FEDERAL REGISTER

Vol. 79 Wednesday,
No. 180 September 17, 2014

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; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional State; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2012–0322; FRL–9914–41–OAR]

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; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States

AGENCY: Environmental Protection Agency (EPA).

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: In this supplemental notice of proposed rulemaking (SNPR), the Environmental Protection Agency (EPA) is supplementing and revising what it previously proposed as its response to a petition for rulemaking filed by the Sierra Club (the Petition). By notice published on February 22, 2013, the EPA proposed its response to the Petition's requests concerning treatment of excess emissions in state rules by sources during periods of startup, shutdown or malfunction (SSM). Subsequent to that proposal, a federal court ruled that the Clean Air Act (CAA or Act) precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. As a result, in this SNPR the EPA is proposing to apply its revised interpretation of the CAA, but only with respect to affirmative defense provisions in state implementation plans (SIPs). For specific affirmative defense provisions identified in the Petition, we are revising the basis for the proposed findings of substantial inadequacy and SIP calls or proposing new findings of substantial inadequacy and SIP calls. For specific provisions that the EPA has independently identified, including SIP provisions in states not included in the February 2013 proposal notice, we are proposing new findings and SIP calls.

DATES: *Comments.* Comments must be received on or before November 6, 2014.

Public Hearing. The EPA will hold a public hearing on this SNPR on October 7, 2014, in Washington, DC.

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 Docket Center, Air Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA Docket Center, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Avenue NW., 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 *http://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 *http://www.regulations.gov* or email. The *http://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 *http://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 *http://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 *http://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 *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 Air Docket is (202) 566–1742.

Public Hearing: A public hearing will be held on October 7, 2014, at the William Jefferson Clinton West Building, Room 1117B, 1301 Constitution Avenue, Washington, DC 20460. The public hearing will convene at 9 a.m. (Eastern Standard Time) and continue until the earlier 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 (*i.e.,* this SNPR specific to affirmative defense provisions in SIPs). 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. Please note that the REAL ID Act, passed by Congress in 2005, established

new requirements for entering federal facilities. These requirements took effect July 21, 2014. If your driver's license is issued by Alaska, American Samoa, Arizona, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New York, Oklahoma or the state of Washington, you must present an additional form of identification to enter the federal building where the public hearing will be held. Acceptable alternative forms of identification include: Federal employee badges, passports, enhanced driver's licenses, and military identification cards. 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. Written comments on the proposed rule must be received by November 6, 2014. Commenters should notify Ms. Long if they will need specific equipment, or if there are other special needs related to providing comments at the hearing. The EPA will provide equipment for commenters to show overhead slides 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 *http://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: Questions concerning this SNPR 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 address: *sutton.lisa@epa.gov*.

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).

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 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	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	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	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, Nevada and the Pacific Islands.
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, EPA-approved implementation plans (''air agencies'').[1]

[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 the 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''

Continued

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 general. In addition, in the final action based on this supplemental proposal, the EPA may find specific SIP provisions in states identified either in the Petition or by the EPA independently 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.[2] For example, if 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 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 applicable to excess emissions. When finalized, this action will embody the EPA's updated SSM Policy for all 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 SNPR will be available on the World Wide Web. Following signature by the EPA Assistant Administrator, a copy of this SNPR will be posted on the EPA's Web site, under ''State Implementation Plans to Address Emissions During Startup, Shutdown and Malfunction,'' at *http://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 a copy of the February 2013 proposal notice.

C. What should I consider as I prepare my comments?

1. *Submitting CBI.* Do not submit this information to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a 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:

or ''air agencies'' when meaning to refer to one, some or all of the 39 states identified in the Petition or other states identified by the EPA in this SNPR. 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.

[2] The specific SIPs that include affirmative defense provisions identified by the EPA independently are listed under section II.B of this SNPR (see table). Furthermore, in comments received on the February 2013 proposal notice, a commenter brought to the EPA's attention one affirmative defense provision in a SIP, that of Texas. In the rulemaking docket, the comment letter may be found at EPA–HQ–OAR–2012–0322–0621.

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* 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 *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, which would be binding on EPA and the public, 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 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 notice, statements about SIPs in general would also apply to tribal implementation plans in general even though not explicitly noted.

The term *SNPR* means or refers to this supplemental notice of proposed rulemaking.

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 the 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. This specific guidance document is referred to as the *1999 SSM Guidance.* When finalized, this action will embody the EPA's updated SSM Policy for all 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 This SNPR

A. How does this notice supplement or revise the EPA's already proposed rulemaking to respond to the Petition?

By notice published on February 22, 2013 (78 FR 12459), we proposed 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). In that February 2013 proposal notice, we described and proposed the EPA's response to each of the Petition's three interrelated requests concerning the treatment of excess emissions from sources during periods of SSM in provisions in SIPs. Among other requests, the Petitioner requested that the EPA rescind its SSM Policy element interpreting the CAA to allow SIPs to include affirmative defense provisions for violations due to excess emissions during any type of SSM events because the Petitioner contended there is no legal basis for such provisions in SIPs.

In this SNPR, we are supplementing and revising what we earlier proposed as our response to the Petitioner's requests, but only to the extent the requests narrowly concern affirmative defense provisions in SIPs. We are not revising or seeking further comment on any other aspects of the February 2013 proposed action.

First, based on reexamination of statutory requirements in light of a recent court decision, we are revising our interpretation of the CAA concerning the issue of affirmative defense provisions in SIPs. Accordingly we propose to grant the Petitioner's overarching request that the EPA rescind its SSM Policy element that interpreted the CAA to allow affirmative defense provisions in SIPs. Our proposal to grant the Petition and to rescind our SSM Policy with respect to allowing affirmative defenses in SIPs is a revision of the position we previously proposed in the February 2013 proposal notice (*i.e.,* to grant in part and to deny in part the Petition on this request). The basis for our proposed revision of the SSM Policy with respect to affirmative defense provisions in SIPs and our revised response to the Petition on this issue is provided in more detail in section IV of this SNPR.

Second, we propose to grant the Petitioner's request that the EPA apply a revised interpretation to, and effectuate the removal of, specific existing affirmative defense provisions in SIPs identified by the Petitioner as inconsistent with the CAA. Accordingly, we propose to grant the Petition with respect to specific existing affirmative defense provisions in the SIPs of 13 states. For all 13 of these states, we have already proposed SIP calls for one or more SIP provisions in our February 2013 proposal notice, but note that we did not at that time propose SIP calls for all affirmative defense provisions in those states because some of the provisions appeared to comply with our policy at the time of the proposal. What we are proposing in this SNPR is to grant the Petition with respect to all of the identified affirmative defenses in these states.

Third, in addition to the specific affirmative defense provisions identified by the Petitioner, the EPA has independently identified other affirmative defense provisions in SIPs and is proposing in this SNPR to take action with respect to these SIP provisions as well. The newly identified affirmative defense provisions are found in six states' SIPs. For two of the states whose SIPs include newly identified affirmative defense provisions, California and Texas, we did not propose a SIP call in the February 2013 proposal notice, as those states were not identified in the Petition. For the other four states (New Mexico, South Carolina, Washington and West Virginia), we did propose a SIP call in the February 2013 proposal notice for one or more SIP provisions, but at that time we did not propose a SIP call for all affirmative defense provisions identified in the Petition or for any affirmative defense provisions that were not identified in the Petition. The EPA is now including 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 court decisions relevant to such provisions under the CAA. Section VII of this SNPR presents the EPA's analysis of each of the affirmative defense SIP provisions at issue.

Fourth, for each of the states where the EPA proposes to grant the Petition concerning specific affirmative defense provisions or to take action on such provisions that EPA has independently identified, the Agency also proposes to find that the existing SIP provision at issue is substantially inadequate to meet CAA requirements and thus under CAA authority proposes to issue a ''SIP call'' with respect to that SIP provision. For those states for which the EPA promulgates a final finding of substantial inadequacy and a SIP call, the EPA has in the February 2013 notice proposed a schedule allowing the states 18 months within which to submit a corrective SIP revision. In section II.C of this SNPR, the EPA accordingly proposes that this schedule apply to all SIP provisions identified as substantially inadequate in this supplemental proposal.

What EPA proposes in this SNPR supersedes the February 2013 proposal only insofar as the SNPR supplements or revises the February 2013 proposal notice with respect to the issues related to affirmative defense provisions in SIPs. After evaluation of public comment on this SNPR, the EPA intends to complete its action on the Petition in one final action, addressing together the issues discussed in the February 2013 proposal notice and in this SNPR.

This action provides the EPA an opportunity to invite public comment on our SSM Policy specific to affirmative defenses. In this SNPR, the EPA is supplementing and revising its proposed responses to the issues in the Petition only to the extent they concern affirmative defenses in SIPs, and the EPA solicits comment on its proposed responses. We note that an opportunity to comment on the EPA's proposed responses to other issues raised in the Petition was provided earlier, in the comment period initiated by our February 2013 proposal notice. Therefore, comments received on this SNPR will be considered germane only to the extent they pertain specifically to the subject of affirmative defenses in SIPs. The EPA does not intend to consider any further comments related to other aspects of the prior proposal, as those other aspects are not being reopened in this supplemental proposal. Moreover, because the EPA's interpretation of the CAA with respect to the legal basis for affirmative defense provisions in SIPs has changed, the EPA does not intend to respond to comments previously submitted on the February 2013 proposal notice to the extent they apply to issues related to affirmative defense provisions in SIPs generally, or to issues related to specific affirmative defense provisions identified by the Petitioner, as those comments will be moot if the EPA finalizes its action as discussed in this SNPR.

Through our proposed rulemaking action, which includes the February 2013 proposal notice and this SNPR, the EPA is clarifying, restating and revising its SSM Policy. When finalized, this action will embody the EPA's updated SSM Policy for all SIP provisions relevant to excess emissions during SSM events. The final action 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 on SSM issues as they further develop their SIPs in the future.

B. To which air agencies does this SNPR apply and why?

In general, the EPA's action on the Petition in this rulemaking may be of interest to all air agencies because the EPA is significantly 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 proposing in this SNPR to grant the Petitioner's request that the EPA rescind its interpretation of the CAA that would allow affirmative defense provisions in SIPs.

More specifically, this SNPR is directly relevant to the states for which we are now proposing SIP calls on the basis that those SIP provisions are inconsistent with CAA requirements because they include affirmative defenses. The EPA is proposing SIP calls with respect to affirmative defense SIP provisions in each of the 17 states (for provisions applicable in 23 statewide and local jurisdictions [3] and

[3] 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

no tribal areas) that show either ''Grant'' or ''SIP call'' as the proposed action under table 1, ''List of States With Affirmative Defense SIP Provisions for Which the EPA Proposes to Grant the Petition or to Address Such Provisions Identified by the EPA.''

TABLE 1—LIST OF STATES WITH SIP AFFIRMATIVE DEFENSE PROVISIONS FOR WHICH THE EPA PROPOSES TO GRANT THE PETITION OR TO ADDRESS SUCH PROVISIONS IDENTIFIED BY THE EPA

EPA region	State	Proposed action[a] with respect to affirmative defenses applicable	
		. . . for malfunctions?	. . . for startup, shutdown or other modes?
III	District of Columbia	Grant	Not applicable.
	Virginia	Grant	Not applicable.
	West Virginia	SIP call (new)	Not applicable.
IV	Georgia	Grant	Grant.
	Mississippi	Grant	Grant.
	South Carolina	SIP call (new)	Not applicable.
V	Illinois	Grant	Not applicable.
	Indiana	Grant	Not applicable.
	Michigan	Not applicable	Grant.
VI	Arkansas	Grant	Not applicable.
	New Mexico	Grant (for state) and SIP call (new for Albuquerque-Bernalillo County).	Grant (for state) and SIP call (new for Albuquerque-Bernalillo County).
	Texas	SIP call (new)	Not applicable.
VIII	Colorado	Grant (change from February 2013 proposal to Deny).	Grant.
IX	Arizona	Grant (for state and for Maricopa County; change from February 2013 proposal to Deny).	Grant (for state and for Maricopa County).
	California	SIP call (new for Eastern Kern APCD, new for Imperial County APCD and new for San Joaquin Valley APCD).	Not applicable.
X	Alaska	Grant	Grant.
	Washington	Grant (for state) and SIP call (new for Energy Facility Site Evaluation Council and new for Southwest Clean Air Agency).	Grant (for state) and SIP call (new for Energy Facility Site Evaluation Council and new for Southwest Clean Air Agency).

[a] The proposed action under the SNPR is the same action as proposed in February 2013 unless noted in this table to be either new or a change. The entry ''SIP call'' indicates that the affirmative defense provision was identified by the EPA independently and was not included in the Petition.

For each state for which the proposed action in this SNPR is either ''Grant'' or ''SIP call,'' the EPA proposes to find that specific affirmative defense provisions in the state's SIP are substantially inadequate to meet CAA requirements for the reason that these provisions are inconsistent with the CAA.

For each state for which the proposed action on the Petition is either ''Grant'' or ''SIP call,'' the EPA is further proposing in this SNPR to call for a SIP revision as necessary to remove the identified affirmative defense provisions from the SIP at issue. The EPA's revised proposal under this SNPR concerning affirmative defense provisions in specific states' SIPs is summarized in section VII of this SNPR.

The SIP calls proposed in this SNPR apply only to those specific provisions, and the scope of each of the SIP calls would be limited to those provisions. This SNPR proposes SIP calls specific to affirmative defense provisions in 17 states. The 17 states include two states for which we are newly proposing SIP calls: California and Texas. For the remaining 15 states, we already proposed SIP calls in the February 2013 proposal notice for one or more SSM-related provisions, although in this SNPR we are in some cases proposing SIP calls for additional affirmative defense provisions and in some cases proposing SIP calls on a basis that has changed from that of our earlier proposal.

For Jefferson County, Kentucky, the affirmative defense provisions for which we proposed in February 2013 to grant the Petition were subsequently removed from the SIP.[4] Thus, under this SNPR we are proposing instead to deny the Petition, and we are no longer proposing a SIP call with respect to affirmative defense provisions for this area because the revision has already been made by the state and approved into the SIP by the EPA. Note, however, that we already proposed a SIP call for Kentucky, for other provisions (*i.e.,* provisions not concerning affirmative defenses in Jefferson County), and this SNPR does not change what we proposed in the February 2013 proposal notice for the other Kentucky SIP provisions.

C. 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 that does not exceed 18 months from the date the Agency notifies the state of the inadequacy. The EPA intends to disseminate notice of any final findings of substantial inadequacy and the issuance of any SIP call promptly after the Administrator signs the final notice.

The EPA has already proposed to provide the full 18-month period

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.

[4] *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).

permissible by statute to give states 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.

Accordingly, the EPA is proposing to establish the due date for the state to respond to the SIP call to be 18 months after the date on which the Administrator signs the notice and disseminates it to the states. If, for example, the EPA's final findings are signed and disseminated in May 2015, then the SIP submission deadline for each of the states subject to the final SIP call would fall 18 months later, in November 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, in notice-and-comment rulemaking on the individual SIP submissions.

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

The EPA's February 2013 proposal notice included an explanation of the potential impacts on states and sources of the SIP calls proposed in that notice. That explanation is repeated here, with additions to encompass and highlight the potential impacts of the proposed further revision of the SSM Policy to disallow affirmative defense provisions for malfunctions, the proposed revisions to the earlier-proposed SIP calls and the additional SIP calls proposed in this notice. The issuance of a SIP call would require an affected state to take one or more actions to revise its SIP. These actions are described below, followed by a description of how those actions by the state may, in turn, affect sources. 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. The EPA's interpretation of those requirements will be embodied in the revised SSM Policy, which will be stated in the **Federal Register** notice for the final action in this rulemaking.

If the final SIP call identifies an automatic exemption provision in a SIP as contrary to the CAA, that provision would have to be removed entirely. An affected source could no longer depend on the automatic exemption to avoid all liability for excess emissions. If the final SIP call identifies an affirmative defense provision in a SIP as contrary to the CAA, that provision would have to be removed entirely. An affected source could no longer depend on the affirmative defense to shield it from monetary penalties assessed by a court for excess emissions; however, even in the absence of such affirmative defense provision in the SIP, a court may nevertheless decide not to assess monetary penalties in light of the effort by the source to avoid and/or minimize the excess emissions. Some other provisions, for example a problematic enforcement discretion provision, could be either 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 restatement in the **Federal Register** notice for the final rulemaking. The EPA notes that if a state removes a SIP-called provision that pertains to the exercise of enforcement discretion rather than amending the provision to remove any implication that the provision limits EPA or citizen suits, this removal would not bar the ability of the state to apply discretion in its own enforcement program but rather 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 decisions it may make 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 be required by the state to, or may have strong business reasons to, modify their physical equipment or operating practices. These changes could be aimed at improving the effectiveness of the emission control systems when operating as designed during startup and shutdown, increasing the durability of components to reduce the occurrence of malfunctions, and/or improving monitoring systems to detect and manage malfunctions promptly. If a state merely removes an exemption, affirmative defense provision, or impermissible enforcement discretion provision, an affected source may need to, or may rationally choose to, make changes of these types to better control emissions so as to comply with existing emission limits continuously and thereby reduce the risk of enforcement action. If the state establishes alternative emission limits for startup and shutdown operation, the source will need to meet these limits, but the required changes by the source, if any, could be less extensive and cost less.

Because of the diversity of the SIP provisions identified in our February 2013 proposal notice and in this supplemental proposal, the diversity of potentially affected sources, the unknown nature of the states' responses to the SIP calls, and the fact that because of existing automatic exemptions many instances of excess emissions have not routinely been reported to air agencies or the EPA, the EPA is unable to estimate the number, nature and overall cost of the changes that emission sources may ultimately make as an indirect result of the proposed SIP calls. To date, the EPA's review of the public comments received on the February 2013 proposal indicates that the information in those public comments is insufficient to allow the EPA to make such estimates.

This supplemental proposal concerns only affirmative defense provisions. The EPA's longstanding interpretation of the CAA as reflected in the existing SSM Policy does not allow a SIP to contain a director's discretion provision for excess emissions during SSM events including malfunctions, an automatic exemption for excess emissions during SSM events including malfunctions, or an enforcement discretion provision that purports to restrict citizen suits or federal personnel. The EPA is not

proposing to change those longstanding aspects of the SSM Policy. In our February 2013 proposal notice, we proposed to interpret the CAA to disallow affirmative defense provisions applicable to startup and shutdown, and in this SNPR we are proposing to interpret the CAA to further disallow affirmative defense provisions applicable to malfunctions. However, a state that receives a SIP call that includes a requirement to remove an affirmative defense for excess emissions would retain its ability to apply discretion in its enforcement program. Such enforcement discretion could be exercised case-by-case, or the SIP may include a provision that directs state personnel in the exercise of enforcement discretion. The criteria in an enforcement discretion provision could resemble the criteria previously recommended by the EPA for an affirmative defense provision for malfunctions. The enforcement discretion provision cannot apply to anyone other than state personnel. For example, the enforcement decisions of state personnel cannot define what is or is not a violation and cannot purport to limit or bar the exercise of enforcement discretion by the EPA or other parties pursuant to the citizen suit provision. An affected state could include an appropriate enforcement discretion provision in the same SIP submission that addresses the SSM provisions identified in the SIP call, or it could submit it separately.

Similar to the dependent nature of the potential impacts of our proposals in the aggregate as described above, the implications of the specific change being proposed in this notice—to disallow affirmative defense provisions for malfunctions—for a regulated source in a given state, in terms of whether and how the source would potentially have incentives to change its equipment or practices, will depend on the nature and frequency of the source's malfunction events and on how the state has chosen to revise the SIP to address excess emissions during malfunction events. After responsive SIP revisions are in place and are being implemented by the states, some sources may have strong incentives to take steps to increase the durability of components and monitoring systems to detect and manage malfunctions promptly, as a court may take such steps into consideration when determining a remedy should there be an enforcement action against excess emissions that have occurred during a malfunction. For the same reasons as cited above, the EPA is unable to estimate the number, nature and overall cost of the changes that emission sources may ultimately make as an indirect result of the revised and additional SIP calls proposed in this SNPR.

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.

The EPA believes that among the impacts on states and their residents of the SIP calls proposed in the February 2013 proposal notice and in this SNPR will be reduced aggregate emissions from industrial sources and improved air quality. For the same reasons that we are unable to estimate the number, nature and overall cost of the changes that sources may ultimately make as an indirect result of the proposed SIP calls, we are unable to estimate the total emission reduction that will be achieved for any particular pollutant or how those reductions will be distributed across the affected states and communities. The EPA believes that it is obligated and authorized to issue the proposed SIP calls to remove affirmative defense provisions even though the EPA is unable to estimate the number, nature, cost and resulting emission reductions that will indirectly result from the removal of such provisions from the affected SIPs.

III. Background for This SNPR

A. What did the Petitioner request?

The Petitioner submitted the Petition to the EPA on June 30, 2011. In the Petition, the Petitioner requested that the EPA address various types of alleged deficiencies in the Agency's SSM Policy. The SSM Policy provides EPA guidance to states with respect to SIP provisions that apply to excess emissions from sources that occur during SSM events. As described in the February 2013 proposal notice, the Petitioner included three interrelated overarching requests concerning the treatment in SIPs of excess emissions from sources during SSM events. In addition, the Petitioner requested that the EPA evaluate specifically identified existing provisions in the SIPs of 39 states that the Petitioner alleged are inconsistent with CAA requirements and with the EPA's interpretations of the CAA in the SSM Policy. The Petitioner identified the specific provisions and explained the basis for its belief that the provisions in question violate one or more requirements of the CAA.

First, the Petitioner argued that any SIP provision providing an affirmative defense for monetary penalties for excess emissions applicable in judicial proceedings is contrary to the CAA. The Petitioner based its overarching arguments concerning the legality of affirmative defense provisions in SIPs upon the explicit statutory provisions of CAA sections 113 and 304. 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 affirmative defenses for excess emissions related to startup or shutdown. *See* section IV of our February 2013 proposal notice for the EPA's proposed response at that time concerning the issue of affirmative defense provisions in SIPs. As explained in section III.B of this SNPR, the EPA did make such distinction in its proposed response in the February 2013 proposal notice, then reasoning that affirmative defense provisions were appropriate for violations due to malfunction events. The issue of affirmative defense provisions in SIPs is the focus of this SNPR, and the EPA is herein proposing to revise its prior proposed action on this issue.

Second, the Petitioner argued that many existing SIPs contain impermissible provisions,[5] 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 CAA or 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. Among the alleged deficient provisions were many that function as affirmative defense provisions, regardless of whether that specific term is used in the state law or regulation at issue and regardless of whether the EPA

[5] The term ''impermissible provision'' as used throughout this SNPR is generally intended to refer to a SIP provision that the EPA believes to be inconsistent with requirements of the CAA. As described later in this SNPR (*see* section VII.A), the EPA is proposing to find a SIP ''substantially inadequate'' to meet CAA requirements where the EPA determines that a specific SIP provision is impermissible under the CAA.

previously explicitly evaluated the provision as an affirmative defense as described in the 1999 SSM Guidance. *See* section V and section IX of our February 2013 proposal notice for the EPA's prior proposed responses concerning the various alleged SIP deficiencies; only issues related to affirmative defense provisions are addressed in this SNPR, and the EPA is proposing to revise its prior proposed action only with respect to specific affirmative defense SIP provisions.

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. *See* section VI of our February 2013 proposal notice for the EPA's proposed response concerning the issue of interpretive letters; that issue is not further addressed in this SNPR and the EPA is seeking no additional comment on this issue.

Among the fundamental concerns raised by the Petitioner was the claim that the EPA's SSM Policy is inconsistent with statutory requirements because the Agency interprets the CAA to authorize states to create SIP provisions that provide an affirmative defense for qualifying sources to assert in the event of violations for excess emissions that occur during SSM events. Even though the EPA interpreted the CAA to allow narrowly drawn affirmative provisions in SIPs that are consistent with recommended criteria intended to assure that states include appropriate limitations and conditions for affirmative defenses, the Petitioner objected to any such provisions. The Petitioner argued that any affirmative defense that purports to eliminate or alter the jurisdiction of federal courts to assess monetary penalties or any other form of relief for violations of SIP emission limits is contrary to the requirements of the CAA. In other words, no matter how narrowly drawn and no matter what the limitations or conditions for the affirmative defense may be, the Petitioner argued that no such affirmative defenses are consistent with CAA requirements for SIP provisions.

In addition, the Petitioner identified specific existing provisions in the SIPs of 14 states that were structured or characterized as affirmative defenses, regardless of whether the provisions in question were consistent with the EPA's SSM Policy as explained in the 1999 SSM Guidance. The Petitioner contended that none of these identified provisions are consistent with CAA requirements because they improperly purport to shield sources from liability for violations of SIP emission limitations through various mechanisms. The Petitioner argued that such provisions are therefore inconsistent with sections 113 and 304 and the fundamental enforcement structure of the CAA created by Congress. Even if the provisions were not otherwise contrary to CAA requirements, the Petitioner argued, each of the identified affirmative defense provisions is also inconsistent in one or more ways with the EPA's own interpretation of the CAA provided in the 1999 SSM Guidance. For example, some of the identified provisions do not apply only to monetary penalties and purport to bar injunctive relief as well, some of the provisions do not require sources to qualify for an affirmative defense through criteria comparable to those recommended by the EPA, and some of the provisions appear to make state personnel the unilateral final arbiters of whether a source qualified for an affirmative defense rather than requiring that this be determined by a trier of fact in a judicial enforcement proceeding, thereby purporting to preclude enforcement by the EPA under section 113 or by others pursuant to the citizen suit authority of section 304.

B. What did the EPA previously propose in this rulemaking with respect to affirmative defense provisions in SIPs?

The EPA published its proposed response to the Petition on February 22, 2013. In that proposal, the EPA explained the claims asserted by the Petitioner, articulated its evaluation of those claims, and proposed to take actions with respect to each of the overarching and specific claims. The proposal addressed a number of interrelated issues concerning the proper treatment of excess emissions during SSM events in SIP provisions. A key component of the proposal, however, was the EPA's evaluation of the Petitioner's claims concerning affirmative defense provisions in SIPs.

With respect to the Petitioner's overarching claim that the EPA's interpretation of the CAA in the SSM Policy permitting states to have affirmative defenses in SIP provisions is in error, the EPA proposed to deny in part and to grant in part. The EPA proposed to deny the Petitioner's claim with respect to affirmative defenses applicable to malfunction events, on the theory that the CAA allows such provisions so long as they are sufficiently narrowly drawn. The EPA reasoned that such provisions are appropriate for violations due to genuine malfunction events, in order to resolve the inherent tension between the fact that the CAA requires that SIP emission limitations must apply continuously and the fact that even properly designed, maintained and operated sources may sometimes have difficulty meeting emission limitations for reasons beyond their control. By contrast, the EPA proposed to grant the Petitioner's claim with respect to affirmative defenses applicable to planned events such as startup and shutdown. This was a change from the EPA's interpretation of the CAA in the 1999 SSM Guidance, in which the EPA previously recommended that states could elect to create such affirmative defense provisions for startup and shutdown events, so long as the provisions were narrowly drawn and consistent with the recommended criteria to assure that they meet CAA requirements. The EPA's evaluation of the Petition and the statutory basis for affirmative defense provisions caused the Agency to reconsider the appropriateness of affirmative defense provisions applicable during startup and shutdown, which are ordinary modes of operation that are generally predictable and within the control of the source. As explained in more detail in the February 2013 proposal notice, the EPA's evaluation in light of then recent case law indicated that providing affirmative defenses applicable during planned events such as startup and shutdown was not consistent with the EPA's interpretation of the CAA to support such provisions for malfunctions and was tantamount to allowing sources to be shielded from monetary penalties for violations due to conduct that is predictable and within their control.[6]

[6] Some commenters on the February 2013 proposal notice 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 it will at least occasionally start up and shut down, and thus these modes of source operation are ''normal'' in the sense that they are

With respect to the specific affirmative defense provisions identified by the Petitioner as deficient, the EPA evaluated each of the provisions to determine whether they were consistent with the EPA's interpretation of the CAA concerning such provisions at the time. This evaluation included examination of the specific provisions in light of the EPA's interpretations of the CAA and recommendations in the 1999 SSM Guidance, as updated in the February 2013 proposal notice (*e.g.,* the revision to the EPA's guidance concerning affirmative defenses for single sources with the potential to cause exceedances of the NAAQS). As a result, the EPA proposed to deny the Petition with respect to the claims concerning affirmative defense provisions to the extent applicable to malfunction events in three jurisdictions: (i) Arizona; (ii) Maricopa County, Arizona; and (iii) Colorado. The EPA proposed to deny the Petition with respect to these affirmative defense provisions to the extent applicable to malfunction events because at that time the EPA believed them to be consistent with the CAA and EPA guidance in the 1999 SSM Policy. The EPA proposed to grant the Petition with respect to the claims concerning affirmative defense provisions in the following jurisdictions: (i) Alaska; (ii) Arizona (affirmative defense for startup and shutdown only); (iii) Maricopa County, Arizona (affirmative defense for startup and shutdown only); (iv) Arkansas; (v) Colorado (affirmative defense for startup and shutdown only); (vi) District of Columbia; (vii) Illinois; (viii) Indiana; (ix) Jefferson County, Kentucky; [7] (x) Michigan; (xi) Mississippi; (xii) New Mexico; (xiii) Virginia; and (xiv) Washington. The EPA's evaluation of the specific provisions in these states identified a variety of deficiencies as explained in more detail in section IX of the February 2013 proposal notice. In general, the EPA considered these provisions deficient because they extended not only to monetary penalties but also to injunctive relief, because they had insufficient criteria to assure that they were sufficiently narrowly drawn, because they extended to events that were not malfunctions, or because of some combination of these concerns.

C. What events necessitated this SNPR?

Subsequent to EPA's issuance of the February 2013 proposal, a federal court ruled that CAA sections 113 and 304 preclude EPA authority to create affirmative defense provisions in the Agency's own regulations imposing emission limits 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 U.S. Court of Appeals for the District of Columbia Circuit issued that decision in *NRDC* v. *EPA* on April 18, 2014.[8] 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 court's decision in *NRDC* v. *EPA* [9] pertained to a challenge to the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations issued pursuant to CAA section 112 to regulate hazardous air pollutants from sources that manufacture Portland cement.[10] In addition to imposing specific emission limitations for the relevant pollutants from the affected sources, the EPA also created an affirmative defense that sources could assert in judicial enforcement proceedings for violations due to excess emissions that occur during qualifying malfunction events. 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 and the source's conduct before, during and after the event. The EPA notes that 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 explicitly repeated these same recommended criteria to states in the February 2013 proposal notice. In addition, the EPA provided sample regulatory text in the February 2013 proposal notice drawn from a comparable NESHAP that the EPA recently promulgated for another source category, to illustrate how states might elect to word appropriate affirmative defense provisions in SIPs.[11] In other words, the affirmative defense provision at issue in the *NRDC* v. *EPA* case was essentially equivalent to the type of provision, both conceptually and in terms of specific regulatory language, which the EPA would previously have considered consistent with CAA requirements for affirmative defense provisions for malfunction events in SIPs.

The EPA believes that the opinion of the court in *NRDC* v. *EPA* has significant impacts on the Agency's SSM Policy and on the positions that the EPA took in the February 2013 proposal notice with respect to issues related to affirmative defenses. Section IV of the February 2013 proposal notice describes in detail the EPA's prior evaluation of the Petition with respect to the overarching issue of affirmative defense provisions in SIPs. In general, the EPA proposed: (i) To deny the request to rescind the SSM Policy with respect to interpreting the CAA to allow states to elect to include appropriately tailored affirmative defense provisions for violations due to excess emissions during periods of malfunction; and (ii) to grant the request to rescind the SSM Policy with respect to affirmative defense provisions for violations due to excess emissions during periods of startup and shutdown. Consistent with this interpretation of the CAA, the EPA previously proposed to revise its SSM Policy to clarify that states could elect to create affirmative defenses in SIP provisions only for malfunction events, and so long as such provisions were narrowly drawn, as recommended in the EPA's guidance. Even these more narrowly defined affirmative defense provisions are no longer consistent with CAA requirements under the reasoning adopted by the court in *NRDC* v. *EPA.*

In addition, section IX of the February 2013 proposal notice provided the EPA's evaluation of each of the specific

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 and which could not have been precluded by proper source design, maintenance and operation.

[7] The EPA notes that the state of Kentucky has now revised the SIP provisions applicable to Jefferson County (Louisville) and eliminated the SIP inadequacies identified in the February 2013 proposal notice. The EPA has already approved the necessary SIP revisions. *See* 79 FR 33101 (June 10, 2014). Accordingly, the EPA's final action on the Petition will not need to include a finding of substantial inadequacy and SIP call for Jefferson County, Kentucky. The recently approved revision did not create an affirmative defense provision, so there is no need to readdress this issue in this jurisdiction.

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

[9] *Id.*

[10] The NESHAP promulgated after the 1990 CAA Amendments are also referred to as ''maximum achievable control technology'' or ''MACT'' standards.

[11] *See* February 2013 proposal notice, 78 FR 12459 at 12478–80.

SIP provisions identified by the Petitioner and proposed to take action on them, in accordance with EPA's interpretation of the CAA for such provisions at that time. These SIP provisions included affirmative defense provisions of various types, including some that the Agency had previously approved as consistent with its interpretation of the CAA in the 1999 SSM Guidance. The EPA evaluated these provisions on a case-by-case basis and proposed either to grant or to deny the Petition with respect to each provision, consistent with the EPA's then current interpretation of the CAA for such provisions.

The recent decision by the U.S. Court of Appeals for the District of Columbia Circuit in *NRDC* v. *EPA* has called into question the legal basis for affirmative defense provisions applicable to violations of CAA requirements. The reasoning used by that 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 the federal courts to impose relief for violations of CAA requirements in SIPs, including the courts' power to restrain violations, to require compliance, and to assess monetary penalties for any violations in accordance with factors provided in CAA section 113(e)(1).

The EPA acknowledges that its SSM Policy since the 1999 SSM Guidance has interpreted the CAA in such a way that states could in effect alter the jurisdiction of federal courts to assess monetary penalties under certain conditions through creation of affirmative defenses. In other words, even though Congress explicitly empowered federal courts to assess monetary penalties for a CAA violation, an affirmative defense could, contrary to the statute, limit the ability of a court to do so. The EPA believes that the court's decision in *NRDC* v. *EPA* compels the Agency to reevaluate its interpretation of the CAA and its proposed action on the Petition concerning affirmative defense provisions in SIPs. As a result, in this SNPR we are revising what we previously proposed as our response to the Petition, but only to the extent relevant to the issue of affirmative defense provisions in SIPs. In section III.C of this SNPR, the EPA explains in detail why the court's interpretation of relevant CAA provisions indicates that states do not have authority to create, and thus the EPA does not have authority to approve, SIP provisions that include an affirmative defense that would operate to alter the jurisdiction of federal courts to assess penalties or other forms of relief authorized in sections 113 and 304. In section VII of this SNPR, the EPA explains how the decision affects the February 2013 proposal with respect to specific provisions in the SIPs of particular states. In section VII of this SNPR, the EPA also includes affirmative defense provisions found in six states' SIPs that the Agency has identified independently, and the EPA explains why each of these additional provisions fails to meet CAA requirements and thus necessitates a finding of substantial inadequacy and a SIP call as well. The EPA is including the additional provisions to assure that it provides comprehensive guidance with respect to this issue to all states and to alleviate confusion that may arise as a result of recent regulatory actions and litigation concerning affirmative defense provisions.

IV. What is the EPA proposing through this SNPR in response to the petitioner's request for rescission of the EPA policy on affirmative defense provisions?

A. Petitioner's Request

The February 2013 proposal notice explained in detail the Petitioner's claims with respect to affirmative defense provisions in SIPs, but it is helpful to repeat the full argument here in order to explain the reasons for the EPA's revised proposal in this SNPR. Understanding those specific claims in light of the court's decision in the *NRDC* v. *EPA* decision serves to illustrate the need for the EPA to reexamine the statutory basis for any affirmative defense in SIP provisions, not merely those provisions limited to malfunction events or to those for malfunction events that are sufficiently narrowly drawn to be consistent with the EPA's prior interpretation of the CAA in the 1999 SSM Guidance.

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.[12] 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.[13] 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.[14] The EPA interpreted 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 jurisdiction to the district courts to determine penalties that should be assessed in an enforcement action involving the violation of an emissions limit.'' [15] 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.'' In addition, the Petitioner cited the provisions of CAA section 304(a), which specifically pertain to citizen suit enforcement and which reiterate that the federal courts have jurisdiction to assess monetary penalties for violations as well as to impose other remedies.[16] 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.[17] The Petitioner

[12] Petition at 11.

[13] *Id.*

[14] Petition at 12.

[15] Petition at 10.

[16] Petition at 11.

[17] *Id.*

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.'' [18]

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.[19] 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 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.

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. 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 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.'' [20] The Petitioner drew no distinction between affirmative defenses for unplanned events such as malfunctions and planned events such as startup and shutdown.

[18] *Id.*

[19] *Id.*

[20] *Id.*

B. The EPA's Proposed Revised Response

As a preliminary matter, the EPA acknowledges that its interpretation of the CAA in its SSM Policy, since issuance of the 1999 SSM Guidance, has been that states may elect to have narrowly drawn affirmative defense provisions in SIPs, so long as they meet certain requirements (*e.g.,* that they only apply to monetary penalties and not to injunctive relief). The EPA's longstanding guidance has also provided very specific recommendations to states concerning how to develop affirmative defense provisions that would be consistent with CAA requirements (*e.g.,* such provisions should require sources to prove in an enforcement proceeding that the violations are not so repetitive as to indicate that the source is improperly designed, maintained or operated). The EPA further acknowledges that it has previously approved affirmative defense provisions in SIPs or, when appropriate, promulgated affirmative defenses in federal implementation plans (FIPs). Indeed, the EPA's approval of affirmative defense provisions in SIPs or promulgation of such provisions in FIPs has been upheld by courts in several decisions.[21]

Most significantly, the EPA's November 2010 approval of an affirmative defense applicable to ''unplanned events'' (*i.e.,* malfunctions) and disapproval of an affirmative defense applicable to ''planned events'' (*e.g.,* planned startup and shutdown) in a Texas SIP submission were challenged by numerous parties. In 2012, the U.S. Court of Appeals for the 5th Circuit upheld EPA's actions, including both the Agency's approval and disapproval of the affirmative defense provisions applicable to the respective types of events.[22] In that litigation, the EPA defended its approval and disapproval actions, including the filing of an opposition to a petition for *certiorari* filed by industry challengers concerning the disapproval of the affirmative defense for planned events. Throughout the litigation over the Texas SIP revision, the EPA reiterated what was at the time its view that appropriately drawn affirmative defense provisions applicable to malfunctions can be consistent with CAA requirements for SIPs. In particular, the EPA argued in that litigation that sections 113 and 304 do not preclude appropriately drawn affirmative defense provisions for malfunctions in SIPs. The 5th Circuit applied the two-step *Chevron* analysis to the EPA's interpretation of section 113 in connection with both the approval of the affirmative defense provision applicable to ''unplanned events'' and the disapproval of the affirmative defense provision applicable to ''planned events.'' With respect to both the approval and disapproval, the court held that the Agency's interpretation of the CAA at that time was a ''permissible interpretation of section [113], warranting deference.'' [23] Subsequent events have caused EPA to reevaluate this interpretation of the CAA requirements.

The EPA has carefully evaluated the more recent April 2014 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *NRDC* v. *EPA* in which the court came to a contrary conclusion with respect to the legal basis for an affirmative defense provision in the Agency's own regulations.[24] In light of this more recent decision, the EPA 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. 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.[25] In order to explain more fully why the EPA believes that the court's decision in *NRDC* v. *EPA* requires the Agency to change its SSM Policy and to revise its February 2013 proposal notice with respect to affirmative defense provisions in SIPs, the EPA will first explain why it believes that the reasoning of the court's decision is more broadly applicable and will then explain why it believes that the specific reasons given by the court for rejecting the EPA's prior interpretation of the CAA would apply with equal weight to SIP provisions.

[21] *See Luminant Generation Co.* v. *EPA,* 714 F.3d 841 (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), *cert. denied,* 134 S.Ct. 387 (2013); *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).

[22] *Luminant Generation Co.* v. *EPA,* 714 F.3d 841 (5th Cir. 2012), *cert. denied,* 134 S.Ct. 387 (2013).

[23] *See Luminant Generation Co.* v. *EPA,* 714 F.3d 841, at 851 and 856 (5th Cir. 2012).

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

[25] See, e.g., *White Stallion Energy Center, LLC* v. *EPA,* 748 F.3d 1222, 1235 (D.C. Cir. 2014) (citing *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 EPA believes that the reasoning of the court's decision in *NRDC* v. *EPA* applies more broadly than to the specific facts of the case for several reasons. First, the EPA notes that the court's decision did not turn upon the specific provisions of CAA section 112. Although the court only evaluated the legal validity of an affirmative defense provision created by the EPA in conjunction with specific standards applicable to manufacturers of Portland cement, the court based its decision upon the provisions of sections 113 and 304 that pertain to enforcement of CAA requirements more broadly, including to SIPs. Sections 113 and 304 pertain to administrative and judicial enforcement generally and are in no way limited to enforcement of emission limitations promulgated by the EPA under section 112. Thus, the EPA does not think that the mere fact that the court only addressed the legality of an affirmative defense provision in this particular context means that the court's interpretation of sections 113 and 304 does not also apply more broadly. To the contrary, the EPA sees no reason why the logic of the court concerning sections 113 and 304 would not apply to SIP provisions as well.

Second, the EPA notes that 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. The court was clearly cognizant that a similar legal issue had arisen in litigation in the U.S. Court of Appeals for the 5th Circuit concerning the Texas SIP and merely acknowledged that fact and clearly stated in this footnote: ''[W]e do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan.'' [26] Given that the case before the court did not pertain to SIP provisions and thus the legal validity of affirmative defense provisions in a SIP did not need to be decided, the EPA believes that footnote 2 simply reflects the court's desire to be clear that it was only addressing the question of whether sections 113 and 304 preclude any EPA authority to create an affirmative defense applicable to private civil suits in its own regulations. However, the EPA believes that the logic of the court's decision in *NRDC* v. *EPA* regarding the import of sections 113 and 304 does extend to SIP provisions. In the remainder of this section of the SNPR, we explain in greater detail why we now think the D.C. Circuit's reading of the statute is the correct one.

Finally, the EPA notes that the fact that the court only addressed the legality of affirmative defense provisions in the context of citizen suit enforcement—which by definition is judicial rather than administrative enforcement—does not affect the relevance of the court's reasoning with respect to the legal basis for affirmative defenses in SIP provisions. Under the CAA, a state has the initial responsibility to develop and submit SIP submissions to meet various requirements (*e.g.,* to impose reasonably available control measures on sources in nonattainment areas). The EPA's evaluation and approval of the state's SIP submission in turn makes the contents of the submission federally enforceable parts of the SIP. Pursuant to sections 113 and 304, the state, the EPA and citizens then have the ability to seek to bring enforcement actions for violations of the requirements of the SIP in federal court. Thus, the court's logic in *NRDC* v. *EPA* would also apply to the provisions of the state's SIP, and the jurisdiction of a court to impose penalties or other forms of relief for violations of SIP requirements under the CAA cannot be altered by an affirmative defense in a state's SIP provision in the same way that it cannot be altered by such a provision in an EPA regulation.

Just as the court's decision is not limited in ways that would preclude it from applying to SIP provisions, the EPA also believes that the logic of the decision would apply with equal weight to affirmative defense provisions in SIPs for a number of reasons. Most significantly, the court rejected a series of arguments that the EPA made to support its legal authority under the CAA to create an affirmative defense in the Portland cement NESHAP. The EPA made the same or comparable arguments to support its interpretation of the CAA to provide authority for states to elect to create, and for the EPA to approve, affirmative defense provisions in SIPs applicable in judicial enforcement cases. The EPA has carefully evaluated the reasoning of the court in the *NRDC* v. *EPA* decision and now believes that its prior interpretation of the CAA with respect to affirmative defense provisions in the SSM Policy, as first stated in the 1999 SSM Guidance and as updated in the February 2013 proposal notice, was incorrect and would not withstand judicial review in light of the *NRDC* v. *EPA* decision. Evaluation of the key points of the court's reasoning in the decision indicates that the court's interpretation of the relevant statutory provisions applies equally to SIP provisions.

First, the *NRDC* v. *EPA* court examined the litigants' key argument that the EPA has no authority to alter the jurisdiction of courts to assess monetary penalties or to alter the factors that courts must consider when assessing the amount of such penalties. The litigants argued that the EPA's creation of an affirmative defense had the effect of altering or eliminating the jurisdiction of the federal courts to impose penalties in a citizen suit enforcement proceeding. The *NRDC* v. *EPA* court evaluated the litigants' argument with a straightforward reading of CAA section 304(a) concerning the rights of ''any person'' to bring an enforcement action and the jurisdiction of federal courts to assess liability and penalties in such an action and of CAA section 113(e)(1) concerning the factors that courts must consider when assessing civil penalties. Citing recent U.S. Supreme Court precedent, the court reasoned that section 304(a) creates a private right of action and that the courts alone are vested with authority to determine the scope of remedies in judicial enforcement, rather than the administrative agency. The *NRDC* v. *EPA* court treated this issue as a question that it could answer with a *Chevron* step 1 plain reading of the statute and evidently saw no ambiguity concerning whether the EPA has authority to alter the rights of litigants to seek monetary penalties for violations or to alter the jurisdiction of the federal courts to assess such penalties. In retrospect and in light of the court's decision, the EPA believes that this is the correct reading of CAA sections 113 and 304 with respect to this question in the SIP context as well. Thus, these statutory provisions functionally bar affirmative defense provisions in SIPs that would have the effect of altering the rights of litigants or the authority of the courts in the event of enforcement for violations of SIP requirements.

Second, the *NRDC* v. *EPA* court evaluated the EPA's argument that an affirmative defense ''fleshes out the statutory requirement that penalties be applied only when 'appropriate.' '' [27] The EPA had argued that CAA section 304(a) provides federal district courts with jurisdiction to ''apply any appropriate civil penalties'' and that such penalties would only be ''appropriate'' if the regulation being enforced specifically provided for such penalties in the first place. In other words, the EPA argued, if the regulation

[26] *See NRDC* v. *EPA,* 749 F.3d 1055, 1063 (D.C. Cir. 2014).

[27] *See NRDC* v. *EPA,* 749 F.3d 1055, 1063 (D.C. Cir. 2014).

contained an affirmative defense that precluded monetary penalties under certain circumstances, then it would not be ''appropriate'' for a court to assess the penalties in those circumstances. The *NRDC* v. *EPA* court disagreed with this argument, stating unequivocally that under the CAA ''deciding whether penalties are 'appropriate' is a job for the courts, not EPA.'' [28] To the extent that a defendant in an enforcement case has a basis for arguing that monetary penalties should be reduced, the court stated that CAA section 113(e)(1) already provides courts with factors that may be taken into consideration. The court emphasized that in judicial enforcement, the court decides whether or not to accept a defendant's arguments concerning the assessment of penalties, not the EPA. In the February 2013 proposal notice, the EPA relied on this same argument to support its position that affirmative defense provisions in SIPs would not contradict CAA sections 113 and 304 and to justify its proposed denial of the Petition with respect to affirmative defenses applicable to malfunctions events.[29] Given that the court has rejected this interpretation of the CAA for the EPA's own regulations, the EPA believes that the same principle applies to states that seek to alter the ability of federal courts to assess penalties for violations of CAA requirements in SIP provisions. If states have no authority to alter the jurisdiction of federal courts to impose remedies for violations explicitly provided for in the CAA, then this affects the EPA's authority to approve any such SIP provisions as consistent with the requirements of the CAA. Pursuant to its authority and responsibility under sections 110(k), 110(l) and 193, the EPA can only approve SIP provisions that comply with the applicable substantive requirements of the CAA. Approving an affirmative defense provision into a SIP that would purport to contravene the jurisdiction of federal courts to determine liability and to impose remedies in accordance with sections 113 and 304 would thus be inappropriate.

Third, the *NRDC* v. *EPA* court scrutinized the EPA's argument that it has authority under CAA section 301 to create an affirmative defense through the general authority of the EPA Administrator ''to prescribe such regulations as are necessary to carry out his functions under'' the CAA.[30] In the February 2013 proposal notice, the EPA did not make this particular argument because it was not proposing EPA regulations to implement the CAA, rather it was proposing action on a petition for rulemaking that entails evaluating the EPA's guidance to states in the SSM Policy concerning whether specific types of SIP provisions are consistent with CAA requirements. Nevertheless, the EPA notes, the court rejected the notion that the EPA has any authority to promulgate regulations that would alter or eliminate the jurisdiction of federal courts to assess penalties when Congress has already directly spoken to that issue. As the court expressed it, ''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.'' The EPA believes that the court's reasoning would extend to situations where the EPA is required to determine whether or not an affirmative defense provision is consistent with CAA requirements. Following this reasoning, the EPA would not have authority, through rulemaking on a state's SIP submission or otherwise, to approve an affirmative defense provision applicable in a judicial enforcement action, because to do so would be inconsistent with the statutory allocation of jurisdiction to the federal courts. In other words, just as the EPA's authority to promulgate regulations to implement the CAA does not encompass the authority to overwrite statutory provisions, the EPA likewise lacks authority to issue guidance to states concerning SIP provisions in the SSM Policy, or to approve a SIP submission that contains such SIP provisions, in a way that would likewise overwrite statutory provisions where Congress has spoken directly.

Fourth, the *NRDC* v. *EPA* court weighed the EPA's argument that CAA section 304 does not ''expressly deny'' EPA authority to create affirmative defenses and thus the EPA is not precluded from doing so.[31] Because the statute is silent with respect to whether or not such provisions are permissible, the EPA inferred that the EPA had authority to create them as a component of the Portland cement NESHAP. In the February 2013 proposal notice, the EPA used a comparable argument that sections 110(a), 113(b) and 113(e) of the CAA do not expressly forbid affirmative defense provisions in SIPs, both to support its position that states could elect to have affirmative defense provisions for malfunctions in SIPs and in support of its proposed denial of the Petition on this point.[32] In response to this particular argument, the *NRDC* v. *EPA* court rejected the suggestion that a court should ''presume a delegation of power absent an express withholding of such power'' as inconsistent with the principles of statutory interpretation under *Chevron*. The court thus expressly rejected the argument that affirmative defense provisions are consistent with the CAA by virtue of the fact that Congress has not explicitly forbidden them, especially in the face of conflicting provisions such as those in sections 113(b) and 304(a) giving jurisdiction to federal courts to assess penalties for violations of CAA requirements. The EPA now believes that this same reasoning applies to affirmative defense provisions in SIPs.

Finally, the *NRDC* v. *EPA* court evaluated the EPA's argument that affirmative defense provisions are ''necessary to account for the tension between requirements that emission limitations be 'continuous' and the practical reality that control technology can fail unavoidably.'' [33] This tension is an important point that the EPA has long noted as a basis for its interpretation of the CAA to allow affirmative defense provisions, not only in its own regulations such as the Portland cement NESHAP, but also in the SSM Policy providing guidance to states for SIP provisions. In the February 2013 proposal notice, the EPA used this same argument and the same case law support to justify its position that states could elect to have affirmative defense provisions for malfunctions in SIPs and for its proposed denial of the Petition on this point.[34] The *NRDC* v. *EPA* court agreed that this would be a ''good argument'' for a source to make in an enforcement proceeding but made clear that this ''tension'' does not give the EPA legal authority to create an affirmative defense.[35] The court thus

[28] *See NRDC* v. *EPA,* 749 F.3d 1055, 1062 (D.C. Cir. 2014).

[29] *See* February 2013 proposal notice, 78 FR 12459 at 12472 (middle column).

[30] *See NRDC* v. *EPA,* 749 F.3d 1055, 1063 (D.C. Cir. 2014).

[31] *Id.*

[32] *See* February 2013 proposal notice, 78 FR 12459 at 12470 (middle column); 12470 (right column); 12472 (right column).

[33] *See NRDC* v. *EPA,* 749 F.3d 1055, 1063 (D.C. Cir. 2014).

[34] *See* February 2013 proposal notice, 78 FR 12459 at 12470 (left column); 12472 (right column); 12487 (left column).

[35] The EPA interprets the court's opinion to mean that a defendant in an enforcement proceeding might want to make this argument as part of its efforts to seek lower penalties, consistent with the factors listed in CAA section 113(e). The court's reference to the EPA's making such an argument relates back to the court's earlier suggestion that the EPA could seek to participate as an intervenor or an *amicus* in a citizen suit enforcement matter if it

Continued

summarily rejected the EPA's argument that the need to ''balance'' the objectives of the CAA and to resolve the ''tension'' in the CAA authorizes creation of affirmative defenses that purport to alter or eliminate the jurisdiction of the courts to assess monetary penalties or other forms of relief. Given the result in the *NRDC* v. *EPA* decision, the EPA believes that this argument can no longer be a basis for the EPA's approval of affirmative defense provisions in SIPs that would apply in judicial enforcement actions. The net result would be that sources can continue to make this practical argument in the context of judicial enforcement proceedings and that this consideration would remain relevant in that forum, but without intercession by states or the EPA concerning whether the source should be liable for penalties in any specific circumstance through an affirmative defense provision in the SIP. In accordance with CAA section 113(e), sources retain the ability to seek lower monetary penalties through the statutory 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 or eliminate otherwise applicable monetary penalties in a particular situation.

In light of the court's decision in *NRDC* v. *EPA,* the EPA believes it necessary to revise its SSM Policy and its February 2013 proposed response to the Petition with respect to the issues related to affirmative defense provisions in SIPs. Given the court's reasoning that sections 113 and 304 preclude the EPA from having authority to create an affirmative defense applicable in private civil suits in federal regulations because such a provision would impinge upon jurisdiction explicitly provided by Congress to the courts, the EPA believes that its past guidance to states in the SSM Policy is flawed. If the EPA has no authority to create affirmative defenses because it cannot alter the jurisdiction of the courts to assess penalties in enforcement proceedings for violations of CAA requirements, then it follows that states likewise cannot alter the jurisdiction of the federal courts in SIP provisions and the EPA cannot approve any SIP provision that purports to do so. The EPA emphasizes that the same logic applies to any SIP provision that purports to eliminate, restrict or otherwise alter the jurisdiction of federal courts to impose any of the expressly listed forms of relief in section 113(b), not merely those applicable to monetary penalties.[36] 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.

For the foregoing reasons, in this SNPR the EPA is proposing to grant the Petition with respect to the Petitioner's request that the EPA rescind its SSM Policy element interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events. Unlike the EPA's view at the time of the February 2013 proposal notice, the EPA now sees no valid basis for interpreting the CAA to permit affirmative defense provisions in SIPs for violations due to excess emissions during any type of event, whether that event is a malfunction totally beyond the control of the source or a planned event within the control of the sources such as a startup or shutdown.

V. Revised SSM Policy on Affirmative Defense Provisions in SIPs

In the February 2013 proposal notice, the EPA evaluated the issues raised by the Petitioner concerning the treatment of excess emissions during SSM events in SIP provisions. As part of responding to the Petition, the EPA proposed to clarify, reiterate and revise its longstanding SSM Policy. In this SNPR, the EPA is now proposing to revise further its interpretation of the CAA with respect to affirmative defense provisions applicable to excess emissions during SSM events.

Based upon a reevaluation of the CAA with respect to SIP provisions, and upon careful consideration of the implications of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

At this juncture, the EPA believes that the reasoning of the U.S. Court of Appeals for the District of Columbia Circuit in *NRDC* v. *EPA* logically extends to affirmative defense provisions created by states in SIPs, as well as to such provisions created by the EPA in its own regulations. Given that sections 113 and 304 functionally bar any affirmative defense that purports to alter or to eliminate the jurisdiction of federal courts to assess penalties for violations of CAA requirements or to impose the other remedies listed in section 113(b), this principle applies to SIP provisions as well. Although the *NRDC* v. *EPA* decision focused on the jurisdiction of the federal courts to assess civil penalties for violations of EPA regulations promulgated under section 112, because that was what was specifically at issue in the case before it, the EPA sees no reason why the same logic would not apply to any SIP provision that purported to alter or eliminate the jurisdiction of the federal courts to exercise their authority in the event of violations as provided in CAA section 113(b), including the authority to restrain violations, to require compliance, to assess civil penalties, to collect any fees and to award any other appropriate relief. In other words, affirmative defense provisions in SIPs that purport to alter or eliminate the broad authority of federal courts to award any of these types of relief in the event of an enforcement action, whether pursuant to section 113 or section 304, are likewise contrary to the enforcement structure of the CAA. Accordingly, the EPA proposes to revise its SSM Policy to interpret the CAA to preclude affirmative defense provisions in SIPs. When finalized, this rulemaking will embody the EPA's revised SSM Policy, and it will provide the most up-to-date and comprehensive EPA guidance on

wants to take a position on what monetary penalties are ''appropriate'' for a given violation.

[36] The EPA notes that CAA section 113(b) expressly gives federal courts jurisdiction ''to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief.'' Similarly, CAA section 304 expressly provides that in the context of a citizen suit enforcement case, federal courts have jurisdiction ''to enforce such an emission standard or limitation, or such an order . . . and to apply any appropriate civil penalties.'' In the latter section, the term ''emission standard or limitation'' is defined broadly in section 304(f).

the subject of the proper treatment of excess emissions from sources during SSM events in SIP provisions.

VI. Legal Authority, Process and Timing for SIP Calls

In section VIII of the February 2013 proposal notice, the EPA explained in detail its statutory authority under CAA section 110(k)(5) to issue a SIP call to states to address SIP deficiencies, the process for making such a SIP call and the timing for such a SIP call. In this SNPR, the EPA is not revising its interpretations of the CAA with respect to those issues and thus is not seeking comment on these topics. The EPA is revising one aspect of the February 2013 proposal notice with respect to the basis for the proposed SIP calls for affirmative defense provisions. In the February 2013 proposal notice, the EPA explained its basis for concluding that different types of deficient SIP provisions identified in the Petition are substantially inadequate to comply with requirements of the CAA and thus warrant a SIP call for a state to revise or to eliminate the impermissible provision. With respect to affirmative defense provisions, the EPA articulated its evaluation of why inadequate affirmative defense provisions applicable to malfunction events, or any affirmative defense provisions applicable to planned events like startup and shutdown, would be inconsistent with fundamental legal requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304.[37] The rationale provided by the EPA in the February 2013 proposal notice was obviously based upon the Agency's interpretation of the relevant requirements of the CAA at the time of that proposal.

In light of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *NRDC* v. *EPA,* however, the EPA has reevaluated whether any form of affirmative defense provision is consistent with CAA requirements for SIP provisions. The court concluded that the EPA has no authority to alter the rights of litigants to seek monetary penalties for violations of CAA requirements and no authority to alter the broad jurisdiction of federal courts to assess such penalties for such violations under CAA sections 113 and 304. The EPA believes that the logic of the court's decision extends to the jurisdiction of the federal courts to impose other remedies expressly provided for in sections 113 and 304 as well. These sections of the CAA are thus among the fundamental requirements with which SIPs must comply in order to be consistent with the enforcement structure created by Congress in the CAA.

The EPA notes that the *NRDC* v. *EPA* court did not condition its decision on considerations such as whether the use of the affirmative defense provision in the Portland cement NESHAP would have a demonstrated causal connection to a given environmental impact (or undermine a specific enforcement action); the court decided the question based solely on the fundamental legal requirements of the CAA, which apply equally to SIPs. The court viewed the statutory requirements for enforcement of violations as a legal bar to the EPA's creating an affirmative defense. The EPA believes that this decision supports the EPA's view that an affirmative defense provision in a SIP that would operate to interfere with the rights of litigants to seek penalties for violations of the SIP or other statutory forms of relief, or to interfere with the jurisdiction of courts to assess penalties or other relief for such violations, is a substantial inadequacy because such provision would violate fundamental legal requirements of the CAA. This potential for interference with the intended enforcement structure of the CAA is sufficient to establish that such an affirmative defense provision is substantially inadequate to meet CAA requirements, and there is no need to demonstrate that the use of the affirmative defense would be causally connected to any particular impact (*e.g.,* a specific violation of a NAAQS at a particular monitor on a particular day, or the undermining of effective enforcement for a particular violation by a particular source). By specifying that parties have the right to seek relief for violations and that courts have jurisdiction to impose relief for such violations, the EPA believes, Congress has already made the determination that SIP provisions have to be consistent with the requirements of CAA sections 113 and 304 without regard to impact on other CAA requirements such as demonstrating attainment. Accordingly, the EPA has the authority and the responsibility to assure that SIP provisions meet the requirements of CAA sections 113 and 304 and do not undermine the enforcement structure for SIPs that was created in the CAA.

[37] *See* February 2013 proposal notice, FR 12459 at 12487–88.

VII. What is the EPA proposing through this SNPR for each of the specific affirmative defense provisions identified in the Petition or identified independently by the EPA?

A. Overview of the EPA's Evaluation of Specific Affirmative Defense SIP Provisions

In addition to its overarching request that the EPA revise its interpretation of the CAA in the SSM Policy with respect to any form of affirmative defense provisions in SIPs, the Petitioner identified specific existing affirmative defense provisions that the Petitioner contended are not consistent with the EPA's own interpretation of the CAA as expressed in the 1999 SSM Guidance. In general, the provisions identified by the Petitioner are structured as affirmative defense provisions, regardless of whether they use the term ''affirmative defense'' and regardless of whether the EPA ever specifically evaluated the provisions with respect to the recommendations for such provisions in the 1999 SSM Guidance. While not agreeing with the EPA's guidance for affirmative defense provisions, the Petitioner expressed concern that all of the identified provisions fail to address some or all of the criteria for affirmative defense provisions that the EPA recommended in the 1999 SSM Guidance.

In the February 2013 proposal notice, the EPA explained that it was reviewing each identified affirmative defense provision on the merits. At that time, the EPA was operating under the belief that its interpretation of the CAA with respect to affirmative defense provisions in SIPs was correct. Accordingly, the EPA evaluated each of the provisions for consistency with the EPA's interpretation of the CAA as set forth in the 1999 SSM Guidance and as it was revising its interpretation in the February 2013 proposal notice. The February 2013 proposal notice thus contained the EPA's proposal 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 violations due to malfunctions for sources under certain circumstances consistent with the overarching CAA objectives, such as attaining and maintaining the NAAQS. In addition, the EPA proposed 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.

Now, however, the EPA is reevaluating each of the specific affirmative defense provisions identified by the Petitioner for consistency with the CAA in light of the court's decision in *NRDC* v. *EPA.* As explained in section III.C of this SNPR, the EPA is revising its interpretation of the CAA concerning the legal basis for affirmative defense provisions. Given that the reasoning of the court applies equally to SIP provisions, the EPA is proposing to grant the Petition with respect to each of these provisions. Thus, the EPA is proposing to find that these provisions are substantially inadequate because they are not consistent with fundamental legal requirements of the CAA and the EPA is proposing to issue a SIP call to each affected state for these specific provisions.

In addition to provisions identified by the Petitioner, the EPA is independently identifying other specific existing problematic affirmative defense provisions in SIPs. As a result, the EPA is newly including one or more affirmative defense provisions in the SIPs of the following four states: (1) New Mexico (Albuquerque-Bernalillo County); (2) Texas; (3) California (Eastern Kern Air Pollution Control District, Imperial County Air Pollution Control District and San Joaquin Valley Air Pollution Control District); and (4) Washington (Energy Facility Site Evaluation Council and Southwest Clean Air Agency). The EPA is including these additional affirmative defense provisions in this SNPR in order to provide comprehensive guidance to all states concerning such provisions in SIPs and to avoid confusion that may arise due to recent Agency administrative actions, litigation and resulting court decisions relevant to such provisions under the CAA. In particular, the EPA is concerned that its explicit approval of affirmative defense provisions in the SIPs of other states as being consistent with the requirements of the CAA as reflected in the 1999 SSM Guidance warrants affirmative action by the Agency to ask those states to revise their SIPs. Accordingly, the EPA is proposing to make a finding of substantial inadequacy for these additional affirmative defense provisions because they are not consistent with fundamental legal requirements of the CAA and the EPA is proposing to issue a SIP call with respect to each affected state for these specific provisions as well.

B. Affected States in EPA Region III

1. District of Columbia

a. Petitioner's Analysis

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.[38] Among the other alleged SIP deficiencies, 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). 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 defense provisions for any excess emissions are wholly inconsistent with the CAA and should be removed from the SIP. The Petitioner's overarching claim was that CAA section 113 is a bar to affirmative defense provisions because EPA does not have authority to alter the jurisdiction of the courts to assess penalties or the factors that Congress directed the courts to consider.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed 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. The EPA previously stated its belief that, by purporting to create a bar to enforcement that applies not only 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. Thus, the EPA previously reasoned that this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for D.C. Mun. Regs. tit. 20 § 606.4. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether the provision met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. The EPA interprets the provision of D.C. Mun. Regs. tit. 20 § 606.4 to create an impermissible affirmative defense for violations of visible emission limitations during ''unavoidable malfunction'' events. The provision operates to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision 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.

For this reason, the EPA is proposing to find D.C. Mun. Regs. tit. 20 § 606.4 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the proposed action on the other four provisions in the DC SIP that are at issue in the Petition.

2. 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.

[38] Petition at 29–30.

Admin. Code § 5–20–180(G)).[39] The Petitioner objected to this provision on multiple grounds, including: (i) That it provides an exemption from the otherwise applicable SIP emission limitations; (ii) that it provides a 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''; and (iii) that if intended as an affirmative defense provision it fails to meet EPA's interpretation of the CAA with respect to such provisions for several reasons.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to 9 Va. Admin. Code § 5–20–180(G). The EPA explained that the provision at issue is deficient for several reasons, including the fact that it is not sufficient as an affirmative defense provision to meet CAA requirements. With respect to the deficiency of the provision as an affirmative defense, the EPA noted that even if it were to consider 9 Va. Admin. Code § 5–20–180(G) as providing for an affirmative defense rather than an automatic or discretionary 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 previously stated its belief that, by purporting to create a bar to enforcement that applies not only to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. The EPA also argued that 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 fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Thus, the EPA previously proposed to find that this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for 9 Va. Admin. Code § 5–20–180(G). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. The EPA interprets the provision of 9 Va. Admin. Code § 5–20–180(G) to create an impermissible affirmative defense for violations of SIP emission limits. The provision would operate to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find 9 Va. Admin. Code § 5–20–180(G) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy of this provision.

3. West Virginia

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified one affirmative defense provision in the SIP for the state of West Virginia in W.Va. Code Section 45–2–9.4. This provision provides an affirmative defense available to sources for excess emissions that occur during malfunctions. The EPA notes that it has already proposed to make a finding of substantial inadequacy and to issue a SIP call for another related provision in W.Va. Code Section 45–2–9.1 for separate reasons not relevant here and the EPA is not reopening its February 2013 proposal notice with respect to the latter SIP provision.

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. The affirmative defense in W.Va. Code Section 45–2–9.4 provides that if a source establishes certain factual criteria ''to the satisfaction of'' a state official, then the occurrence of a malfunction is an ''affirmative defense.'' The EPA notes that the affirmative defense for malfunctions in W.Va. Code Section 45–2–9.4 was not consistent with the EPA's prior interpretation of the CAA and with its recommendations for such provisions in the 1999 SSM Guidance. Regardless of that fact, the EPA believes that this provision impermissibly purports to alter or eliminate the jurisdiction of federal courts to assess penalties or to impose other forms of relief for violations of SIP emission limits. Under this provision, if the source is able to establish that it met each of the specified criteria to the satisfaction of the state official, then the provision purports to bar any relief for those violations. Accordingly, the EPA believes that this affirmative defense provision is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that

[39] Petition at 70–71.

the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for the affirmative defense provision applicable to excess emissions that occur during malfunctions in W.Va. Code Section 45–2–9.4. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets W.Va. Code Section 45–2–9.4 to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties or to impose other forms of relief as contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find W.Va. Code Section 45–2–9.4 substantially inadequate to meet CAA requirements and thus the EPA is proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the proposed action on the other provisions in the West Virginia SIP that are at issue in the Petition.

C. Affected States in EPA Region IV

1. 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)).[40] The Petitioner objected to this provision on multiple grounds, including: (i) That it provides an exemption from the otherwise applicable SIP emission limitations by providing that the excess emissions ''shall be allowed'' subject to certain conditions; (ii) 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 1999 SSM Guidance; and (iii) 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 Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). The EPA explained that the provision at issue is deficient for several reasons, including the fact that it is not sufficient as an affirmative defense provision to meet CAA requirements. With respect to the deficiency of the provision as an affirmative defense, the EPA noted that 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 as interpreted in the EPA's recommendations in the EPA's SSM Policy. By purporting to create a bar to enforcement that applies not only to monetary penalties but also to injunctive relief, the EPA reasoned that this provision is inconsistent with the requirements of CAA sections 113 and 304. The EPA also argued that 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, the EPA previously reasoned that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) was deficient because it applies not only to malfunctions but also to startup and shutdown events, contrary to the EPA's interpretation of the CAA set forth in the February 2013 proposal notice. Thus, the EPA previously proposed to find that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. The EPA interprets the provision of Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) to create an impermissible affirmative defense for violations of SIP emission limits. The provision operates to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

[40] Petition at 32.

The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the other separate bases for the finding of substantial inadequacy of this provision.

2. Mississippi

a. Petitioner's Analysis

The Petitioner objected to three provisions in the Mississippi SIP as being inconsistent with the CAA and the EPA's SSM Policy.[41] Among the other alleged SIP deficiencies, 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).[42] 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,'' [43] 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.'' [44] 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.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, 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 because they are deficient affirmative defense provisions. By purporting to create a bar to enforcement that applies not only to monetary penalties but also to injunctive relief, the EPA reasoned that these provisions are inconsistent with the requirements of CAA sections 113 and 304. The EPA also argued that 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, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations during malfunctions. With respect to the comparable affirmative defense for maintenance in 11–1–2 Miss. Code R. § 10.3, the EPA reiterated its long held position that no affirmative defense is appropriate for violations that occur during maintenance because maintenance is a normal mode of source operation during which the source should be expected to comply with the applicable emission limitations. Thus, the EPA previously proposed to find that 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 are not appropriate as affirmative defense provisions because they are inconsistent with fundamental requirements of the CAA.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether the provision met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. The EPA interprets the provisions of 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 to create an impermissible affirmative defenses for violations of SIP emission limits. These provisions operate to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere 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.

For these reasons, the EPA is proposing to find 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 provisions substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions. The EPA notes that in this SNPR it is only addressing 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 with respect to the deficiency as affirmative defense provisions and is not revising its February 2013 proposal with respect to another SIP provision, 11–1–2 Miss. Code R. § 10.2, for which the EPA has proposed to make a finding of substantial inadequacy and to issue a SIP call on different grounds.

3. South Carolina

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified one affirmative defense provision in the SIP for the state of South Carolina in S.C. Code Ann. Regs. 62.1, Section II(G)(6). This provision provides that permits for certain sources may contain an affirmative defense for excess emissions that occur during emergencies. The permits at issue embody federally enforceable emission limits that assure the sources will remain below the threshold for major stationary sources subject to the permitting requirements of title V of the CAA. By accepting these emission limits in permits as authorized by this provision of the state's SIP, these sources are treated as minor sources rather than major sources for regulatory purposes.

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the

[41] Petition at 29–30.

[42] Petition at 47–49.

[43] Petition at 48.

[44] Petition at 47–48.

EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. The affirmative defense in S.C. Code Ann. Regs. 62.1, Section II(G)(6) provides that if a source meets certain factual criteria, then the occurrence of an emergency is an ''affirmative defense'' for any technology-based emission limitation violations that occur during the emergency. The affirmative defense is not limited to monetary penalties and appears to bar any form of relief if the source meets the criteria for the defense. The EPA notes that the affirmative defense for emergencies in S.C. Code Ann. Regs. 62.1, Section II(G)(6) was not consistent with the EPA's prior interpretation of the CAA and with its recommendations for such provisions in the 1999 SSM Guidance. Regardless of that fact, the EPA believes that this provision impermissibly purports to alter or eliminate the jurisdiction of federal courts to assess penalties or to impose other forms of relief for violations of federally enforceable SIP or permit emission limits. Under this provision, if the source is able to establish that it met each of the specified criteria, then the provision purports to bar any relief for those violations. Accordingly, the EPA believes that this affirmative defense provision is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for the affirmative defense provisions applicable to excess emissions that occur during emergencies in S.C. Code Ann. Regs. 62.1, Section II(G)(6). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets S.C. Code Ann. Regs. 62.1, Section II(G)(6) to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties or to impose other forms of relief as contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find S.C. Code Ann. Regs. 62.1, Section II(G)(6) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the proposed action on the other provisions in the South Carolina SIP that are at issue in the Petition.

D. Affected States in EPA Region V

1. Illinois

a. Petitioner's Analysis

The Petitioner objected to three generally applicable provisions in the Illinois SIP (Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265) which the Petitioner argued have the effect of providing discretionary exemptions from otherwise applicable SIP emission limitations.[45] The Petitioner objected to these provisions on multiple grounds, including: (i) that the provisions invite sources to request, during the permitting process, advance permission to continue to operate during a malfunction or breakdown and to request advance permission to ''violate'' otherwise applicable emission limitations during startup; (ii) that the provisions state that, once granted, the advance permission to violate the emission limitations ''shall be a prima facie defense to an enforcement action''; and (iii) that the term '''prima facie defense' is ambiguous in its operation.'' The Petitioner argued that the latter 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 Prior Proposal

In the February 2013 proposal notice, 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. The EPA proposed to grant the Petition for these provisions even though the state has asserted that the effect of these provisions together only provides sources with a *prima facie* defense in an enforcement proceeding. Even if interpreted to provide an affirmative defense rather than an automatic or discretionary exemption, however, the EPA previously noted that the provisions do not provide 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.

In the February 2013 proposal notice, the EPA enumerated various ways in which the provisions were not consistent with the EPA's recommendations in the EPA's SSM Policy interpreting the CAA: (i) It is not clear that the defense applies only to monetary penalties, which is inconsistent with the requirements of CAA sections 113 and 304; (ii) the defense applies to violations that occurred during startup periods, which

[45] Petition at 33–36.

is inconsistent with CAA sections 113 and 304; (iii) the provisions shift the burden of proof to the enforcing party; and (iv) 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 together interpreted to provide a *prima facie* defense to enforcement rather than to provide exemptions, the EPA already proposed to find that these provisions are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. To the extent that Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265 together do provide only a defense as characterized by the state rather than an exemption, the EPA believes that they create an impermissible affirmative defense for violations of SIP emission limits. These provisions would operate together to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere 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.

For these reasons, the EPA is proposing to find Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions. The EPA notes that in this SNPR it is only addressing these provisions with respect to their deficiency as an affirmative defense and is not revising its February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy for 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)).[46] The Petitioner objected to this provision on multiple grounds, including: (i) That it provides an exemption from the otherwise applicable SIP emission limitations; (ii) that it is ambiguous because it provides that excess emissions during malfunction periods ''shall not be considered a violation'' if the source demonstrates that a number of conditions are met, but it does not specify to whom or in what forum such demonstration must be made; (iii) that if the foregoing demonstration need only be made to the satisfaction of the state, then this 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; and (iv) that if the demonstration is to be made in an enforcement context, then the provision could be interpreted as providing an affirmative defense, but one that is inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to 326 Ind. Admin. Code 1–6–4(a). The EPA noted at that time that even if it were to interpret 326 Ind. Admin. Code 1–6–4(a) to be an affirmative defense applicable in an enforcement context, then the provision is not consistent with the EPA's recommendations for such affirmative defenses 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 previously proposed to find that 326 Ind. Admin. Code 1–6–4(a) is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for 326 Ind. Admin. Code 1–6–4(a). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

To the extent that 326 Ind. Admin. Code 1–6–4(a) provides only a defense rather than an exemption, the EPA believes that it creates an impermissible affirmative defense for violations of SIP emission limits. The provision would operate to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision 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

[46] Petition at 36–37.

their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find 326 Ind. Admin. Code 1–6–4(a) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense and is not revising its February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy for the 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 (Mich. Admin. Code r. 336.1916).[47] The Petitioner objected to this provision on multiple grounds, including: (i) That one of the criteria in the affirmative defense provision, Mich. Admin. Code r. 336.1916, 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'' thereby applying to sources with the ''potential'' to cause violations of the NAAQS contrary to the recommendations of EPA's 1999 SSM Guidance; and (ii) that the affirmative defense provision is available for violations of ''an applicable emission limitation,'' which Petitioner argued could be construed by a court to include ''limits derived from federally promulgated technology based standards, such as NSPSs and NESHAPs,'' contrary to EPA's interpretation of the CAA in the 1999 SSM Guidance to preclude SIP-based affirmative defenses for violations of these federal technology-based standards.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed 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 EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. For this reason, the EPA previously proposed to find that Mich. Admin. Code r. 336.1916 is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for Mich. Admin. Code r. 336.1916. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Mich. Admin. Code r. 336.1916 to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. The fact that this affirmative defense applies during planned and predictable events exacerbates this problem, but even if the provision were applicable only to genuine malfunction events it is not a permissible SIP provision. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find Mich. Admin. Code r. 336.1916 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

E. Affected States and Local Jurisdictions in EPA Region VI

1. Arkansas

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Arkansas SIP as inconsistent with the CAA and the EPA's SSM Policy.[48] One of these provisions, Reg. 19.602, provides an ''affirmative defense'' applicable to violations by sources in certain circumstances. The Petitioner objected to Reg. 19.602 because it provides a ''complete affirmative defense'' for excess emissions that occur during emergency conditions. 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 Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to Reg. 19.602. The EPA explained its view that Reg. 19.602 is an impermissible affirmative defense provision because it does not explicitly limit the defense to monetary penalties, it establishes criteria that are inconsistent with those recommended 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. As a consequence, the EPA reasoned that Reg. 19.602 is inconsistent with the requirements for SIP provisions in CAA sections 110(a)(2)(A), 110(a)(2)(C) and 302(k). For these reasons, the EPA previously proposed to find that Reg. 19.602 is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of

[47] Petition at 44–46.

[48] 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). For ease of description, we refer herein to Reg. 19.602.

substantial inadequacy and the SIP call for Reg. 19.602. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Reg. 19.602 to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find Reg. 19.602 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the proposed action on the other provision in the Arkansas SIP that is at issue in the Petition.

2. 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).[49] The Petitioner objected to the inclusion of these provisions in the SIP based on its view that affirmative defense provisions 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 Prior Proposal

In the February 2013 proposal notice, the EPA proposed 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 noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was 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. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. The EPA also proposed to grant the Petition with respect to 20.2.7.111 NMAC, which includes an affirmative defense applicable during malfunction events. The EPA previously 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. Finally, the EPA proposed to grant the Petition with respect to 20.2.7.113 NMAC. The EPA previously stated its belief 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. Thus, the EPA previously proposed to find 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.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to 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). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets 20.2.7.111 NMAC and 20.2.7.112 NMAC to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. As to 20.2.7.113 NMAC, the EPA interprets this provision to operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose any form of relief contemplated in CAA sections 113 and 304. Thus, 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

[49] 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).

emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find 20.2.7.111 NMAC, 20.2.7.112 NMAC and 20.2.7.113 NMAC substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

3. New Mexico: Albuquerque-Bernalillo County

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified three affirmative defense provisions in the SIP for the state of New Mexico that apply in the Albuquerque-Bernalillo County area. 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). The EPA acknowledges that it explicitly approved these affirmative defense provisions in 2010, after ascertaining that they were consistent with the Agency's interpretation of the CAA and its recommendations for such provisions in the 1999 SSM Guidance, applicable at that point in time.[50]

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Although the EPA previously determined that 20.11.49.16.A NMAC, 20.11.49.16.B NMAC and 20.11.49.16.C NMAC were consistent with CAA requirements, the Agency now believes that these provisions impermissibly purport to alter or eliminate the jurisdiction of federal courts to assess penalties for violations of SIP emission limits. In the case of the affirmative defenses applicable to malfunctions and to startup and shutdown, the provisions set forth the elements of an affirmative defense to be asserted by sources in the event of violations during such events. In the case of the affirmative defense applicable to emergencies, the provision sets forth the elements of an affirmative defense to be asserted in the event of violations during emergencies. For each of these affirmative defense provisions, if the source is able to establish that it met each of the specified criteria to a trier of fact in an enforcement proceeding, then the provision purports to bar any civil penalties for those violations (and in the case of the affirmative defense for emergencies could be construed to bar other forms of relief as well). Accordingly, the EPA believes that each of these affirmative defense provisions is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that these provisions are not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for the affirmative defense provisions applicable to 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). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets 20.11.49.16.A NMAC and 20.11.49.16.B NMAC to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. As to 20.11.49.16.C NMAC, the EPA interprets this provision to operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose any form of relief contemplated in CAA sections 113 and 304. Thus, 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.

For these reasons, the EPA is proposing to find 20.11.49.16.A NMAC, 20.11.49.16.B NMAC and 20.11.49.16.C NMAC substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue 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.

4. Texas

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA

[50] *See,* ''Approval and Promulgation of Implementation Plans; Albuquerque-Bernalillo County, NM; Excess Emissions,'' 75 FR 5698 (Feb. 4, 2010).

has identified four affirmative defense provisions in the SIP for the state of Texas. 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)).[51] The EPA acknowledges that it explicitly approved these affirmative defense provisions in 2010, after ascertaining that they were consistent with the Agency's interpretation of the CAA and its recommendations for such provisions in the 1999 SSM Guidance, applicable at that point in time. Moreover, the EPA defended its approval of these specific provisions (as well as its disapproval of related provisions relevant to affirmative defenses for planned events) in litigation in the U.S. Court of Appeals for the 5th Circuit.

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Although the EPA previously determined that 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d) and 30 TAC 101.222(e) were consistent with CAA requirements, the Agency now believes that these provisions impermissibly purport to alter or eliminate the jurisdiction of federal courts to assess penalties for violations of SIP emission limits. For all of these affirmative defenses applicable to upsets and unplanned events, the provisions set forth the elements of an affirmative defense to be asserted by sources in the event of violations during such events. For each of these affirmative defense provisions, if the source is able to establish that it met each of the specified criteria to a trier of fact in an enforcement proceeding, then the provision purports to bar any civil penalties for those violations. Accordingly, the EPA believes that each of these affirmative defense provisions is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that these provisions are not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for the affirmative defense provisions applicable to 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)). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d), and 30 TAC 101.222(e) to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. Thus, 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. The EPA appreciates the efforts previously undertaken by the state to amend its SIP to make it consistent with the CAA, as interpreted in the Agency's 1999 SSM Guidance, but the EPA must now revise its SSM Policy with respect to affirmative defense provisions in SIPs.

For these reasons, the EPA is proposing to find 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d) and 30 TAC 101.222(e) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions. The EPA notes that removal of these four provisions from the SIP will render cross-references to these provisions in 30 TAC 101.221(e) (as it applies to 30 TAC 101.222(b)–(e)), 30 TAC 101.222(f) and 30 TAC 101.222(g) superfluous and no longer operative, and the EPA thus recommends that these provisions be removed as well.

F. Affected State in EPA Region VIII: Colorado

1. 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)).[52] 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

[51] The EPA notes that ''upsets'' and ''unplanned events'' in these provisions are what are more commonly referred to as malfunctions, as confirmed by the state at the time the EPA approved these provisions as part of the SIP. *See,* ''Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction,'' 75 FR 68989 (Nov. 10, 2010).

[52] Petition at 25–27.

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.'' [53] 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.[54] The Petitioner objected to this as not merely inconsistent with the EPA's 1999 SSM Guidance but also as 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.''

2. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed 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 interpretation of the CAA. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. For these reasons, the EPA previously proposed to find that 5 Colo. Code Regs § 1001–2(II.J) is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

The EPA previously proposed 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 proposed to deny 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 an exceedance of the NAAQS or PSD increments. The EPA reasoned 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. The EPA noted in the February 2013 proposal notice that it was updating its previous guidance recommendations to states for SIPs in the SSM Policy in order to indicate that in lieu of restricting the application of an affirmative defense provision only to sources without the potential to cause NAAQS violations, the state could elect to require a source to prove that the excess emissions did not cause an exceedance of the NAAQS or PSD increments as an element of the defense instead. Accordingly, the EPA previously proposed to find that 5 Colo. Code Regs § 1001–2(II.E) is consistent with CAA requirements and declined to make a finding of substantial inadequacy with respect to this provision.

3. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup and shutdown in 5 Colo. Code Regs § 1001–2(II.J). The EPA is also reversing its prior denial of the Petition with respect to the affirmative defense provision applicable to malfunctions in 5 Colo. Code Regs § 1001–2(II.E) and is proposing to find that provision substantially inadequate and to issue a SIP call for that provision as well. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets 5 Colo. Code Regs § 1001–2(II.J) and 5 Colo. Code Regs § 1001–2(II.E) to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere 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.

For these reasons, the EPA is proposing to find 5 Colo. Code Regs § 1001–2(II.J) and 5 Colo. Code Regs § 1001–2(II.E) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

G. 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 Environmental 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)).[55] First, the Petitioner asserted 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 recommendation 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

[53] *Id.* at 25.

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

[55] Petition at 20–22.

exceedance.'' [56] Although acknowledging that R18–2–310 contains some limitations to address this issue, the Petitioner argued that the limitations in the SIP provision do not reduce the incentive for such sources to emit at levels close to those that would violate a NAAQS or PSD increment in the way that entirely disallowing affirmative defenses for these types of sources would. Accordingly, the Petitioner requested that the EPA require Arizona either to remove R18–2–310(B) and (C) from the SIP entirely or to revise the rule so that affirmative defenses ''are not available to a single source or one of a small group of sources who have 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 for affirmative defense provisions 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 SIP provision should be revised to require such a demonstration.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to deny the Petition with respect to the arguments concerning ADEQ's affirmative defense provisions for malfunctions in R18–2–310(B) because this provision is consistent with the requirements of the CAA, as interpreted by the EPA in the SSM Policy. In particular, the EPA proposed to deny 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 an exceedance of the NAAQS or PSD increments. The EPA reasoned 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. The EPA noted in the February 2013 proposal notice that it was updating its previous guidance recommendations to states for SIPs in the SSM Policy in order to indicate that in lieu of restricting the application of an affirmative defense provision only to sources without the potential to cause NAAQS violations, the state could elect to require a source to prove that the excess emissions did not cause a violation of the NAAQS as an element of the defense instead. Accordingly, the EPA previously proposed to find that R18–2–310(B) is consistent with CAA requirements and declined to make a finding of substantial inadequacy with respect to this provision.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in R18–2- 310(C), the EPA proposed to grant the Petition 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 noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. For these reasons, the EPA previously proposed to find that R18–2–310(C) is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is reversing its prior proposed denial of the Petition with respect to the affirmative defense provision applicable to malfunctions in R18–2–310(B) and is proposing to find that provision substantially inadequate and to issue a SIP call for that provision. The EPA is also revising the prior basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup and shutdown in R18–2–310(C). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets R18–2–310(B) and R18–2–310(C) to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere 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.

For these reasons, the EPA is proposing to find R18–2–310(B) and R18–2–310(C) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

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).[57] These provisions in Maricopa County Air Quality Department (MCAQD) Rule 140 are similar to the affirmative defense provisions in ADEQ R18–2–310.[58]

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.'' [59] Accordingly, the

[56] Petition at 20.

[57] Petition at 23.

[58] Petition at 20–22.

[59] *Id.*

Petitioner requested that the EPA require Arizona and/or MCAQD either to remove these provisions from the SIP entirely 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 Prior Proposal

In the February 2013 proposal notice, the EPA proposed to deny the Petition with respect to the arguments concerning MCAQD's affirmative defense provisions for malfunctions in Regulation 3, Rule 140, § 401 because this provision is consistent with the requirements of the CAA, as interpreted by the EPA in the SSM Policy. In particular, the EPA proposed to deny 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 an exceedance of the NAAQS or PSD increments. The EPA reasoned 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. The EPA noted in the February 2013 proposal notice that it was updating its previous guidance recommendations to states for SIPs in the SSM Policy in order to indicate that in lieu of restricting the application of an affirmative defense provision only to sources without the potential to cause NAAQS violations, the state could elect to require a source to prove that the excess emissions did not cause a violation of the NAAQS as an element of the defense instead. Accordingly, the EPA previously proposed to find that Regulation 3, Rule 140, § 401 is consistent with CAA requirements and declined to make a finding of substantial inadequacy with respect to this provision.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in Regulation 3, Rule 140, § 402, the EPA previously proposed to grant the Petition because it provides an affirmative defense for violations due to excess emissions applicable during startup and shutdown events, contrary to the EPA's interpretation of the CAA. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. For these reasons, the EPA previously proposed to find that Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402 is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is reversing its prior proposed denial of the Petition with respect to the affirmative defense provision applicable to malfunctions in Regulation 3, Rule 140, § 401 and is proposing to find that provision substantially inadequate and to issue a SIP call for that provision. The EPA is also revising the prior basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup and shutdown in Regulation 3, Rule 140, § 402. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Regulation 3, Rule 140, § 401 and Regulation 3, Rule 140, § 402 to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere 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.

For these reasons, the EPA is proposing to find Regulation 3, Rule 140, § 401 and Regulation 3, Rule 140, § 402 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

3. California: Eastern Kern Air Pollution Control District

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified an affirmative defense provision in the SIP for the state of California applicable in the Eastern Kern Air Pollution Control District (APCD). 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 light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Kern County Rule 111 includes the elements of an affirmative defense to be asserted by sources in the event of violations during breakdown conditions. The provision defines ''breakdown conditions'' as any unforeseeable failure or malfunction of air pollution control equipment or monitoring equipment. If the source is able to establish that it met each of the specified criteria to an ''air pollution control officer'' (*i.e.,* an official of the state or the Eastern Kern APCD), then the provision purports to bar any enforcement action and thus any form of remedy for the violations that occur during the malfunction. Accordingly, the EPA believes that the affirmative defense provision created by Kern County Rule 111 is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for Kern County Rule 111 Equipment Breakdown in the California SIP applicable in the Eastern Kern APCD.[60] The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that Kern County Rule 111 did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Kern County ''Rule 111 Equipment Breakdown'' to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. The provision provides that if a violating source meets certain criteria set forth in Rule 111, then ''no enforcement action may be taken.'' By proscribing any enforcement by any party if the source meets certain criteria, Rule 111 creates an affirmative defense that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find Kern County ''Rule 111 Equipment Breakdown'' substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

4. California: Imperial County Air Pollution Control District

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified an affirmative defense provision in the SIP for the state of California applicable in the Imperial Valley APCD. 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 light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Imperial County Rule 111 includes the elements of an affirmative defense to be asserted by sources in the event of violations during breakdown conditions. The provision defines ''breakdown conditions'' as any unforeseeable failure or malfunction of air pollution control equipment or monitoring equipment. If the source is able to establish that it met each of the specified criteria to an ''air pollution control officer'' (*i.e.,* an official of the state or the Imperial Valley APCD), then the provision purports to bar any enforcement action and thus any form of remedy for the violations that occur during the malfunction. Accordingly, the EPA believes that the affirmative defense provision created by Imperial County Rule 111 is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for Imperial County ''Rule 111 Equipment Breakdown'' in the California SIP applicable in the Imperial Valley APCD. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that Imperial County Rule 111 did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such

[60] The EPA is proposing in this SNPR to make a finding of substantial inadequacy and to issue 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 APCD.

provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Imperial County ''Rule 111 Equipment Breakdown'' to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. The provision provides that if a violating source meets certain criteria set forth in Rule 111, then ''no enforcement action may be taken.'' By proscribing any enforcement by any party if the source meets certain criteria, Rule 111 creates an affirmative defense that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find Imperial County ''Rule 111 Equipment Breakdown'' substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

5. California: San Joaquin Valley Air Pollution Control District

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified affirmative defense provisions in the SIP for the state of California applicable in the San Joaquin Valley APCD. The affirmative defenses are included in: (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.'' [61] 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 light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Fresno County Rule 110, Kern County Rule 111, Kings County Rule 111, Madera County Rule 113, Stanislaus County Rule 110 and Tulare County Rule 111 include the elements of an affirmative defense to be asserted by sources in the event of violations during breakdown conditions. Each of these provisions defines ''breakdown conditions'' in comparable ways as any unforeseeable failure or malfunction of air pollution control equipment or monitoring equipment. If the source is able to establish that it met each of the specified criteria to a ''Control Officer'' (*i.e.,* an official of the state or the San Joaquin Valley APCD), then the provision purports to bar any enforcement action and thus any form of remedy for the violations that occur during the malfunction. Accordingly, the EPA believes that each of the affirmative defense provisions created by Fresno County Rule 110, Kern County Rule 111, Kings County Rule 111, Madera County Rule 113, Stanislaus County Rule 110 and Tulare County Rule 111 is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that these provisions are not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for six provisions in the California SIP applicable in the San Joaquin Valley APCD: (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.'' [62] The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that Fresno County Rule 110, Kern County Rule 111, Kings County Rule 111, Madera County Rule 113, Stanislaus County Rule 110 and Tulare County Rule 111 did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to

[61] The EPA notes that comparable provisions appear in the California SIP for the San Joaquin Valley APCD in Merced County (in ''Rule 109 Equipment Breakdown'') and in San Joaquin County (in ''Rule 110 Equipment Breakdown''). However, the EPA interprets these provisions to be enforcement discretion provisions, applicable only to the state or air district personnel. In each of these counties, the applicable rules provide that if the source meets certain criteria, then ''the Air Pollution Control Officer may elect to take no enforcement action.'' The EPA believes that these provisions unequivocally apply only to the exercise of enforcement discretion by the state or air district personnel and are not operative in the event of enforcement by the EPA or others under the authority of the citizen suit provision of CAA section 304. For this reason, the EPA is not proposing to make a finding of substantial inadequacy and a SIP call for these comparable provisions in Merced County Rule 109 and San Joaquin County Rule 110. If the state of California disagrees with this interpretation, the EPA anticipates that the state will inform the Agency of that fact though comment on this SNPR.

[62] The EPA is proposing in this SNPR to make a finding of substantial inadequacy and to issue 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 APCD.

assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Fresno County Rule 110, Kern County Rule 111, Kings County Rule 111, Madera County Rule 113, Stanislaus County Rule 110 and Tulare County Rule 111 to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. These provisions provide that if a violating source meets certain criteria set forth in each of the Rules, then ''no enforcement action may be taken.'' By proscribing any enforcement by any party if the source meets certain criteria, each of these provisions creates an affirmative defense that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that these provisions interfere 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.

For these reasons, the EPA is proposing to find Fresno County ''Rule 110 Equipment Breakdown,'' Kern County ''Rule 111 Equipment Breakdown,'' Kings County ''Rule 111 Equipment Breakdown,'' Madera County ''Rule 113 Equipment Breakdown,'' Stanislaus County ''Rule 110 Equipment Breakdown'' and Tulare County ''Rule 111 Equipment Breakdown'' substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

H. Affected States and Local Jurisdictions 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).[63] 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. Finally, the Petitioner pointed out, the provision is worded as if it were an affirmative defense, but it uses criteria more relevant for enforcement discretion. In other words, the Petitioner argued that the provision is inconsistent with the EPA's recommendations for affirmative defense provisions in SIPs in the 1999 SSM Guidance.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to Alaska Admin. Code tit. 18 § 50.240. To the extent that this provision is intended to be an affirmative defense, the EPA believed it to be deficient to meet the requirements of the CAA for such provisions. The provision applies to excess emissions during startup, shutdown and maintenance events, contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for malfunctions. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. Additionally, the EPA previously reasoned that 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 EPA previously considered Alaska Admin. Code tit. 18 § 50.240 to be inconsistent with the fundamental requirements of the CAA and thus proposed to find the provision substantially inadequate to meet CAA requirements and to issue a SIP call with respect to the provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is revising the prior basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup, shutdown and upsets in Alaska Admin. Code tit. 18 § 50.240. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Alaska Admin. Code tit. 18 § 50.240 to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties or impose injunctive relief under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find Alaska Admin. Code tit. 18 § 50.240 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its

[63] Petition at 18–20.

February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy of this provision.

2. 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).[64] 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 more relevant for enforcement discretion.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed 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 then current interpretation of the CAA to allow such affirmative defenses only for malfunctions. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup, shutdown and maintenance was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance.[65] Furthermore, the EPA previously reasoned that 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 defense provisions applicable to malfunctions. Moreover, the provision appears to bar the EPA and citizens from seeking penalties and injunctive relief. Thus, the EPA previously considered Wash. Admin. Code § 173–400–107 to be inconsistent with the fundamental requirements of the CAA and the EPA thus proposed to find the provision substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to the provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is revising the prior basis for the proposed finding of substantial inadequacy and the proposed SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup, shutdown, maintenance and upsets in Wash. Admin. Code § 173–400–107. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Wash. Admin. Code § 173–400–107 to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties or impose injunctive relief under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find Wash. Admin. Code § 173–400–107 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy of this provision.

3. Washington: Energy Facility Site Evaluation Council

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified affirmative defense provisions in the SIP for the state of Washington that relate to the Energy Facility Site Evaluation Council (EFSEC).[66] The EFSEC portion of the SIP includes Wash. Admin. Code § 463–39–005, which adopts by reference Wash. Admin. Code § 173–400–107, thereby incorporating the affirmative defenses applicable to startup, shutdown, scheduled maintenance and ''upsets'' for which, as explained earlier in this SNPR, the EPA has proposed to find Wash. Admin. Code § 173–400–107 substantially inadequate to meet CAA requirements.

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit

[64] Petition at 71–72.

[65] The EPA notes that its SSM Policy guidance has always stated that affirmative defense provisions in SIPs are not appropriate for excess emissions that occur during maintenance activities. The 1999 SSM Guidance only made recommendations with respect to affirmative defense provisions applicable to malfunctions and to startup and shutdown. The 1983 SSM Guidance recommended that ''scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator'' and therefore recommended even against the exercise of enforcement discretion for violations during maintenance except under limited circumstances. *See* 1983 SSM Guidance at Attachment, Page 3.

[66] This is the state agency that reviews and authorizes the construction and operation of major energy facilities in Washington for all media in lieu of any other individual state or local agency permits. Thus these affirmative defense provisions can become embodied in the authorizations for such sources.

states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Wash. Admin. Code § 463–39–005 incorporates by reference the elements of an affirmative defense to be asserted by sources in the event of violations during startup, shutdown, scheduled maintenance and upsets. The provision provides criteria for each type of event. If the source is able to establish that it met each of the specified criteria, then the provision purports to bar any enforcement action and thus any form of remedy for the violations that occur during such events. The provision explicitly states that if the criteria are met, then the violations ''shall be excused and not subject to penalty.'' Accordingly, the EPA believes that the affirmative defenses created by Wash. Admin. Code § 463–39–005 through its incorporation by reference of Wash. Admin. Code § 173–400–107 are inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the Wash. Admin. Code § 463–39–005 provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for Wash. Admin. Code § 463–39–005's incorporation by reference of Wash. Admin. Code § 173–400–107 in the Washington SIP with respect to the EFSEC. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that the affirmative defenses created in Wash. Admin. Code § 463–39–005 through its incorporation by reference of Wash. Admin. Code § 173–400–107 did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Wash. Admin. Code § 463–39–005's incorporation by reference of Wash. Admin. Code § 173–400–107 to provide affirmative defenses that would operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. The provision provides that if a violating source meets certain criteria incorporated by reference from Wash. Admin. Code § 173–400–107, then the excess emissions are ''excused and not subject to penalty.'' By proscribing any enforcement by any party if the source meets certain criteria, Wash. Admin. Code § 463–39–005 creates affirmative defenses that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find Wash. Admin. Code § 463–39–005's incorporation by reference of Wash. Admin. Code § 173–400–107 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

4. Washington: Southwest Clean Air Agency

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified affirmative defense provisions in the SIP for the state of Washington applicable in the portion of the state regulated by the Southwest Clean Air Agency (SWCAA).[67] The affirmative defenses are included in the SIP in SWAPCA ''400–107 Excess Emissions.'' This SIP provision 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 light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. SWAPCA 400–107 Excess Emissions includes the elements of an affirmative defense to be asserted by sources in the event of violations during startup and shutdown, maintenance and upsets. The provision provides criteria for each type of event. If the source is able to establish that it met each of the specified criteria to ''the Authority or the decision-making entity'' (*i.e.,* officials of the state or the SWCAA), then the provision purports to bar any enforcement action and thus any form of

[67] 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.

remedy for the violations that occur during such events. The provision explicitly states that if the criteria are met, then the violations ''shall be excused and not subject to penalty.'' Accordingly, the EPA believes that the affirmative defenses created by SWAPCA 400–107 are inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for SWAPCA ''400–107 Excess Emissions'' in the Washington SIP applicable in the area regulated by SWCAA. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that SWAPCA 400–107 Excess Emissions did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets SWAPCA ''400–107 Excess Emissions'' to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. The provision provides that if a violating source meets certain criteria set forth in SWAPCA 400–107, then the excess emissions are ''excused and not subject to penalty.'' By proscribing any enforcement by any party if the source meets certain criteria, SWAPCA 400–107 creates affirmative defenses that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that this provision 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.

For these reasons, the EPA is proposing to find SWAPCA ''400–107 Excess Emissions'' substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

VIII. 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 SPNR, in response to the Petition, merely states the EPA's current 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 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.[68]

After considering the economic impacts of this SNPR 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 states the EPA's current interpretation of the statutory requirements of the CAA. To the extent that the EPA 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 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

[68] 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) a small governmental 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.

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. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with the EPA's policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this SNPR 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 SNPR 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 SNPR 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 SNPR would require 17 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)(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. 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 U.S. 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 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.[69]

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 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. 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), which establish procedural requirements specific to rulemaking under the CAA.

IX. 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

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: September 5, 2014.

Janet G. McCabe,

Acting Assistant Administrator.

[FR Doc. 2014–21830 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

[69] *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)).