

**State Plans to Address Emissions during  
Startup, Shutdown and Malfunction:  
Supplemental Proposal to Address  
Affirmative Defense Provisions**

**Fact Sheet**

**Action**

- On **September 5, 2014**, the U.S. Environmental Protection Agency (EPA) proposed a rule supplementing and revising its February 2013 proposal to ensure states have plans in place that require industrial facilities across the country to follow air pollution rules during times when the facility is starting up or shutting down, or when a malfunction occurs.
- EPA's February 2013 proposal responds to a petition for rulemaking filed by the Sierra Club. The Petition includes interrelated requests concerning the treatment of excess emissions when industrial facilities are starting up, shutting down, and malfunctioning--specifically how those emissions are treated in state implementation plan (SIP) provisions that the EPA approved in the past. Many of these state plans are outdated and are not consistent with current rules and court decisions.
- In response to a recent court decision, the EPA has reconsidered an earlier interpretation of the Clean Air Act and is proposing to change its policy on approvability of affirmative defense provisions in SIPs. An affirmative defense would shield a facility from monetary penalties but not from the responsibility to take action to limit future problems. Affirmative defense provisions have frequently been included among startup, shutdown, and malfunction (SSM) provisions in SIPs.
- The EPA is now proposing to revise its February 2013 proposal, so that it reflects the recent court opinion that affirmative defense provisions cannot be applicable to violations of Clean Air Act requirements (even if the violations resulted from malfunctions). This action does not change what the EPA proposed in the February 2013 notice for any other issues.
- In this supplemental proposal, the EPA is proposing:
  1. to grant the request in the Petition that EPA revise its guidance interpreting the Clean Air Act, to make clear that affirmative defense provisions are not permissible in SIPs;
  2. "SIP calls" for provisions that the Petition identified in the SIPs of 13 states on the basis that they are inconsistent with the Clean Air Act because they include affirmative defense provisions; and
  3. "SIP calls" for provisions that the EPA identified in the SIPs of four states on the same basis.
    - California and Texas were not already subject to proposed SIP calls for any SSM provisions in the February 2013 proposal.
    - Portions of New Mexico and Washington. In the February 2013 notice, the EPA proposed a SIP call for at least one other SSM provision for other parts of these states.

Under the SIP calls, EPA would direct the affected states to remove affirmative defense provisions from their SIPs.

- In total, the EPA is proposing findings that the SSM provisions in the SIPs of 17 states (covering 23 statewide and local jurisdictions) do not meet the requirements of the Clean Air Act with respect to affirmative defense provisions (see list at the end of this fact sheet).
- The EPA is proposing to give the affected states 18 months to correct and submit their state plans to the Agency. The 18-month clock would start when EPA takes final action on the February 2013 proposal and this supplemental action. Eighteen months is the longest period of time allowed under the Clean Air Act for SIP revision and submittal. Assuming the EPA promulgates a finding of inadequacy and a SIP call by notice signed in May 2015, then the SIP submission deadline for each of the states subject to the final SIP calls would be in November 2016.
- The EPA will hold a public hearing on this supplemental proposal on October 7, 2014, in Washington, D.C. and will accept comment on this action until November 6, 2014.

## **Background**

- In its February 2013 proposal, the EPA proposed to clarify that states could elect to provide in their SIPs for an "affirmative defense" to enforcement actions brought for excess emissions that occur during a period of malfunction. At that time, the EPA believed that narrowly drawn affirmative defense provisions, consistent with the EPA's 1999 SSM Policy ("State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown"), were permissible under the Clean Air Act and could serve in judicial proceedings to shield sources from monetary penalties for excess emissions, as long as specified criteria in the SIP were met.
- In a case involving the SIP of Texas, the U.S. Court of Appeals for the 5th Circuit on July 30, 2012, upheld the EPA's approval of a SIP provision including an affirmative defense applicable to malfunctions and disapproval of SIP provisions including an affirmative defense applicable to startup, shutdown, and maintenance. *See Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2012), *cert. denied*, 134 S.Ct. 387 (2013).
- Subsequent to the February 2013 proposal and the July 2012 5th Circuit decision, on April 18, 2014, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). The court evaluated the legal validity of an affirmative defense provision created by the EPA in conjunction with specific standards applicable to the manufacturers of Portland cement. In the court's opinion, affirmative defense provisions in EPA's own regulations cannot be applicable to violations of CAA requirements.
- In this supplemental proposal, EPA extends the logic of the D.C. Circuit court's decision in *NRDC v. EPA* to SIP provisions.

- Under terms of a settlement agreement with the Sierra Club and WildEarth Guardians, the signature deadline for this supplemental notice is September 5, 2014, and the signature date for the final notice is May 22, 2015.

### **How to Comment**

- The EPA will accept comment on the proposal that are received (or postmarked) by November 6, 2014. Comments, identified by Docket ID No. EPA-HQ- OAR-2012-0322, may be submitted by one of the following methods:
  - Federal eRulemaking Portal: <http://www.regulations.gov>: Follow the online instructions for submitting comments.
  - Email: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov). Attention Docket ID No. EPA-HQ-OAR-2012-0322.
  - Fax: (202) 566-9744.
  - Mail: Attention Docket ID No. EPA-HQ-OAR-2012-0322, Air and Radiation Docket and Information Center, Environmental Protection Agency, Mail Code: 28221T, 1200 Pennsylvania Ave., NW, Washington, D.C. 20460.
  - Hand Delivery or Courier: EPA Docket Center, 1301 Constitution Ave., NW, EPA WJC Building Room 3334, Washington, D.C. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

### **For More Information**

- To download a copy of this notice, go to EPA's website at: <http://www.epa.gov/airquality/urbanair/sipstatus/>
- Today's proposed action and other background information are also available electronically at <http://www.regulations.gov>, EPA's electronic public docket and comment system. The docket number for this action is Docket ID No. EPA-HQ-OAR-2012-0322.
- For more information on the proposed rule, contact Lisa Sutton at (919) 541-3450 or [sutton.lisa@epa.gov](mailto:sutton.lisa@epa.gov).

**List of States with SSM SIP Provisions for Which the EPA Proposes a SIP Call**

<b>EPA Region</b>	<b>State</b>	<b>SIP call already proposed (February 2013) for one or more provisions</b>	<b>SIP call proposed in this SNPR (either newly or as revised) specifically for affirmative defense provisions</b>
I	Maine	Yes	
	New Hampshire	Yes	
	Rhode Island	Yes	
II	New Jersey	Yes	
III	Delaware	Yes	
	District of Columbia	Yes	Yes
	Virginia	Yes	Yes
	West Virginia	Yes	Yes
IV	Alabama	Yes	
	Florida	Yes	
	Georgia	Yes	Yes
	Kentucky	Yes	
	Mississippi	Yes	Yes
	North Carolina	Yes	
	South Carolina	Yes	Yes
	Tennessee	Yes	
V	Illinois	Yes	Yes
	Indiana	Yes	Yes
	Michigan	Yes	Yes
	Minnesota	Yes	
	Ohio	Yes	
VI	Arkansas	Yes	Yes
	Louisiana	Yes	
	New Mexico	Yes	Yes
	Oklahoma	Yes	
	Texas		<b>Yes</b>
VII	Iowa	Yes	
	Kansas	Yes	
	Missouri	Yes	
VIII	Colorado	Yes	Yes
	Montana	Yes	
	North Dakota	Yes	
	South Dakota	Yes	
	Wyoming	Yes	
IX	Arizona	Yes	Yes
	California		<b>Yes</b>
X	Alaska	Yes	Yes
	Washington	Yes	Yes
<b>Sum:</b>		<b>36 states</b>	<b>17 states (newly including California and Texas)</b>