptions for emissions during SSM events.

Finally, the EPA does not agree with the commenters' view of the significance of the reference to the *Kamp* v. *Hernandez* decision by the court in the *Sierra Club* decision. The *Kamp* decision upheld the EPA's approval of a SIP provision that imposed an SO_2 emission limitation on a specific stationary source.[158] To the extent that the commenters believe that the *Kamp* decision stands for the principle that SIP emission limitations can be ''continuous'' even if they do not restrictemissionstothesame numerical limitation at all times, this point is not in dispute. As explained in section VII.A of this document, the EPA agrees with this principle. If, however, the commenters believe that the *Kamp* decision instead indicates that SIP emission limitations may contain exemptions, such that no emission standard applies during some mode of source operation, then that is simply incorrect. The EPA-approved SIP provision at issue in *Kamp* did not itself allow for a certain number of ''exceedances'' of the emission limitation each year. The state emission limitation rule in that case was developedtoensureattainmentand maintenance of the then applicable SO_2 NAAQS and the approved emission limitation for the source fluctuated but was continuous. It was the specifications of the SO_2 NAAQS standard that allowed for a certain number of ''exceedances'' each year. The NAAQS themselves are not ''emission limitations'' governed by section 302(k) andcommonlyhave a statistical ''form'' that authorizes a set number of ''exceedances'' of the numerical level of the NAAQS before there is a ''violation'' of the NAAQS.[159] Thus, the EPA believes that the court in the *Sierra Club* decision properly cited the *Kamp* case as support for the fundamental proposition that emission limitations must be ''continuous.'' Moreover, the EPA notes that commenters did not address other reported decisions in which courts have upheld the Agency's disapproval of SIP submissions containing SSM exemptions.[160]

d. Comments that the EPA's proposed action contradicts a 2009 guidance document concerning the effect of the *Sierra Club* decision on SSM exemptions in existing standards.

Comment: A number of commenters suggested that the EPA's February 2013 proposal is inconsistent with a memorandum (in fact a public letter) issued by the Agency following the *Sierra Club* decision in which the D.C. Circuit vacated two EPA provisions that exempt sources from section 112(d) emission standards during periods of SSM (Kushner letter).[161] The commenters noted that the Kushner letter explained that many MACT standards have SSM exemptions that were not affected by the *Sierra Club* decision. They argued that the Kushner letter should be read to mean that no emission limitations other than the ones explicitly discussed within that letter would be affected by the court's holding that emission limitations under the CAA must be continuous.

Response: The EPA disagrees with these comments for several reasons. First, the commenters misinterpret the Kushner letter. The purpose of the Kushner letter was to explain the direct and immediate impact of the *Sierra Club* decision, which vacated the SSM exemption in EPA's NESHAP general provisionsregulations. The Kushner letter explained that the vacatur would ''immediately and directly'' affect only the subset of NESHAP source category standards that incorporated the general provisions' exemption byreference, and thatcontain nootherregulatorytext exempting or excusing, in any way, compliance during SSM events, because only the general provisions' exemption was challenged and before the court in the *Sierra Club* case. However, the Kushner letter clearly stated that the legality of all NESHAP SSM exemption provisions was in question and that EPA would examine such provisions in light of the court's decision. Therefore, the commenters' suggestion that the Kushner letter supports a limited reading of the legal reasoning of the *Sierra Club* case is incorrect.

Second, the Kushner letter did not explicitly or implicitly address the issue of whether the CAA allows exemptions for emissions during SSM events in SIP provisions. That fact is unsurprising, in that at the time of the Kushner letter the EPA already had guidance in the SSM Policy (issued and reiterated in 1982, 1983, 1999 and 2001) that clearly stated the Agency's view that such exemptions are not permissible in SIP provisions, consistent with CAA requirements. It would also have been unnecessary for the Kushner letter discussing the impact of the *Sierra Club* decision on NESHAP standards to have mentioned that the statutory definition of emission limitation also precludes exemptions for SSM provisions in SIPs. The EPA had already made this point explicitly in the 1999 SSM Guidance, when it explained the reasons why such provisions would be contrary to CAA requirements for SIPs.[162] Thus, the EPA's guidance for SIP provisions concerning emissions during SSM events had already explicitly articulated that provisions with exemptions for SSM events could not be approved pursuant to CAA section 110(l), because that would interfere with a fundamental requirement of the CAA, *i.e.,* the definition of ''emission limitation'' in section 302(k).

Finally, the EPA disagrees that the Kushner letter could override the applicability of the logic of the *Sierra Club* decision to SIP provisions, even if the Agency had any such intentions. The D.C. Circuit's evaluation of the issue with respect to the EPA's own regulations was premised not solely upon the particular requirements of section 112 but also more broadly on the meaning and specific definition of the term ''emission limitation'' under the CAA. That definition applies to SIP provisions as well as to the EPA's own regulations. Because the SSM Policy in effect at the time of the *Sierra Club* decision and the time of the Kushner letter already stated that EPA interpreted the CAA to prohibit SIP provisions that exempt emissions during SSM events, there would have

[157] *See* CAA section 165(a)(4) and CAA section 173(a)(2).

[158] 753 F.3d 1444, 1452–53 (9th Cir. 1985).

[159] *See, e.g.,* 40 CFR 50.18 (24-hour $PM_{2.5}$ NAAQS met when 98th-percentile monitored value is less than or equal to 35 ug/m^3).

[160] *See, e.g., Mich. Dep't of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000) (upholding disapproval of SIP provisions because they contained exemptions applicable to SSM events); *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's issuance of a SIP call to a state to correct SSM-related deficiencies).

[161] *See* Letter from A. Kushner, Director, Office of Civil Enforcement, EPA/OECA, regarding ''*Vacatur of Startup, Shutdown, and Malfunction (SSM) Exemption (40 CFR 63.6(f)(1) and 63.6(h)(1)),*'' July 22, 2009, in the rulemaking docket.

[162] *See* 1999 SSM Guidance at 2, footnote 1.

been no need for the Kushner letter to speak to this issue.[163]

e. Comments that the EPA's proposed action on the Petition is incorrect because the Agency's recent MATS rule and Area Source Boiler rule regulations contain exemptions for emissions during SSM events.

Comment: Many commenters asserted that the EPA's February 2013 proposed action to find SIP provisions with exemptions for emissions during SSM events to be substantially inadequate is arbitrary and capricious because recent Agency NESHAP regulations under section 112 contain similar exemptions. Commenters pointed to recently promulgated rules such as the MATS rule [164] and the Area Source Boiler rule [165] as examples of NESHAP regulations that they claim contain similar exemptions. According to commenters, the emission limitations in EPA's own MATS rule ''allow excess emissions during SSM events,'' suggestingthatthe Agencycreated exemptions for such emissions.[166] Other commenters similarly argued that the EPA created emission limitations in the Area Source Boiler rule that do not apply ''continuously'' because the numerical limitations do not apply during startup and shutdown.[167] In short, these commenters argued that the EPA is being arbitrary and capricious because it is holding emission limitations in SIPs to a different and higher standard than emission limitations under its own NSPS and NESHAP regulations.

Response: The EPA disagrees with these commenters. The recent EPA rulemaking efforts that commenters claim are at odds with EPA's SIP call are completely consistent with the Agency's action today. First, as explained in the February 2013 proposal, the EPA has not taken the position that sources must be subject to SIP emission limitations that are set at the same numerical level at all times, or that are expressed as numerical limitations at all times. As the EPA stated, ''[i]f justified, the state can develop special emission limitations or control measures that apply during startup or shutdown if the source cannot meet the otherwise applicable emission limitation in the SIP.'' [168] The EPA's 1999 SSM Guidance articulated that SIP provisions may include alternative emission limitations applicable during startup and shutdown as part of a continuously applicable emission limitation when properly developed and otherwise consistent with CAA requirements. Moreover, the EPA recommended specific criteria relevant to the creation of such alternative emission limitations. The EPA reiterated that guidance in the February 2013 proposal and is providing a clarified version of the guidance in this final action. This issue is addressed in more detail in section VII.B.2 of this document.

The EPA also disagrees with the assertion that it is holding state SIP provisions to a different standard than its own NSPS and NESHAP regulations. The EPA notes that SIP emission limitations and NSPS and NESHAP emission limitations are, of course, designed for different purposes (*e.g.,* to meet the NAAQS versus to reduce emissions of HAPs) and have to meet some different statutory requirements (*e.g.,* to be RACM versus be standards that are compliant with section 112). However, the EPA understands the commenters' claim to be more specifically that the Agency is applying a different interpretation of the term ''emission limitation'' and taking a different approach to the treatment of emissions during SSM events in its own regulations, even in recent regulations developed subsequent to the *Sierra Club* decision. The EPA believes that this argument reflects a misunderstanding of both the February 2013 proposal and what the Agency's own new regulations contain.

The MATS rule and the Area Source Boiler rule in fact illustrate how the EPA is creating emission limitations that apply continuously, with numerical limitations or combinations of numerical limitations and other specific technological control requirements or work practice requirements applicable during startup and shutdown, depending upon what is appropriate for the source category and the pollutants at issue. For example, in the MATS rule the EPA has promulgated regulations that impose emission limitations on various subcategories of sources to address HAP emissions. To do so, the EPA developed emission limitations to address the relevant pollutants using a combination of numericalemission limitations and work practices. The work practice requirements specifically apply to sources during startup and shutdown and are thus components of the continuously applicable emission limitations.[169]

Similarly, in the Area Source Boiler rule [170] the EPA has imposed emission limitations on affected sources for PM, mercury and CO. The specific emission limitations that apply vary depending upon the subcategory of boiler. The emission limitations include a combination of numerical emission limitations and work practice requirements that together apply during all modes of source operation. For some subcategories, the standards that apply during startup and shutdown differ from the standards that apply during other periods of operation. This illustrates what the EPA considers the correct approach to creating emission limitations: (i) The emission limitation contains no exemption for emissions during SSM events; (ii) the component of the emission limitation that applies during startup and shutdown is clearly stated and obviously is an emission limitation that applies to the source; (iii) the component of the emission limitation that applies during startup and shutdown meets the applicable stringency level for this type of emission limitation (in this case section 112); and (iv) the emission limitation contains requirements to make it legally and practically enforceable. In short, the Area Source Boiler rule established emission limitations that apply continuously, in accordance with the requirements of the CAA, and consistent with the court's decision in the *Sierra Club* decision. States with SIP provisions that are deficient because they contain automatic or discretionary exemptions for emissions during SSM events may wish to consider the Agency's own approach when they develop SIP revisions in response to this SIP call.

f. Comments that section 110(a)(2)(A) authorizes states to have SIP provisions with exemptions for emissions during SSM events because they are not ''emission limitations'' and are not

[163] *See, e.g.,* 1999 SSM Guidance, Attachment at 1 (''any provision that allows for an automatic exemption for excess emissions is prohibited'').

[164] The mercury and air toxics standards (MATS) rule for power plants regulates emissions from new and existing coal- and oil-fired electric utility steam generating units (EGUs) under 40 CFR part 63, subpart UUUUU.

[165] The Area Source Boiler rule regulates industrial, commercial and institutional boilers at area sources under 40 CFR part 63, subpart JJJJJJ.

[166] *See* MATS rule, requirements during startup, shutdown and malfunction, 77 FR 9304 at 9370 (February 16, 2012).

[167] *See* Area Source Boiler rule, notice of final action on reconsideration, periods of startup and shutdown, 78 FR 7487 at 7496 (February 1, 2013).

[168] *See* February 2013 proposal, 78 FR 12459 at 12488 (February 22, 2013).

[169] The EPA took final action on a petition for reconsideration concerning the MATS rule and the Utility NSPS that made certain revisions related to the emission limitations and work practices applicable during startup and shutdown. Those revisions did not, however, alter the basic structure of the emission limitations as numerical limitations, or numerical limitations with work practice components during startup and shutdown, depending upon the source category and the pollutants at issue. *See* 79 FR 68777 (November 19, 2014).

[170] 78 FR 7487 (February 1, 2013).

subject to the requirement to be ''continuous.''

Comment: Section 110(a)(2)(A) requires states to have SIPs that include emission limitations for purposes of imposing restrictions on sources of emissions in order to attain and maintain the NAAQS and to meet other CAA requirements. Some commenters noted that, in addition to ''emission limitations,'' section 110(a)(2)(A) also explicitly refers to ''other control measures, means, or techniques.'' Unlike the term ''emission limitation,'' which is defined in section 302(k), commenters contended that these ''other control[s]'' need not be continuous. Accordingly, these commenters argued that emission controls in SIP provisions that either contain, or are subject to, SSM exemptions can be viewed merely as examples of these ''other control measures, means, or techniques'' that are validly included in SIPs and that do not have to limit emissions from sources on a continuous basis. Specifically, these commenters asserted that the plain text of section 110(a)(2)(A) does not require SIPs to include only emission limitations but rather requires that SIPs include ''emission limitations,'' ''other control measures, means, or techniques,'' or a mixture thereof. Furthermore, according to some of these commenters, an interpretation of section 110(a)(2)(A) that requires all SIP provisions to be ''emission limitations,'' and thus subject to the requirement that they be continuous, would render the ''other control'' language in the statute superfluous.

Response: The EPA agrees with the commenters that SIPs do not have to be composed solely of numerical emission limitations, that SIPs can contain other forms of controls in addition to emission limitations and that certain forms of controls other than emission limitations may not need to apply to sources continuously. However, the EPA disagrees with the commenters' conclusion that the mere act of labeling certain SIP provisions as ''control measures, means, or techniques'' rather than as ''emission limitations'' can be a means to circumvent the requirement that emission limitations must regulate sources continuously. To the extent that there is any ambiguity in the requirements of section 110(a)(2), it is not reasonable to interpret the statute to allow the explicit requirement that emission limitations must be continuous to be negated in this fashion.

As an initial matter, the SIP provisions that contain automatic or discretionary exemptions during SSM events at issue in this SIP call excuse compliance with requirements that presumably were submitted to the EPA as emission limitations, were intended to limit emissions on a continuous basis or were otherwise included to ensure that the SIP contained continuous emission limitations. All of the SIP provisions at issue in this action provide automatic or discretionary exemptions from emission limitations that are formulated as restrictions on the ''quantity, rate, or concentration'' of emissions from affected sources, just as section 302(k) describes the purpose of an emission limitation. Longstanding EPA regulations applicable to SIPs require that states have a control strategy to provide for attainment and maintenance of the NAAQS.[171] The required ''control strategy'' is defined to be the combination of measures including, but not limited to, ''emission limitations,'' ''emission control measures applicable to in use motor vehicles'' and ''transportation control measures'' listed in section 108(f).[172] The regulatory definition of ''emission limitation'' applicable to SIP provisions tracks the statutory definition of section 302(k) and notably also does not define the term to allow exemptions for emissions during SSM events.[173] To the EPA's knowledge, none of the specific SIP provisions that contain or that are subject to the automatic or discretionary exemptions at issue in this SIP call action were developed by the states with the intention or expectation that absent the exemption they would not apply at all times when the source is in operation; *i.e.,* they impose restrictions on emissions that were intended to apply continuously when the source is emitting pollutants. Logically, the states intended the emission limitations to impose limits that apply continuously at all times when the affected sources are emitting pollutants or else there would have been no impetus to include any exemptions for emissions during SSM events.

However, even if the EPA were to accept the commenters' premise *arguendo*—that inclusion of an SSM exemption in a given SIP provision turns ''emission limitations'' into ''other control measures, means, or techniques,'' this would not be a reasonable reading of the requirements of section 110(a)(2)(A) and section 302(k) for several reasons. To the extent that either section 110(a)(2)(A) or section 302(k) is ambiguous with respect to this point, the EPA does not interpret the CAA to allow exemptions for emissions during SSM events in SIP provisions in the way advocated by the commenters.

First, section 110(a)(2)(A) explicitly requires that SIPs must contain emission limitations as necessary to meet various CAA requirements. Section 302(k) requires that such emission limitations must limit ''the quantity, rate, or concentrations of emissions of air pollutants on a *continuous* basis.'' Moreover, section 302(k) reiterates that the term ''continuous emission limitation'' also specifically includes ''any requirement relating to the operation or maintenance of a source to assure *continuous* emission reduction.'' Lest there be doubt, section 302(m) provides a definition for the related term ''means of emission limitation'' as ''a system of continuous emissions reduction (including the use of specific technology or fuels with specified pollution characteristics).'' In the *Sierra Club* v. *Johnson* decision, the D.C. Circuit concluded that the statutory definition of ''emission limitation'' in section 302(k) precludes exemptions for emissions during SSM events because such exemptions are inconsistent with the requirement for continuous controls.[174] Given the emphasis that the statute places on the requirement that sources be subject to continuous emission controls, and given the emphasis that courts have placed on the requirement that sources be subject to continuous controls on their emissions, the EPA believes that it is illogical that the statutory requirement for continuous controls on sources could be subverted merely by the act of labeling a given SIP provision a ''control measure'' rather than an ''emission limitation.'' The commenters' argument that if a given SIP provision contains an SSM exemption, it is merely a ''control measure[ ], mean[ ], or technique[ ]'' reduces the explicit requirement for continuous controls on emissions to a semantic exercise.

Second, the EPA believes that the commenters' reading of the statute to permit SIP provisions to contain an SSM exemption by virtue of what it is labeled is incorrect if taken to its logical extreme. The commenters' interpretation of section 110(a)(2)(A) would theoretically allow a SIP to contain no emission limitations whatsoever, merely a collection of requirements labeled ''control measures'' so that sources can be excused from having to limit emissions on a continuous basis. This result is contrary to judicially approved EPA

[171] *See, e.g.,* 40 CFR 51.100.

[172] *See, e.g.,* 40 CFR 51.100(n).

[173] *See* 40 CFR 51.100(z).

[174] *See Sierra Club* v. *Johnson,* 551 F.3d 1019, 1027–28 (citing CAA sections 112(d)(2), 302(k)).

interpretations of prior versions of the CAA as requiring all SIPs to include continuously applicable emission limitations and only requiring ''other'' additional controls ''as may be necessary'' to satisfy the NAAQS.[175] Additionally, this result is contrary to legislative history of the 1990 Clean Air Act Amendments, which indicates that in slightly revising this portion of section 110(a)(2)(A), Congress intended to merely ''combine and streamline'' previously existing SIP requirements into a single provision, not to vitiate statutory requirements concerning emission limitations.[176]

Finally, the EPA's interpretation of the requirements of section 110(a)(2) does not render the ''other control'' language in the statute superfluous as claimed by the commenters. In addition to emission limitations, the EPA interprets that section to allow other ''control measures, means or techniques'' as contemplated by the statute. For example, the EPA's regulations implementing SIP requirements explicitly enumerate nine separate types of measures that states may include in SIPs.[177] This list of nine different forms of potential SIP provisions to reduce emissions varies broadly, from measures that ''impose emission charges or taxes or other economic incentives or disincentives'' to ''changes in schedules or methods of operation of commercial or industrial facilities'' to ''any transportation control measure including those transportation measures listed in section 108(f).'' The EPA made clear that this list is not all-inclusive. In addition, the EPA has, when appropriate, approved SIP provisions that impose various forms of emissions controls that are not, by definition, emission limitations.[178] Thus, the commenters are in error in their belief that the EPA's reading of the statute to require that SIPs contain emission limitations that apply continuously ignores the other forms of potential measures that section 110(a)(2)(A) authorizes.

Section 110(a)(2) requires SIPs to include enforceable emission limitations and other controls ''as necessary or appropriate to meet the applicable requirements'' of the CAA. Regardless of whether commenters' semantic labeling arguments are valid in the abstract, they are not correct with respect to the fundamental CAA requirements for SIPs relating to continuous emission limitations. The automatic or discretionary exemptions for emissions during SSM events in the SIP provisions at issue in this SIP call authorize exemptions from statutorily required emission limitations. To the extent that such a SIP provision would functionally or legally exempt sources from regulation during SSM events, the SIP provision fails to be a continuously applicable enforceable emission limitation as required by the CAA. The fact that a SIP may also contain ''other control[s]'' as advocated by the commenters does not negate the statutory requirement that emission limitations must apply continuously.

g. Comments that the definition of ''emission limitation'' in section 302(k) does not require that all forms of emission limitations must apply continuously.

Comment: Section 110(a)(2)(A) requires that SIPs must contain emission limitations, and section 302(k) defines the term ''emission limitation'' to mean a limit on emissions from a source that applies continuously. A number of commenters disagreed that section 302(k) requires that *all* ''emission limitations'' have to be ''continuous.'' The commenters argued that section 302(k) establishes two distinct categories of emission limitations: (1) Requirements that ''limit[ ] the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction,'' and (2) requirements constituting a ''design, equipment, work practice or operational standard promulgated under this chapter.'' These commenters claimed that only the first purported category is emission limitations that must be continuous and that the second purported category is emission limitations that do not need to apply continuously. Accordingly, these commenters asserted that SIP provisions that are rendered noncontinuous by inclusion of exemptions for emissions during SSM events are still legally valid ''emission limitations'' because they fall within the second category. Other commenters separately contended that under section 302(k), SIP provisions imposing requirements ''relating to the operation or maintenance of sources'' do not need to be continuous, unlike those imposing requirements that limit ''the quantity, rate, or concentration of emissions or air pollutants.''

Response: The EPA disagrees with the commenters' view that section 302(k) establishes two discrete categories of emission limitations, only one of which must reduce continuous emissions on a continuous basis. The EPA acknowledges that the text of section 302(k) is ambiguous with respect to this point, but the Agency does not agree with the commenters' interpretation of the statute. The statutory text of section 302(k) begins with a catch-all definition of the term ''emission limitation'' as ''a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis . . . .''[179] The EPA believes that the rest of the first sentence in section 302(k), beginning with the word ''including,'' is best read as a list of examples of types of measures that satisfy this general definition. In other words, the remainder of the sentence provide examples of types of SIP provisions that could be used to limit emissions on a continuous basis, including any design standard, equipment standard, work practice standard or operational standard promulgated under the CAA, as well as ''any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.'' However, each of these forms of emission limitation would be required to apply at all times, or be required to apply in combination at all times, in order to meet the fundamental requirement that the emission limitation serves to limit emissions from the affected sources continuously. Thus, the EPA interprets the term ''emission limitation'' to permit emission limitations that are composed of a combination of numerical limitations, technological control requirements and/or work practice requirements, so long as they are components of an emission limitation that applies continuously. This interpretation accords with

[175] *See, e.g., Kennecott Copper Corp.* v. *Train,* 526 F.2d 1149, 1153 (9th Cir. 1975). The current version of section 110(a)(2)(A) is admittedly worded differently than the 1970 version. However, for purposes of these commenters the critical distinction is not that Congress changed the location of the word ''necessary'' but rather that Congress changed the subject that ''necessary'' modifies—and thus the entire scope of 110(a)(2)(A)—from satisfying the NAAQS to meeting ''applicable requirements'' of the entire CAA.

[176] *See, e.g.,* S. Rept. 101–228, at 20 (noting that the structure of section 110(a)(2)(A) as it appears today reflects congressional intent to ''combine and streamline'' previously existing SIP requirements into a single provision).

[177] *See* 40 CFR 51.100(n).

[178] *See, e.g.,* 71 FR 7683 (February 14, 2006) (approving as BACM the use of ''conservation management practices'' to control fugitive dust emissions from agricultural sources, including techniques that limit emissions only during certain activities or times); 68 FR 56181 (September 30, 2003) (approving as BACM an ''episodic wood burning curtailment'' program that restricts the use of wood-burning stoves based on predicted particulate matter concentrations).

[179] CAA section 302(k).

statutory context,[180] the legislative historyregarding thedefinition of ''emission limitation,'' [181] judicial interpretationsofsection302(k)[182] and the EPA's definition of ''emission limitation'' in its SIP regulations.[183] Accordingly, the EPA's interpretation of section 302(k) is reasonable.

The EPA also disagrees with the commenters who contended that the third clause of section 302(k) authorizes exemptions for emissions during SSM events in emission limitations. The commenters argued that requirements ''relating to the operation or maintenance of sources'' do not have to be continuous. The EPA believes that this reading of the statute is simply in error, because section 302(k) on its face provides that these requirements must ''assure continuous emission reduction.'' [184]

h. Comments that exemptions or affirmative defenses are not only not prohibited, but are actually required by the CAA because they are necessary to make an emission limitation ''reasonable'' or ''achievable'' for sources that cannot comply during SSM events.

Comment: Commenters argued that some emission limitations currently in SIPs are only ''reasonable'' or technologically ''achievable'' because they include exemptions or affirmative defenses applicable to emissions during SSM events. According to these commenters, without exemptions or affirmative defenses to excuse sources from compliance with the limits during SSM events, these emission limitations would not bereasonable orachievable as required by law. To support these contentions, commenterscitedcaselaw fromtheearly 1970s toargue that the CAA *requires* emission limitations in SIP provisions to include exemptions or affirmative defenses for SSM events.

Response: The EPA agrees that SIP provisions should impose emission limitations that are reasonable and achievable by sources, so long as they are also consistent with the applicable legal requirements for that type of provision. The EPA acknowledges that in some cases, emission limitations may need to include alternative numerical limitations, technological controls or work practices during some modes of operation, such as startup and shutdown. As explained in detail in the February 2013 proposal and in this action, the EPA interprets the CAA to allow SIP provisions to include different numerical limitations or other control requirements as components of a continuously applicable emission limitation, so long as the SIP provision meets all other applicable requirements. However, the EPA disagrees with these commenters' conclusions that the need for ''reasonable'' and ''achievable'' emission limitations provides a legal justification for exemptions or affirmative defenses for excess emissions during SSM events.

First, many of the commenters erroneously presupposed that an emission limitation must continuously control emissions at the *same* rate, quantity, or concentration at all times. For sources or source categories that cannot comply with otherwise applicable emission limitations during certain modes of operation, such as startup and shutdown, the state may elect to develop alternative emission limitations applicable during those events as a component of the SIP provision. The EPA has provided recommended criteria for states to use in developing appropriate alternative emission limitations. Appropriate alternative emission limitations would ensure the existence of requirements that limit the quantity, rate or concentration of pollutants from the affected sources on a continuous basis, while also providing differing limitations tailored specifically to limit emissions during specified modes of source operation. As long as those differing limitations are components of a continuously applicable emission limitation that meets other applicable substantive requirements (*e.g.,* is RACT for stationary sources in nonattainment areas) and that is legally and practically enforceable, then such alternative emission limitations are valid. States are not required to create such alternative emission limitations, but to do so is an acceptable approach.

Second, these commenters pointed to no provision of the CAA requiring or allowingexemptionsoraffirmative defenses for SSM events. Instead, they contend that D.C. Circuit opinions in *Portland Cement Association* v. *Ruckelshaus* [185] and *Essex Chemical Corp.* v. *Ruckelshaus* [186] require SIPs to include exemptions for emissions during SSM events. As an initial matter, these cases predate amendments to the CAA that expressly defined ''emission limitation'' asarequirement that continuously limits emissions. Furthermore, even accepting these commenters' interpretations of those cases (which as explained below, EPA does not), any purported holdings to that effect have been further eroded by more recent case law from the D.C. Circuit and other courts. Most importantly, the *Sierra Club* v. *Johnson* decision has reiterated that emission limitations must apply continuously in order to comply with section 302(k), and the logic of *NRDC* v. *EPA* decision indicates that affirmative defense provisions are not appropriate because they purport to alter the jurisdiction of the courts.[187]

In addition to these more recent legal developments, however, the two earlier D.C. Circuit cases highlighted by commenters simply did not hold what commenters claim that they held. With respect to the *Portland Cement Association* decision, commenters selectively quoted from the case for the proposition that the D.C. Circuit had ''acknowledged'' that malfunctions are an inescapable aspect of industrial life and that EPA must make allowances for malfunctions when promulgating standards. The full sentence from the opinion, however, makes clear that the D.C. Circuit was merely summarizing the ''concern of manufacturers,'' not stating the court's own position.[188] To the contrary, the EPA believes that *Portland Cement* stands for the broader proposition that a system incorporating flexibility is reasonable and consistent with the overall intent of the CAA, and the EPA merely ''may'' take such flexibility into account.[189] As relevant to this action, the flexibility provided states to ensure continuous controls by developing alternative emission limitations is fully consistent with that view of the CAA. SIP provisions that include alternative emission limitations provide the sort of ''limited safety valve'' contemplated by the courts that can serve to make SIP emission limitations more achievable without authorizing complete exemptions for

[180] *See, e.g.,* CAA section 302(m) (defining ''means of emission limitation'' as a ''system of continuousemissionreduction'').

[181] *See e.g.,* H.R. Rep. 95–294, at 92 (1977) (explaining that the definition of ''emission limitation,'' like the definition of ''standard of performance,'' was intended to ''ma[ke] clear that constant or continuous means of reducing emissionsmust be used to meet th[ose] requirements''); S. Rep. 95–127, at 94 (explaining that the definition of ''emission limitation'' was intended to ''clarify the committee's view that the only acceptable basic strategy is one based on continuous emission control,'' rather than ''unacceptable'' ''[i]ntermittent controls or dispersion techniques . . . .'').

[182] *See, e.g., Sierra Club* v. *Johnson,* 551 F.3d 1019, 1027–28 (D.C. Cir. 2008).

[183] *See* 40 CFR 51.100(n) (defining ''emission limitation'' as a requirement that limits emissions on a continuous basis).

[184] *See* CAA section 302(k).

[185] 486 F.2d 375 (D.C. Cir. 1973).

[186] 486 F.2d 427 (D.C. Cir. 1973).

[187] *See Sierra Club* v. *Johnson,* 551 F.3d 1019 (D.C. Cir. 2008); *NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014).

[188] *Portland Cement Ass'n,* 486 F.2d at 398.

[189] *Id.* at 399.

emissions during SSM events in violation of statutory requirements.[190]

Commenters also cited *Essex Chemical Corp.* for the proposition that SSM exemptions are necessary to ensure that standards are reasonable. This court decision, however, also did not hold that emission limitations must provide exemptions or affirmative defenses for excess emissions during SSM events. To the contrary, the petitioners' complaint in *Essex Chemical Corp.* was that EPA had "fail[ed] to provide that *lesser standards, or* no standards at all, should apply when the stationary source is experiencing startup, shutdown, or mechanical malfunctions through no fault of the manufacturer." [191] It was these variant provisions that, in the court's opinion, "appear[ed] necessary" to ensure that the standards before it were reasonable.[192] Again, the EPA believes that emission limitations in SIP provisions may include alternative emission limitations that can provide those "lesser standards" that apply during startup and shutdown events consistent with the court's opinion but also ensure that emissions are continuously limited as required by the 1977 CAA Amendments defining "emission limitation."

As a legal matter, the court in *Essex Chemical* was reviewing a specific "never to be exceeded" standard for new and modified sources and addressed only whether the EPA's failure to provide some form of flexibility during SSM events was supported by the record; [193] the court was not interpreting whether the CAA inherently required such exemptions (rather than alternative limits) regardless of future developments in technology. Accordingly, the D.C. Circuit ultimately remanded the challenged standards to the EPA for reconsideration, not because SSM exemptions are mandatory but rather because of comments made by the EPA Acting Administrator and deficiencies identified in the administrative record with respect to "never to be exceeded" limits for those specific standards. In short, the *Essex Chemical* court did not hold that the CAA "requires" emission limitations to include exemptions for emissions during SSM events as suggested by commenters.

Furthermore, the EPA notes that the most salient legal holding of *Essex Chemical* with respect to achievability is not what the court said about the circumstances peculiar to the EPA's development of those specific standards but rather is the court's holding that standards of performance can be "achievable" even if there is no facility "currently in operation which can at all times and under all circumstances meet the standards . . . ." [194] Thus, the decision supports the EPA's conclusion that the CAA requires appropriately drawn emission limitations that apply on a continuous basis. As explained in section IV of this document, SIP provisions also cannot include the affirmative defenses advocated by commenters, because those are inconsistent with CAA provisions concerning the jurisdiction of the courts.

i. Comments that the EPA is requiring that all SIP emission limitations must be "numerical" at all times and set at the same numerical level at all times.

Comment: Many commenters on the February 2013 proposal evidently believed that the EPA was proposing an interpretation of the term "emission limitation" under section 302(k) that would requires all SIP provisions to impose numerical emission limits, and that such limits must be set at the same numerical level at all times. These commenters argued that numerical emission limitations are not required by the text of section 302(k). For example, commenters pointed to section 302(k)'s use of "work practice or operational standard[s]" as evidence that an emission limitation may be composed of more than merely numerical criteria. These commenters also reiterated their view that section 302(k) allows for or requires alternative limits during periods of SSM, including non-numerical alternative limits such as work practice or operational standards.

Response: At the outset, the EPA notes that it did not intend to imply that all emission limitations in SIP provisions must be expressed numerically, or that they must be set at the same numerical level for all modes of source operation. To the contrary, the EPA intended to indicate that states may elect to create emission limitations that include alternative emission limitations that apply during certain modes of source operation, such as startup and shutdown. This was the reason for inclusion of the recommended criteria for states to develop appropriate alternative emission limitations applicable during startup and shutdown in section VII.A of the February 2013 proposal. The EPA has provided similar recommended criteria in this final action (see section VII.B.2 of this document). The EPA agrees that neither section 110(a)(2)(A) nor section 302(k) inherently requires that SIP emission limitations must be expressed numerically. Furthermore, section 302(k) does not itself require imposition of numerical limitations or foreclose the use of higher numerical levels, specific technological controls or work practices during certain modes of operation.

Although some CAA programs may require or impose a presumption that emission limitations be expressed numerically, the text of section 110(a)(2)(A) and section 302(k) does not expressly state a preference for emission limitations that are in all cases numerical in form.[195] Rather, as many commenters pointed out, the critical aspect of an emission limitation in general is that it be a "requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis . . . ." [196] Accordingly, although other regulatory requirements may also apply, a non-numerical design standard, equipment standard, work practice standard or operational standard could theoretically meet the definition of "emission limitation" for purposes of section 302(k) if it continuously limited the quantity, rate or concentration of air pollutants.[197] By contrast, if a non-numerical requirement does not itself (or in combination with other components of the emission limitation) limit the quantity, rate or concentration of air pollutants on a continuous basis, then the non-numerical standard (or overarching requirement) does not meet the statutory definition of an emission limitation under section 302(k).

Finally, the EPA does not believe that section 110(a)(2)(A) or section 302(k) mandates that an emission limitation be composed of a single, uniformly applicable numerical emission limitation. As the EPA stated in the February 2013 proposal, "[i]f 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

[190] *Id.* (citing *International Harvester,* 478 F.2d 615, 641 (D.C. Cir. 1973)).

[191] *Essex Chem. Corp* v. *Ruckelshaus,* 486 F.2d at 433 (emphasis added).

[192] *See id.*

[193] *Id.* ("the record does not support the 'never to be exceeded' standard currently in force").

[194] *Essex Chem. Corp* v. *Ruckelshaus,* 486 F.2d 427, 433 (D.C. Cir. 1973).

[195] Numerical requirements or preferences for some emission limitations flow from substantive requirements of specific CAA programs, which are incorporated into section 110(a)(2)(A) by the requirement that SIPs "include enforceable emission limitations . . . as may be necessary or appropriate to meet the applicable requirements of" the CAA. CAA section 110(a)(2)(A).

[196] *See, e.g., id.,* section 112(h)(4).

[197] For example, emission limitations must meet the requirements of various substantive provisions of the CAA and must be legally and practically enforceable.

requirements that apply during such periods, so long as they meet other applicable CAA requirements.'' [198] As explained in the EPA's response in section VII.A.3 of this document regarding the meaning of the statutory term ''continuous,'' the critical aspect for purposes of section 302(k) is not whether the emission limitation is expressed as a static versus variable numerical limitation but rather whether as a whole it constitutes a requirement that limits emissions on a continuous basis. Furthermore, any emission limitation must also meet all other applicable CAA requirements concerning stringency and enforceability.

j. Comments that an emission limitation can be ''continuous'' even if it has different numerical limitations applicable during some modes of source operation or has a combination of numerical emission limitations and specific control technologies or work practices applicable during other modes of operation.

Comment: Several commenters argued that an emission limitation can be ''continuous'' under section 302(k) even if it provides different substantive requirements applicable during SSM events. One commenter illustrated this position with a hypothetical:

> [W]hile Section 302 requires ''emission limits'' to be ''continuous,'' it does not specify . . . that the same ''emission limit'' must apply at all times. That is, if a state chooses to require sources to comply with a 40% opacity limit during steady-state operations, the Act does not then require the state to apply that 40% limit at all times, including startup, shutdown and malfunction events.

Commenters pointed to a number of sources as justification for this position, including the text of section 302(k), relevant case law, legislative history of the 1977 CAA Amendments, prior EPA interpretations, and practical concerns.

Response: The EPA agrees with these commenters' conclusion that an ''emission limitation'' under section 302(k) does not need to be expressed as a static, inflexible limit on emissions. Rather, a SIP provision qualifying as an ''emission limitation'' consistent with section 302(k) must merely limit ''the quantity, rate, or concentration'' of emissions, and must do so ''on a continuous basis.'' The critical aspect for purposes of section 302(k) is that the SIP provision impose limits on emissions on a continuous basis, regardless of whether the emission limitation as a whole is expressed numerically or as a combination of numerical limitations, specific control technology requirements and/or work practice requirements, and regardless of whether the emission limitation is static or variable. For example, so long as the SIP provision meets other applicable requirements, it may impose different numerical limitations for startup and shutdown.

The EPA also agrees that the text of section 302(k) does not require states to impose emission limitations that include a static, inflexible standard. Rather, the term ''emission limitation'' is merely defined as a ''requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis. . . .'' The continuous limits imposed by emission limitations are a fundamental distinction between emission limitations and the other control measures, means or techniques that may also limit emissions.[199] The text of section 302(k), however, does not distinguish between a variable or static ''requirement'' that continuously limits emissions—all that is required is that the emissions are limited on a continuous basis.

This interpretation is consistent with prior EPA interpretations of section 302(k), as well as relevant case law. In *Kamp* v. *Hernandez,* the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) upheld the EPA's interpretation of ''continuous'' in section 302(k), as requiring that ''some limitation on emissions, although not necessarily the same limitation, is always imposed'' on the source.[200] More recently, the D.C. Circuit favorably cited *Kamp* when holding that section 302(k) requires emission standards to limit emissions on a continuous basis and precludes exemptions for emissions during SSM events.[201]

Legislative history confirms that Congress was primarily concerned that there be constant or continuous means of reducing emissions—not that the nature of those controls could not be different during different modes of operation.[202] For example, legislative history from the 1977 CAA Amendments states that Congress added section 302(k)'s definition of ''emission limitation'' to:

> . . . ma[ke] clear that constant or continuous means of reducing emissions must be used to meet these requirements. By the same token, intermittent or supplemental controls or other temporary, periodic, or limited systems of control would not be permitted as a final means of compliance.[203]

Although this legislative history demonstrates congressional intent that any ''emission limitation'' would require limits on emissions at all times, this history does not necessarily indicate that the emission limitation must consist of a single static numerical limitation. Accordingly, this legislative history is consistent with the EPA's view that section 302(k) requires continuous limits on emissions and that variable (albeit still continuous) limits on emissions can qualify as an emission limitation for purposes of section 302(k).

Finally, although the EPA agrees with these commenters' conclusion, the EPA does not agree with these commenters' view that practical concerns *require* states in all cases to establish alternative emission limitations for modes of operation such as startup and shutdown within any continuously applicable emission limitation. Principles of cooperative federalism incorporated into section 110 allow states great leeway in developing SIP emission limitations, provided those limitations comply with applicable legal requirements.[204] States are thus not required to establish alternative emission limitations for any sources during startup and shutdown, but they may elect to do so. Neither the definition of ''emission limitation'' in section 302(k) nor the requirements of section 110(a)(2)(A) explicitly require states to develop emission limitations that include alternative emission limitations for periods of SSM, just as they do not explicitly preclude states from doing so.

[198] 78 FR 12459 at 12471.

[199] *See* CAA section 110(a)(2)(A).

[200] *Kamp* v. *Hernandez,* 752 F.2d 1444, 1452–53 (9th Cir. 1985) (citing *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council,* 467 U.S. 837 (1984)) (upholding EPA's ''broader definition of 'continuous'" under section 302(k)).

[201] *Sierra Club* v. *Johnson,* 551 F.3d 1019, 1027–28 (D.C. Cir. 2008) (quoting *Kamp,* 752 F.2d at 1452).

[202] *See, e.g.,* H.R. Rep. 95–294, at 92 (1977) (explaining that the definition of ''emission limitation,'' like the definition of ''standard of performance,'' was intended to ''ma[ke] clear that constant or continuous means of reducing emissions must be used to meet th[ose] requirements''); S. Rep. 95–127, at 94 (explaining that the definition of ''emission limitation'' was intended to ''clarify the committee's view that the only acceptable basic strategy is one based on continuous emission control,'' rather than ''unacceptable'' ''[i]ntermittent controls or dispersion techniques . . . .'').

[203] H.R. Rep. 95–294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170); *Sierra Club* v. *Johnson,* 551 F.3d at 1027 (quoting the same); *Kamp* v. *Hernandez,* 752 F.2d at 1453–54 (quoting the same).

[204] As discussed above and elsewhere in this document, those requirements include satisfying the definition of ''emission limitation'' under CAA section 302(k), and being ''enforceable'' in accordance with section 110(a)(2)(A).

k. Comments that an emission limitation can be ''continuous'' even if it includes periods of exemptions from the emission limitation.

Comment: Commenters asserted that a requirement limiting emissions can be ''continuous'' even if a SIP provision includes periods of exemption from that limit. For example, some commenters contended that SSM exemptions only excuse compliance with emission limitations for a ''short duration,'' or ''brief'' period of time, and that these purportedly ephemeral interruptions should not be viewed as rendering the requirement noncontinuous. Other commenters contendedthat the EPA misinterpreted portions of the D.C. Circuit's opinion in *Sierra Club* v. *Johnson,*[205] interpreting section 302(k). Specifically, this group of commenters claimed that because the holding of that case was based on a combined reading of sections 112 and 302(k), the court's interpretation of the word ''continuous'' in section 302(k) does not extend outside the context of section 112. This included one commenter who suggested, in a one-sentence footnote, that ''[i]n the cooperative-federalism context''—presumably of section 110— ''the standard of flexibility that Congress gave the States with respect to selecting the elements of their SIPs is not necessarily the same standard Congress set to govern EPA's responsibility to establish the NAAQS or section 112 standards.'' Still other commenters further argued that the EPA mischaracterized legislative history discussing ''continuous'' in section 302(k). According to these commenters, the context of legislative history on section 302(k) indicates that Congress did not intend for the word ''continuous'' to be given its plain meaning but rather intended to use ''continuous'' in relation only to specific types of intermittent controls.

Response: The EPA disagrees with these commenters. First, commenters' interpretation would contravene the plain meaning of ''continuous.'' Section 302(k) defines ''emission limitation'' as a requirement that ''limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis. . . .''[206] Although the word ''continuous'' is not separately defined in the Act, its plain and unambiguous meaning is ''uninterrupted.''[207] Accordingly, to the extent that a SIP provision provides for any period of time when a source is *not* subject to any requirementthatlimitsemissions, the requirements limiting the source's emissions by definition cannot do so ''on a continuous basis.'' Such a source would not be subject to an ''emission limitation,'' as that term is defined under section 302(k). Thesame principle applies even for ''brief'' exemptions from limits on emissions, because such exemptions nevertheless render theemissionlimitation noncontinuous.

Second, the EPA disagrees with commenters' interpretation of the D.C. Circuit's opinion in *Sierra Club.* While the court's ultimate decision was based on ''sections 112 and 302(k) . . . read together,''[208] the court's analysis of what makes a standard ''continuous'' was based on section 302(k) alone.[209] Although the precise components of an emission limitation or standard may expand depending on which other provisions of the CAA are applicable, the bedrock definition for what it means to be an ''emission limitation'' under section 302(k) does not. Congress appeared to share the EPA's view that section 302(k) provides a bedrock definition of ''emission limitation'' applicable ''to all emission limitations under the act, not just to limitations under sections 110, 111, or 112 of the act.''[210] Accordingly, the D.C. Circuit's interpretation of section 302(k) applies equally in the context of SIP provisions developed by states as in the context of MACT standards developed by the EPA, even if additional requirements may be different.[211]

Finally, the EPA rejects commenters' contention that section 302(k)'s legislative history indicates that use of the word ''continuous'' in the definition of ''emission limitation'' was merely intended to prevent the use of intermittent controls or, even more narrowly, only dispersion techniques. While legislative history of the 1977 Amendments discusses at length the concerns associated with these types of controls, section 302(k) was not intended to merely prevent the narrow problem of intermittent controls. To the contrary, the House Report states that under section 302(k)'s definition of emission limitation, ''intermittent or supplemental controls *or other temporary, periodic, or limited systems of control* would not be permitted as a final means of compliance.''[212]

In explaining congressional intent behind adopting a statutory definition of ''emission limitation,'' the House Report articulated a rationale broader than would apply if Congress had merely intended to prohibit the tall stacks and dispersion techniques that commenters claimweretargeted: ''Eachsource's prescribed emission limitationis the fundamental toolforassuring that ambient standards are attained and maintained. Withoutanenforceable emission limitation which will be *complied with at all times,* there can be no assurance that ambient standards will be attained and maintained.''[213] By contrast, Congress criticizedlimitations structured in ways that could not ''provide assurances thattheemission limitation will be met at all times,'' or that would sometimes allow the ''emission limitation [to] be exceeded, perhaps by a wide margin . . . .''[214] Such flaws ''would defeat the remedy provision provided by section 304 of the act which allows citizens to assure compliance with emission limitations and other requirements of the act.''[215] Exemptions for emissions during SSM events have the same effects.[216]

In adopting section 302(k)'s definition of ''emission limitation,'' Congress did not merely intend to prohibit the use of intermittent controls as final compliance strategies—much less intermittent controls as narrowly defined by commenters to mean only dispersion techniques and certain ''tall stacks.'' Rather, Congress intended to eliminate the fundamental problems

[205] 551 F.3d 1019 (D.C. Cir. 2008).

[206] CAA section 302(k).

[207] *See Webster's Third New International Dictionary* 493–94 (Phillip Babcock Gove ed., Merriam-Webster 1993) (defining ''continuous'').

[208] *Sierra Club,* 551 F.3d at 1027.

[209] *See id.* (quoting H.R. Rep. 95–294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170); *see also Kamp* v. *Hernandez,* 752 F.2d at 1453–54 (quoting the same andcomingto the same conclusion).

[210] *See* H.R. 95–294, at 92 (1977); *see also* section 302 (stating that the definitions appearing therein apply ''[w]hen used in this chapter'').

[211] The fact that CAA section 110 incorporates principles of cooperative federalism does not inevitably mean that the definition of ''emission limitation'' under section 302(k) changes depending on whether it is applied in the context of section 110 versus section 112. Accordingly, in the context of judicial interpretation of a statute, the U.S. Supreme Court has held that judges cannot ''give the same statutory text different meanings in different cases.'' *Clark* v. *Martinez,* 543 U.S. 371, 386 (2005). The EPA believes that the text and legislative history of section 302(k) evince congressional intent to consistently apply the definition of ''emission limitation'' under section 302(k) rather than to develop an inconsistent interpretation peculiar to section 110.

[212] H.R. 95–294, at 92 (emphasis added).

[213] *Id.* (emphasis added). The Senate Report expressed a similar sentiment. *See* S. Rep. No. 95–127, at 94–95 (1977) (explaining that the definition of ''emission limitation'' was intended ''to clarify the committee's view that the only acceptable *basic strategy* [for emission limitations in SIPs] is one based on continuous emission control'').

[214] *See* H.R. 95–294, at 92.

[215] *See id.*

[216] *See, e.g., NRDC* v. *EPA,* 749 F.3d 1055, 1064 (D.C. Cir. 2014) (holding that an affirmative defense for excess emissions during malfunctions contradicts the requirement that an emission limitation be ''continuous'').

that were illustrated by use of those controls.[217] SSM exemptions and affirmative defenses raise many of the same problems, and addressing those problems through this action fully accords with section 302(k)'s legislative history.

l. Comments that the ''as may be necessary or appropriate'' language in section 110(a)(2)(A) *per se* authorizes states to create exemptions in SIP emission limitations.

Comment: Some commenters contended that section 110(a)(2)(A) merely requires states to include emission limitations and other control measures in their SIPs ''as may be necessary or appropriate.'' These commenters interpreted that language as a broad delegation of discretion to states to develop SIP provisions that are necessary or appropriate to satisfy the particular needs of a state, as judged solely by that state. Some of the commenters argued that the EPA's interpretation of ''as may be necessary or appropriate'' would, in all circumstances, improperly substitute the EPA's judgment for that of the state concerning what emission limitations are necessary or appropriate. One commenter highlighted the EPA's proposal to deny the Petition with respect to a specific SIP provision of the South Carolina SIP that entirely exempts a source category from regulation.[218] According to this commenter, if the ''as may be necessary or appropriate'' language grants states the authority to exempt a source category from regulation entirely, then it must allow states to exempt sources selectively during SSM events.

Some commenters further argued that regardless of what the terms ''emission limitations'' or ''other control measures, means, or techniques'' mean, section 110(a)(2)(A) only requires states to include such emission controls in SIPs ''as may be necessary or appropriate'' to meet the NAAQS, or some requirement germane to attainment of the NAAQS, such as various technology-based standards or general principles of enforceability. Commenters also disagreed with the EPA's purported interpretation that the statutory phrase ''as may be necessary'' only qualifies what ''other control[s]'' are required, rather than also qualifying what emission limitations are required. According to these commenters, that interpretation is a vestige of the 1970 CAA and was foreclosed by textual changes in the 1977 CAA Amendments or, alternatively, the 1990 CAA Amendments.

Response: The EPA disagrees with the commenters' interpretation of the ''as may be necessary or appropriate'' language of section 110(a)(2)(A). As an initial matter, those commenters contending that section 110(a)(2)(A) is only concerned with what is ''necessary or appropriate'' to attain and maintain the NAAQS (or some requirement germane to the NAAQS) ignore the plain language of section 110(a)(2)(A). While the predecessor provisions to section 110(a)(2)(A) prior to the 1990 CAA Amendments did indeed speak in terms of emissions controls ''necessary to insure attainment and maintenance of [the NAAQS],'' [219] the statute in effect today requires controls ''necessary or appropriate *to meet the applicable requirements of this chapter,*'' [220]—*i.e.,* to meet the requirements of the CAA as a whole. Thus, at a minimum, the EPA interprets the phrase ''as may be necessary or appropriate'' to include what is necessary or appropriate to meet legal requirements of the CAA, including the requirement that emission limitations must apply on a continuous basis.

Regardless of whether all SIPs must always contain emission limitations, the text of the CAA is clear that the EPA is at a minimum tasked with determining whether SIPs include all emission limitations that are ''necessary'' (*i.e.,* required) ''to meet the applicable requirements of'' that CAA. Broadly speaking, this requires that the EPA determine whether the SIP meets the basic legal requirements applicable to all SIPs (*e.g.,* the requirements of section 110(a)(2)(A) through (M)), whether the SIP contains emission limitations necessary to meet substantive requirements of the Act (*e.g.,* RACT-level controls in nonattainment areas) and whether all emission limitations and other controls, as well as the schedules and timetables for compliance, are legally and functionally enforceable.

In every state subject to this SIP call, the EPA has previously concluded in approving the existing SIP provisions that the emission limitations are necessary to comply with legal requirements of the CAA. The states in question would not have developed and submitted them, and the EPA would not have approved them, unless the state and the EPA considered those emission limitations fulfilled a CAA requirement in the first instance. However, the automatic and discretionary exemptions for emissions during SSM events in the SIP provisions at issue in this action render those necessary emission limitations noncontinuous, and thus not meeting the statutory definition of ''emission limitations'' as defined in section 302(k). Accordingly, regardless of whether all SIPs must always include emission limitations, these specific SIP provisions fail to meet a fundamental requirement of the CAA because they do not impose the continuous emission limitations required by the Act.

The EPA also disagrees with the argument raised by commenters that its denial of the Petition with respect to a South Carolina SIP provision supports the validity of SSM exemptions in SIP emission limitations.[221] In that situation, the state determined that regulating the source category at issue was not a necessary or appropriate means of meeting the requirements of the CAA. The EPA's approval of that provision indicates that the Agency agreed with that determination. This factual scenario is not the same as one in which the state has determined that regulation of the source category *is* necessary or appropriate to meet CAA requirements. Once the determination is made that the source category must or should be regulated, then the SIP provisions developed by the state to regulate the source must meet applicable requirements. These include that any limits on emissions must be consistent with CAA requirements, including the requirement that any emission limitation limit emissions on a continuous basis. The EPA agrees that a state can validly determine that regulation of a source category is not necessary, so long as this is consistent with CAA requirements. This is not the same as allowing impermissible exemptions for emissions from a source category that must be regulated.

Finally, the EPA does not agree with commenters' allegations that that the EPA's interpretation of section 110(a)(2)(A) eliminates the states' discretion to take local concerns into account when developing their SIP provisions. Rather, for reasons discussed in more detail in the EPA's response in section V.D.2 of this document regarding cooperative federalism, the EPA's interpretation is

[217] *See, e.g.,* H.R. 95–294, at 94 (noting that the provision was intended to overcome ''objections'' to suchmeasures, not merely the measures themselves); *id.* at 92 (indicating that the problems arise from ''temporary, periodic, or limited systems of control'' generally, not merely dispersion techniques or tall stacks).

[218] *See* 78 FR 12459 at 12512 (citing S.C. Code Ann. Regs. 61–62.5 St 5.2(l)(b)(14)).

[219] *See, e.g.,* Clean Air Act of 1970, Public Law 91–604, section 4(a), 84 Stat. 1676, 1680 (December 31, 1970).

[220] Section 110(a)(2)(A).

[221] *See* 78 FR 12459 at 12512 (citing S.C. Code Ann. Regs. 61–62.5 St 5.2(l)(b)(14)).

fully consistent with the principles of cooperative federalism codified in the CAA. As courts have concluded, although Congress provided states with ''considerable latitude in fashioning SIPs, the CAA 'nonetheless subjects the States to strict minimum compliance requirements' and gives EPA the authority to determine a state's compliance with the requirements.'' [222] This interpretation is also consistent with congressional intent that the EPA exercise supervisory responsibility to ensure that, *inter alia,* SIPs satisfy the broad requirements that section 110(a)(2) mandates that SIPs ''shall'' satisfy.[223] Where the EPA determines that a SIP provision does not satisfy legal requirements, the EPA is not substituting its judgment for that of the state but rather is determining whether the state's judgment falls within the wide boundaries of the CAA.

m. Comments that a ''general duty'' provision—or comparable generic provisions that require sources to ''exercise good engineering judgment,'' to ''minimize emissions'' or to ''not cause a violation of the NAAQS''—inoculate or make up for exemptions in specific emission limitations that apply to the source.

Comment: Numerous commenters argued that even if some of the SIP provisions with SSM exemptions identified in this SIP call are not themselves emission limitations, they are nevertheless *components* of valid emission limitations. According to these commenters, some SIPs contain separate ''general duty'' provisions that are not affected by SSM exemptions and thus have the effect of limiting emissions from sources during SSM events that are explicitly exempted from the emission limitations in the SIP. These general-duty provisions vary, but most of them: (1) Instructsourcesto''minimize emissions''consistentwithgoodair pollutioncontrol practices, (2) prohibit sources fromemittingpollutants that cause a violation of the NAAQS, or (3) prohibit source operators from ''improperly operating or maintaining'' their facilities.

Commenters contended that these general-duty provisions are requirements that—either alone or in combination with other requirements—have the effect of limiting emissions on a continuous basis. In other words, the commenter asserted that these general-duty provisions impose limits on emissions during SSM events, when the otherwiseapplicablecontrolsnolonger apply. According to these commenters, SSM exemptions that excuse noncompliance with typical controls do not interrupt the continuous application of an ''emission limitation,'' because these general-duty provisions elsewhere in the SIP or in a separate permit are part of the emission limitation and apply even during SSM events.

Some commenters further argued that some SSM exemptions themselves demonstrate that sources remain subject to general-duty provisions during SSM events. These SSM exemptions require sources seeking to qualify for the exemption to demonstrate that, *inter alia,* they were at the time complying with certain general duties. Accordingly, these commenters contended that the SSM exemption itself demonstrates that sources remain subject to requirements that limit their emissions during SSM events, even when the source is excused from complying with other components of the overarching emission limitation.

Finally, as evidence that these general-duty clauses must be permissible under the CAA, some commenters pointed to similar federal requirements established by the EPA under the NSPS and NESHAP programs.[224] These commenters argued that the D.C. Circuit's decision in *Sierra Club* v. *Johnson* [225] was limited to circumstances unique to section 112 and does not support a *per se* prohibition on general-duty clauses operating as ''emission limitations.''

Response: The EPA disagrees with these comments. As described elsewhere in this response to comments, all ''emission limitations'' must limit emissions of air pollutants on a continuous basis.[226] The specific requirements of a SIP emission limitation must be discernible on the face of the provision, must meet the applicable substantive and stringency requirements of the CAA and must be legally and practically enforceable. The general-duty clauses identified by these commenters are not part of the putative emission limitations contained in these SIP provisions. To the contrary, these general-duty clauses are often located in different parts of the SIP and are often not cross-referenced or otherwise identified as part of the putative continuously applicable emission limitation.

Furthermore, the fact that a SIP provisionincludes prerequisites to qualifying for an SSM exemption does not mean those prerequisites are themselves an ''alternative emission limitation'' applicable during SSM events. The text and context of the SIP provisions at issue in this SIP call action make clear that the conditions under which sources qualify for an SSM exemption are not themselves componentsofanoverarchingemission limitation—*i.e.,* a requirement that limits emissions of air pollutants from the affected source on a continuous basis. Rather, these provisions merely identify the circumstances when sources areexemptfromemission limitations.

Reviewing an example of the SIP provisions cited by commenters is illustrative of this point. For example, several commenters pointed to provisions in Alabama's SIP that excuse a source from complying with an otherwise applicable emission limitation only when the permittee ''took all reasonable steps to minimize emissions'' and the ''permitted facility was at the time being properly operated.'' According to commenters, the general duties in this provision—to take reasonable steps to minimize emissions, and to properly operate the facility—ensure that even during SSM events, the permittee remains subject to requirements limiting emissions.

However, a review of the provisions themselves in context—not selectively quoted—reveals that these general-duty provisions were included in the SIP not as components of an emission limitation but rather as components of an *exception* to that emission limitation. In order to qualify, the SIP requires the permittee to have taken ''all reasonable steps to minimize levels of emissions *that exceeded the emission standard*'' [227]—an acknowledgement that the emissions to be ''minimize[d]'' are those that ''exceed[]'' (*i.e.,* go beyond) the required limits of ''the emission standard.'' In case there were any doubt that the general-duty provisions identified are elements of an exemption from an emission limitation, rather than components of the emission limitation itself, the provisions apply during what the Alabama SIP calls ''[e]xceedances of *emission limitations*'' [228] and are found within a

[222] *Michigan* v. *EPA,* 213 F.3d 663, 687 (D.C. Cir. 2000) (quoting *Union Elec. Co.* v. *EPA,* 427 U.S. 246, 256–57 (1976)).

[223] With respect to section 110(a)(2)(A), this means that a SIP must at least contain legitimate, enforceable emission limitations to the extent they are necessary or appropriate ''to meet the applicable requirements'' of the Act. Likewise, SIPs cannot have enforcement discretion provisions or affirmative defense provisions that contravene the fundamental requirements concerning the enforcement of SIP provisions.

[224] *See, e.g.,* 40 CFR 63.6(e)(3).

[225] 551 F.3d 1019, 1027–28 (D.C. Cir. 2008).

[226] CAA section 302(k).

[227] Ala. Admin. Code Rule 335–3–14–.03(h)(2)(ii)(III) (emphasis added).

[228] *Id.* at 335–3–14–.03(h)(2)(ii) (emphasis added).

broader section addressing ''Exceptions to *violations of emission limitations*.'' [229] By exempting sources from compliance with ''the emission standard,'' theseexemptionsrender the SIP emission limitation noncontinuous, contrary to section 302(k).[230]

The consequences for failing to satisfy the preconditions for an exemption further bolster the conclusion that these preconditions are not themselves part of an emission limitation. Failure to meet the ''general duty'' preconditions for an SSM exemption means that the source remains subject to the otherwise applicable emission limitation during the SSM event and is thus liable for violating the emission limitation. If those general duties were independent parts of an emission limitation (rather than merely preconditions for an exemption), then one would expect that periods of time could exist when the source was liable for violating those general duties rather than the default emission limitation.

The general-duty provisions that apply as part of the SSM exemption are notalternativeemissionlimitations; they merely define an unlawful exemption to an emission limitation. States have discretion to fix this issue in a number of ways, including by removing the exceptions entirely, by replacing these exceptions with alternative emission limitations including specific control technologies or work practices that do ensure continuous limits on emissions or by reformulating the entire emission limitation.

In addition to the EPA's fundamental disagreement with commenters that these general-duty provisions are actually components of emission limitations, the EPA has additional concerns about whether many of these provisions could operate as stand-alone emission limitations even if they were properly identified as portions of the overall emissions limitations in the SIP.[231] Furthermore, some of these general-duty provisions do not meet the level of stringency required to be an ''emission limitation'' compliant with specific substantive provisions of the CAA applicable to SIP provisions.[232] Accordingly, while states are free to include general-duty provisions in their SIPs as separate additional requirements, for example, to ensure that owners and operators act consistent with reasonable standards of care, the EPA does not recommend using these background standards to bridge unlawful interruptions in an emission limitation.[233]

The NSPS and NESHAP emission standards and limitations that the EPA has issued since *Sierra Club* demonstrate the distinct roles played by emissionlimitationsandgeneral-duty provisions. The emission limitations themselves are clear and legally and functionally enforceable, and they are composed of obviously integrated requirementsthatlimitemissionsona continuous basis during all modes of source operation. Crucially, the general-duty provisions in these post-*Sierra Club* regulationsmerelysupplementthe integratedemissionlimitation; theydo not supplant the emission limitation, whichindependentlyrequires continuous limits on emissions. As discussed elsewhere in this document, the fact that the EPA is in the process of updating its own regulations to comply with CAA requirements does not alter the legal requirements applicable to SIPs.

n. Comments that EPA's action on the petition is a ''change of policy.''

Comment: A number of commenters claimed that the EPA's action on the Petition is illegitimate because it is based upon a ''change of policy.'' Some commenters claimed that the EPA's reliance on the definition of ''emission limitation'' in section 302(k) and the requirements for SIP provisions in section 110(a)(2) as barring automatic exemptions are ''new.'' These commenters claimed that the EPA has historically relied on the fact that NAAQS are ambient-standard-based and that the EPA has relied also on the fact that SSM exemptions had potential adverse air quality impacts as the basis for interpreting the CAA to preclude exemptions. The commenters argued that this basis for the SSM Policy is evidenced by the fact that EPA itself historically included SSM exemptions in NSPS and NESHAP rules, which establish emission limitations that should be governed by section 302(k) as well.

Other commenters claimed that the EPA is changing its SSM Policy by seeking to revoke ''enforcement discretion'' exercised on the part of states, which the EPA specifically recognized as an acceptable approach in the 1983 SSM Guidance. A commenter asserted that ''fairness principles'' mean that the EPA cannot require a state to modify its SIP without substantial justification. The commenter further contended that the EPA's claim that it has a longstanding interpretation of the CAA that automatic exemptions are not allowed in SIP provisions is false; otherwise, the commenter argued, the EPA would not have approved some of the provisions at issue in the SIP call long after 1982. As evidence for this argument, the commenter pointed to the West Virginia regulations that provide an automatic exemption.

Finally, other commenters argued that the EPA's changed interpretation of the CAA requires an acknowledgement that the SSM Policy is being changed and a rational explanation for such change. These commenters noted that the EPA previously argued in a brief for the type of exemption provisions that it is now claiming are deficient, citing *Sierra Club* v. *Johnson,* No. 02–1135 (D.C. Cir. March 14, 2008). The commenters claimed that the EPA has provided no rational basis for its change in interpretation of the CAA concerning exemptions for emissions during SSM events.

Response: The EPA's longstanding position, at least since issuance of the 1982 SSM Guidance, is that SIP provisions providing an exemption from emission limitations for emissions during SSM events are prohibited by the CAA. The EPA's guidance documents issued in 1982 and 1983 expressly recognized that in place of exemptions, states should exercise enforcement discretion in determining whether to pursue a violation of an emission limitation. In the 1983 SSM Guidance, the EPA made recommendations for states that elected to adopt specific SIP provisions affecting their own exercise of enforcement discretion, so long as those provisions do not apply to enforcement discretion of the EPA or other parties under the citizen suit provision of the CAA. More than 15 years ago, in the 1999 SSM Guidance, the EPA reiterated its longstanding position that it is inappropriate for SIPs to exempt SSM emissions from compliance with emission limitations and repeated that instead of incorporating exemptions, enforcement discretion could be an appropriate tool. In addition, EPA clarified at that time that a narrowly tailored affirmative

[229] *Id.* at 335–3–14–.03(h) (emphasis added).

[230] *See* CAA section 302(k) (defining ''emission limitation'' and ''emission standard'').

[231] *See Sierra Club,* 551 F.3d at 1026 (discussing the EPA's prior determinations that ''compliance with the general duty on its own was insufficient to prevent the SSM exemption from becoming a 'blanket' exemption'').

[232] *See, e.g., Sierra Club* v. *Johnson,* 551 F.3d at 1027–28 (soholding withrespect to section 112).

[233] For example, the EPA has concerns the some of these general-duty provisions, if at any point relied upon as the sole requirement purportedly limiting emissions, could undermine the ability to ensure compliance with SIP emission limitations relied on to achieve the NAAQS and other relevant CAA requirements at all times. *See* section 110(a)(2)(A), (C); *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1161–62 (10th Cir. 2012).

defense might also be an appropriate tool for addressing excess emissions in a SIP provision. However, in response to recent court decisions, and as discussed in detail in section IV of this document, the EPA no longer interprets the CAA to permit affirmative defense provisions in SIPs.

Although the EPA did not expressly rely on the definition of ''emission limitation'' in section 302(k) as the basis for its SSM Policy in each of these guidance documents, it did rely on the purpose of the NAAQS program and the underlying statutory provisions (including section 110) governing that program. In the 1999 SSM Guidance, however, the EPA indicated that the definition of emission limitation in section 302(k) was part of the basis for its position concerning SIP provisions.[234] After the EPA issued the 1999 SSM Guidance, the D.C. Circuit issued a decision holding that the definition of emission limitation in section 302(k) does not allow for periods when sources are not subject to emissions standards.[235] While the court's decision concerned the section 112 program addressing hazardous air pollutants, the EPA believes that the court's ruling concerning section 302(k) applies equally in the context of SIP provisions because the definition of emission limitation also applies to SIP requirements. That court's decision is consistent with and provides support for the EPA's longstanding position in the SSM Policy that exemptions from compliance with SIP emission limitations are not appropriate under the CAA.

Commenters claimed that by interpreting the CAA to prohibit exemptions for emissions during SSM events the EPA is revoking ''enforcement discretion'' exercised by the state. This is not true. As part of state programs governing enforcement, states can include regulatory provisions or may adopt policies setting forth criteria for how they plan to exercise their own enforcement authority. Under section 110(a)(2), states must have adequate authority to enforce provisions adopted into the SIP, but states can establish criteria for how they plan to exercise that authority. Such enforcement discretion provisions cannot, however, impinge upon the enforcement authority of the EPA or of others pursuant to the citizen suit provision of the CAA. The EPA notes that the requirement for adequate enforcement authority to enforce CAA requirements is likewise a bar to automatic exemptions from compliance during SSM events.

Commenters confused the EPA's evolution in describing the basis for its longstanding SSM Policy as a change in the SSM Policy itself. The EPA's interpretation of the CAA in the SSM Policy has not changed with respect to exemptions for emissions during SSM events. The EPA's discussion of the basis for its longstanding interpretation has evolved and become more robust over time as the EPA has responded to comments in rulemakings and in response to court decisions. In support of its interpretation of the CAA that exemptions for periods of SSM are not acceptable in SIPs, the EPA has long relied on its view that NAAQS are health-based standards and that exemptions undermine the ability of SIPs to attain and maintain the NAAQS, to protect PSD increments, to improve visibility and to meet other CAA requirements. By contrast, the EPA historically took the position that SSM exemptions were acceptable for certain technology-based standards, such as NSPS and NESHAP standards, and argued that position in the *Sierra Club* case cited by commenters. However, in that case, the court explicitly ruled against the EPA's interpretation, holding that exemptions for emissions during SSM events are precluded by the definition of ''emission limitation'' in CAA section 302(k). The *Sierra Club* court's rationale thus provided additional support for the EPA's longstanding position with respect to SSM exemptions in SIP provisions, and in more recent actions the EPA has relied on the reasoning from the court's decision as further support for its current SSM Policy. Thus, even if the EPA were proceeding under a ''change of policy'' here as the commenters claimed, the EPA has adequately explained the basis for its current SSM Policy, including the basis for any actual ''change'' in that guidance (*e.g.,* the actual change in the SSM Policy with respect to affirmative defense provisions in SIPs). Courts have upheld an agency's authority to revise its interpretation of a statute, so long as that change of interpretation is explained.[236]

o. Comments that the EPA's proposed action on the petition is based on a ''changed interpretation'' of the definition of ''emission limitation.''

Comment: Commenters claimed that the EPA's action on the Petition is based on a changed interpretation of the term ''emission limitation'' and that the Agency cannot apply that changed interpretation ''retroactively.'' One commenter citedseveralcasesforthe proposition that retroactivity is disfavored and that the EPA is applying this new interpretation retroactively to existing SIP provisions. The commenter claimed that the EPA approved the existing SIP provisions with full knowledge of what those provisions were and ''consistent with the provisions EPA itself adopted and courts required.'' The commenter characterizedthe SIP provisions for which the EPA is issuing a SIP call as ''enforcement discretion'' provisions and ''affirmative defense'' provisions for startupandshutdown. Thecommenter contended that the EPA does not have authority to issue a SIP call on the premise that the CAA is less flexible than the Agency previously thought. The commenter concluded that ''[t]he factors of repose, reasonable reliance, and settled expectations favor not imposing EPA's new interpretations.''

Response: The EPA disagrees that this SIP call action has ''retroactive'' effect. As recognized by the commenter, this SIP call action does not automatically change the terms of the existing SIP or of any existing SIP provision, nor does it mean that affected sources could be held liable in an enforcement case for past emissions that occurred when the deficient SIP provisions still applied. Rather, the EPA is exercising its clear statutory authority to call for the affected states to revise specific deficient SIP provisions so that the SIP provisions will comply with the requirements of the CAA prospectively and so that affected sources will be required to comply with the revised SIP provisions prospectively.

To the extent that a SIP provision complied with previous EPA interpretations of the CAA that the Agency has since determined are flawed, or to the extent that the EPA erroneously approved a SIP provision that was inconsistent with the terms of the CAA, the EPA disagrees that it is precluded from requiring the state to modify its SIP now so that it is consistent with the Act. In fact, that is precisely the type of situation that the SIP call provision of the CAA is designed to address. Specifically, section 110(k)(5) begins, ''[w]henever'' the EPA determines that an applicable implementation plan is inadequate to attain or maintain the NAAQS, to mitigate adequately interstate pollutant transport, or ''to otherwise comply with

[234] *See* 1999 SSM Guidance at 2, footnote 1. The EPA includedsection 302(k) amongthe statutory provisions that formed the basis for its interpretations of the CAA in that document.

[235] *Sierra Club,* 551 F.3d 1019 (D.C. Cir. 2008).

[236] The EPA emphasized this important point in the SNPR. *See* 79 FR 55919 at 55931.

any requirement'' of the Act, the EPA must call for the SIP to be revised. The commenter does not question that sections 110(a)(2) and 302(k) are requirements of the Act. Thus, the EPA has authority under section 110(k)(5) to call on states to revise their SIP provisions to be consistent with those requirements.

The EPA disagrees that the doctrines of ''repose,'' ''reasonable reliance'' and ''settled expectations'' preclude such an action. The CAA is clear that ''whenever'' the EPA determines that a SIP provision is inconsistent with the statute, ''the Administrator shall'' notify the state of the inadequacies and establish a schedule for correction. This language does not provide the Agency with discretion to consider the factors cited by the commenter in deciding whether to call for a SIP revision once it is determined to be flawed. Here, the EPA has determined that the SIP provisions at issue are flawed and thus the Agency was required to notify the states to correct the inadequacies.

p. Comments that the EPA should not encourage states to rely on enforcement discretion because this will inevitably lead to states' creating emission limitations that some sources cannot meet.

Comment: Commenters claimed that it is not appropriate for the EPA to encourage states to exercise enforcement discretion rather than to encourage them either to define periods when numerical emission limitations do not apply or to develop alternative emission limitations or other control measures. The commenters contended that inclusion of an enforcement discretion provision in a SIP is superfluous. The commenter cited to *Portland Cement,* where the D.C. Circuit court stated that ''an excessively broad theory of enforcement discretion might endanger securing compliance with promulgated standards.'' [237] The commenter also cited the *Marathon Oil* case in the Ninth Circuit in which the court rejected an approach that relied heavily on enforcement discretion. The commenter then asserted that sources are liable for violations and that ''[s]ources should not be required to litigate remedy for violations they cannot avoid.'' [238] The commenter concluded that it is ''unreasonable for EPA to subject itself to claims that it must exercise its federal enforcement authority in the event a state refuses to enforce unachievable standards, or for states to put source owners and operators in jeopardy of criminal prosecution for starting up a source with knowledge that a numerical emission limitation might be exceeded. In summary, the commenter appeared to argue that the EPA should require states to establish alternative numerical emission limitations or other control requirements during SSM events, rather than merely eliminating SSM exemptions and relying on enforcement discretion to address SSM emissions.

Response: The EPA disagrees with the commenter's suggestion that the EPA should discourage states from relying on enforcement discretion. Enforcement discretion is a valid state prerogative, long recognized by courts. However, the EPA agrees with the commenter that states should not adopt overly broad enforcement discretion provisions for inclusion in their SIPs. Section 110(a)(2) requires states to have adequate enforcement authority, and overly broad enforcement discretion provisions would run afoul of this requirement if they have the effect of precluding adequate state authority to enforce SIP requirements. The EPA also agrees that states may elect to include alternative emission limitations, whether expressed numerically or otherwise, for certain periods of normal operations, including startup and shutdown.

It is unclear precisely what the commenters are advocating when they suggest that sources should not be subject to litigating a remedy for violations they cannot avoid. The likely interpretation is that the commenters believe that excess emissions during unavoidable events should be automatically exempted (*i.e.,* not considered a violation). This approach was rejected by the court in *Sierra Club* v. *Johnson,* because it was not consistent with the definition of emission limitation in section 302(k).[239] As previously explained in the February 2013 proposal and in this document, the EPA believes that definition, and thus the court's holding in *Sierra Club,* is equally relevant for the SIP program.

With respect to a commenter's concerns about criminal enforcement, the EPA disagrees that sources will be unable to start operations because they will automatically be subject to criminal prosecution if an emission limitation is exceeded during a malfunction. Under CAA section 113(c), criminal enforcement for violation of a SIP can occur when a person knowingly violates a requirement or prohibition of an implementation plan ''during any period of federally assumed enforcement or more than 30 days after having been notified'' under the provisions governing notification that the person is violating that specific requirement of the SIP. The EPA is unaware of any jurisdictions where federally assumed enforcement is in force, and the EPA does not anticipate that this situation would arise often. Thus, in almost every case, criminal enforcement would not occur in the absence of a pending notification of a civil enforcement case and could then apply only for repeated violation of the activity at issue in that civil action. Moreover, the concern raised by the commenter is one that would exist if there is any requirement that applies during a period of malfunction beyond the owner's control. The commenter's preferred way to address this concern would be to exempt these periods from compliance with any requirements, an approach rejected by the *Sierra Club* court as inconsistent with the definition of ''emission limitation'' and an approach that the EPA's longstanding SSM Policy has explained is inconsistent with the purpose of the NAAQS program, which is to ensure public health is protected through attainment and maintenance of the NAAQS, protection of PSD increments, improvement of visibility and compliance with other requirements of the CAA.

Finally, to the extent that the commenter was advocating that the EPA should require states to develop SIP provisions that impose alternative emission limitations during certain modes of source operation such as startup and shutdown to replace SSM exemptions, the EPA notes that to require states to do so would not be consistent with the principles of cooperative federalism and could be misconstrued as the Agency's imposing a specific control requirement in contravention of the *Virginia* decision.[240] As the commenter elsewhere itself argued, states have broad discretion in how to develop SIP provisions to meet the objectives of the CAA, so long as those provisions also meet the legal requirements of the CAA. To the extent that a state would prefer to have emission limitations that apply continuously, without higher numerical levels or specific technological controls or work practice standards applicable during modes of operation such as startup and shutdown, that is the prerogative of the state, so long as the revised SIP provision otherwise meets

[237] 486 F.2d at 399 n.91.

[238] *Marathon Oil Co.* v. *Environmental Protection Agency,* 564 F.2d 1253 (9th Cir. 1977).

[239] 551 F.3d 1019 (D.C. Cir. 2008).

[240] *See Virginia* 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).

CAA requirements. If a state determines that it is reasonable to require a source to meet a specific emission limitation on a continuous basis and also decides to rely on its own enforcement discretion to determine whether a violation of that emission limit should be subject to enforcement, then the EPA believes that to do so is within the discretion of the state.

q. Comments that the EPA's action on the Petition is inconsistent with the Credible Evidence Rule.

Comment: A number of commenters raised concerns based upon how the EPA's statements in the February 2013 proposal relate to the Credible Evidence Rule issued in 1997.[241] For example, one commenter argued that throughout the February 2013 proposal, when the EPA stated that excess emissions during SSM events should be treated as ''violations'' of the applicable SIP emission limitations, the Agency was contradicting the Credible Evidence Rule and other provisions of law. The commenter emphasized that the determination of whether excess emissions during an SSM event are in fact a ''violation'' of the applicable SIP provisions must be made using the appropriate reference test method. In addition, the commenter asserted that whether any other form of information may be used as ''credible evidence'' of a violation must be evaluated by the trier of fact in a specific enforcement action. Another commenter raised a different argument based on the Credible Evidence Rule, claiming that the EPA's statements in the preamble to that rulemaking contradict the EPA's statements in the February 2013 proposal and support the need for exemptions for emissions during SSM events. The implication of the commenter is that any such EPA statements in connection with the Credible Evidence Rule would negate the Agency's interpretation of the statutory requirements for SIP provisions as interpreted in the SSM Policy since at least 1982, the decision of the court in the *Sierra Club* case or any other actions such as the recent issuance of EPA regulations with no such SSM exemptions.

Response: The EPA agrees, in part, with the commenters who expressed concern that the Agency's statements in the February 2013 proposal could be misconstrued as a definitive determination that the excess emissions during any and all SSM events are automatically a violation of the applicable emission limitation, without factual proof of that violation, and without the existence and scope of that violation being decided by the appropriate trier of fact. The EPA agrees that the alleged violation of the applicable SIP emission limitation, if not conceded by the source, must be established by the party bearing the burden of proof in a legal proceeding. The degree to which evidence of an alleged violation may derive from a specific reference method or any other credible evidence must be determined based upon the facts and circumstances of the exceedance of the emission limitations at issue.[242] This is a basic principle of enforcement actions under the CAA, but the EPA wishes to make this point clearly in this final action to avoid any unintended confusion between the legal standard creating the enforceable obligation and the evidentiary standard for proving a violation of that obligation.

The EPA's general statements in the February 2013 proposal, the SNPR and this final action about treatment of SSM emissions as a violation pertain to another basic principle, *i.e.,* that SIP provisions cannot treat emissions during SSM events as exempt, because this is inconsistent with CAA requirements. Thus, when the EPA explains that these emissions must be treated as ''violations'' in SIP provisions, this is meant in the sense that states with SSM exemptions need to remove them, replace them with alternative emission limitations that apply during startup and shutdown or eliminate them by revising the emission limitation as a whole. Once impermissible SSM exemptions are removed from the SIP, then any excess emissions during such events may be the subject of an enforcement action, in which the parties may use any appropriate evidence to prove or disprove the existence and scope of the alleged violation and the appropriate remedy for an established violation. To be clear, the fact that these emissions are currently exempt through inappropriate SIP provisions is a deficiency that the EPA is addressing in this action. Thus, the EPA disagrees with the commenters' suggestion that these emissions are never to be treated as violations simply because a deficient SIP provision currently includes an SSM exemption. Once the SIP provisions are corrected, the excess emissions may be addressed through the legal structure for establishing an enforceable violation, which then may be proven using appropriate evidence, including test method evidence or other credible evidence. This means that excess emissions that occur during an SSM event will be treated for enforcement purposes in exactly the same manner as excess emissions that occur outside of SSM events. The EPA acknowledges that the limitation that applies during a startup or shutdown event might ultimately be different (whether higher or lower) than the limitation that applies at other times, if the state elects to replace the SSM exemption with an appropriate alternative emission limitation in response to this SIP call action.

The EPA also disagrees with commenters who claimed that statements by the Agency in the Credible Evidence Rule final rule preamble support the inclusion of exemptions for SSM events in SIP provisions. The commenter is correct that at that time, the EPA held the view that emission limitations in its own NSPS could be considered ''continuous,'' notwithstanding the fact that they contained ''specifically excused periods of noncompliance'' (*i.e.,* exemptions from emission limitations during SSM events).[243] Similarly, at that time the EPA relied on a number of reported court decisions discussed in the preamble for the Credible Evidence Rule for determining at that time that NSPS could contain such exemptions in order to make the emission limitations ''reasonable.'' However, after the court's decision in the *Sierra Club* case interpreting the definition of emission limitation in section 302(k), these EPA statements in the preamble for the Credible Evidence Rule are no longer correct and thus do not apply to the EPA's action in this document.

First, the EPA notes that these prior statements related to the Credible Evidence Rule specifically addressed not SIP provisions but rather the provisions of the Agency's own technologically based NSPS. The statements in the document make no reference to SIP provisions, which is unsurprising given that EPA's SSM Policy at the time indicated that no such SSM exemptions are appropriate in SIP provisions. Second, the EPA's justification for exemptions from emission limitations during SSM events in NSPS was made prior to the 2008

[241] *See* ''Credible Evidence Revisions; Final rule,'' 62 FR 8314 (February 24, 1997).

[242] For example, the degree to which data from continuous opacity monitoring systems (COMS) is evidence of violations of SIP opacity or PM mass emission limitations is a factual question that must be resolved on the facts and circumstances in the context of an enforcement action. *See, e.g., Sierra Club* v. *Pub. Ser* v. *Co. of Colorado, Inc.,* 894 F.Supp. 1455 (D. Colo. 1995) (allowing use of COMS data to prove opacity limit violations).

[243] *Id.,* 62 FR 8314, 8323–24.

decision of the court in the *Sierra Club* case. The EPA's interpretation of the statute and the case law to justify exemptions for emissions during SSM events in that 1997 document is no longer correct. Finally, the EPA in its own new NESHAP and NSPS regulations is now providing no exemptions for emissions during SSM events and is imposing specific numerical limitations or other control requirements on sources that apply to affected sources at all times, including during SSM events.[244] Thus, the statements in the 1997 Credible Evidence Rule preamble relied upon by commenters do not render the EPA's interpretation of the CAA with respect to SSM exemptions in SIP provisions in this action incorrect.

For clarity, the EPA emphasizes that it is in no way reopening, revising or otherwise amending the Credible Evidence Rule in this action. The EPA is merely responding to commenters who characterized the relationship between Agency statements in that rulemaking action and this SIP call action. The EPA also emphasizes that no changes to the Credible Evidence Rule should be necessary as a result of this rulemaking.

r. Comments that exemptions in opacity standards should be permissible because opacity is not a NAAQS pollutant.

Comment: Many state and industry commenters argued that the EPA should interpret the CAA to allow SIP provisions that impose opacity emission limitations to contain exemptions for SSM events or for other modes of source operation. The reasons given by commenters ranged broadly, but they included assertions that opacity is not a criteria pollutant, that opacity limitations serve no purpose other than as a tool to monitor PM control device performance, that there is no reliable correlation between opacity and PM mass, that there are circumstances during which sources may not be capable of meeting the otherwise applicable SIP opacity standards and that opacity is not an ''air pollutant.'' Commenters also argued that because SIP opacity standards were originally established when the NAAQS applied to ''total suspended particles'' (TSP), rather than the current PM_{10} and $PM_{2.5}$, this alone should be a reason to allow SSM exemptions now that the NAAQS have been revised and the indicator species changed. Some of the commenters acknowledged that their underlying concern is that requirements for COMS on certain sources have rendered it much easier to monitor exceedances of SIP opacity limits and to bring enforcement actions for alleged violations.

Response: The EPA agrees with many of the points made by commenters but not with the conclusion that the commenters drew from these points, *i.e.,* that exemptions for SSM events are appropriate in SIP provisions that impose opacity emission limitations.

First, although the EPA agrees that opacity itself is not a criteria pollutant and that there is thus no NAAQS for opacity, this does not mean that SIP opacity limitations are not ''emission limitations'' subject to the requirements of section 110(a)(2)(A) and do not need to be continuous. As the commenters often conceded, opacity is a surrogate for PM emissions for which there are NAAQS, and opacity has served this purpose since the beginning of the SIP program in the 1970s. SIP provisions that impose opacity emission limitations often date back to theearliest phases of the SIP program. From the outset, such opacity limitations have provided an important regulatory tool for implementing the PM NAAQS and for limiting PM emissions from sources. To this day, states continue to use opacity limitations in SIP provisions and the EPA continues to use opacity limitations in its own NSPS and NESHAP regulations, as necessary, for specific source categories.[245] EPA regulations applicable to SIPs explicitly define the term ''emission limitation'' to include opacity limits.[246] It is also important to note that these SIP provisionsimpose opacity emission limitations that sources must meet independently; *i.e.,* opacity limitations are independent ''emission limitations'' under section 110(a)(2)(A) that must, consistent with section 302(k), ''limit[ ] the quantity, rate, or concentration of emissions of air pollutants on a continuous basis.'' These opacity emission limitations in SIP provisions are not stated conditionally as opacity limits that sources do not need to meet if they are otherwise in compliance with PM mass emission limitations or with any other CAA requirements. Thus, the fact that opacity is not itself a criteria pollutant is irrelevant.

Second, although the EPA agrees that SIP opacity limitations also provide an important means of monitoring control device performance and thus indirectly provide a means to monitor compliance with PM emission limitations as well, this does not mean that opacity limits do not need to meet the statutory requirements for SIP emission limitations. Historically, opacity limits have been an important tool for implementation of the PM NAAQS, and in particular for the implementation and enforcement of PM mass limitations on sources to help attain and maintain the PM NAAQS. The EPA agrees that opacity is a useful tool to indicate overall operation and maintenance of a source and its emission control devices, such as electrostatic precipitators or baghouses. SIP opacity limitations provided this tool even before modern instruments that measure PM emissions on a direct, continuous basis existed. At a minimum, elevated opacity indicates potential problems with source design, operation or maintenance, or potential problems with incorrect operation of pollution control devices, especially at the elevated levels of many existing opacity standards. Well-run sources should be in compliance with typical SIP opacity limits. Opacity exceeding the applicable limitations can be indicative of problems that justify further investigation by sources and regulators, such as conducting a stack test to determine compliance with PM mass emission limitations. Not all sources have or will have PM CEMS, or have PM CEMS at all emission points, to monitor PM emissions directly, nor do PM CEMS necessarily obviate the need for opacity standards to regulate condensables, and thus there is a continued need for opacity emission limitations in SIPs. The continued need for SIP opacity limitations for this and other purposes contradicts the commenters' arguments concerning the validity of SSM exemptions.

Third, the EPA agrees that the precise correlation between opacity and PM mass emissions is not always known for a specific source under all operating conditions, unless there is parallel testing and measurement of the opacity and the PM emissions to determine the correlation at that particular source. Similarly, parametric monitoring can be used to establish such a correlation. Nevertheless, there is commonly a positive correlation between PM and opacity and thus elevated opacity is often indicative of additional PM

[244] *See, e.g.,* 40 CFR 60.42Da, where paragraph (e)(1) applies a numerical PM emission limitation at all times except during periods of startup and shutdown, and paragraph (e)(2) applies work practice standards during periods of startup and shutdown.

[245] *See, e.g.,* 40 CFR 60.42Da(b). The EPA's revised NSPS for this category imposes an opacity limit of 20 percent at all times, except for one 6-minute period per hour when the opacity may rise to 27 percent. Notably, as an option, sources may elect to install PM CEMS and be subject only to the revised particulate matter emission limitation.

[246] *See* 40 CFR 51.100(z) (defining the term ''emission limitation'' as limits on ''the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirements which limit the level of opacity'').

emissions from a source. Even in those instances where a precise correlation is not available, however, the use of opacity as a means to assure the reduction of PM emissions and to monitor source compliance remains a valid approach to regulation of PM from sources. In any event, the absence of a precise correlation between opacity and PM does not justify the complete exemptions from SIP opacity limitations during SSM events that the commenters advocate and instead suggests that it may be appropriate to replace such exemptions with valid and enforceable alternative numerical limitations or other control requirements as a component of the SIP opacity emission limitation that applies during startup and shutdown. Opacity emission limitations in SIPs must meet the statutory requirements for emission limitations.

Fourth, the EPA agrees with commenters that for some sources some PM controls cannot operate, or operate at full effectiveness and ideal efficiency, during startup and shutdown. Accordingly, as the commenters implicitly recognized, the resulting increases in PM emissions can result in elevated opacity and thus exceedances of the applicable SIP opacity emission limitations. In those situations where it is true that no additional emissions controls are available or would function more effectively to reduce PM emissions, and hence to reduce opacity, it may be appropriate for states to consider imposing an alternative opacity emission limitation applicable during startup and shutdown. As discussed in section VII.B.2 of this document, the EPA provides recommendations to states concerning how to develop such alternative emission limitations. To the extent that sources believe that a SIP provision with a higher opacity level for startup and shutdown may be justified, they may seek these alternative limitations from the state and they can presumably advocate for opacity standards that are tailored to reflect the correlation between PM mass and opacity at a specific source. Significantly, however, even if it is appropriate to impose a somewhat higher opacity limitation for some sources during specifically defined modes of operation such as startup and shutdown, that does not justify the total exemptions from SIP opacity emission limitations during SSM events that the commenters advocated. To provide total exemptions from SIP opacity emission limitations during SSM events does not provide any incentive for sources to be better designed, operated, maintained and controlled to reduce emissions, nor does it comply with the most basic requirement that SIP emission limitations be continuous in accordance with section 302(k). As explained in section X.B of this document, the SIP revisions in response to this SIP call action will need to be consistent with the requirements of sections 110(k)(3), 110(l) and 193 as well as any other applicable requirements.

Fifth, the EPA notes that few commenters seriously argued that SIP provisions for opacity do not fit within the plain language of section 110(a)(2)(A) or the definition of ''emission limitation'' in section 302(k) or in EPA regulations applicable to SIP provisions. Section 110(a)(2)(A) requires SIPs to contain such enforceable emission limitations ''as may be necessary and appropriate to meet the applicable requirements of'' the CAA. Opacity limitations in SIP provisions are necessary and appropriate for a variety of reasons already described, including as a means to reduce PM emissions, as a means to monitor source compliance and to provide for more effective enforcement. Opacity limitations in SIP provisions also easily fit within the concept of a limit on the ''quantity, rate or concentration of air pollutants'' that relates to the ''operation or maintenance of a source to assure continuous emission reduction and any design, equipment, work practice or operational standard'' under the CAA, as provided in section 302(k). The term ''air pollutant'' is defined broadly in section 302(g) to mean ''any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.'' Even if opacity is not itself an air pollutant, it is clearly a means of monitoring and limiting emissions of PM from sources and is thus encompassed within the definition of ''emission limitation'' in section 302(k).[247] Significantly, existing EPA regulations applicable to SIP provisions already explicitly define the term ''emission limitation'' to include opacity limitations.[248]

Finally, the EPA does not agree with commenters who argued that because SIP opacity limitations were often originally imposed when the PM NAAQS was for TSP, it is legally acceptable to have exemptions for emissions during SSM events now that the PM NAAQS use PM_{10} and $PM_{2.5}$ as the indicator species. On a factual level, it is obvious that SIP provisions for opacity limitations are expressed in terms of percentage ''opacity'' unrelated to the size of the particles. Opacity represents the degree to which emissions reduce the transmission of light and obscures the view of an object in the background. In general, the more particles which scatter or absorb light that passes through an emissions point, the more light will be blocked, thus increasing the opacity percentage of the emissions plume. The EPA agrees that variables such as the size, number and composition of the particles in the emissions can result in variations in the percentage of opacity. Notwithstanding the changes in the NAAQS, however, both states and the EPA have continued to rely on opacity limitations because they serve the same purposes for the current PM_{10} and $PM_{2.5}$ NAAQS (and other purposes such as the regulation of HAPs under section 112) that they previously did for the TSP NAAQS. Indeed, as the PM NAAQS have been revised to provide better protection of public health, the need for such opacity limitations continues unless there is a better means to monitor source compliance, such as PM CEMS. As with other SIP emission limitations, the EPA interprets the CAA to preclude SSM exemptions in opacity standards.

s. Comments that exemptions from SIP opacity limitations for excess emissions during SSM events should be allowed because such emissions are difficult to monitor or to control.

Comment: Several commenters argued that the EPA's proposal of a SIP call for SIP opacity emission limitations that include an SSM exemption is arbitrary and capricious because it is difficult or impossible to monitor or measure opacity during SSM events. According to commenters, there is no compliance methodology to determine whether opacity limitations are met during SSM events and this is the reason that the EPA's own general provisions for NSPS and NESHAP exclude emissions during SSM events as ''not representative'' of source operation. In the absence of a specific methodology to demonstrate compliance, the commenters argued that expecting sources to comply with any opacity emission limitations during SSM events is arbitrary and capricious. The commenters asserted that in light of this, the EPA must interpret the CAA to allow exemptions for SSM events in SIP opacity provisions.

A number of commenters also argued that because emission controls for PM do not function, or do not function as effectively or efficiently, during certain

[247] *See Sierra Club* v. *TVA,* 430 F.3d 1337, 1340 (11th Cir. 2005).

[248] *See* 40 CFR 51.100(z).

modes of source operation, the EPA should interpret the CAA to permit exemptions for SSM events in opacity emission limitations. Many commenters explained that certain types of emission controls at certain types of sources only operate at specific temperatures or under specific conditions. For example, many commenters stated that existing pollution control devices on certain categories of stationary sources do not operate, or do not operate as effectively or efficiently, during startup and shutdown. Based upon this assertion, the commenters argued that the EPA should interpret the CAA to allow total exemptions from SIP opacity emission limitations during such periods.

Commenters also characterized the EPA's February 2013 proposal as ''particularly unreasonable'' with respect to SSM exemptions in SIP opacity limitations, because those limitations should be allowed to exclude elevated opacity during periods when PM emissions controls devices are ''not expected to operate correctly.'' According to commenters, treating the higher opacity during SSM events ''as a violation simply because it is indicating something that is expected is ridiculous.'' As an example, the commenters specifically mentioned occurrences such as when a source's electrostatic precipitator (ESP) is not functioning or is not functioning properly as periods during which there should be an exemption from SIP opacity emission limitations.

Response: The EPA agrees with some of the points made by commenters but does not agree with the conclusions that the commenters drew from these points, *i.e.,* that alleged difficulties in monitoring, measuring or controlling opacity during some modes of source operation in general justify complete exemptions from opacity emission limitations during SSM events.

First, the EPA does not agree with the argument that there is no ''compliance methodology'' available for purposes of verifying compliance with SIP opacity limitations. Since the earliest phases of the SIP program, Reference Method 9 has been available as a means of verifying a source's compliance with applicable SIP opacity emission limitations. Whatever concerns the commenters may have with this test method, it is a valid method and it continues to be used as a means of verifying source compliance with opacity limitations and a source of evidence for determining whether there are violations of such emission limitations.[249] Sources routinely monitor and certify to their compliance with SIP opacity limitations based upon Method 9. In addition, COMS have been available, and in some cases are required, as another means of monitoring emissions and verifying compliance with opacity emission limitations. With respect to COMS, commenters expressed concerns that they are not always accurate, are not always properly calibrated or are not always the reference test method for SIP opacity emission limitations, and other similar arguments. In this rulemaking, the EPA is not addressing these allegations concerning COMS but merely noting that COMS are an available means of monitoring opacity from sources and in appropriate circumstances can provide data meeting the EPA's criteria as credible evidence to be used to determine compliance with emission limitations.

Second, the EPA does not agree that the fact that its regulations concerning performance tests in 40 CFR 63.7(e) for NESHAP and in 40 CFR 60.8(c) for NSPS exclude SSM emissions for purposes of evaluation of emissions under normal operating conditions provides a justification for SSM exemptions from opacity emission limitations in SIP provisions. The D.C. Circuit decision in *Sierra Club* has already indicated that such exemptions are not permissible in emission limitations and vacated the general provisions applicable to NESHAP. In the case of the exemption language in 40 CFR 60.8(c) relevant to NSPS, the EPA acknowledges that it has not yet taken action to revise the language to eliminate that exemption. However, in promulgating new NSPS regulations subsequent to the *Sierra Club* decision, the EPA is including emission limitations for newly constructed, reconstructed and modified sources that apply continuously and including provisions expressly stating that the SSM exemptions in the General Provisions do not apply. The EPA notes that the commenter is also in error because the performance tests are intended to be a means of evaluating emissions from sources during periods that are representative of source operation.

Third, the EPA does not agree with the premise that because certain forms or types of emission controls do not work, or do not work as effectively or efficiently, during certain modes of operation at some sources, it necessarily follows that sources should be totally exempt from emission limitations during such periods. The EPA interprets the CAA to require that SIP emission limitations be continuous. As explained in section VII.A of this document, emission limitations do not necessarily need to be expressed numerically, can have higher numerical levels during certain modes of operation, and may be composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements during certain modes of operation, so long as these emission limitations meet applicable CAA stringency requirements and are legally and practically enforceable. If it is factually accurate that a given source category requires a higher opacity limit during periods such as startup and shutdown, then the state may elect to develop one consistent with other CAA requirements. The EPA has provided guidance to states with criteria to consider in revising their SIP provisions to replace exemptions with an appropriate alternative emission limitation for such purposes. The EPA emphasizes that even if it is the case that existing control measures cannot operate, or cannot operate as effectively or efficiently, during startup and shutdown at a particular source, this does not legally justify a complete exemption from SIP emission limitations and may merely indicate that additional emission controls or work practices are necessary when the existing control measures are insufficient to meet the applicable SIP emission limitation. The EPA is taking this approach with its own recent NSPS and NESHAP regulations, when appropriate, in order to ensure that its own emission limitations are consistent with CAA requirements.

Finally, the EPA also disagrees with the logic of commenters that argued in favor of exemptions from SIP opacity limitations during periods when a source is most likely to violate them, *e.g.,* when the source's control devices are not functioning. Even if exemptions from SIP opacity emission limitations were legally permissible under the CAA, which they are not, it would be illogical to excuse compliance with the standards during the precise periods when opacity standards are most

[249] The EPA notes that one commenter characterized SIP opacity limits as ''archaic'' and suggested that the Agency should issue a SIP call requiring their removal from SIPs entirely. Unless and until regulatorsand sources have a better means of monitoring compliance with PM emission limitations on a continuous basis, such as through installation of PM CEMS, the EPA believes that opacity limits will continue to be a necessary part of emission limitations. There will continue to be sources of emissions for which it will not be cost-effective or technologically viable to require the installation of PM CEMS or for which opacity standards will be needed as a means of regulating condensables.

needed to monitor source compliance with SIP emission limitations and provide incentives to avoid and promptly correct malfunctions; *i.e.,* it would be illogical to require no legal restriction onemissions whenthe sources are most likely to be emitting the most air pollutants. Inclusion of exemptions for exceedances of SIP opacity limitations during such periods would remove incentives to design, maintainandoperate thesource correctly, andto promptly correct malfunctions, in order to assure that it meets the applicable SIP emission limitations. By exempting excess emissions during such events, the provision would undermine the enforcement structure of the CAA in section 113 and section 304, through which the air agency, the EPA and citizensareauthorizedtoassure that sources meet their obligations. The EPA emphasizesthat while exemptions from SIP limitations are not permissible in SIP provisions, states may elect to impose appropriate alternative emission limitations. They may include alternative numerical limitations, control technologies or work practices that apply during modes of operation such as startup and shutdown, so long as all components of the SIP emission limitation meet all applicable CAA requirements.

t. Comments that exemptions in SIP opacity limitations should be permissible for ''maintenance,'' ''soot-blowing'' or other normal modes of source operation.

Comment: A number of industry commenters argued that the EPA should interpret the CAA to allow exemptions from SIP opacity limitations for ''maintenance.'' Thecommentersstated that during maintenance, sourcesmust shut down operations andcontrol devices while the source is cleaned or repaired. During such periods, the commenters explained, aventilation system operated to protect workers at the source could result in monitored exceedances of a SIP opacity limitation. Commentersspecificallyargued that although COMS data may suggest violations of opacity standards during such periods, the fact that the source is not combustingfuel duringmaintenance should mean that the opacity emission limitation does not apply at such times. According to commenters, opacity limitations are only intended to reflect the performance of pollution control equipment while the source is operating and thus have no relevance during periods of maintenance. Other commenters made comparable arguments with respect to soot-blowing, asserting that the high opacity levels during this activity are ''indicative of normal ESP operation, not poor performance.'' In other words, the commenters argued that opacity limitations should contain complete exemptions for opacity emitted during soot-blowing on the theory that the elevated emissions during this mode of operation show that the control measure on a source is functioning properly. The commenters further argued that considering emissions during soot-blowing for purposes of PM limitations is appropriate, but not for purposes of opacity limitations, because of the way in which regulators developed the respective emission limitations.

Response: The EPA does not agree that exemptions from SIP opacity limitations are appropriate for any mode of source operation, whether during SSM events or during other normal, predictable modes of source operation. To the extent that there are legitimate technological reasons why sources are able to meet only a higher opacity limitation during certain modes of operation, it does not follow that this constraint justifies complete exemption from any standard or any alternative technological control or work practice in order to reduce opacity during such periods. Providing a complete exemption for opacity during these modes of source operation, and no specific alternative emission limitation during such periods, removes incentives for sources to be properly designed, maintained and operated to reduce emissions during such periods.

With respect to maintenance, the EPA does not agree with commenters that total exemptions from opacity emission limitations during such activities are consistent with CAA requirements for SIP provisions. As the EPA has stated repeatedly in its interpretation of the CAA in the SSM Policy, maintenance activities are predictable and planned activities during which sources should be expected to comply with applicable emission limitations.[250] The premise of the commenters advocating for such exemptions for all emissions during maintenance is evidently that nothing can be done to limit PM emissions and thus limit opacity during maintenance activities, and the EPA disagrees with that general premise. To the extent appropriate, however, states may elect to create alternative emission limitations applicable to opacity during maintenance periods, so long as they are consistent with CAA requirements. The EPA provides recommendations for alternative emission limitations in section VII.B.2 of this document.

With respect to soot-blowing, the EPA likewise does not agree that total exemptions from opacity limitations during such periods are consistent with CAA requirements. As with maintenance in general, soot-blowing is an intentional, predictable event within the control of the source. The commenters' implication is that nothing whatsoever could be done to limit opacity during such activities, and the EPA believes that this is both inaccurate and not a justification for sources' being subject to no standards whatsoever during soot-blowing. In addition, the EPA disagrees with the commenters' claim that exemptions from opacity emission limitations during soot-blowing are legally permissible because this allegedly shows that the control devices for opacity and PM are in fact performing correctly. This argument incorrectly presupposes that the sole reason for SIP opacity emission limitations is as a means of better evaluating control measure performance. This is but one reason for SIP opacity limitations. Moreover, the EPA notes, excusing opacity during soot-blowing has the diametrically opposite effect of the actual purpose of the control devices and can result in much higher emissions as opposed to encouraging limiting these emission with other forms of controls.

Finally, the EPA notes, the commenters' argument that whether opacity limitations should apply during soot-blowing depends upon whether the emissions were or were not accounted for in the applicable PM emissions is also based upon an incorrect premise. Even if the PM emission limitation applicable to a source was developed to include the emissions during soot-blowing specifically, it does not follow that sources should be completely exempted from opacity limitations during such periods. As the commenters themselves frequently acknowledged, when compared to other enforcement tools, SIP opacity provisions often provide a much more effective and continuous means of determining source compliance with SIP PM limitationsandcontrol measure performance. A typical SIP opacity provisionimposes an emission limitation such as 20 percent opacity at all times, except for 6 minutes per hour when those emissions may rise to 40 percent opacity. Well-maintained and

[250] *See* 1982 SSM Guidance at Attachment p. 2; 1983 SSM Guidance at Attachment p. 3. The EPA notes that it also did not interpret the CAA to permitaffirmative defense provisionsforplanned events under its prior 1999 SSM Guidance on the grounds thatsources shouldbe expected to operate in accordance with applicable SIP emission limitationsduring maintenance. Thisinterpretation was upheld in *Luminant Generation* v. *EPA,* 714 F.3d 841 (5th Cir. 2013).

well-operated sources should be able to meet such SIP opacity limitations. Given that properly designed, maintained and operated sources should typically have opacity substantially below these levels, elevated opacity at a source is a good indication that the source may not be in compliance with its applicable PM limitations.

u. Comments that elimination of exemptions from SIP opacity emission limitations during SSM events will compel states to alter the averaging period of opacity limitations so as to allow sources to have elevated emissions during SSM events.

Comment: Commenters argued that if exemptions for excess emissions during SSM events are not legally permissible in SIP opacity emission limitations, then states will have no option but to alter the existing opacity limitations. The commenters argued that if the SSM exemptions areremoved, thenthe averagingtime should be ''greatly extended'' and the numerical limits ''should be significantly increased.''

Response: The EPA agrees that SIP provisions for opacity that contain exemptions for SSM events at issue in this action must be revised to eliminate the exemptions. States may elect to do this by merely removing the exemptions, by replacing the exemptions with appropriate alternative emission limitations that apply in place of the exemptions or, as the commenters evidently advocate, by a total overhaul of the emission limitation. The EPA disagrees, however, with the commenters' contentions that removal of the SSM exemptions would necessarily result in extensions of the averaging time or increases of the numerical levels in the existing SIP opacity emission limitations. In some cases, extension of the averaging period and elevation of the numerical limitations may in fact be appropriate. In other cases, however, it may instead be appropriate to reduce the existing numerical opacity limitations, given improvements in control technology since the original imposition of the limits and the need for additional PM emission reductions from the affected sources due to more recent revisions to the PM NAAQS. Thus, the EPA notes, a total revision of some of the SIP opacity limitations at issue in this action may indeed be the proper course for states to consider. The implications of the commenters' argument, however, are that existing opacity limitations will automatically need to be revised in order to allow sources to continue to emit as usual and that states and sources may ignore improvements that have been made in source design, operation, maintenance or controls to reduce emissions. The EPA emphasizes that the removal of impermissible SSM exemptions should not be perceived as an opportunity to provide new *de facto* exemptions for these emissions by manipulation of the averaging time and the numerical level of existing opacity emission limitations.

In any event, the EPA is not in this final action deciding how states must revise SIP opacity emission limitations but is merely issuing a SIP call directing the affected states to eliminate existing automatic and discretionary exemptions for excess emissions during SSM events. The affected states will elect how best to respond to this SIP call, whether by simply removing the exemptions, by replacing the exemptions with appropriate alternative emission limitations applicable to startup and shutdown or other normal modes of operation or by a complete overhaul of the SIP provision in question. In particular, where the affected sources are located in designated nonattainment areas, there may be a need to evaluate additional controls that are needed for attainment planning purposes that were not necessary when the emission limitation was first adopted. Whichever approach a state determines to be most appropriate, the resulting SIP submission to revise the existing deficient provisions will be subject to review by the EPA pursuant to sections 110(k)(3), 110(l) and 193. Considerations relevant to this issue are discussed in section X.B of this document.

B. Alternative Emission Limitations During Periods of Startup and Shutdown

1. What the EPA Proposed

In the February 2013 proposal, the EPA reiterated its longstanding interpretation of the CAA that SIP provisions cannot include exemptions from emission limitations for emissions during SSM events but may include different requirements that apply to affected sources during startup and shutdown. Since the 1982 SSM Guidance, the EPA has clearly stated that startup and shutdown are part of the normal operation of a source and should be accounted for in the design and operation of the source. Thus, the EPA has long concluded that sources should be required to meet the applicable SIP emission limitations during normal modes of operation including startup and shutdown.[251] In the 1983 SSM Guidance, the EPA explained that it may be appropriate to exercise enforcement discretion for violations that occur during startup and shutdown under proper circumstances. In the 1999 SSM Guidance, the EPA further explained that it interprets the CAA to permit SIP emission limitations that include alternative emission limitations specifically applicable during startup and shutdown. In the context of making recommendations to states for how to address emissions during startup and shutdown, the EPA provided seven criteria for states to evaluate in establishing appropriate alternative emission limitations. The specific purpose for these recommendations was to take into account technological limitations that might prevent compliance with the otherwise applicable emission limitations. As explained in detail in the February 2013 proposal, the EPA did not intend these criteria to be the basis for the creation of exemptions from SIP emission limitations during startup and shutdown, because the Agency interprets the CAA to prohibit such exemptions.

In the February 2013 proposal, the EPA also repeated its guidance concerning establishment of alternative emission limitations that apply to sources during startup and shutdown, in those situations where the sources cannot meet the otherwise applicable SIP emission limitations. As explained in section VII.A of the February 2013 proposal, the EPA interprets the CAA to require that SIP emission limitations must be continuous and thus to prohibit exemptions for emissions during startup and shutdown. This does not, however, mean that every SIP emission limitation must be expressed as a numerical limitation or that it must impose the same limitations during all modes of source operation. The EPA's interpretation of the CAA with respect to SIP provisions is that SIP emission limitations: (i) Do not need to be numerical in format; (ii) do not have to apply the same limitation (*e.g.,* numerical level) at all times; and (iii) may be composed of a combination of numerical limitations, specific technological control requirements and/

[251] Some commenters on the February 2013 proposal focused great attention on whether startup and shutdown are modes of ''normal'' source operation. The EPA assumes that every source is designed, maintained and operated with the expectation that the source will at least occasionally start up and shut down, and thus these modes of operation are ''normal'' in the sense that they are to be expected. The EPA used this term in the ordinary sense of the word to distinguish between such predictable modes of source operation and genuine ''malfunctions,'' which are by definition supposed to be unpredictable and unforeseen events that could not have been precluded by proper source design, maintenance and operation.

or work practice requirements, with each component of the emission limitation applicable during a defined mode of source operation. Regardless of how an air agency elects to express the emission limitation, however, the emission limitation must limit emissions from the affected sources on a continuous basis. Thus, if there are different numerical limitations or other control requirements that apply during startup and shutdown, those must be clearly stated components of the emission limitation, must meet the applicable level of control required for the type of SIP provision (*e.g.,* be RACT for sources located in nonattainment areas) and must be legally and practicably enforceable.

2. What Is Being Finalized in This Action

The EPA is reiterating its interpretation of the CAA to allow SIP emission limitations to include components that apply during specific modes of source operation, such as startup and shutdown, so long as those components together create a continuously applicable emission limitation that meets the relevant substantive requirements and requisite level of stringency for the type of SIP provision at issue and is legally and practically enforceable. In addition, the EPA is updating the specific recommendations to states for developing such alternative emission limitations described in the February 2013 proposal, by providing in this document some additional explanation and revisions to the text of its recommended criteria regarding alternative emission limitations.

The EPA's longstanding position is that the CAA does not allow SIP provisions that include exemptions from emission limitations for excess emissions that occur during startup and shutdown. The EPA reiterates that exemptions from SIP emission limitations are also not permissible for excess emissions that occur during other periods of normal source operation. 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 modes 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 the 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 that occur during planned and predicted periods should be treated as violations of any applicable emission limitations.

However, the EPA interprets the CAA to allow SIPs to include alternative emission limitations for modes of operation during which an otherwise applicable emission limitation cannot be met, such as may be the case during startup or shutdown. The alternative emission limitation, whether a numerical limitation, technological control requirement or work practice requirement, would apply during a specific mode of operation as a component of the continuously applicable emission limitation. For example, an air agency might elect to create an emission limitation with different levels of control applicable during specifically defined periods of startup and shutdown than during other normal modes of operation. All components of the resulting emission limitation must meet the substantive requirements applicable to the type of SIP provision at issue, must meet the applicable level of stringency for that type of emission limitation and must be legally and practically enforceable. The EPA will evaluate a SIP submission that establishes a SIP emission limitation that includes alternative emission limitations applicable to sources during startup and shutdown consistent with its authority and responsibility pursuant to sections 110(k)(3), 110(l) and 193 and any other CAA provision substantively germane to the SIP revision. Absent a properly established alternative emission limitation for these modes of operation, a source should be required to comply with the otherwise applicable emission limitation.

In addition, the EPA is providing in this document some additional explanation and clarifications to its recommended criteria for developing alternative emission limitations applicable during startup and shutdown. The EPA continues to recommend that, in order to be approvable (*i.e.,* meet CAA requirements), alternative 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. Accordingly, 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 establish alternative emission limitations that apply to startup and shutdown. The EPA repeated those criteria in the February 2013 proposal as guidance to states for developing components of emission limitations that apply to sources during startup, shutdown or other specific modes of source operation to meet CAA requirements for SIP provisions.

Comments received on the February 2013 proposal suggested that the purpose of the recommended criteria may have been misunderstood by some commenters. The criteria were phrased in such a way that commenters may have misinterpreted them to be criteria to be applied by a state retrospectively (*i.e.,* after the fact) to an individual instance of emissions from a source during an SSM period, in order to establish whether the source had exceeded the applicable emission limitation. This was not the intended purpose of the recommended criteria at the time of the 1999 SSM Guidance, nor is it the intended purpose now.

The EPA seeks to make clear in this document that the recommended criteria are intended as guidance to states developing SIP provisions that include emission limitations with alternative emission limitations applicable to specifically defined modes of source operation such as startup and shutdown. A state may choose to consider these criteria in developing such a SIP provision. The EPA will use these criteria when evaluating whether a particular alternative emission limitation component of an emission limitation meets CAA requirements for SIP provisions. Any SIP revision establishing an alternative emission limitation that applies during startup and shutdown would be subject to the same procedural and substantive review requirements as any other SIP submission.

Based on comment on the February 2013 proposal, the EPA is updating the criteria to make clear that they are recommendations relevant for development of appropriate alternative emission limitations in SIP provisions. Thus, in this document, the EPA is providing a restatement of its recommended criteria that reflects clarifying but not substantive changes to the text of those criteria. One clarifying change is removal of the word ''must'' from the criteria, to better convey that these are recommendations to states concerning how to develop an approvable SIP provision with alternative requirements applicable to

startup and shutdown and to make clear that other approaches might also be consistent with the CAA in particular circumstances.

The clarified criteria for developing and evaluating alternative emission limitations applicable during startup and shutdown are as follows:

(1) The revision is 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 is technically infeasible during startup or shutdown periods;

(3) The alternative emission limitation requires that the frequency and duration of operation in startup or shutdown mode are minimized to the greatest extent practicable;

(4) As part of its justification of the SIP revision, the state analyzes the potential worst-case emissions that could occur during startup and shutdown based on the applicable alternative emission limitation;

(5) The alternative emission limitation requires that all possible steps are taken to minimize the impact of emissions during startup and shutdown on ambient air quality;

(6) The alternative emission limitation requires that, at all times, the facility is operated in a manner consistent with good practice for minimizing emissions and the source uses best efforts regarding planning, design, and operating procedures; and

(7) The alternative emission limitation requires that the owner or operator's actions during startup and shutdown periods are documented by properly signed, contemporaneous operating logs or other relevant evidence.

It may be appropriate for an air agency to establish alternative emission limitations that apply during modes of source operation other than during startup and shutdown, but any such alternative emission limitations should be developed using the same criteria that the EPA recommends for those applicable during startup and shutdown.

3. Response to Comments

The EPA received a number of comments, both supportive and adverse, concerning the issue of how air agencies may replace existing exemptions for emissions during SSM events with alternative emission limitations that apply during startup, shutdown or other normal modes of source operation. The majority of these comments were critical of the EPA's position but did not base this criticism on an interpretation of specific CAA provisions. For clarity and ease of discussion, the EPA is responding to these comments, grouped by issue, in this section of this document.

a. Comments that as a technical matter sources cannot meet emission limitations (or cannot be accurately monitored) during startup and shutdown.

Comment: Several commenters claimed that as a technical matter, SIP emission limitations cannot be met or that monitoring to ensure compliance with emission limitations cannot occur during startup and shutdown. Commenters raised ''practical concerns'' with the EPA's proposal as it applies to emissions during SSM at electric generating units (EGUs). The commenters claimed that it is incorrect to treat periods of startup and shutdown as part of ''normal source operation'' and claimed that it is fundamentally incorrect to characterize all periods of startup and shutdown as planned events. The commenters claimed that many air pollution control devices (APCDs) are subject to technical, operational or safety constraints that prevent use or optimization during startup and shutdown periods. The commenters requested the EPA to continue the practice of allowing states to provide ''protection'' from enforcement for excess emissions during startup and shutdown. The commenters claimed that the EPA's premise for this action is that startup and shutdown events are planned and sources should be able to meet limits applicable during these normal operations. The commenters asserted that the proposal does not recognize technical and operational limits and that it conflicts with the EPA's own acknowledgement in the proposal that there are sometimes technical, operational and safety limits that may prevent compliance with emission limitations during startup and shutdown. The commenters also noted that the type of equipment that a control device is attached to may affect the time it takes for a control device to reach optimization. Further, the commenters identified control technologies that cannot achieve reductions until specific temperatures are reached and other technologies that cannot be used during startup and/or shutdown because of technical limitations or safety concerns. Finally, the commenters noted that the geographical location and/or weather can have an effect on the operation of a source and control devices during startup and shutdown.

Commenters raised specific concerns regarding pollution controls for EGUs. The commenters claimed that startup and shutdown events are unavoidable at EGUs even though they may be planned. The commenters also attached appendices providing an explanation of why emissions are higher for startup and shutdown for certain types of EGUs. The commenters claimed that the ''EPA's proposal to eliminate the States' SSM provisions, and prohibit them from adopting any provisions for startups and shutdowns, could force sources to comply with emission limitations during periods when they were never meant to apply, thus rendering those emissions limitations unachievable.'' The commenters also noted that the permits for their sources all require that the sources minimize the magnitude and duration of emissions during SSM. The implication of this latter comment is that a general duty to minimize emissions is sufficient to justify the exemption of all emissions during SSM events in the underlying SIP provisions.

Response: Although intended as criticism of the EPA's proposed action, these comments in fact support the Agency's position that states should consider startup and shutdown events as they promulgate standards for specific industries or even for specific sources. The commenters seem to suggest that because some equipment or sources cannot during startup and shutdown meet the emission limits that apply during ''regular'' operation, no limit or standards should apply during startup and shutdown. The EPA disagrees. As the court in *Sierra Club* held, emission limitations must apply at ''all times.'' That is not to say that the emission limitation must impose the same numerical limitation or impose the same other control requirement at all times. As explained at length in section VII.A of this document, the EPA interprets the CAA to allow SIP emission limitations that may be a combination of numerical limitations, technological control measures and/or work practice requirements, so long as the resulting emission limitations are properly developed to meet CAA requirements and are legally and practically enforceable. As the commenters noted, the EPA does recognize that some control equipment cannot be operated at all or in the same manner during every mode of normal operations.

In its 1999 SSM Guidance, the EPA expressly recognized that an appropriate way for a state to address such technological limitations is to set alternative emission limitations that apply during periods of startup and shutdown as part of the SIP emission

limitation.[252] In these cases the state should consider how the control equipment works in determining what standards should apply during startup and shutdown. In addition, as noted by commenters, such standards may vary based on location (*e.g.,* standards in a hot and humid area may differ from those adopted for a cool and dry area). Some equipment during startup and shutdown may be unable to meet the same emission limitation that applies during steady-state operations and so alternative limitations for startup and shutdown may be appropriate.[253] However, for many sources, it should be feasible to meet the same emission limitation that applies during steady-state operations also during startup and shutdown.[254] These are issues for the state to consider in developing specific regulations as they revise the deficient SIP provisions identified in this action. The EPA emphasizes that the state has discretion to determine the best means by which to revise a deficient provision to eliminate an automatic or discretionary SSM exemption, so long as that revision is consistent with CAA requirements. The EPA will work with the states as they consider possible revisions to deficient provisions.

The EPA recognizes that a malfunction may cause a source to shut down in a manner different than in a planned shutdown, and in that case, such a shutdown would typically be considered part of the malfunction event. However, as part of the normal operation of a facility, sources typically will also have periodic or otherwise scheduled startup and shutdown of equipment, and steps to limit emissions during this type of event are or can be planned for. The EPA disagrees with the suggestion of commenters that because some startup or shutdown events may be unplanned, all startup and shutdown events should be exempt from compliance with any requirements. For those events that are planned, the state should be able to establish requirements to regulate emissions, such as a numerical limitation, technological control measure or work practice standard that will apply as a part of the revised emission limitation. When unplanned startup or shutdown events are part of a malfunction, they should be treated the same as a malfunction; however, as with malfunctions, startup and shutdown events cannot be exempted from compliance with SIP requirements. Questions of liability and remedy for violations that result from malfunctions are to be resolved in the context of an enforcement action, if such an action occurs.

b. Comments that it is impossible, unreasonable or impractical for states to develop emission limitations that apply during startup and shutdown to replace existing exemptions.

Comment: A number of commenters suggested that it will be difficult for states to develop emission limits that apply during startup and shutdown. One state commenter reasoned that alternative emission limits are applied to facilities in that state through individual permits on a case-by-case basis and claimed that there are 500 permitted facilities in the state. The commenter contended that ''non-steady-state'' limits would need to be set for startup and shutdown for all 500 permitted facilities and that such an effort would be ''time, resource, and data intensive.'' The state commenter further contended that it would be unreasonable to require the state to include such limits ''for every source'' in the SIP because ''permit modifications would need to occur every time there is a new emission source, a source ceases to operate, or an emission-related regulation is changed.''

A local government commenter stated that to establish limits for startup and shutdown that also demonstrate compliance with the NSR regulations (including protection of the NAAQS and PSD increments and maintenance of BACT or LAER) would be a difficult, time-consuming task that was mostly impractical.

An industry commenter claimed that the EPA is encouraging states to adopt numerical alternative emission limitations in their SIP provisions that would apply during startup and shutdown. The commenter claimed that adequate and accurate emissions data are necessary to do so and that such information is not generally available for existing equipment or, in many cases, for new equipment. Furthermore, the commenter asserted, even if an emission limit could be established for startup and shutdown, there are no current approved test measures to verify compliance during such modes of operation. Even where data are available, the commenter alleged, the data may not be representative of actual conditions because of limitations related to low-load conditions. If a state lacks information to conclude that a limit can be met, the commenter argued, the state should not be required to establish numerical limits but should instead be allowed ''to specify that numerical standards do not apply to those conditions or that those conditions are exempt, or should be allowed to establish work practice standards.''

Response: The comments of the state commenter seem to be based on the premise that all sources will be unable to meet otherwise applicable SIP emission limitations during periods of startup and shutdown. The EPA anticipates that many types of sources should be able during startup and shutdown to meet the same emission limitation that applies during full operation. Additionally, even where a specific type of operation may not during startup and/or shutdown be able to meet an emission limitation that applies during full operation, the state should be able to develop appropriate limitations that would apply to those types of operations at all similar types of facilities. The EPA believes that there will be limited, if any, cases where it may be necessary to develop source-specific emission requirements for startup and/or shutdown. In any event, this is a question that is best addressed by each state in the context of the revisions to the SIP provisions at issue in this action. To the extent that there are appropriate reasons to establish an emission limitation with alternative numerical, technological control and/or work practice requirements during startup or shutdown for certain categories of sources, this SIP call action provides the state with the opportunity to do so.

As to the commenter's concern that such alternative emission limitations should not be included in a state's SIP, the EPA disagrees. The SIP needs to reflect the control obligations of sources, and any revision or modification of those obligations should not be occurring through a separate process, such as a permit process, which would not ensure that ''alternative'' compliance options do not weaken the SIP. The SIP is a combination of state statutes, regulations and other requirements that the EPA approves for demonstrating attainment and maintenance of the NAAQS, protection of PSD increments, improvement of visibility and compliance with other

[252] *See* 1999 SSM Guidance, Attachment at 4–5.

[253] The EPA notes that it has taken this approach in its own recent actions establishing emission limitations for sources. *See, e.g.,* ''National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Final rule; notice of final action on reconsideration,'' 78 FR 7137 (January 31, 2013) (example of work practice requirement for startup as a component of a continuous emission limitation).

[254] The EPA notes that it has taken this approach in its own recent actions establishing emission limitations for sources. *See, e.g.,* ''National Emission Standards for Hazardous Air Pollutants Residual Risk and Technology Review for Flexible Polyurethane Foam Production; Final rule,'' 79 FR 48073 (August 15, 2014) (example of NESHAP emission limitation that is continuous and does not include a different component for periods of startup or shutdown).

CAA requirements. As discussed in section X.B of this document, any revisions to obligations in the SIP need to occur through the SIP revision process and must comply with sections 110(k)(3), 110(l) and 193 and any other applicable substantive requirements of the CAA.

As to concerns that a SIP revision will be necessary every time a new source comes into existence, an existing source is permanently retired or a new regulation is promulgated, the EPA does not see these as significant concerns. Unless the startup or shutdown process for an individual source is truly unique to that source, then existing SIP provisions for sources within the same industrial category should be able to apply to any new source. Moreover, assuming any new source is subject to permitting obligations, then any applicable startup and shutdown issues should already be resolved in developing the permit for such source. The state could choose to incorporate that permit by reference into the SIP at the time it next modifies its SIP. Further, assuming that there is a source-specific regulation for a source in the SIP (a circumstance that the EPA believes would occur only rarely), the state is not obligated to remove such provision when the source is retired. Rather, the state could leave the provision in its rules or remove such a provision the next time it submits another SIP revision or when it chooses to do a ''cleanup'' of the SIP, an activity that numerous states have taken from time to time. Finally, whenever a new regulation is promulgated is precisely the time that a state should be considering the appropriate provisions that would apply during startup and shutdown, as that is the time when the state is considering what is necessary to comply with the CAA and what is necessary to meet attainment, maintenance or other requirements of the CAA.

The local government commenter contended that establishing limits for startup and shutdown that also demonstrate compliance with the NSR regulations (including protection of the NAAQS and PSD increments and imposition of BACT- or LAER-level controls) would be a difficult, time-consuming task that was impractical. The commenter did not provide an explanation of how this would be difficult. The implication of the comment is that a SIP provision that provides an exemption or an affirmative defense for emissions during startup and shutdown would be compliant with the statutory requirements and NSR regulations (including attainment of the NAAQS and protecting PSD increments). That is incorrect because the EPA does not interpret the CAA to allow such exemptions or affirmative defenses for purposes of NSR regulations. The suggestion that a SIP provision that does not regulate emissions during startup and shutdown would be more likely to address NAAQS attainment and to protect PSD increments than would a SIP provision that does regulate such emissions is illogical. The EPA further notes that the Agency's interpretation of the CAA, explicitly set forth in a 1993 guidance document, has been that periods of startup and shutdown must be addressed in any new source permit.[255] Moreover, the EPA explained in the February 2013 proposal, in the SNPR and in the background memorandum accompanying the February 2013 proposal concerning the legal basis for this action why exemptions and affirmative defenses applicable to emissions during SSM events are not consistent with CAA requirements for SIP provisions.

c. Comments that the EPA should ''authorize'' states to replace SSM exemptions with ''work practice'' standards developed by the EPA in its own recent NESHAP and NSPS rules.

Comment: Commenters suggested that the EPA should allow states to use work practice standards to address emissions during startup and shutdown. The NESHAP rules cited by commenters included the Industrial Boiler MACT rule [256] and the MATS rule, and the NSPS rules cited by the commenters included the NSPS for Electric Utility Steam Generating Units (40 CFR part 60, subpart Da) and the gas turbine NSPS as examples of where the EPA itself has established work practice standards rather than numerical emission limitations for periods of startup and shutdown. The commenters suggested that where these work practice standards are already in place, states should be able to rely on the work practice standards rather than having to create new SIP provisions.

Response: The EPA agrees that states may adopt work practice standards to address periods ofstartupand shutdown as a component of a SIP emission limitation that applies continuously. Adoption of work practice standards from a NESHAP or NSPS as a component of an emission limitation to satisfy SIP requirements is addressed in this document not as a requirement or even as a recommendation but rather as an approach that a state may use at its option. The EPA cannot foretell the extent to which this optional approach of adopting other existing standards to satisfy SIP requirements may benefit an individual state. For a state choosing to use this approach, such work practice standards must meet the otherwise applicable CAA requirements (*e.g.,* be a RACT-level control for the source as part of an attainment plan requirement) and the necessary parameters to make it legally and practically enforceable (*e.g.,* have adequate recordkeeping, reporting and/or monitoring requirements to assure compliance). However, it cannot automatically be assumed that emission limitation requirements in recent NESHAP and NSPS are appropriate for all sources regulated by SIPs. The universe of sources regulated under the federal NSPS and NESHAP programs is not identical to the universe of sources regulated by states for purposes of the NAAQS. Moreover, the pollutants regulated under the NESHAP (*i.e.,* HAPs) are in many cases different than those that would be regulated for purposes of attaining and maintaining the NAAQS, protecting PSD increments, improving visibility and meeting other CAA requirements.[257] Thus, the EPA cannot say as a matter of law that those federal regulations establish emission limitation requirements appropriate for all of the sources that states are regulating in their SIPs or for the purpose for which they are being regulated. The EPA believes, however, that those federal regulations and the technical materials in the public record for those rules may provide assistance for states as they develop and consider regulations for sources in their states and may be appropriate for adoption by the state in certain circumstances. In particular, the NSPS regulations should provide very relevant information for sources of the same type, size and control equipment type, even if the sources were not constructed or modified within a date range that would make them subject to the NSPS. The EPA therefore encourages states to explore these approaches, as well as any other relevant information available, in

[255] *See* Memorandum from John B. Rasnic, EPA/OAQPS, January 28, 1993, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0022.

[256] The Industrial Boiler MACT rule regulates industrial, commercial and institutional boilers and processheatersatmajor sourcesunder 40 CFRpart 63, subpart DDDDD.

[257] While some HAPs are also VOCs or particulate matter, many HAPs are not. Moreover, there are many VOCs and types of particulate matter that are not HAPs and thus are not regulated under the MACT standards. The MACT standards also do not address other criteria pollutants or pollutant precursors from sources that may be relevant for SIP purposes.

determining what is appropriate for revised SIP provisions.

d. Comments that if states remove existing SSM exemptions and replace them with alternative emission limitations that apply during startup and shutdown events, this would automatically be consistent with the requirements of CAA section 193.

Comment: Commentersstatedthat section 193 was included in the CAA to prohibit states from modifying regulationsin place prior to November 15, 1990, unless the modification ensures equivalent or greater reductions of the pollutant. The commenters assertedthattothe extent astate replaces ''general excess emissions exclusions and/or affirmative defense provisions'' such amendments would *per se* be more stringent than the provisions they replace. The commenters also contended that any replacement SIP provision that spells out more clearly how a source will operate ensures equivalent or greater emission reductions. The commenters urged the EPA to clarify that any revisions pursuant to a final SIP call would not be considered ''backsliding.''

Response: The EPA agrees with the commenters that any SIP submission made by a state in response to this SIP call action will need to comply with the requirements of section 193 of the CAA, if that section applies to the SIP provision at issue. In addition, such SIP provision will also need to comply with section 110(l), which requires that SIP revisions do not interfere with attainment, reasonable progress or any other applicable requirement of the CAA. However, it is premature to draw the conclusion that any SIP revision made by a state in response to this SIP call will automatically meet the requirements of section 110(l) and section 193. Such a conclusion could only be made in the context of reviewing the actual SIP revision. The EPA will address this issue, for each SIP revision in response to this SIP call action, at the time that it proposes and finalizes action on the SIP revision, and any comments on this issue can be raised during those individual rulemaking actions. The EPA provides additional guidance to states on the analysis needed to comply with section 110(l) and section 193 in section X.B of this document.

C. Director's Discretion Provisions Pertaining to SSM Events

1. What the EPA Proposed

In the February 2013 proposal, the EPA stated and explained in detail the reasons for its belief that the CAA prohibits unbounded director's discretion provisions in SIPs, including those provisions that purport to authorize unilateral revisions to, or exemptions from, SIP emission limitations for emissions during SSM events.[258]

2. What Is Being Finalized in This Action

The EPA is reiterating its interpretation of the CAA with respect to unbounded director's discretion provisions applicable to emissions during SSM events, which is that SIP provisions cannot contain director's discretion to alter SIP requirements, including those that allow for variances or outright exemptions for emissions during SSM events. This interpretation has been clear with respect to emissions during SSM events in the SSM Policy since at least 1999. In the 1999 SSM Guidance, the EPA stated that it would not approve SIP revisions ''that would enable a State director's decision to bar EPA's or citizens' ability to enforce applicable requirements.'' [259] Director's discretion provisions operate to allow air agency personnel to make just such unilateral decisions on an *ad hoc* basis, up to and including the granting of complete exemptions for emissions during SSM events, thereby negating any possibility of enforcement for what would be violations of the otherwise applicable emission limitation. Given that the EPA interprets the CAA to bar exemptions from SIP emission limitations for emissions during SSM events in the first instance, the fact that director's discretion provisions operate to authorize these exemptions on an *ad hoc* basis compounds the problem. The EPA acknowledges, however, that both states and the Agency have, in some instances, failed to adhere to the requirements of the CAA with respect to this issue consistently in the past, and thus the need for this SIP call to correct existing deficiencies in SIPs.[260] In order to be clear about its interpretation of the CAA with respect to this point on a going-forward basis, the EPA is reiterating in this action that SIP provisions cannot contain unbounded director's discretion provisions, including those that operate to allow for variances or outright exemptions from SIP emission limitations for excess emissions during SSM events.

Many commenters on the February 2013 proposal opposed the EPA's interpretation of the CAA with respect to director's discretion provisions simply on the grounds that states are *per se* entitled to have unfettered discretion with respect to the content of their SIP provisions. Other commenters argued that any director's discretion provision is merely a manifestation of an air agency's general ''enforcement discretion.'' Some commenters simply asserted that recent court decisions by the Fifth Circuit definitively establish that the CAA does not prohibit SIP provisions that include director's discretion, regardless of whether those provisions contain any limitations whatsoever on the exercise of that discretion.[261] The commenters did not, however, address the specific statutory interpretations that the EPA set forth in the February 2013 proposal to explain why SIP provisions that authorize unlimited director's discretion are prohibited by CAA provisions applicable to SIP revisions.

As explained in detail in the February 2013 proposal and in section VII.C of this document, the EPA interprets the CAA to prohibit SIP provisions that include unlimited director's discretion to alter the SIP emission limitations applicable to sources, including those that operate to allow exemptions for emissions from sources during SSM events. The EPA believes that such provisions that operate to authorize total exemptions from emission limitations on an *ad hoc* basis are especially problematic. Given that the EPA interprets section 110(a)(2)(A) and section 302(k) to preclude exemptions for emissions during SSM events in emission limitations in the first instance, it is also impermissible for states to have SIP provisions that authorize such exemptions on an *ad hoc* basis. These provisions functionally allow the air agency to impose its own enforcement discretion decisions on the EPA and other parties by granting exemptions for emissions that should be treated as violations of the applicable SIP emission limitations. Provisions that functionally allow such exemptions are also inconsistent with requirements of the CAA related to enforcement

[258] *See* February 2013 proposal, 78 FR 12459 at 12485–86.

[259] *See* 1999 SSM Guidance at 3.

[260] In this action, the EPA is addressing the specific SIP provisions with director's discretion provisions that the Petitioner listed in the Petition. In the event that there are other such impermissible director's discretion provisions in existing SIPs, the EPA will address those provisions in a later action.

[261] For example, commenters on the February 2013 proposal cited two decisions of the Fifth Circuit within which the court cited a prior EPA approval of a SIP revision in Georgia that contained director's discretion provisions supposedly comparable to those at issue in the Fifth Circuit cases. These provisions were not included in the Petition and the EPA is not reexamining those provisions as part of this action.

including: (i) The general requirements of section 110(a)(1) that SIPs provide for enforcement; (ii) the section 110(a)(2)(A) requirement that the specific emission limitations and other contents of SIPs be enforceable; and (iii) the section 110(a)(2)(C) requirement that SIPs contain a program to provide for enforcement. Moreover, these provisions operate to interfere with the enforcement structure of the CAA provided in section 113 and section 304, through which the EPA and other parties have authority to seek enforcement for violations of CAA requirements, including SIP emission limitations.

There are two ways in which such a provision can be consistent with CAA requirements: (1) When the exercise of director's discretion by the state agency to alter or eliminate the SIP emission limitation can have no effect for purposes of federal law unless and until the EPA ratifies that state action with a SIP revision; or (2) when the director's discretion authority is adequately bounded such that the EPA can ascertain in advance, at the time of approving the SIP provision, how the exercise of that discretion to alter the SIP emission limitations for a source could affect compliance with other CAA requirements. If the provision includes director's discretion that could result in violation of any other CAA requirement for SIPs, then the EPA cannot approve the provision consistent with the requirements of section 110(k)(3) and section 110(l). For example, a director's discretion provision that authorizes state personnel to excuse source compliance with SIP emission limitations during SSM events could not be approved because the provision would run afoul of the requirement that sources be subject to emission limitations that apply continuously, consistent with section 302(k).

3. Response to Comments

The EPA received a number of comments, both supportive and adverse, concerning the issue of director's discretion provisions in SIPs. The majority of these comments were critical of the EPA's position but did not base this criticism on an interpretation of specific CAA provisions. For clarity and ease of discussion, the EPA is responding to these comments, grouped by issue, in this section of this document.

a. Comments that broad state discretion in how to develop SIP provisions includes the authority to create provisions that include director's discretion variances or exemptions for excess emission during SSM events.

Comment: A number of state and industry commenters argued that because states have great discretion when developing SIP provisions in general, this necessarily includes the ability to create director's discretion provisions in SIPs that authorize state personnel to grant unilateral variances or exemptions for emissions during SSM events. According to commenters, the overarching principle of ''cooperative federalism'' and court decisions concerning the division of regulatory responsibilities between the states and the EPA support their view that states can create SIP provisions that provide authority to alter the SIP emission limitations or other requirements via director's discretion provisions without restriction.

Response: The EPA disagrees with the commenters' view that director's discretion provisions in SIPs are *per se* permissible because of the principles of cooperative federalism. As explained in more detail in section V.D.2 of this document, states and the EPA each have authorities and responsibilities under the CAA. With respect to SIPs, under section 107(a) the states have primary responsibility for assuring attainment of the NAAQS within their borders. Under section 110(a) the states have a statutory duty to develop and submit a SIP that provides for the attainment, maintenance and enforcement of the NAAQS, as well as meeting many other CAA requirements and objectives. The specific procedural and substantive requirements that states must meet for SIPs are set forth in section 110(a)(1) and section 110(a)(2) and in other more specific requirements throughout the CAA (*e.g.,* the attainment plan requirements for each of the NAAQS as specified in part D). By contrast, the EPA has its own statutory authorities and responsibilities, including the obligation to review new SIP submissions for compliance with CAA procedural and substantive requirements pursuant to sections 110(k)(3), 110(l) and 193. In addition, the EPA has authority to assure that previously approved SIP provisions continue to meet CAA requirements, whether through the SIP call authority of section 110(k)(5) or the error correction authority of section 110(k)(6).

As the EPA explained in detail in the February 2013 proposal, SIP provisions that include unbounded director's discretion to alter the otherwise applicable emission limitations are inconsistent with CAA requirements. Such provisions purport to authorize air agency personnel unilaterally to change or to eliminate the applicable SIP emission limitations for a source without meeting the requirements for a SIP revision. Pursuant to the EPA's own responsibilities under sections 110(k)(3), 110(l) and 193 and any other CAA provision substantively germane to the specific SIP provision at issue, it would be inappropriate for the Agency to approve a SIP provision that automatically preauthorized the state unilaterally to revise the SIP emission limitation without meeting the applicable procedural and substantive statutory requirements for a SIP revision. Section 110(i) prohibits modification of SIP requirements for stationary sources by either the state or the EPA, except through specified processes. The EPA's implementing regulations applicable to SIP provisions likewise impose requirements for a specific process for the approval of SIP revisions.[262] In addition, section 116 explicitly prohibits a state from adopting or enforcing regulations for sources that are less stringent than what is required by the emission limitations in its SIP, *i.e.,* the emission limitation previously approved by the EPA as meeting the requirements of the CAA applicable to that specific SIP provision. It is a fundamental tenet of the CAA that states cannot unilaterally change SIP provisions, including the emission limitations within SIP provisions, without the EPA's approval of the change through the appropriate process. This core principle has been recognized by multiple courts.[263]

b. Comments that director's discretion provisions are an exercise of ''enforcement discretion.''

Comment: Several state and industry commenters asserted that the EPA was wrong to interpret the CAA to preclude director's discretion provisions, because such provisions are merely an exercise of a state's traditional ''enforcement discretion.''

Response: The EPA disagrees that a director's discretion provision in a SIP is a valid exercise of enforcement discretion. Normally, the concept of enforcement discretion is understood to mean that a regulator has discretion to determine whether a specific violation

[262] *See, e.g.,* 40 CFR 51.104(d) and 40 CFR 51.105.

[263] *See, e.g., Sierra Club* v. *TVA,* 430 F.3d 1337, 1346 (11th Cir. 2005) (''If a state wants to add, delete, or otherwise modify a SIP provision, it must submit the proposed change to EPA for approval''); *Duquesne Light Co.* v. *EPA,* 698 F.2d 456, 468 n.12 (D.C. Cir. 1983) (''with certain enumerated exceptions, states do not have the power to take any action modifying any requirement of their SIPs, without approval from EPA''); *Train* v. *NRDC,* 421 U.S. 60, 92 (1975) (''[A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the Agency'').

of the law by a source warrants enforcement and to determine the nature of the remedy to seek for any such violation. The EPA of course agrees that states have enforcement discretion of this type and that the states may exercise such enforcement discretion as they see fit, as does the Agency itself. However, the EPA does not agree that air agencies may create SIP provisions that operate to eliminate the ability of the EPA or citizens to enforce the emission limitations of the SIP. The EPA stated clearly in the 1999 SSM Guidance that it would not approve SIP provisions that ''would enable a State director's decision to bar EPA's or citizens' ability to enforce applicable requirements.'' [264] The Agency explained at that time that such an approach is inconsistent with the requirements of the CAA applicable to the enforcement of SIPs.

The commenters' argument was that states may create SIP provisions through which they may unilaterally decide that the emissions from a source during an SSM event should be exempted, such that the emissions cannot be treated as a violation by anyone. A common formulation of such a provision provides only that the source needs to notify the state regulatory agency that an exceedance of the emission limitations occurred and to report that the emissions were the result of an SSM event. If those minimal steps occur, then such provisions commonly authorize state personnel to make an administrative decision that the emissions in question were not a ''violation'' of the applicable emission limitation. It may be entirely appropriate for the state agency to elect not to bring an enforcement action based on the facts and circumstances of a given SSM event, as a legitimate exercise of its own enforcement discretion. However, by creating a SIP provision that in effect authorizes the state agency to alter or suspend the otherwise applicable SIP emission limitations unilaterally through the granting of exemptions, the state agency would functionally be revising the SIP with respect to the emission limitations on the source. This revision of the applicable emission limitation would have occurred without satisfying the requirements of the CAA for a SIP revision. As a result of this *ad hoc* revision of the SIP emission limitation, the EPA and other parties would be denied the ability to exercise their own enforcement discretion. This is contrary to the fundamental enforcement structure of the CAA, as provided in section 113 and section 304, through which the EPA and other parties are authorized to bring enforcement actions for violations of SIP emission limitations. The state's decision not to exercise its own enforcement discretion cannot be a basis on which to eliminate the legal rights of the EPA and other parties to seek to enforce.

The commenters also suggested that the director's discretion provisions authorizing exemptions for SSM events are nonsegregable parts of the emission limitations, *i.e.,* that states have established the numerical limitations at overly stringent levels specifically in reliance on the existence of exemptions for any emissions during SSM events. Although commenters did not provide facts to support the claims that states set more stringent emission limitations in reliance on SSM exemptions, in general or with respect to any specific emission limitation, the EPA acknowledges that this could possibly have been the case in some instances. Even if a state had taken this approach, however, it does not follow that SIP provisions containing exemptions for SSM events are legally permissible. Emission limitations in SIPs must be continuous. When a state takes action in response to this SIP call to eliminate the director's discretion provisions or otherwise to revise them, the state may elect to overhaul the emission limitation entirely in order to address this concern. So long as the resulting revised SIP emission limitation is continuous and meets the requirements of sections 110(k)(3), 110(l) and 193 and any other sections that are germane to the type of SIP provision at issue, the state has discretion to revise the provision as it determines best.

c. Comments that the EPA's having previously approved a SIP provision that authorizes the granting of variances or exemptions for SSM events through the exercise of director's discretion renders the provision consistent with CAA requirements.

Comment: Several state and industry commenters argued that the EPA's past approval of a SIP provision with a director's discretion feature automatically means that the exercise of that authority (whether to revise the applicable SIP emission limitations unilaterally or to grant *ad hoc* exemptions from SIP emission limitations) is valid under the CAA. One commenter asserted that because the EPA has previously approved such a provision, ''that discretion is itself part of the SIP, and the exercise of discretion in no way modifies SIP requirements.'' Another commenter argued that director's discretion provisions in SIPs are *per se* valid because ''[a]ll of the SIP provisions went through a public procedure at the time of their initial SIP approval.''

Response: First, the EPA disagrees with the theory that a SIP provision that includes director's discretion authority for state personnel to modify or grant exemptions from SIP emission limitations unilaterally is valid merely by virtue of the fact that the Agency previously approved it. By definition, when the EPA makes a finding of substantial inadequacy and issues a SIP call, that signifies that the Agency previously approved a SIP provision that does not meet CAA requirements, whether that deficiency existed at the time of the original approval or arose later. The EPA has explicit authority under section 110(k)(5) to require that a state eliminate or revise a SIP provision that the Agency previously approved, whenever the EPA finds an existing SIP provision to be substantially inadequate to meet CAA requirements. The fact that the EPA previously approved it does not mean that a deficient provision may remain in the SIP forever once the Agency determines that it is deficient.

Second, the EPA disagrees that the fact that a SIP provision underwent public process at the time of its original creation by the state, or at the time of its approval by EPA as part of the SIP, means *per se* that the provision is consistent with CAA requirements. If an existing SIP provision is deficient because it in effect allows a state to revise existing SIP emission limitations without meeting the many explicit statutory requirements for a SIP revision, the fact that the revision that created the impermissible provision itself met the proper procedural requirements for a SIP revision is irrelevant. Even perfect compliance with the procedural requirements for a SIP revision at the time of its development by the state or its approval by the EPA does not override a substantive deficiency in the provision, nor does it preclude the later issuance of a SIP call to correct a substantive deficiency.

Third, the EPA disagrees with the circular logic that because a deficient provision with director's discretion currently exists in a SIP, it means that exercise of the director's discretion to grant variances or outright exemptions to sources for emissions during SSM events is therefore consistent with CAA requirements for SIPs. An unbounded director's discretion provision that authorizes an air agency to alter or eliminate the otherwise applicable SIP emission limitation functionally allows the state to revise the SIP emission

[264] 1999 SSM Guidance at 3.

limitation without meeting the requirements for a SIP revision. In particular, when such provisions authorize state personnel to grant outright exemptions from the SIP emission limitations, this is tantamount to a revision of the SIP emission limitation without complying with the procedural and substantive requirements of the CAA applicable to SIP revisions, including section 110(l), section 193 and any other substantive requirements applicable to the particular SIP emission limitation in question.

d. Comments that director's discretion provisions in SIPs are not prohibited by the CAA, based on recent judicial decisions.

Comment: A number of state and industry commenters argued that nothing in the CAA explicitly prohibits states from having SIP provisions that include director's discretion authorization for state personnel to modify or eliminate existing SIP provisions unilaterally, with or without any process or within any limiting parameters. In support of this proposition, the commenters cited recent decisions of the Fifth Circuit in two cases concerning the EPA's disapproval of SIP submissions from the state of Texas. Commenters argued that the EPA's interpretation of the CAA to prohibit director's discretion provisions in SIPs is incorrect in light of the decision of the court in *Texas* v. *EPA*.[265] According to commenters, the court's decision establishes that no provision of the CAA bars such provisions. To support this contention, one commenter quoted the court's decision extensively, highlighting the statement, ". . . the EPA has invoked the term 'director discretion' as if that term were an independent and authoritative standard, and has not linked the term to the language of the CAA." Similarly, the commenters cited another decision of that court in the *Luminant* director's discretion case.[266] From that decision, commenters quoted the court's statement that the "EPA had no legal basis to demand 'replicable' limitations on the Director's discretion" and the succeeding sentence, "[n]ot once in its proposed or final disapproval, or in its argument before this court, has the EPA pointed to any applicable provision of the Act or its regulations that includes a 'replicability' standard." These commenters did not, however, address the specific statutory provisions identified by the EPA in the February 2013 proposal and the explanation that the Agency provided with respect to this issue.

Response: The EPA disagrees that either decision cited by commenters stands for the definitive proposition they assert, *i.e.,* that director's discretion provisions in SIPs are not precluded by the CAA. In *Luminant Generation Co.* v. *EPA* (the *Luminant* director's discretion case), the court evaluated the EPA's disapproval of a SIP submission from the state of Texas that created SIP provisions to implement minor source permitting requirements. The EPA disapproved the SIP submission for several reasons, one of which was based on the director's discretion provision prohibiting use of the standard permit for a pollution control project that the director determines raises health concerns or threatens the NAAQS. The EPA was concerned that this provision gave the director of the state agency discretion to make case-by-case decisions about what the specific permit terms would be for each source, without sufficient parameters or limitations on the exercise of that authority. Thus, the EPA reasoned that without any boundaries on the exercise of this authority for director's discretion, it would be impossible for the Agency to know in advance (*i.e.,* at the time of acting on the SIP submission) whether the state agency would only use that discretion in a way that would result in permits with terms consistent with meeting CAA requirements.[267] As the EPA explained in the rulemaking at issue in the *Luminant* director's discretion case, "[t]here are no replicable conditions in the PCP Standard Permit that specify how the [TCEQ] Director's discretion is to be implemented" for the individual case-by-case determinations.[268] In other words, the EPA was being asked to approve a SIP provision without knowing how the SIP provision would actually be implemented and thus without knowing whether the results would be consistent with applicable CAA requirements.

As the commenters stated, the court in the *Luminant* director's discretion case vacated the EPA's disapproval of the SIP submission for several reasons, including the rejection of the Agency's argument that it could not approve the SIP submission due to the director's discretion feature of the SIP provisions and the resulting lack of "replicability."[269] The court found that the EPA "failed to identify a single provision of the Act that Texas's program violated, let alone explain its reasons for reaching its conclusion."[270] With respect to the director's discretion issue, phrased in terms of "replicability," the court found that "[n]ot once in its proposed or final disapproval, or in its argument before this court, has the EPA pointed to any applicable provision of the Act or its regulations that include a 'replicability' standard."

The EPA believes that the court's decision in the *Luminant* director's discretion case is distinguishable on several important grounds. Most importantly, the court rejected the EPA's disapproval of the SIP submission because the Agency had not provided an adequate explanation of why the director's discretion provision at issue was inconsistent with the requirements of the CAA for SIP provisions. The court emphasized the absence of any explanation in the administrative record for the proposed or final actions that

[265] 690 F.3d 670 (5th Cir. 2012).

[266] *Luminant Generation Co.* v. *EPA,* 675 F.3d 917 (5th Cir. 2012). Throughout this document, the EPA refers to this as the *Luminant* director's discretion case, to distinguish it from another *Luminant case cited in this document, Luminant Generation* v. *EPA,* 714 F.3d 841 (5th Cir. 2013).

[267] The EPA notes that the court in the *Luminant* director's discretion case focused on the fact that the director's discretion provision included the discretion to require more of sources, if there "are health effects concerns or the potential to exceed the [NAAQS]," and the court expressed that it did not understand why that requirement was not alone adequate to allay the Agency's concerns. *Luminant Generation Co.* v. *EPA,* 675 F.3d 917, 929 n.11. The EPA's primary concern, although not clearly articulated in the rulemaking record, was that at the time of acting on the SIP submission, there was no way for the Agency to know in advance what the state would require of any source in the first instance, let alone what additional things the state might require in situations where it unilaterally decided that more might be necessary in any given permit.

[268] *See* "Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit; Proposed rule," 74 FR 48467 at 48476 (September 23, 2009).

[269] The term "replicable" was taken from EPA guidance concerning SIP provisions for attainment plans. As a "fundamental principle" for SIP provisions and permits, the EPA explained that the requirements imposed upon sources should be "replicable"; *i.e.,* if they contain "procedures for changing the rule, interpreting the rule, or determining compliance with the rule, the procedures are sufficiently specific and nonsubjective so that two independent entities applying the same procedures would obtain the same result." *See* General Preamble, 57 FR 13498 at 13568 (April 16, 1992). The EPA's intent in using this term, although not clearly expressed in the rulemaking record, has been to indicate that a properly constructed SIP provision with an appropriate degree of discretion and flexibility would contain sufficient specifications and limits on the exercise of that discretion such that the Agency could adequately evaluate the provision at the time of its submission. Absent sufficient limits on the discretion, the EPA could not properly evaluate how exercise of the discretion could affect compliance with CAA requirements.

[270] 675 F.3d 917, 924 (5th Cir. 2012).

explained which specific provisions of the CAA preclude such a provision and why. In the February 2013 proposal and in this document, the EPA has identified and explained the specific CAA provisions that operate to preclude unbounded director's discretion provisions in SIPs.

Second, the court in the *Luminant* director's discretion case based its decision in part on the view that the specific director's discretion provision at issue in that case would always result in more stringent regulation of affected sources and always entail exercise of the discretion in a way that would protect the NAAQS.[271] Although its view was not articulated clearly in the record, the EPA did not agree with that assessment because it was not possible to evaluate in advance how the director's discretion authority would in fact be exercised. By contrast, the SIP provisions at issue in this action are not structured in such a way as to allow the exercise of discretion only to make the emission limitations *more stringent.* To the contrary, the director's discretion provisions at issue in this action authorize the state agencies to excuse sources from compliance with the otherwise applicable SIP emission limitation during SSM events. Were the sources seeking these discretionary exemptions meeting the applicable SIP emission limitations, they would not need an exemption. It logically follows that sources are seeking these exemptions because their emissions during such events are higher than the otherwise applicable emission limitation allows. Unlike the specific director's discretion provision at issue in the *Luminant* director's discretion case, which the court said ''can only serve to protect the NAAQS,'' the exercise of the director's discretion authority in the SIP provisions at issue in this action can operate to make the emission limitations less stringent and can thereby undermine attainment and maintenance of the NAAQS, protection of PSD increments, improvement of visibility and achievement of other CAA objectives.

In the *Texas* decision, the court evaluated the EPA's disapproval of another SIP submission from the state of Texas that pertained to requirements for the permitting program for minor sources. The EPA had disapproved the submission for several different reasons, including that the Agency believed the specific provisions at issue provided the state agency with too much director's discretion authority to decide what, if any, monitoring, recordkeeping and reporting requirements should be imposed on any individual affected source in its permit. The EPA concluded that if at the time it was evaluating the SIP provision for approval it could not reasonably anticipate how the state agency would exercise the discretion authorized in the provision, this made the submission unapprovable ''for being too vague and not replicable.'' [272] The *Texas* court disagreed. The court concluded that the ''degree of discretion conferred on the TCEQ director cannot sustain the EPA's rejection of the MRR requirements'' and that the EPA insisted on ''some undefined limit on a director's discretion . . . based on a standard that the CAA does not empower the EPA to enforce.'' [273]

The EPA believes that the decision of the court in *Texas* v. *EPA* is also distinguishable with respect to the issue of whether director's discretion provisions are consistent with CAA requirements. First, the *Texas* court based its decision primarily on the conclusion that the EPA had failed to identify and explain the provisions of the CAA that (i) preclude approval of SIP provisions that include unbounded director's discretion or (ii) impose a requirement for ''replicability'' in the exercise of director's discretion. The *Texas* court emphasized that although the EPA disapproved the SIP submission for failure to meet CAA requirements, the court found that the EPA ''is yet to explain why.'' [274] The court further reasoned that ''the EPA has invoked the term 'director discretion' as if that term were an independent and authoritative standard, and has not linked the term to language of the CAA.'' [275] Later in the opinion the court explicitly emphasized that because it was reviewing the EPA's decisionmaking process in the disapproval action, the court could not consider any basis for the disapproval that was not articulated by the EPA in the rulemaking record.[276] The EPA is explaining its interpretation of the relevant CAA provisions in this action.

Second, the *Texas* court also asserted its own conclusion that there is nothing in the CAA that pertains to director's discretion in SIP provisions or to any limitations on the exercise of such discretion. As the court stated it:

> There is, in fact, no independent and authoritative standard in the CAA or its implementing regulations requiring that a state director's discretion be cabined in the way that the EPA suggests. Therefore, the EPA's insistence on some undefined limit on a director's discretion is . . . based on a standard that the CAA does not empower the EPA to enforce.

However, the court reached this conclusion based upon the administrative record before it and reiterated that it could not consider any basis for the disapproval not articulated by the EPA in the rulemaking record: ''We are reviewing an agency's decisionmaking process, so the agency's action must be upheld, if at all, on the basis articulated by the agency itself.'' [277] Given the court's conclusion that the EPA had failed to provide any explanation as to why the CAA precludes director's discretion provisions in the challenged rulemaking, the EPA believes that the court did not have the opportunity to consider the Agency's rationale that is provided in this action. In the February 2013 proposal and in this document, the EPA is heeding the court's admonishment to explain in the rulemaking record the statutory basis for the Agency's interpretation of the CAA to prohibit director's discretion provisions that are inadequately bounded. As explained in this action, SIP provisions that functionally authorize a state agency to amend existing SIP emission limitations applicable to a source unilaterally without a SIP revision are contrary to multiple specific provisions of the CAA that pertain to SIP revisions.

Third, the *Texas* court emphasized that, notwithstanding the apparent flexibility that the director's discretion provision provided to the state agency with respect to deciding on the level of monitoring, recordkeeping and reporting to be imposed on each source by permit, the state's regulations explicitly prohibited relaxations of the level of control. The court gave weight to the explicit wording of the specific provision at issue in the case which provided that ''[t]he existing level of control may not be lessened for any facility.'' [278] The EPA does not agree that the specific requirements for monitoring, recordkeeping and reporting for a given source are unrelated to the level of control. In any event, the director's discretion provisions of the type at issue in this

[271] *Luminant Generation Co.* v. *EPA,* 675 F.3d 917, 929 n.11 (''The provision at issues states: ''This standard permit must not be used [if] the executive director determines there are health effects concerns or the potential to exceed a [NAAQS] . . . until those concerns are addressed to the satisfaction of the executive director.'').

[272] *Id.,* 690 F.3d 670, 680.

[273] *Id.,* 690 F.3d 670, 682.

[274] *Id.,* 690 F.3d 670, 681.

[275] *Id.*

[276] *Id.,* 690 F.3d 670, 682.

[277] *Id.,* 690 F.3d 670, 682.

[278] *Id.,* 690 F.3d 670, 681.

action are not limited to those that would not ''lessen'' the level of control. To the contrary, the provisions at issue in this SIP call action authorize state agency personnel to grant outright exemptions from otherwise applicable SIP emission limitations during SSM events. Thus, the EPA concludes that this portion of the reasoning of the *Texas* decision would not apply to the current action.

Finally, the *Texas* court viewed the fact that the EPA had previously approved similar director's discretion provisions in Texas and in Georgia as evidence that such provisions must be consistent with CAA requirements. The EPA acknowledges that it has, from time to time, approved SIP submissions that it should not have, whether through failure to recognize an issue, through a misunderstanding of the facts, through a mistaken interpretation of the law or as a result of other such circumstances. Congress itself clearly recognized that the EPA may occasionally take incorrect action on SIP submissions, whether incorrect at the time of the action or as a result of later events. Section 110(k)(5) and section 110(k)(6) both provide the EPA with explicit authority to address past approvals of SIP submissions that turn out to have been mistakes, whether at the time of the original approval or as a result of later developments. The fact that the EPA has explicit authority to issue a SIP call establishes that Congress anticipated that the Agency may at some point approve a SIP provision that it should not have approved because the provision is substantially inadequate to meet CAA requirements. The EPA does not agree, however, that its approval of a comparable SIP provision at some time in the past negates the Agency's authority to disapprove a current SIP submission that fails to meet applicable procedural or substantive requirements. A challenger of the disapproval can always argue that the inconsistency between the prior approval and the later disapproval is evidence that the EPA is being arbitrary and capricious in its interpretation of the statute—but at bottom the correct question is whether the Agency is correctly interpreting the CAA in the disapproval action currently being challenged. The fact that the EPA may have approved another SIP submission with a comparable defect in the past does not override the requirements of the CAA.

Significantly, the commenters apparently make the same mistake as the EPA did in the rulemakings at issue in the cited court decisions, by not adequately addressing the relevant statutory provisions that apply to SIP provisions in general and apply to revisions of existing EPA-approved SIP provisions in particular. The commenters failed to consider the core problem with unbounded director's discretion provisions (*i.e.,* that such provisions allow for unilateral revision, relaxation or exemption from SIP emission limitations, without adequate evaluation by the EPA and the public). As a result, the commenters do not address the proper application of CAA provisions that govern SIP revisions and the rationale for requiring that such SIP revisions be reviewed by the EPA in accordance with the explicit requirements of sections 110(k)(3), 110(l) and 193 and the other requirements germane to the SIP provision at issue (*e.g.,* RACT-level controls for sources located in nonattainment areas). Indeed, the commenters did not acknowledge the inherent problem with director's discretion provisions, which is that such provisions have the potential to undermine SIP emission limitations dramatically through *ad hoc* exemptions for excess emissions during SSM events. By allowing for exemptions for emissions during SSM events, these provisions also remove the incentives for sources to be properly designed, maintained and operated so that they will comply continuously with SIP emission limitations during all modes of source operation.

The EPA notes that the commenters did not acknowledge or address the specific explanation that the Agency provided in the February 2013 proposal, including the EPA's identification of the specific statutory provisions applicable to the revision of SIP provisions. Because these commenters did not address the EPA's explanation of the CAA provisions that it interprets to preclude director's discretion provisions in SIPs, the commenters have not provided substantive comment concerning the EPA's interpretation of the CAA on this issue. The commenters did not dispute the EPA's interpretation of the CAA on this particular point on statutory grounds. Rather, the commenters argued based on their own policy preferences for an approach to director's discretion provisions that would allow sources to receive *ad hoc* exemptions for excess emissions during SSM events without the need for imposition of an appropriate alternative SIP emission limitation, for adequate public process for development of such an alternative SIP emission limitation or for oversight by the EPA of any revision to the applicable SIP emission limitations as required by the CAA.

e. Comments opposed to the EPA's approach on the premise that there is no ''director's discretion'' concern if the SIP provision creates a permit program through which state officials grant sources variances or exemptions from otherwise applicable SIP provisions.

Comment: State commenters argued that they have imposed sufficient boundaries on the exercise of director's discretion provisions in their SIPs, by virtue of the fact that they grant sources variances or exemptions from SIP emission limitations through a permitting program. Commenters stated that their permitting program provides a more structured process and an opportunity for public input into the decisions concerning variances or exemptions. Moreover, they argued that state law does provide preconditions to the granting of variances or exemptions and thus these are not granted automatically. Based upon these procedural requirements, the commenters contended that their exercise of director's discretion is not ''unbounded'' as the EPA suggested in the February 2013 proposal.

Response: The EPA acknowledges that a permitting program can provide a more structured and consistent process than may be provided in a SIP for granting variances and exemptions from SIP emission limitations and related requirements and may provide more opportunity for public participation in those decisions. However, to the extent that the end result of this permitting process is that a given source is given a less stringent emission limitation than the otherwise applicable SIP emission limitation or is given an outright exemption from the SIP emission limitation, this result still functionally constitutes a revision of the SIP emission limitation without meeting the statutory requirements for a SIP revision. The EPA is not authorized to approve a program that in essence allows a SIP revision without compliance with the applicable statutory requirements in sections 110(k)(3), 110(l) and 193 and any other provision that is germane to the particular SIP emission limitation at issue.

The EPA emphasizes that air agencies always retain the ability to regulate sources more stringently than required by the provisions in its SIP. Section 116 explicitly provides, with certain limited exceptions, that states retain the authority to regulate emissions from sources. Unless preempted from controlling a particular source, nothing precludes states from regulating sources more stringently than otherwise required to meet CAA requirements, so long as they meet CAA requirements. However, if there is an applicable

emission limitation in a SIP provision (or an EPA regulation promulgated pursuant to sections 111 or 112), section 116 explicitly stipulates, ''such State or political subdivision may not adopt or enforce any emission standard or emission limitation which is less stringent than the standard or limitation under such plan or limitation.'' Thus, a state could elect to regulate a source more stringently than required by a specific SIP emission limitation (*e.g.,* by imposing a more stringent numerical emission limitation on a particular source or by imposing additional recordkeeping, reporting and monitoring requirements in addition to those of the SIP provision), but the state cannot weaken or eliminate the SIP emission limitation (*e.g.,* by granting exemptions from applicable SIP emission limitations for emissions during SSM events). If a state elects to alter an emission limitation in a SIP provision, the state must do so in accordance with the statutory provisions applicable to SIP revisions.

Finally, the EPA notes, if a state elects to use a permitting process as a source-by-source means of imposing more stringent emission limitations or additional requirements on sources, doing so can be an acceptable approach. So long as the underlying SIP provisions are adequate to provide the requisite level of control or requirements to assure enforceability, a state is free to use a permitting program to impose additional requirements above and beyond those provided in the SIP.

D. Enforcement Discretion Provisions Pertaining to SSM Events

1. What the EPA Proposed

In the February 2013 proposal, the EPA explained in detail that it believes that the CAA allows states to adopt SIP provisions that impose reasonable limits upon the exercise of enforcement discretion by air agency personnel, so long as those provisions do not apply to the EPA or other parties. The EPA believes that its interpretation of the CAA with respect to enforcement discretion provisions applicable to emissions during SSM events has been clear in the SSM Policy. In the 1982 SSM Guidance and the 1983 SSM Guidance, the EPA indicated that states could elect to adopt SIP provisions that include criteria that apply to the exercise of enforcement discretion by state personnel. In the 1999 SSM Guidance, the EPA emphasized that it would not approve such provisions if they would operate to impose the state's enforcement discretion decisions upon the EPA or other parties because this would be inconsistent with requirements of title I of the CAA.[279] The EPA acknowledged, however, that both the states and the Agency have failed to adhere to the CAA with respect to this issue in the past, and thus the need for this SIP call action to correct the existing deficiencies in SIPs.

2. What Is Being Finalized in This Action

In order to be clear about this important point on a going-forward basis, the EPA is reiterating that SIP provisions cannot contain enforcement discretion provisions that would bar enforcement by the EPA or citizens for any violation of SIP requirements if the state elects not to enforce.

The EPA has previously issued a SIP call to a state specifically for purposes of clarifying an existing SIP provision to assure that regulated entities, regulators and courts will not misunderstand the correct interpretation of the provision.[280] As the EPA stated in that action:

> . . . 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.[281]

The EPA has explained in previous iterations of its SSM Policy that a fundamental principle of the CAA with respect to SIP provisions is that the provisions must be enforceable not only by the state but also by the EPA and others pursuant to the citizen suit authority of section 304. Accordingly, the EPA has long stated that SIP provisions cannot be structured such that a decision by the state not to enforce may bar enforcement by the EPA or other parties.

3. Response to Comments

The EPA received a small number of comments concerning the issue of ambiguous enforcement discretion provisions in SIPs. For clarity and ease of discussion, the EPA is responding to these comments, grouped by issue, in this section of this document.

a. Comments that supported the clarification of ambiguous enforcement discretion provisions in general but opposed the EPA's views with respect to specific SIP provisions.

Comment: Environmental group commenters disagreed with the EPA's proposed denial of the Petition with respect to specific enforcement discretion provisions in the SIPs of several states. The commenters contended that the SIP provisions are too ambiguous for courts to recognize that the exercise of enforcement discretion by state personnel did not preclude enforcement by the EPA or others.

Response: The EPA disagrees with these comments. In the February 2013 proposal, the EPA explained how it reads the specific enforcement discretion provisions in the SIPs of each of these states. The EPA explained its evaluation of these provisions in detail. In comments submitted on the February 2013 proposal, the states in question agreed with the EPA's reading of the provisions. Each state agreed that these provisions only applied to air agency personnel and not to the EPA or any other party. Thus, the EPA believes that there should be no dispute about the proper interpretation of these SIP provisions in any potential future enforcement action.

b. Comments that opposed the EPA's issuing SIP calls to obtain state agency clarification of ambiguous enforcement discretion provisions in SIPs.

Comment: One commenter asserted that requiring states to correct an ambiguous ''enforcement discretion'' provision in its SIP in order to eliminate ''perceived ambiguity'' is a ''waste of resources.'' Although agreeing that a state's exercise of enforcement discretion cannot affect enforcement by the EPA or other parties under the citizen suit provision, the commenter believed that the existence of ambiguous provisions that could be misconstrued by a court to bar enforcement by the EPA or others if the state elects not to enforce is not a significant concern.

Response: The EPA agrees with the commenter that a state's legitimate exercise of enforcement discretion not to enforce in the event of violations of SIP provisions should have no bearing whatsoever on whether the EPA or others may seek to enforce for the same violations. However, the Agency disagrees with the commenter concerning whether some SIP provisions need to be clarified in order to assure that this principle is adhered to in practice in enforcement actions. For example, if on the face of an approved SIP provision the state

[279] *See* 1999 SSM Guidance at 3.

[280] *See* ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 75 FR 70888 at 70892–93 (November 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).

[281] *See id.*

appears to have the unilateral authority to decide that a specific event is not a ''violation'' or if it otherwise appears that if the state elects not to pursue enforcement for such violation then no other party may do so, then that SIP provision fails to meet fundamental legal requirements for enforcement under the CAA. If the SIP provision appears to provide that the decision of the state not to enforce for an exceedance of the SIP emission limit bars the EPA or others from bringing an enforcement action, then that is an impermissible imposition of the state's enforcement discretion decisions on other parties. The EPA has previously issued a SIP call to resolve just such an ambiguity, and its authority to do so has been upheld.[282] Given that the commenter agrees with the underlying principle that a state's exercise of enforcement discretion should have no bearing on the exercise of enforcement authority of the EPA or citizens, the Agency presumes that the commenter would not in fact oppose a SIP revision to clarify that point. Moreover, the commenter would not be harmed by such a SIP revision and would have no basis upon which to challenge it. As the clarification of the ambiguous SIP provision should be in the interest of all involved, including the regulated entities, the regulators and the public, the EPA does not believe that resources used to eliminate such ambiguities would be wasted.

E. Affirmative Defense Provisions in SIPs During Any Period of Operation

As explained in detail in the SNPR, the EPA believes that the CAA prohibits affirmative defense provisions in SIPs. The EPA acknowledges that since the 1999 SSM Guidance, the Agency had interpreted the CAA to allow narrowly tailored affirmative defense provisions. However, the EPA's interpretation of the statute was based on arguments that have since been rejected by the DC Circuit in the *NRDC* v. *EPA* decision. The EPA received a substantial number of comments, both supportive and adverse, concerning the issue of affirmative defense provisions in SIPs. These comments and the EPA's responses to them are discussed in section IV.D of this document.

F. Relationship Between SIP Provisions and Title V Regulations

As the EPA explained in the February 2013 proposal, the SIP provisions identified in the Petition highlighted an area of potential ambiguity or conflict between the SSM Policy applicable to SIP provisions and the EPA's regulations applicable to CAA title V operating 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 federal operating permit programs.[283] Under each set of regulations, the EPA has provided that permits may contain, at the permitting authority's discretion, an ''emergency provision.'' [284]

The regulatory parameters applicable to such emergency provisions in operating permits are the same for state operating permit program regulations and the federal operating permit program regulations. The definition of emergency is identical in the regulations for each program.[285]

Thus, if there is an emergency event meeting the regulatory definition, then the EPA's regulations for operating permit programs provide for an ''affirmative defense'' to enforcement for noncompliance with technology-based standards during the emergency event, provided the source can demonstrate through specified forms of evidence that the event and the permittee's actions during and after the event met a number of specific requirements.[286]

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. In its February 2013 proposal, the EPA explained that while it was proposing to allow narrowly drawn affirmative defense provisions for malfunctions in SIPs, SIP provisions that were modeled after the regulations in 40 CFR part 70 and 40 CFR part 71 were still in conflict with the EPA's interpretation of the CAA for SIP provisions and thus could not be allowed.[287] However, as explained in the SNPR, the reasoning in the subsequent *NRDC* v. *EPA* court decision is that even narrowly defined affirmative defense provisions in SIPs are no longer consistent with the CAA.[288] Accordingly, regardless of whether affirmative defense provisions in SIPs were defined more narrowly than were the provisions applicable to operating permits under 40 CFR part 70 and 40 CFR part 71, they cannot be included in SIPs. For these reasons, the EPA has evaluated the specific SIP provisions identified in the Petition and is taking final action to find 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.

Additionally, we are not taking action in this rulemaking to alter the emergency provisions found in 40 CFR part 70 and 40 CFR part 71. Those regulations, which are applicable to title V operating permits, may only be changed through appropriate rulemaking to revise parts 70 and 71. Further, any existing permits that contain such emergency provisions may only be changed through established permitting procedures. The EPA is considering whether to make changes to 40 CFR part 70 and 40 CFR part 71, and if so, how best to make those changes. In any such action, EPA would also intend to address the timing of any changes to existing title V operating permits. Until that time, as part of normal permitting process, the EPA encourages permitting authorities to consider the discretionary nature of the emergency provisions when determining whether to continue to include permit terms modeled on those provisions in operating permits that the permitting authorities are issuing in the first instance or renewing.

G. 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 final action on the Petition, of its clarifications and revisions to the SSM Policy and of its application of the updated SSM Policy to the specific existing SIP provisions discussed in section IX of this document.

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 grant of the Petitioner's request that the EPA interpret the CAA to disallow all affirmative defense provisions is intended to convey that the EPA has

[282] *See* ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision; Proposed rule,'' 76 FR 21639 (April 18, 2011).

[283] *See* 40 CFR 70.1–70.12; 40 CFR 71.1–71.27.

[284] *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 (November 1, 2001).

[285] *See* 40 CFR 70.6(g)(1); 40 CFR 71.6(g)(1).

[286] 40 CFR 70.6(g)(3); 40 CFR 71.6(g)(3).

[287] *See* February 2013 proposal, 78 FR 12459 at 12481–82.

[288] *See* SNPR, 79 FR 55919 at 55929–30.

changed its views about such provisions and that its prior views expressed in the 1999 SSM Guidance and related rulemakings on SIP submissions were incorrect. 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 immediately any existing permit terms or conditions regarding excess emissions during SSM events that reflect previously approved SIP provisions. The EPA's finding of substantial inadequacy and a SIP call for a given state provides the state 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 this final action, developed through notice and comment, to be the statement of 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 adding to and clarifying its prior statements in the 1999 SSM Guidance and making the specific changes to that guidance as discussed in this action. Thus, this 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 that ''[w]henever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality 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.'' [289]

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 only become inadequate due to subsequent events.[290] 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 $PM_{2.5}$ 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

[289] 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.

[290] *See, e.g., Michigan* v. *EPA,* 213 F.3d 663 (D.C. Cir. 2000) (upholding the ''NO_X 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 (December 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 (April 18, 2011) (the EPA issued a SIP call to rectify SIP provisions dating back to 1980).

required to constitute a ''reasonably available control measure'' in CAA section 172(c)(1) and the other applicable statutory requirements for the implementation of the 1997 $PM_{2.5}$ NAAQS. Failure to 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.[291] 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 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.[292] 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 exemption and have literally caused a specific NAAQS violation.[293]

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.[294] 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 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.[295] If a court could

[291] *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 (October 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 (April 18, 2011) (the EPA issued a SIP call to one state requiring it to rectify several very specific SIP provisions).

[292] *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).

[293] 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 failed 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 (December 13, 2010).

[294] *See* ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 74 FR 21639 at 21641 (April 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).

[295] 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

construe the ambiguous SIP provision to bar enforcement, then 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 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.[296]

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 purport to limit or eliminate a court's jurisdiction to assess liability and impose remedies for exceedances of SIP emission limitations. 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 Agency determines that a SIP call is the proper means to rectify an existing deficiency in a SIP.

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 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 attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility, and SIP provisions that include such exemptions fail to meet these and 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 302(k), 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 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.

Because the NAAQS are not directly enforceable against individual sources, air agencies rely on the adoption and enforcement of these generic and specific emission limitations in SIPs in order to provide for attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility, and to meet 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 to encourage 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 another wise applicable emission limitation if the source could not meet the requirement in certain circumstances.[297] 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 preauthorized exercise of director's discretion will not interfere with other CAA requirements, such as providing for attainment and maintenance of the

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.

[296] *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).

[297] 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.

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 emission limitations required by 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, except through specified processes.[298] 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 by that term is acceptable, the EPA interprets the statute to prohibit such provisions unless they would be consistent with the statutory and regulatory requirements that apply to SIP revisions.[299] 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. The EPA's approval of a SIP provision that purported to allow unilateral revisions of the emission limitations in the SIP by the state, without complying with the statutory requirements for a SIP revision, would itself be contrary to fundamental procedural and substantive requirements of the CAA.

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.[300] 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, then to be consistent with CAA requirements the provisions must be structured so that any resulting variances or other deviations from the emission limitation or other 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 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 provides sufficient process or sufficient bounds on the exercise of director's discretion to be permissible. Most on their face would allow potentially limitless exemptions from SIP requirements 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 or other 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 *ad hoc* mechanism of a 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.

[298] 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 (January 26, 2011); ''Corrections to the California State Implementation Plan,'' 69 FR 67062 at 67063 (November 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'').

[299] *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.'').

[300] *See, e.g.,* ''Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to Regulation 1,'' 76 FR 4540 (January 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; Direct final rule,'' 74 FR 57051 (November 3, 2009) (rulemaking to remove, pursuant to CAA section 110(k)(6), variance provisions from Arizona and Nevada SIPs).

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 there is 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.[301]

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.[302] 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 and citizens, and any court in which they seek to pursue an enforcement claim for violation of SIP requirements, must retain the authority toevaluateindependently whethera source's violation of an emission limitation warrants enforcement action. Potential for enforcement by the EPA or through a citizen suit provides an important safeguardintheevent that the air agency lacks resources or ability to enforce violations and provides additional deterrence. Accordingly, a SIP provision that operates at the air agency's election to eliminate the authority of the EPA or the public to pursue enforcement actions 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 Affirmative Defense Provisions

The EPA believes that SIP provisions that provide an affirmative defense for excess emissions during SSM events are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible affirmative defense operates to limit or eliminate the jurisdiction of federal courts to assess liability or to impose remedies in an enforcement proceeding for exceedances of SIP emission limitations. Some affirmative defense provisions apply broadly, whereas others are components of specific emission limitations. Some provisions use the explicit term ''affirmative defense,'' whereas others are structured as such provisions but do not use this specific terminology. All of these provisions, however, share the same legal deficiency in that they purport to alter the statutory jurisdiction of federal courts under section 113 and section 304 to determine liability and to impose remedies for violations of CAA requirements, including SIP emission limitations. Accordingly, an affirmative defense provision that operates to limit or to eliminate the jurisdiction of the federal courts would undermine the enforcement structure of the CAA and would thus be substantially inadequate to meet fundamental requirements in CAA sections 113 and 304. By undermining enforcement, such provisions also are inconsistent with fundamental CAA requirements such as attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility.

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 states to submit corrective SIP submissions 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 agencies, affected sources and members of the public all are adequately

[301] *See, e.g.,* ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 75 FR 70888 at 70892 (November 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.

[302] *See* 1999 SSM Guidance at 3.

informed and afforded the opportunity to participate in the process. Through the February 2013 proposal, the SNPR and this final notice, the EPA is providing a full evaluation of the issues raised by the Petition and has used this process as a means of giving clear and up-to-date guidance concerning SIP provisions relevant to the treatment of excess emissions during SSM events that is consistent with CAA requirements.

If the state fails to submit the corrective SIP revision by the deadline established in this final notice, CAA section 110(c) authorizes the EPA to "find[ ] that [the] State has failed to make a required submission." [303] 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 finds that the air agency failed to submit a complete SIP revision that responds to this 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.[304]

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 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 NSR 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 deficient SIP revision in response to a SIP call.[305] In the February 2013 proposal, as the EPA has done in other SIP calls, the EPA proposed that the 2-to-1 emission offset requirement will apply for all new sources subject to the nonattainment NSR program beginning 18 months following such finding or disapproval unless the state corrects the deficiency before that date. The EPA proposed that the highway funding restrictions sanction will also apply beginning 24 months following such finding or disapproval unless the state corrects the deficiency before that date. Finally, the EPA proposed that the provisions in 40 CFR 52.31 regarding staying the sanctions clock and deferring the imposition of sanctions would also apply. In this action, the EPA is finalizing the order of sanctions as proposed in the February 2013 proposal and finalizing its decision concerning the application of 40 CFR 52.31.

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, *i.e.,* 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 that 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 any NAAQS within the state. In this case, the EPA will evaluate the geographic scope of potential sanctions at the time it makes a determination that the air agency has failed to make a complete SIP submission in response to this SIP call, or at the time it disapproves such a SIP submission. The appropriate geographic scope for sanctions may vary depending upon the SIP provisions at issue.

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

When the EPA finalizes a finding of substantial inadequacy and a 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 that is up to 18 months from the date of the final finding of inadequacy.

The EPA proposed to establish a date 18 months from the date of promulgation of the final finding for the state to respond to the SIP call. After further evaluation of this issue and consideration of comments on the proposed SIP call, the EPA has decided to finalize the proposed schedule. Thus, the SIP submission deadline for each of the states subject to this SIP call will be November 22, 2016. 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 providing 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 full 18 months authorized under CAA section 110(k)(5) in order to allow states sufficient time to make SIP revisions following their own SIP development process. During this time, the EPA recognizes, an affected state will need to revise its 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. There may be exceptions, particularly in states that have adopted especially time-consuming procedures for adoption and submission of SIP revisions. 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. For example, if circumstances do not allow the state to develop alternative emission limitations within that time, the state may find it necessary to remove the automatic exemptions in an initial responsive SIP revision and establish alternative emission limitations in a later SIP revision. 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

[303] CAA section 110(c)(1)(A).

[304] The 2-year deadline does not necessarily apply to FIPs following disapproval of a tribal implementation plan.

[305] *See* "Selection of Sequence of Mandatory Sanctions for Findings Made Pursuant to Section 179 of the Clean Air Act," 59 FR 39832 (August 4, 1994), codified at 40 CFR 52.31.

Office as they develop the SIP revisions. The EPA intends to review and act upon the SIP submissions as promptly as resources will allow, in order to correct these deficiencies in as timely a manner as possible. Recent experience with several states that elected to correct the deficiencies identified in the February 2013 proposal in advance of this final action suggests that these SIP revisions can be addressed efficiently through cooperation between the air agencies and the EPA.

The EPA notes that the SIP call for affected states finalized in this action is narrow and applies 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. With adequate justification, this SIP revision might, *e.g.,* replace a numerical emission limitation with an alternative control method (design, equipment, work practice or operational standard) as a component of the emission limitation applicable during startup and/or shutdown periods.

The EPA emphasizes 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 revision in response to the SIP call. Under principles of cooperative federalism, the CAA vests air agencies with substantial discretion in how to develop SIP provisions, so long as the provisions meet the legal requirements and objectives of the CAA.[306] Thus, the inclusion of a SIP call to a state in this action should not be misconstrued as a directive to the state to adopt a particular control measure. The EPA is merely requiring that affected states make SIP revisions 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.[307] Through this rulemaking action, the EPA is reiterating, clarifying and updating its interpretations of the CAA with respect to SIP provisions that apply to emissions from sources during SSM events in order to provide states with comprehensive guidance concerning such provisions.

Finally, the EPA notes that under section 553 of the Administrative Procedure Act, 5 U.S.C. 553(d), an agency rule should not be ''effective'' less than 30 days after its publication, unless certain exceptions apply including an exception for ''good cause.'' In this action, the EPA is simultaneously taking final action on the Petition, issuing its revised SSM Policy guidance to states for SIP provisions applicable to emissions during SSM events and issuing a SIP call to 36 states for specific existing SIP provisions that it has determined to be substantially inadequate to meet CAA requirements. Section 110(k)(5) provides that the EPA must notify states affected by a SIP call and must establish a deadline for SIP submissions by affected states in response to a SIP call not to exceed 18 months after the date of such notification. The EPA is notifying affected states of this final SIP call action on May 22, 2015. Thus, regardless of the effective date of this action, the deadline for submission of SIP revisions to address the specific SIP provisions that the EPA has identified as substantially inadequate will be November 22, 2016. In addition, the EPA concludes that there is good cause for this final action to be effective on May 22, 2015, the day upon which the EPA provided notice to the states, because any delayed effective date would be unnecessary given that CAA section 110(k)(5) explicitly provides that the deadline for submission of the required SIP revisions runs from the date of notification to the affected states, not from some other date, and shall not exceed 18 months.

D. Response to Comments Concerning SIP Call Authority, Process and Timing

The EPA received a wide range of comments on the February 2013 proposal and the SNPR questioning the scope of the Agency's authority to issue this SIP call action under section 110(k)(5), the process followed by EPA for this SIP call action, or the timing that the EPA provided for response to this SIP call action. Although there were numerous comments on these general topics, the majority of the comments raised the same questions and made similar arguments (*e.g.,* that the EPA has an obligation under section 110(k)(5) to ''prove'' not only that an exemption for SSM events in a SIP emission limitation is contrary to the explicit legal requirements of the CAA but also that this illegal exemption ''caused'' a specific violation of the NAAQS at a particular monitor on a particular day). For clarity and ease of discussion, the EPA is responding to these overarching comments, grouped by topic, in this section of this document.

1. Comments that section 110(k)(5) requires the EPA to ''prove causation'' to have authority to issue a SIP call.

Comment: Numerous state and industry commenters argued that the EPA has no authority to issue a SIP call with respect to a given SIP provision unless and until the Agency first proves definitively that the provision has caused a specific harm, such as a specific violation of the NAAQS in a specific area. These commenters generally focused uponthe ''attainment and maintenance'' clause of section 110(k)(5) and did not address the ''comply with any requirement of'' the CAA clause.

For example, many industry commenters opposed the EPA's interpretation of section 110(k)(5) on the grounds that the Agency had failed to provide a specific technical analysis ''proving'' how the SIP provisions failed to provide for attainment or maintenance of the NAAQS. For areas attaining the NAAQS, commenters asserted that there should be a presumption that existing SIP provisions are adequate if they have resulted in attainment of the NAAQS. For areas violating the NAAQS, commenters claimed that the EPA is required to conduct a technical analysis to determine if there is a ''nexus between the provisions that are the subject of its SSM SIP Call Proposal and the specific pollutants for which attainment has not been achieved.'' Other industry commenters argued that in order to have authority to issue a SIP call, the EPA must prove through a technical analysis that a given SIP provision ''is'' substantially inadequate, not that it ''may be.'' These commenters claimed that the EPA has not shown how any of the SIP provisions at issue in this action ''threatens the NAAQS, fails to sufficiently mitigate interstate transport, or comply with any other

[306] *See Virginia* 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).

[307] Notwithstanding the latitude states have in developing SIP provisions, the EPA is required to assure thatstates meet the basiclegalcriteria for SIPs. *See Michigan* v. *EPA,* 213 F.3d 663, 686 (D.C. Cir. 2000) (upholding NO_x 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).

CAA requirement.'' Many industry commenters questioned whether exempt emissions during SSM events pose any attainment-related concerns, making assertions such as: ''[i]nfrequent malfunction, startup and shutdown events at a limited number of stationary sources are likely to have no effect on attainment.''

Many state commenters made similar arguments, based on the specific attainment or nonattainment status of areas in their respective states. For example, one state commenter claimed that the EPA failed to make required technical findings that the specific provisions the Agency identified as legally deficient ''are so substantially inadequate that the State cannot attain or maintain the NAAQS or otherwise comply with the CAA.'' The commenter claimed that the EPA should have evaluated all of the state's emission limitations, emission inventories and attainment and maintenance demonstrations for the NAAQS, rather than focusing on these individual SIP provisions. In order to demonstrate substantial inadequacy under section 110(k)(5), the state claimed, the EPA ''must point to facts'' that show ''the State cannot attain or maintain the NAAQS or comply with the CAA'' if the provisions remain in the SIP. Other states made comparable arguments with respect to the SIP provisions at issue in their SIPs and claimed that the EPA is required to establish how the provisions caused or contributed to a specific violation of a NAAQS in those states.

By contrast, many environmental group commenters and individual commenters took the opposite position concerning what is necessary to support a finding of substantial inadequacy under section 110(k)(5). These commenters argued that that the EPA may issue a SIP call not only where it determines that a SIP is substantially inadequate to attain or maintain a NAAQS with a technical analysis but also where the Agency determines that the SIP is substantially inadequate ''to comply with any requirement of the Act.'' The commenters noted that the EPA identified specific statutory provisions of the CAA with which the SIP provisions at issue in this action do not comply. For example, these commenters agreed with the EPA's view that SIP provisions with automatic or discretionary exemptions for emissions during SSM events do not meet the fundamental requirements that SIP emission limitations must apply to limit emissions from sources on a continuous basis, in accordance with sections 110(a)(2)(A), 110(a)(2)(C) and 302(k). In addition to arguing that failure to meet legal requirements of the CAA is a sufficient basis for a SIP call, some commenters provided additional support to illustrate how SIP provisions with deficiencies such as automatic or discretionary exemptions for emissions during SSM events result in large amounts of excess emissions that would otherwise be violations of the applicable emission limitations.

Response: The EPA disagrees with the argument that it has no authority to issue a SIP call under section 110(k)(5) unless the Agency provides a factual or technical analysis to demonstrate that the SIP provision at issue caused a specific environmental harm or undermined a specific enforcement case. As explained in the February 2013 proposal, in the SNPR and in this final action, the EPA interprets its authority under section 110(k)(5) to authorize a SIP call for not only provisions that are substantially inadequate for purposes of attainment or maintenance of the NAAQS but also those provisions that are substantially inadequate for purposes of ''any requirement'' of the CAA.[308] To be clear, the EPA can also issue a SIP call whenever it determines that a SIP as a whole, or a specific SIP provision, is deficient because the SIP did not prevent specific violations of a NAAQS, at a specific monitor, on a specific date. However, that is not the extent of the EPA's authority under section 110(k)(5).

On its face, section 110(k)(5) does not impose any explicit requirements with respect to what specific form of factual or analytical basis is necessary for issuance of a SIP call. Because the statute does not prescribe the basis on which the EPA is to make a finding of substantial inadequacy, the Agency interprets section 110(k)(5) to provide discretion concerning what is necessary to support such a finding. The Agency believes that the nature of the factual or analytical basis necessary to make a finding is dependent upon the specific nature of the substantial inadequacy in a given SIP provision.

For example, when the EPA issued the NO_X SIP Call to multiple states because their SIPs failed to address interstate transport adequately in accordance with section 110(a)(2)(D)(i)(I), the Agency did base that SIP call on a detailed factual analysis including ambient air impacts.[309] In that situation, the specific requirement of the CAA at issue was the statutory obligation of each state to have a SIP that contains adequate provisions to prohibit emissions from sources ''in amounts'' that ''contribute significantly to nonattainment in, or interfere with maintenance by, any other State'' with respect to the NAAQS. Because of the phrase ''in amounts,'' the EPA considered it appropriate to evaluate whether each state's SIP was substantially inadequate to comply with section 110(a)(2)(D)(i)(I) through a detailed analysis of the emissions from the state and their impacts on other states. Moreover, given the use of ambiguous terms in section 110(a)(2)(D)(i)(I) such as ''contribute significantly,'' the EPA concluded that it was appropriate to conduct a detailed analysis to quantify the amount of emissions that each of the affected states needed to eliminate in order to comply with section 110(a)(2)(D)(i)(I) for the specific NAAQS in question. However, the EPA's decision to determine these facts and to conduct these analyses as a basis for that particular SIP call action was due to the nature of the SIP deficiency at issue and the wording of section 110(a)(2)(D)(i)(I). The EPA has similarly issued other SIP calls for which the Agency determined that a specific factual or technical analysis was appropriate to support the finding of substantial inadequacy.[310]

Not all situations, however, require the same type of detailed factual analysis to support the finding of substantial inadequacy. For example, when the EPA issued the PSD GHG SIP call to 13 states for failure to have a PSD permitting program that properly addresses GHG emissions, the Agency did not need to base that SIP call action on a detailed factual analysis of ambient air impacts.[311] In that situation, the statutory requirement of the CAA in question was the obligation of each state SIP under section 110(a)(2)(C) to

[308] *See* February 2013 proposal, 78 FR 12459 at 12483–89 (February 22, 2013); SNPR, 79 FR 55919 at 55935.

[309] *See* ''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 (October 27, 1998).

[310] *See, e.g.,* ''Finding of Substantial Inadequacy of Implementation Plan; Call for Iowa State Implementation Plan Revision,'' 76 FR 41424 (July 14, 2011) (SIP call to Iowa due to $PM_{2.5}$ NAAQS violations in Muscatine area); ''Approval and Promulgation of State Implementation Plans; Call for Sulfur Dioxide SIP Revisions for Billings/Laurel, MT [Montana],'' 58 FR 41430 (August 4, 1993) (SIP call to Montana due to modeled violations of the SO_2 NAAQS).

[311] *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,'' 75 FR 77698 (December 13, 2010). The EPA notes that a number of petitioners challenged this SIP call on various grounds, but the court ultimately determined that they did not have standing. *Texas* v. *EPA,* 726 F.3d 180 (D.C. Cir. 2013).

include a PSD permitting program that addresses all federally regulated air pollutants, including GHGs. In that action, the EPA made a finding that the SIPs of 13 states were substantially inadequate to ''comply with any requirement'' of the CAA because the PSD permitting programs in their EPA-approved SIPs did not apply to GHG emissions from new and modified sources. Accordingly, the EPA issued a SIP call to the 13 states because their SIPs failed to comply with specific legal requirements of the CAA. This failure to meet an explicit CAA legal requirement to address GHG emissions in permits for sources as required by statute did not require the EPA to provide a technical analysis of the specific environmental impacts that this substantial inadequacy would cause. For this type of SIP deficiency, it was sufficient for the EPA to make a factual finding that the affected states had SIPs that failed to meet this fundamental legal requirement.[312] The EPA has issued other SIP calls for which the Agency made a finding that a state's failure to meet specific legal requirement of the CAA for SIPs was a substantial inadequacy without the need to provide a technical air quality analysis relating to NAAQS violations.[313]

The EPA believes that the most relevant precedent for what is necessary to support a finding of substantial inadequacy in this action is the SIP call that the Agency previously issued to the state of Utah for deficient SIP provisions related to the treatment of excess emissions during SSM events.[314] In that SIP call action, the EPA made a finding that two specific provisions in the state's SIP were substantially inadequate because they were inconsistent with legal requirements of the CAA. For one of the provisions that included an exemption for emissions during ''upsets'' (*i.e.,* malfunctions), the EPA explained:

> Contrary to CAA section 302(k)'s definition of emission limitation, the exemption [in the provision] renders emission limitations in the Utah SIP less than continuous and, contrary to the requirements of CAA sections 110(a)(2)(A) and (C), undermines the ability to ensure compliance with SIP emissions limitations relied on to achieve the NAAQS and other relevant CAA requirements at all times. Therefore, the [provision] renders the Utah SIP substantially inadequate to attain or maintain the NAAQS or to comply with other CAA requirements such as CAA sections 110(a)(2)(A) and (C) and 302(k), CAA provisions related to prevention of significant deterioration (PSD) and nonattainment NSR permits (sections 165 and 173), and provisions related to protection of visibility (section 169A).[315]

For a second provision, the EPA made a finding of substantial inadequacy because the provision interfered with the enforcement structure of the CAA. The EPA explained:

> This provision appears to give the executive secretary exclusive authority to determine whether excess emissions constitute a violation and thus to preclude independent enforcement action by EPA and citizens when the executive secretary makes a non-violation determination. This is inconsistent with the enforcement structure under the CAA, which provides enforcement authority not only to the States, but also to EPA and citizens. . . . Because it undermines the envisioned enforcement structure, it also undermines the ability of the State to attain and maintain the NAAQS and to comply with other CAA requirements related to PSD, visibility, NSPS, and NESHAPS.[316]

In the Utah SIP call rulemaking, the EPA received similar adverse comments arguing that the Agency has no authority under section 110(k)(5) to issue a SIP call without a factual analysis that proves that the deficient SIP provisions caused a specific environmental harm, such as a NAAQS violation. Commenters in that rulemaking likewise argued that the EPA was required to prove a causal connection between the excess emissions that occurred during a specific exempt malfunction and a specific violation of the NAAQS. In response to those comments, the EPA explained:

> [W]e need not show a direct causal link between any specific unavoidable breakdown excess emissions and violations of the NAAQS to conclude that the SIP is substantially inadequate. It is our interpretation that the fundamental integrity of the CAA's SIP process and structure is undermined if emission limits relied on to meet CAA requirements can be exceeded without potential recourse by any entity granted enforcement authority by the CAA. We are not restricted to issuing SIP calls only after a violation of the NAAQS has occurred or only where a specific violation can be linked to a specific excess emissions event.[317]

The EPA's interpretation of section 110(k)(5) in the Utah action was directly challenged in *US Magnesium, LLC* v. *EPA*.[318] Among other claims, the petitioners argued that the EPA did not have authority for the SIP call because the Agency had not ''set out facts showing that the [SIP provision] has prevented Utah from attaining or maintaining the NAAQS or otherwise complying with the CAA.'' Thus, the same arguments raised by commenters in this action have previously been advanced and rejected by the EPA and the courts. The court expressly upheld the EPA's interpretation of section 110(k)(5), concluding:

> Certainly, a SIP could be deemed substantially inadequate because air-quality records showed that actions permitted under the SIP resulted in NAAQS violations, but the statute can likewise apply to a situation like this, where the EPA determines that a SIP is no longer consistent with the EPA's understanding of the CAA. In such a case, the CAA permits the EPA to find that a SIP is substantially inadequate to comply with the CAA, which would allow the EPA to issue a SIP call under CAA section 110(k)(5).[319]

Finally, the EPA disagrees with the commenters on this specific point because it is not a logical construction of section 110(k)(5). The implication of the commenters' argument is that if a given area is in attainment, then the question of whether the SIP provisions meet applicable legal requirements is irrelevant. If a given area is not in attainment, then the implication of the commenter's argument is that the EPA must prove that the legally deficient SIP provision factually caused the violation of the NAAQS or else the legal deficiency is irrelevant. In the latter case, the logical extension of the commenter's argument is that no matter how deficient a SIP provision is to meet applicable legal requirements, the EPA is foreclosed from directing the state to correct that deficiency unless and until there is proof of a specific environmental harm caused, or specific enforcement case thwarted, by that deficiency. Such a reading is inconsistent with both the letter and the intent of section 110(k)(5).

2. Comments that the EPA must make specific factual findings to meet the

[312] *Id.,* 75 FR 77698 at 77705–07.

[313] *See, e.g.,* ''Finding of Substantial Inadequacy of Implementation Plan; Call for California State Implementation Plan Revision,'' 68 FR 37746 (June 25, 2003) (SIP call to California for failure to meet legal requirements of section 110(a)(2)(C), section 110(a)(2)(I), and section 110(a)(2)(E) because of exemptions for agricultural sources from NNSR and PSD permitting requirements); ''Credible Evidence Revisions,'' 62 FR 8314 at 8327 (February 24, 1997) (discussing SIP calls requiring states to revise their SIPs to meet CAA requirements with respect to the use of any credible evidence in enforcement actions for SIP violations).

[314] *See* ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision; Proposed rule,'' 76 FR 21639 (April 18, 2011).

[315] *Id.,* 76 FR 21639 at 21641. The EPA also found the first provision substantially inadequate because it operated to create an additional exemption for emissions during malfunctions that modified the existing emission limitations in some federal NSPS and NESHAP that the state had incorporated by reference into its SIP. The EPA's 1999 SSM Guidance had indicated that state SIP provisions could not validly alter NSPS or NESHAP.

[316] *Id.*

[317] *Id.,* 76 FR 21639 at 21643.

[318] 690 F.3d 1157 (10th Cir. 2012).

[319] *Id.* 690 F.3d at 1168.

requirements of section 110(a)(2)(H)(ii) to have authority to issue a SIP call.

Comment: A number of commenters argued that even if section 110(k)(5) does not require the EPA to provide a technical analysis to support a finding of substantial inadequacy, section 110(a)(2)(H)(ii) does impose this obligation. The commenters noted that section 110(a)(2)(H)(ii) requires states to revise their SIPs ''whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate.'' The commenters claimed that this statutory language imposes a requirement for the EPA to ''find'' the SIP inadequate and ''clearly indicates that a SIP Call must be justified by factual findings supported by record evidence.''

One commenter argued that the use of the word ''finds'' should be read in light of the dictionary definition of ''find''—''to discover by study or experiment.'' The commenter noted that courts commonly hold that agencies must draw a link between the facts and a challenged agency decision. To support this basic principle of administrative law, the commenter cited a litany of cases including: *Motor Vehicle Mfrs Ass'n* v. *State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983); *Appalachian Power Co.* v. *EPA,* 251 F.3d 1026, 1034 (D.C. Cir. 2001); *Tex Tin Corp.* v. *EPA,* 992 F.2d 353, 356 (D.C. Cir. 1993); *Nat'l Gypsum* v. *EPA,* 968 F.2d 40, 43–44 (D.C. Cir. 1992); *Michigan* v. *EPA,* 213 F.3d 663, 681 (D.C. Cir. 2000). Thus, the commenter suggested that the statutory language of section 110(a)(2)(H)(ii) requires a specific factual or technical demonstration concerning the ambient air impacts of an inadequate SIP provision, even if the language of section 110(k)(5) does not.

Another commenter argued that the phrase ''on the basis of information available to the Administrator'' in section 110(a)(2)(H)(ii) means that the EPA must not only consider the specific terms of the SIP provisions relative to the legal requirements of the statute but must also consider other information that is ''available,'' including how the provisions have been affecting air quality or enforcement since approval. In support of this proposition, the commenter cited 1970 legislative history for section 110(a)(2)(H):

> Whenever the Secretary or his representative finds from new information developed after the plan is approved that the plan is not or will not be adequate to achieve promulgated ambient air quality standards he must notify the appropriate States and give them an opportunity to respond to the new information.[320]

Thus, the commenter concluded that the EPA must not only find that the SIP is facially inconsistent with the legal requirements of the CAA but also find it ''substantially inadequate'' to achieve the goals of the requirements as a factual matter before issuing a SIP call. The implication of the commenter's argument is that section 110(a)(2)(H)(ii) imposes additional limitations upon the EPA's authority to issue a SIP call.

Response: The EPA disagrees that it has not made the findings necessary to support the present SIP call action. The thrust of the commenters' argument is that the facts that the EPA ''finds'' or the ''information'' upon which the EPA bases such a finding can *only* be technical or scientific facts proving that a given SIP provision resulted in emissions that caused a specific violation of the NAAQS. As with section 110(k)(5), however, nothing in section 110(a)(2)(H)(ii) compels such a narrow reading. The plain language of section 110(a)(2)(H)(ii) does not support the commenters' arguments. To the extent that section 110(a)(2)(H)(ii) is ambiguous, however, the EPA does not interpret it to require the types of technical findings claimed by the commenters in the case of SIP provisions that do not meet legal requirements of the CAA. To the contrary, the EPA interprets the statutory language to leave to the Agency's discretion what facts or information are necessary to find that a given SIP provision is substantially inadequate. In short, the EPA's ''finding'' may be a finding that a SIP provision does not meet applicable legal requirements without definitive proof that this legal deficiency caused a specific outcome, such as a specific impact on the NAAQS or a specific enforcement action.

First, section 110(a)(2)(H)(ii) does not on its face directly address the scope of the EPA's authority, unlike section 110(k)(5). Section 110(a)(2)(H)(ii) appears in section 110(a)(2), which contains a listing of specific structural or program requirements that each state's SIP must include. In the case of section 110(a)(2)(H)(ii), the CAA requires each state to have provisions in its SIP that ''provide for revision of such plan'' in the event that the EPA issues a SIP call. Given that section 110(k)(5) is the provision that directly addresses the EPA's authority to issue a SIP call, section 110(a)(2)(H)(ii) should not be interpreted in a way that contradicts or curtails the broad authority provided in section 110(k)(5). The EPA does not interpret section 110(k)(5) to require proof that a given SIP provision caused a specific environmental harm or undermined a specific enforcement action in order to find the provision substantially inadequate. If the provision fails to meet fundamental legal requirements of the CAA for SIP provisions, that alone is sufficient.

Second, even if read in isolation, section 110(a)(2)(H)(ii) does not specify what type of finding the EPA is required to make or specify the way in which the Agency should make such a finding. The EPA agrees that this section of the CAA describes findings that the EPA makes ''on the basis of information available to the Administrator that the plan is substantially inadequate to attain'' the NAAQS. This section does not, however, expressly state that the ''information'' in question must be a particular form of information, nor does it expressly require any specified form of technical analysis such as modeling that demonstrates that a particular SIP deficiency caused a violation of the NAAQS. Because the term ''information'' is not limited in this way, the EPA interprets it to mean whatever form of information is relevant to the finding in question. For certain types of deficiencies, the EPA may determine that such a technical analysis is appropriate, but that does not mean that it is required as a basis for all findings of substantial inadequacy.[321]

Third, section 110(a)(2)(H)(ii), like section 110(k)(5), is not limited to findings related exclusively to attainment of the NAAQS. Section 110(a)(2)(H)(ii) also expressly refers to findings by the EPA that a SIP is substantially inadequate ''to otherwise comply with any additional requirements established under'' the CAA. The EPA interprets this explicit reference to ''any additional requirements'' to include any legal requirements applicable to SIP provisions, such as the requirement that emission limitations must apply continuously. The commenters misconstrue section 110(a)(2)(H)(ii) to

[320] *See* S. Rep No. 91–1196 at 55–56 (1970).

[321] *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; Final rule,'' 63 FR 57355 (October 27, 1998) (EPA found that the SIPs of multiple states did not adequately control emissions that resulted in significant contribution to nonattainment in other states); ''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 77697 (December 13, 2010) (EPA found that the SIPs of multiple states did not meet the legal requirements for PSD permitting for GHG emissions).

refer exclusively to provisions that are literally found to cause a specific violation of the NAAQS. The EPA acknowledges that the legislative history quoted by the commenters discusses findings related to a failure of a SIP to attain the NAAQS, but the passage quoted does not explain the meaning of ''new information'' any more specifically than the statute, nor does the passage explain why the actual statutory text of section 110(a)(2)(H)(ii) now refers to findings related to failures to meet ''any additional requirements'' of the CAA.[322] Moreover, the commenters did not address the changes to the CAA in 1977 that added to the statutory language to refer to other requirements, nor did they address the changes to the CAA in 1990 that added section 110(k)(5), which refers to all other requirements of the CAA. The EPA believes that the more recent changes to the statute in fact support its view that section 110(a)(2)(H)(ii) entails compliance with the legal requirements of the CAA, not the narrow reading advocated by the commenters.

Fourth, the EPA disagrees with the commenters' arguments that it did not make factual ''findings'' to support this SIP call. To the contrary, the EPA has made numerous factual determinations with regard to the specific SIP provisions at issue. For example, for those SIP provisions that include automatic exemptions for emissions during SSM events, the EPA has found that the provisions are inconsistent with the definition of ''emission limitation'' in section 302(k) and that SIP provisions that allow sources to exceed otherwise applicable emission limitations during SSM events may interfere with attainment and maintenance of the NAAQS. The EPA has also made the factual determination that other SIP provisions that authorize director's discretion exemptions during SSM events are inconsistent with the statutory provisions applicable to the approval and revision of SIP provisions. The EPA has found that overbroad enforcement discretion provisions are inconsistent with the enforcement structure of the CAA in that they could be interpreted to allow the state to make the final decision whether such emissions are violations, thus impeding the ability of the EPA and citizens to enforce the emission limitations of the SIP. Similarly, the EPA has found, consistent with the court's decision in *NRDC* v. *EPA,* that affirmative defenses in SIP provisions are inconsistent with CAA requirements because they operate to alter or eliminate the jurisdiction of the courts to determine liability and impose penalties. In short, the EPA has made the factual findings that specific provisions are substantially inadequate to meet requirements of the CAA, as contemplated in both section 110(a)(2)(H)(ii) and section 110(k)(5).

Finally, the EPA notes that the cases cited by the commenters to support their contentions concerning the factual basis for agency decisions are not relevant to the specific question at hand. The correct question is whether section 110(a)(2)(H)(ii) requires the type of factual or technical analysis that they claim. None of the cases they cited address this specific issue. By contrast, the decision of the Tenth Circuit in *US Magnesium, LLC* v. *EPA* is much more relevant. In that decision, the court concluded that the EPA's authority under section 110(k)(5) is not restricted to situations where a deficient SIP provision caused a specific violation of the NAAQS and the exercise of that authority does not require specific factual findings that the provision caused such impacts.[323]

3. Comments that the EPA lacks authority to issue a SIP call because it is interpreting the term ''substantial inadequacy'' incorrectly.

Comment: Some commenters claimed that although the term ''substantially inadequate'' is not defined in the statute, the EPA made no effort to interpret the term. Citing *Qwest Corp.* v. *FCC,* 258 F.3d 1191, 1201–02 (10th Cir. 2001), the commenters argued that the EPA is not entitled to any deference to its interpretation of the term ''substantial inadequacy.''

Other commenters acknowledged that the EPA took the position that the term ''substantially inadequate'' is not defined in the CAA and that the Agency can establish an interpretation of that provision under *Chevron* step 2. However, these commenters disagreed that the EPA's interpretation of the term in the February 2013 proposal was reasonable. In particular, the commenters disagreed with the EPA's view that once a SIP provision is found to be ''facially inconsistent'' with a specific legal requirement of the CAA, nothing more is required to find the provision ''substantially inadequate'' to ''comply with'' that requirement. Commenters claimed that the EPA's interpretation conflicts with the statute because it ignores the statutory requirement that a SIP call be based on inadequacies that are ''substantial'' and that the interpretation does not meet the ''high bar'' Congress established before states could be required to undertake the difficult task of revising a SIP.

State commenters claimed that the requirement that the EPA must determine that the SIP is ''substantially'' inadequate establishes a heavy burden for the EPA. The commenters relied on a dictionary definition of ''substantially'' as meaning ''considerable in importance, value, degree, amount, or extent.'' The commenters argued that when modifying the word ''inadequate,'' the use of the modifier ''substantially'' in section 110(k)(5) enhances the degree of proof required. Thus, the commenters argued that the EPA cannot just assume that the provisions may prevent attainment of the NAAQS.

Other industry commenters disagreed that the term ''substantially inadequate'' is ambiguous but claimed that even if it were, the EPA's own interpretation is vague and ambiguous. The commenters asserted that the EPA's statement that it must evaluate the adequacy of specific SIP provision ''in light of the specific purposes for which the SIP provision at issue is required'' and with respect to whether the provision meets ''fundamental legal requirements applicable to such a provision'' is not a reasonable interpretation of the statutory language. Furthermore, the commenters argued, the EPA's interpretation of section 110(k)(5) to authorize a SIP call in the absence of any causal evidence that the SIP provision at issue causes a particular environmental impact reads out of the statute ''the explicit requirement that a SIP call related to NAAQS be made only where the state plan is substantially inadequate to attain or maintain the relevant standard.''

Response: The EPA disagrees with commenters who claimed that the Agency did not explain its interpretation of section 110(k)(5) in general, or the term ''substantially inadequate'' in particular, in the February 2013 proposal. To the contrary, the EPA provided an explanation of why it considers section 110(k)(5) to be ambiguous and provided a detailed explanation of how the Agency is interpreting and applying that statutory language to the specific SIP provisions at issue in this action.[324] Moreover, the EPA explained why it believes that the four major types of

[322] The EPA notes that the significance of this 1970 legislative history was raised in *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1166 (10th Cir. 2012). That court found the legislative history ''inapposite'' simply because it did not pertain to section 110(k)(5) which Congress added to the CAA in 1990. This legislative history passage is of limited significance in this action as well.

[323] *Id.,* 690 F.3d 1157, 1166.

[324] *See* February 2013 proposal, 78 FR 12459 at 12483–88.

provisions at issue are inconsistent with applicable legal requirements of the CAA and thus substantially inadequate. In the SNPR, the EPA reiterated its interpretation of section 110(k)(5) with respect to affirmative defense provisions in SIPs but updated that interpretation in response to the logic of the more recent court decision in *NRDC* v. *EPA*. Thus, the commenters' reliance on the *Qwest* decision is not appropriate, because the EPA did explain its interpretation of the statute and it is not one that is contrary to the statute. A more appropriate precedent is the decision in *US Magnesium, LLC* v. *EPA,* in which the same court upheld the EPA's interpretation of its authority under section 110(k)(5). In short, the EPA believes that section 110(k)(5) provides the EPA with discretion to determine what constitutes a substantial inadequacy and to determine the appropriate basis for such a finding in light of the relevant CAA requirements at issue. Thus, the commenters are in error that the EPA did not articulate its interpretation of section 110(k)(5).

The EPA also disagrees with those commenters who argued that the Agency has ignored or misinterpreted the term ''substantial'' in this action. As many commenters acknowledged, this term is not defined in the statute. Their reliance on a dictionary definition, however, is based on the incorrect premise that a failure to comply with the legal requirements of the CAA for SIP provisions is not ''considerable in importance, value, degree, amount, or extent.''

First, the commenters' argument ignores the full statutory language of section 110(k)(5) in which the EPA is authorized to issue a SIP call whenever it determines that a given SIP provision is inadequate, not only because of impacts on attainment of the NAAQS but also upon a failure to meet ''any other requirement'' of the CAA. As explained in the February 2013 proposal and in the SNPR, the EPA interprets its authority under section 110(k)(5) to encompass any type of deficiency, including failure to meet specific legal requirements of the CAA for SIP provisions. Failure to comply with these legal requirements can have the effect of interfering with attainment and maintenance of the NAAQS (*e.g.,* by allowing unlimited emissions from sources during SSM events), but the failure to comply with the legal requirements is in and of itself a basis for a SIP call.

Second, the commenters' argument implies that failure of a SIP provision to meet a legal requirement of the CAA is not a ''substantial'' inadequacy. The EPA strongly disagrees with the view that complying with applicable legal requirements is not an important consideration in general, and not important with respect to the specific legal defects at issue here. For example, the EPA considers a SIP provision that does not apply continuously because it contains SSM exemptions to be substantially inadequate because it fails to meet legal requirements of sections 110(a)(2)(A), 110(a)(2)(C) and 302(k). In particular, failure to meet the legal requirements for an emission limitation as contemplated in section 302(k) is a ''substantial'' inadequacy. The EPA is not alone in this view; the D.C. Circuit in the *Sierra Club* v. *Johnson* case held that emission limitations must be continuous and cannot contain SSM exemptions. If inclusion of SSM exemptions in emission limitations were not a ''substantial'' deficiency from the court's perspective, presumably the court would have ruled differently. As another example, the EPA considers the inclusion of affirmative defenses in SIP provisions that operate to alter the jurisdiction of the courts to be a substantial inadequacy. Again, the EPA's view that SIP provisions cannot interfere with the enforcement structure of the CAA set forth in section 113 and section 304 is not unreasonable. The court's decision in *NRDC* v. *EPA* held that EPA regulations cannot alter or eliminate the jurisdiction of courts to determine liability and impose remedies in judicial enforcement cases and this same logic extends to the states in SIP provisions. Contrary to the arguments of the commenters, the EPA reasonably interprets the term ''substantial'' in section 110(k)(5) to include compliance with the legal requirements of the CAA applicable to SIP provisions.

Third, the EPA notes that its reading of section 110(k)(5) does not ''read out of the statute'' the statutory language that SIP provisions can be substantially inadequate ''to attain or maintain the relevant NAAQS'' as claimed by the commenters. The EPA agrees that SIP provisions can be found substantially inadequate for this specific reason, but it is the commenters who read words out of section 110(k)(5) by disregarding the portion of the statute that also authorizes a SIP call whenever a SIP provision does not ''comply with any requirement of'' the CAA. Indeed, the EPA believes that SIP provisions that fail to meet the specific legal requirements of the CAA are very likely to have these impacts as well; *e.g.,* the unlimited emissions authorized by SSM exemptions can interfere with attainment and maintenance of the NAAQS. The EPA believes that Congress consciously included these fundamental legal requirements in order to assure that SIP provisions will achieve the objectives of the CAA, such as attainment and maintenance of the NAAQS. For example, legislative history for section 302(k) indicates that Congress intentionally required that emission limitations apply continuously in order to assure that they would achieve these goals as well as be consistent with the enforcement structure of the CAA.[325]

4. Comments that the EPA lacks authority to issue a SIP call because it is required to ''quantify'' the magnitude of any alleged SIP deficiency in order to establish that it is substantial.

Comment: A number of commenters argued that, in addition to failing to provide a required technical analysis to support a SIP call, the EPA was also failing to quantify in advance the degree of inadequacy that is necessary for a given SIP provision to be substantially inadequate. The commenters asserted that the EPA has a burden to define in advance what amount of inadequacy is ''substantial,'' before the Agency can require states to comply with a SIP call. Some commenters made this argument based upon their experience with prior SIP call rulemakings, such as the NO_X SIP call in which the Agency performed such an analysis. Other commenters, however, evidently based this argument upon their reading of the D.C. Circuit's decision in *EME Homer City Generation, L.P.* v. *EPA.*[326] Some commenters also argued that ''all'' past EPA SIP calls have been based upon a specific technical analysis concerning the sufficiency of a SIP to provide for attainment and maintenance of a NAAQS and that this establishes that such an analysis is always required.

Response: The EPA disagrees that section 110(k)(5) requires the Agency to ''quantify'' the degree of inadequacy in a given SIP provision before issuing a SIP call. As explained in detail in the February 2013 proposal and this document, the EPA interprets section 110(k)(5) to authorize the Agency to determine the nature of the analysis necessary to make a finding that a SIP provision is substantially inadequate. The EPA agrees that for certain SIP call actions, such as the NO_X SIP call, the

[325] *See, e.g.,* H.R. 95–294, at 92 (1977) (referring to emission limitations as a fundamental tool for assuring attainment and maintenance of the NAAQS and stating that unless they are ''complied with at all times, there can be no assurance that ambient standards will be attainment and maintained.''

[326] 696 F.3d 7, 29 (D.C. Cir. 2012) *rev'd,* 134 S. Ct. 1584 (2014).

specific nature of the SIP call in question for section 110(a)(2)(D)(i) did warrant a technical evaluation of whether the emissions from sources in particular states were significantly contributing to violations of a NAAQS in other states. Thus, the EPA elected to perform a specific form of analysis to determine whether emissions from sources in certain states significantly contributed to violations of the NAAQS in other states, and if so, what degree of reductions were necessary to remedy that interstate transport.

The nature of the SIP deficiencies at issue in this action does not require that type of technical analysis and does not require a ''quantification'' of the extent of the deficiency. In this action, the EPA is promulgating a SIP call action that directs the affected states to revise existing SIP provisions with specific legal deficiencies that make the provisions inconsistent with fundamental legal requirements of the CAA for SIPs, *e.g.,* automatic exemptions for emissions during SSM events or affirmative defense provisions that limit or eliminate the jurisdiction of courts to determine liability and impose remedies for violations. Accordingly, the EPA has determined that it is not necessary to establish that these deficiencies literally caused a specific violation of the NAAQS on a particular day or undermined a specific enforcement case. It is sufficient that the provisions fail to meet a legal requirement of the CAA and thus are substantially inadequate as provided in section 110(k)(5).

5. Comments that the EPA's interpretation of substantial inadequacy would override state discretion in development of SIP provisions.

Comment: Some state and industry commenters argued that the EPA's interpretation of its authority under section 110(k)(5) is wrong because it is inconsistent with the principle of cooperative federalism. These commenters asserted that the EPA's interpretation of the term ''substantially inadequate,'' as explained in the February 2013 proposal, would allow the Agency to dictate that states revise their SIPs without any consideration of whether the states' preferred control measures affect attainment of the NAAQS, thereby expanding the EPA's role in CAA implementation. Consequently, these commenters concluded, the EPA's interpretation of section 110(k)(5) is neither ''reasonable'' nor ''a permissible construction of the statute'' under the principles of *Chevron* deference.[327]

Response: The EPA disagrees with the commenters' view of the cooperative-federalism relationship established in the CAA, as explained in detail in section V.D.2 of this document. Because the commenters are misconstruing the respective responsibility and authorities of the states and the EPA under cooperative federalism, the Agency does not agree that its interpretation of section 110(k)(5) is ''unreasonable'' for this reason under the principles of *Chevron*. As explained in detail in the February 2013 proposal, the EPA interprets its authority under section 110(k)(5) to include the ability to require states to revise their SIP provisions to correct the types of deficiencies at issue in this action.

Section 110(k)(5) explicitly authorizes the EPA to issue a SIP call for a broad range of reasons, including to address any SIP provisions that relate to attainment and maintenance of the NAAQS, to interstate transport, or to any other requirement of the CAA.[328] The EPA's authority and responsibility to review SIP submissions in the first instance is to assure that they meet all applicable procedural and substantive requirements of the CAA, in accordance with the requirements of sections 110(k)(3), 110(l) and 193. The EPA's authority and responsibility under the CAA includes assuring that SIP provisions comply with specific statutory requirements, such as the requirement that emission limitations apply to sources continuously. The CAA imposes these statutory requirements in order to assure that the larger objectives of SIPs are achieved, such as the attainment and maintenance of the NAAQS, protection of PSD increments, improvement of visibility and providing for effective enforcement. The CAA imposes this authority and responsibility upon the EPA when it first evaluates a SIP submission for approval. Likewise, after the initial approval, section 110(k)(5) authorizes the EPA to require states to revise their SIPs whenever the Agency later determines that to be necessary to meet CAA requirements. This does not in any way allow the EPA to interfere in the states' selection of the control measures they elect to impose to satisfy CAA requirements relating to NAAQS attainment and maintenance, provided that those selected measures comply with all CAA requirements such as the need for continuous emissions limitations. Accordingly, the EPA believes that its interpretation of section 110(k)(5) is fully consistent with the letter and the purpose of the principles of cooperative federalism.

6. Comments that the EPA cannot issue a SIP call for an existing SIP provision unless the provision was deficient at the time the state originally developed and submitted the provision for EPA approval.

Comment: Commenters argued that the EPA is using the SIP call to require states to change SIP provisions that were acceptable at the time they were originally approved and argued that section 110(k)(5) cannot be used for that purpose. Specifically, one commenter asserted that section 110(k)(5) provides that findings of substantial inadequacy shall ''subject the State to the requirements of this chapter to which the State was subject *when it developed and submitted the plan for which such finding was mad*e.'' (Emphasis added by commenter.) The implication of the commenters' argument is that a SIP provision only needs to meet the requirements of the CAA that were applicable at the time the state originally developed and submitted the provision for EPA approval. Because the EPA has no authority to issue a SIP call under their preferred reading of section 110(k)(5), the commenters claimed, the EPA would have to use its authority under section 110(k)(6) and would have to establish that the original approval of each of the provisions at issue in this action was in error.

Response: The EPA disagrees with this reading of section 110(k)(5). As an initial matter, the commenter takes the quoted excerpt of the statute out of context. The quoted language follows ''to the extent the Administrator deems appropriate.'' Thus, it is clear when the statutory provision is read in full that the EPA has discretion in specifying the requirements to which the state is subject and is not limited to specifying only those requirements that applied at the time the SIP was originally ''developed and submitted.'' Moreover, this cramped reading of section 110(k)(5) is not a reasonable interpretation of the statute because by this logic, the EPA could never require states to update grossly out-of-date SIP provisions so long as the provisions originally met CAA requirements. Given that the CAA creates a process by which

[327] *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843–44 (1984).

[328] *See, e.g., US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1168 (10th Cir. 2012) (citing 42 U.S.C. 7410(k)(5)) (holding that the EPA may issue a SIP call not only based on NAAQS violations, but also whenever ''EPA determines that a SIP is no longer consistent with the EPA's understanding of the CAA''); *id.* at 1170 (upholding the EPA's authority ''to call a SIP in order to clarify language in the SIP that could be read to violate the CAA,'' even absent a pertinent judicial finding).

the EPA is required to establish and to update the NAAQS on a continuing basis, and states are required to update and revise their SIPs on a continuing basis, the Agency believes that Congress would not have intended that SIP provisions remain static for all time simply because they were adequate when first developed and approved. Such an interpretation would mean that subsequent legally significant events such as amendments of the CAA, court decisions interpreting the CAA and new or revised EPA regulations are not relevant to the continuing adequacy of existing SIP provisions. Similarly, such an interpretation would mean that facts arising later could never provide a basis for a SIP call, *e.g.,* to address interstate transport that was not evident at the time of the original development and approval of the SIP provisions or that needs to be addressed further because of a revised NAAQS.

The commenters also argued that if a state's SIP provision was flawed at the time the EPA approved it, then the Agency's only alternative for addressing the deficient provision is through the error correction authority of section 110(k)(6). The EPA disagrees. The CAA provides a number of tools to address flawed SIPs and the EPA does not interpret these provisions to be mutually exclusive. While the EPA could potentially have relied on section 110(k)(6) to remove the deficient provisions at issue in this action, the Agency believes that section 110(k)(5) authority also provides a means to address flawed SIP provisions. As explained in the February 2013 proposal, the EPA specifically considered the relative merits of reliance on section 110(k)(5) and section 110(k)(6) and determined that the former was a better approach for this action.[329] In the present circumstances, the EPA is not addressing a single targeted flaw, *i.e.,* a specific SIP revision that was flawed. Moreover, the EPA is not only dealing with a multitude of states in this action, but also in many cases with numerous SIP provisions developed over the years by a specific state. The provisions at issue often are included in several different places in a complex SIP and can affect multiple emission limitations in the SIP that apply to sources for purposes of multiple NAAQS.

Comparing the SIP call and error correction approaches, the EPA concluded that the SIP call authority under section 110(k)(5) provides the better approach for this action, in that it allows the states to evaluate the overall structure of their existing SIPs and determine how best to modify the affected SIP provisions in order to address the identified deficiencies. By contrast, use of the error correction authority under section 110(k)(6) would result in immediate disapproval and removal of existing SIP provisions from the SIP, which could cause confusion in terms of what requirements apply to sources. Moreover, the EPA's disapproval of a SIP submission through an error correction that reverses a prior SIP approval of a required SIP provision starts a ''sanctions clock,'' and sanctions would apply if the state has not submitted a revised SIP within 18 months. Similarly, the EPA would be required to promulgate a FIP if the Agency has not approved a revised SIP submission from the state within 24 months. In comparison, the sanctions and federal plan ''clocks'' would not start under the SIP call approach unless and until the state fails to submit a SIP revision in response to this SIP call, or unless and until the EPA disapproves that SIP submission. As explained in the February 2013 proposal, the EPA determined that the SIP call process was a better procedure through which to address the deficient SIP provisions at issue in this action.

7. Comments that the EPA failed to considerhowexcess emissions resulting from SSM exemptions would affect compliance with specific NAAQS, including NAAQS with different averaging periods or different statistical forms.

Comment: In addition to general claims that the EPA failed to provide required technical analysis to support the proposed SIP call to states for automatic and discretionary SSM exemptions, commenters specifically argued that the EPA is required to establish that these exemptions have caused violations in light of the considerations such as the averaging time or statistical form of specific NAAQS. The implication of the commenters' argument is that in order to demonstrate that a given SIP provision with an SSM exemption is substantially inadequate under section 110(k)(5), the EPA has to establish definitively that the emissions during SSM events would cause a violation of a particular NAAQS. This would potentially include an evaluation of the impacts of the exempted emissions on NAAQS with different averaging periods, *e.g.,* impacts on an annual NAAQS, a 24-hour NAAQS, or a 1-hour NAAQS, and impacts on NAAQS with different statistical forms, *e.g.,* a NAAQS that measures attainment by an annual arithmetical mean versus one that is measured by a 98th-percentile value. Moreover, commenters alluded to the difficulty of ascertaining definitively how emissions of specific precursor pollutants during a given exempted SSM event would affect attainment of one or more NAAQS.

To support the argument that the validity of SSM exemptions must be evaluated with respect to specific NAAQS, the commenters relied upon recent modeling guidance for the 1-hour NO_2 NAAQS in which, the commenters claimed, the EPA directed states to disregard emissions during SSM events for purposes of demonstrating compliance with that NAAQS. The commenters claimed that the cited EPA guidance supports their argument that emissions from a source during any specific SSM event are unlikely to cause a violation of the 1-hour NO_2 NAAQS. Accordingly, the commenters argued that the EPA has no authority to interpret the CAA to preclude exemptions for emissions during SSM events without first demonstrating that the exempt emissions cause NAAQS violations.

Response: As explained in the February 2013 proposal, and in response to other comments in this action, the EPA does not interpret section 110(k)(5) to require a specific technical analysis to support a SIP call related to legal deficiencies in SIP provisions. In section 110(k)(5), Congress left it to the Agency's discretion to determine what type and level of analysis is necessary to establish that a SIP provision is substantially inadequate. As explained in the February 2013 proposal, the EPA does not need to define the precise contours of its authority under section 110(k)(5) for all potential types of SIP deficiencies in this action. For purposes of this action, it is sufficient that the SIP provisions at issue are inconsistent with applicable requirements. While an ambient air quality impact analysis may be appropriate to support a SIP call with respect to certain requirements of the CAA, *e.g.,* a SIP call for failure to have SIP provisions to prevent significant contribution to nonattainment in another state in accordance with section 110(a)(2)(D)(i)(I), the EPA does not interpret the CAA to require such an analysis in all instances. In particular, where the substantial inadequacy is related to a failure to meet a fundamental legal requirement for SIP provisions, such as the requirement in section 302(k) that emission limitations apply continuously, the EPA does not believe that such a technical analysis is required.

[329] *See* February 2013 proposal, 78 FR 12459 at 12483, n.72.

For example, section 302(k) does not differentiate between the legal requirements applicable to SIP emission limitations for an annual NAAQS versus for a 1-hour NAAQS, nor between any NAAQS based upon the statistical form of the respective standards. In addition to being supported by the text of section 302(k), the EPA's interpretation of the requirement for sources to be subject to continuous emission limitations is also the most logical given the consequences of the commenters' theory. The commenters' argument provides additional practical reasons to support the EPA's interpretation of the CAA to preclude exemptions for emissions during SSM events from SIP emission limitations as a basic legal requirement for all emission limitations.

The EPA agrees that to ascertain the specific ambient impacts of emissions during a given SSM event can sometimes be difficult. This difficulty can be exacerbated by factors such as exemptions in SIP provisions that not only excuse compliance with emission limitations but also affect reporting or recordkeeping related to emissions during SSM events. Determining specific impacts of emissions during SSM events can be further complicated by the fact that the limited monitoring network for the NAAQS in many states may make it more difficult to establish that a given SSM event at a given source caused a specific violation of the NAAQS. Even if a NAAQS violation is monitored, it may be the result of emissions from multiple sources, including multiple sources having an SSM event simultaneously. The different averaging periods and statistical forms of the NAAQS may make it yet more difficult to determine the impacts of specific SSM events at specific sources, perhaps until years after the event occurred. By the commenters' own logic, there could be situations in which it is functionally impossible to demonstrate definitively that emissions during a given SSM event at a single source caused a specific violation of a specific NAAQS.

The commenters' argument, taken to its logical extension, could result in situations where a SIP emission limitation is only required to be continuous for purposes of one NAAQS but not for another, based on considerations such as averaging time or statistical form of the NAAQS. Such situations could include illogical outcomes such as the same emission limitation applicable to the same source simultaneously being allowed to contain exemptions for emissions during SSM events for one NAAQS but not for another. For example, purely hypothetically under the commenters' premise, a given source could simultaneously be required to comply with a rate-based NO_X emission limitation continuously for purposes of a 1-hour NO_2 NAAQS but not be required to do so for purposes of an annual NO_2 NAAQS, or the source could be required to comply continuously with the same NOx limitation for purposes of the 8-hour ozone NAAQS and the 24-hour $PM_{2.5}$ NAAQS but not be required to do so for purposes of the annual $PM_{2.5}$ NAAQS. Add to this the further complication that the source may be located in an area that is designated nonattainment for some NAAQS and attainment for other NAAQS, and thus subject to emission limitations for attainment and maintenance requirements simultaneously.

Under the commenters' premise, the same SIP emission limitation, subject to the same statutory definition in section 302(k), could validly include SSM exemptions for purposes of some NAAQS but not others. Such a system of regulation would make it unnecessarily hard for regulated entities, regulators and other parties to determine whether a source is in compliance. The EPA does not believe that this is a reasonable interpretation of the requirements of the CAA, nor of its authority under section 110(k)(5). This unnecessary confusion is easily resolved simply by interpreting the CAA to require that a source subject to a SIP emission limitation for NO_X must meet the emission limitation continuously, in accordance with the express requirement of section 302(k), thus making SSM exemptions impermissible. The EPA does not agree that the term "emission limitation" can reasonably be interpreted to allow noncontinuous emission limitations for some NAAQS and not others. The D.C. Circuit has already made clear that the term "emission limitation" means limits that apply to sources continuously, without exemptions for SSM events.

Finally, the EPA disagrees with the specific arguments raised by commenters concerning the modeling guidance for the 1-hour NO_2 NAAQS.[330] As relevant here, that guidance provides recommendations about specific issues that arise in modeling that is used in the PSD program for purposes of demonstrating that proposed construction will not cause or contribute to a violation of the 1-hour NO_2 NAAQS. Thus, as an initial matter, the EPA notes that the context of that guidance relates to determining the extent of emission reductions that a source needs to achieve in order to obtain a permit under the PSD program, which is distinct from the question of whether an emission limitation in a permit must assure continuous emission reductions.

The commenters argued that this EPA guidance "allows sources to completely exclude all emissions during startup and shutdown scenarios." This characterization is inaccurate for a number of reasons. First, the guidance in question is only intended to address certain modeling issues related to predictive modeling to demonstrate that proposed construction will not cause or contribute to violation of the 1-hour NO_2 NAAQS, for purposes of determining whether a PSD permit may be issued and whether the emission limitations in the permit will require sufficient emission reductions to avoid a violation of this standard.

Second, to the extent that the guidance indicates that air quality considerations might in certain circumstances and for certain purposes be relevant to determining what emission limitations should apply to a source, that does not mean a source may legally have an exemption from compliance with existing emissions limitations during SSM events. In the guidance cited by the commenter, the EPA did recommend that under certain circumstances, it may be appropriate to model the projected impact of the source on the NAAQS without taking into account "intermittent" emissions from sources such as emergency generators or emissions from particular kinds of "startup/shutdown" operations.[331] However, the EPA did not intend this to suggest that emissions from sources during SSM events may validly be treated as exempt in SIP emission limitations. Within the same guidance document, the EPA stated unequivocally that the guidance "has no effect on or relevance to existing policies and guidance regarding excess emissions that may occur during startup and shutdown." The EPA explained further that "all emissions from a new or modified source are subject to the applicable permitted emission limits and may be subject to enforcement concerning such excess emissions, regardless of whether a portion of those emissions are not included in the modeling demonstration based on the

[330] *See* Memorandum, "Additional Clarification Regarding Application of Appendix W Modeling Guidance for the 1-hour NO_2 National Ambient Air Quality Standard," from T. Fox, EPA/OAQPS, to Regional Air Division Directors, March 1, 2011.

[331] *Id.* at 2.

guidance provided here.'' [332] In other words, even if a state elects not to include intermittent emissions from some types of startup and shutdown events in certain modeling exercises, this does not mean that sources can be excused from compliance with the emission limitation during startup and shutdown, via an exemption for such emissions.

Third, the guidance does not say that all SSM emissions may be considered intermittent and excluded from the modeling demonstration. The guidance explicitly recommends that the modeling be based on ''emission scenarios that can logically be assumed to be relatively continuous or which occur frequently enough to contribute significantly to the annual distribution of daily maximum 1-hour concentrations'' and gives the example that it may be appropriate to include startup and shutdown emissions from a peaking unit at a power plant in the modeling demonstration because those units go through frequent startup/shutdown cycles.[333] Thus, the guidance does not support commenters' premise that the EPA must evaluate the air quality impacts from SSM events in SIP actions to determine that SSM exemptions in SIP provisions are substantially inadequate to meet fundamental requirements of the CAA.

8. Comments that this SIP call action is inconsistent with 1976 EPA guidance for such actions.

Comment: One commenter argued that the EPA misinterpreted the term ''substantially inadequate'' in the February 2013 proposal because the Agency is reading this term differently than in the past. In support of this contention, the commenter pointed to a 1976 guidance document from the EPA concerning the question of when a SIP may be substantially inadequate. The commenter argued that the EPA is wrongtointerpretthattermtomean anything other than a demonstrated failureto provide for factual attainment of the NAAQS. According to the commenter, thecontent ofthe 1976 guidance indicates that the EPA is obligated to conduct a specific analysis to determine the air quality impact of an alleged inadequacy in a SIP provision and to establish and document the specific air quality impacts of the inadequacy.

Response: The EPA disagrees with the commenter for multiple reasons. First, the 1976 document referred to by the commenter was the EPA's guidance on the requirements of the CAA as it was embodied in 1970, not as Congress substantially amended it in 1990. The 1976 guidance pertained not to the current SIP call provision at section 110(k)(5) but rather to the requirements of section 110(a)(2)(H). This is particularly significant because the 1990 CAA Amendments added section 110(k)(5) to the statute. Although section 110(a)(2)(H) remains in the statute, it is primarily a requirement applicable to state ''infrastructure'' SIP obligations through which states are required to have state law authority to meet the structural SIP elements required in section 110(a)(2).[334] In reviewing SIPs for compliance with section 110(a)(2)(H), the EPA verifies that state SIPs include the legal authority to respond to any SIP call. By contrast, the EPA's authority to issue a SIP call under section 110(k)(5) is worded broadly, explicitly including the authority to make a finding of substantial inadequacy not only for failure to attain or maintain the NAAQS but also for failures related to interstate transport or ''otherwise to comply with any requirement of'' the CAA.

Second, even setting aside that the guidance is not relevant to the EPA's authority under section 110(k)(5), the 1976 guidance on its face did not purport to define the full contours of the term ''substantially inadequate'' in section 110(a)(2)(H). The 1976 guidance stated explicitly that ''it is difficult to develop comprehensive guidelines for all cases'' and only listed ''[s]ome factors that could be considered'' in evaluating whether a state's SIP is substantially inadequate.[335] While the EPA acknowledges that these factors were primarily focused upon ambient air considerations as suggested by the commenter, they were not limited to that topic. Moreover, the EPA stated that factors ''other than air quality and emission data must be considered'' and provided several examples, including potential amendments to the CAA under consideration at that point in time that might change state SIP obligations and thus create the need for a SIP call. More significantly, nothing in the 1976 guidance indicated that the EPA should or would ignore legal deficiencies in existing SIP provisions or that legal deficiencies are not relevant to the question of whether a SIP would provide for attainment of the NAAQS.

Third, the EPA notes that the commenter did not advocate that the Agency follow the 1976 guidance with respect to other issues, *e.g.,* that the EPA would initiate the obligations of states to revise their SIPs simply by making an announcement of substantial inadequacy ''without proposal''; that states would be required to make the necessary SIP revision within 12 months; or that states should make those revisions by no later than July 1, 1977.

The EPA has fully articulated its interpretation of the term ''substantial inadequacy'' in section 110(k)(5) in the February 2013 proposal. As explained in the proposal, the EPA interprets its current authority to include the issuance of a SIP call for the types of legal deficiencies identified in this action. In order to establish that these legal deficiencies are substantial inadequacies, the EPA does not interpret section 110(k)(5) to require the Agency to document precisely how each deficiency factually undermines the objectives of the CAA, such as attainment and maintenance of the NAAQS in a particular location on a particular date. It is sufficient that these provisions are inconsistent with the legal requirements for SIP provisions set forth in the CAA that are intended to assure that SIPs in fact do achieve the intended objectives.

10. Comments that because the EPA has misinterpreted the statutory terms ''emission limitation'' and ''continuous,'' the EPA has not established a substantial inadequacy.

Comment: Many state and industry commenters disagreed with the EPA's interpretation of the CAA to prohibit SSM exemptions in SIP provisions. These arguments took many tacks, based on the interpretation of various statutory provisions, the applicability of the court decision in *Sierra Club* v. *Johnson,* alleged inconsistencies related to this requirement in the EPA's own NSPS and NESHAP regulations and a variety of other arguments. In particular, many commenters argued that the EPA was misinterpreting the statutory terms ''emission limitation'' and ''continuous'' in section 302(k) to preclude automatic or discretionary exemptions for emissions during SSM events in SIP provisions. As an extension of these arguments, commenters also argued that the EPA lacks authority under section 110(k)(5) to issue a SIP call when it has incorrectly interpreted a relevant statutory term as the basis for finding a SIP provision to be substantially inadequate.

[332] *Id.* at 11.

[333] *Id.* at 9.

[334] *See* Memorandum, ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Section 110(a)(1) and 110(a)(2),'' from Stephen D. Page, Director, OAQPS, to Regional Air Directors, Regions 1–10, September 13, 2013, at page 51 (explaining that a state meets section 110(a)(2)(H) by having authority to revise its SIP in response to a SIP call).

[335] *Id.* at 10–11.

Response: The EPA disagrees that it lacks authority to issue this SIP call on the grounds claimed by the commenters. As explained in detail in the February 2013 proposal and in this final action, the EPA has long interpreted the CAA to preclude SSM exemptions in SIP provisions. This interpretation has been stated by the EPA since at least 1982, reiterated in subsequent SSM Policy guidance documents, applied in a number of notice and comment rulemakings and upheld by courts.

With respect to the arguments that the EPA has incorrectly interpreted the terms ''emission limitation'' and ''continuous'' in this action, the EPA has responded in detail in section VII.A.3 of this document and need not repeat those responses here. In short, the EPA is interpreting those terms consistent with the relevant statutory language and consistent with the decision of the court in *Sierra Club* v. *Johnson.* Because the specific SIP provisions identified in this action with automatic or discretionary exemptions for emissions during SSM events do not limit emissions from the affected sources continuously, the EPA has found these provisions substantially inadequate to meet CAA requirements in accordance with section 110(k)(5).

11. Comments that section 110(k)(5) imposes a ''higher burden of proof'' upon the EPA than section 110(l) and that section 110(l) requires the EPA to conduct a specific technical analysis of the impacts of a SIP revision.

Comment: Commenters argued that the EPA is misinterpreting section 110(k)(5) to authorize a SIP call using a lower ''standard'' than the section 110(l) ''standard'' that requires disapproval of a new SIP provision in the first instance. The commenters stated that section 110(k)(5) requires a determination by the EPA that a SIP provision is ''substantially inadequate'' to meet CAA requirements in order to authorize a SIP call, whereas section 110(l) provides that the EPA must disapprove a SIP revision provision only if it ''would interfere with'' CAA requirements. Thus, the commenters asserted that ''the SIP call standard is higher than the SIP revision standard.'' The commenters further argued that it would be ''illogical and contrary to the CAA to interpret section 110 to establish a lower standard for calling a previously approved SIP and demanding revisions to it than for disapproving that SIP in the first place.'' For purposes of section 110(l), the commenters claimed, the EPA ''is required'' to rely on specific ''data and evidence'' that a given SIP revision would interfere with CAA requirements and this requirement is thus imposed by section 110(k)(5) as well. In support of this reasoning, the commenters relied on prior court decisions pertaining to the requirements of section 110(l).

Response: The EPA disagrees with the commenters' interpretations of the relative ''standards'' of section 110(k)(5) and section 110(l) and with the commenters' views on the court decisions pertaining to section 110(l). In addition, the EPA notes that the commenters did not fully address the related requirements of section 110(k)(3) concerning approval and disapproval of SIP provisions, of section 302(k) concerning requirements for emission limitations or of any other sections of the CAA that are substantively germane to specific SIP provisions and to enforcement of SIP provisions in general.[336]

The commenters argued that, by the ''plain language'' of the CAA and because of ''common sense,'' Congress intended the section 110(k)(5) SIP call standard to be ''higher'' than the section 110(l) SIP revision. The EPA disagrees that this is a question resolved by the ''plain language.'' To the contrary, the three most relevant statutory provisions, section 110(k)(3), section 110(l), and section 110(k)(5), are each to some degree ambiguous and are likewise ambiguous with respect to how they operate together to apply to newly submitted SIP provisions versus existing SIP provisions. Section 110(k)(3) requires the EPA to approve a newly submitted SIP provision ''if it meets all of the applicable requirements of [the CAA].'' Implicitly, the EPA is required to disapprove a SIP provision if it does not meet all applicable CAA requirements. Section 110(l) provides that the EPA may not approve any SIP revision that ''would interfere with . . . any other applicable requirement of [the CAA].'' Section 110(k)(5) provides that the EPA shall issue a SIP call ''whenever'' the Agency finds an existing SIP provision ''substantially inadequate . . . to otherwise comply with [the CAA].'' None of the core terms in each of the three provisions is defined in the CAA. Thus, whether the ''would interfere with'' standard of section 110(l) is *per se* a ''lower'' standard than the ''substantially inadequate'' standard of section 110(k)(5) as advocated by the commenters is not clear on the face of the statute, and thus the EPA considers these terms ambiguous.

As explained in detail in the February 2013 proposal, the EPA interprets its authority under section 110(k)(5) broadly to include authority to require a state to revise an existing SIP provision that fails to meet fundamental legal requirements of the CAA.[337] The commenters raise a valid point that section 110(l) and section 110(k)(5), as well as section 110(k)(3), facially appear to impose somewhat different standards. However, the EPA does not agree that the proper comparison is necessarily between section 110(k)(5) and section 110(l) but instead would compare section 110(k)(5) and section 110(k)(3). Section 110(l) is primarily an ''anti-backsliding'' provision, meant to assure that if a state seeks to revise its SIP to change *existing* SIP provisions that the EPA has previously determined *did meet* CAA requirements, then there must be a showing that the revision of the existing SIP provisions (*e.g.,* a relaxation of an emission limitation) would not interfere with attainment of the NAAQS, reasonable further progress or any other requirement of the CAA. By contrast, section 110(k)(3) is a more appropriate point of comparison because it directs the EPA to approve a SIP provision ''that meets all applicable requirements'' of the CAA and section 110(k)(5) authorizes the EPA to issue a SIP call for previously approved SIP provisions that it later determines do not ''comply with any requirement'' of the CAA.

Notwithstanding that each of these three statutory provisions applies to different stages of the SIP process, all three of them explicitly make compliance with the legal requirements of the CAA a part of the analysis. At a minimum, the EPA believes that Congress intended these three sections, working together, to ensure that SIP provisions must meet all applicable legal CAA requirements when they are initially approved and to ensure that SIP provisions continue to meet CAA requirements over time, allowing for potential amendments to the CAA, changes in interpretation of the CAA by the EPA or courts or simply changed facts. With respect to compliance with the applicable legal requirements of the

[336] CAA section 110(k)(5) states that ''[w]henever the [EPA] finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately [ ] interstate pollutant transport . . ., or to otherwise comply with any requirement of [the CAA], the [EPA] shall require the State to revise the plan as necessary to correct such inadequacies.'' Section 110(l) states that, in the event a state submits a SIP revision, the EPA ''shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of [the CAA].'' Section 110(k)(3) states that the EPA ''shall approve such submittal . . . if it meets all the requirements of [the CAA].''

[337] *See* February 2013 proposal, 78 FR 12459 at 12483–88.

CAA, the EPA does not interpret section 110(k)(5) as setting a *per se* ''higher'' standard. Under section 110(l), the EPA is likewise directed not to approve a SIP revision that is not consistent with legal requirements imposed by the CAA, including those relevant to SIP provisions such as section 302(k). Pursuant to section 110(l), the EPA would not be authorized to approve a SIP revision that contradicts requirements of the CAA; pursuant to section 110(k)(5) the EPA is authorized to direct states to correct a SIP provision that it later determines does not meet the requirements of the CAA.

The EPA also disagrees with the commenters' characterization of the requirements of section 110(l) and their arguments based on court decisions concerning section 110(l). Commenters rely on the decision in *Ky. Res Council* v. *EPA* to support their argument that section 110(l) requires the EPA to disapprove a SIP revision only if it ''would interfere'' with a requirement of the CAA, not if it ''could interfere'' with such requirements.[338] From this decision, the commenters argue that the EPA is required to conduct a specific technical analysis under section 110(l) to determine the specific impacts of the revision on attainment and maintenance of the NAAQS and argue that by inference this must therefore also be required by section 110(k)(5). To the extent that court decisions concerning section 110(l) are relevant, these court decisions do not support the commenters' position.

First, the EPA notes that the commenters mischaracterize section 110(l) as requiring a particular form or method of analysis to support approval or disapproval of a SIP revision. Section 110(l) does not contain any such explicit requirement or specifications. The EPA interprets section 110(l) only to require an analysis that is appropriate for the particular SIP revision at issue, and that analysis can take different forms or different levels of complexity depending on the facts and circumstances relevant to the SIP revision. Like section 110(l), the EPA believes that section 110(k)(5) does not specify a particular form of analysis necessary to find a SIP provision substantially inadequate.

Second, the commenters mischaracterize the primary decision that they rely upon. The court in *Ky. Res Council* v. *EPA* expressly discussed the fact that section 110(l) does not specify precisely how any such analysis should be conducted and deferred to the EPA's reasonable interpretation of what form of analysis is appropriate for a given SIP revision.[339] Indeed, the decision stands for the proposition that the EPA does *not* necessarily have to develop an attainment demonstration in order to evaluate the impacts of a SIP revision, *i.e.* ''prove'' whether the revision will interfere with attainment, maintenance, reasonable further progress or any other requirements of the CAA. Thus, the commenters' argument that section 110(k)(5) has to require a specific technical analysis of impacts on attainment and maintenance because section 110(l) does so is simply in error.

Third, the section 110(1) cases cited by the commenters did not involve SIP revisions in which states sought to change existing SIP provisions so that they would fail to meet the specific CAA requirements at issue in this action. For example, none of the cases involved the EPA's approval of a new automatic exemption for emissions during SSM events. Had the state submitted a SIP revision that failed to meet applicable requirements of the CAA for SIP provisions, such as changing existing SIP emission limitations so that they would thereafter include SSM exemptions, then the EPA would have had to disapprove them.[340] The challenged rulemaking actions at issue in the cases relied upon by the commenters involved SIP revision changes unrelated to the specific legal requirements at issue in this action. Accordingly, the EPA's evaluation of those SIP revisions focused upon other issues, such as whether the revision would factually result in emissions that would interfere with attainment and maintenance of the NAAQS, that were relevant to the particular provisions at issue in those cases.

12. Comments that the EPA is misinterpreting *US Magnesium* and that the decision provides no precedent for this action.

Comment: A number of industry commenters arguedthatthe EPA's reliance on the decision of the Tenth Circuit in *US Magnesium, LLP* v. *EPA* is misplaced.[341] According to the commenters, the EPA did not correctly interpret the decision and is misapplying it in acting upon the Petition. The commenters asserted that the decision provides no precedent for this action because it was decided upon issues different from those at issue here. Commenters also argued that the court did not reach an important issue because the petitioner had failed to comment on it, *i.e.,* the argument that the EPA had not defined the term ''substantially inadequate'' in the rulemaking.[342]

Response: The EPA disagrees with the commenters on this point. The EPA of course acknowledges that the court in *US Magnesium* did not address the full range of issues related to the correct treatment of emissions during SSM events in SIP provisions that were raised in the Petition, *e.g.,* the court did not need to address the legal basis for affirmative defense provisions in SIPs because of the nature of the SIP provisions at issue in that case. However, the *US Magnesium* court evaluated many of the same key questions raised in this rulemaking and reached decisions that are very relevant to this action.

First, the *US Magnesium* court specifically upheld the EPA's SIP call actionrequiringthestatetoremove or revise a SIP provision that included an automaticexemption foremissionsfrom sources during ''upsets,'' *i.e.,* malfunctions. In doing so, the court was fully aware of the reasons why the EPA interprets the CAA to prohibit such exemptions, because they violate statutory requirements including section 302(k), section 110(a)(2)(A) and (C), and other requirements related to attainment and maintenance of the NAAQS. The court explained at length the EPA's reasoning about why the SIP provisions were inconsistent with CAA requirements for SIP provisions.[343]

Second, the court specifically upheld the EPA's SIP call action requiring the state to revise its SIP to remove or revise another SIP provision that could be interpreted to give state personnel the authority to determine unilaterally whether excess emissions from sources are a violation of the applicable emission limitation and thereby preclude any enforcement action by the EPA or citizens.

Third, the court also upheld the EPA's authority to issue a SIP call requiring a state ''to clarify language in the SIP that could be read to violate the CAA, when a court has not yet interpreted the language in that way.'' Indeed, the court opined that ''in light of the potential conflicts'' between competing interpretations of the SIP provision,

[338] *See* 467 F.3d 986 (6th Cir. 2006).

[339] *See* 467 F.3d at 995 (rejecting claim that section 110(l) required a modeled attainment demonstration to prove that the SIP revision would meet applicable CAA requirements).

[340] The EPA notes that the one exception to this, of course, is the Agency's recent approval of new SIP provisions in Texas that created an affirmative defense for malfunctions. As discussed elsewhere in this document, however, the EPA has determined that such provisions do not meet CAA requirements and is thus issuing a SIP call for those provisions.

[341] *See* 690 F.3d 1157 (10th Cir. 2012).

[342] *Id.,* 690 F.3d 1167, n.3.

[343] *Id.,* 690 F.3d at 1159–63.

''seeking revision of the SIP was prudent, not arbitrary or capricious.''[344]

Fourth, the court explicitly upheld the EPA's reasonable interpretation of section 110(k)(5) to authorize a SIP call when a state's SIP provision is substantially inadequate to meet applicable legal requirements, without making ''specific factual findings'' that the deficient provision resulted in a NAAQS violation. The EPA interpreted the CAA to allow a SIP call if the Agency ''determined that aspects of the SIP undermine the fundamental integrity of the CAA's SIP process and structure, regardless of whether or not the EPA could point to specific instances where the SIP allowed violations of the NAAQS.'' The *US Magnesium* court explicitly agreed that section 110(k)(5) authorizes issuance of a SIP call ''where the EPA determines that a SIP is no longer consistent with the EPA's understanding of the CAA.''[345]

Fifth, the court rejected claims that the EPA was requiring states to comply with the SSM Policy guidance rather than the CAA requirements, and the court noted that the Agency had undertaken notice-and-comment rulemaking to evaluate whether the SIP provisions at issue were consistent with CAA requirements.[346]

Sixth, the court rejected the claim that the EPA was interpreting the requirements of the CAA incorrectly because the EPA is in the process of bringing its own NSPS and NESHAP regulations into line with CAA requirements for emission limitations, in accordance with the *Sierra Club* v. *Johnson* decision.[347] The court noted that the EPA is now correcting SSM exemptions in its own regulations, and thus its prior interpretation of the CAA, rejected by the court in *Sierra Club* v. *Johnson,* did not make the SIP call to Utah arbitrary and capricious.[348]

On these and many other issues, the EPA believes that the court's decision in *US Magnesium* provides an important and correct precedent for the Agency's interpretation of the CAA in this action. The commenters' apparent disagreement with the court does not mean that the decision is not relevant to this action. The commenters specifically argued that the *US Magnesium* court did not reach the issue of whether the EPA had ''defined'' the term ''substantial inadequacy'' in the challenged rulemaking because the petitioner had not raised this point in comments. The EPA does not necessarily agree that ''defining'' the full contours of the term is a necessary step for a SIP call, but regardless of that fact the Agency did explain its interpretation of the term ''substantial inadequacy'' with respect to the SIP provisions at issue in the February 2013 proposal, the SNPR and this final action.

13. Comments that EPA has to evaluate a SIP ''as a whole'' to have the authority to issue a SIP call.

Comment: Many state and industry commenters argued that the EPA cannot evaluate individual SIP provisions in isolation and that the Agency is required to evaluate the entire SIP and any related permit requirements in order to determine if a specific SIP provision is substantially inadequate. In particular, some commenters argued that the EPA was wrong to focus upon the exemptions in SIP emission limitations for emissions during SSM events without considering whether some other requirement of the SIP or of a permit might operate to override or otherwise modify the exemptions. Many of the commenters asserted that other ''general duty'' clause requirements, elsewhere in other SIP provisions or in permits for individual sources, make the SSM exemptions in SIP emission limitations valid under the CAA.[349] These other requirements were often general duty-type standards that require sources to minimize emissions, to exercise good engineering judgment or not to cause a violation of the NAAQS. The implication of the commenters' arguments is that such general-duty requirements legitimize an SSM exemption in a SIP emission limitation—even if they are not explicitly a component of the SIP provision, if they are not incorporated by reference in the SIP provision and if they are not adequate to meet the applicable substantive requirements for that type of SIP provision.

Response: The EPA disagrees with the basic premise of the commenters that the EPA cannot issue a SIP call directing a state to correct a facially deficient SIP provision without first determining whether an unrelated and not cross-referenced provision of the SIP or of a permit might potentially apply in such a way as to correct the deficiency. As explained in section VII.A.3 of this document, the EPA believes that all SIP provisions must meet applicable requirements of the CAA, including the requirement that they apply continuously to affected sources. In reviewing the specific SIP provisions identified in the Petition, the EPA determined that many of the provisions include explicit automatic or discretionary exemptions for emissions during SSM events, whether as a component of an emission limitation or as a provision that operates to override the otherwise applicable emission limitation. Based on the EPA's review of these provisions, neither did they apply ''continuously'' as required by section 302(k) nor did they include cross-references to any other limitations that applied during such exempt periods to potentially provide continuous limitations. To the extent that the SIP of a state contained any other requirements that applied during such periods, that fact was not plain on the face of the SIP provision. If the EPA was unable to ascertain what, if anything, applied during these explicitly exempt periods, then the Agency concludes that regulated entities, members of and the public, and the courts will have the same problem. The EPA has authority under section 110(k)(5) to issue a SIP call requiring a state to clarify a SIP provision that is ambiguous or unclear such that the provision can lead to misunderstanding and thereby interfere with effective enforcement.[350]

To the extent that an affected state believes that the EPA has overlooked another valid provision of the SIP that would cure the substantial inadequacy that the Agency has identified in this action, the state may seek to correct the deficient SIP provision by properly revising it to remove the impermissible exemption or affirmative defense and replacing it with the requirements of the other SIP provision or by including a clear cross-reference that clarifies the applicability of such provision as a component of the specific emission limitation at issue. The state should make this revision in such a way that the SIP emission limitation is clear on its face as to what the affected sources are required to do during all modes of operation. The emission limitation should apply continuously, and what is required by the emission limitation under any mode of operation should be

[344] *Id.,* 690 F.3d at 1170.

[345] *Id.,* 690 F.3d at 1168.

[346] *Id.,* 690 F.3d at 1168.

[347] *Id.,* 690 F.3d at 1169.

[348] *Id.,* 690 F.3d at 1170.

[349] The EPA notes that other commenters on the February 2013 proposal made similar arguments with respect to affirmative defense provisions in their SIPs, asserting that other SIP provisions or terms in permits provided additionalcriteria that would have made the affirmative defense provisions at issue consistent with the EPA's interpretation of the CAA in the 1999 SSM Guidance. *See, e.g.,* Comment from Virginia Department of Environmental Quality at 1–2, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0613. Because the EPA no longer interprets the CAA to allow any affirmative defense provisions, these comments are not germane.

[350] *See US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1169 (10th Cir. 2012).

readily ascertainable by the regulated entities, the regulators and the public. The EPA emphasizes, however, that each revised SIP emission limitation must meet the substantive requirements applicable to that type of provision (*e.g.,* impose RACM/RACT-level controls on sources located in nonattainment areas) and must be legally and practically enforceable (*e.g.,* have sufficient recordkeeping, reporting and monitoring requirements). The revised SIP emission limitation must be consistent with all applicable CAA requirements.

14. Comments that the EPA inappropriately is ''using guidance'' as a basis for the SIP call action.

Comment: State and industry commenters asserted that the EPA is relying on guidance as the basis for issuing this SIP call action and argued that the EPA cannot issue a SIP call based on guidance. The commenters argued that the EPA guidance provided in the SSM Policy is not binding and that states thus have the flexibility to develop SIP provisions that are not in conformance with EPA guidance. Some commenters claimed that if the EPA wishes to make the interpretations of the CAA in its SSM Policy binding upon states, then it must do so through a notice-and-comment rulemaking and must codify those requirements in binding regulations in the CFR. The commenters argued that states should not be subject to a SIP call for existing provisions in their SIPs on the basis that they do not conform to guidance in the SSM Policy. Some commenters acknowledged that the EPA is providing notice and comment on its SSM Policy through this action, but still they contended that the EPA's interpretation of the CAA is not binding upon states unless the Agency codifies its updated SSM Policy in regulations in the CFR.

Response: The EPA disagrees with arguments that the Agency has acted inappropriately by relying on its interpretations of the CAA set forth in the SSM Policy in issuing this SIP call. As explained in the February 2013 proposal, the SSM Policy is merely guidance. It is correct that guidance documents are nonbinding. However, the guidance provides the EPA's recommendations concerning how best to interpret the statutory requirements of the CAA that are binding. Moreover, the EPA's interpretation of the CAA in the SSM Policy can become binding once the Agency adopts and applies that interpretation through notice-and-comment rulemaking. The EPA is issuing this SIP call action through notice-and-comment rulemaking and has specifically taken comment on its interpretations of the CAA as they apply to the specific SIP provisions at issue in this action. Thus, the EPA is requiring the affected states to comply with the requirements of the CAA, not with the SSM Policy guidance itself.[351]

The EPA also disagrees with commenters that in order to rely on its interpretation of the CAA in the SSM Policy, the EPA must first issue regulatory provisions applicable to SIP provisions. There is no such general obligation for the EPA to codify its interpretations of the CAA in regulatory text. Unless Congress has specifically directed the EPA to promulgate regulations for a particular purpose, the EPA has authority and discretion to promulgate such regulations as it deems necessary or helpful in accordance with its authority under section 301. With respect to issues concerning proper treatment of excess emissions during SSM events in SIP provisions, the EPA has historically proceeded by issuance of guidance documents. In this action, the EPA is undergoing notice-and-comment rulemaking to update and revise its guidance and to apply that guidance to specific existing SIP provisions. Thus, the EPA is not required to promulgate specific implementing regulations as a precondition to making a finding of substantial inadequacy to address existing deficient SIP provisions.

15. Comments that the EPA's redesignation and approval of a maintenance plan for an area in a state with a SIP that has provisions at issue in the SIP call establishes that all provisions in the SIP meet CAA requirements.

Comment: Commenters argued that the ''EPA's allegations that SSM provisions could threaten the NAAQS is contradicted by'' the fact that the ''EPA has consistently approved re-designation requests and attainment and maintenance plans, notwithstanding SSM provisions.'' According to these commenters, ''[t]he fact that EPA has already approved numerous re-designation requests . . . indicates that EPA has already (and in many cases, very recently) admittedthatthe[State SIPs are] fully approved, sufficient to achieve the NAAQS, and fully enforceable.'' The commenters argued that the appropriate time for the EPA to have addressed any issues concerning deficient SIP provisions applicable to emissions during SSM events was ''in the context of its review and approval of [maintenance] plans.'' Because the EPA has been approving maintenance plans for areas in states subject to this SIP call action, the commenters believed, this ''is evidence that the Agency has not viewed SSM-related emissions as a threat to attainment or maintenance of the NAAQS.'' In essence, these commenters argued that the EPA's redesignation of any area in any of the states at issue in this rulemaking indicates that the SIPs of these states fully meet all CAA requirements and that there are no deficiencies whatsoever in the SIPs of these states.

Response: The EPA disagrees with the commenters' premise that the Agency's approval of redesignation requests and maintenance plans for certain nonattainment areas, notwithstanding the presence of impermissible provisions related to emissions during SSM events that may have been present in the SIP for those areas, is evidence that the EPA does not view SSM-related emissions as a threat to attainment or maintenance of the NAAQS. Contrary to the theory of the commenters, the EPA's redesignation of an area to attainment does not mean that the SIP for the state in question fully meets each and every requirement of the CAA.

The CAA sets forth the general criteria for redesignation of an area from nonattainment to attainment in section 107(d)(3)(E). These criteria include a determination by the EPA that the area has attained the relevant standard (section 107(d)(3)(E)(i)) and that the EPA has fully approved the applicable implementation plan for the area for purposes of redesignation (section 107(d)(3)(E)(ii) and (v)). The EPA must also determine that the improvement in air quality in the area is due to reductions that are permanent and enforceable (section 107(d)(3)(E)(iii)) and that the EPA has fully approved a maintenance plan for the area under section 175A (section 107(d)(3)(E)(iv)).

For purposes of redesignation, the EPA has long held that SIP requirements that are not linked with a particular nonattainment area's designation and classification, including certain section 110 requirements, arenot ''applicable'' for purposes of evaluating compliance withthespecificredesignationcriteria in CAA sections 107(d)(3)(E)(ii) and (v).[352] The EPA maintains this

[351] The EPA's reliance on interpretations of the CAA in the SSM Policy through notice-and-comment rulemakings has previously been upheld by several courts. *See, e.g., US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1168 (10th Cir. 2012) (upholding the EPA's SIP call to Utah for existing SIP provisions); *Mich. Dep't of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000) (upholding the EPA's disapproval of a SIP submission).

[352] *See, e.g.,* ''Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Arizona;

interpretation because these requirements remain applicable after an areaisredesignatedtoattainment. Forat least the past 15 years, the EPA has applied thisinterpretationwithrespect to requirements to which a state will continue to be subject after the area is redesignated.[353] Courts reviewingthe EPA's interpretation oftheterm ''applicable'' in section 107(d)(3) inthe context of requirements applicable for redesignation have generally agreed with the Agency.[354]

The EPA therefore approves redesignation requests in many instances without passing judgment on every part of a state's existing SIP, if it finds those parts of the SIP are not ''applicable'' for purposes of section 107(d)(3). For example, the EPA recently approved Arizona's request to redesignate the Phoenix-Mesa 1997 8-hour ozone nonattainment area and its accompanying maintenance plan, while recognizing that Arizona's SIP may contain affirmative defense provisions that are not consistent with CAA requirements.[355] In that case, the EPA explicitly noted that approval of the redesignation of the Phoenix-Mesa nonattainment area did not relieve Arizona or Maricopa County of its obligation to remove the affirmative defense provisions from the SIP, if the EPA was to take later action to require correction of the Arizona SIP with respect to those provisions.[356]

The EPA also disagrees with commenters to the extent they suggest that the Agency must use the redesignation process to evaluate whether any existing SIP provisions are legally deficient. The EPA has other statutory mechanisms through which to address existing deficiencies in a state's SIP, and courts have agreed that the EPA retains the authority to issue a SIP call to a state pursuant to CAA section 110(k)(5) even after redesignation of a nonattainment area in that state.[357] The EPA recently addressed this issue in the context of redesignating the Ohio portion of the Huntington-Ashland (OH–WV–KY) nonattainment area to attainment for the $PM_{2.5}$ NAAQS.[358] In response tocomments challengingthe proposed redesignation due tothe presence of certain SSM provisions in the Ohio SIP, the EPA concluded that the provisions at issue did not provide a basis for disapproving the redesignation request.[359] In so concluding, the EPA noted that the SSM provisions and related SIP limitations at issue in that state were already approved into the SIP and thus ''permanent and enforceable'' for the purposes of meeting section 107(d)(3)(E)(iii) and that the Agency has other statutory mechanisms for addressing any problems associated with the SSM provisions.[360] The EPA emphasizes that the redesignation of areas to attainment does not relieve states of the responsibility to remove legally deficient SIP provisions either independently or pursuant to a SIP call. To the contrary, the EPA maintains that it may determine that deficient provisions such as exemptions or affirmative defense provisions applicable to SSM events are contrary to CAA requirements and take action to require correction of those provisions even after an area is redesignated to attainment for a specific NAAQS. This interpretation is consistent with prior redesignation actions.

In some cases, the EPA has stated that the presence of illegal SSM provisions does constitute grounds for denying a redesignation request. For example, the EPA issued a proposed disapproval of Utah's redesignation requests for Salt Lake County, Utah County and Ogden City PM_{10} nonattainment areas.[361] However, the specific basis for the proposed disapproval in that action, which was one of many SIP deficiencies identified by EPA, was the state's inclusion in the submission of new provisions not previously in the SIP that would have provided blanket exemptions from compliance with emission standards during SSM events. Those SSM exemptions were not in the previously approved SIP, and the EPA declined to approve them in connection with the redesignation request because such provisions are inconsistent with CAA requirements. In most redesignation actions, states have not sought to create new SIP provisions that are inconsistent with CAA requirements as part of their redesignation requests or maintenance plans.

Finally, the EPA disagrees with commenters that approval of a maintenance plan for any area has the result of precluding the Agency from later finding that certain SIP provisions are substantially inadequate under the CAA on the basis that those provisions may interfere with attainment or maintenance of the NAAQS or fail to meet any other legal requirement of the CAA. The approval of a state's redesignation request and maintenance plan for a particular NAAQS is not the conclusion of the state's and the EPA's responsibilities under the CAA but rather is one step in the process Congress established for identifying and addressing the nation's air quality problems on a continuing basis. The redesignation process allows states with nonattainment areas that have attained the relevant NAAQS to provide the EPA with a demonstration of the control measures that will keep the area in attainment for 10 years, with the caveat that the suite of measures may be revisited if necessary and must be revisited with a second maintenance plan for the 10 years following the initial 10-year maintenance period.

Moreover, it is clear from the structure of section 175A maintenance plans that Congress understood that the EPA's approval of a maintenance plan is not a guarantee of future attainment air quality in a nonattainment area. Rather, Congress foresaw that violations of the NAAQS could occur following a redesignation of an area to attainment and therefore required section 175A maintenance plans to include contingency measures that a state could implement quickly in response to a violation of a standard. The notion that the EPA's approval of a maintenance plan must be the last word with regard to the contents of a state's SIP simply does not comport with the framework Congress established in the CAA for redesignations. The EPA has continuing authority and responsibility to assure that a state's SIP meets CAA

Redesignation of the Phoenix-Mesa Nonattainment Area to Attainment for the 1997 8-Hour Ozone Standard; Proposed rule,'' 79 FR 16734 at 16739 n.22 (March 26, 2014).

[353] *See, e.g.,* 73 FR 22307 at 22312–13 (April 25, 2008) (proposed redesignation of San Joaquin Valley; the EPA concluded that section 110(a)(2)(D) transport requirements are not applicable under section 110(d)(3)(E)(v) because they ''continue to apply to a state regardless of the designation of any one particular area in the state''); 62 FR 24826 at 24829–30 (May 7, 1997) (redesignation of Reading, Pennsylvania, Area; the EPA concluded that the additional controls required by section 184 were not ''applicable'' for purposes of section 107(d)(3)(E) because ''they remain in force regardless of the area's redesignation status'').

[354] *See Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004); *Wall* v. *EPA,* 265 F.3d 426, 438 (6th Cir. 2001). *But see Sierra Club* v. *EPA,* Nos. 12–3169, 12–3182, 12–3420 (6th Cir. Mar. 18, 2015), *petition for reh'g en banc filed.*

[355] 79 FR 55645 (September 17, 2014).

[356] *Id.* at 55648. The EPA notes that it has included the deficient SIP provisions that include the affirmative defenses in this action, thereby illustrating that it can take action to address a SIP deficiency separately from the redesignation action, where appropriate.

[357] *See Southwestern Pennsylvania Growth Alliance* v. *EPA,* 114 F.3d 984 (6th Cir. 1998) (Redesignation of Cleveland-Akron-Lorain area determined valid even though the Agency subsequently proposed a SIP call to require Ohio and other states to revise their SIPs to mitigate ozone transport to other states).

[358] *See* 77 FR 76883 (December 31, 2012).

[359] *Id.* at 76891–92.

[360] The EPA notes that the provisions at issue in the redesignation action are included in this SIP call, thus illustrating that the Agency can address these deficient provisions in a context other than a redesignation request.

[361] 74 FR 62717 (December 1, 2009).

requirements, even after approving a redesignation request for a particular NAAQS.

In conclusion, the EPA is not required to reevaluate the validity of all previously approved SIP provisions as part of a redesignation. The existence of provisions such as impermissible exemptions and affirmative defenses applicable during SSM events in an approved SIP does not preclude the EPA's determination that emission reductions that have provided for attainment and that will provide for maintenance of a NAAQS in a nonattainment area are ''permanent and enforceable,'' as those terms are meant in section 107(d)(3), or that the state has met all applicable requirements under section 110 and part D relevant for the purposes of redesignation. Finally, if the EPA separately determines that the state's SIP is deficient after the redesignation of the area to attainment, the Agency can issue a SIP call requiring a corrective SIP revision. Redesignation of areas to attainment in no way relieves states of their continuing responsibilities to remove deficient SIP provisions from their SIPs in the event of a SIP call.

16. Comments that in issuing a SIP call the EPA is ''dictating'' to states how to regulate their sources and taking away their discretion to adopt appropriate control measures of their own choosing in developing a SIP.

Comment: Several commenters claimed that the EPA's SIP call action removes discretion that states would otherwise have under the CAA. Commenters claimed that the action has the effect of unlawfully directing states to impose a particular control measure by requiring the state to regulate all periods of operation for any source it chooses to regulate. Because the alternative emission limitations and work practice standards that the EPA asserts are necessary under the statutory definition of ''emissions limitation'' are not real options in some cases, the commenters claimed, the EPA's proposal is the type of mandate that the court in the *Virginia* decision found to have violated the CAA.[362] Other commenters also cited to the *Virginia* decision, as well as citing to the U.S. Supreme Court's decision in *Train* v. *NRDC,* in which the Court held that ''so long as the ultimate effect of a State's choice of emissions limitations is compliance with the national standards, the State is at liberty to adopt whatever mix of emissions limitations it deems best suited to its particular situation.[363] The commenters concluded that the EPA cannot prescribe the specific terms of SIP provisions applicable to SSM events absent evidence that the provisions undermine the NAAQS or are otherwise inconsistent with the Act.

Commenters claimed that states are provided substantial discretion under the Act in how to develop SIPs and that the EPA's SIP call action is inconsistent with this long-recognized discretion because it limits the states to one option: ''Eliminate any consideration of unavoidable emissions during planned startups and shutdowns and adopt only an extremely limited affirmative defense for unavoidable emissions during a malfunction.'' The commenters claimed that other options available to states include ''justifying existing provisions, adopting alternative numeric emission limitations, work practice standards, additional operational limitations, or revising existing numeric emission limitations and/or their associated averaging times to create a sufficient compliance margin for unavoidable SSM emissions.''

The commenters further asserted that the EPA's February 2013 proposal contained inconsistent statements about how the Agency expects states to respond to the SIP call. For example, according to one commenter, the EPA states in one place that startup and shutdown emissions above otherwise applicable limits must be considered a violation yet elsewhere discusses the fact that states can adopt alternative emission limitations for startup and shutdown. The commenter also asserted that the EPA recommended that states could elect to adopt the an approach to emissions during startup and shutdown like that of the EPA's recent MATS rule but that the EPA then failed to explain that the MATS rule contains ''exemptions'' for emissions during startup and shutdown that apply so long as the source meets the general work practice standards in the rule. This commenter claimed that the EPA's own approach is inconsistent with statements in the February 2013 proposal that states should treat all startups and shutdowns as ''normal operations.''

Response: The EPA disagrees with the commenter's claims that the SIP call violates the structure of ''cooperative federalism'' that Congress enacted for the SIP program in the CAA. Under this structure, the EPA establishes NAAQS and reviews state plans to ensure that they meet the requirements of the CAA. States take primary responsibility for developing plans to attain and maintain the NAAQS, but the EPA is required to step in if states fail to adopt plans that meet the statutory requirements. As the court in *Virginia* recognized, Congress gave states discretion in choosing the ''mix of controls'' necessary to attain and maintain the NAAQS. *See also Train* v. *NRDC,* 421 U.S. 60, 79, 95 (1975). The U.S. Supreme Court first recognized this program of cooperative federalism in *Train,* and the Court stated:

> The Act gives the Agency no authority to question the wisdom of a State's choices of emissions limitations if they are part of a plan which satisfies the standards of § 110(a)(2) . . . [S]o long as the ultimate effect of a State's choice of emissions limitations is compliance with the national standards, the State is at liberty to adopt whatever mix of emissions limitations it deems best suited to its particular situation.

The issue in that case concerned whether changes to requirements that would occur before the area was required to attain the NAAQS were variances that should be addressed pursuant to the provision governing SIP revisions or were ''postponements'' that must be addressed under section 110(f) of the CAA of 1970, which contained prescriptive criteria. The court concluded that the EPA reasonably interpreted section 110(f) not to restrict a state's choice of the mix of control measures needed to attain the NAAQS and that revisions to SIPs that would not impact attainment of the NAAQS by the attainment date were not subject to the limits of section 110(f). While the court recognized that states had discretion in determining the appropriate emissions limitations, it also recognized that the SIP must meet the standards of section 110(a)(2). In *Virginia,* the issue was whether at the request of the Ozone Transport Commission the EPA could mandate that states adopt specific motor vehicle emission standards more stringent than those mandated by CAA sections 177 and 202 for regulating emissions from motor vehicles.

As the EPA has consistently explained in its SSM Policy, the Agency does not believe that exemptions from compliance with any applicable SIP emission limitation requirements during periods of SSM are consistent with the obligation of states in SIPs, including the requirements to demonstrate that plans will attain and maintain the NAAQS, protect PSD increments and improve visibility. If a source is free from any obligation during periods of SSM, there is nothing restraining those emissions and such emissions could cause or contribute to an exceedance or violation of the NAAQS. Moreover, neither the state nor citizens would have authority to take enforcement

[362] 108 F.3d at 1410.

[363] 421 U.S. 60, 79 (1975).

action regarding such emissions. Also, even if historically such excess emissions have not caused or contributed to an exceedance or violation, this would not mean that they could not do so at some time in the future. Finally, given that there are many locations where air quality is not monitored such that a NAAQS exceedance or violation could be observed, the inability to demonstrate that such excess emissions have not caused or contributed to an exceedance or violation would not be proof that they have not. Thus, the EPA has long held that exemptions from emission limitations for emissions during SSM events are not consistent with CAA requirements, including the obligation to attain and maintain the NAAQS and the requirement to ensure adequate enforcement authority.

Despite claims by the commenter to the contrary, the EPA has not mandated the specific means by which states should regulate emissions from sources during startup and shutdown events. Requiring states to ensure that periods of startup and shutdown are regulated consistent with CAA requirements is not tantamount to prescribing the specific means of control that the state must adopt. By the SIP call, the EPA has simply explained the statutory boundaries to the states for SIP provisions, and the next step is for the states to revise their SIPs consistent with those boundaries. States remain free to choose the ''mix of controls,'' so long as the resulting SIP revisions meet CAA requirements. The EPA agrees with the commenter who notes several options available to the states in responding to the SIP call. The commenter stated that there are various options available to states, such as ''adopting alternative numeric emission limitations, work practice standards, additional operational limitations, or revising existing numeric emission limitations and/or their associated averaging times to create a sufficient compliance margin for unavoidable SSM emissions.'' However, the state must demonstrate how that mix of controls for all periods of operation will ensure attainment and maintenance of the NAAQS or meet other required goals of the CAA relevant to the SIP provision, such as visibility protection. For example, if a state chooses to modify averaging times in an emission limitation to account for higher emissions during startup and shutdown, the state would need to consider and demonstrate to the EPA how the variability of emissions over that averaging period might affect attainment and maintenance of a NAAQS with a short averaging period (*e.g.,* how a 30-day averaging period for emissions can ensure attainment of an 8-hour NAAQS). One option noted by the commenter, ''justifying existing provisions,'' does not seem promising, based on the evaluation that the EPA has performed as a basis for this SIP call action. If by justification, the commenter simply means that the state may seek to justify continuing to have an exemption for emissions during SSM events, the EPA has already determined that this is impermissible under CAA requirements.

The EPA regrets any confusion that may have resulted from its discussion in the preamble to the February 2013 proposal. The EPA's statement that startup and shutdown emissions above otherwise applicable limitations must be considered a violation is simply another way of stating that states cannot exempt sources from complying with emissions standards during periods of startup and shutdown. This is not inconsistent with the EPA's statement that states can develop alternative requirements for periods of startup and shutdown where emission limitations that apply during steady-state operations could not be feasibly met. In such a case, startup and shutdown emissions would not be exempt from compliance but rather would be subject to a different, but enforceable, standard. Then, only emissions that exceed such alternative emission limitations would constitute violations.

17. Comments that because areas are in attainment of the NAAQS, SIP provisions such as automatic exemptions for excess emissions during SSM events are rendered valid under the CAA.

Comment: Commenters argued that SSM exemptions should be permissible in SIP provisions applicable to areas designated attainment because, they asserted, there is evidence that the exemptions do not result in emissions that cause violations of the NAAQS. To support this contention, the commenters observed that a number of states with SSM exemptions in SIP provisions at issue in this SIP call are currently designated attainment in all areas for one or all NAAQS and also that some of these states had areas that previously were designated nonattainment for a NAAQS but subsequently have come into attainment. Thus, the commenters asserted, the SIP provisions that the EPA identified as deficient due to SSM exemptions must instead be consistent with CAA requirements because these states are in attainment. The commenters claimed that because these areas have shown they are able to attain and maintain the NAAQS or to achieve emission reductions, despite SSM exemptions in their SIP provisions, the EPA's concerns with respect to SSM exemptions are unsupported and unwarranted. Based on the premise that SSM exemptions are not inconsistent with CAA requirements applicable to areas that are attaining the NAAQS, the commenters claimed that such provisions cannot be substantially inadequate to meet CAA requirements.

Response: The EPA disagrees with the commenters' view that, so long as the provisions apply in areas designated attainment, the CAA allows SIP provisions with exemptions for emissions during SSM events. The commenters based their argument on the incorrect premise that SIP provisions applicable to sources located in attainment areas do not also have to meet fundamental CAA requirements such as sections 110(a)(2)(A), 110(a)(2)(C) and 302(k). Evidently, the commenters were only thinking narrowly of the statutory requirements applicable to SIP provisions in SIPs for purposes of part D attainment plans, which are by design intended to address emissions from sources located in nonattainment areas and to achieve attainment of the NAAQS in such areas. The EPA does not interpret the fundamental statutory requirements applicable to SIP provisions (*e.g.,* that they impose continuous emission limitations) to apply exclusively in nonattainment areas; these requirements are relevant to SIP provisions in general.

The statutory requirements applicable to SIPs are not limited to areas designated nonattainment. To the contrary, section 107(a) imposes the responsibility on each state to attain and maintain the NAAQS ''within the entire geographic areas comprising such State.'' The requirement to maintain the NAAQS in section 107(a) clearly applies to areas that are designated attainment, including those that may previously have been designated nonattainment. Similarly, section 110(a)(1) explicitly requires states to have SIPs with provisions that provide for the implementation, maintenance and enforcement of the NAAQS. By inclusion of ''maintenance,'' section 110(a)(1) clearly encompasses areas designated attainment as well as nonattainment. The SIPs that states develop must also meet a number of more specific requirements set forth in section 110(a)(2) and other sections of the CAA relevant to particular air quality issues (*e.g.,* the requirements for attainment plans for the different NAAQS set out in more detail in part D). Among those basic requirements that

states must meet in SIPS are section 110(a)(2)(C), requiring apermitting program applicable to sources in areas designated attainment, and section 110(a)(2)(D)(i)(II), requiring SIP provisions to prevent interference with protection of air quality in areas designated attainment in other states. Part C, in turn, imposes additional requirements on states with respect to prevention of significant deterioration of air quality in areas designated attainment. Although the EPA agrees that the CAA distinguishes between, and imposes different requirements upon, areas designated attainment versus nonattainment, there is no indication that the statute distinguishes between the basic requirements for emission limitations in these areas, including that they be continuous.

Section 110(a)(2)(A) requires states to include ''emission limitations'' in their SIPs ''as may be necessary or appropriate to meet applicable requirements of'' the CAA. The EPA notes that the commenters have raised other arguments concerning the precise meeting of ''necessary or appropriate'' (*see* section VII.A.3 of this document), but in this context the Agency believes that because states are required to have SIPs that provide for ''maintenance'' of the NAAQS it is clear that the general requirements for emission limitations in SIPs are not limited to areas designated nonattainment. Section 110(a)(2)(A) contains no language distinguishing between emission limitations applicable in attainment areas and emission limitations applicable in nonattainment areas. Significantly, the definition of the term ''emission limitation'' in section 302(k) likewise makes no distinction between requirements applicable to sources in attainment areas versus nonattainment areas. The EPA sees no basis for interpreting the term ''emission limitation'' differently for attainment areas and nonattainment areas, with respect to whether such emission limitations must impose continuous controls on the affected sources. Most importantly, section 110(a)(2)(A) does explicitly require that any such emission limitations must ''meet the applicable requirements'' of the CAA, and the EPA interprets this to include the requirement that emission limitations apply continuously, *i.e.,* contain no exemptions for emissions during SSM events. This requirement applies equally in all areas, including attainment and nonattainment areas.

The EPA's interpretation of the CAA in the SSM Policy has long extended to SIP provisions applicable to attainment areas as well as to nonattainment areas. Since at least 1982, the SSM Policy has stated that SIP provisions with SSM exemptions areinconsistent with requirements of the CAA to provide bothforattainment and maintenance of the NAAQS, *i.e.,* inconsistent with requirements applicable to both nonattainment and attainment areas.[364] Since at least 1999, the EPA's SSM Policy has clearly stated that SIP provisions with SSM exemptions are inconsistent with protection of PSD increments in attainment areas.[365] The EPA provided its full statutory analysis with respect to SSM exemptions and CAA requirements applicable to areas designatedattainmentinthe background memorandum accompanying the February 2013 proposal.[366]

Finally, the EPA disagrees with the commenters' theory that, absent proof that the SIP deficiency has caused or will cause a specific violation of the NAAQS, the Agency lacks authority to issue a SIP call for SIP provisions that apply only in areas attaining the NAAQS. This argument is inconsistent with the plain language of section 110(k)(5). Section 110(k)(5) authorizes the EPA to issue a SIP call whenever the SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstatetransportortocomply with any other CAA requirement. The explicit reference to a SIP's being inadequate to maintain the NAAQS clearly indicates that the EPA has authority to make a finding of substantial inadequacy for a SIP provisionapplicabletoattainment areas, not only for a SIP provision applicabletononattainmentareas. In addition, section 110(k)(5) explicitly authorizes the EPA to issue a SIP call not only in instances related to a specific violation of the NAAQS but rather whenever the Agency determines that a SIP provision is inadequate to meet requirements related to attainment and maintenance of the NAAQS or any other applicable requirement of the Act, including when the provision is inadequatetomeetthefundamental legalrequirementsapplicableto SIP provisions. Were the EPA's authority limited to issuing a SIP call only in the event an area was violating the NAAQS, section 110(k)(5) would not explicitly include requirements related to ''maintenance'' and would not explicitly include the statement ''otherwise comply with any requirement of [the CAA].''

18. Comments that the EPA's initial approval of these deficient provisions, or subsequent indirect approval of them through action on other SIP submissions, establishes that these provisions meet CAA requirements.

Comment: A number of commenters argued that because the EPA initially approved the SIP provisions at issue in this rulemaking, this establishes that these provisions meet CAA requirements. Other commenters argued that subsequent actions on other SIP submissions in effect override the fact that the SIP provisions at issue are legally deficient. For example, an industry commenter asserted that there have been ''dozens of instances where EPA has reviewed Alabama SIP revision submittals'' and the EPA has never indicated ''that it believed these rules to be inconsistent with the CAA.'' Other state commenters made similar arguments suggesting that the EPA's original approval of these provisions, and the fact that the EPA has not previously taken action to require states to revise them, indicates that they are not deficient.

Response: The EPA disagrees with these commenters. The fact that the EPA once approved a SIP provision does not mean that the SIP provision is *per se* consistent with the CAA, or consistent with the CAA notwithstanding any later legal or factual developments. This is demonstrated bythevery existence of the SIP call provision in section 110(k)(5), wherebythe EPA mayfind thatan''applicable implementation plan for any area is substantially inadequatetoattain or maintainthe relevant [NAAQS] . . . or to otherwise comply with any requirement of'' the CAA. This SIP call authority expressly authorizes the EPA to direct a state to revise its SIP to remedy any substantial inadequacy, including failures to comply with legal requirements of the CAA. By definition, when the EPA promulgates a SIP call, this means that the Agency has previously approved the provision into the SIP, rightly or wrongly. The SIP call provision would be meaningless if a SIP provision were considered perpetually consistent with CAA requirements after it was originally approved, and merely because of that prior approval as commenters suggest. In the February 2013 proposal, the EPA acknowledged its own responsibility in approving provisions that were inconsistent with CAA requirements.

The EPA also disagrees with the argument that the Agency's action on other intervening SIP submissions from a state over the years since the approval

[364] *See* 1982 SSM Guidance, Attachment at 1.

[365] *See* 1999 SSM Guidance at 2.

[366] *See* Memorandum, ''Statutory, Regulatory, and Policy Context for this Rulemaking,'' February 4, 2013, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0029.

of the original deficient SIP provision in some way negates the original deficiency. The industry commenter pointed to ''dozens of instances where EPA reviewed Alabama SIP revision submittals'' as times when the EPA should have addressed any SSM-related deficient SIP provisions. However, the EPA's approval of other SIP revisions does not necessarily entail reexamination and reapproval of every provision in the SIP. The EPA often only examines the specific provision the state seeks to revise in the SIP submission without reexamining all other provisions in the SIP. The EPA sometimes broadens its review if commenters bring other concerns to the Agency's attention during the rulemaking process that are relevant to the SIP submission under evaluation.

19. Comments that exemptions for excess emissions during exempt SSM events would not distort emissions inventories, SIP control measure development or modeling, because the EPA's regulations and guidance concerning ''rule effectiveness'' adequately account for these emissions, and therefore the proposed SIP calls are not needed or justified.

Comment: One commenter argued that provisions allowing exemptions or affirmative defenses for excess emissions during startup and shutdown are consistent with a state's authority under CAA section 110 and that this is evidenced by the fact that the EPA has issued guidance on ''rule effectiveness'' that plainly takes into account a ''discount'' factor in a state's demonstration of attainment when it chooses to adopt startup/shutdown provisions. This commenter cited the EPA's definition of ''rule effectiveness'' at 40 CFR 51.50 and EPA guidance on demonstrating attainment of $PM_{2.5}$ and regional haze air quality goals.[367]

Response: The EPA disagrees with the characterization in this comment of past EPA guidance and with the conclusion that the fact of the existence of EPA guidance on ''rule effectiveness'' would support the claim that the CAA provides authority for exemptions or affirmative defenses for excess emissions during startup and shutdown. The EPA's definition of ''rule effectiveness'' at 40 CFR 51.50 does not refer to startup and shutdown; it refers only to ''downtime, upsets, decreases in control efficiencies, and other deficiencies in emission estimates,'' and once defined the term ''rule effectiveness'' is not subsequently used within 40 CFR part 51 in any way that would indicate that it is meant to capture the effect of exemptions during startup and shutdown. The EPA guidance on demonstrating attainment of $PM_{2.5}$ and regional haze goals cited by the commenter also does not address rule effectiveness or excess emissions during startup and shutdown. The terms ''startup'' and ''shutdown'' do not appear in the attainment demonstration guidance. The EPA did issue a different guidance document in 1992 on rule effectiveness,[368] but that document focused only on the preparation of emissions inventories for 1990, not on demonstrating attainment of NAAQS or regional haze goals. Moreover, the 1992 guidance document addressed ways of estimating actual 1990 emissions in light of the likelihood of a degree of source noncompliance with applicable emission limitations, not on the emissions that would be permissible in light of the absence of a continuous emission limitation applicable during startup and shutdown. The terms ''startup'' and ''shutdown'' do not appear in the 1992 guidance. In 2005, the EPA replaced the 1992 guidance document on rule effectiveness as part of providing guidance for the implementation of the 1997 ozone and $PM_{2.5}$ NAAQS.[369] Like the 1992 guidance, the 2005 guidance associated ''rule effectiveness'' with the issue of noncompliance and did not provide any specific advice on quantifying emissions that could be legally emitted because of SSM exemptions in SIPs. To avoid misunderstanding, the 2005 guidance included a question and answer on startup and shutdown emissions to the effect that emissions during startup and shutdown should be included in ''actual emissions.'' This question and answer included the statement, ''[L]ess preferably, [emissions during startup, shutdown, upsets and malfunctions] can be accounted for using the rule effectiveness adjustment procedures outlined in this guidance.'' However, other than in this question and answer, the 2005 guidance does not mention emissions during startup and shutdown events; it focuses on issues of noncompliance with applicable emission limitations. The fact that the 1992 guidance document did not intend for ''rule effectiveness'' to encompass SIP-exempted emissions during startup and shutdown, and that the 2005 guidance also did not, is confirmed by a statement in a more recent draft EPA guidance document:

> In addition to estimating the actual emissions during startup/shutdown periods, another approach to estimate startup/shutdown emissions is to adjust control parameters via the emissions calculation parameters of rule effectiveness or primary capture efficiency. *Using these parameters for startup/shutdown adjustments is not their original purpose,* but can be a simple way to increase the emissions and still have a record of the routine versus startup/shutdown portions of the emissions. (Emphasis added.) [370]

Furthermore, as explained in the proposals for this action and in this document, the EPA believes that it is a fundamental requirement of the CAA that SIP emission limitations be continuous, which therefore precludes exemptions for excess emissions during startup and shutdown. At bottom, although it is true that these guidance documents indicated that one less preferable way to account for startup and shutdown emissions could be through the rule effectiveness analysis, this does not in any way indicate that exemptions from emissions limitations would be appropriate for such periods.

Comment: A commenter argued that the EPA has not shown any substantial inadequacy with respect to CAA requirements but that the closest the EPA comes to identifying a substantial inadequacy is in the EPA's discussion of its concern regarding the impacts of SSM exemptions on the development of accurate emissions inventories for air quality modeling and other SIP planning. This commenter and another commenter in particular noted a passage in the February 2013 proposal that stated that emission limitations in SIPs are used to meet various requirements for attainment and maintenance of the NAAQS and that all of these uses typically assume continuous source compliance with emission limitations.[371] These commenters disagreed with the EPA's statement that all of these uses typically assume continuous source compliance with

[367] The commenter appears to have been meaning to cite to the draft EPA guidance document ''Draft Guidance for Demonstrating Attainment of Air Quality Goals for $PM_{2.5}$ and Regional Haze,'' January 2, 2001. This draft guidance on $PM_{2.5}$ and Regional Haze was combined with similar guidance on ozone in the final guidance document ''Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze,'' April 2007, EPA–454/B–07–002.

[368] ''Guidelines for Estimating and Applying Rule Effectiveness for Ozone/CO State Implementation Plan Base Year Inventories,'' November 1992, EPA–4S2JR–92.010.

[369] ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' Appendix B, August 2005, EPA–454/R–05–001.

[370] ''Draft Emissions Inventory Guidance for Implementation of Ozone [and Particulate Matter]* National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' April 11, 2014, page 62.

[371] February 2013 proposal, 78 FR 12459 at 12485.

applicable emission limitations, and the commenters cited several EPA guidance documents and statements that, they believe, address SSM and ensure that states do not simply assume continuous compliance. These commenters in addition cited to footnote 4 of the EPA's 1999 SSM Guidance.[372] The commenters argued that as long as states are complying with the EPA's inventory and modeling rules and guidance, SSM exemptions and similar applicability provisions have no negative impact on SIP planning.

Response: The EPA acknowledges that the cited statement in the February 2013 proposal, that various types of required analysis used to develop SIPs or permits ''typically assume continuous source compliance with emission limitations,'' was an oversimplification of a complex situation. However, the EPA disagrees with the commenters' assertion that the EPA's inventory rules and other guidance are sufficient to ensure that SSM exemptions, where they still exist in SIPs, have no negative impact on SIP planning. Also, if the EPA were to allow them, such exemptions could become more prevalent and have a larger negative effect. More importantly, regardless of how SSM exemptions may or may not negatively impact things like emissions inventories, as explained elsewhere in this document, the EPA believes that it is a fundamental requirement of the CAA that SIP emission limitations be continuous, which therefore precludes exemptions for excess emissions during SSM events.

Generally, the EPA's guidance and rules do not say that it is correct for estimates of source emissions used in SIP development to be based on an assumption of continuous compliance with the SIP emission limitations even if the SIP contains exemptions for SSM periods. Rather, the EPA has generally emphasized that SIPs and permits should be based on the best available information on actual emissions, including in most cases the effects of known or reasonably anticipatable noncompliance with emission limitations that do apply.[373] Because the EPA's longstanding SSM Policy has interpreted the Act to prohibit exemptions during SSM events, it has not been a focus of EPA guidance to explain to states how to take account of such exemptions. As the commenters have pointed out, some aspects of some EPA guidance documents have some relationship to the issue of accounting for SSM exemptions. Nevertheless, taken together, the EPA's guidance does not and cannot ensure that emission estimates used in developing SIPs and permits correctly reflect actual emissions in all cases in which SSM exemptions still exist in SIPs, particularly for sources that, unlike all or most of the sources represented by these two commenters, are not subject to continuous emissions monitoring. For a source not subject to continuous emissions monitoring, when excess emissions during SSM events are exempted by a SIP—whether automatically, on a special showing or through director's discretion—it is much more likely that those emissions would not be quantified and reported to the air agency such that they could be accounted for in SIP and permit development. For example, when the SIP includes exemptions for excess emissions during SSM events, there may be no motive for a source to perform a special stack test during a SSM period in which there is no applicable emission limitation and possibly no legal basis for an air agency to require such a stack test. It would also be unusual to find well-documented emission factors for such transient operation that could be used in place of source-specific testing.

As explained in a response provided earlier in this document, the EPA guidance documents also cited by these commenters in fact do not address how the effect of exemptions in SIPs for excess emissions during startup and shutdown can be accounted for in an attainment or maintenance demonstration. The cited 1992 ''rule effectiveness'' guidance in regard to issues such as noncompliance in the form of non-operation of control equipment, malfunctions, poor maintenance and deterioration of control equipment was meant to address how the issues affected emissions in 1990, not in a future year when the NAAQS must be attained. The 2005 guidance also did not provide any particular advice on how ''rule effectiveness'' concepts could be used to estimate emissions during exempt SSM periods. Given that the EPA's longstanding SSM Policy has been that exemptions for excess emissions during SSM events are not permissible, the EPA had no reason to provide guidance on how attainment demonstrations should account for such exemptions.

The commenters are right to infer that the EPA does believe that where exemptions for excess emissions during anticipatable events still remain in current SIPs, attainment demonstrations ideally should account for them. Indeed, the EPA's guidance has recommended that all emissions during startup and shutdown events be included in both historical and projected emissions inventories.[374] However, as long as exemptions for excess emissions during SSM events have the effect of making such excess emissions not be violations and thus not reportable as violations, it will be difficult for air agencies to have confidence that they have sufficient knowledge of the magnitude, location and timing of such emissions as would be needed to accurately account for those emissions in attainment demonstrations, especially for NAAQS with averaging periods of one day or less. The EPA has promulgated emissions inventory reporting rules, but these rules apply requirements to air agencies rather than to the sources that would have actual knowledge of startup and shutdown events and emissions. To make a complying inventory data submission to the EPA, an air agency does not have to obtain from sources information on the magnitude and timing of emissions during SSM events for which an exemption applies, and to the EPA's knowledge most air agencies do not obtain this information. The EPA's emissions inventory rules require the reporting of historical annual-total emissions only (and in some areas ''typical'' seasonal and/or daily emissions for certain pollutants), not day-to-day emissions. Actual emissions during SSM events should be included in these annual emissions. While data formats are available from the EPA to allow a state to segregate the total annual emissions during SSM events

[372] The EPA interprets the citation ''*See supra* pp. 21–24'' as being intended to refer to those pages of ''Guidelines for Estimating and Applying Rule Effectiveness for Ozone/CO State Implementation Plan Base Year Inventories,'' November 1992, EPA–4S2JR–92.010, which this commenter did not refer to by title.

[373] New source permitting under the PSD program is an exception to the principle that the effects of noncompliance should be included in estimates of source emissions. The air quality impact analysis for a proposed PSD permit is based on an assumption that the source will operate without malfunctions. However, it may be necessary in this type of analysis to consider excess emissions that are the result of poor maintenance, careless operation or other preventable conditions. *See* 40 CFR part 51, appendix W, section 8.1.2, footnote a.

[374] For example, *see* ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' Appendix B, August 2005, EPA–454/R–05–001. A recent draft EPA guidance on the preparation of emissions inventories for attainment demonstrations recognizes that, in contrast to startup and shutdown emissions, emissions during malfunctions are not predictable and do not need to be included in projected inventories for the future year of attainment. *See* ''Draft Emissions Inventory Guidance for Implementation of Ozone [and Particulate Matter]* National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' April 11, 2014, page 62.

from annual emissions during other type of operation, to segregate the emissions is not a requirement and few states do so. Moreover, the EPA's emissions inventory rules require reporting on most sources only on an ''every third year'' basis, which means that unless an air agency has authority to and does require more information from sources than is needed to meet the air agency's reporting obligation to the EPA, the air agency will not be in a position to know whether and how, between the triennial inventory reports, excess emissions during startup and shutdown may be changing due to variations in source operation and possibly affecting attainment or maintenance. Thus, the EPA's emissions inventory rules provide air agencies only limited leverage in terms of ability to obtain detailed information from sources regarding the extent to which actual emissions during SSM events may be unreported in emissions inventories, due to SIP exemptions. The EPA believes that when exemptions for excess emissions during SSM events are removed from SIPs, thereby making high emissions during SSM events specifically reportable deviations from emission limitations for more sources than now report them as such, it will be easier for air agencies to understand the timing and magnitude of event-related emissions that can affect attainment and maintenance. However, this belief is not the basis for this SIP call action, only an expected useful outcome of it.

Footnote 4 of the EPA's 1999 SSM Guidance suggested that ''[s]tates may account for [potential worst-case emissions that could occur during startup and shutdown] by including them in their routine rule effectiveness estimates.'' This statement in the 1999 document's footnote may seem at odds with the statement in this response that the ''rule effectiveness'' concept was not meant to embrace excess emissions during startup and shutdown that were allowed because of SIP exemptions. However, the footnote is attached to text that addresses ''worst-case'' emissions that are higher than allowed by the applicable SIP, because that text speaks about the required demonstration to support a SIP revision containing an affirmative defense for violations of applicable SIP emission limitations. Thus, estimates of such worst-case emissions would reflect the effects of noncompliance, which is within the intended scope of the EPA's ''rule effectiveness'' guidance. Footnote 4 was not referring to the issue of how to account for the effect of SSM exemptions.[375]

Comment: A number of commenters stated their understanding that the EPA has proposed SIP calls as a way of improving air agencies' implementation of EPA-specified requirements in emissions inventory or modeling, and they stated that if this is the EPA's concern then the EPA should address the issue in that context.

Response: To clarify its position, the EPA explains here that while it believes that approvable SIP revisions in response to the proposed SIP calls will have the benefit of providing information on actual emissions during SSM events that can improve emissions inventories and modeling, the availability of this additional information is not the basis for the SIP calls that are being finalized. The EPA believes that it is a fundamental requirement of the CAA that SIP emission limitations be continuous, which therefore precludes exemptions for excess emissions during startup and shutdown.

Comment: An air agency commenter stated that facilities in its state are required to submit data on all annual emissions, including emissions from startup and shutdown operation (and malfunctions), as part of its annual emissions inventory, and that it takes these emissions into consideration as part of SIP development.

Response: The EPA appreciates the efforts of this commenter to develop SIPs that account for all emissions. However, these efforts and whatever degree of success the commenter enjoys do not change the fundamental requirement of the CAA that SIP emission limitations be continuous, which therefore precludes exemptions for excess emissions during startup and shutdown.

Comment: A commenter argued that even to the extent SSM emissions present some level of uncertainty in model-based air quality projections, that uncertainty is small compared to other sources of uncertainty in modeling analyses, and so SSM emissions will not have any significant impact on attainment demonstrations or any underlying air quality modeling analysis.

Response: In support of this very general statement, the commenter provided only its own assessment of its own experience and the similar opinion of unnamed permitting agencies. In any case, this SIP call action is not based on any EPA determination about how modeling uncertainties due to SSM exemptions in SIPs compare to other modeling uncertainties.

20. Comments that exemptions for excess emissions during SSM events are not a concern with respect to PSD and protection of PSD increments.

Comment: Commenters asserted that the EPA has not adequately explained the basis for its concerns about the impact of emissions during SSM events on PSD increments.

Response: The EPA disagrees. As explained in detail in the background memorandum included in the docket for this rulemaking,[376] CAA section 110(a)(2)(C) requires that a state's SIP must include a PSD program to meet CAA requirements for attainment areas.[377] In addition, section 161 explains that ''[e]ach [SIP] shall contain emission limitations and such other measures as may be necessary . . . to prevent significant deterioration of air quality for such region . . . designated . . . as attainment or unclassifiable.'' Specifically, each SIP is required to contain measures assuring that certain pollutants do not exceed designated maximum allowable increases over baseline concentrations.[378] These maximum allowable increases are known as PSD increments. Applicable EPA regulations require states to include in their SIPs emission limitations and such other measures as may be necessary in attainment areas to assure protection of PSD increments.[379] Authorizing sources in attainment areas to exceed SIP emission limitations during SSM events compromises the protection of these increments.

The commenters' concerns seem to be focused on PSD permitting for individual sources rather than on emission limitations in SIPs. The commenters asserted that the EPA already adequately accounts for all emissions during SSM events when calculating the baseline and increment consumption and expressed concern about the potential for ''double counting'' of emissions by counting them both toward the baseline and against increment. The EPA agrees that

[375] In light of the *NRDC* v. *EPA* decision, affirmative defense provisions are not allowed in SIPs any longer, so this aspect of the 1999 SSM Guidance is no longer relevant.

[376] *See* Memorandum, ''Statutory, Regulatory, and Policy Context for this Rulemaking,'' February 4, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0029.

[377] ''Each implementation plan . . . shall . .ensp;. include a program to provide for . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved, including a permit program as required in . . . part C.'' CAA section 110(a)(2)(C).

[378] CAA section 163.

[379] *See* 40 CFR 51.166(c).

emissions should not be double-counted and has regulatory requirements in place to ensure that emissions are either attributed to the baseline or counted against increment but not both.[380] Nevertheless, permitting agencies base their calculations of both the baseline and increment consumption on air quality data representing actual emissions from sources.[381] As explained more fully in the background memorandum accompanying the February 2013 proposal, the EPA is concerned that as a result of SSM exemptions in SIPs, inventories of actual emissions often do not include an accurate accounting of excess emissions that occur during SSM events. Moreover, the models used to calculate increment consumption typically assume continuous source compliance with applicable emission limitations.[382] Authorizing exceedances of emission limitations during SSM events would compromise the accuracy of the projections made by these models. Accurate calculations of the baseline and increment consumption rely on the correct accounting of all emissions, including those occurring during SSM events. Without accurate data, the EPA cannot be certain that state agencies are calculating baseline or increment consumption correctly or that increments in attainment areas are not being exceeded. For the foregoing reasons, the EPA is concerned that SSM exemptions in SIPs compromise the ability of the PSD program to protect air quality increments.

21. Comments that because ambient air quality has improved over the duration of the CAA through various regulatory programs such as the Acid Rain Program, this disproves that SIP provisions including exemptions for excess emissions during SSM events pose any concerns with respect to protection of public health and the environment.

Comment: Industry commenters claimed that because ambient air quality data show that air quality has been consistently improving over a period of years, this proves that exemptions for emissions during SSM events do not impede the ability of areas to attain and maintain the NAAQS. The commenters provided a chart showing percentage reduction in emissions of the various NAAQS pollutants ranging from 52 percent reduction in NO_X between 1980 and 2010 to 83 percent reduction in direct PM_{10} emissions for that same time period. The commenters further claimed that a significant portion of the recent emissions reductions have been achieved by electric utilities. The commenters also provided charts and graphs showing reductions in pollutants under the CAA Acid Rain Program. The commenters further claimed that the states in which they operate—Alabama, Florida, Georgia, Mississippi and North Carolina—are meeting the NAAQS, with isolated exceptions. The commenters further stated that, although the EPA recently has promulgated several new NAAQS, the attainment plans for those standards are not yet due, and thus the new standards cannot justify the SIP call. The commenters concluded by noting that the states' success in achieving the various NAAQS, even as the NAAQS have been strengthened, demonstrates that the existing SSM exemptions in SIP provisions identified by the EPA do not ''place the NAAQS at risk.'' Regarding visibility, the commenters noted that plans to show progress in meeting the regional haze goal were due in 2013 and that evidence shows that visibility is also improving notwithstanding the existing SSM exemptions.

Response: The EPA agrees that many areas in the U.S. have made great strides in improving ambient air quality under the CAA. However, excess emissions from sources during SSM events have the potential to undermine that progress and are also inconsistent with the requirements of the CAA, as discussed elsewhere in the February 2013 proposal and in this final action. The EPA notes that the fact that an area has attained the NAAQS does not demonstrate that emissions during SSM events do not have the potential to undermine attainment or maintenance of the NAAQS, interfere with protection of PSD increments or interfere with visibility. For certain pollutants, such as lead or SO_2, a single source could have a single SSM event that could cause an exceedance of the NAAQS that would otherwise not have occurred. It is through its SIP that a state demonstrates that it has in place an air quality management program that will attain and maintain the NAAQS on an ongoing basis, and so it is critical that the state, through its SIP provisions, can ensure that emissions during normal source operation including startup and shutdown events do not exceed levels relied on for purposes of developing attainment and maintenance plans. Similarly, SIP provisions designed to protect visibility must also meet requirements of the CAA, and exemptions for emissions during SSM events would likewise have the potential to undermine visibility objectives of the CAA. Thus, it is not appropriate to exempt emissions during these SSM events from compliance with emission limitations in SIPs. As explained in this final action, the state has flexibility in choosing how to regulate source during these periods of operation, and sources do not necessarily have to be subject to the same numerical emissions limitations or the same other control requirements during startup and shutdown that apply during other modes of operation. However, SIP emission limitations must be continuous, and thus sources must be subject to requirements that apply at all times including during startup and shutdown.

22. Comments that the EPA's position that SIP provisions such as automatic exemptions for excess emissions during SSM events hinder effective enforcement for violations is incorrect, because there have been a number of citizen suits brought under the CAA.

Comment: According to industry commenters, the EPA's argument that deficient SIP provisions concerning emissions during SSM events limit enforcement of violations of emissions limitations under sections 113 and 304 is inaccurate, because ''the facts show that SSM provisions do not preclude or hinder enforcement of any CAA requirements.'' The commenters provided a list of ''recent'' enforcement actions and asserted that ''[t]he sheer number of cases demonstrates that the existing regulations provide ample opportunity for enforcement.'' The commenters cited to litigation brought by citizen groups that the commenters asserted has resulted in settlements including ''injunctive relief and supplemental environmental projects (''SEPs'') worth tens of millions, if not hundreds of millions, of dollars.'' The commenters also cited to one example to suggest that ''whereas EPA and/or States may use enforcement discretion'' in certain types of cases, ''citizen groups do not.''

[380] *See* 40 CFR 51.166 and 52.21.

[381] *See* CAA section 169(4) (defining baseline concentration); 40 CFR 51.166(b)(13)(i) (setting forth what is included in baseline concentration; 40 CFR 52.21(b)(13)(i) (same). The **Federal Register** document promulgating the revised PSD regulations also explained this point. In that document, the EPA explained, ''[B]aseline concentrations reflect actual air quality in an area. Increment consumption or expansion is directly related to baseline concentration. Any emissions not included in the baseline are counted against the increment. The complementary relationship between the concepts supports using the same approach for calculating emissions contributions to each.'' 45 FR 52676, 52718 (August 7, 1980). ''Actual emissions'' is defined in 40 CFR 51.166(b)(21)(i) and 52.21(b)(21)(i).

[382] *See* 45 FR 52717 (''increment consumption and expansion should be based primarily on actual emissions increases and decreases, which can be presumed to be allowable emissions for sources subject to source-specific emissions limitations.'').

Response: The EPA disagrees with the commenters' logic that the mere existence of enforcement actions negates the concern that deficient SIP provisions interfere with effective enforcement of SIP emission limitations. The EPA believes that deficient SIP provisions 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. For example, automatic or discretionary exemption provisions for excess emissions during SSM events by definition completely eliminate the possibility of enforcement for what may otherwise be clear violations of emissions limitations during those times. Affirmative defense provisions purport to alter or eliminate the statutory jurisdiction of courts to determine liability or to impose remedies for violations. These types of provisions eliminate the opportunity to obtain injunctive relief or penalties that may be needed to ensure appropriate efforts to design, operate and maintain sources so as to prevent and to minimize excess emissions, protect the NAAQS and PSD increments and meet other CAA requirements. Similarly, the exemption of sources from liability for excess emissions during SSM events eliminates incentives to minimize emissions during those times. These exemptions thus reduce deterrence of future violations from the same sources or other sources during these periods.

In the February 2013 proposal, the EPA discussed in detail an enforcement case that illustrates and supports the Agency's position.[383] In that case, citizen suit plaintiffs sought to bring an enforcement action against a source for thousands of self-reported exceedances of emission limitations in the source's operating permit. The source asserted that those exceedances were not ''violations,'' through application of a permit provision that mirrored an underlying Georgia SIP provision. The U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) ultimately determined that the provision created an ''affirmative defense'' for SSM emissions that shielded the source from liability for numerous violations. The court noted that even if the approved provision in Georgia's SIP was inconsistent with the EPA's guidance on the proper treatment of excess emissions during SSM events, the defendant could rely on the provision because the EPA had not taken action through rulemaking to rectify any discrepancy.[384] In this final action on the Petition, the EPA has determined that the specific SIP provision at issue in that case is deficient for several reasons. Had that deficient SIP provision not been in the SIP at the time of the enforcement action, then the provision would not have had any effect on the outcome of the case. Instead, the courts would have evaluated the alleged violations and imposed any appropriate remedies consistent with the applicable CAA provisions, rather than in accordance with the SIP provision that imposed the state's enforcement discretion preferences on other parties contrary to their rights under the CAA.

As the outcome of this case demonstrates, the mere fact that a number of enforcement actions have been filed does not mean that the deficient SIP provisions identified by the EPA in this SIP call action do not hinder effective enforcement under sections 113 and 304. To the contrary, that case illustrates exactly how conduct that might otherwise be a clear violation of the applicable SIP emission limitations by a source was rendered immune from enforcement through the application of a provision that operated to excuse liability for violations and potentially allowed unlimited excess emissions during SSM events.

The commenters cited 15 other enforcement cases brought by government and citizen groups over a span of 17 years, but the commenters do not indicate whether any SIP provisions relevant to emissions during SSM events were involved, nor do the commenters indicate whether any provisions at issue in this SIP call action were involved in any of the enforcement cases it cited.[385] Even if an enforcement action has been initiated, the EPA's fundamental point remains: SIP provisions that exempt what would otherwise be a violation of SIP emissions limitations can undermine effective enforcement during times when the CAA requires continuous compliance with such emissions limitations. By interfering with enforcement, such provisions undermine the integrity of the SIP process and the rights of parties to seek enforcement for violation of SIP emission limitations.

A number of commenters on the February 2013 proposal indicated that, from their perspective, a primary benefit of automatic or discretionary exemptions in SIP provisions applicable to emissions during SSM events is to shield sources from liability. Similarly, commenters on the SNPR indicated that, from their perspective, a key benefit of affirmative defense provisions is to prevent what is in their opinion inappropriate enforcement action for violations of SIP emission limitations during SSM events. The EPA does not agree that the purpose of SIP provisions should be to preclude or impede effective enforcement of SIP emission limitations. To the contrary, the potential for enforcement for violations of CAA requirements is a key component of the enforcement structure of the CAA. To the extent that commenters are concerned about inappropriate enforcement actions for conduct that is not in violation of CAA requirements, the EPA believes that the sources already have the ability to defend against any such invalid claims in court.

23. Comments that the EPA's alleged inclusion of ''exemptions'' or ''affirmative defenses'' in enforcement consent decrees negates the Agency's interpretation of the CAA to prohibit them in SIP provisions.

Comment: One industry commenter claimed that the EPA has itself recently promulgated an exemption for emissions during SSM events. The commenter cited an April 1, 2013, settlement agreement in a CAA enforcement case against Dominion Energy as an example. According to the commenter, this settlement agreement ''provides allowances for excess emissions during startup and shutdown'' and ''allows an EGU to operate without the ESP when it is not practicable.'' The commenter characterized this as the creation of an exemption from the applicable emission limitations during startup and shutdown. The commenter further alleged that the settlement agreement ''provides for an affirmative defense to stipulated penalties for excess emissions occurring during start up and shutdown.'' The commenter intended the fact that the EPA agrees to this type

[383] *See* February 2013 proposal, 78 FR 12459 at 12504–05.

[384] *See Sierra Club* v. *Georgia Power Co.,* 443 F.3d 1346 (11th Cir. 2006).

[385] Even if these cases did all involve SIP provisions relevant to SSM events, the sampling of cases cited by the commenter still do not prove the commenter's point. The commenter indicated that 11 of the 15 cited cases resulted in settlement. The EPA presumes that neither party admitted any fault in these settlements and it remains unknown whether the court would have found the existence of a violation. In addition, because these cases were settled, it is unknown whether exemption or affirmative defense provisions would have prevented the court from finding liability for violation of a CAA emissions limitation that would otherwise have applied. In one additional case cited by the commenter, the court determined that the defendant successfully asserted an affirmative defense to alleged violations of a 6-minute 40-percent opacity limit. The outcome of this case evidently supports the EPA's concerns about the impacts of such provisions.

of provision in an enforcement settlement agreement to establish that affirmative defense provisions must also be valid in SIP provisions so that sources can assert them in the event of any violation of SIP emission limitations.

Response: The EPA disagrees with the commenter concerning the EPA's purported creation of exemptions for SSM events in enforcement consent decrees or settlement agreements. Consent decrees or settlement agreements negotiated by the EPA to resolve enforcement actions do not raise the same concerns as automatic exemptions for excess emissions during SSM periods or any other provisions that the EPA has found substantially inadequate in this SIP call action.

The EPA has the authority to enter consent decrees and settlement agreements in its enforcement cases and uses this discretion to resolve these cases. Settlements aim to achieve the best possible result for a given case, taking into account its specific circumstances and risks, but are still compromises between the parties to the litigation.

The EPA also disagrees with comments that attempt to equate affirmative defense provisions in SIPs with affirmative defense clauses that the EPA and defendants agree to contractually in a consent decree or settlement agreement to resolve an enforcement case. Some consent decrees and settlement agreements that the EPA enters into contain provisions referred to as ''affirmative defenses'' that apply only with respect to whether a source must pay stipulated penalties specified in the consent decree or settlement agreement. However, the EPA does not believe these agreements are counter to CAA requirements. The provisions in these contractual agreements are distinguishable from affirmative defense provisions in SIPs for excess emissions during SSM events. Affirmative defenses to stipulated penalties apply only in the limited context of violations of the contract terms of the consent decree or settlement agreement.

Significantly, these affirmative defense provisions apply only to the stipulated penalties of the consent decree or settlement agreement and do not carry over for incorporation into the source's permit. Most importantly, these affirmative defense provisions do not affect the penalty for violations of CAA requirements in general or of SIP emission limitation violations in particular. Further, a consent decree is itself a court order, and where these provisions have been used in a consent decree they are sanctioned by the court and cannot be seen as a compromise of the court's own jurisdiction or authority. Indeed, the specific consent decree cited by the commenter contains exactly these types of ''affirmative defense'' provisions that are applicable only to the stipulated penalties imposed contractually by the consent decree and that do not operate to create any other form of affirmative defense applicable more broadly.

The EPA's use of these provisions in enforcement consent decrees or settlement agreements is not inconsistent with the EPA's interpretation of the CAA to preclude such provisions in SIPs. The EPA interprets the CAA to preclude such affirmative defenses in SIP provisions because they purport to alter or eliminate the jurisdiction of courts to find liability or to impose remedies for CAA violations in the event of judicial enforcement. No such concern is presented by the types of provisions in consent decrees or settlement agreements raised by the commenters, because the terms of such agreements must be approved and sanctioned by a court.

24. Comments that the EPA should provide more than 18 months for the SIP call because state law administrative process can take longer than that.

Comment: Several state and industry commenters claimed that states will need longer than 18 months to submit SIPs in response to a SIP call. One state commenter argued generally that more time is needed for the state to ''change rules and submit a proposed SIP revision'' but did not provide any detail on how much more time is needed. The commenter concluded that a ''total of five years'' is needed for both the state to complete its actions and for facilities ''to change operating procedures or add hardware.'' Another state commenter claimed states would need at least 3 years to submit revised plans and cited to 40 CFR 51.166(a)(6) as providing a 3-year window for submission of SIP revisions.

An industry commenter asserted that it has taken EPA numerous years to address the startup and shutdown provisions in its own MACT standards and that states will need a similar amount of time to ''unspin'' the SSM provisions from SIP emission limitations and replace them with new requirements. The commenter pointed to the difficulty of modifying multiple permits and source-specific or source-category specific regulations. The commenter urged the EPA to provide much more time that the 18 months allowed by statute for a SIP call through ''a transition period of a reasonable length far exceeding 48 months.''

Another industry commenter stated that more time is necessary but recognized that the maximum statutory period is 18 months. The commenter supported the EPA's providing states with the full 18 months to submit SIP revisions, because that time is needed in order for the states to undertake the necessary technical analyses to support the SIP revisions and in order to allow for the state rulemaking processes.

Response: The EPA recognizes that rule development and the associated administrative processes can be complex and time-consuming for states and for the Agency. Thus, the EPA is providing the maximum period allowed under CAA section 110(k)(5)—18 months—for states to submit SIP revisions in response to the SIP call. The EPA does not have authority under the statute to provide states with a longer period of time to submit these SIP submissions. To assist states in responding to this SIP call, the EPA is providing updated and comprehensive guidance concerning CAA requirements applicable to SIP provisions with respect to emissions during SSM events. Ideally, this guidance will allow states and the EPA to address the existing deficiencies as efficiently as possible, given the statutory schedules applicable to both states and the Agency.

The commenter who cited to 40 CFR 51.166(a)(6) is incorrect that it provides authority for the EPA to grant states 3 years to correct SIPs in response to a SIP call. The regulatory provision cited by the commenter is part of the EPA's regulations for the PSD program and simply provides that if the EPA amends that section of the PSD regulations, then a state will have 3 years to make a SIP submission to revise its SIP to meet the new PSD requirements in response to such amendments. This final action does not amend the PSD regulations and 40 CFR 51.166(a)(6) is not implicated. Under CAA section 110(k)(5), the EPA is only authorized to provide a maximum period of 18 months for states to submit SIP revisions to rectify the SIP deficiencies.

25. Comments that EPA should issue an interim enforcement policy, with respect to enforcement between the time that states revise SIP requirements and source permits are revised to reflect those changes.

Comment: One commenter argued that if the EPA finalizes the proposed SIP call for provisions applicable to emissions during SSM events, it will take state regulators a significant period of time to ''disaggregate'' the effect of those deficient provisions on various

other SIP provisions and the requirements of source operating permits. Because these corrections to SIP provisions and permit requirements will take time to occur, the commenter asserted that ''a transition period of reasonable length far exceeding 48 months will be needed to shield industry from enforcement.'' The commenter thus requested that the EPA impose such a transition period. In addition, the commenter suggested that the EPA should create ''an interim enforcement policy'' to shield sources and allow reliance on affirmative defense provisions ''even after SIPs are corrected until permits reflect those changes.'' The commenter posed this request based upon concern that there will be industry confusion concerning what requirements apply to individual sources until permits are revised to reflect the correction of the deficient SIP provisions.

Response: The EPA agrees with the commenter that it will take time for states to make the necessary SIP revisions in response to this SIP call, for the EPA to evaluate and act upon those SIP submissions and subsequently for states or the Agency to revise operating permits in the ordinary course to reflect the corrected state SIPs. As explained in the February 2013 proposal, the EPA consciously elected to proceed via its SIP call authority under section 110(k)(5) and to provide the statutory maximum of 18 months for the submission of corrective SIP revisions. The EPA chose this path specifically in order to provide states with time to revise their deficient SIP provisions correctly and in the manner that they think most appropriate, consistent with CAA requirements. The EPA also explicitly acknowledged that during the pendency of the SIP revision process, and during the time that it will take for permit terms to be revised in the ordinary course, sources will remain legally authorized to emit in accordance with current permit terms.[386]

The EPA is in this final action reiterating that the issuance of the SIP call action does not automatically alter any provisions in existing operating permits. By design, sources for which emission limitations are incorporated in permits will thus have a *de facto* transition period during which they can take steps to assure that they will ultimately meet the revised SIP provisions (*e.g.,* by changing their equipment or mode of operation to meet an appropriate emission limitation that applies during startup and shutdown instead of relying on exemptions). Sources subject to permit requirements will thus have yet more time (beyond the 18 months allowed for the SIP revision in response to this SIP call action) over the permit review cycle to take steps to meet revised permit terms reflecting the revised SIP provisions. However, the EPA does not agree with the commenter that there is a need for a ''transition period'' to ''shield'' sources from enforcement. The EPA's objective in this action is to eliminate impermissible SIP provisions that exempt emissions during SSM events or otherwise interfere with effective enforcement for violations that occur during such events. Further delaying the time by which sources will be expected to comply with SIP provisions that are consistent with CAA requirements is inappropriate. Moreover, the primary purpose of SIP provisions is not to shield sources from liability for violations of CAA requirements but rather to assure that sources are required to meet CAA requirements.

The EPA shares the commenter's concern that there is the potential for confusion on the part of sources or other parties in the interim period between the correction of deficient SIP provisions and the revision of source operating permits in the ordinary course. However, the EPA presumes that most sources required to have a permit, especially a title V operating permit, are sufficiently sophisticated and aware of their legal rights and responsibilities that the possibility for confusion on the part of sources should be very limited. Likewise, by making clear in this final action that sources will continue to be authorized to operate in accordance with existing permit terms until such time as the permits are revised after the necessary SIP revision, the EPA anticipates that other parties should be on notice of this fact as well. Regardless of the potential for confusion by any party, the EPA believes that the legal principle of the ''permit shield'' is well known by regulated entities, regulators, courts and other interested parties. Accordingly, the EPA is not issuing any ''enforcement policy'' in connection with this SIP call action.

26. Comments that a SIP call directing states to eliminate exemptions for excess emissions during SSM events is a ''paper exercise'' or ''exalts form over substance.''

Comment: A number of commenters argued that by requiring states to correct deficient SIP provisions, such as by requiring removal of exemptions for emissions during SSM events, this SIP call action will not result in any environmental benefits. For example, state commenters claimed that they will not be able simply to revise regulations to eliminate startup and shutdown exemptions. Instead, the commenters claimed, the states will need to revise the emissions limitations completely in order to take into account the EPA's interpretation of the CAA that such exemptions are impermissible. The commenters asserted that rewriting the state regulations will produce no reduction in emissions or improvement in air quality and will merely impose burdens upon states to change existing regulations. The implication of the commenters' argument is that states will merely revise SIP emission limitations to allow the same amount of emissions during SSM events by some other means, rather than by establishing emission limitations that would encourage sources to be designed, operated and maintained in a fashion that would better control those emissions.

Response: The EPA does not agree with the commenters' assertion that revisions to the affected SIP provisions in response to this SIP call action will produce no emissions reductions or improvements in air quality. The EPA recognizes that some states may elect to develop revised emission limitations that provide for alternative numerical limitations, control technologies or work practices applicable during startup and shutdown that differ from requirements applicable during other modes of source operation. Other states may elect to develop completely revised emission limitations and elevate the level of the numerical emission limitation that applies at all times to account for greater emissions during startup and shutdown. However, any such revised emission limitations must comply with applicable substantive CAA requirements relevant to the type of SIP provision at issue, *e.g.* be RACM and RACT for sources located in nonattainment areas, and must meet other requirements for SIP revisions such as in sections 110(k)(3), 110(l) and 193.

The EPA believes that revision of the existing deficient SIP provisions has the potential to decrease emissions significantly in comparison to existing provisions, such as those that authorize unlimited emissions during startup and shutdown. Elimination of automatic and director's discretion exemptions for emissions during SSM events should encourage sources to reduce emissions during startup and shutdown and to take steps to avoid malfunctions. Elimination of inappropriate enforcement discretion provisions and affirmative defense provisions should

[386] *See* February 2013 proposal, 78 FR 12459 at 12482.

provide increased incentive for sources to be properly designed, operated and maintained in order to reduce emissions at all times. The EPA also anticipates that revision of older SIP emission limitations in light of more recent technological advances in control technology, and in light of more recent NAAQS, has the potential to result in significant emission control and air quality improvements. In any event, by bringing these provisions into compliance with CAA requirements, the EPA believes that the resulting SIP provisions will support the fundamental integrity of the SIP process and structure, both substantively and with respect to enforceability.

27. Comments that the EPA should make its interpretation of the CAA with respect to SSM exemptions applicable only ''prospectively'' and not require states to correct existing deficient provisions.

Comment: Commenters argued that the EPA should not issue a SIP call to states for existing SIP provisions and should only require states to comply with its interpretations of the CAA ''prospectively.'' One commenter argued that the SIP provisions at issue in this SIP call action were approved by the EPA in the past and have largely been ''upheld through several EPA refinements and guidance on SSM since then.'' The commenter estimated that the proposed SIP call would require states to reestablish emission limits for thousands of existing sources or could require existing sources to comply with emission limitations that did not originally take into account emissions during SSM events. The commenter characterized the EPA's action on the Petition as a change of policy with which the EPA should only require states to meet prospectively, putting states ''on notice'' that the EPA will evaluate future SIP submissions under a different test applicable only to new sources going forward.

Other commenters argued that the EPA cannot require states to revise their SIP provisions if this would have the effect of making existing sources have to comply with the revised SIP. According to the commenters, existing sources should be ''grandfathered'' and should not have to change their control strategies or modes of operation to meet the revised SIP requirements. The commenters asserted that issuance of a SIP call without grandfathering existing sources would ''retroactively'' require sources to comply with the new SIP provisions and ''suddenly'' render sources noncompliant, even though they were in compliance with the SIP when they were originally designed, financed and built. The commenter claimed that the SIP call would ''change the legal structure for commercial transactions that have already taken place.'' The thrust of the commenters' argument is that sources, once built, should never be subjected to any additional pollution control requirements once they are in existence.

Response: The EPA disagrees with the commenters' suggestions for multiple reasons. At the outset, the EPA notes that the only significant actual ''change'' in the Agency's SSM Policy in this action is the determination that affirmative defense provisions are not permissible in SIP provisions. Since the 1999 SSM Guidance, the EPA had interpreted the CAA to allow such affirmative defense provisions, so long as they were limited only to civil penalties and very narrowly drawn consistent with criteria recommended by the Agency. As fully explained in section IV of this document, however, the EPA has determined in light of the court's decision in *NRDC* v. *EPA* that the CAA does not permit SIP provisions that operate to alter or eliminate the jurisdiction of the courts to determine liability and impose remedies in judicial enforcement actions.[387] In other respects, this action primarily consists of the EPA's taking action to assure that SIP provisions are consistent with the CAA as the Agency has interpreted it in the SSM Policy for many years.

In addition, it is not appropriate for the EPA to allow states to retain deficient SIP provisions that would continue to excuse existing sources from complying with the revised SIP provisions in perpetuity or that would only require that future sources comply with such revised SIP provisions. The commenters advocate for ''grandfathering'' that would authorize current sources to continue to operate under existing deficient SIP provisions (*e.g.,* with exemptions for SSM emissions or with affirmative defense provisions) while requiring only new sources to comply with revised SIP provisions that meet CAA requirements. The EPA understands the practical reasons why the commenters make this suggestion, but such an approach would be grossly unfair both to new sources and to the communities affected by emissions from the old sources, as well as flatly inconsistent with the requirements of the CAA for SIP provisions. Existing sources will not be required to comply with the revised SIP emission limitations until the SIPs are updated, and if they are subject to permit requirements the sources may continue to operate consistent with those permits until the operating permits are revised to reflect the revised SIP requirements, but after that time current sources will be required to comply. Thus, sources will not immediately be in noncompliance with any requirements. The EPA has authority to issue a SIP call at any time that it determines a SIP provision is substantially inadequate, even if it mistakenly thought that the SIP provision was adequate at some time in the past. Sources will be on notice of the SIP call and the state's administrative process to respond to it long before they will be required to comply with a revised SIP provision, and those sources will have ample opportunity to participate in the rulemakings establishing new requirements at both the state and federal level.

Finally, the EPA notes, the need for states to establish new emission limitations and change permit terms for many sources should not be viewed as an unusual occurrence. The need to reexamine existing SIP provisions and permit terms applicable to sources in response to this SIP call action is comparable to the process that states would undertake to update their SIPs as necessary to meet new and evolving CAA requirements, including future revised NAAQS. For example, under section 110(a)(1) and section 110(a)(2) states are already required to reexamine and potentially to revise their SIP provisions whenever the EPA promulgates a new or revised NAAQS. States already need to reexamine emission limitations required by section 110(a)(2)(A) and other relevant sections of the CAA in their SIPs on a regular basis as the NAAQS are revised (*e.g.,* the potential need to revisit what is RACT for a specific source category with respect to a new NAAQS), as new legal requirements are created (*e.g.* the potential need to address interstate transport including compliance with any applicable FIP addressing a SIP deficiency with respect to this issue), or as new emissions control technologies are developed (*e.g.,* what is RACT for a pollutant may evolve with technological developments). Thus, as a general matter, states already engage in periodic review of their SIP provisions on a regular basis, and the potential need to update the emissions limitations applicable to sources and thereafter the

[387] The EPA notes, however, that many of the affirmative defense type provisions at issue in this action were also not consistent with the Agency's interpretation of the CAA in the 1999 SSM Guidance. Thus, even in the absence of the *NRDC* v. *EPA* decision, these provisions were not consistent with the EPA's prior interpretation of the CAA for such provisions.

need to update the permits applicable to those sources is part of that process. This SIP call action simply directs the affected states to address specific deficiencies in their SIP provisions as part of this normal evolutionary process.

28. Comments that directing states to correct their existing SIP provisions will require many sources to change terms of their operating permits.

Comment: A number of commenters opposed the February 2013 proposal because of the administrative burden the action would impose on air agencies and sources. Commenters asserted that requiring states to remove affirmative defense provisions for startup and shutdown from SIPs and to develop alternative emission limitations for such periods of operation instead is unreasonable. Other commenters argued that requiring removal of the deficient SIP provisions would impose enormous and time-consuming burdens on permitting authorities and the regulated community associated with the development of new or revised emissions limitations for startup and shutdown, the revision of SIPs and the revision of permits to incorporate such revised emision limitations. Another commenter asserted that sources only accepted numerical limits in permits with the understanding that they also had the benefit of affirmative defenses in the event of exceedances of those numerical emission limits during periods of SSM. The commenter thus argued that sources would seek to revise the permit limits in order to account for the absence of such affirmative defenses.

Response: The EPA acknowledges the concerns raised by commenters concerning the need for air agencies to revise the deficient SIP provisions at issue in this action, as well as the need for the EPA to review the resulting SIP revisions. The EPA does not agree, however, with the commenters' argument that the need for these administrative actions is a justification for leaving the deficient provisions unaddressed.

The EPA also acknowledges that the SIP revisions initiated by this SIP call action will result in the removal of deficient provisions such as automatic and discretionary SSM exemptions, overly broad enforcement discretion provisions and affirmative defense provisions. These SIP revisions will ultimately need to be reflected in revised operating permit terms for sources. This SIP call action will not, however, have an automatic impact on any permit terms and conditions, and the resource burden to revise permits will be spread over many years. After a state makes the necessary revisions to its SIP provisions, any needed revisions to operating permits to reflect the revised SIP provisions will occur in the ordinary course as the state issues new permits or reviews and revises existing permits. For example, in the case of title V operating permits, permits with more than 3 years remaining will be reopened to add new applicable requirements within 18 months of the promulgation of the requirements. If a permit has less than 3 years remaining, the new applicable requirement will be added at renewal.[388]

IX. What is the EPA's final action for each of the specific SIP provisions identified in the Petition or by the EPA?

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. 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 for multiple states in the Petition as well as in the EPA's independent evaluation, there are some overarching conceptual points that merit discussion in general terms. Thus, this section IX.A of the document provides a general discussion of each of the overarching points, including a summary of what the EPA proposed to determine with respect to the relevant SIP provisions collectively. The EPA received comments on the proposed determinations from affected states, the Petitioner and other commenters. A detailed discussion of the comments received with the EPA's responses is provided in the Response to Comment document available in the docket for this rulemaking.

Sections IX.B through IX.K of this document name the specific SIP provisions identified in the Petition or by the EPA, including a summary of what the EPA proposed and followed by the EPA's stated final action with respect to each SIP provision.

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 SSM. Some of these provisions also pertain to exemptions for excess emissions 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 SSM, so that the excess emissions are defined as not violations. Most of 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 proposed 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 agreed that a SIP provision identified by the Petitioner contained such an exemption contrary to the requirements of the CAA, the EPA proposed 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 nonviolation, thereby barring enforcement by the EPA or others.

[388] *See* 40 CFR 70.7(f)(1)(i).

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 described in sections VII.C and VIII.A.3 of this document, 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 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 agreed that a SIP provision identified by the Petitioner contained such a discretionary exemption contrary to the requirements of the CAA, the EPA proposed 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 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 agreed 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 proposed to grant the Petition and to take action to rectify the problem. By contrast, where the EPA's evaluation indicated 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 proposed to deny the Petition, and the EPA invited 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 was intended 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.

In the February 2013 proposal, the EPA noted 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 view was, and still is, that the provisions 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. Affirmative Defense Provisions

The Petitioner asked the EPA to rescind its SSM Policy element that interpreted the CAA to allow SIPs to include affirmative defenses for violations due to excess emissions during any type of SSM events. Related to this request, the Petitioner asked the EPA to find that states with 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. If the EPA were to deny the Petitioner's request that the EPA revise its interpretation of the CAA, the Petitioner asked that the EPA in the alternative 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 to issue a SIP call to states with provisions inconsistent with the EPA's interpretation of the CAA.

The Petitioner drew no distinction between affirmative defense provisions for malfunctions versus affirmative defense provisions for startup and shutdown or other normal modes of operation. As explained in section IV.B of the February 2013 proposal, the EPA did make such distinction in its proposed response to the Petition, at that time proposing to revise its SSM Policy to reflect an interpretation of the CAA that affirmative defense provisions applicable during startup and shutdown were not appropriate but reasoning that affirmative defense provisions remained appropriate for violations when due to malfunction events. Thus, in the February 2013 proposal, the EPA proposed to issue a SIP call to a state to rectify a problem with an affirmative defense provision only if the provision included an affirmative defense that was applicable to excess emissions during startup and shutdown or included an affirmative defense that was applicable to excess emissions during malfunctions but was inconsistent with the criteria recommended in the EPA's SSM Policy.

Subsequent to that February 2013 proposal, a federal court ruled that the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. The *NRDC* v. *EPA* decision pertained to a challenge to the EPA's NESHAP regulations issued pursuant to CAA section 112 to regulate hazardous air pollutants from sources that manufacture Portland cement.[389] As explained in detail in section V of the SNPR, the court's decision in *NRDC* v. *EPA* compelled the Agency to revise its interpretation of the CAA concerning the legal basis for affirmative defense provisions. As a result, the EPA proposed in the SNPR to further revise its SSM Policy with respect to affirmative defense provisions applicable to excess emissions during SSM events (as described in section V of the SNPR) and to apply its revised interpretation of the CAA to specific provisions in the SIPs of particular states (as described in section VII of the SNPR).

For some of the affirmative defense provisions identified by the Petitioner, the EPA in the SNPR reproposed granting of the Petition but proposed a revised basis for its proposed findings of inadequacy and SIP calls. For other affirmative defense provisions identified

[389] *NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014).

by the Petitioner, the EPA in the SNPR reversed its prior proposed denial of the Petition, and it newly proposed findings of inadequacy and SIP calls. Further, for some affirmative defense provisions that were not explicitly identified by the Petitioner, the EPA in the SNPR proposed findings of inadequacy and SIP calls for additional affirmative defense provisions that were not explicitly identified by the Petitioner.

B. Affected States in EPA Region I

1. Maine

As described in section IX.B.1 of the February 2013 proposal, 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). 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).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 06–096–101 Me. Code R. § 3 and 06–096–101 Me. Code R. § 4.

Consequently, the EPA proposed to find that 06–096–101 Me. Code R. § 3 and 06–096–101 Me. Code R. § 4 are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to 06–096–101 Me. Code R. § 3 and 06–096–101 Me. Code R. § 4. Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call to Maine to correct its SIP with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Maine SIP that the EPA received and considered during the development of this rulemaking.

2. New Hampshire

As described in section IX.B.2 of the February 2013 proposal, 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." 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). Second, the Petitioner objected to two specific provisions in the New Hampshire SIP that 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).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to N.H. Code R. Env-A 902.03, N.H. Code R. Env-A 1203.05 and N.H. Code R. Env-A 902.04. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to N.H. Code R. Env-A 1207.02.

Consequently, the EPA proposed to find that N.H. Code R. Env-A 902.03, N.H. Code R. Env-A 1203.05 and N.H. Code R. Env-A 902.04 were substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions. Through comments submitted on the February 2013 proposal, however, the EPA has ascertained that the versions of N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 902.04 identified in the Petition and evaluated in the February 2013 proposal are no longer in the state's SIP. In November 2012, the EPA approved a SIP revision that replaced N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 902.04 with a new version of Env-A 900 that does not contain the deficient provisions identified in the February 2013 proposal.[390] These provisions no longer exist for purposes of state or federal law. In addition, the EPA has determined that the version of N.H. Code R. Env-A 1203.05 identified in the Petition and the February 2013 proposal is no longer in the state's SIP as a result of another SIP revision.[391] Because these three provisions are no longer components of the EPA-approved SIP for the state of New Hampshire, the Petition is moot with respect to these provisions and there is no need for a SIP call with respect to these no longer extant provisions.

In this final action, the EPA is denying the Petition with respect to N.H. Code R. Env-A 902.03, N.H. Code R. Env-A 902.04, N.H. Code R. Env-A 1203.05 and N.H. Code R. Env-A 1207.02. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the New Hampshire SIP that the EPA received and considered during the development of this rulemaking.

3. Rhode Island

As described in section IX.B.3 of the February 2013 proposal, 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).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 25–4–13 R.I. Code R. § 16.2.

Consequently, the EPA proposed to find that 25–4–13 R.I. Code R. § 16.2 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to 25–4–13 R.I. Code R. § 16.2. Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Rhode Island SIP that the EPA received and considered during the development of this rulemaking.

[390] *See* "Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Reasonably Available Control Technology for the 1997 8-Hour Ozone Standard; Direct final rule," 77 FR 66388 (November 5, 2012).

[391] *See* "Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Reasonably Available Control Technology Update To Address Control Techniques Guidelines Issued in 2006, 2007, and 2008; Direct final rule," 77 FR 66921 (November 8, 2012).

C. Affected State in EPA Region II

New Jersey

As described in section IX.C.1 of the February 2013 proposal, the Petitioner objected to two specific provisions in the New Jersey SIP that allow for automatic exemptions for excess emissions during emergency situations. The Petitioner objected to the first provision because it provides industrial process units that 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 objected to the second provision because it provides electric generating units (EGUs) an exemption from the otherwise applicable NO_X 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).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to N.J. Admin. Code 7:27–7.2(k)(2). Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to N.J. Admin. Code 7:27–19.1.

Consequently, the EPA proposed to find that N.J. Admin. Code 7:27–7.2(k)(2) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to N.J. Admin. Code 7:27–7.2(k)(2) and denying the Petition with respect to N.J. Admin. Code 7:27–19.1. Accordingly, the EPA is finding that the provision in R.J. Admin. Code 7:27–7.2(k)(2) is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the New Jersey SIP that the EPA received and considered during the development of this rulemaking.

D. Affected States in EPA Region III

1. Delaware

As described in section IX.D.1 of the February 2013 proposal, the Petitioner objected to seven provisions in the Delaware SIP that provide exemptions during startup and shutdown from the otherwise applicable SIP emission limitations. 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 (Control of Volatile Organic Compound Emissions); and 7–1100–1142 Del. Code Regs § 2.3.5 (Specific Emission Control Requirements).

For reasons explained fully in the February 2013 proposal, the EPA proposed 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.

Consequently, the EPA proposed to find that 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 are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting 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 § 2.3.1.6 (updated to § 2.3.1.6 from earlier identification as § 2.3.5). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions.

2. District of Columbia

As described in section IX.D.2 of the February 2013 proposal, the Petitioner objected to five provisions in the District of Columbia (DC) SIP as being inconsistent with the CAA and the EPA's SSM Policy. The Petitioner first objected to a generally applicable provision in the DC SIP that allows for discretionary exemptions during periods of maintenance or malfunction (D.C. Mun. Regs. tit. 20 § 107.3). 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) 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)). Finally, the Petitioner objected to the provision in the DC SIP that provides an affirmative defense for violations of visible emission limitations during ''unavoidable malfunction'' (D.C. Mun. Regs. tit. 20 § 606.4).

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to D.C. Mun. Regs. tit. 20 § 107.3 and D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2. Also for reasons explained in the February 2013 proposal, the EPA proposed to deny the Petition with respect to D.C. Mun. Regs. tit. 20 § 805.1(c)(2). Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the petition with respect to D.C. Mun. Regs. tit. 20 § 606.4 on the basis that it was not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's SSM Policy at the time.

Subsequently, for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provision in D.C. Mun. Regs. tit. 20 § 606.4, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that D.C. Mun. Regs. tit. 20 § 107.3, D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 and D.C. Mun. Regs. tit. 20 § 606.4 are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to D.C. Mun. Regs. tit. 20 § 107.3, D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 and D.C. Mun. Regs. tit. 20 § 606.4 and is denying the Petition with respect to D.C. Mun. Regs. tit. 20 § 805.1(c)(2). Accordingly, the EPA is finding that the provisions in D.C. Mun. Regs. tit. 20 § 107.3, D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 and D.C. Mun. Regs. tit. 20 § 606.4 are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call to the District of Columbia to correct its SIP with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the DC SIP that the EPA received and considered during the development of this rulemaking.

3. Virginia

As described in section IX.D.3 of the February 2013 proposal, 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)). First, the Petitioner objected because this provision provides an exemption from the otherwise applicable SIP emission limitations. 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.'' 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 at the time'' and the provision ''fails to establish any procedure through which the criteria are to be evaluated.''

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 9 Va. Admin. Code § 5–20–180(G). Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to this provision on the basis that it was not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's SSM Policy.

Subsequently, for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to 9 Va. Admin. Code § 5–20–180(G), but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that 9 Va. Admin. Code § 5–20–180(G) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to 9 Va. Admin. Code § 5–20–180(G) and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Virginia SIP that the EPA received and considered during the development of this rulemaking.

4. West Virginia

As described in section IX.D.4 of the February 2013 proposal, the Petitioner made four types of objections identifying inadequacies regarding SSM provisions in West Virginia's SIP. First, the 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). Second, the Petitioner objected to seven discretionary exemption provisions because these provisions provide exemptions from the otherwise applicable SIP emission limitations. 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). 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 EPA's SSM Policy regarding source category-specific rules. 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.''

For reasons explained in the February 2013 proposal, the EPA proposed 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 on the basis that each of these provisions allows for automatic exemptions. Also for reasons explained in the February 2013 proposal, the EPA proposed 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 on the basis that these provisions allow for discretionary exemptions from otherwise applicable SIP emission limitations. Further, for reasons explained in the February 2013 proposal, the EPA proposed 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 allows for discretionary exemptions from otherwise applicable SIP emission limitations.[392] The W. Va. Code R. § 45–

[392] As explained in the February 2013 proposal, 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, and so the EPA similarly proposed to issue a SIP call with respect to the latter provision. *See* 78 FR 12459 at 12500, n.111. W. Va. Code R. § 45–2–10.2 is an alternative limit that applies during periods of maintenance. In the February 2013 proposal, the EPA noted that this provision was inconsistent with the EPA's SSM Policy interpreting the CAA because it was an alternative limit that specifically applied during periods of maintenance. Although the EPA originally contemplated that an alternative emission limitation could appropriately apply only during startup or shutdown, the EPA recognizes in section VII.B of this document that it may be appropriate for an air agency to establish alternative emission limitations that apply during modes of source operation other than during startup and shutdown, but any such alternative emission limitations should be developed using the same criteria that the EPA recommends for those applicable during startup and shutdown. The alternative emission limitation applicable during maintenance does not appear to have been developed using the

Continued

7–10.4 allows state officials the discretion to establish alternative visible emissions standards during startup and shutdown upon application.

Subsequently, for reasons explained fully in the SNPR, the EPA identified one affirmative defense provision in the West Virginia SIP in W. Va. Code R. § 45–2–9.4 that was not identified by the Petitioner, and the EPA proposed to make a finding of substantial inadequacy and to issue a SIP call for this provision.

Consequently, the EPA proposed to find that W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3, W. Va. Code R. § 45–40–100.8, 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, W. Va. Code R. § 45–21–9.3, W. Va. Code R. § 45–3–3.2 and W. Va. Code R. § 45–7–10.4, which are provisions identified by the Petitioner, and W. Va. Code R. § 45–2–10.2 and W. Va. Code R. § 45–2–9.4, which are provisions identified by the EPA, are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to the West Virginia SIP provisions identified by the Petitioner. Accordingly, the EPA is finding that the provisions in W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3, W. Va. Code R. § 45–40–100.8, 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, W. Va. Code R. § 45–21–9.3, W. Va. Code R. § 45–3–3.2 and W. Va. Code R. § 45–7–10.4, which are provisions identified by the Petitioner, and W. Va. Code R. § 45–2–10.2 and W. Va. Code R. § 45–2–9.4, which are provisions identified by the EPA, are substantially inadequate to meet CAA requirements. The EPA is thus issuing a SIP call to West Virginia to correct its SIP with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the West Virginia SIP that the EPA received and considered during the development of this rulemaking.

E. Affected States and Local Jurisdictions in EPA Region IV

1. Alabama

As described in section IX.E.1 of the February 2013 proposal, 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)).

For reasons explained fully in the February 2013 proposal, the EPA proposed 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).

Consequently, the EPA proposed 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 proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting 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). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Alabama SIP that the EPA received and considered during the development of this rulemaking.

2. Florida

As described in section IX.E.2 of the February 2013 proposal, the Petitioner objected to three specific provisions in the Florida SIP that allow for generally applicable automatic exemptions for excess emissions during SSM (Fla. Admin. Code Ann Rule 62–210.700(1)), for fossil fuel steam generators during startup and shutdown (Fla. Admin. Code Ann Rule 62–210.700(2)), and for such sources during boiler cleaning and load change (Fla. Admin. Code Ann Rule 62–210.700(3)).[393] After objecting to the three provisions that create the exemptions, the Petitioner noted that the related provision in Fla. Admin. Code Ann Rule 62–210.700(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.

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Fla. Admin. Code Ann Rule 62–210.700(1), Fla. Admin. Code Ann Rule 62–210.700(2), Fla. Admin. Code Ann Rule 62–210.700(3) and Fla. Admin. Code Ann Rule 62–210.700(4).

Consequently, the EPA proposed to find that Fla. Admin. Code Ann Rule 62–210.700(1), Fla. Admin. Code Ann Rule 62–210.700(2), Fla. Admin. Code Ann Rule 62–210.700(3) and Fla. Admin. Code Ann Rule 62–210.700(4) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to Fla. Admin. Code Ann Rule 62–210.700(1), Fla. Admin. Code Ann Rule 62–210.700(2), Fla. Admin. Code Ann Rule 62–210.700(3) and Fla. Admin. Code Ann Rule 62–210.700(4). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Florida SIP that the EPA received and considered during the development of this rulemaking.

3. Georgia

As described in section IX.E.3 of the February 2013 proposal, the Petitioner objected to a provision in the Georgia SIP that provides for exemptions for excess emissions during SSM under certain circumstances (Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7)). 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

recommended criteria for such alternative emission limitations. In addition, the EPA finds that this provision, like W. Va. Code R. § 45–2–10.1, is also deficient because it allows for discretionary exemptions from otherwise applicable SIP emission limitations. As noted in the proposal, such provisions that authorize director's discretion exemptions are impermissible in SIPs.

[393] The EPA notes that in the February 2013 proposal, it incorrectly cited Fla. Admin. Code Ann Rule 52.201.700 when it intended to cite Rule 52.210.700. The transposition of numbers was a typographical error. Commenters on the proposal correctly recognized that the EPA intended to instead refer to Fla. Admin. Code Ann Rule 52.210.700. *See, e.g.,* comment letter received from the Florida Department of Environmental Protection, May 13, 2013, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0878.

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. Second, the Petitioner argued that although the provision provides some ''substantive criteria,'' the provision does not meet the criteria the EPA recommended at the time for an affirmative defense provision consistent with the requirements of the CAA in the 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.''

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to this provision on the basis that it was not a permissible affirmative defense provision consistent with the requirements of the CAA and the EPA's recommendations in the EPA's SSM Policy at the time.

Subsequently, forreasonsexplained in the SNPR, the EPA reproposed granting of the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7), but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that Ga. Comp. R. & Regs. 391–3– 1–.02(2)(a)(7) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Georgia SIP that the EPA received and considered during the development of this rulemaking.

4. Kentucky

As described in section IX.E.4 of the February 2013 proposal, 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)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 401 KAR 50:055 § 1(1).

Consequently, the EPA proposed to find that 401 KAR 50:055 § 1(1) is substantially inadequate to meet CAA requirementsandthus proposed toissue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to 401 KAR 50:055 § 1(1). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Kentucky SIP that the EPA received and considered during the development of this rulemaking.

5. Kentucky: Jefferson County

As described in section IX.E.5 of the February 2013 proposal, the Petitioner objected to a generally applicable provision in the Jefferson County Air Regulations 1.07 because it provided for discretionary exemptions from compliance with emission limitations during SSM. The provision required 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). Second, the Petitioner objected to the affirmative defense for emergencies in Jefferson County Air Regulations 1.07.

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to provisions in the Jefferson County Air Regulations 1.07.

Subsequently, for reasons explained fully in the SNPR, the EPA reversed its prior proposed granting of the Petition with respect to Jefferson County Air Regulations 1.07. For Jefferson County, Kentucky, the provisions for which the EPA proposed in February 2013 to grant the Petition were subsequently removed from the SIP. Thus, in the SNPR, the EPA proposed instead to deny the Petition.[394] As explained in the SNPR, the state of Kentucky has revised the SIP provisions applicable to Jefferson County and eliminated the SIP inadequacies identified in the February 2013 proposal document. The EPA has already approved the necessary SIP revisions.[395] Accordingly, the EPA's final action on the Petition does not include a finding of substantial inadequacy and SIP call for Jefferson County, Kentucky.

In this final action, the EPA is denying the Petition with respect to Jefferson County Air Regulations 1.07. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Kentucky SIP that the EPA received and considered during the development of this rulemaking.

6. Mississippi

As described in section IX.E.6 of the February 2013 proposal, the Petitioner objectedtotwogenerallyapplicable provisions in the Mississippi SIP that allowforaffirmativedefenses 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). 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 at the time.'' 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).

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3. Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the petition with respect to these provisions on the basis that they were not appropriate as an affirmative defense provisions because they were

[394] *See* SNPR, 79 FR 55919 at 55925.

[395] *See* Approval and Promulgation of Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; Emissions During Startups, Shutdowns, and Malfunctions, 79 FR 33101 (June 10, 2014).

inconsistent with fundamental requirements of the CAA. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 11–1–2 Miss. Code R. § 10.2.

Subsequently, for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provisions in 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for these provisions.

Consequently, the EPA proposed to find that 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 are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting 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. Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Mississippi SIP that the EPA received and considered during the development of this rulemaking.

7. North Carolina

As described in section IX.E.7 of the February 2013 proposal, the Petitioner objectedtotwogenerallyapplicable provisions in the North Carolina SIP that provide exemptionsforemissions exceedingotherwiseapplicable SIP emission limitations at the discretion of thestate agency during malfunctions (15A N.C. Admin. Code 2D.0535(c)) and during startup and shutdown (15A N.C. Admin. Code 2D.0535(g)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g).

Consequently, the EPA proposed to find that 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 proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the North Carolina SIP that the EPA received and considered during the development of this rulemaking.

8. North Carolina: Forsyth County

As described in section IX.E.8 of the February 2013 proposal, the Petitioner objectedtotwogenerallyapplicable provisions in the Forsyth County Code that provide exemptionsforemissions exceedingotherwiseapplicable SIP emission limitations at the discretion of a local official during malfunctions (Forsyth County Code, ch. 3, 3D.0535(c)) andstartupandshutdown (Forsyth County Code, ch. 3, 3D.0535(g)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g).

Consequently, the EPA proposed 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 proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the North Carolina SIP that the EPA received and considered during the development of this rulemaking.

9. South Carolina

As described in section IX.E.9 of the February 2013 proposal, the Petitioner objected to three provisions in the South Carolina SIP, arguing that they contained impermissible source category- and pollutant-specific exemptions. 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_X 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))andexemptionsfrom sulfur limits for kraft pulp mills for excess emissions that occur during SSM events (S.C. Code Ann. Regs. St 4(XI)(D)(4)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to S.C. Code Ann. Regs. 61–62.5 St 1(C) and S.C. Code Ann. Regs. St 4(XI)(D)(4). Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14).

Subsequently, forreasonsexplained fully in the SNPR, the EPA identified one affirmative defense provision in the South Carolina SIP in S.C. Code Ann. Regs. 62.1, Section II(G)(6) that was not identified by the Petitioner, and the EPA proposed to make a finding of substantial inadequacy and to issue a SIP call for this provision.

Consequently, the EPA proposed to find that the provisions in S.C. Code Ann. Regs. 61–62.5 St 1(C), S.C. Code Ann. Regs. St 4(XI)(D)(4) and S.C. Code Ann. Regs. 62.1, Section II(G)(6) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to S.C. Code Ann. Regs. 61–62.5 St 1(C), S.C. Code Ann. Regs. St 4(XI)(D)(4) and S.C. Code Ann. Regs. 62.1, Section II(G)(6) and denying the Petition with respect to S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14). Accordingly, the EPA is finding that the provisions in S.C. Code Ann. Regs. 61–62.5 St 1(C), S.C. Code Ann. Regs. St 4(XI)(D)(4) and S.C. Code Ann. Regs. 62.1, Section II(G)(6) are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the South Carolina SIP that the EPA received and considered during the development of this rulemaking.

10. Tennessee

As described in section IX.E.10 of the February 2013 proposal, the Petitioner objected to three provisions in the Tennessee SIP. First, the Petitioner objected to two provisions that authorize a state official to decide whether 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)). 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.''

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Tenn. Comp. R. & Regs. 1200–3–20–.07(1), Tenn. Comp. R. & Regs. 1200–3–20–.07(3) and Tenn. Comp. R. & Regs. 1200–3–5–.02(1).

Consequently, the EPA proposed to find that Tenn. Comp. R. & Regs. 1200–3–20–.07(1), Tenn. Comp. R. & Regs. 1200–3–20–.07(3) and Tenn. Comp. R. & Regs. 1200–3–5–.02(1) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to Tenn. Comp. R. & Regs. 1200–3–20–.07(1), Tenn. Comp. R. & Regs. 1200–3–20–.07(3) and Tenn. Comp. R. & Regs. 1200–3–5–.02(1). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Tennessee SIP that the EPA received and considered during the development of this rulemaking.

11. Tennessee: Knox County

As described in section IX.E.11 of the February 2013 proposal, 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)). 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.''

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Knox County Regulation 32.1(C). For instance, the regulation was inconsistent with requirements related to credible evidence.

Consequently, the EPA proposed to find that Knox County Regulation 32.1(C) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Knox County Regulation 32.1(C). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Tennessee SIP that the EPA received and considered during the development of this rulemaking.

12. Tennessee: Shelby County

As described in section IX.E.12 of the February 2013 proposal, 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. 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.

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Shelby County Code § 16–87.

Consequently, the EPA proposed to find that Shelby County Code § 16–87 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Shelby County Code § 16–87. Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Tennessee SIP that the EPA received and considered during the development of this rulemaking.

F. Affected States in EPA Region V

1. Illinois

As described in section IX.F.1 of the February 2013 proposal, 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. 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. Admin. Code tit. 35 § 201.265).

Further, 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.''

For reasons explained in the February 2013 proposal, the EPA proposed 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.

Subsequently, for reasons explained fully in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provisions in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill.

Admin. Code tit. 35 § 201.265, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for these provisions.

Consequently, the EPA proposed 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 proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting 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. Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Illinois SIP that the EPA received and considered during the development of this rulemaking.

2. Indiana

As described in section IX.F.2 of the February 2013 proposal, 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)). 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 the demonstration was required to have been 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. If instead, as the Petitioner noted, the demonstration was required to have been made in an enforcement context, the provision could be interpreted as providing an affirmative defense.

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 326 Ind. Admin. Code 1–6–4(a).

Subsequently, for reasons explained fully in the SNPR, the EPA reproposed granting of the Petition with respect to 326 Ind. Admin. Code 1–6–4(a), but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that 326 Ind. Admin. Code 1–6–4(a) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to 326 Ind. Admin. Code 1–6–4(a). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Indiana SIP that the EPA received and considered during the development of this rulemaking.

3. Michigan

As described in section IX.F.3 of the February 2013 proposal, the Petitioner objected toa generally applicable provision in Michigan's SIP, Mich. Admin. Code r. 336.1916, that provides for an affirmative defense to monetary penalties for violations of otherwise applicable SIP emission limitations during periods of startup and shutdown.

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Mich. Admin. Code r. 336.1916.

Subsequently, for reasons explained fully in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provision in Mich. Admin. Code r. 336.1916, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that Mich. Admin. Code r. 336.1916 substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Mich. Admin. Code r. 336.1916. Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Michigan SIP that the EPA received and considered during the development of this rulemaking.

4. Minnesota

As described in section IX.F.4 of the February 2013 proposal, 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 SSM (Minn. R. 7011.1415).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Minn. R. 7011.1415.

Consequently, the EPA proposed to find that Minn. R. 7011.1415 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Minn. R. 7011.1415. Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Minnesota SIP that the EPA received and considered during the development of this rulemaking.

5. Ohio

As described in section IX.F.5 of the February 2013 proposal, the Petitioner 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)). 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)). 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)). Finally, the Petitioner objected to five 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) and Ohio Admin. Code 3745–75–04(L).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 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 3745–14–11(D). Also for reasons explained fully in the February 2013 proposal, the EPA proposed 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), on the basis that they are not part of the Ohio SIP and thus cannot represent a substantial inadequacy in the SIP. In addition, for reasons explained fully in the February 2013 proposal, the EPA proposed to find that another provision, Ohio Admin. Code 3745–15–06(C), is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision, even though the Petitioner did not request that the EPA evaluate this provision. As explained in the February 2013 proposal, the EPA determined that Ohio Admin. Code 3745–15–06(C) was the regulatory mechanism in the SIP by which exemptions are granted in the two provisions to which the Petitioner did object.

Consequently, the EPA proposed to find that the provisions 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), Ohio Admin. Code 3745–14–11(D) and Ohio Admin. Code 3745–15–06(C) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to 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), Ohio Admin. Code 3745–14–11(D) and Ohio Admin. Code 3745–15–06(C) are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. Also in this final action, the EPA is denying 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). This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Ohio SIP that the EPA received and considered during the development of this rulemaking.

G. Affected States in EPA Region VI

1. Arkansas

As described in section IX.G.1 of the February 2013 proposal, the Petitioner objected to two provisions in the Arkansas SIP. First, the Petitioner objected to a provision that provides an automatic exemption for excess emissions of VOC for sources located in Pulaski County that occur due to malfunctions (Reg. 19.1004(H)). 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.

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Reg. 19.1004(H) and Reg. 19.602.

Subsequently, for reasons explained fully in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provision in Reg. 19.602, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision. Consequently, the EPA proposed to find that Reg. 19.1004(H) and Reg. 19.602[396] are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to Reg. 19.1004(H) and Reg. 19.602. Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Arkansas SIP that the EPA received and considered during the development of this rulemaking.

2. Louisiana

As described in section IX.G.2 of the February 2013 proposal, 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. 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 NO_X from certain sources within the Baton Rouge Nonattainment Area (LAC 33:III.2201(C)(8)). 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.'' Second, the Petitioner objected to provisions that provide discretionary exemptions to various emission limitations. Three of these provisions provide discretionary exemptions from otherwise applicable SO_2 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) and 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 reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to LAC 33:III.2153(B)(1)(i) and LAC 33:III.2201(C)(8) on the basis that these provisions allow for automatic exemptions for excess emissions from otherwise applicable SIP emission limitations. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 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) on the basis that

[396] In a final action published March 4, 2015 (80 FR 11573), the EPA approved revisions of the Arkansas SIP pertaining to the regulation and permitting of $PM_{2.5}$. Among the approved revisions was a change to Reg. 19.602, to capitalize the letter ''C'' in that regulation's title, ''Emergency Conditions''). To the extent the EPA's recent action affected Reg. 19.602, that action was only a ministerial matter and should not be construed as reapproval of the provision on its merits. That action does not affect the basis on which the EPA proposed to find Reg. 19.602 substantially inadequate in the February 2013 proposal.

these provisions allow impermissible discretionary exemptions.

Consequently, the EPA proposed to findthat LAC 33:III.2153(B)(1)(i), LAC 33:III.2201(C)(8), 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) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to LAC 33:III.2153(B)(1)(i), LAC 33:III.2201(C)(8), 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). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Louisiana SIP that the EPA received and considered during the development of this rulemaking.

3. New Mexico

As described in section IX.G.3 of the February 2013 proposal, the Petitioner objected to three provisions in the New Mexico SIP that provide affirmative defenses forexcess 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).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 20.2.7.111 NMAC, 20.2.7.112 NMAC and 20.2.7.113 NMAC.

Subsequently, for reasons explained fully in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provisions in 20.2.7.111 NMAC, 20.2.7.112 NMAC and 20.2.7.113 NMAC, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call fortheseprovisions.

Consequently, the EPA proposed to find that the provisions in 20.2.7.111 NMAC, 20.2.7.112 NMAC and 20.2.7.113 NMAC are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to 20.2.7.111 NMAC, 20.2.7.112 NMAC and 20.2.7.113 NMAC. Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the New Mexico SIP that the EPA received and considered during the development of this rulemaking.

4. New Mexico: Albuquerque-Bernalillo County

The Petitioner did not identify any provisions in the SIP for the state of New Mexico that specifically apply in the Albuquerque-Bernalillo County area, which is why this area was not explicitly addressed in the February 2013 proposal.

Subsequently, for reasons explained fully in the SNPR, the EPA identified three affirmative defense provisions in the SIP for the state of New Mexico that apply in the Albuquerque-Bernalillo County area, and the EPA proposed to make a finding of substantial inadequacy and to issue a SIP call for these provisions. These provisions provide affirmative defenses available to sources for excess emissions that occur during malfunctions (20.11.49.16.A NMAC), during startup and shutdown (20.11.49.16.B NMAC) and during emergencies (20.11.49.16.C NMAC).

In this final action, the EPA is finding that the provisions in 20.11.49.16.A NMAC, 20.11.49.16.B NMAC and 20.11.49.16.C NMAC are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. The EPA notes that removal of 20.11.49.16.A NMAC, 20.11.49.16.B NMAC and 20.11.49.16.C NMAC from the SIP will render 20.11.49.16.D NMAC, 20.11.49.16.E, 20.11.49.15.B (15) (concerning reporting by a source of intent to assert an affirmative defense for a violation), a portion of 20.11.49.6 NMAC (concerning the objective of establishing affirmative defense provisions) and 20.11.49.18 NMAC (concerning actions where a determination has been made under 20.11.49.16.E NMAC) superfluous and no longer operative, and the EPA thus recommends that these provisions be removed as well. This action is fully consistent with what the EPA proposed in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the New Mexico SIP that the EPA received and considered during the development of this rulemaking.

5. Oklahoma

As described in section IX.G.4 of the February 2013 proposal, 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)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to OAC 252:100–9–3(a) and OAC 252:100–9–3(b).

Consequently, the EPA proposed to find that OAC 252:100–9–3(a) and OAC 252:100–9–3(b) aresubstantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to OAC 252:100–9–3(a) and OAC 252:100–9–3(b). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Oklahoma SIP that the EPA received and considered during the development of this rulemaking.

6. Texas

The Petitioner did not identify in the June 2011 petition any provisions in the SIP for the state of Texas, which is why this state was not explicitly addressed in the February 2013 proposal.

Subsequently, for reasons explained fully in the SNPR, the EPA identified four affirmative defense provisions in the SIP for the state of Texas, and the EPA proposed to make a finding of substantial inadequacy and to issue a SIP call for these provisions. These provisions provide affirmative defenses available to sources for excess emissions that occur during upsets (30 TAC 101.222(b)), unplanned events (30 TAC 101.222(c)), upsets with respect to opacity limits (30 TAC 101.222(d)) and unplanned events with respect to opacity limits (30 TAC 101.222(e)).

In this final action, the EPA is finding that the provisions in 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d) and 30 TAC 101.222(e) are substantially inadequate to meet CAA requirements and the EPA is thus

issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Texas SIP that the EPA received and considered during the development of this rulemaking.

H. Affected States in EPA Region VII

1. Iowa

As described in section IX.H.1 of the February 2013 proposal, the Petitioner 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)). Also, 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)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Iowa Admin. Code r. 567–24.1(1) on the basis that this provision allows for exemptions from the otherwise applicable SIP emission limitations. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Iowa Admin. Code r. 567–24.1(4) on the basis that the provision is on its face clearly applicable only to Iowa state enforcement personnel and that the provision thus 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.

Consequently, the EPA proposed to find that Iowa Admin. Code r. 567–24.1(1) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Iowa Admin. Code r. 567–24.1(1). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. Also in this final action, the EPA is denying the Petition with respect to Iowa Admin. Code r. 567–24.1(4). This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Iowa SIP that the EPA received and considered during the development of this rulemaking.

2. Kansas

As described in section IX.H.2 of the February 2013 proposal, the Petitioner objected to three provisions in the Kansas SIP that allow for exemptions for excessemissions 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)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to K.A.R. § 28–19–11(A), K.A.R. §28–19–11(B) and K.A.R.§28–19–11(C).

Consequently, the EPA proposed 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 proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to K.A.R. § 28–19–11(A), K.A.R. § 28–19–11(B) and K.A.R. § 28–19–11(C). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Kansas SIP that the EPA received and considered during the development of this rulemaking.

3. Missouri

As described in section IX.H.3 of the February 2013 proposal, the Petitioner objected to two provisions in the Missouri SIP that could be interpreted to provide discretionary exemptions. 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)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Mo. Code Regs. Ann. tit 10, §10–6.220(3)(C) on the basis 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. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C) on the basis that the provision is on its face clearly applicable only to Missouri state enforcement personnel and that the provision thus 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.

Consequently, the EPA proposed to find that the provision in Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Mo. Code Regs. Ann. tit 10, §10–6.220(3)(C). Accordingly, the EPA is finding that this provisionis substantiallyinadequateto meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. Also in this final action, the EPA is denying the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C). This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Missouri SIP that the EPA received and considered during the development of this rulemaking.

4. Nebraska

As described in section IX.H.4 of the February 2013 proposal, the Petitioner objected to two provisions in the Nebraska SIP. 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 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). Second, the Petitioner objected to a specific provision in Nebraska state law that contains exemptions for excess emissions at hospital/medical/infectious

waste incinerators (HMIWI) during SSM (Neb. Admin. Code Title 129 § 18–004.02).

For reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Neb. Admin. Code Title 129 § 11–35.001. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Neb. Admin. Code Title 129 § 18–004.02 on the basis that this regulation is not part of the Nebraska SIP and thus cannot represent an inadequacy in the SIP.

In this final action, the EPA is denying the Petition with respect to Neb. Admin. Code Title 129, Chapter 35, Section 001 (correction to citation, as per comment received from Nebraska DEQ, from earlier identification as Neb. Admin. Code Title 129 § 11–35.001) and Neb. Admin. Code Title 129 § 18–004.02.

This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any other comments specific to the Nebraska SIP that the EPA received and considered during the development of this rulemaking.

5. Nebraska: Lincoln-Lancaster

As described in section IX.H.5 of the February 2013 proposal, 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. (Note that as per comment subsequently received from Nebraska DEQ, the correct citation is Neb. Admin. Code Title 129, Chapter 35, Section 001.)

For reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Art. 2 § 35, on the basis that this provision is on its face clearly applicable only to Lincoln-Lancaster County enforcement personnel and that the provision thus 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 not to bring an enforcement action.

In this final action, the EPA is denying the Petition with respect to Art. 2 § 35. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any other comments specific to the Nebraska SIP that the EPA received and considered during the development of this rulemaking.

I. Affected States in EPA Region VIII

1. Colorado

As described in section IX.I.1 of the February 2013 proposal, 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)).

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 5 Colo. Code Regs § 1001–2(II.J). Also for reasons explained in the February 2013 proposal, the EPA proposed to deny the Petition with respect to 5 Colo. Code Regs § 1001–2(II.E) on the basis that it included an affirmative defense applicable to malfunction events that was consistent with the requirements of the CAA as interpreted by the EPA in the 1999 SSM Guidance.

Subsequently, for reasons explained fully in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provision in 5 Colo. Code Regs § 1001–2(II.J) applicable to startup and shutdown, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision. Also for reasons explained in the SNPR, the EPA reversed its prior proposed denial of the Petition with respect to the affirmative defense provision 5 Colo. Code Regs § 1001–2(II.E) applicable to malfunctions.

Consequently, the EPA proposed to find that the provisions in 5 Colo. Code Regs § 1001–2(II.J) and 5 Colo. Code Regs § 1001–2(II.E) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to 5 Colo. Code Regs § 1001–2(II.J) and 5 Colo. Code Regs § 1001–2(II.E). Accordingly, the EPA is finding that the provisions in 5 Colo. Code Regs § 1001–2(II.J) and 5 Colo. Code Regs § 1001–2(II.E) are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call to Colorado to correct its SIP with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Colorado SIP that the EPA received and considered during the development of this rulemaking.

2. Montana

As described in section IX.I.2 of the February 2013 proposal, the Petitioner objected to an exemption from otherwise applicable emission limitations for aluminum plants during startup and shutdown (Montana Admin. R 17.8.334).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to ARM 17.8.334.

Consequently, the EPA proposed to find that ARM 17.8.334 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to ARM 17.8.334. Accordingly, the EPA is finding that ARM 17.8.334 is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Montana SIP that the EPA received and considered during the development of this rulemaking.

3. North Dakota

As described in section IX.I.3 of the February 2013 proposal, the Petitioner objected to two provisions in the North Dakota SIP that create exemptions from otherwise applicable emission limitations. 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)).

For reasons explained in the February 2013 proposal, the EPA proposed 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)) and also with respect to a

provision to which the Petitioner cited but did not explicitly object, N.D. Admin. Code 33–15–03–04.3 (cited in the Petition as N.D. Admin. Code § 33–15–03–04(3)). Also for reasons explained in the February 2013 proposal, the EPA proposed 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)).

Subsequently, the state of North Dakota removed N.D. Admin. Code 33–15–03–04.4 and N.D. Admin. Code 33–15–05–01.2.a(1) and eliminated the SIP inadequacies with respect to those two of the three provisions identified in the February 2013 proposal notice. The EPA has already approved the necessary SIP revisions for those two provisions.[397] Thus, the EPA's final action on the Petition does not need to include a finding of substantial inadequacy and SIP call for those two provisions.

In this final action, the EPA is granting the Petition with respect to N.D. Admin. Code 33–15–03–04.3 and denying the Petition with respect to N.D. Admin. Code 33–15–03–04.4 and N.D. Admin. Code 33–15–05–01.2.a(1). Accordingly, the EPA is finding that the provision in N.D. Admin. Code 33–15–03–04.3 is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call to North Dakota to correct its SIP with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 with respect to this provision. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the North Dakota SIP that the EPA received and considered during the development of this rulemaking.

4. South Dakota

As described in section IX.I.4 of the February 2013 proposal, 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)). 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."

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to S.D. Admin, R. 74:36:12:02(3).

Consequently, the EPA proposed to find that S.D. Admin, R. 74:36:12:02(3) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to S.D. Admin, R. 74:36:12:02(3). Accordingly, the EPA is finding that S.D. Admin, R. 74:36:12:02(3) is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the South Dakota SIP that the EPA received and considered during the development of this rulemaking.

5. Wyoming

As described in section IX.I.5 of the February 2013 proposal, the Petitioner objected to a specific provision in the Wyoming SIP that provides an exemption for excess PM emissions from diesel engines during startup, malfunction and maintenance (WAQSR Chapter 3, section 2(d), cited as ENV–AQ–1 Wyo. Code R. § 2(d) in the Petition). 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."

For reasons explained fully in the February 2013 proposal, the EPA proposed 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).

Subsequently, the state of Wyoming revised WAQSR Chapter 3, section 2(d) and eliminated the SIP inadequacies identified in the February 2013 proposal document with respect to this provision. The EPA has already approved the necessary SIP revision for this provision.[398] Thus, the EPA's final action on the Petition does not need to include a finding of substantial inadequacy and SIP call for this provision.

In this final action, the EPA is denying the Petition with respect to WAQSR Chapter 3, section 2(d). Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Wyoming SIP that the EPA received and considered during the development of this rulemaking.

J. Affected States and Local Jurisdictions in EPA Region IX

1. Arizona

As described in section IX.J.1 of the February 2013 proposal, 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)).

For reasons explained in the February 2013 proposal, the EPA proposed to deny the Petition with respect to AAC Section R18–2–310(B) on the basis that it included an affirmative defense applicable to malfunction events that was consistent with the CAA as interpreted by the EPA in the 1999 SSM Guidance.

Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to AAC Section R18–2–310(C).

Subsequently, for reasons explained fully in the SNPR, the EPA reversed its prior proposed denial of the Petition with respect to the affirmative defense provision AAC Section R18–2–310(B) applicable to malfunctions. Also for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provision in AAC Section R18–2–310(C) applicable to startup and shutdown, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that the provisions in AAC Section R18–2–310(B) and AAC Section R18–2–310(C) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to AAC Section R18–2–310(B) and AAC Section R18–2–310(C). Accordingly, the EPA is finding that the provisions in AAC Section R18–2–310(B) and AAC Section R18–2–310(C) are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments

[397] *See* "Approval and Promulgation of Implementation Plans; North Dakota; Revisions to the Air Pollution Control Rules," 79 FR 63045 (October 22, 2014).

[398] *See* "Approval and Promulgation of Implementation Plans; Wyoming; Revisions to the Air Quality Standards and Regulations," 79 FR 62859 (October 21, 2014).

specific to the Arizona SIP that the EPA received and considered during the development of this rulemaking.

2. Arizona: Maricopa County

As described in section IX.J.2 of the February 2013 proposal, 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 Regulation 3, Rule 140, § 402). These provisions in Maricopa County Air Quality Department (MCAQD) Rule 140 are similar to the affirmative defense provisions in ADEQ R18–2–310.

For reasons explained in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Maricopa County Air Pollution Control Regulation 3, Rule 140, § 401 on the basis that it included an affirmative defense applicable to malfunction events that was consistent with the CAA as interpreted by the EPA in the 1999 SSM Guidance. Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402.

Subsequently, for reasons explained fully in the SNPR, the EPA reversed its prior proposed denial of the Petition with respect to the affirmative defense provision Maricopa County Air Pollution Control Regulation 3, Rule 140, § 401 applicable to malfunctions. Also for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provision in Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402 applicable to startup and shutdown, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that the provisions in Maricopa County Air Pollution Control Regulation 3, Rule 140, § 401 and Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402 are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to Maricopa County Air Pollution Control Regulation 3, Rule 140, § 401 and Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402. Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Arizona SIP that the EPA received and considered during the development of this rulemaking.

3. Arizona: Pima County

As described in section IX.J.3 of the February 2013 proposal, the Petitioner objected to a provision in the Pima County Department of Environmental Quality's (PCDEQ) Rule 706 that pertains to enforcement discretion.

For reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to PCDEQ Rule 706.

In this final action, the EPA is denying the Petition with respect to PCDEQ Rule 706. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Arizona SIP that the EPA received and considered during the development of this rulemaking.

4. California: Eastern Kern Air Pollution Control District

The Petitioner did not identify any provisions in the SIP for the state of California, which is why this state was not explicitly addressed in the February 2013 proposal.

Subsequently, for reasons explained fully in the SNPR, the EPA identified an affirmative defense provision in the SIP for the state of California applicable in the Eastern Kern Air Pollution Control District (APCD), and the EPA proposed to make a finding of substantial inadequacy and to issue a SIP call for this provision. The affirmative defense is included in Kern County ''Rule 111 Equipment Breakdown.'' This SIP provision provides an affirmative defense available to sources for excess emissions that occur during a breakdown condition (*i.e.,* malfunction).

In this final action, the EPA is finding that Kern County Rule 111 Equipment Breakdown in the California SIP applicable in the Eastern Kern APCD [399] is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the California SIP that the EPA received and considered during the development of this rulemaking.

5. California: Imperial County Air Pollution Control District

The Petitioner did not identify any provisions in the SIP for the state of California, which is why this state was not explicitly addressed in the February 2013 proposal.

Subsequently, for reasons explained fully in the SNPR, the EPA identified an affirmative defense provision in the SIP for the state of California applicable in the Imperial Valley APCD, and the EPA proposed to make a finding of substantial inadequacy and to issue a SIP call for this provision. The affirmative defense is included in Imperial County ''Rule 111 Equipment Breakdown.'' This SIP provision provides an affirmative defense available to sources for excess emissions that occur during a breakdown condition (*i.e.,* malfunction).

In this final action, the EPA is finding that Imperial County ''Rule 111 Equipment Breakdown'' in the California SIP applicable in the Imperial Valley APCD is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the California SIP that the EPA received and considered during the development of this rulemaking.

6. California: San Joaquin Valley Unified Air Pollution Control District

The Petitioner did not identify any provisions in the SIP for the state of California, which is why this state was not explicitly addressed in the February 2013 proposal.

Subsequently, for reasons explained fully in the SNPR, the EPA identified affirmative defense provisions in the SIP for the state of California applicable in the San Joaquin Valley Unified APCD, and the EPA proposed to make a finding of substantial inadequacy and to issue a SIP call for these provisions. The affirmative defenses are included in: (i) Fresno County ''Rule 110 Equipment

[399] The EPA is in this final action making a finding of substantial inadequacy and issuing a SIP call for Kern County Rule 111 Equipment Breakdown in the California SIP as it applies in each the Eastern Kern APCD and the San Joaquin Valley Unified APCD.

Breakdown''; (ii) Kern County ''Rule 111 Equipment Breakdown''; (iii) Kings County ''Rule 111 Equipment Breakdown''; (iv) Madera County ''Rule 113 Equipment Breakdown''; (v) Stanislaus County ''Rule 110 Equipment Breakdown''; and (vi) Tulare County ''Rule 111 Equipment Breakdown.'' Each of these SIP provisions provides an affirmative defense available to sources for excess emissions that occur during a breakdown condition (*i.e.,* malfunction).

In this final action, the EPA is finding that the following six provisions in the California SIP applicable in the San Joaquin Valley Unified APCD are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions: (i) Fresno County ''Rule 110 Equipment Breakdown''; (ii) Kern County ''Rule 111 Equipment Breakdown''; (iii) Kings County ''Rule 111 Equipment Breakdown''; (iv) Madera County ''Rule 113 Equipment Breakdown''; (v) Stanislaus County ''Rule 110 Equipment Breakdown''; and (vi) Tulare County ''Rule 111 Equipment Breakdown.''[400] This action is fully consistent with what the EPA proposed in the SNPR. Please refer to the Response to Commentdocument available in the docket for this rulemaking concerning any comments specific to the California SIP that the EPA received and considered during the development ofthisrulemaking.

K. Affected States in EPA Region X

1. Alaska

As described in section IX.K.1 of the February 2013 proposal, 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). The provisionprovides: ''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 also stated that the provision is worded as if it were an affirmative defense but it uses criteria for enforcement discretion.

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Alaska Admin. Code tit. 18 § 50.240 on the basis that, to the extent the provision was intended to be an affirmative defense, it was not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's 1999 SSM Guidance.

Subsequently, for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to Alaska Admin. Code tit. 18 § 50.240, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that Alaska Admin. Code tit. 18 § 50.240 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Alaska Admin. Code tit. 18 § 50.240. Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Alaska SIP that the EPA received and considered during the development of this rulemaking.

2. Idaho

As described in section IX.K.2 of the February 2013 proposal, 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).

For reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Idaho Admin. Code r. 58.01.01.131.

In this final action, the EPA is denying the Petition with respect to Idaho Admin. Code r. 58.01.01.131. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Idaho SIP that the EPA received and considered during the development of this rulemaking.

3. Oregon

As described in section IX.K.3 of the February 2013 proposal, 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).

For reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Or. Admin. R. 340–028–1450.

In this final action, the EPA is denying the Petition with respect to Or. Admin. R. 340–028–1450. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Oregon SIP that the EPA received and considered during the development of this rulemaking.

4. Washington

As described in section IX.K.4 of the February 2013 proposal, 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). 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 also stated that the provision is worded as if it were an affirmative defense but it uses criteria for enforcement discretion.

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Wash. Admin. Code § 173–400–107 on the basis that, to the extent the provision was intended to be an affirmative defense, it was not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's 1999 SSM Guidance.

Subsequently, for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to Wash. Admin. Code § 173–400–107, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that Wash. Admin. Code § 173–400–107 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

[400] The EPA is in this final action making a finding of substantial inadequacy and issuing a SIP call for Kern County Rule 111 Equipment Breakdown in the California SIP as it applies in each the Eastern Kern APCD and the San Joaquin Valley Unified APCD.

In this final action, the EPA is granting the Petition with respect to Wash. Admin. Code § 173–400–107. Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Washington SIP that the EPA received and considered during the development of this rulemaking.

5. Washington: Energy Facility Site Evaluation Council

The Petitioner did not identify any provisions in the SIP for the state of Washington that specifically apply to the Energy Facility Site Evaluation Council (EFSEC) area, which is why this area was not explicitly addressed in the February 2013 proposal.

Subsequently, for reasons explained fully in the SNPR, the EPA identified affirmative defense provisions in the SIP for the state of Washington that relate to the EFSEC, and the EPA proposed to make a finding of substantial inadequacy and to issue a SIP call for these provisions in Wash. Admin. Code § 463–39–005. In the EFSEC portion of the SIP, Wash. Admin. Code § 463–39–005 adopts by reference Wash. Admin. Code § 173–400–107, thereby incorporating the affirmative defenses applicable to startup, shutdown, scheduled maintenance and ''upsets'' that the EPA is also finding substantially inadequate in Wash. Admin. Code § 173–400–107 (see section IX.K.4 of this document).

In this final action, the EPA is finding that Wash. Admin. Code § 463–39–005 is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Washington SIP that the EPA received and considered during the development of this rulemaking.

6. Washington: Southwest Clean Air Agency

The Petitioner did not identify any provisions in the SIP for the state of Washington that specifically apply in the portion of the state regulated by the Southwest Clean Air Agency (SWCAA),[401] which is why this area was not explicitly addressed in the February 2013 proposal.

Subsequently, for reasons explained fully in the SNPR, the EPA identified affirmative defense provisions in the SIP for the state of Washington that apply in the portion of the state regulated by SWCAA, and the EPA proposed to make a finding of substantial inadequacy and to issue a SIP call for these provisions. The affirmative defenses are included in the SIP in SWAPCA ''400–107 Excess Emissions.'' This SIP section provides an affirmative defense available to sources for excess emissions that occur during startup and shutdown, maintenance and ''upsets'' (*i.e.,* malfunctions). It is identical to Wash. Admin. Code § 173–400–107 in all respects except that SWAPCA 400–107(3) contains a more stringent requirement for the reporting of excess emissions.

In this final action, the EPA is finding that SWAPCA ''400–107 Excess Emissions'' in the Washington SIP applicable in the area regulated by SWCAA is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Washington SIP that the EPA received and considered during the development of this rulemaking.

X. Implementation Aspects of EPA's SSM SIP Policy

A. Recommendations Concerning Alternative Emission Limitations for Startup and Shutdown

In response to a SIP call concerning an existing automatic or discretionary exemption for excess emissions during SSM events, the EPA anticipates that a state may elect to create an alternative emission limitation that applies during startup and shutdown events (or during any other normal mode of operation during which the exemption may have applied) as a revised element or component of the existing emission limitation. The EPA emphasizes that states have discretion to revise the identified deficient provisions by any means they choose, so long as the revised provision is consistent with CAA requirements for SIP provisions. If a state elects to create an alternative emission limitation to replace an existing exemption, there are several issues that the state should consider.

First, as explained in sections VII.B and XI of this document, the EPA has longstanding guidance that provides recommendations to states concerning the development of alternative emission limitations applicable during startup and shutdown to replace exemptions in existing SIP provisions. The EPA first provided this guidance in the 1999 SSM Guidance but has reiterated and clarified its guidance in this action. The EPA recommends that states consider the seven clarified criteria described in sections VII.B and XI of this document when developing new alternative emission limitations to replace automatic or discretionary exemptions, in order to assure that the revised provisions submitted to the EPA for approval meet basic CAA requirements for SIP emission limitations.

Second, the EPA reiterates that SIP emission limitations that are expressed as numerical limitations do not necessarily have to require the same numerical level of emissions during all modes of normal source operation. Under appropriate circumstances consistent with the criteria that the EPA recommends for alternative emission limitations, it may be appropriate to have a numerical emission limitation that has a higher numerical level applicable during specific modes of source operation, such as during startup and shutdown. For example, if a rate-based NO_X emission limitation in the SIP applies to a specific source category, then it may be appropriate for that emission limitation to have a higher numerical standard applicable during defined periods of startup or shutdown. Such an approach can be consistent with SIP requirements, so long as that higher numerical level for startup or shutdown is properly established and is legally and practically enforceable, and so long as other overarching CAA requirements are also met. However, alternative emission limitations applicable during startup and shutdown cannot be inappropriately high or an effectively unlimited or uncontrolled level of emissions, as those would constitute impermissible *de facto* exemptions for emissions during certain modes of operation.

Third, the EPA reiterates that SIP emission limitations do not necessarily have to be expressed in terms of a numerical level of emissions. There are many sources for which a numerically expressed emission limitation will be the most appropriate and will result in

[401] The EPA notes that the SWCAA was formerly named, and in some places in the SIP still appears, as the ''Southwest Air Pollution Control Authority'' or ''SWAPCA.'' The EPA anticipates that the name will be updated in the SIP in due course as the state revises the SIP.

the most legally and practically enforceable SIP requirements.[402] However, the EPA recognizes that for some source categories, under some circumstances, it may be appropriate for the SIP emission limitation to include a specific technological control requirement or specific work practice requirement that applies during specified modes of source operation such as startup and shutdown. For example, if the otherwise applicable numerical SO_2 emission limitation in the SIP is not achievable, and the otherwise required SO_2 control measure is not effective during startup and shutdown and/or measurement of emissions during startup and shutdown is not reasonably feasible, then it may be appropriate for that emission limitation to impose a different control measure, such as use of low sulfur coal, applicable during defined periods of startup and shutdown in lieu of a numerically expressed emission limitation. Such an approach can be consistent with SIP requirements, so long as that alternative control measure applicable during startup and shutdown is properly established and is legally and practically enforceable as a component of the emission limitation, and so long as other overarching CAA requirements are also met.

Fourth, the EPA notes that revisions to replace existing automatic or discretionary exemptions for SSM events with alternative emission limitations applicable during startup and shutdown also need to meet the applicable overarching CAA requirements with respect to the SIP emission limitation at issue. For example, if the emission limitation is in the SIP to meet the requirement that the source category be subject to RACT level controls for NO_X for purposes of the ozone NAAQS, then the state should assure that the higher numerical level or other control measure that will apply to NO_X emissions during startup and shutdown does constitute a RACT level of control for such sources for such pollutant during such modes of operation.

Finally, the EPA notes that states should not replace automatic or discretionary exemptions for excess emissions during SSM events with alternative emission limitations that are a generic requirement such as a ''general duty to minimize emissions'' provision or an ''exercise good engineering judgment'' provision.[403] While such provisions may serve an overarching purpose of encouraging sources to design, maintain and operate their sources correctly, such generic clauses are not a valid substitute for more specific emission limitations that apply during normal modes of operation such as startup and shutdown.

B. Recommendations for Compliance With Section 110(l) and Section 193 for SIP Revisions

In response to a SIP call for any type of deficient provision, the EPA anticipates that each state will determine the best way to revise its SIP provisions to bring them into compliance with CAA requirements. In this action the EPA is only identifying the provisions that need to be revised because they violate fundamental requirements of the CAA and providing guidance to states in the SSM Policy concerning the types of provisions that are and are not permissible with respect to the treatment of excess emissions during SSM events. The EPA recognizes that one important consideration for air agencies as they evaluate how best to revise their SIP provisions in response to this SIP call is the nature of the analysis that will be necessary for the resulting SIP revisions under section 110(l) and section 193. The EPA is therefore providing in this document general guidance on this important issue in order to assist states with SIP revisions in response to the SIP call.

Section 110(k)(3) directs the EPA to approve SIP submissions that comply with applicable CAA requirements and to disapprove those that do not. Under section 110(l), the EPA is prohibited from approving any SIP revision that would interfere with any applicable requirement concerning attainment and reasonable further progress or any other requirements of the CAA. To illustrate different ways in which section 110(l) and section 193 may apply in the evaluation of future SIP submissions in response to the SIP call, the EPA anticipates that there are several common scenarios that states may wish to consider when revising their SIPs:

Example 1: A state elects to revise an existing SIP provision by removing an existing automatic exemption provision, director's discretion provision, enforcement discretion provision or affirmative defense provision, without altering any other aspects of the SIP provision at issue (*e.g.,* elects to retain the emission limitation for the source category but eliminate the exemption for emissions during SSM events). Although the EPA must review each SIP submission for compliance with section 110(l) and section 193 on the facts and circumstances of the revision, the Agency believes in general that this type of SIP revision should not entail a complicated analysis to meet these statutory requirements. Presumably, removal of the impermissible components of preexisting SIP provisions would not constitute backsliding, would in fact strengthen the SIP and would be consistent with the overarching requirement that the SIP revision be consistent with the requirements of the CAA. Accordingly, the EPA believes that this type of SIP revision should not entail a complicated analysis for purposes of section 110(l). If the SIP revision is also governed by section 193, then elimination of the deficiency will likewise presumably resultinequal or greater emission reductions and thus comply with section 193 without the need for a more complicated analysis. The EPA has recently evaluated a SIP revision to remove specific SSM deficiencies in this manner.[404]

Example 2: A state elects to revise its SIP provision by replacing an automatic exemption for excess emissions during startup and shutdown events with an appropriate alternative emission limitation (*e.g.,* a different numerical limitation or different other control requirement) that is explicitly applicable during startup and shutdown as a component of the revised emission limitation. Although the EPA must review each SIP revision for compliance with section 110(l) and section 193 on the facts and circumstances of the revision, the Agency believes in general that this type of SIP revision should not entail a complicated analysis to meet these statutory requirements. Presumably, the replacement of an automatic exemption applicable to startup and shutdown with an appropriate alternative emission limitation would not constitute backsliding, would strengthen the SIP and would be consistent with the overarching requirement that the SIP revision be consistent with the

[402] The EPA notes that in the CAA there is a presumption in favor of numerical emission limitations for purposes of section 112 and section 169, but section 110(a) does not include such an explicit presumption. However, there may be sources for which a numerically expressed emission limitation is the one that is most legally and practically enforceable, even during startup and shutdown, and for which a numerically expressed emission limitation is thus most appropriate.

[403] The EPA notes that the ''general duty'' imposed under CAA section 112(r) is a separate standard, in addition to the otherwise applicable emission limitations and is not in lieu of those requirements.

[404] *See* ''Approvaland Promulgationof Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; Emissions During Startups, Shutdowns, and Malfunctions,'' proposed at 78 FR 29683 (May 21, 2013), finalized at 79 FR 33101 (June 10, 2014).

requirements of the CAA. The state should develop that alternative emission limitation in accordance with the EPA's guidance recommendations for such provisions to assure that it would meet CAA requirements.[405] In addition, that alternative emission limitation would both need to meet the overarching CAA applicable requirements that the emission limitation is designed and intended to meet (*e.g.,* RACT-level controls for the source category in an attainment area for a NAAQS) and need to be legally and practically enforceable (*e.g.,* have adequate recordkeeping, reporting, monitoring or other features requisite for enforcement). If a state has developed the alternative emission limitation consistent with these criteria, then the EPA anticipates that the revision of the emission limitation to replace the exemption with an alternative emission limitation applicable to startup and shutdown would not be backsliding, would be a strengthening of the SIP and would be consistent with the requirement of section 110(l) that a SIP revision be consistent with the requirements of the CAA. Similarly, if section 193 applies to the emission limitation that the state is revising, then the replacement of an exemption applicable to emissions during startup and shutdown with an appropriately developed alternative emission limitation that explicitly applies during startup and shutdown would presumably result in equal or greater emission reductions and thus should meet the requirements of section 193 without the need for a more complicated analysis.

Example 3: A state elects to revise an existing SIP provision not merely by removal of an existing automatic exemption provision, director's discretion provision, enforcement discretion provision or affirmative defense provision, but by the removal of the deficiency combined with a total revision of the emission limitation. The EPA anticipates that there may be emission limitations for which a state may elect to do such a wholesale revision of the SIP provision as part of eliminating an impermissible component of the existing provision (*e.g.,* removal of an automatic exemption applicable to emissions during SSM events through a complete revision of the emission limitation to create a different emission limitation that applies at all times, including during SSM events). In developing a completely revised SIP provision, the state should assure that the replacement provision meets the applicable overarching CAA requirements that the provision is designed and intended to meet, is legally and practically enforceable and is not less stringent than the prior SIP provision. The EPA believes in general that this type of SIP revision may require a more in-depth analysis to meet these statutory requirements of section 110(l) and section 193. To the extent that there is any concern that the revised SIP provision is less stringent than the provision it replaces, then there will need to be a careful evaluation as to whether the revised provision would interfere with any applicable requirement concerning attainment and reasonable further progress and with any other applicable requirement of the CAA. Presumably, however, so long as the state has properly developed the revised emission limitation to assure that it meets the overarching CAA requirements and to assure that it will not result in a less stringent emission limitation, then the complete revision of the emission limitation would not constitute backsliding, would be a strengthening of the SIP and thereby would comply with section 110(l). If the SIP revision is also governed by section 193, then there will also need to be an analysis to assure that the revision will result in equal or greater emission reductions and thus comply with section 193. To the extent that there is concern that the revision would result in a less stringent emission limitation than the preexisting emission limitation, then a more complex analysis would likely be required.

The EPA emphasizes that each SIP revision must be evaluated for compliance with section 110(l) and section 193 on the facts and circumstances of the specific revision, but these examples are intended to provide general guidance on the considerations and the nature of the analysis that may be appropriate for different types of SIP revisions. States should contact their respective EPA Regional Offices (see the **SUPPLEMENTARY INFORMATION** section of this document) for further recommendations and assistance concerning the analysis appropriate for specific SIP revisions in response to this SIP call.

XI. Statement of the EPA's SSM SIP Policy as of 2015

The EPA's longstanding interpretation of the CAA is that SIP provisions cannot include exemptions from emission limitations for emissions during SSM events. In order to be permissible in a SIP, 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. Regardless of its form, a fully approvable SIP emission limitation must also meet all substantive requirements of the CAA applicable to such a SIP provision, *e.g.,* the statutory requirement of section 172(c)(1) for imposition of RACM and RACT on sources located in designated nonattainment areas.

This section of the document provides more specific guidance on the appropriate treatment of emissions during SSM events in SIP provisions, replacing the EPA's prior guidance issuedin memoranda of 1982, 1983, 1999 and 2001. The more extended explanations and interpretations provided in other sections of this document are also applicable, should a situation arise that is not sufficiently covered by this section's more concise policy statement. This SSM Policy as of 2015 is a policy statement and thus constitutes guidance. As guidance, this SSM Policy as of 2015 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 a given SIP provision is consistent with the requirements of the CAA and applicable regulations.

A. Definitions

The term *alternative emission limitation* means, in this document, an emission limitation in a SIP that applies to a source during some but not all periods ofnormaloperation(*e.g.,* applies only during a specifically defined mode of operation such as startup orshutdown). Analternative emission limitation is a component of a continuously applicable SIP emission limitation, and it may take the form of a control measure such as a design, equipment, work practice or operational standard (whether or not numerical). This definition of the term is independent of the statutory use of the term ''alternative means of emission limitation'' in sections 111(h)(3) and 112(h)(3), which pertain to the conditions under which the EPA may pursuant to sections 111 and 112 promulgate emission limitations, or components of emission limitations,

[405] These recommendations are discussed in detail in section VII.B.2 of this document.

that are not necessarily in numeric format.

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 otherwise applicable emission limitations or control measures, or to excuse noncompliance with otherwise applicable emission limitations or control measures, which would be binding on the EPA and the public.

The term *emission limitation* means, in the context of a SIP, 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 in a SIP provision. In this respect, the term *emission limitation* is defined as in section 302(k) of the CAA. By definition, an emission limitation can take various forms or a combination of forms, but in order to be permissible in a SIP it 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. Regardless of its form, a fully approvable SIP emission limitation must also meet all substantive requirements of the CAA applicable to such a SIP provision, *e.g.,* the statutory requirement of section 172(c)(1) for imposition of reasonably available control measures and reasonably available control technology (RACM and RACT) on sources located in designated nonattainment areas.

The term *excess emissions* means the emissions of air pollutants from a source that exceed any applicable SIP emission limitation. In particular, this term includes those emissions above the otherwise applicable SIP emission limitation that occur during startup, shutdown, malfunction or other modes of source operation, *i.e.,* emissions that would be considered violations of the applicable emission limitation but for an impermissible automatic or discretionary exemption from such emission limitation.

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

The term *shutdown* means, generally, the cessation of operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In individual SIP provisions it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

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 *startup* means, generally, the setting in operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In an individual SIP provision it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

B. Emission Limitations in SIPs Must Apply Continuously During All Modes of Operation, Without Automatic or Discretionary Exemptions or Overly Broad Enforcement Discretion Provisions That Would Bar Enforcement by the EPA or by Other Parties in Federal Court Through a Citizen Suit

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." All of the specific requirements of a SIP emission limitation must be discernible in the SIP, for clarity preferably within a single section or provision; must meet the applicable substantive and stringency requirements of the CAA; and must be legally and practically enforceable.

To the extent that a SIP provision allows any period of time when a source is *not* subject to any requirement that limits emissions, the requirements limiting the source's emissions by definition cannot do so "on a continuous basis." Such a source would not be subject to an "emission limitation," as required by the definition of that term under section 302(k). However, the CAA allows SIP provisions that include numerical limitations, specific technological control requirements and/or work practice requirements that limit emissionsduring startupand shutdown as components of a continuously applicable emission limitation, as discussed in section XI.C of this document.

Accordingly, automatic or discretionary exemption provisions applicable during SSM events are impermissible in SIPs. This impermissibility applies even for "brief" exemptions from limits on emissions, because such exemptions nevertheless render the limitation noncontinuous. Furthermore, thefact that a SIP provision includes prerequisites to qualifying for an SSM exemption does not mean those prerequisites are themselves an "alternative emissionlimitation" applicable during SSM events.

Automatic exemptions. A typical SIP provision that includes an impermissible automatic exemption would provide that a source has to meet a specific emission limitation during all modes of operation except startup, shutdown and malfunction; by definition any excess emissions during such events would not be violations and thus there could be no enforcement based on those excess emissions. With respect to automatic exemptions from emission limitations in SIPs, the EPA's longstanding interpretation of the CAA is that such exemptions are impermissible because they are inconsistent with the fundamental requirements of the CAA. Automatic exemptions from otherwise applicable emission limitations render those emission limitations less than continuous as required by CAA sections 302(k), 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).

Discretionary exemptions. A typical SIP provision that includes an impermissible "director's discretion" componentwouldpurporttoauthorize air agency personnel to modify existing SIP requirements under certain conditions, *e.g.,* to grant a variance from anotherwiseapplicableemission limitation if the source could not meet the requirement in certain circumstances.[406] Director'sdiscretion provisions operate to allow air agency personnelto make unilateral decisions on an *ad hoc* basis, up to and including the granting of complete exemptions for

[406] 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 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 or alternative compliance methods.

emissions during SSM events, thereby negating anypossibilityofenforcement for what would be violations of the otherwise applicable emission limitation. With respect to such director's discretion provisions in SIPs, the EPA interprets the CAA to prohibit these 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. In particular, the EPA interprets the CAA to preclude SIP provisions that provide director's discretion authority to create discretionary exemptions for violations when the CAA would not allow such exemptions in the first instance.

If an air agency elects to have SIP provisions that contain a director's discretion feature, then to be consistent with CAA requirements the provisions must be structured so that any resulting variances or other deviations from the emission limitation or other 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 action to enforce the provision of the SIP as it was originally approved by the EPA.

Adoption of the EPA's NSPS or NESHAP that have not yet been revised. The EPA has recently begun revising and will continue to revise NSPS and NESHAP as needed, to make the EPA's regulations consistent with CAA requirements by removing exemptions and affirmative defense provisions applicable to SSM events, and generally on the same legal basis as for this action. A state should not submit an NSPS or NESHAP for inclusion into its SIP as an emission limitation (whether through incorporation by reference or otherwise) unless either: (i) That NSPS or NESHAP does not include an exemption or affirmative defense for SSM events; or (ii) the state takes action as part of the SIP submission to render such exemption or affirmative defense inapplicable to the SIP emission limitation. Because SIP provisions must apply continuously, including during SSM events, the EPA can no longer approve SIP submissions that include any emission limitations with such exemptions, even if those emission limitations are NSPS or NESHAP regulations that the EPA has not yet revised to make consistent with CAA requirements. Alternatively, states may elect to adopt an existing NSPS or NESHAP as a SIP provision, so long as the SIP provision excludes the exemption or affirmative defense applicable to SSM events.[407] States may also wish to replace the SSM exemption in NSPS or NESHAP regulations with appropriately developed alternative emission limitations that apply during startup and shutdown in lieu of the SSM exemption. Otherwise, the EPA's approval of the deficient SSM exemption provisions into the SIP would contravene CAA requirements for SIP provisions and would potentially result in misinterpretation or misapplication of the standards by regulators, regulated entities, courts and members of the public. The EPA emphasizes that the inclusion of an NSPS or NESHAP as an emission limitation in a state's SIP is different and distinct from reliance on such standards indirectly, such as reliance on the NSPS or NESHAP as a source of emission reductions that may be taken into account for SIP planning purposes in emissions inventories or attainment demonstrations. For those uses, states may continue to rely on the EPA's NSPS and NESHAP regulations, even those that have not yet been revised to remove inappropriate exemptions, in accordance with the requirements applicable to those SIP planning functions.

Other modes of normal operation. SIPs also may not 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 modes of normal operation at a source, for which the source can be designed, operated and maintained in order to meet an applicable emission limitations and during which the source should be expected to control and minimize emissions. Excess emissions that occur during planned and predicted periods should be treated as violations of applicable emission limitations. Accordingly, exemptions for emissions during these periods of normal source operation are not consistent with CAA requirements.

It may be appropriate for an air agency to establish an alternative numerical limitation or other form of control measure that applies during these modes of source operation, as for startup and shutdown events, but any such alternative emission limitation should be developed using the same criteria that the EPA recommends for alternative emission limitations applicable during startup and shutdown. Similarly, any SIP provision that includes an emission limitation for sources that includes alternative emission limitations applicable to modes of operation such as ''maintenance,'' ''load change,'' ''soot-blowing'' or ''on-line operating changes'' must also meet the applicable level of stringency for that type of emission limitation and be practically and legally enforceable.

C. Emission Limitations in SIPs May Contain Components Applicable to Different Modes of Operation That Take Different Forms, and Numerical Emission Limitations May Have Differing Levels and Forms for Different Modes of Operation

There are approaches other than exemptions that would be consistent with CAA requirements for SIP provisions that states can use to address excess emissions during certain events. While automatic exemptions and director's discretion exemptions from otherwise applicable emission limitations for SSM events are not consistent with the CAA, SIPs may include criteria and procedures for the use of enforcement discretion by air agency personnel, as described in section XI.E of this document. Similarly, SIPs may, rather than exempt excess emissions, include emission limitations that subject those emissions to alternative numerical limitations or other control requirements during startup and shutdown events or other normal modes of operation, so long as those components of the emission limitations meet applicable CAA requirements and are legally and practically enforceable.

The EPA does not interpret section 110(a)(2) or section 302(k) to require that an emission limitation in a SIP provision be composed of a single, uniformlyapplicable numerical emission limitation. The text of section 110(a)(2) and section 302(k) does not require states to impose emission limitations that include a static, inflexible standard. The critical aspect for purposes of section 302(k) is that the SIP provision impose limits on emissions on a continuous basis, regardless of whether the emission

[407] Under CAA section 116, states have the explicit general authority to regulate more stringently than the EPA. Indeed, under section 116 states can regulate sources subject to EPA regulations promulgated under section 111 or section 112 so long as they do not regulate them less stringently. According, the EPA believes that states may elect to adopt EPA regulations under section 111 or section 112 as SIP provisions and expressly eliminate the exemptions for emissions during SSM events.

limitation as a whole is expressed numerically or as a combination of numerical limitations, specific control technology requirements and/or work practice requirements applicable during specific modes of operation, and regardless of whether the emission limitation is static or variable. Thus, emission limitations in SIP provisions do not have to be composed solely of numerical emission limitations applicable at all times. For example, so long as the SIP provision meets other applicable requirements, it may impose different numerical limitations for startup and shutdown. Also, for example, SIPs can contain numerical emission limitations applicable only to some periods and other forms of controls applicable only to some periods, with certain periods perhaps subject to both types of limitation. Thus, SIP emission limitations: (i) Do not need to be numerical in format; (ii) do not have to apply the same limitation (*e.g.,* numerical level) at all times; and (iii) may be composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements, with each component of the emission limitation applicable during a defined mode of source operation. In practice, it may be that numerical emission limitations are the most appropriate from a regulatory perspective (*e.g.,* to be legally and practically enforceable) and thus the emission limitation would need to be established in this form to meet CAA requirements. It is important to emphasize, however, that regardless of how the state structures or expresses a SIP emission limitation—whether solely as one numerical limitation, as a combination of different numerical limitations or as a combination of numerical limitations, specific technological control requirements and/or work practice requirements that apply during certain modes of operation such as startup and shutdown—the emission limitation as a whole must be continuous, must meet applicable CAA stringency requirements and must be legally and practically enforceable.[408]

Startup and shutdown are part of the normal operation of a source and should be accounted for in the design and operation of the source.[409] It should be possible to determine an appropriate form and degree of emission control during startup and shutdown and to achieve that control on a regular basis. Thus, sources should be required to meet defined SIP emission limitations during startup and shutdown. However, the EPA interprets the CAA to permit SIP emission limitations that include alternative emission limitations specifically applicable during startup and shutdown. Regarding startup and shutdown periods, the EPA considers the following to be the correct approach to creating an emission limitation: (i) The emission limitation contains no exemption for emissions during SSM events; (ii) the component of any alternative emission limitation that applies during startup and shutdown is clearly stated and obviously is an emission limitation that applies to the source; (iii) the component of any alternative emission limitation that applies during startup and shutdown meets the applicable stringency level for this type of emission limitation; and (iv) the emission limitation contains requirements to make it legally and practically enforceable. Section XI.D of this document contains more specific recommendations to states for developing alternative emission limitations.

In contrast to startup and shutdown, a malfunction is unpredictable as to the timing of the start of the malfunction event, its duration and its exact nature. The effect of a malfunction on emissions is therefore unpredictable and variable, making the development of an alternative emission limitation for malfunctions problematic. There may be rare instances in which certain types of malfunctions at certain types of sources are foreseeable and foreseen and thus are an expected mode of source operation. In such circumstances, the EPA believes that sources should be expected to meet the otherwise applicable emission limitation in order to encourage sources to be properly designed, maintained and operated in order to prevent or minimize any such malfunctions. To the extent that a given type of malfunction is so foreseeable and foreseen that a state considers it a normal mode of operation that is appropriate for a specifically designed alternative emission limitation, then such alternative should be developed in accordance with the recommended criteria for alternative emission limitations. The EPA does not believe that generic general-duty provisions, such as a general duty to minimize emissions, is sufficient as an alternative emission limitation for any type of event including malfunctions.

States developing SIP revisions to remove impermissible exemption provisions from emissions limitations may choose to consider reassessing particular emission limitations, for example to determine whether limits originally applicable only during non-SSM periods 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 and meeting other applicable CAA requirements. Such a revision of an emission limitation will need to be submitted as a SIP revision for EPA approval if the existing limitation to be changed is already included in the SIP or if the existing SIP relies on the particular existing emission limitation to meet a CAA requirement.

Some SIPs contain other generic regulatory requirements frequently referred to as ''general duty'' type requirements, such as a general duty to minimize emissions at all times, a general duty to use good engineering judgment at all times or a general duty not to cause a violation of the NAAQS at any time. To the extent that such other general-duty requirement is properly established and legally and practically enforceable, the EPA would agree that it may be an appropriate separate requirement to impose upon sources in addition to the (continuous) emission limitation. The EPA itself imposes separate general duties of this type in appropriate circumstances. The existence of these generic provisions does not, however, legitimize exemptions for emissions during SSM events in a SIP provision that imposes an emission limitation.

General-duty requirements that are not clearly part of or explicitly cross-referenced in a SIP emission limitation cannot be viewed as a component of a continuous emission limitation. Even if clearly part of or explicitly cross-referenced in the SIP emission limitation, however, a given general-duty requirement may not be consistent with the applicable stringency requirements for SIP provisions that should apply during startup and

[408] The EPA notes that CAA section 123 explicitly prohibits certain intermittent or supplemental controls on sources. In a situation where an emission limitation is continuous, by virtue of the fact that it has components applicable during all modes of source operation, the EPA would not interpret the components that applied only during certain modes of operation, *e.g.,* startup and shutdown, to be prohibited intermittent or supplemental controls.

[409] Every source is designed, maintained and operated with the expectation that the source will at least occasionally start up and shut down, and thus these modes of operation are ''normal'' in the sense that they are to be expected. The EPA uses this term in the ordinary sense of the word to distinguish between such predictable modes of source operation and genuine ''malfunctions,'' which are by definition supposed to be unpredictable and unforeseen events that could not have been precluded by proper source design, maintenance and operation.

shutdown. In general, the EPA believes that a legally and practically enforceable alternative emission limitation applicable during startup and shutdown should be expressed as a numerical limitation, a specific technological control requirement or a specific work practice applicable to affected sources during specifically defined periods or modes of operation. Accordingly, while states are free to include general-duty provisions in their SIPs as separate additional requirements, for example, to ensure that owners and operators act consistent with reasonable standards of care, the EPA does not recommend using these background standards to bridge unlawful interruptions in an emission limitation.[410]

D. Recommendations for Development of Alternative Emission Limitations Applicable During Startup and Shutdown

A state can develop special, alternative emission limitations that apply during startup or shutdown if the source cannot meet the otherwise applicable emission limitation in the SIP. SIP provisions may include alternative emission limitations for startup and shutdown as part of a continuously applicable emission limitation when properly developed and otherwise consistent with CAA requirements. However, if a non-numerical requirement does not itself (or in combination with other components of the emission limitation) limit the quantity, rate or concentration of air pollutants on a continuous basis, then the non-numerical standard (or overarching requirement) does not meet the statutory definition of an emission limitation under section 302(k).

In cases in which measurement of emissions during startup and/or shutdown is not reasonably feasible, it may be appropriate for an emission limitation to include as a component a control for startup and/or shutdown periods other than a numerically expressed emission limitation.

The federal NESHAP and NSPS regulations and the technical materials in the public record for those rules may provide assistance for states as they develop and consider emission limitations and alternative emission limitations for sources in their states, and definitions of startup and shutdown events and work practices for them found in these regulations may be appropriate for adoption by the state in certain circumstances. In particular, the NSPS regulations should provide very relevant information for sources of the same type, size and control equipment type, even if the sources were not constructed or modified within a date range that would make them subject to the NSPS. The EPA therefore encourages states to explore these approaches.

The EPA recommends that, in order to be approvable (*i.e.,* meet CAA requirements), alternative 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. The EPA recommends the following seven specific criteria as appropriate considerations for developing emission limitations in SIP provisions that apply during startup and shutdown:

(1) The revision is 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 is technically infeasible during startup or shutdown periods;

(3) The alternative emission limitation requires that the frequency and duration of operation in startup or shutdown mode are minimized to the greatest extent practicable;

(4) As part of its justification of the SIP revision, the state analyzes the potential worst-case emissions that could occur during startup and shutdown based on the applicable alternative emission limitation;

(5) The alternative emission limitation requires that all possible steps are taken to minimize the impact of emissions during startup and shutdown on ambient air quality;

(6) The alternative emission limitation requires that, at all times, the facility is operated in a manner consistent with good practice for minimizing emissions and the source uses best efforts regarding planning, design, and operating procedures; and

(7) The alternative emission limitation requires that the owner or operator's actions during startup and shutdown periods are documented by properly signed, contemporaneous operating logs or other relevant evidence.

If a state elects to create an emission limitation with different levels of control applicable during specifically defined periods of startup and shutdown than during other normal modes of operation, then the resulting emission limitation must meet the substantive requirements applicable to the type of SIP provision at issue, meet the applicable level of stringency for that type of emission limitation and be legally and practically enforceable. Alternative emission limitations applicable during startup and shutdown cannot allow an inappropriately high level of emissions or an effectively unlimited or uncontrolled level of emissions, as those would constitute impermissible *de facto* exemptions for emissions during certain modes of operation.

E. Enforcement Discretion Provisions

One approach other than exemptions that would be consistent with CAA requirements for SIP provisions that states can use to address excess emissions during SSM events is to include in the SIP criteria and procedures for the use of enforcement discretion by air agency personnel. SIPs may contain such provisions concerning the exercise of discretion by the air agency's own personnel, but such provisions cannot bar enforcement by the EPA or by other parties through a citizen suit.

Pursuant to the CAA, all parties with authority to bring an enforcement action to enforce SIP provisions (*i.e.,* the state, the EPA or any parties who qualify under the citizen suit provision of section 304) have enforcement discretion that they may exercise as they deem appropriate in any given circumstances. For example, if the event that causes excess emissions is an actual malfunction that occurred despite reasonable care by the source operator to avoid malfunctions, then each of these parties may decide that no enforcement action is warranted. In the event that any party decides that an enforcement action is warranted, then it has enforcement discretion with respect to what remedies to seek from the court for the violation (*e.g.,* injunctive relief, compliance order, monetary penalties or all of the above), as well as the type of injunctive relief and/or amount of monetary penalties sought.[411]

As part of state programs governing enforcement, states can include regulatory provisions or may adopt policies setting forth criteria for how they plan to exercise their own

[410] For example, the EPA has concerns the some general-duty provisions, if at any point relied upon as the sole requirement purportedly limiting emissions, could undermine the ability to ensure compliance with SIP emission limitations relied on to achieve the NAAQS and other relevant CAA requirements at all times. *See* section 110(a)(2)(A), (C); *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1161–62 (10th Cir. 2012).

[411] The EPA notes that only the state and the Agency have authority to seek criminal penalties for knowing and intentional violation of CAA requirements. The EPA has this explicit authority under CAA section 113(c).

enforcement authority. Under section 110(a)(2), states must have adequate authority to enforce provisions adopted into the SIP, but states can establish criteria for how they plan to exercise that authority. Such enforcement discretion provisions cannot, however, impinge upon the enforcement authority of the EPA or of others pursuant to the citizen suit provision of the CAA. 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 state elects not to do so. The EPA and citizens, and any federal 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 a citizen suit provides an important safeguard in the event that the state lacks resources or ability to enforce violations and provides additional deterrence. Accordingly, a SIP provision that operates at the state's election to eliminate the authority of the EPA or the public to pursue enforcement actions in federal court would undermine the enforcement structure of the CAA and would thus be substantially inadequate to meet fundamental requirements of the CAA.

Also, states should not adopt overly broad enforcement discretion provisions for inclusion in their SIPs, even for their own personnel. Section 110(a)(2) requires states to have adequate enforcement authority, and overly broad enforcement discretion provisions would run afoul of this requirement if they have the effect of precluding adequate state authority to enforce SIP requirements. 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 affect compliance with other CAA requirements, then it may be possible to determine in advance that the preauthorized exercise of director's discretion will not interfere with other CAA requirements, such as providing for attainment and maintenance of the NAAQS.

When using enforcement discretion in determining whether an enforcement action is appropriate in the case of excess emissions during a malfunction, satisfaction of the following criteria should be considered:

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

(2) 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 were utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

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

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

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

F. Affirmative Defense Provisions in SIPs

The EPA believes that SIP provisions that function to alter the jurisdiction or discretion of the federal courts under CAA section 113 and section 304 to determine liability and to impose remedies are inconsistent with fundamental legal requirements of the CAA, especially with respect to the enforcement regime explicitly created by statute. Affirmative defense provisions by their nature purport to limit or eliminate the authority of federal courts to find liability or to impose remedies through factual considerations that differ from, or are contrary to, the explicit grants of authority in section 113(b) and section 113(e). These provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain or what forms of remedy they purport to limit or eliminate.

Section 113(b) provides courts with explicit jurisdiction to determine liability and to impose remedies of various kinds, including injunctive relief, compliance orders and monetary penalties, in judicial enforcement proceedings. This grant of jurisdiction comes directly from Congress, and the EPA is not authorized to alter or eliminate this jurisdiction under the CAA or any other law. With respect to monetary penalties, CAA section 113(e) explicitly includes the factors that federal courts and the EPA are required to consider in the event of judicial or administrative enforcement for violations of CAA requirements, including SIP provisions. Because Congress has already given federal courts the jurisdiction to determine what monetary penalties are appropriate in the event of judicial enforcement for a violation of a SIP provision, neither the EPA nor states can alter or eliminate that jurisdiction by superimposing restrictions on that jurisdiction and discretion granted by Congress to the courts. Accordingly, pursuant to section 110(k) and section 110(l), the EPA cannot approve any such affirmative defense provision in a SIP. If such an affirmative defense provision is included in an existing SIP, the EPA has authority under section 110(k)(5) to require a state to remove that provision.

Couching an affirmative defense provision in terms of merely defining whether the emission limitation applies and thus whether there is a ''violation,'' as suggested by some commenters, is also problematic. If there is no ''violation'' when certain criteria or conditions for an ''affirmative defense'' are met, then there is in effect no emission limitation that applies when the criteria or conditions are met; the affirmative defense thus operates to create an exemption from the emission limitation. As explained in the February 2013 proposal, the CAA requires that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise. This interpretation is consistent with the decision in *Sierra Club* v. *Johnson* concerning the term ''emission limitation'' in section 302(k).[412] Characterizing the exemptions as an ''affirmative defense'' runs afoul of the requirement that emission limitations must apply continuously.

The EPA wishes to be clear that the absence of affirmative defense provisions in SIPs does not alter the legal rights of sources under the CAA. In the event of an enforcement action for an exceedance of a SIP emission limitation, a source can elect to assert any common law or statutory defenses that it determines are supported, based upon the facts and circumstances surrounding the alleged violation.

[412] 551 F.3d 1019 (D.C. Cir. 2008).

Under section 113(b), courts have explicit authority to impose injunctive relief, issue compliance orders, assess monetary penalties or fees and impose any other appropriate relief. Under section 113(e), federal courts are required to consider the enumerated statutory factors when assessing monetary penalties, including ''such other factors as justice may require.'' For example, if the exceedance of the SIP emission limitation occurs due to a malfunction, that exceedance is a violation of the applicable emission limitation but the source retains the ability to defend itself in an enforcement action and to oppose the imposition of particular remedies or to seek the reduction or elimination of monetary penalties, based on the specific facts and circumstances of the event. Thus, elimination of a SIP affirmative defense provision that purported to take away the statutory jurisdiction of the federal court to exercise its authority to impose remedies does not disarm sources in potential enforcement actions. Sources retain all of the equitable arguments they could have made under an affirmative defense provision; they must simply make such arguments to the reviewing court as envisioned by Congress in section 113(b) and section 113(e).

Once impermissible SSM exemptions are removed from the SIP, then any excess emissions during such events may be the subject of an enforcement action, in which the parties may use any appropriate evidence to prove or disprove the existence and scope of the alleged violation and the appropriate remedy for an established violation. Any alleged violation of an applicable SIP emission limitation, if not conceded by the source, must be established by the party bearing the burden of proof in a legal proceeding. The degree to which evidence of an alleged violation may derive from a specific reference method or any other credible evidence must be determined based upon the facts and circumstances of the exceedance of the emission limitation at issue.[413] Congress vested the federal courts with the authority to judge how best to weigh the evidence in an enforcement action.

[413] For example, the degree to which data from continuous opacity monitoring systems (COMS) is evidence of violations of SIP opacity or PM mass emission limitations is a factual question that must be resolved on the facts and circumstances in the context of an enforcement action. *See, e.g., Sierra Club* v. *Pub. Serv. Co. of Colorado, Inc.,* 894 F.Supp. 1455 (D. Colo. 1995) (allowing use of COMS data to prove opacity limit violations).

G. Anti-Backsliding Considerations

The EPA recognizes that one important consideration for air agencies as they evaluate how best to revise their SIP provisions in response to this SIP call is the nature of the analysis that will be necessary for the resulting SIP revisions under section 110(k)(3), section 110(l) and section 193. Under section 110(l), the EPA is prohibited from approving any SIP revision that would interfere with any applicable requirement concerning attainment and reasonable further progress or any other requirements of the CAA. Section 193 prohibits states from modifying regulations in place prior to November 15, 1990, unless the modification ensures equivalent or greater reductions of the pollutant. SIP revision must be evaluated for compliance with section 110(l) and section 193 on the facts and circumstances of the specific revision. Section X of this document provides three example scenarios in which a state might remove an impermissible SSM provision from its SIP, including how sections 110(l) and 193 considerations might apply. These examples are intended to provide general guidance on the considerations and the nature of the analysis that may be appropriate for different types of SIP revisions. Air agencies should contact their respective EPA Regional Offices (see the **SUPPLEMENTARY INFORMATION** section of this document) for further recommendations and assistance concerning the analysis appropriate for specific SIP revisions involving changes in SSM provisions.

XII. Environmental Justice Consideration

The final action restates the EPA's interpretation of the statutory requirements of the CAA. Through the SIP calls issued to certain states as part of this SIP call action under CAA section 110(k)(5), the EPA is only requiring each affected state to revise its SIP to comply with existing requirements of the CAA. The EPA's action therefore leaves to each affected state the choice as to how to revise the SIP provision in question to make it consistent with CAA requirements and to determine, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources. The EPA has not performed an environmental justice analysis for purposes of this action, because it cannot geographically locate or quantify the resulting source-specific emission reductions. Nevertheless, the EPA believes this action will provide environmental protection for all areas of the country.

XIII. References

The following is a list of documents that are specifically referenced in this document. Some listed documents also include a document ID number associated with the docket for this rulemaking.

1. 1982 SSM Guidance (Memorandum to Regional Administrators, Region I–X from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, Subject: Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions, dated September 28, 1982), EPA–HQ–OAR–2012–0322–0005.
2. 1983 SSM Guidance (Memorandum to Regional Administrators, Region I–X from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, Subject: Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions, dated February 15, 1983), EPA–HQ–OAR–2012–0322–0006.
3. 1999 SSM Guidance (Memorandum to EPA Regional Administrators, Regions I–X from Steven A. Herman and Robert Perciasepe, USEPA, Subject: State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown, dated September 20, 1999), EPA–HQ–OAR–2012–0322–0007.
4. 2001 SSM Guidance (Memorandum to EPA Regional Administrators, Regions I–X from Eric Schaeffer, Director, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, and John S. Seitz, Director, Office of Air Quality Planning and Standards, Office of Air and Radiation, dated December 5, 2001), EPA–HQ–OAR–2012–0322–0038.
5. ''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 (December 13, 2010), EPA–HQ–OAR–2012–0322–0014.
6. *Am. Farm Bureau Fedn* v. *United States EPA,* 984 F.Supp.2d 289 (M.D. Pa. 2013).
7. *Appalachian Power Co.* v. *EPA,* 249 F.3d 1032 (D.C. Cir. 2001).
8. *Appalachian Power Co.* v. *EPA,* 251 F.3d 1026 (D.C. Cir. 2001).
9. ''Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to Regulation 1; Notice of proposed rulemaking,'' 75 FR 42342 (July 21, 2010), EPA–HQ–OAR–2012–0322–0015, finalized as proposed at 76 FR 4540 (January 26, 2011), EPA–HQ–OAR–2012–0322–0016.
10. ''Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Reasonably Available Control Technology for the 1997 8-Hour Ozone Standard; Direct final rule,'' 77 FR 66388 (November 5, 2012).

11. "Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Reasonably Available Control Technology Update To Address Control Techniques Guidelines Issued in 2006, 2007, and 2008; Direct final rule," 77 FR 66921 (November 8, 2012).
12. "Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Redesignation, Maintenance Plan, and Emissions Inventories for Reading; Ozone Redesignations Policy Change; Final rule," 62 FR 24826 (May 7, 1997).
13. "Approval and Promulgation of Air Quality Implementation Plans; Utah; Redesignation Request and Maintenance Plan for Salt Lake County; Utah County; Ogden City PM_{10} Nonattainment Area; Proposed rule," 74 FR 62717 (December 1, 2009).
14. "Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Arizona; Redesignation of Phoenix-Mesa Area to Attainment for the 1997 8-Hour Ozone Standard; Final rule," 79 FR 55645 (September 17, 2014).
15. "Approval and Promulgation of Implementation Plansand Designation of Areas for Air Quality Planning Purposes; Ohio; Redesignation of the Ohio Portion of the Huntington-Ashland 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment; Final rule," 77 FR 76883 (December 31, 2012).
16. "Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Arizona; Redesignation of the Phoenix-Mesa Nonattainment Area to Attainment for the 1997 8-Hour Ozone Standard; Proposed rule," 79 FR 16734 (March 26, 2014).
17. "Approval and Promulgation of Implementation Plans; Arkansas; Revisions for the Regulation and Permitting of Fine Particulate Matter; Final rule," 80 FR 11573 (March 4, 2015).
18. "Approval and Promulgation of Implementation Plans; Corrections to the Arizona and Nevada State Implementation Plans; Direct final rule," 74 FR 57051 (November 3, 2009), EPA–HQ–OAR–2012–0322–0018.
19. "Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of California; PM–10; Revision of Designation; Redesignation of the San Joaquin Valley Air Basin PM–10 Nonattainment Area to Attainment; Approval of PM–10 Maintenance Plan for the San Joaquin Valley Air Basin; Approval of Commitments for the East Kern PM–10 Nonattainment Area; Proposed rule," 73 FR 22307 (April 25, 2008).
20. "Approval and Promulgation of Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; Emissions During Startups, Shutdowns, and Malfunctions," proposed at 78 FR 29683 (May 21, 2013) and finalized at 79 FR 33101 (June 10, 2014), EPA–HQ–OAR–2012–0322–0890.
21. "Approval and Promulgation of Implementation Plans; North Dakota; Revisions to the Air Pollution Control Rules; Final rule," 79 FR 63045 (October 22, 2014).
22. "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 (November 10, 2010), EPA–HQ–OAR–2012–0322–0892.
23. "Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit; Proposed rule," 74 FR 48467 (September 23, 2009).
24. "Approval and Promulgation of Implementation Plans; Wyoming; Revisions to the Air Quality Standards and Regulations," 79 FR 62859 (October 21, 2014).
25. "Approval and Promulgation of State Implementation Plans; Call for Sulfur Dioxide SIP Revisions for Billings/Laurel, MT [Montana]," 58 FR 41430 (August 4, 1993).
26. "Approval and Promulgation of State Implementation Plans; Michigan," 63 FR 8573 (February 20, 1998), EPA–HQ–OAR–2012–0322–0023.
27. *Arizona Public Service Co.* v. *EPA,* 562 F.3d 1116 (10th Cir. 2009).
28. *ATK Launch Systems, Inc.* v. *EPA,* 651 F.3d 1194 (10th Cir. 2011).
29. *Auer* v. *Robbins,* 519 U.S. 452 (1997).
30. CAA of 1970, Pub. L. 91–604, section 4(a), 84 Stat. 1676 (December 31, 1970).
31. *Catawba County, North Carolina* v. *EPA,* 571 F.3d 20 (D.C. Cir. 2009).
32. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984).
33. "Clean Air Act Full Approval of Partial Operating Permit Program; Allegheny County; Pennsylvania; Direct final rule," 66 FR 55112 (November 1, 2001), EPA–HQ–OAR–2012–0322–0020.
34. *Conn. Light & Power Co.* v. *NRC,* 673 F.2d 525 (D.C. Cir. 1982).
35. "Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans; Notice of proposed rulemaking," 61 FR 38664 (July 25, 1996), EPA–HQ–OAR–2012–0322–0034, finalized at 62 FR 34641 (June 27, 1997), EPA–HQ–OAR–2012–0322–0035.
36. "Corrections to the California State Implementation Plan," 69 FR 67062 (November 16, 2004), EPA–HQ–OAR–2012–0322–0017.
37. "Credible Evidence Revisions; Final rule," 62 FR 8314 (February 24, 1997).
38. "Draft Emissions Inventory Guidance for Implementation of Ozone [and Particulate Matter]* National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations," April 11, 2014.
39. *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d 7 (D.C. Cir. 2012) *rev'd,* 134 S. Ct. 1584 (2014).
40. "Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations," Appendix B, August 2005, EPA–454/R–05–001.
41. "Federal Implementation Plan for the Billings/Laurel, MT [Montana], Sulfur Dioxide Area," 73 FR 21418 (April 21, 2008), EPA–HQ–OAR–2012–0322–0009.
42. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502 (2009).
43. February 2013 proposal ("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; Proposed rule," 78 FR 12459, February 22, 2013), EPA–HQ–OAR–2012–0322–0055.
44. "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 (October 27, 1998), EPA–HQ–OAR–2012–0322–0037.
45. "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 (April 18, 2011), EPA–HQ–OAR–2012–0322–0010.
46. "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 75 FR 70888 (November 19, 2010), EPA–HQ–OAR–2012–0322–0012.
47. "Finding of Substantial Inadequacy of Implementation Plan; Call for Iowa State Implementation Plan Revision," 76 FR 41424 (July 14, 2011).
48. "Finding of Substantial Inadequacy of Implementation Plan; Call for California State Implementation Plan Revision," 68 FR 37746 (June 25, 2003).
49. *Florida Power & Light Co.* v. *Costle,* 650 F.2d 579 (5th Cir. 1981).
50. *Florida Power & Light Co.* v. *United States,* 846 F.2d 765 (D.C. Cir. 1988).
51. "Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze," April 2007, EPA–454/B–07–002.
52. "Guidelines for Estimating and Applying Rule Effectiveness for Ozone/CO State Implementation Plan Base Year Inventories," November 1992, EPA–4S2JR–92.010.
53. H. Rept. 101–490.
54. H.R. 95–294 (1977).
55. *Howmet Corp.* v. *EPA,* 614 F.3d 544 (D.C. Cir. 2010).
56. *Industrial Environmental Association* v. *Browner,* No. 97–71117 (9th Cir. May 26, 2000).
57. *Ky. Res Council* v. *EPA,* 467 F.3d 986 (6th Cir. 2006).
58. *Luminant Generation* v. *EPA,* 714 F.3d 841 (5th Cir. 2013) [EPA–HQ–OAR–2012–0322–0881], *cert. denied,* 134 S. Ct. 387 (2013).

59. Memorandum, ''Additional Clarification Regarding Application of Appendix W Modeling Guidance for the 1-hour NO_2 National Ambient Air Quality Standard,'' from T. Fox, EPA/OAQPS, to Regional Air Division Directors, March 1, 2011.
60. Memorandum,''Estimate of Potential Direct Costs of SSM SIP Calls to Air Agencies,'' April 28, 2015.
61. Memorandum, ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Section 110(a)(1) and 110(a)(2),'' from Stephen D. Page, Director, OAQPS, to Regional Air Directors, Regions 1–10, September 13, 2013.
62. Memorandum, ''Statutory, Regulatory, and Policy Context for this Rulemaking,'' February 4, 2013, EPA–HQ–OAR–2012–0322–0029 (Background Memorandum).
63. *Mich. Dep't of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000).
64. *Michigan* v. *EPA,* 213 F.3d 663 (D.C. Cir. 2000).
65. *Mid-Tex Elec. Co-op, Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985).
66. *Montana Sulphur & Chemical Co.* v. *EPA,* 666 F.3d 1174 (9th Cir. 2012) [EPA–HQ–OAR–2012–0322–0032], *cert. denied,* 133 S. Ct. 409 (2012).
67. *Motor Vehicle Mfrs Ass'n* v. *State Farm Mut. Auto Ins. Co.,* 463 U.S. 29 (1983).
68. ''National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Proposed rule,'' 80 FR 3089 (January 21, 2015).
69. ''National Emission Standards for Hazardous Air Pollutants Residual Risk and Technology Review for Flexible Polyurethane Foam Production; Final rule,'' 79 FR 48073 (August 15, 2014).
70. ''National Emission Standards for Hazardous Air Pollutants: Generic Maximum Achievable Control Technology Standards; and Manufacture of Amino/Phenolic Resins; Final rule,'' 79 FR 60897 (October 8, 2014).
71. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967 (2005).
72. *Nat'l Gypsum* v. *EPA,* 968 F.2d 40 (D.C. Cir. 1992).
73. *New Hampshire* v. *Maine,* 532 U.S. 742 (2011).
74. *North Dakota* v. *EPA,* 730 F.3d 750 (8th Cir. 2013), *cert. denied,* 134 S. Ct. 2662 (2014).
75. *NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014), EPA–HQ–OAR–2012–0322–0885.
76. *Oklahoma* v. *EPA,* 723 F.3d 1201 (10th Cir. 2013), *cert. denied,* 134 S. Ct. 2662 (2014).
77. ''Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards; Final rule,'' 79 FR 79017 (December 31, 2014).
78. ''Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards; Proposed rule,'' 79 FR 41752 (July 17, 2014).
79. *Omnipoint Corp.* v. *Fed. Commc'ns Comm'n,* 78 F.3d 620 (D.C. Cir. 1996).
80. Petition (''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,'' on behalf of Sierra Club, dated June 30, 2011), EPA–HQ–OAR–2012–0322–0003.
81. ''Proposed Settlement Agreement, Clean Air Act Citizen Suit,'' 76 FR 54465 (September 1, 2011).
82. ''Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Final rules,'' 45 FR 52676 (August 7, 1980).
83. ''Standards of Performance for Fossil-Fuel-Fired Steam Generators for Which Construction Is Commenced After August 17, 1971; Standards of Performance for Electric Utility Steam Generating Units for Which Construction Is Commenced After September 18, 1978; Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units; and Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units; Final rule,'' 74 FR 5072 (January 28, 2009).
84. S. Rep No. 91–1196 (1970).
85. ''Selection of Sequence of Mandatory Sanctions for Findings Made Pursuant to Section 179 of the Clean Air Act,'' 59 FR 39832 (August 4, 1994), EPA–HQ–OAR–2012–0322–0033, codified at 40 CFR 52.31.
86. Settlement Agreement executed November 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, in *Sierra Club et al.* v. *Jackson,* No. 3:10–cv–04060–CRB (N.D. Cal.), EPA–HQ–OAR–2012–0322–0039.
87. *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004).
88. *Sierra Club* v. *Georgia Power Co.,* 443 F.3d 1346 (11th Cir. 2006).
89. *Sierra Club* v. *Johnson,* 551 F.3d 1019 (D.C. Cir. 2008), EPA–HQ–OAR–2012–0322–0048.
90. *Sierra Club* v. *Pub. Serv. Co. of Colorado, Inc.,* 894 F.Supp. 1455 (D. Colo. 1995).
91. SNPR (''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; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States; Supplemental notice of proposed rulemaking,'' 79 FR 55919, September 17, 2014), EPA–HQ–OAR–2012–0322–0909.
92. *Southwestern Pennsylvania Growth Alliance* v. *EPA,* 114 F.3d 984 (6th Cir. 1998).
93. *State Farm Mut. Auto Ins. Co.* v. *Campbell,* 538 U.S. 408 (2003).
94. ''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; Notice of extension of public comment period,'' 78 FR 20855 (April 8, 2013), EPA–HQ–OAR–2012–0322–0126.
95. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992).
96. *Tex Tin Corp.* v. *EPA,* 992 F.2d 353 (D.C. Cir. 1993).
97. *Texas* v. *EPA,* No. 10–60961, 2011 WL 710498 (5th Cir. Feb. 24, 2011).
98. *Train* v. *NRDC,* 421 U.S. 60 (1975).
99. *U.S.* v. *Ford Motor Co.,* 736 F.Supp. 1539 (W.D. Mo. 1990).
100. *U.S.* v. *General Motors Corp.,* 702 F.Supp. 133 (N.D. Texas 1988).
101. *Union Elec. Co.* v. *EPA,* 427 U.S. 246 (1976).
102. *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157 (10th Cir. 2012), EPA–HQ–OAR–2012–0322–0031.
103. *Virginia* v. *EPA,* 108 F.3d 1397 (D.C. Cir. 1997).
104. *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001).
105. *Wyo. Outdoor Council* v. *U.S. Forest Serv.,* 165 F.3d 43 (D.C. Cir. 1999).

XIV. Statutory and Executive Order Reviews

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

This action is a ''significant regulatory action'' that was submitted to the Office of Management and Budget (OMB) for review because it raises novel legal or policy issues. Any changes made in response to OMB recommendations have been documented in the docket.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This action merely reiterates the EPA's interpretation of the statutory requirements of the CAA and does not require states to collect any additional information. Through the SIP calls issued to certain states as part of this action under CAA section 110(k)(5), the EPA is only requiring each affected state to revise its SIP to comply with existing requirements of the CAA.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. Any agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to this rule. This action

will not impose any requirements on small entities. Instead, the action merely reiterates the EPA's interpretation of the statutory requirements of the CAA. Through the SIP calls issued to certain states as part of this SIP call action under CAA section 110(k)(5), the EPA is only requiring each affected state to revise its SIP to comply with existing requirements of the CAA. The EPA's action therefore leaves to each affected state the choice as to how to revise the SIP provision in question to make it consistent with CAA requirements and to determine, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any federal mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no new enforceable duty on any state, local or tribal governments or the private sector. The regulatory requirements of this action apply to certain states for which the EPA is issuing a SIP call. To the extent that such affected 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 do 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.

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

This action does not have tribal implications as specified in Executive Order 13175. 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.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because, in prescribing the EPA's action for states regarding their obligations for SIPs under the CAA, it implements specific standards established by Congress in statutes.

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

This action is not a ''significant energy action'' 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 (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. The action 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 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 action requires that certain states bring their treatment of these emissions into line with CAA requirements, which will lead to certain sources' having greater incentives to control emissions during such events.

K. Determination Under Section 307(d)

Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d) establishes procedural requirements specific to rulemaking under the CAA. Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to ''such other actions as the Administrator may determine.''

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

XV. Judicial Review

The Administrator determines that this action is ''nationally applicable'' within the meaning of section 307(b)(1) of the CAA. This action in scope and effect 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 action to be of ''nationwide scope or effect'' and thus to indicate the venue for challenges to be in the D.C Circuit. Thus, any petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit.

In addition, pursuant to CAA section 307(d)(1)(V), the EPA is determining that this rulemaking action is subject to the requirements of section 307(d), which establish procedural requirements specific to rulemaking under the CAA. In the event there is a judicial challenge to this action and a court determines that the EPA has erred with respect to any portion of this action, the EPA intends the components of this action to be severable.

XVI. Statutory Authority

The statutory authorityfor thisaction is provided by CAA section 101 *et seq.* (42 U.S.C. 7401 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Affirmative defense, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Excess emissions, Greenhouse gases, Hydrofluorocarbons, Incorporation by reference, 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: May 22, 2015.

Gina McCarthy,

Administrator.

[FR Doc. 2015–12905 Filed 6–11–15; 8:45 am]

BILLING CODE 6560–50–P

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

RECEIVED
MAY 31 2016
Air Quality Bureau

MAY 25 2016

Rita Bates
Planning Section Chief
Air Quality Bureau
New Mexico Environment Department
525 Camino de los Marquez, Suite 1
Santa Fe, NM 87505-1816

Dear Ms. Bates:

Thank you for the opportunity to review and comment on the proposed revisions to the New Mexico Administrative Code, Title 20, Chapter 2, Part 7 - Excess Emissions (hereinafter "Excess Emissions Rule"). The EPA appreciates your efforts to address the EPA's June 12, 2015 (80 FR 33840) State Implementation Plan (SIP) Call. It is our understanding that New Mexico intends to withdraw the affirmative-defense-related provisions of the existing Excess Emissions Rule from the EPA-approved New Mexico SIP, and at the same time maintain the existing Excess Emissions Rule as a "state-only" rule. As proposed, the provisions to be withdrawn from the New Mexico SIP are 20.2.7.6 (B) NMAC, 20.2.7.110(B)(15) NMAC, 20.2.7.111 NMAC, 20.2.7.112 NMAC, 20.2.7.113 NMAC, 20.2.7.115 NMAC, and 20.2.7.116 NMAC. Consequently, the existing Excess Emissions Rule <u>except</u> those sections identified above will remain a part of the EPA-approved SIP for New Mexico.

As proposed, we continue to believe that an approach of retaining affirmative defense-related provisions of the Excess Emissions Rule as a matter of state law, outside of the SIP ("State-only"), would be consistent with CAA requirements, and consistent with the EPA's guidance in the Startup, Shutdown, and Malfunction (SSM) Policy. Indeed, the EPA specifically addressed this potential approach in the SSM SIP Call. See 80 FR at 33855-56. "State-only" affirmative defense provisions, even though outside the SIP, should be properly worded and not preclude enforcement by the state for violations of CAA requirements, including the authority to assess or sue to recover in court civil penalties and to seek criminal remedies for violations of any applicable requirement. See section 110(a)(2)(C), and 40 CFR 70.11(a)(3). Otherwise, this could be problematic with approvability of Infrastructure SIPs for New Mexico and/or your Operating Permit program.

Our specific comments are:

1. Your SIP submittal letter should include a statement that New Mexico is requesting the EPA's review/approval of the removal of sections of the Excess Emissions Rule identified above from the New Mexico SIP, as required by the EPA's SSM SIP Call of June 12, 2015 (80 FR 33968).

2. Due to the fact that New Mexico is proposing to remove certain provisions from the New Mexico SIP, a demonstration under Clean Air Act Section 110(l) is a necessary component of your SIP submittal to the EPA. See June 12, 2015 (80 FR 33975). If you require assistance with the requirements for an appropriate Section 110(l) demonstration, the EPA Regional staff can provide assistance.

Should you have any questions regarding this letter, please feel free to contact me at (214) 665-7242.

Sincerely,

Guy Donaldson
Chief
Air Planning Section

FFIDAVIT OF PUBLICATION

OF NEW MEXICO
of Bernalillo SS

Friedes, being duly sworn, declares and says that she is Advertising Dir
querque Journal, and that this newspaper is duly qualified to publish legal n
ments within the meaning of Section 3, Chapter 167, Session Laws of 1937, and that
has been made of assessed as court cost; that the notice, copy of which is hereto
ished in said paper in the regular daily edition, for 1 times on the followi
July 10, 2016

d subscribed before me, a Notary Public, in and
ounty of Bernalillo and State of New Mexico this
of August of 2016.

116.96

t to come at end of month.

T NUMBER 1007594

OFFICIAL
Sandra B. G
NOTARY P
STATE OF NEV
My Commission Expires:

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

(1) identify the person for whom the witness(es) will testify;
(2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
(3) include a copy of the direct testimony of each technical witness in narrative;
(4) list and attach each exhibit anticipated to be offered by that person at the hearing; and
(5) attach the text of any recommended modifications to the proposed revised SIP.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on August 19, 2016, and should reference the docket number, EIB 16-03 (R), and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Pam Castañeda, Board Administrator
Environmental Improvement Board
P. O. Box 5469
Santa Fe, NM 87502
Phone: (505) 827-2425, Fax (505) 827-2818

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is not unduly repetitious of the testimony.

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

Persons having a disability and needing help in being a part of this hearing process should contact Pam Castañeda, Board Administrator, by August 26, 2016 at P.O. Box 5469, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-2425 or email pam.castaneda@state.nm.us. TDY users please access her number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed revised regulations at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.
Journal: July 10, 2016

AFFIDAVIT OF PUBLICATION

RECEIVED
AUG 16 2016
Air Quality Bureau

STATE OF NEW MEXICO
County of Bernalillo SS

Sharon Friedes, being duly sworn, declares and says that she is Advertising Director of **The Albuquerque Journal**, and that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, Chapter 167, Session Laws of 1937, and that payment therefore has been made of assessed as court cost; that the notice, copy of which is hereto attached, was published in said paper in the regular daily edition, for 1 times on the following dates:

July 10, 2016

Sworn and subscribed before me, a Notary Public, in and for the County of Bernalillo and State of New Mexico this 15th day of August of 2016.

OFFICIAL SEAL
Sandra B. Gutierrez
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 2-18-17

PRICE $133.86

Statement to come at end of month.

ACCOUNT NUMBER 1298224

DIRECCIÓN DE MEJORAS MEDIOAMBIENTALES DE NUEVO MÉXICO
AVISO DE AUDIENCIA DE REVISIÓN DE PLAN DE IMPLEMENTACIÓN DEL ESTADO

La Dirección de Mejoras Medioambientales de Nuevo México ("dirección") celebrará una audiencia pública el 9 de septiembre del 2016 a las 9:00 a. m. en el edificio del Capitolio del Estado de Nuevo México, 490 Old Santa Fe Trail, sala 307, en Santa Fe, Nuevo México. El propósito de la audiencia es considerar la EIB 16-03 (R), propuesta revisión al Plan de Implementación del Estado de Nuevo México ("SIP" por sus siglas en inglés) con relación a la Regla del Control de la Calidad del Aire, Título 20, Capítulo 2, Parte 7 (Exceso de Emisiones) Código Administrativo de Nuevo México ("20.2.7 NMAC").

El Departamento del Medio Ambiente de Nuevo México ("NMED", por sus siglas en inglés) es el que propone esta revisión del SIP.

El propósito de esta audiencia pública es considerar y tomar una posible acción sobre una petición del NMED para revisar el SIP de Nuevo México. Las propuestas revisiones del SIP responden a una norma emitida por la Agencia de Protección Ambiental (EPA, por sus siglas en inglés) el 12 de junio del 2015. La EPA de EE. UU. emitió una conclusión que ciertas estipulaciones del SIP en las secciones 111, 112 y 113 de la 20.2.7 NMAC – Exceso de Emisiones son substancialmente inadecuadas para cumplir con los requisitos de la Ley de Aire Limpio. Para tratar la conclusión de la EPA, el Departamento propone eliminar del SIP las secciones 111, 112, 113 y otras que sea necesario y dejar estas secciones como una norma ejecutable sólo por el estado.

El texto completo del propuesto SIP revisado del NMED está disponible en el sitio en la web del NMED: https://www.env.nm.gov o comunicándose con Robert Spillers en el (505) 476-4324 o robert.spillers@state.nm.us. El propuesto SIP revisado también se puede examinar durante horas hábiles en la oficina de Calidad del Aire, 525 Camino de los Marquez, Suite 1, Santa Fe, Nuevo México. Para hacer comentarios sobre esta propuesta, comuníquese con Robert Spillers en esa oficina.

La audiencia se llevará a cabo de acuerdo con la 20.1.1 NMAC (Procesos Reglamentarios – Dirección de Mejoras Medioambientales), la Ley de Mejoras Medioambientales, NMSA 1978, Sección 74-1-9; la Ley de Control de Calidad del Aire, NMSA 1978, Sección 74-2-6; y otros procedimientos que sean aplicables.

A todas las personas interesadas se les dará una oportunidad razonable en la audiencia para presentar pruebas pertinentes, información, puntos de vista y argumentos, en forma oral o escrita, para someter pruebas e interrogar a testigos. Las personas que deseen dar testimonio técnico deben presentar un aviso por escrito a la Dirección indicando su intención de hacerlo. El aviso de intención debe:

(1) identificar a la persona por quien el testigo (los testigos) dará(n) testimonio.
(2) identificar a cada testigo técnico que la persona presentará e indicar la capacidad del testigo e incluir una descripción de su educación y antecedentes profesionales;
(3) incluir una copia de las declaraciones directas en forma de narración de cada testigo técnico;
(4) dar una lista de las pruebas que la persona vaya a presentar en la audiencia y adjuntar cada una de las pruebas; y
(5) adjuntar el texto de cualquier modificación recomendada para el propuesto SIP revisado.

Los avisos de intención para la audiencia deben recibirse en la oficina de la Dirección a más tardar el 19 de agosto del 2016 a las 5:00 p. m. y deben hacer referencia al número del caso, EIB 16-03 (R), y la fecha de la audiencia. Los avisos de intención de presentar testimonio técnico deben presentarse a:

Pam Castañeda, Board Administrator
Environmental Improvement Board
P. O. Box 5469
Santa Fe, NM 87502
Tel.: (505) 827-2425, Fax (505) 827-2818

Cualquier miembro del público en general puede atestiguar en la audiencia. No es necesario avisar previamente para dar testimonio que no sea técnico en la audiencia. También, cualquier persona puede ofrecer pruebas con relación a su testimonio, siempre y cuando dichas pruebas no sean exageradamente repetitivas.

Un miembro del público en general que en lugar de hacer declaraciones orales en la audiencia desee presentar una declaración por escrito para que conste en el acta, deberá registrar la declaración por escrito antes de la audiencia o la puede entregar en la audiencia.

Las personas con discapacidades y que necesiten ayuda para participar en esta audiencia deben comunicarse con Pam Castañeda, Administradora de la Dirección, a más tardar para el 26 de agosto del 2016, en P.O. Box 5469, 1190 St. Francis Drive, Santa Fe, Nuevo México, 87502, por el teléfono 505-827-2425 o por el correo electrónico pam.castaneda@state.nm.us. Los usuarios de TDY pueden acceder a su número por el New Mexico Relay Network en el 1-800-659-8331.

La Dirección puede tomar una decisión sobre las propuestas normas revisadas al concluir la audiencia, o puede convocar a una reunión después de la audiencia para considerar la acción sobre la propuesta.
Journal: July 10, 2016

Sign in Sheet

Name	Affiliation	Email Address
Myles Culhane	Oxy	myles_culhane@oxy.com
Scott Janoe	BakerBotts	scott.janoe@bakerbotts.com
Suzi Holland	Chevron	Suzi.Holland@chevron.com
Dennis Newman	Oxy	dennis_newman@oxy.com
Trent Adcock	Oxy	trent_adcock@oxy.com
Robert Samaniego	NMED AQB	robert.samaniego@state.nm.us
Jon Lutz	NMED AQB	jon.lutz@state.nm.us
Bob Spillers	NMED/AQB	robert.spillers@state.nm.us
WILLIAM CALHOUN	OXY	WILLIAM_CALHOUN@OXY.COM
Wally Deangmeister	NMOGA	wallyd@NMOGA.org
Gail Cooke	NMED/AQB	gail.cooke@state.nm.us
Chris Atencio	NMED/OGC	christopher.atencio@state.nm.us
Allan Morris	NMED/AQB	allan.morris@state.nm.us
KERWIN SINGLETON	NMED/AQB	KERWIN.SINGLETON@STATE.NM.US
Richard Goodyear	AQB	richard.goodyear@state.nm.us
TED SCHOOLEY	AQB	TED.SCHOOLEY@STATE.NM.US
Kendal Stegmann	Devon	Kendal.Stegmann@dvn.com

Sign in Sheet
SSM SIP Call Public Involvement Meeting
Roswell, NM December 2, 2015

Name	Affiliation	Email
Dan Girard	Mack Energy Corp	dgirard@ mec.com
Greg Nibert	Hinkle Shanor LLP	gnibert@hinklelawfirm.com
Aaron Friess	Hinkle Shanor LLP	afriess@hinklelawfirm.com
Katie Parker	Yates Petroleum Corp.	katie@yatespetroleum.com
Jarrett Airhart	Trinity Consultants	jairhart@ trinityconsultants.com
Alena Polk	Enterprise Products	ampolk@ eprod.com
CINDY KLEIN	TARGA RESOURCES	cklein@targaresources.com
Jeremy Haass	Yates Petroleum Corp.	jhaass@yatespetroleum.com
Jennifer Sanchez	BLM	jlsanchez@blm.gov
Chuck Schmidt	BLM	cschmidt@blm.gov
Jennifer Knowlton	Agave Energy Company	jknowlton@agaveenergy.com

Sign in Sheet
SSM SIP Call Public Involvement Meeting
Roswell, NM December 2, 2015

Name	Affiliation	Email
Jasmine McCauley	Mosaic	jasmine.mccauley@mosaicco.com
Dixie Ventura	Sen Heinrich Staff	dixie_venturaC heinrich-senate.gov
Beverly Allen	Sen Tom Udall	see card
Ron Hillman	Armstrong Energy Corporation	rhillman@armstrongenergycorp.com

SIGN-IN SHEET

NAME	AFFILIATION	EMAIL
Rumell Seale	Enterprise Products	Rseale@eprod.com
Michael Dame	Enervest Operating	mdame@enervest.net
John Roe	Dugan Production	johnroe@duganproduction.com
Matt Carnahan	~~MCERNA~~ Four Corners Materials	mcarnahan@4cornersmaterials.com
Pete Siegmund	Four Corners Materials	psiegmund@oldcastlematerials.com
David Hinson	M & G Drilling	dhinson@qwestoffice.net
Gloria Lehmer	SJC Citizen	glolehmer@yahoo.com
Mark Jones	NMED	mark.jones@state.nm.us
Daniel Tso	Citizen	detso49@yahoo.com

SIGN-IN SHEET

NAME	AFFILIATION	EMAIL

SIGN-IN SHEET

NAME	AFFILIATION	EMAIL
MYKE LANE	COP	myke.k.lane@conocophillips.com
LEE GARDNER	ENERVEST	WGARDNER@ENERVEST.NET
Ed Hasely	Energen	ed.hasely@energen.com

Sign in Sheet
SSM SIP Call Public Involvement Meeting
Santa Fe, NM December 15, 2015

Name	Affiliation	Email
Dennis Newman	Oxy	dennis_newman@oxy.com
Louis Rose	M&A	Lrose@montand.com
Andy Berger	Tri-State	
Doug Lempke	Tri-State	
David Grafton	Environmental Standard	
Robin DeLapp	PNM	
Deanna Lockie	Sport Environmental	
Jane Cudney-Black	Western Solutions	
Andrea Issod	Sierra Club	
Claire Booth	Arcadis	
Marcel Fiedler	NM Gas	

Sign in Sheet
SSM SIP Call Public Involvement Meeting
Santa Fe, NM December 15, 2015

Name	Affiliation	Email
Rebecca Moss	Santa Fe New Mexican	
Tony Fristacchi		
Adam Aaronstein	Trinity Consultants	
Jane Cudney	" "	
Catherine Dann	Circ Energy	

Sign in Sheet
SSM SIP Call Public Comment Meeting
Santa Fe, NM April 18, 2016

Name	Affiliation	Email
Louis Rose	M+A	Lrose@montand.com
Ralph Gruebel	NMED/AQB C/E Section	ralph.gruebel@state.nm.us
MIKE BOWEN	NM MINING ASSOC	NMMA@COMCAST.NET
T.S. Trujillo	Gallagher & Kennedy	ajt@gknet.com
CARLOS LUCERO	PNM	Carlos.lucero@pnm.com
Karin Foster	IPANM	karin@ipanm.org.
Carina Munoz	NMED C&E	
Renae Held	NMED/AQB C+E Section	renae.held@state.nm.us
Lisa Killion	Cirrus Consulting	~~lisa~~ killion@cirrusllc.com
Dal Mellenberg	G&K	dlm@gknet.com

Sign in Sheet
SSM SIP Call Public Comment Meeting
Farmington, NM April 19, 2016

Name	Affiliation	Email
Michael Hunnan	Williams Four Corners	michael.hunnan@williams.com
Monica Sandoval	Williams Four Corners	monica.sandoval@williams.com
David Hinson	MBG	dhinson@qwest office.net
James Fenton	Daily Times	jfenton@daily-times.com
James McDaniel	XTO Energy	james_mcdaniel@xtoenergy.com
Chuck Creeknore	ConocoPhillips	chuck.creeknore@conocophillips.com
MYKE LANE	CONOCOPHILLIPS	myke.k.lane@cop.com
Tom Mullins	SYNERGY OPERATING	Tom.Mullins@Synergy OPERATING.com
SHAUNE MCGOWAN	LT ENVIRONMENTAL	SMcgowan@LtenV.com

Sign in Sheet
SSM SIP Call Public Comment Meeting
Roswell, NM April 21, 2016

Name	Affiliation	Email
Brett Fulks	Devon	brett.fulks@dvn.com
Montral Walker	Devon	montral.walker@dvn.com
Dan Girand	Muck	dgirand@mec.com
Jennifer Knowlton	Agave	jknowlton@agaveenergy.com
MITCH KRAKALSKAS	STRATA	MITCH@STRATANM.COM
Eric Burch	Mosaic	eric.burch@mosaicco.com

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REVISIONS TO: **No. EIB 16-03 (R)**
***New Mexico's State Implementation* Plan**

Air Quality Bureau,
Environmental Protection Division of the
New Mexico Environment Department,

Petitioner.

STATEMENT OF REASONS AND ORDER

STATEMENT OF REASONS

1. The Clean Air Act ("CAA") requires New Mexico to adopt and submit a plan for the implementation, maintenance, and enforcement of primary and secondary national ambient air quality standards ("NAAQS") to the U.S. Environmental Protection Agency ("EPA"). 42 U.S.C. § 7410(a) (CAA § 110(a)); NMED **Exhibit 6**, pg. 1.

2. The state implementation plan ("SIP") must include an enforcement program, emission limitations, and control measures. 42 U.S.C. § 7410(a)(2)(C) (CAA § 110(a)(2)(C)).

3. EPA reviews and approves SIP submittals pursuant to 42 U.S.C. § 7410(k) (CAA § 110(k)).

4. If New Mexico fails to submit a SIP or the SIP fails to satisfy minimum criteria, EPA may promulgate a federal implementation plan or trigger a mandatory 18-month or 24-month sanctions clock pursuant to Section 179 of the CAA. 42 U.S.C. § 7410(c) (CAA § 110(c)); NMED **Exhibit 6**, pg. 11.

5. Prior to submitting a SIP revision, New Mexico must provide reasonable notice and opportunity for a public hearing. 42 U.S.C § 7410(l) (CAA § 110(l)); NMED **Exhibit 6**, pp. 12 - 13.

6. The New Mexico Environment Department ("Department") developed and presented the proposed SIP revisions to the New Mexico Environmental Improvement Board ("Board") for its consideration and approval in its Notice of Intent to Present Technical Testimony filed on August 19, 2016 pursuant to NMSA 1978, Sections 74-2-5 (2007) and 74-2-5.1(H) (1992). *See* NMED Notice of Intent to Present Technical Testimony.

7. On June 12, 2015, EPA issued a notice to 36 states, requiring each state to revise its SIP to comply with EPA's new interpretation of the CAA (the "SIP Call"). NMED **Exhibit 14**, 80 Fed. Reg. 33,840 (June 12, 2015) (codified at 40 C.F.R. § 52.1620).

8. As part of the SIP Call, EPA specifically reviewed New Mexico's affirmative defense provisions and found them to be substantially inadequate and contradictory to the CAA on the grounds that they improperly limit judicial jurisdiction. NMED **Exhibit 14**, 80 Fed. Reg. at 33,487, F.N. 12 and 13.

9. EPA determined that New Mexico's affirmative defense provisions, 20.2.7.111 through .113 NMAC, are substantially inadequate based partly on the D.C. Circuit Court of Appeals decision in *Natural Resources Defense Council v. EPA*. ("*NRDC*"). NMED **Exhibit 14**, 80 Fed. Reg. 33,840, 33,845; NMED **Exhibit 6**, pg. 4. In *NRDC*, the Court reviewed, among other things, a challenge to EPA's affirmative defense provisions in private civil suits, available when an "unavoidable" malfunction results in impermissible levels of emissions. NMED **Exhibit 13**, *NRDC*, 749 F.3d 1055, 1057 (D.C. Cir. 2014). The D.C. Circuit found that only a court can

determine if civil penalties are appropriate in private CAA suits, and thus, EPA's affirmative defenses were inappropriate. *Id*. 1063-64.

10. Subsequently, EPA reevaluated its CAA interpretation regarding affirmative defenses beyond the holding of the opinion. NMED **Exhibit 14**, 80 Fed. Reg. at 33,844. EPA construed the opinion to apply to SIPs as well as EPA's own affirmative defense provisions, though the court specifically did not address SIPs in its *NRDC* opinion. *Id*. 33,851; *see also* NMED **Exhibit 13**, *NRDC*, 749 F.3d at 1064 F.N. 2.

11. The Board promulgated the current affirmative defense provisions in 2008. NMED **Exhibit 6**, pg. 2; *See also* NMED **Exhibit 8**.

12. The New Mexico affirmative defense provisions allow affirmative defenses from civil penalties in cases of excess emissions during startup, shutdown, malfunctions, and emergencies. Permittees can claim an affirmative defense for excess emissions during start up, shutdown or malfunction, provided that the Department determines that the permittee has demonstrated that it meets the necessary criteria to claim the defense. 20.2.7.111 - .112 NMAC; NMED **Exhibit 6**, pg.5.

13. Additionally, a permittee may claim an affirmative defense from a civil penalty for excess emissions during an emergency, i.e. a situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God, which requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation due to unavoidable increases in emissions attributable to the emergency. 20.2.7.113 NMAC. The emergency affirmative defense is available provided the Department determines that the permittee demonstrates that it meets the necessary criteria to

claim an affirmative defense. *Id*. The affirmative defense provisions provide no defense from liability or injunctive relief. 20.2.7.111 - .113 NMAC; NMED **Exhibit 6**, pg. 5.

14. The affirmative defense provisions are not an automatic exemption from enforcement, as permittees must make significant demonstrations to qualify for an affirmative defense from a civil penalty. *See Id*.

15. While all excess emissions are violations, EPA recognized that imposition of a penalty for excess emissions during sudden and unavoidable malfunctions, startups, or shutdowns caused by circumstances entirely beyond the control of the owner or operator may not be appropriate. NMED **Exhibit 8**, 74 Fed. Reg. 46909, 46912 (Sep. 14, 2009) (Approval and Promulgation of Implementation Plans; New Mexico; Excess Emissions).

16. The SIP Call's main concern is jurisdictional conflict. *See* NMED **Exhibit 14**, 80 Fed. Reg. at 33,852.

17. The deadline for response to the SIP Call is November 22, 2016. NMED **Exhibit 14**, 80 Fed. Reg. at 33848.

18. In the SIP Call, EPA provided the option for affected states to remove affirmative defenses from the SIP but leave them to apply as state only regulations, applicable to state enforcement personnel only. NMED **Exhibit 14**, 80 Fed. Reg. at 33,848; NMED **Exhibit 6**, pp. 9 - 10.

19. The Department proposal removes portions of the affirmative defense provisions from the SIP, but not from the regulations, in accordance with the EPA's direction in the SIP call. NMED **Exhibit 5**; NMED **Exhibit 6**, pp. 10 – 11.

20. By making the affirmative defense provisions "state only" in their application, New Mexico can resolve the EPA's jurisdictional concern. NMED **Exhibit 6**, pg. 11.

21. The Department proposed to denote which portions of 20.2.7 NMAC are included in the SIP through the annotations following the regulation. Pursuant to 1.24.1.7 NMAC, the annotation is not part of the rule. *Id*.

22. The notice and hearing requirements were satisfied in this SIP revision process. *See* NMED **Exhibit 6**, pp. 12 – 13; *see also* NMED **Exhibit 16**.

23. The Department's proposal received a favorable response from EPA Region VI. *See* NMED **Exhibit 15**.

24. The affirmative defense provisions do not preclude administrative or judicial enforcement actions to require corrective action by a permittee or for injunctive relief. The affirmative defense provisions apply only to the Department, and they do not preclude any person or agency, including the Department, from assessing or suing to recover civil penalties in a court of competent jurisdiction. The affirmative defense provisions are not available in any federal or third party actions pursuant to Sections 113 or 304 of the Clean Air Act and do not require a party seeking enforcement pursuant to those sections to first exhaust the administrative procedures of 20.2.7 NMAC.

25. The proposed revisions satisfy the statutory requirements of the Air Quality Control Act, NMSA 1978, Section 74-2-5(E).

26. The Board has the authority to approve these proposed revisions pursuant to NMSA 1978, Section 74-2-5(C).

27. The proposed revisions are adopted for any and all of the reasons stated above.

ORDER

By a _____ majority vote of a quorum of the Board members, the proposed SIP revisions were approved by the Board on September 9, 2016. Annotations to 20.2.7 NMAC, with any appropriate corrections of typographical errors or formatting, shall be filed with the New Mexico State Records Center, and shall be submitted as expeditiously as possible by the Department to the EPA for approval of delegation authority.

SIGNED this ____ day of September, 2016.

_____

John Volkerding, Chair
New Mexico Environmental Improvement Board
1190 St. Francis Drive, Suite S2100
Santa Fe, New Mexico 87505
(505) 827-2425
(505) 827-0310 Fax

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **Statement of Reasons and Order** was sent via the stated methods below to the following parties on _____ __, 2016:

Via hand delivery:

Christopher N. Atencio
Andrew P. Knight
Office of General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102-3400
Counsel for the New Mexico Environment Department

Via First Class U.S. Mail:

Jennie Lusk
Assistant General Counsel
New Mexico Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504
Counsel for the Environmental Improvement Board

_____
Pam Castañeda, Board Administrator
Environmental Improvement Board
1190 South Saint Francis Drive, Suite 2102
pam.castaneda@state.nm.us
Phone: (505) 827-2425
Fax: (505) 827-2818