



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

SEP 30 2021

DEPUTY ADMINISTRATOR

MEMORANDUM

SUBJECT: Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy

FROM: Janet McCabe *Janet McCabe*

TO: Regional Administrators

I am withdrawing the October 9, 2020, guidance memorandum titled, "Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans" (2020 Memorandum) and would like to inform you of additional related actions that the Environmental Protection Agency intends to take, many of which will be led by the regional offices.

The 2020 Memorandum outlined circumstances under which the EPA could approve certain types of provisions governing periods of startup, shutdown, and malfunction in state implementation plans¹ developed under section 110 of the Clean Air Act. In addition to withdrawing the 2020 Memorandum, I am reinstating the agency's prior policy as set out in the 2015 SSM SIP Action (80 FR 33840; June 12, 2015). Specifically, SSM exemption provisions (i.e., automatic exemptions, discretionary exemptions, and overly broad enforcement discretion provisions) and affirmative defense SIP provisions will generally be viewed as inconsistent with CAA requirements. This memorandum also addresses the EPA's plans to revisit three individual SIP actions relating to SSM taken in 2020.

This memorandum constitutes guidance. As guidance, this memorandum does not bind states, the EPA, or other entities and does not constitute a "final" action. The EPA's evaluation of any SIP submission will be conducted through notice-and-comment proceedings in which the EPA will determine whether a given SIP provision, taken in light of the considerations outlined in this guidance and all other applicable requirements, is consistent with the requirements of the CAA. This guidance memorandum is relevant to future notice-and-comment proceedings on SIPs that

¹ For convenience, in this document the EPA refers to "state implementation plans," but acknowledges that ideas discussed in this memorandum may be equally applicable to federal implementation plans or tribal implementation plans.

contain provisions applicable to excess emissions during SSM events. If the policy described here is relied upon in a future 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.

I. Background

This section provides general background on SSM provisions in SIPs, as well as background on three relevant previous actions, or groups of actions, taken by the EPA regarding SSM SIP policy. This memorandum addresses EPA policy on two key types of SIP provisions: those that create or authorize exemptions from SIP emissions limits during SSM periods and those that contain affirmative defenses to civil penalties in enforcement actions brought for violations of SIP emissions limits. Provisions that allow or excuse excess emissions during SSM events have the potential to lead to higher emissions and endanger public health.

Although the EPA announced a policy against the permissibility of SSM exemptions as early as 1977, the EPA acknowledges that some exemption provisions were approved into SIPs over the years. The U.S. Court of Appeals for the District of Columbia Circuit issued a ruling in 2008 that found that inclusion of SSM exemptions in section 112 standards is not allowed under the CAA.² In reaching that decision, the D.C. Circuit opined on the generally applicable CAA definition for emission limitations and standards, so this decision further supported the EPA's longstanding position that SSM exemptions in SIPs are inconsistent with the CAA. For affirmative defenses, the EPA had approved SIP provisions that provided sources with affirmative defenses to civil penalties for violations occurring during periods of SSM, if those provisions met specific criteria under a 1999 policy. The D.C. Circuit vacated in 2014 an affirmative defense provision in EPA regulations that met those specific criteria, finding that the EPA lacked authority to create such a defense because it would impermissibly encroach upon the authority of federal courts to find liability or impose remedies.³

In light of the concerns about the public health impact of SSM SIP provisions and the 2008 and 2014 court cases establishing relevant precedents, the EPA sought to clarify and update its SSM SIP Policy in a 2015 action.

A. 2015 Policy and SIP Call

The EPA issued on June 12, 2015, a *Federal Register* notice (2015 SSM SIP Action) clarifying, restating, and updating its national policy regarding SSM provisions in SIPs (2015 Policy).⁴ At the same time, the EPA applied this policy and issued SIP calls pursuant to CAA section 110(k)(5) to 36 states (applicable in 45 statewide and local jurisdictions and no tribal areas) to amend their SIPs to correct deficiencies involving SSM provisions. That notice also responded to a Sierra Club petition alleging specific deficiencies in existing SIPs relating to SSM provisions. Although the 2015 Policy addressed numerous SSM issues, this memorandum focuses on

² *Sierra Club v. Johnson* 551 F.3d 1019 (D.C. Cir. 2008).

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

⁴ 80 FR 33840, June 12, 2015.

exemption provisions and affirmative defenses, as these are the two elements addressed by the 2020 Memorandum.

B. SSM SIP Call Withdrawals for North Carolina, Texas, and Iowa

EPA Regions 4, 6 and 7 took final actions in 2020 to withdraw SIP calls previously issued to North Carolina, Texas and Iowa. These actions were inconsistent with the EPA's 2015 Policy. Although the policy was changed with the issuance of the 2020 Memorandum in October 2020, the actions taken before then in 2020 were undertaken as intentional deviations from the 2015 policy, as provided for under the EPA's Regional Consistency regulations.⁵ The actions concluded that the specific SSM provisions at issue, which involved affirmative defenses (Texas) and automatic or discretionary exemptions (North Carolina and Iowa), were permissible in these SIPs and accordingly withdrew the SIP calls issued to those states.

C. 2020 Memorandum: Inclusion of Provisions Governing Periods of SSM in SIPs

The EPA issued on October 9, 2020, the 2020 Memorandum outlining a new national policy related to SSM exemption provisions and affirmative defense provisions, which govern excess emissions during SSM events.⁶ That guidance memorandum superseded the guidance provided in the 2015 Policy on exemptions and affirmative defense provisions. Specifically, for SSM exemption provisions, the 2020 Memorandum stated that it may be permissible for a SIP to contain such provisions provided that the SIP contained numerous planning requirements that were collectively protective of the National Ambient Air Quality Standards by design. The 2020 Memorandum stated that such redundancy helps to ensure that the NAAQS are both attained and maintained. For affirmative defense provisions, the 2020 Memorandum stated that narrowly tailored provisions could be consistent with CAA requirements and listed 10 factors which, if met, would generally allow the EPA to consider an affirmative defense approvable.⁷

Importantly, the 2020 Memorandum did not alter the determinations made in the 2015 SSM SIP Action that identified specific SIP provisions that were substantially inadequate to meet the requirements of the Act. It indicated the EPA's intent to review the remaining SIP calls that were issued in the 2015 SSM SIP Action and to consider whether to maintain, modify or withdraw particular SIP calls through future actions. It anticipated finishing this review by the end of 2023.

II. Withdrawal of October 9, 2020, Memorandum

Through this memorandum, I withdraw the 2020 Memorandum in its entirety. The EPA hereby reinstates its prior policy that SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally would not be approvable if contained in a SIP submission. I have considered and rejected the reasoning advanced in the 2020 Memorandum to justify the approval of exemption and affirmative defense provisions. The statutory interpretations extensively discussed in the 2015 Policy are more

⁵ 40 CFR Part 56.

⁶ Memorandum from Administrator Wheeler to Regional Administrators, dated October 9, 2020, titled "Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans."

<https://www.epa.gov/air-quality-implementation-plans/guidance-inclusion-provisions-governing-periods-startup-shutdown>.

⁷ See 2020 Memorandum, p.9 for the full list.

consistent with the CAA and relevant case law for the reasons explained in the 2015 SSM SIP Action. For instance, the analysis in the 2020 Memorandum does not adequately address CAA requirements other than NAAQS attainment and maintenance. These include, but are not limited to, section 110(l)'s procedural requirements governing SIP amendments, section 302(k)'s requirement that all emission limitations apply on a "continuous" basis, and the substantive stringency requirements applicable to emission limitations pursuant to sections 165, 172 and 173 (among other provisions). Similarly, the 2020 Memorandum does not directly address why the agency could approve affirmative defense provisions in SIPs when the D.C. Circuit found in 2008 such provisions beyond the scope of the EPA's authority to create in section 112 standards. The 2015 Policy, by contrast, analyzes how CAA requirements affect the permissibility of SSM exemptions and meaningfully applies relevant D.C. Circuit case law.⁸ Moreover, the 2015 Policy was 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 health and environmental protections provided by the CAA.⁹ The EPA's issuance of the SIP Calls for 36 states in the 2015 SSM Action, in accordance with the 2015 Policy, was intended to ensure that all modes of source operation, including periods of SSM, have emissions limitations in place that can be appropriately enforced.

In making the decision to reinstate the policy positions and legal interpretations underpinning the 2015 Policy, I have considered whether there are any reliance interests associated with the 2020 Memorandum. I have determined that any such interests, if they exist at all, would not be significant given that the 2020 Memorandum was in place for less than a year. Further, the 2020 Memorandum did not change the status of any SIP call issued in 2015 and had no binding legal effect. To the extent there are any reliance interests, they would be minor and would not outweigh the significant policy interests underpinning the Agency's reinstatement of the 2015 policy. I am aware that 32 states have submitted SIP revisions in response to the 2015 SIP Call. I am not aware that any of these states have undertaken rulemakings pursuant to the 2020 Memorandum. It is important that the EPA move forward to review and take action on these pending SIP submittals.

This withdrawal has the effect of retracting the 2020 Memorandum's statements superseding the prior 2015 Policy with respect to exemption provisions and affirmative defense provisions. By this withdrawal, the EPA is reinstating the 2015 Policy with respect to those provisions and reaffirming the 2015 Policy with respect to all other provisions not superseded by the 2020 Memorandum. Thus, the 2015 Policy is restored in its entirety. This memorandum does not further interpret or update the 2015 Policy; the full policy is as originally described in the June 12, 2015, *Federal Register* notice and need not be further summarized here.¹⁰

The EPA intends to implement the principles laid out in the 2015 Policy as the agency considers taking future actions on SIP submissions, including submittals in response to relevant SIP calls. As stated previously, if the EPA relies on the 2015 Policy in future EPA actions on SIPs, the

⁸ See, e.g., 80 FR at 33849-850, 33889-925.

⁹ 80 FR 33985.

¹⁰ The policy is stated in Section XI of that notice, pages 33976-33982. The notice is available at <https://www.govinfo.gov/content/pkg/FR-2015-06-12/pdf/2015-12905.pdf#page=137>.

EPA will provide notice and opportunity for public comment in those proceedings, and those final agency actions will each be subject to judicial review.

Finally, the statement in the 2020 Memorandum regarding the EPA's plans to review and potentially modify or withdraw particular SIP calls by the end of 2023 no longer reflects the EPA's intent. Those SIP calls were issued pursuant to the 2015 Policy, and through issuance of this memorandum, that policy is reinstated as agency policy on SSM provisions in SIPs. As such, those SIP calls remain in effect.

III. Revisiting the 2020 State-Specific SSM SIP Call Withdrawals

The EPA plans to revisit the three state-specific SSM SIP call withdrawals that were finalized in 2020 for North Carolina, Texas and Iowa. The three withdrawals were based on policy and statutory interpretations that were also included in the 2020 Memorandum; and, therefore, it is appropriate to revisit these actions and consider whether they should be altered in light of the agency's withdrawal of that guidance memorandum and its reinstatement of the 2015 Policy. These withdrawals were notice-and-comment rulemaking actions, so we will be undertaking notice-and-comment rulemaking actions to reconsider whether any of the findings underlying those actions should be retained in light of the EPA's reaffirmation of the 2015 Policy. In the course of reconsidering those actions, the EPA will take comment on any policy or interpretations that are the basis for any replacement or modified action. I am asking the Office of Air and Radiation to work closely with the three affected regional offices to complete any necessary notice-and-comment rulemaking actions expeditiously.

IV. Future Implementation of the 2015 SSM Policy and SIP Call

In light of uncertainty about the agency's SSM policy that was introduced with the three state-specific SSM SIP call withdrawals noted above and by the issuance of the 2020 Memorandum, many of the EPA actions necessary to implement the 2015 SSM SIP Action have been delayed. Along with the reinstatement of the 2015 Policy, the agency renews its commitment to implementing the pending SIP calls, which remain in place, and intends to take additional SIP actions consistent with the 2015 Policy.

V. Conclusion

This memorandum is intended to provide necessary clarity on the EPA's policy on the permissibility of SSM provisions in SIPs, which is set out in the 2015 Policy. I recognize that the regional offices are working diligently to take timely action on SIPs, and I appreciate all the upcoming work you are ready to take on to expeditiously implement the 2015 Policy. Please share this memorandum with your staff, as well as with colleagues at state, local, tribal and territorial air agencies. If these air agencies or other stakeholders have state-specific questions, we encourage them to reach out to the relevant regional office contacts. For any questions concerning this memorandum, please contact our colleague Mike Koerber, deputy director, Office of Air Quality Planning and Standards at (919) 541-5557 or Koerber.Mike@epa.gov.