



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

October 9, 2020

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans

FROM: Andrew R. Wheeler

A handwritten signature in black ink, appearing to read "Andrew R. Wheeler", written over the printed name.

TO: Regional Administrators 1-10

This guidance memorandum addresses the question of whether and when it may be permissible for a state to include certain types of provisions governing periods of startup, shutdown, and malfunction (SSM) in state implementation plans¹ developed pursuant to section 110 of the Clean Air Act (CAA or Act). This guidance memorandum supersedes and replaces certain policy statements outlined in the 2015 Startup, Shutdown, and Malfunctions (SSM) SIP Action.

Background

The CAA requires the Environmental Protection Agency (EPA) to identify pollutants that could endanger the public health and welfare and to establish national ambient air quality standards (NAAQS), which EPA has done for six criteria pollutants. The CAA's cooperative federalism framework provides states with the "primary responsibility" for attaining and maintaining the NAAQS and offers flexibility for specific state needs and priorities. Each state prepares a SIP that identifies the controls and programs the state will use to attain and maintain the NAAQS.

Congress established a contrasting regime to control the emissions of hazardous air pollutants, which are those known to cause cancer and other serious health impacts, such as reproductive effects or birth defects. Section 112 of the CAA establishes the system by which EPA regulates toxic air pollutants. CAA section 112 requires that once a source category is listed for regulation, EPA (not the states) must use a specific and exacting process to establish nationally applicable, category-wide, technology-based emissions standards.

With respect to attainment and maintenance of the NAAQS, the U.S. Supreme Court has recognized that the CAA gives a state "wide discretion" to formulate its plan pursuant to CAA section 110 and went so far as to say that "the State has virtually absolute power in allocating

¹ For convenience, in this document EPA refers to "state implementation plans," but acknowledges that ideas introduced in this guidance memorandum may be equally applicable to federal implementation plans (FIPs) or tribal implementation plans (TIPs).

emission limitations so long as the national standards are met.” *See, e.g., Union Elec. Co. v. EPA*, 427 U.S. 246, 250 & 267 (1976). *See also id.* at 269 (“Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.”). The Court has also explained, “so long as the ultimate effect of a State’s choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.” *See Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). States are the best suited to determine how best to implement the NAAQS within their jurisdiction and are given primary responsibility under CAA section 110 to do so. EPA’s role, with respect to a SIP revision, is focused on reviewing the submission to determine whether it meets the applicable criteria of the CAA, and, where it does, section 110(k)(3) of the Act requires EPA to approve the submission. In approving a SIP, EPA does not, as a matter of law or policy, establish its own requirements for the state to implement beyond the requirements contained in the CAA.

In the 2015 SSM SIP Action (80 FR 33840; June 12, 2015), EPA issued an SSM SIP policy, which provides that neither exemption nor affirmative defense provisions were consistent with CAA requirements. As EPA explained in that notice, the 2015 SSM SIP policy was “a nonbinding policy statement that does not, in and of itself, constitute ‘final’ action.” 80 FR at 33864. In addition to, and separate from, announcing the SSM SIP policy, EPA took final agency action applying that policy. Specifically, EPA issued findings that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and thus issued SIP calls pursuant to CAA section 110(k)(5) for those states.²

Petitions for review were subsequently filed on the 2015 SSM SIP Action in the D.C. Circuit Court of Appeals. On April 24, 2017, the D.C. Circuit granted EPA’s request to postpone oral argument in the case because EPA was reviewing the 2015 SSM SIP Action and EPA stated that the prior positions taken by the Agency with respect to the SSM Action may not necessarily reflect its ultimate conclusions after that review is complete. After extensive review and taking two regional actions that deviated from the 2015 SSM SIP policy in line with EPA’s consistency requirements, EPA believes that SSM provisions in SIPs may be permissible in certain circumstances, as outlined in the remainder of this guidance memorandum. EPA plans to review each SIP call remaining from the 2015 Action in light of this new memorandum and to conduct future notice-and-comment proceedings with respect to the disposition of those SIP calls. The application of this policy will depend upon the specific SSM provision and the other features of any given SIP to which it is applied, and if interpretations expressed in this memorandum are relied upon in a proposal for EPA action on a SIP, such interpretation will also be open to notice and comment in that future proceeding. EPA’s approval or disapproval of any SIP, and its circumstance-specific application of this policy, will be proposed, open for public comment, and subject to judicial review in any resulting final agency action.

At the outset, EPA notes that it maintains discretion and authority to change its CAA interpretation from a prior position. In *FCC v. Fox Television Stations, Inc.*, the U.S. Supreme Court plainly stated that an agency is free to change a prior policy as long as “the new policy is permissible under the statute, ... there are good reasons for it, and ... the agency believes it to be better.” 566 U.S. 502, 515 (2009) (referencing *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)). *See also Perez v. Mortgage Bankers Assn.*, 135 S. Ct. 1199 (2015). By offering a reasoned explanation for the new policy, the Agency “display[s] awareness that it is changing position” and “show[s] that there are good reasons for the new policy.” *Id.* at 515. The

² Section 110(k)(5) of the CAA provides that the Administrator shall require a state to submit a proposed revision to its SIP whenever the Administrator determines that the SIP is substantially inadequate to attain or maintain the relevant NAAQS, to mitigate adequately the interstate transport of pollution, or to otherwise comply with any requirement of the CAA. The CAA section 110(k)(5) process is commonly referred to as a “SIP call.”

Agency “need not demonstrate ... that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.” *Id.*

In cases where a new policy “rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account,” the Court found that a more detailed justification might be warranted than what would suffice for a new policy. *Id.* at 515-16. No more detailed justification is warranted here because there is no factual dispute at issue here and there are no substantial reliance interests in EPA’s former prohibition on SSM provisions. In any case, EPA’s new policy is justified by EPA’s reading of the statute, as further outlined in this guidance memorandum, and the need to grant a high degree of flexibility to states to formulate their own plan pursuant to CAA section 110. The policies on exemptions and affirmative defenses in this policy statement provide for and reflect that flexibility. Moreover, as explained EPA will take comment on any interpretation in this memorandum where relevant in the context of future proposed SIP actions.

For the reasons laid out below, the guidance presented here supersedes the 2015 SSM SIP policy on exemption and affirmative defense provisions. The remaining parts of the 2015 SSM SIP policy remain in effect. This memorandum does not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act. In order to change those determinations and alter or withdraw the 2015 SIP call, subsequent actions will need to be taken. Those subsequent actions would provide for public notice and comment and will, if finalized, be judicially reviewable. EPA plans to continue its review of each of the SIP calls issued in 2015 and to consider whether any particular SIP call should be maintained, modified, or withdrawn in light of the guidance discussed herein. EPA anticipates completing this review by December 31, 2023.

Exemption Provisions

Exemption provisions – both those referred to as “automatic exemptions”³ and those termed “director discretion provisions”⁴ in the 2015 SSM SIP Action – may be permissible in SIPs under certain circumstances. The general requirements in CAA section 110 to attain and maintain the NAAQS and the latitude provided to states through the SIP development process create a framework in which a state may be able to ensure attainment and maintenance of the NAAQS notwithstanding the presence of SSM exemptions in the SIP. It is permissible for a SIP to contain SSM exemptions for limited periods applicable to discrete standards, only if the SIP is composed of numerous planning requirements that are collectively NAAQS-protective by design. Such redundancy helps to ensure that the NAAQS are both attained and maintained, which was Congress’s goal in creating the SIP development and adoption process. In evaluating whether the requirements of a SIP are collectively NAAQS protective despite the inclusion of an SSM exemption provision, EPA expects to conduct an in-depth analysis of the SIP, including a multifactor, weight-of-the-evidence exercise that balances many considerations.

The 2015 SSM SIP policy – that SIPs with exemption provisions cannot be consistent with CAA requirements – was predicated on the idea that an emission limitation or standard could not apply continuously, in line with the CAA section 302(k)’s definition of “emission limitation,” if the SIP permitted exemptions for any period of time from the emission limitation or standard.

³ “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.

⁴ 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.

Under this policy, the presumed lack of “continuous emission limitations or standards” was viewed as creating a substantial risk that exemptions could permit excess emissions that could ultimately result in a NAAQS violation. However, for certain SIPs with overlapping planning requirements that together ensure attainment and maintenance of the NAAQS, a prohibition on exemption provisions was unnecessary and came at the expense of state autonomy and flexibility. EPA now believes that the general requirements in CAA section 110 to attain and maintain the NAAQS and the inherent flexibilities of the SIP development process create a continuous framework in which a state may, depending on the other features of its SIP, be able to ensure attainment and maintenance of the NAAQS notwithstanding the presence of SSM exemptions.

The 2015 SSM SIP policy cited the D.C. Circuit’s decision in *Sierra Club v. Johnson*, 551 F.3d 1019 (D.C. Cir. 2008) (*Sierra Club*), as support for the position that SIPs may not contain SSM exemption provisions. In *Sierra Club*, a divided panel of the D.C. Circuit reviewed an EPA rule promulgated pursuant to CAA section 112 that contained an automatic SSM exemption, and the majority concluded that “the SSM exemption violates the CAA’s requirement that some section 112 standard apply continuously.” 551 F.3d at 1027-1028. In the 2015 SSM SIP policy, EPA applied the *Sierra Club* court’s interpretation of CAA section 302(k)’s definition of “emission limitation” in the CAA section 112 context to the requirements of CAA section 110. CAA section 110(a)(2)(A) provides that SIPs shall include “enforceable *emission limitations* and other control measures, means, or techniques ... as may be necessary or appropriate to meet the applicable requirements of this chapter.” EPA’s application of the *Sierra Club* decision to CAA section 110 SIP requirements rested on the Agency’s premise that the D.C. Circuit’s interpretation of the definition of “emission standards” in CAA section 302(k) applied generally to the whole Act. (The definition in CAA section 302(k) applies to both “emission limitation” and “emission standard.”) Although the *Sierra Club* decision does not allow sources to be exempt from complying with CAA section 112 emission standards during periods of SSM, that reasoning is not determinative of EPA’s consideration of SIPs under CAA section 110. In the *Sierra Club* decision, the court explained, “[i]n requiring that sources regulated under section 112 meet the strictest standards, Congress gave no indication that it intended the application of MACT standards to vary based on different time periods.” 551 F.3d at 1028. That is, the court found that when EPA promulgates standards pursuant to CAA section 112, a single or some combination of CAA section 112-compliant standards must apply continuously, but the court did not make any statement applying its holding beyond CAA section 112. *Cf. Sierra Club*, 551 F.3d at 1027 (“When sections 112 and 302(k) are read together, then, Congress has required that there must be continuous section 112-compliant standards.”) *See also id.* (“[s]ection 302(k)’s inclusion of this broad phrase in the definition of ‘emission standard’ suggests that emissions reduction requirements ‘assure continuous emission reduction’ without necessarily continuously applying a single standard.”). The general duty provision that applied during SSM periods was “neither ‘a separate and independent standard under CAA section 112(d),’ nor ‘a free-standing emission limitation that must independently be in compliance’ with section 112(d), nor an alternative standard under section 112(h).” *Id.* at 1028. The decision itself did not address whether the rationale articulated with respect to SSM exemptions in CAA section 112 rules applies to SIPs approved under section 110. It also did not address what forms of SIP provisions could combine to appropriately create continuous protections.

EPA took the position in the 2015 SSM SIP policy that the legal reasoning in *Sierra Club* applied equally to CAA section 112 rules and section 110 approved SIPs. More specifically, in the 2015 SSM SIP policy EPA interpreted CAA section 302(k)’s definition of “continuous” to apply broadly to both sections 112 and 110. But further consideration has shown that an alternative reading of the relevant statutory sections is superior as a matter of both law and policy.

Fundamentally, CAA sections 112 and 110 have different goals and establish different approaches for implementation by the state and EPA. The court in *Sierra Club* recognized that Congress intended “that sources regulated under section 112 meet the strictest standards,” a

requirement without a similar analog in CAA section 110. *Sierra Club* at 1028. CAA section 112 sets forth specific standards for specific source categories once they are listed for regulation pursuant to CAA section 112(c). Once listed, the statute directs EPA (not the states) to use a specific and exacting process to establish nationally applicable, category-wide, technology-based emissions standards. *See* 42 U.S.C. § 7412(d) (requiring EPA to establish emission standards, known as “maximum available control technology” or “MACT” standards for major sources that “require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section” that EPA determines is achievable considering statutory factors). States do not have a role in establishing 112 standards and do not generally enjoy flexibility in determining how the ultimate requirements of CAA section 112 will be met.

In contrast, the CAA sets out a different requirement for section 110 SIPs, reflecting that SIP development and implementation rely on a federal-state partnership and are designed to be flexible for each state’s circumstances. The CAA sets the minimum requirements to attain, maintain, and enforce ambient air quality standards, while allowing each state to customize its own approach for the sources and air quality challenges specific to its own circumstances. It is important to note that EPA sets the NAAQS for each criteria pollutant to provide the requisite degree of protection for public health and welfare, but does not direct the states on how to achieve the NAAQS. Implementation of the NAAQS, then, is fundamentally different in nature than the source-specific standards EPA issues under section 112. Therefore, the D.C. Circuit’s concern that section 112 standards must apply “continuously” to regulate emissions from a particular source are not necessarily applicable in the context of section 110, where a state’s plan may contain a broad range of measures, including limits on the emissions of multiple pollutants from multiple sources of various source categories – all directed towards Congress’s broad goal of timely attainment and maintenance the NAAQS.

It is important also to note that the list of potential CAA section 110(a)(2)(A) measures that a state may implement are required only “as may be necessary or appropriate to meet the applicable requirements of this chapter.” This language suggests that Congress intended to give states the flexibility to craft a plan that makes the most sense for that state, so long as the set of emissions limitations, control measures, means and techniques, when taken as a whole, meet the requirements of attaining and maintaining the NAAQS.

Because the purposes and mechanisms of CAA sections 110 and 112 are different, it is reasonable to interpret the same term (emission limitation) to have different meanings in those sections; a singular interpretation may not necessarily apply statute-wide. The U.S. Supreme Court has recognized that principles of statutory construction are not so rigid as to necessarily require that the same terminology has the exact same meaning in different parts of the same statute. *See Env’tl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). The Court explained in *Duke Energy* that there is “no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically.” *Id.* at 575-6. “Context counts,” stated the Court; terms can have “different shades of meaning” reflecting “different implementation strategies” even in the same statute. *Id.* at 574, 76 (citations omitted). *See also Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014) (“a statutory term – even one defined in the statute – may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” (citations omitted)). Indeed, the D.C. Circuit’s decision interpreting section 112 acknowledged that “the court must examine the meaning of certain words or phrases *in context.*” *Sierra Club*, 551 F.3d at 1027.

The text of CAA section 110(a)(2)(A) reflects the increased flexibility built into section 110 as compared to section 112. The requirement that the “emissions standards” EPA issues under section 112, *see, e.g.*, section 112(c)(2), apply continuously may, as the D.C. Circuit held, prevent EPA from providing SSM exemptions in those standards. However, at the same time, it is reasonable to interpret the concept of continuous “emission limitations” in a SIP to be focused not on a single standard that applies invariably, but rather on whether the various components of the

approved SIP operate together in a continuous manner to ensure attainment and maintenance of the NAAQS. Unlike section 112, which relies exclusively on “emissions standards,” section 110 relies on a web of potential control mechanisms—“emission limitations and other control measures, means or techniques (including economic incentives . . .), as well as schedules and timetables for compliance.” And section 110 gives the state discretion to choose among these mechanisms “as may be necessary or appropriate to meet the applicable requirements of this chapter.” Therefore, it is reasonable to conclude that the *Sierra Club* decision’s disapproval of SSM provisions under section 112 should not be extended to CAA section 110.

In the 2015 SSM SIP policy, EPA noted additional concerns with provisions that give director’s discretion to exempt periods of SSM. EPA said that such provisions essentially constitute a variance from an otherwise applicable emission limitation – because they allow air agency personnel to make unilateral decisions on an *ad hoc* basis regarding excess emissions during SSM events. And because such ad hoc decisions do not comply with the statutory SIP revision process, EPA determined in 2015 that director’s discretion SSM provisions are not acceptable in SIPs.

While acknowledging EPA’s former position, a director’s discretion exemption provision may not necessarily make a SIP provision unapprovable or make an existing SIP substantially inadequate to meet CAA requirements in certain circumstances. For the same reasons that an automatic SSM exemptions may be consistent with CAA requirements in certain situations, in similar circumstances director’s discretion exemptions also may be permissible. If a director’s discretion exemption provision contains specific criteria, it likely would excuse emissions in more limited circumstances than automatic exemptions. Accordingly, the same reasoning that supports a position that automatic exemptions in SIPs may not be inconsistent with the CAA also informs EPA’s position that director’s discretion exemption provisions may not be inconsistent with the CAA. As with other SSM exemption provisions, EPA believes it would be appropriate to evaluate director’s discretion exemption provisions on a case-by-case basis in light of the SIP as a whole. Further, any action consistent with a director’s discretion exemption provision would not be an unlawful revision of the SIP. For example, if a director’s discretion exemption provision establishes a framework for when and how an air agency director may determine that SSM excess emissions do not constitute a violation, and that framework was approved into the SIP after going through a public process, a director applying the approved framework would simply be acting in accordance with the SIP-approved provisions.

EPA expects that determining whether a specific exemption provision will be permissible in an identified state SIP will involve an in-depth analysis of the SIP to determine whether it is composed of numerous planning requirements that are, when taken collectively, protective of the NAAQS. EPA anticipates that this will be a multifactor, weight-of-the evidence exercise that balances many considerations. In such an instance, EPA believes it may conclude that a SIP adequately provides for attainment and maintenance of the NAAQS, even if the SIP allows exemptions to specific emission limits for discrete periods, such as SSM events. A state may be able to demonstrate that a combination of emission limitations “as may be necessary or appropriate” that apply during normal operations but not during SSM periods and “other control measures, means, or techniques” that may apply during SSM periods – such as general duty provisions in the SIP with respect to criteria pollutants, work practice standards, best management practices, or alternative emission limits – are protective of the NAAQS.

In addition to reviewing any information provided by the state, EPA may consider other available evidence and provide additional analysis, as necessary, when reviewing SSM emission limitation exemptions in SIPs. For example, EPA could also consider a state’s air quality as one factor in its overall weight of the evidence analysis and whether a state has any current nonattainment areas for a NAAQS, particularly when considering whether to withdraw a SIP call issued in 2015 for an exemption provision.

EPA anticipates that it will also consider the SSM provision itself. For example, a requirement that sources use best practicable air pollution control practices to minimize emissions during startup, shutdown, or malfunction periods may be considered favorably in determining whether a given exemption provision (in combination with the other provisions of the SIP) is approvable. If the provision contains limitations on whether SSM events are considered emission standard violations or requires that source owners or operators limit the duration and severity of SSM events, it may be reasonable to conclude that such a provision, when considered alongside other factors, will not jeopardize a state's ability to attain and maintain the NAAQS. A director's discretion provision that contains specific criteria governing a director's decision may also provide additional protections of the NAAQS, particularly if factors considered by the director include whether sources minimize emissions or limit the extent of emissions which could occur to the greatest extent practicable, and particularly if the source owner or operator has the burden of proving that the criteria are satisfied.⁵

Affirmative Defense Provisions

A SIP provision that creates an affirmative defense⁶ to claims for penalties in enforcement actions regarding excess emissions caused by malfunctions may be consistent with CAA requirements in certain circumstances. EPA recognizes that imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances beyond the control of the owner or operator may not be appropriate. In the context of malfunctions, EPA is cognizant of the reality that even process equipment or a control device that is properly designed, maintained, and operated can sometimes fail.⁷ If a specific affirmative defense provision applies only to excess emissions that cannot be avoided by a source operator, EPA believes that removing that affirmative defense provision from a SIP will not reduce emissions and therefore would not result in an environmental or public health or welfare benefit. At the same time, EPA has a fundamental responsibility under the CAA to ensure that SIPs provide for attainment and maintenance of the NAAQS. After balancing these considerations, EPA has concluded that affirmative defenses may be permissible in SIPs if they are narrowly tailored so as not to undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the CAA.

In 2013, the U.S. Court of Appeals for the Fifth Circuit upheld the EPA's 2010 approval of an affirmative defense as to civil penalties for excess emissions during malfunction periods in the Texas SIP. *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 387 (2013). In 2014, the D.C. Circuit issued a decision regarding the legality of affirmative defense provisions included in a certain National Emissions Standard for Hazardous Air Pollutants

⁵ CAA section 113 authorizes the United States to enforce, among other things, the requirements or prohibitions of an applicable implementation plan or permit. CAA section 304 authorizes citizens to enforce, among other things, any emission standard or limitation under the CAA, including applicable state implementation plan and permit requirements. If approved into a SIP, a director's discretion provision may be available to sources in an enforcement action brought by the state, EPA, or citizens.

⁶ The EPA uses the term "affirmative defense" to mean a response or defense put forward by a defendant in the context of an enforcement proceeding, 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" in the context of a SIP means, more specifically, a state law provision in a SIP that specifies particular criteria or preconditions that, if met, would 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.

⁷ This reality is why EPA has allowed affirmative defense provisions in other CAA programs for facility malfunctions and upsets that are beyond the control of a source owner or operator. EPA's Title V regulations have long provided that, where applicable, an emergency, defined as "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source 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," constitutes an affirmative defense in an enforcement action if defined criteria are met. 40 CFR §§ 70.6(g); 71.6(g).

(NESHAP) established under CAA section 112. *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). The D.C. Circuit vacated EPA's affirmative defense provision in that section 112 NESHAP, holding that the CAA gives district courts sole authority in federal enforcement proceedings to determine whether a penalty for a violation of a section 112 NESHAP is appropriate. However, in the *NRDC* decision, the court stated that it was not confronted with the decision of whether an affirmative defense may be appropriate in a SIP and noted that the Fifth Circuit, in *Luminant Generation v. EPA*, had upheld EPA's approval of affirmative defenses as to civil penalties in the Texas SIP. 749 F.3d at 1064 n.2.

Upon further analysis, EPA recognizes that the policy position on affirmative defense SIP provisions for malfunctions as upheld by the Fifth Circuit's *Luminant* decision is a reasonable interpretation of the CAA and that it is not necessary to extend the D.C. Circuit's reasoning in *NRDC* to affirmative defense provisions in SIPs in conflict with *Luminant*. As EPA acknowledged in the 2015 SSM SIP policy, the CAA does not speak directly to the question of whether affirmative defense provisions are permissible in section 110 SIPs. *See* 80 FR 33856; *see also Luminant*, 714 F.3d at 852-53 (determining under *Chevron* step 1 that CAA section 113 does not discuss whether a state may include an affirmative defense in its SIP and, "turn[ing] to step two of *Chevron*," holding that the Agency's interpretation of the CAA to allow certain affirmative defenses as to civil penalties in SIPs was a "permissible interpretation of section [113], warranting deference."). Therefore, EPA concludes it has discretion to determine how to reasonably interpret the statute to develop a policy on this issue in a manner consistent with the precedent in the Fifth Circuit. *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 differences in scope and relative balance of state and federal authority between CAA sections 110 and 112 suggest that the D.C. Circuit's reasoning with respect to limits on federal agency authority under the latter does not address the distinct question of whether a state may deem affirmative defense provisions to be an appropriate part of their overall NAAQS maintenance strategy for inclusion in their SIP submissions to EPA. As explained in the prior section, the mechanisms established under section 112 of the CAA to control hazardous air pollutants are substantially and meaningfully different than those under section 110. CAA section 110 functions within a cooperative federalism system in which states propose plans to attain and maintain the NAAQS and EPA determines whether their specific plans comply with the Act's requirements. CAA section 112, on the other hand, strictly prescribes how EPA must establish federal emission standards for a specific class of sources, and it gives states little flexibility in the implementation of those standards. In addition, EPA's role, with respect to a SIP revision, is focused on reviewing the submission to determine whether it meets the minimum criteria of the CAA, and, where it does, EPA must approve the submission. In the context of a SIP, EPA is not establishing its own requirements for the state to implement. CAA section 110(a)(2)(A)-(B) requires states to submit SIPs with emission limits and other controls necessary to meet CAA requirements, and CAA section 110(a)(2)(C) requires SIPs to include "a program to provide for the enforcement" of those emission control measures. In light of the inherent flexibility established by Congress in CAA section 110 for NAAQS implementation, for EPA to approve a state's SIP submission that contains an affirmative defense provision that is adequately protective and does not interfere with any applicable requirement of the CAA may be an appropriate recognition that states have latitude to define in their SIPs what constitutes an enforceable emission limitation, so long as the SIP meets all applicable CAA requirements. *See* CAA § 107(a) (states have the primary responsibility for assuring air quality within the state by submitting a SIP "which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained..."). In further considering this issue and consistent with the above discussion, EPA believes that the application of the D.C. Circuit's reasoning in the *NRDC* decision to SIPs is not appropriate.

In the *Luminant* case – which is the only directly applicable court decision addressing whether affirmative defense SIP provisions are consistent with CAA requirements – the

environmental petitioners raised the same basic argument that was key to the D.C. Circuit's *NRDC* holding: They argued that EPA's approval of the Texas affirmative defense SIP provision conflicts with the CAA's provision that, in the case of EPA enforcement and citizen suits, a federal district court "shall have jurisdiction" to assess a "civil penalty." CAA §§ 113(b); 304(a). The Fifth Circuit, however, upheld as "neither contrary to law nor in excess of [the EPA's] statutory authority" EPA's position that the Texas provision at issue in that case was narrowly tailored and consistent with the penalty assessment criteria in CAA section 113(e). In addition, the Fifth Circuit stated that the availability of the affirmative defense in the Texas SIP "does not negate the district court's jurisdiction to assess civil penalties using the criteria outlined in [CAA section 113(e)], ... it simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed." *Luminant*, 714 F.3d at 853 fn. 9. The *Luminant* decision is the *only* existing court precedent that addresses the approvability of affirmative defense provisions in SIPs, and that court held that EPA acted consistent with statutory authority in approving an affirmative defense against civil penalties that was narrowly tailored to address excess emissions occurring during a malfunction.

There may be situations where an affirmative defense provision that provides that the defendant has the burden of demonstrating the following factors generally could be considered to be narrowly tailored as to not undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the CAA:

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 practices 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 was utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;
5. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
6. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
7. All emission monitoring systems were kept in operation if at all possible;
8. The owner or operator's actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence;
9. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and,
10. The owner or operator properly and promptly notified the appropriate regulatory authority.

The CAA provides that, in the case of EPA enforcement and citizen suits, a federal district court "shall have jurisdiction" to assess civil penalties; in assessing the amount of a civil penalty, the court must consider the penalty assessment criteria outlined in CAA section 113(e). The criteria outlined previously are consistent with the penalty assessment criteria identified in CAA section 113, which are considered by the courts and EPA in determining whether or not to assess a civil penalty for violations, and, if so, in what amount. In 2013, in reviewing EPA's approval of an affirmative defense provision in Texas's SIP that met all ten of the above-outlined criteria, the 5th Circuit held that approval was based upon a permissible interpretation of CAA section 113 and deserved deference. 714 F.3d at 853. EPA acknowledges that an effective enforcement program must be able to collect penalties to deter avoidable violations. However, EPA also acknowledges – as did the 5th Circuit – that, despite good practices, sources may be unable to meet emission

limitations during malfunctions due to events beyond the control of the owner or operator. EPA finds it may be reasonable to determine that a SIP can provide for an affirmative defense against civil penalties for circumstances where it is not feasible to meet the applicable emission limits, and where the narrowly tailored criteria that the source must prove can ensure that the source has made every reasonable effort to comply with those emission limitations.

CAA section 110(a)(2)(C) requires SIPs to include “a program to provide for the enforcement” of those emission control measures. In light of the latitude provided to states by Congress in CAA section 110 for NAAQS implementation, EPA has determined that inclusion of an affirmative defense provision in a SIP may be appropriate due to the latitude that states have to define in their SIPs what constitutes an enforceable emission limitation, so long as the SIP meets all applicable CAA requirements.

Conclusion

This memorandum constitutes guidance. As guidance, this memorandum does not bind states, EPA, or other parties, but it does reflect EPA’s current understanding of the statutory requirements of the CAA. Because this memorandum is nonbinding, it does not constitute a “final” action. 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 evaluating a previously issued SIP call, will be conducted through a notice-and-comment proceedings in which EPA will determine whether a given SIP provision, taken in light of the considerations outlined in this guidance, is consistent with the requirements of the CAA. This guidance memorandum is relevant to future notice-and-comment proceedings on SIPs that contain provisions applicable to emissions during SSM events. If interpretations expressed in this memorandum are relied upon in a future proposal for EPA action on a SIP, such interpretation will be open to notice and comment in that future proceeding. This memorandum’s application in each such notice and comment proceeding will be proposed, open for public comment, and subject to judicial review in any resulting final agency action.

Questions concerning specific issues and SIP provisions should be directed to the appropriate Regional office. Regional office staff should coordinate with Juan Santiago, Air Quality Policy Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: 919-541-1084; and email address: *Juan.Santiago@epa.gov*.