

April 29, 2019

Frequently Asked Questions

EPA Region 6's Proposed Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and of Call for Texas State Implementation Plan (SIP) Revision: Affirmative Defense Provisions for Malfunctions

General

Q: Describe the proposed action regarding startup, shutdown and malfunction (SSM) policy being taken in EPA Region 6 (Region 6 or the Region).

A: EPA Region 6's proposed action (1) outlines an alternative interpretation under consideration regarding the permissibility of affirmative defense provisions in the State Implementation Plans (SIPs) of states located in Region 6 that departs from the EPA's 2015 policy on this subject; and (2) proposes to withdraw a SIP Call issued to Texas in 2015 based on a finding that the affirmative defense provisions in the SIP for the state of Texas applicable to excess emissions that occur during certain upset events and unplanned maintenance, startup, or shutdown activities are adequately protective and do not interfere with any applicable requirement of the Clean Air Act (CAA) such that they would be consistent with the newly announced Region 6 alternative interpretation if adopted.

Q: What alternative interpretation is Region 6 considering?

A: Region 6 is considering adopting a policy that affirmative defense provisions are generally permissible in SIPs when they are adequately protective and do not interfere with any applicable requirement of the CAA.

Q: Why is Region 6 allowed to deviate from nationally-applicable EPA policy?

A: In accordance with the Regional Consistency regulations at 40 CFR § 56.5(b), on October 16, 2018, the Region 6 Regional Administrator sought and received concurrence from the relevant headquarters office to propose an action that is inconsistent with national policy.

Q: What is the impact of this proposal?

A: If Region 6 finalizes this action as proposed, Texas would no longer have an obligation to submit a SIP revision addressing its existing affirmative defense SIP provisions in the absence of the SIP call. Texas may choose to withdraw the SIP revision it submitted in November 2016 in response to the SIP call, on which the EPA has not proposed nor taken action to approve or disapprove.

Q: Does Region 6's proposal impact EPA's existing national policy regarding SIP provisions that provide exemptions from emission limitations during periods of SSM?

A: No. The alternative interpretation presented in Region 6's proposal only concerns affirmative defense provisions in SIPs. Region 6 is not considering any alternative interpretation with respect to SSM exemption provisions at this time.

Questions about how other states are impacted

Q: If adopted, would the Region 6 alternative SSM policy regarding affirmative defenses apply for all states within Region 6?

A: If adopted, the alternative SSM policy regarding affirmative defense provisions being considered in this action would constitute guidance within Region 6 and the Region would apply it to states within this region.

Q: For states within Region 6 that were SIP-called for affirmative defense provisions, does Region 6 plan to withdraw the SSM SIP Call for those states?

A: In this action, Region 6 is proposing to withdraw the SSM SIP Call only for Texas based upon an analysis that the specific affirmative defense provisions in the Texas SIP applicable to excess emissions that occur during certain upset events and unplanned maintenance, startup, or shutdown activities are adequately protective and do not interfere with any applicable requirement of the CAA and thus align with the alternative SSM policy under consideration. Any potential withdrawal of the SSM SIP Call for other states within Region 6 based on final adoption of this policy would require the Region to evaluate each state's SIP on a case-by-case basis against that policy and to propose to withdraw the SSM SIP Call through a separate notice-and-comment rulemaking, as appropriate. This proposal is limited to the Texas SSM SIP Call.

Q: How does the proposed action affect the SIP Call for states in all other regions besides Region 6?

A: The proposed rulemaking has no affect for states outside Region 6. The alternative SSM policy regarding affirmative defense provisions in this action is being considered only by Region 6 and, if adopted, would constitute guidance only within Region 6 for potential application to states within this region. The alternative SSM policy being considered by Region 6 does not change the national policy for affirmative defense provisions that was outlined in the 2015 SSM SIP Action, which remains applicable to states in other Regions.

Q: My state submitted a SIP revision that was consistent with the national policy on SSM affirmative defense provisions outlined in the 2015 Action. What if the state no longer wants this submittal to be approved into its SIP?

A: EPA has a statutory duty to act on all complete SIP submittals before the Agency and approve SIP submittals that meet all applicable CAA requirements. States may, at their discretion, withdraw SIP submittals that are currently before EPA such that EPA would no longer act on the subject submittal, but there could be consequences of such withdrawal. For further information, interested state agencies should follow up with their respective EPA Regional office.

Litigation/other issues

Q: What is the status of the litigation on the 2015 SSM SIP Action?

A: EPA requested that the court hold the litigation challenging the 2015 SSM SIP Action in abeyance while EPA reviews the agency's SSM policy. The U.S. Court of Appeals for the D.C. Circuit issued an order on April 24, 2017, granting this request. EPA must file status reports on its review of the policy with the court every 90 days.