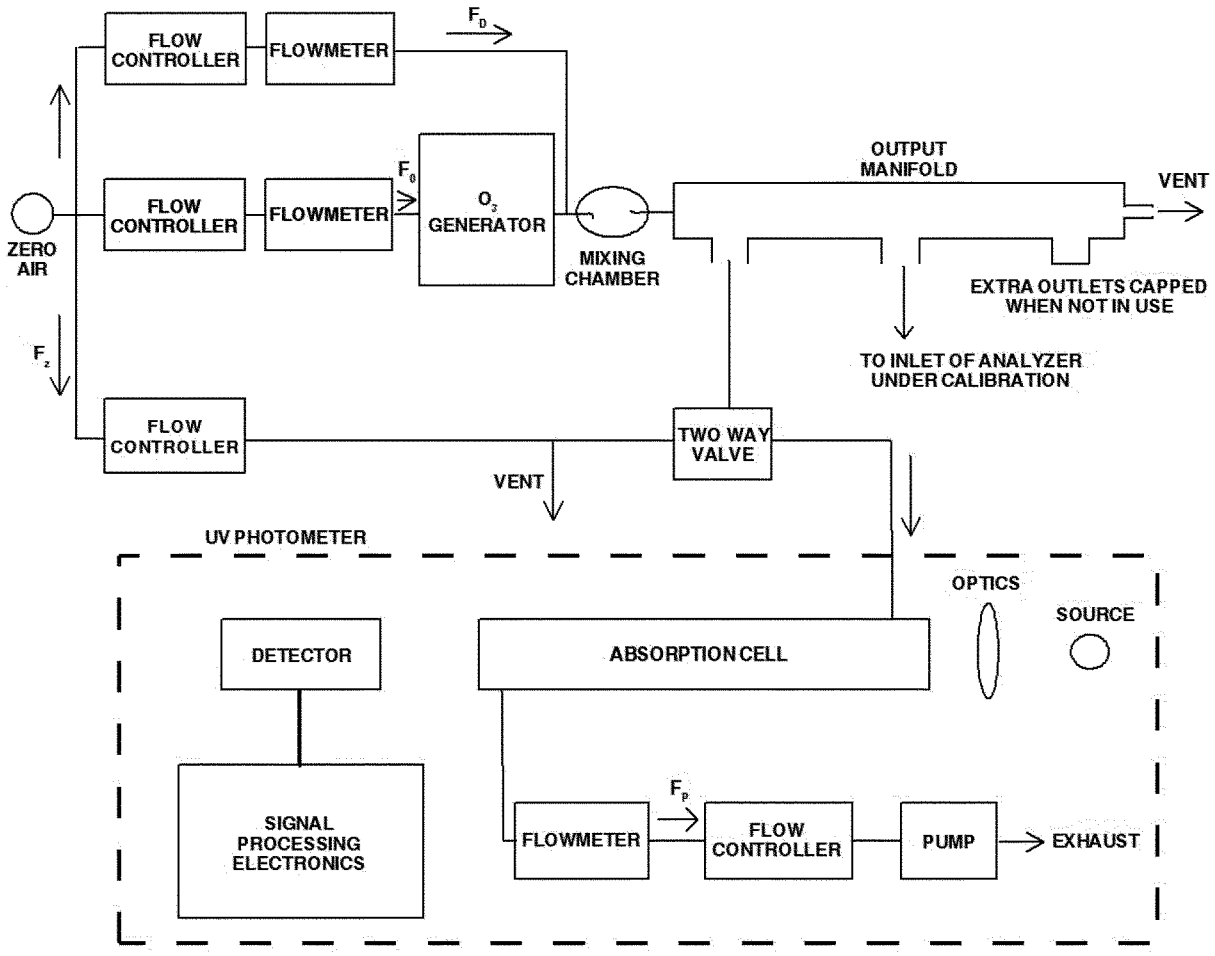

Figure 3 of Section 7 to Appendix D of Part 50—Schematic diagram of a typical UV photometric calibration system (Option 1).

[FR Doc. 2023–03578 Filed 2–23–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2022–0814; FRL–9836–01–OAR]

RIN 2060–AV79

State Implementation Plans: Findings of Substantial Inadequacy and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed action.

SUMMARY: Consistent with the Environmental Protection Agency's (EPA's) policy interpretation for State Implementation Plan (SIP) provisions applying to excess emissions during periods of Startup, Shutdown and Malfunction (SSM) as outlined in EPA's 2015 SSM SIP Action, the EPA is proposing to reinstate its findings of substantial inadequacy and associated ''SIP calls'' that were withdrawn in 2020 for the states of Texas, North Carolina, and Iowa for SSM provisions in those states' SIPs that do not comply with statutory requirements and EPA's SSM Policy. The EPA is also proposing to issue new findings of substantial inadequacy and SIP calls to the state of Connecticut (CT); the state of Maine (ME); Shelby County, Tennessee (TN); the state of North Carolina (NC); Buncombe County, NC; Mecklenburg County, NC; the state of Wisconsin (WI); and the state of Louisiana (LA), for additional SSM provisions identified as deficient by the Agency.

DATES: *Comments.* Written comments must be received on or before April 25, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID EPA–HQ–OAR–2022–0814. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: For information about this proposed action, contact Sydney Lawrence, Office of Air Quality Planning and Standards, Air Quality Policy Division, C504–05, U.S. Environmental Protection Agency, Research Triangle Park, NC; telephone number: (919) 541–4768; email address: *lawrence.sydney@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA. For information related to a specific SIP, please contact the appropriate EPA Regional office:

EPA Regional office	Contact for Regional office (person, mailing address, and telephone number)	State
Region 1	Alison Simcox, EPA Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts 02109, *simcox.alison@epa.gov,* (617) 918–1684.	CT, ME.
Region 4	Brad Akers, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street SW, Atlanta, Georgia 30303, *akers.brad@epa.gov,* (404) 562–9089. Joel Huey, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street SW, Atlanta, Georgia 30303, *huey.joel@epa.gov*, (404) 562–9104.	NC, TN.
Region 5	Michael Leslie, EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, *leslie.michael@epa.gov,* (312) 353–6680.	WI.
Region 6	Alan Shar, EPA Region 6, 1201 Elm Street, Suite 500, Dallas, TX 75270, *shar.alan@epa.gov,* (214) 665–6691.	LA, TX.
Region 7	Ashley Keas, EPA Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219, *keas.ashley@epa.gov,* (913) 551–7629.	IA.

I. General Information

A. How is the preamble organized?

The information presented in this document is organized as follows:

B. Does this action apply to me?

Entities potentially affected by this action include states, U.S. territories, local authorities and eligible Tribes that are currently administering, or may in the future administer, the EPA approved implementation plans (''air agencies''). While recognizing similarity to (and in some instances overlap with) issues concerning other air programs, *e.g.,* concerning SSM provisions in EPA's regulatory programs for New Source Performance Standards (NSPS) pursuant to section 111 and National Emission Standards for Hazardous Air Pollutants (NESHAP) pursuant to section 112, the EPA notes that the issues addressed in this document are specific to SSM provisions in the SIP program.

Through this action, the EPA is applying an interpretation consistent with the CAA outlined in its 2015 SSM SIP Action [1] with respect to SIP provisions applicable to excess emissions during SSM events in general (''SSM Policy''). Applying that interpretation, EPA is issuing findings that the SIPs of eight states (10 statewide and local jurisdictions) are substantially inadequate to meet CAA requirements, pursuant to CAA section 110(k)(5), and thus those states (named in sections VI. and VII. of this document) are directly affected by this action. This action may also be of interest to the public and to owners and operators of industrial facilities that are subject to emission limitations in SIPs, because it will require changes to certain state rules applicable to excess emissions during SSM events.

C. Where can I get a copy of this document and other related information?

The EPA has established a docket for this action under Docket ID EPA–HQ–OAR–2022–0814. Publicly available docket materials are available either electronically through *https://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA/DC, William Jefferson Clinton Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC. The telephone number for the Public Reading Room is

[1] *See* ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,'' (80 FR 33840, June 12, 2015).

(202) 566–1744 and the telephone number for the Office of Air and Radiation Docket and Information Center is (202) 566–1742. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

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

1. *Submitting CBI.* Do not submit information containing CBI to the EPA through *https://www.regulations.gov/.* Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions.* If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.,* Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office using the email address, *oaqpscbi@epa.gov,* and should include clear CBI markings as described later. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2022–0814. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

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.

E. What is the meaning of key terms used in this document? [2]

For the purpose of this document, 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 *alternative emission limitation* means, in this document, an emission limitation in a SIP that applies to a source during some but not all periods of normal operation (*e.g.,* applies only during a specifically defined mode of operation such as startup or shutdown). An alternative emission limitation is a component of a continuously applicable SIP emission limitation, and it may take the form of a control measure such as a design, equipment, work practice or operational standard (whether or not numerical). This definition of the term is independent of the statutory use of the term ''alternative means of emission limitation'' in CAA sections 111(h)(3) and 112(h)(3), which pertain to the conditions under which the EPA may, pursuant to sections 111 and 112, promulgate emission limitations, or components of emission limitations, that are not necessarily in numeric format.

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 otherwise applicable emission limitations or control measures, or to excuse noncompliance with otherwise applicable emission limitations or control measures, which would be binding on the EPA and the public.

The term *EPA* refers to the United States Environmental Protection Agency.

The term *EPA's SSM Policy* refers to EPA's national policy interpretation of the CAA in which SIP provisions cannot include exemptions from emission limitations for emissions during SSM events. In order to be permissible in a SIP, an emission limitation must be applicable to the source continuously, *i.e.,* cannot include periods during which emissions from the source are legally or functionally exempt from regulation. Regardless of its form, a fully approvable SIP emission limitation must also meet all substantive requirements of the CAA applicable to such a SIP provision, *e.g.,* the statutory requirement of CAA section 172(c)(1)

[2] The EPA previously defined many of these key terms, which can be found in the 2015 SSM SIP Action. *See* 80 FR 33840 at 33842.

for imposition of Reasonably Available Control Measures (RACM) and Reasonably Available Control Technology (RACT) on sources located in designated nonattainment areas. The EPA clarified its SSM Policy in its 2015 SSM SIP Action and reiterated that policy interpretation in the McCabe memo.

The term *emission limitation* means, in the context of a SIP, a legally binding restriction on emissions from a source or source category, such as a numerical emission limitation, a numerical emission limitation with higher or lower levels applicable during specific modes of source operation, a specific technological control measure requirement, a work practice standard, or a combination of these things as components of a comprehensive and continuous emission limitation in a SIP provision. In this respect, the term emission limitation is defined as in section 302(k) of the CAA. By definition, an emission limitation can take various forms or a combination of forms, but in order to be permissible in a SIP it must be applicable to the source continuously, *i.e.,* cannot include periods during which emissions from the source are legally or functionally exempt from regulation. Regardless of its form, a fully approvable SIP emission limitation must also meet all substantive requirements of the CAA applicable to such a SIP provision, *e.g.,* the statutory requirement of CAA section 172(c)(1) for imposition of reasonably available control measures and reasonably available control technology (RACM and RACT) on sources located in certain designated nonattainment areas.

The term *excess emissions* means the emissions of air pollutants from a source that exceed any applicable SIP emission limitation. In particular, this term includes those emissions above the otherwise applicable SIP emission limitation that occur during startup, shutdown, malfunction or other modes of source operation, *i.e.,* emissions that would be considered violations of the applicable emission limitation but for an impermissible automatic or discretionary exemption from such emission limitation.

The term *malfunction* means a sudden and unavoidable breakdown of process or control equipment.

The term *McCabe memo* refers to the guidance memorandum titled, ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy'' issued by EPA Deputy Administrator Janet McCabe on September 30, 2021.

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 *practically enforceable* means, in the context of a SIP emission limitation, that the limitation is enforceable as a practical matter (*e.g.,* contains appropriate averaging times, compliance verification procedures and recordkeeping requirements). The term uses ''practically'' as it means ''in a practical manner'' and not as it means ''almost'' or ''nearly.'' In this document, the EPA uses the term ''practically enforceable'' as interchangeable with the term ''practicably enforceable.''

The term *shutdown* means, generally, the cessation of operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In individual SIP provisions it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

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 document, statements about SIPs in general would also apply to tribal implementation plans in general even though not explicitly noted.

The term *SIP Call* refers to the requirement for a revised SIP in response to a finding by the EPA that a SIP is ''substantially inadequate'' to meet CAA requirements pursuant to CAA section 110(k)(5), entitled ''Calls for plan revisions.'' Following such a finding, the EPA shall require the State to revise the plan as necessary to correct such inadequacies.

The term *2015 SSM SIP Action* refers to the final action taken by the EPA in a **Federal Register** document (80 FR 33840; June 12, 2015) on June 12, 2015, which responded to a June 30, 2011, petition filed by Sierra Club 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,'' restated and updated its national policy regarding SSM provisions in SIPs, and found pursuant to CAA section 110(k)(5) that a number of the identified provisions were ''substantially inadequate'' to meet CAA requirements, requiring certain states to amend those provisions.

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 may be exceedances of the applicable emission limitations and thus excess emissions.

The term *startup* means, generally, the setting in operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In an individual SIP provision, it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

The term *Wheeler memo* refers to the guidance memorandum titled ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans'' issued by EPA Administrator Andrew Wheeler on October 9, 2020.

II. Brief Timeline of Actions Relevant to This Proposed Action

This section provides a brief timeline of several relevant past actions that provide context for the proposed action included in this document. Additional detail about these past actions is provided in section V., Statutory, Regulatory, and Policy Background of this document.

June 2011: On June 30, 2011, Sierra Club filed a petition for rulemaking asking EPA to consider how certain identified air agency rules in EPA-approved SIPs treated excess emissions during periods of startup, shutdown, or malfunction of industrial process or emission control equipment.

June 2015: On June 12, 2015, following notice and public comment, the EPA published a final action that responded to the Sierra Club Petition, restated and updated its national policy regarding SSM provisions in SIPs, and found pursuant to CAA section 110(k)(5) that a number of the identified provisions were ''substantially inadequate'' to meet CAA requirements, requiring 36 states (45 state and local jurisdictions) to amend those provisions.[3] This action is referred to as the 2015 SSM SIP Action.

February 2020: On February 7, 2020, EPA Region 6 published a final action that withdrew the SIP call issued to

[3] *See* Id.

Texas as part of the 2015 SSM SIP Action.[4]

April 2020: On April 28, 2020, Region 4 published a final action that withdrew the SIP call issued to North Carolina as part of the 2015 SSM SIP Action.[5]

October 2020: On October 9, 2020, then-EPA Administrator Andrew Wheeler issued a new guidance memorandum that superseded the guidance provided in the 2015 SSM SIP Action on two subjects: exemptions and affirmative defense provisions. This memorandum is referred to in this document as the ''Wheeler memo.''

November 2020: On November 17, 2020, EPA Region 7 published a final action that withdrew the SIP call issued to Iowa as part of EPA's 2015 SSM SIP Action.[6]

September 2021: On September 30, 2021, EPA Deputy Administrator Janet McCabe issued a memorandum titled ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,'' which withdrew the Wheeler memo and reinstated EPA's SSM Policy as outlined in the 2015 SSM SIP Action. This memorandum is referred to in this document as the ''McCabe memo.''

III. Overview of Proposed Action

In this document, in accordance with EPA's policy for SIP provisions applying to excess emissions during periods of SSM outlined in EPA's 2015 SSM SIP Action, EPA is proposing to reinstate its findings of substantial inadequacy and associated SIP calls that were withdrawn in 2020 for the states of Texas, North Carolina, and Iowa for SSM provisions in those SIPs that do not comply with statutory requirements and EPA's SSM Policy. EPA is also proposing to issue new findings of substantial inadequacy and SIP calls to the state of Connecticut; the state of Maine; the state of North Carolina; Shelby County, Tennessee; Buncombe County, North Carolina; Mecklenburg County, North Carolina; the state of Wisconsin; and the state of Louisiana for additional SSM provisions identified as deficient by the Agency.

These actions apply interpretations consistent with EPA's SSM SIP policy as outlined in the 2015 SSM SIP Action, which explained in detail the reasons why the EPA finds certain types of SSM provisions to be substantially inadequate as a matter of both law and policy under the CAA. Generally, in the 2015 SSM SIP Action, the EPA found that these types of provisions, described in section V.A of this document, are inconsistent with certain requirements of the CAA, also described in more detail in that section. The EPA also described policy rationales to support this action. The EPA noted in the 2015 SSM SIP Action that the identified types of provisions allow opportunities for sources to emit pollutants during SSM periods repeatedly and in quantities that could cause unacceptable air pollution in nearby communities with no legal pathway within the existing EPA-approved SIP for air agencies, the EPA, the public or the courts to require the sources to make reasonable efforts to reduce these emissions.[7] In the time since the 2015 SSM SIP Action, the EPA has taken substantial steps to address these deficient provisions. Nevertheless, the continued existence of impermissible SSM provisions in certain SIPs has the potential to lessen the incentive for development of control strategies that are effective at reducing emissions during startup and shutdown, even though such strategies could become increasingly helpful in achieving the primary air quality objectives of the CAA (*e.g.,* attainment and maintenance of the NAAQS and the protection of public health and the environment). Accordingly, to ensure that all populations across the affected states, including minority, low-income and indigenous populations overburdened by pollution, receive the full health and environmental protections provided by the CAA, EPA is issuing the additional SIP Calls described in this document to address additional deficient provisions not identified in the 2015 action, and re-issuing certain SIP calls that the Agency erroneously withdrew in 2020.

A. To which air agencies does this action apply to and why?

This proposed action applies to the states with statewide and/or local provisions relevant to excess emissions that the EPA has determined are impermissible because they are inconsistent with CAA requirements as interpreted by EPA's SSM Policy. Specifically, the EPA is proposing to issue findings of substantial inadequacy with respect to reinstating the 2015 findings for three states (North Carolina, Texas, and Iowa) and issuing new findings with respect to the specific existing SIP provisions in six states (Maine, Connecticut, North Carolina, Tennessee, Louisiana, and Wisconsin) that the EPA is proposing to find are inconsistent with the CAA and EPA's SSM Policy. The eight states in total (for provisions applicable in 10 statewide and local jurisdictions) are listed in Table 1, ''List of States and/or Local Jurisdictions with SSM Provisions for Which EPA Proposes to SIP Call.''

TABLE 1—LIST OF STATE AND/OR LOCAL JURISDICTIONS WITH SSM PROVISIONS FOR WHICH EPA PROPOSES TO SIP CALL

State/local jurisdiction	EPA region	Provision
Connecticut	1	Connecticut Administrative Code Title 22a Chapter 174 section 38(c)(11).
Maine	1	Maine Administrative Code 06–096 Chapter 138 section 3–O. Maine Administrative Code 06–096 Chapter 150 section 4–C.
North Carolina	4	North Carolina Administrative Code Title 15A Chapter 02 Subchapter D section .0535(c) and (g). North Carolina Administrative Code Title 15A Chapter 02 Subchapter D section 1423(g).
North Carolina (Mecklenburg County).	4	Mecklenburg County Air Pollution Control Ordinance Rule section 2.0535(c).
North Carolina (Buncombe County)[a].	4	Western North Carolina Regional Air Quality Agency Air Code section 1–137(c).
Tennessee (Shelby County)	4	Shelby County Air Code 3–17 (City of Memphis Code 16–83).
Wisconsin	5	Wisconsin Administrative Code Chapter NR 431.05(1)–(2) and Chapter NR 436.03(2).
Louisiana	6	Louisiana Administrative Code Title 33 Chapter 9 section 917.
Texas	6	Texas Administrative Code Title 30 Part 1 Chapter 101 Subchapter F Division 3 section 101.222(b)–(e).

[4] *See* 85 FR 7232 (February 7, 2020).

[5] *See* 85 FR 23700 (April 28, 2020).

[6] *See* 85 FR 73218 (November 17, 2020).

[7] See 80 FR 33840 at 33843.

TABLE 1—LIST OF STATE AND/OR LOCAL JURISDICTIONS WITH SSM PROVISIONS FOR WHICH EPA PROPOSES TO SIP CALL—Continued

State/local jurisdiction	EPA region	Provision
Iowa	7	Iowa Administrative Code Agency 567 Chapter 24 Rule 24.1(1).

[a] The EPA notes that the local agency formerly referred to as the Western North Carolina Regional Air Quality Agency has recently been renamed as the Asheville-Buncombe Air Quality Agency. This program and the corresponding portion of the North Carolina SIP, codified at 40 CFR 52.1770(c)(4), covers Buncombe County in North Carolina. The version of the code approved into the SIP is codified as the Western North Carolina Regional Air Quality Agency (WNCRAQA) Air Code.

B. What is 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, 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 up to 18 months from the date of the final finding of substantial inadequacy. Accordingly, the EPA is proposing that if it issues a final finding of substantial inadequacy and SIP call for a state, the EPA will establish a date 18 months from the date of promulgation of the final finding for the state to respond to the SIP call. 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), 113(b), 113(e), 193, and 304, including EPA's interpretation of the CAA reflected in the SSM Policy as explained in the 2015 SSM SIP Action. Considering the affected air agencies' need to develop appropriate regulatory provisions to address the SIP call and conduct any required processes for developing a SIP, we are proposing the 18-month due date because we believe that states should be provided the maximum time allowable under CAA section 110(k)(5) in order to ensure they have sufficient time. EPA expects that 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. In light of the potential for public health impacts during this time period, we solicit comment on whether establishing a shorter time period than 18 months could instead be sufficient for the affected air agencies to develop their submittals.

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

The issuance of a SIP call would require an affected state [8] to take action to revise its SIP to correct identified deficiencies. That action by the state may, in turn, affect sources as described later in this document. Any state that receives a SIP call because of SSM provisions has options as to exactly how to revise its SIP to correct the deficiency. 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. Some provisions that may be identified in a final SIP call—for example, an automatic exemption provision—would have to be removed entirely and an affected source could no longer depend on the exemption to avoid all liability for excess emissions. Some other provisions—for example, a problematic enforcement discretion provision or affirmative defense provision—could either be removed entirely from the SIP or retained if revised appropriately, in accordance with EPA's interpretation of the CAA as described in EPA's 2015 SSM SIP Action. The EPA notes that if a state removes a SIP provision that pertains to the state's exercise of enforcement discretion, this removal will not affect the ability of the state to use discretion in its state enforcement program.

The legal effect of a final SIP call is to direct the state to revise its SIP. Thus, the EPA anticipates that affected states will undertake their processes to determine how to resolve the identified deficiencies. The EPA further anticipates that the remedy may differ depending on what type of provision is implicated in the SIP call. For example, where specific emission limits applicable to specific sources are implicated, states may choose to consider reassessing particular emission limitations 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. A revision of an emission limitation made in response to a SIP call must be submitted to the EPA for approval. The EPA would then review the SIP revision for consistency with the CAA requirements of sections 110(a), 110(k), 110(l), 113(b), 113(e), 193, and 304, including EPA's interpretation of the CAA reflected in its SSM Policy, as explained in the 2015 SSM SIP Action. 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.

D. What happens in an affected state in the interim period starting when the EPA promulgates the final SIP call and ending when the EPA approves the required SIP revision?

When the EPA issues a final SIP call to a state, that action alone does not cause any automatic change in the legal status of the existing affected provision(s) in the SIP or as a matter of state law. The SIP revision process typically begins with a state regulatory action to revise the underlying state provision. Once that action is completed, and consistent with state regulatory processes, a rule may be in effect at the state level even before it is submitted to the EPA as part of a SIP. Furthermore, the rule may be in effect at the state level during the time in which the SIP revision is pending before the EPA for review. During the time that the state takes to develop a SIP revision in response to the SIP call and the time that the EPA takes to evaluate and act upon the resulting SIP submission from the state pursuant to CAA section 110(k), the existing affected SIP provision(s) will remain in place. The EPA recognizes that in the interim period, there may continue to be instances of excess emissions that adversely affect attainment and maintenance of the NAAQS, interfere

[8] For the purposes of this action, the term ''state'' generally refers to both state and local air agencies identified in this document.

with Prevention of Significant Deterioration (PSD) increments, interfere with visibility and cause other adverse consequences as a result of the impermissible provisions. The EPA is particularly concerned about the potential for public health impacts in this interim period during which states, the EPA, and sources make necessary adjustments to rectify deficient SIP provisions and take steps to improve source compliance. However, given the need to resolve these longstanding SIP deficiencies in a careful and comprehensive fashion, the EPA believes that providing sufficient time consistent with statutory constraints for these corrections to occur will ultimately be the best course to meet the ultimate goal of eliminating the inappropriate SIP provisions and replacing them with provisions consistent with CAA requirements.

E. What happens if a state fails to meet the SIP submission deadline or if the EPA disapproves the SIP submission?

If, in the future, the EPA finds that a state that is subject to this SIP call, should it be finalized, has failed to submit a complete SIP revision as required by the final rule, or the EPA disapproves such a SIP revision, then the finding or disapproval would trigger an obligation for the EPA to impose a federal implementation plan (FIP) within 24 months after that date. In addition, if a state fails to make the required SIP revision, or if the EPA disapproves the required SIP revision, then either event can also trigger mandatory 18-month and 24-month sanctions clocks under CAA section 179. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program, and restrictions on highway funding in nonattainment areas. More details concerning the timing and process of the SIP call, and potential consequences of the SIP call, are provided in section VIII. of this document.

IV. Is this action in response to any petitions for rulemaking?

While the 2015 SSM SIP Action was published in response to a Sierra Club petition for rulemaking, this 2023 SSM SIP Call proposed action is not intended to serve as a response to any petitions for rulemaking. The EPA is aware that the subject matter of this proposed action overlaps with two petitions.[9] If this action is finalized, EPA intends to address separately whether any additional action is necessary to respond to those petitions.

V. Statutory, Regulatory, and Policy Background

This section provides relevant background on EPA's SSM policy under the CAA, as outlined in the 2015 SSM SIP Action. It briefly describes the 2015 SSM SIP Action and the types of provisions EPA found to be deficient in issuing the SIP Calls in 2015. The EPA is applying an interpretation consistent with its SSM policy in issuing the notices of deficiency in the current action. This section also describes the three SIP Call withdrawals made by EPA in 2020 for North Carolina, Texas, and Iowa, as further background for the proposal to reinstate them. It also provides background on an October 2020 EPA memorandum announcing changes to EPA's SSM Policy, the subsequent withdrawal of that memorandum in September 2021, and the reinstatement of EPA's SSM Policy as outlined in the 2015 SSM SIP Action.

This section is provided as background and is not intended to interpret or alter these previous withdrawal actions. For details, consult the original actions using the references provided. We emphasize that the SIP calls in the current action are an application of existing policy from the 2015 Action that was adopted through notice and comment rulemaking, and that the EPA's SSM policy as outlined in the 2015 SSM SIP Action remains valid, binding, and in effect. By providing these descriptions, the EPA is not reopening its interpretation of the CAA regarding SSM provisions in SIPs for comment. The Agency had an extensive comment period for the policy interpretations underlying the 2015 SSM SIP Action. Any comments on EPA's interpretation of the CAA should have been filed in that Action. Because the current Proposed Action is simply an application of EPA's SSM policy, the EPA is seeking comments only on the applicability of the 2015 SSM SIP Action's interpretation of the Act to the states that the EPA proposes to SIP call in later sections of this document.

A. EPA's 2015 SSM SIP Action

On June 30, 2011, Sierra Club filed a petition for rulemaking (June 2011 Sierra Club petition) asking the EPA to consider how identified air agency rules in EPA-approved SIPs treated excess emissions during periods of startup, shutdown, or malfunction of industrial process or emission control equipment. On June 12, 2015, the EPA responded to the Sierra Club petition, restated and updated its national policy regarding SSM provisions in SIPs, and found pursuant to CAA section 110(k)(5) that a number of the identified provisions were ''substantially inadequate'' to meet CAA requirements, requiring certain states to amend those provisions. As mentioned previously in this document, this action is referred to as the 2015 SSM SIP Action.

In the 2015 SSM SIP Action, among other things, the EPA clarified its position on the following issues.

Emission Limitation

The term emission limitation is explicitly defined in section 302(k) of the CAA: ''a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.'' In the context of a SIP, EPA views an emission limitation as a legally binding restriction on emissions from a source or source category, such as a numerical emission limitation, a numerical emission limitation with higher or lower levels applicable during specific modes of source operation, a specific technological control measure requirement, a work practice standard, or a combination of these things as components of a comprehensive and continuous emission limitation in a SIP provision. By definition, an emission limitation can take various forms or a combination of forms, but in order to be permissible in a SIP it must be applicable to the source continuously, *i.e.,* cannot include periods during which emissions from the source are legally or functionally exempt from regulation. Regardless of its form, a fully approvable SIP emission limitation must also meet all substantive requirements of the CAA applicable to such a SIP provision, *e.g.,* the statutory requirement of CAA section 172(c)(1) for imposition of reasonably available control measures and reasonably

[9] *See* ''Petition to Find Inadequate and Correct Wisconsin's State Implementation Plan under Section 110 of the Clean Air Act Due to Unlawful Startup, Shutdown, and Maintenance Provisions'' filed by the Midwest Environmental Defense Center (MEDC) on June 7, 2012, and ''Petition for Reconsideration and Rulemaking Addressing Startup, Shutdown, and Malfunction Loopholes in State Implementation Plans'' filed by Sierra Club on April 12, 2021.

available control technology (RACM and RACT) on sources located in certain designated NAAs.[10]

Automatic Exemption Provisions

Automatic exemption provisions are generally applicable provisions in a SIP that would provide that if certain conditions exist during a period of excess emissions, then those exceedances would not be considered violations of the applicable emission limitations.[11] In the 2015 SSM SIP Action, the EPA stated that automatic exemption provisions in SIPs were impermissible in SIPs and, where SIP provisions provide an automatic exemption from otherwise applicable emission limitations, they are substantially inadequate to meet CAA requirements. EPA's longstanding view, as articulated in the 1982 SSM Guidance, 1983 SSM Guidance, 1999 SSM Guidance, 2001 SSM Guidance, and in the 2015 SSM SIP Action, is that SIP provisions that include automatic exemptions for excess emissions during SSM events, such that the excess emissions during those events are not considered violations of the applicable emission limitations, do not meet CAA requirements.[12] Such exemptions undermine the attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility, and SIP provisions that include such exemptions fail to meet these and other fundamental requirements of the CAA. Even where exempted SSM emissions are not currently causing or contributing to an exceedance of a NAAQS or PSD increment, automatic exemption provisions undermine the assurance that affected communities have that this will continue to be the case (for example, if emissions increase in the future, from SSM events or otherwise). Automatic exemptions also lessen incentives for sources to take necessary steps to prevent exempted emissions from causing exceedances, and they remove a pathway for EPA and the public to remedy such exceedances if they result from exempted emissions. In addition, the EPA interprets CAA sections 110(a)(2)(A) and 110(a)(2)(C) to require that SIPs that contain ''emission limitations'' must meet CAA requirements. Pursuant to CAA section 302(k), those emission limitations must be ''continuous.'' Automatic exemptions from otherwise applicable emission limitations thus render those limits less than continuous and thereby inconsistent with a fundamental requirement of the CAA, specifically sections 302(k), 110(a)(2)(A) and 110(a)(2)(C). As such, automatic exemption provisions are substantially inadequate to meet CAA requirements and, thus, require SIP call under section 110(k)(5).

Director's Discretion Provisions

Director's discretion provisions, in general, are regulatory provisions that authorize a state regulatory official unilaterally to grant exemptions or variances from otherwise applicable emission limitations or control measures, or to excuse noncompliance with otherwise applicable emission limitations or control measures, which would be binding on the EPA and the public.[13] In the 2015 SSM SIP Action, the EPA stated that, for the same reasons as automatic exemptions, but for additional reasons as well, unbounded director's discretion provisions were impermissible in SIPs, and SIP provisions that allow discretionary exemptions from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements. Primarily, director's discretion provisions violate a fundamental requirement of the CAA because they serve to create exemptions from otherwise applicable emission limitations, which, as is discussed above, is inconsistent with the CAA's requirement that such emission limitations operate continuously. Director's discretion provisions are additionally problematic because, unless it is possible at the time of the approval of the SIP provision to anticipate and analyze the impacts of the potential exercise of the director's discretion, such provisions functionally could allow *de facto* revisions of the approved emission limitations required by the SIP, without complying with the process for SIP revisions required by the CAA. Sections 110(a)(1) and (2) of the CAA impose procedural requirements on states that seek to amend SIP provisions. The elements of CAA section 110(a)(2) and other sections of the CAA, depending upon the subject of the SIP provision at issue, impose substantive requirements that states must meet in a SIP revision. Section 110(i) of the CAA prohibits modification of SIP requirements for stationary sources by either the state or the EPA, except through specified processes.

The 2015 document went on to explain that section 110(k) of the CAA imposes procedural and substantive requirements on the EPA for action upon any SIP revision. Sections 110(l) and 193 of the CAA both impose additional procedural and substantive requirements on the state and the EPA in the event of a SIP revision. Key among these many requirements for a SIP revision would be the necessary demonstration that the SIP revision in question would not interfere with any requirement concerning attainment and reasonable further progress or ''any other applicable requirement of'' the CAA to meet the requirements of CAA section 110(l). The EPA interprets the statute to prohibit director's discretion provisions unless they would be consistent with the statutory and regulatory requirements that apply to SIP revisions.[14] A SIP provision that purports to give broad and unbounded director's discretion to alter the existing legal requirements of the SIP with respect to meeting emission limitations would be tantamount to allowing a revision of the SIP without meeting the applicable procedural and substantive requirements for such a SIP revision. EPA's approval of a SIP provision that purported to allow unilateral revisions of the emission limitations in the SIP by the state, without complying with the statutory requirements for a SIP revision, would itself be contrary to fundamental procedural and substantive requirements of the CAA. The 2015 document also described EPA's efforts to discourage these provisions and to remove existing provisions that it had previously approved in error.

In addition, discretionary exemptions undermine effective enforcement of the SIP by the EPA or through a citizen suit, because often there may have been little or no public process concerning the exercise of director's discretion to grant the exemptions, or easily accessible documentation of those exemptions. Thus, even ascertaining the possible existence of such *ad hoc* exemptions will further burden parties who seek to evaluate whether a given source is in compliance or to pursue enforcement if it appears that the source is not. Where there is little or no public process concerning such *ad hoc* exemptions, or there is inadequate access to relevant documentation of those exemptions, enforcement by the EPA or through a citizen suit may be severely compromised. As explained in the 1999

[10] *See* 80 FR 33840 at 33842.

[11] *See* Id.

[12] *See* 80 FR 33840 at 33849, 33889.

[13] *See* 80 FR 33840 at 33842.

[14] *See, e.g.,* EPA's implementing regulations at 40 CFR 51.104(d) (''In order for a variance to be considered for approval as a revision to the [SIP], the State must submit it in accordance with the requirements of this section'') and 51.105 (''Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.'').

SSM Guidance,[15] the EPA does not interpret the CAA to allow SIP provisions that would allow the exercise of director's discretion concerning violations to bar enforcement by the EPA or through a citizen suit. The exercise of director's discretion to exempt conduct that would otherwise constitute a violation of the SIP would interfere with effective enforcement of the SIP. Such provisions are inconsistent with and undermine the enforcement structure of the CAA provided in CAA sections 113 and 304, which provide independent authority to the EPA and citizens to enforce SIP provisions, including emission limitations.

Affirmative Defense Provisions

Affirmative defense provisions, in the context of enforcement proceedings, mean that 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.[16] In the 2015 SSM SIP Action, the EPA stated that affirmative defense provisions were impermissible in SIPs, and SIP provisions that provide an affirmative defense for excess emissions during SSM events are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible affirmative defense operates to limit or eliminate the jurisdiction of federal courts to assess liability or to impose remedies in an enforcement proceeding for exceedances of SIP emission limitations. Some affirmative defense provisions apply broadly, whereas others are components of specific emission limitations. Some provisions use the explicit term ''affirmative defense,'' whereas others are structured as such provisions but do not use this specific terminology. All of these provisions, however, share the same legal deficiency in that they purport to alter the statutory jurisdiction of federal courts under section 113 and section 304 to determine liability and to impose remedies for violations of CAA requirements, including SIP emission limitations. Accordingly, an affirmative defense provision that operates to limit or to eliminate the jurisdiction of the federal courts would undermine the enforcement structure of the CAA and would thus be substantially inadequate to meet fundamental requirements in CAA sections 113 and 304. By undermining enforcement, such provisions may also be inconsistent with fundamental CAA requirements such as attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility.

SIP Call Authority Under Section 110(k)(5)

Finally, the EPA also provided in the 2015 SSM SIP Action a description of the SIP Call mechanism that it used to address the substantial inadequacies it identified. This is the same mechanism we are proposing to use to address the inadequacies identified in this document. In 2015, the EPA noted that the CAA provides a mechanism for the correction of flawed SIPs, under CAA section 110(k)(5), which provides that, ''Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate . . . or to otherwise comply with any requirement of [the Act], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies.'' [17]

By its explicit terms, this provision authorizes the EPA to find that a state's existing SIP is ''substantially inadequate'' to meet CAA requirements and, based on that finding, to ''require the State to revise the [SIP] as necessary to correct such inadequacies.'' This type of action is commonly referred to as a ''SIP call.'' [18]

Consistent with the approach taken in the 2015 SSM SIP Action, section 110(k)(5) explicitly authorizes the EPA to issue a SIP call ''whenever'' the EPA makes a finding that the existing SIP is substantially inadequate, thus providing authority for the EPA to take action to correct existing inadequate SIP provisions even long after their initial approval, or even if the provisions only become inadequate due to subsequent events.[19] The provision gives the EPA authority to identify any deficiency in a SIP that currently exists, regardless of the fact that the EPA previously approved that particular provision in the SIP and regardless of when that approval occurred. CAA section 110(k)(5) authorizes the EPA to take action with respect to SIP provisions that are substantially inadequate to meet any CAA requirements, including requirements relevant to the proper treatment of excess emissions during SSM events. As is discussed in detail in the sections above, there are serious legal and practical consequences from impermissible SSM provisions appearing in SIPs, making it clear to EPA that such provisions are appropriately categorized as substantially inadequate. Further detail on EPA's SIP Call authority under section 110(k)(5) can be found in section VIII of this document.

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

Texas: Texas Administrative Code (TAC) Title 30 Part 1 Chapter 101 Subchapter F Division 3 Section 101.222(b)–(e)

In the 2015 SSM SIP Action, the EPA granted a June 30, 2011, Sierra Club petition with respect to 30 TAC 101.222(b)–(e), finding that these provisions were substantially inadequate to meet the requirements of the CAA and issuing a SIP call for those provisions.[20]

In that action, the EPA found 30 TAC 101.222(b)–(e) to be substantially

[15] *See* EPA's 1999 SSM Guidance (Memorandum to EPA Regional Administrators, Regions I–X from Steven A. Herman and Robert Perciasepe, USEPA, Subject: State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown, dated September 20, 1999).

[16] *See* 80 FR 33840 at 33842.

[17] *See* CAA section 110(k)(5).

[18] The EPA also has other discretionary authority to address incorrect SIP provisions, such as the authority in CAA section 110(k)(6) for the EPA to correct errors in prior SIP approvals. The authority in CAA section 110(k)(5) and CAA section 110(k)(6) can sometimes overlap and offer alternative mechanisms to address problematic SIP provisions. In this instance, the EPA believes that the mechanism provided by CAA section 110(k)(5) is the better approach, because it may be difficult to avoid eliminating the affected emission limitations from the SIP by using the mechanism of the CAA section 110(k)(6) error correction, potentially leaving no emission limitation in place, whereas the mechanism of the CAA section 110(k)(5) SIP call is guaranteed to keep the provisions in place during the pendency of the state's revision of the SIP and EPA's action on that revision. In the case of provisions that include impermissible automatic exemptions or discretionary exemptions, the EPA believes that retention of the existing SIP provision is preferable to the absence of the provision in the interim. In addition, in this particular situation, EPA believes that allowing states the flexibility to correct substantial inadequacies relating to SSM in their own SIPs, subject to EPA's review, is appropriate under the CAA's cooperative federalism framework.

[19] *See, e.g., Michigan* v. *EPA,* 213 F.3d 663 (D.C. Cir. 2000) (upholding the ''NO_X SIP Call'' to states requiring revisions to previously approved SIPs with respect to ozone transport and CAA section 110(a)(2)(D)(i)(I)); ''Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final rule,'' 75 FR 77698 (December 13, 2010) (the EPA issued a SIP call to 13 states because the endangerment finding for GHGs meant that these previously approved SIPs were substantially inadequate because they did not provide for the regulation of GHGs in the PSD permitting programs of these states as required by CAA section 110(a)(2)(C) and section 110(a)(2)(J)); ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 74 FR 21639 (April 18, 2011) (EPA issued a SIP call to rectify SIP provisions dating back to 1980).

[20] *See* 80 FR 33840 at 33968.

inadequate to meet the requirements of the Act on the basis that these provisions operate to alter or eliminate federal courts' jurisdiction to determine penalties for violations of SIP requirements and, therefore, undermine Congress's grant of jurisdiction, and are inconsistent with CAA requirements.[21] These provisions provide affirmative defenses as to civil penalties for sources of excess emissions that occur during upsets (section 101.222(b)), unplanned events (section 101.222(c)), upsets with respect to opacity limits (section 101.222(d)), and unplanned events with respect to opacity limits (section 101.222(e)). These provisions provide a narrowly tailored affirmative defense for emissions that exceed applicable emissions limitations that occur during upsets and unplanned MSS activities. The EPA considers both ''upsets'' and ''unplanned MSS activities'' to be functionally equivalent to malfunctions, as discussed in the 2015 SSM SIP Action.

On February 7, 2020, EPA Region 6 published a final action finding that 30 TAC 101.222(b)–(e) were permissible affirmative defense provisions after seeking the EPA headquarters concurrence to deviate from EPA's national policy announced in the 2015 SSM SIP Action.[22] The Region 6 action stated that imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances beyond the control of the owner or operator may not be appropriate. In the context of unplanned events or malfunctions, the Region 6 action indicated that even process equipment or a control device that is properly designed, maintained, and operated can sometimes fail. At the same time, as outlined in the 2015 SSM SIP Action, the EPA has a fundamental responsibility under the CAA to ensure that SIPs provide for attainment and maintenance of the NAAQS and protection of air quality increments in the Prevention of Significant Deterioration (PSD) program. After balancing these considerations, the Region 6 action concluded that the Texas SIP provisions containing affirmative defenses were appropriately narrowly tailored and would not undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the CAA. The Region 6 document determined that 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d), and 30 TAC 101.222(e) were not substantially inadequate to meet the requirements of the Act and withdrew the SIP call issued to Texas as part of the 2015 SSM SIP Action.

North Carolina

In the 2015 SSM SIP Action, the EPA granted a June 30, 2011, Sierra Club petition with respect to provisions 15A NCAC 02D .0535(c) and 15A NCAC 02D .0535(g), finding that those provisions were substantially inadequate to meet the requirements of the CAA and issuing a SIP call for those provisions.[23]

In that action, the EPA found 15A NCAC 02D .0535(c) and 15A NCAC 02D .0535(g) to be substantially inadequate to meet the requirements of the Act on the basis that these provisions provide exemptions for emissions exceeding otherwise applicable SIP emission limitations at the discretion of the state agency during SSM events.

On April 28, 2020, EPA Region 4 published a final action adopting an alternative policy allowing certain automatic exemption provisions and director's discretion provisions in SIPs for the state of North Carolina.[24] The Region 4 document interpreted CAA section 110(a)(2)(A) to allow for ''exemptions from numerical emission limits so long as the SIP contains a set of emission limitations, control measures or other means or techniques, which, taken as a whole, meet the requirements of attaining and maintaining the NAAQS under subpart A.'' [25] After evaluating the SIP as a whole and determining that the SIP, collectively, was protective of the NAAQS, the Region 4 document concluded that automatic exemption provisions were permissible in the NC SIP. Region 4 also found that director's discretion provisions, because they are more limited in scope than automatic exemption provisions, likewise did not render the SIP inadequate.

In light of the alternative policy regarding automatic exemption provisions for North Carolina, Region 4 determined that 15A NCAC 02D .0535(c) and 15A NCAC 02D .0535(g) were not substantially inadequate to meet the requirements of the Act and withdrew the SIP call issued to North Carolina as part of the 2015 SSM SIP Action. Additionally, the Region 4 notice approved a SIP revision submitted by the NC Department of Air Quality (DAQ), through a letter dated June 5, 2017, which sought to change North Carolina's SIP-approved rule regarding nitrogen oxides (NO_X) emissions from large internal combustion engine sources at 15A NCAC 02D .1423, *Large Internal Combustion Engines.* This rule, 15A NCAC 02D.1423, was not included in the 2015 SSM SIP Call Action but includes a provision that automatically exempts periods of SSM and scheduled maintenance activities from regulation.[26]

Iowa

In the 2015 SSM SIP Action, the EPA granted the Sierra Club's petition with respect to IAC 567–24.1(1), finding that the provision was substantially inadequate to meet the requirements of the CAA and issued a SIP call for that provision.

In that action, the EPA found IAC 567–24.1(1) to be substantially inadequate to meet the requirements of the Act on the basis that this provision automatically allows for automatic exemptions from the otherwise applicable SIP emission limitations.[27] This provision explicitly states that excess emissions during periods of startup, shutdown, and cleaning of control equipment are not violations of the emission standard.[28]

In a June 22, 2020, supplemental notice of proposed rulemaking, EPA Region 7 articulated the interpretation that the general requirements in CAA section 110 to attain and maintain the NAAQS, along with the latitude provided to states through the SIP development process, create a framework in which a state may be able to ensure attainment and maintenance of the NAAQS notwithstanding the presence of SSM exemptions in the SIP.[29] On November 17, 2020, EPA Region 7 published a final action that adopted this interpretation.[30] On October 9, 2020, the EPA issued the Wheeler memo to revise SSM policy. Among other things, the memo discussed this interpretation in more detail and adopted it as agency policy. That memo is described in more detail in the next section, section V.C., of this document. In light of this agency policy, EPA Region 7 determined IAC 567–24.1(1) was not substantially inadequate to meet the requirements of the Act and withdrew the SIP call issued to Iowa as part of EPA's 2015 SSM SIP Action. In

[21] *See* 80 FR 33840 at 33851–53.

[22] 85 FR 7232 (February 7, 2020).

[23] *See* 80 FR 33840 at 33964.

[24] *See* 85 FR 23700.

[25] *See* Id. at 23705.

[26] *See* 80 FR at 33880. 15A NCAC 02D .1423 was not included in the 2015 SSM SIP Action but is included in this document under section VII.C.2 of this document.

[27] *See* 80 FR 33840 at 33969.

[28] The provision does not provide for an exemption during periods of malfunction. However, for ease of reference, the EPA refers to the provision as an ''SSM'' provision in order to align with public comments which regularly reference ''SSM'' events and provisions.

[29] *See* 85 FR 37405 (June 22, 2020).

[30] *See* 85 FR 73218 (November 17, 2020).

finalizing the Iowa SIP call withdrawal, the EPA referred to the October 2020 policy memorandum, outlining a new national policy related to specific SIP provisions governing excess emissions during SSM events.[31]

C. 2020 Wheeler Memo and Subsequent Withdrawal via 2021 McCabe Memo

As mentioned in section V.B. of this document, on October 9, 2020, the EPA issued a guidance memorandum outlining a new national policy related to specific SIP provisions governing excess emissions during SSM events.[32] The new guidance memorandum superseded the guidance provided in the 2015 SSM SIP Action on two subjects: exemptions and affirmative defense provisions. Importantly, it did not alter the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act. This memorandum was signed by Administrator Andrew Wheeler and is referred to in this document as the ''Wheeler memo.''

Specifically, with regard to exemption provisions, the Wheeler memo stated that such provisions—both those referred to as ''automatic exemptions'' and those termed ''director discretion provisions'' in the 2015 SSM SIP Action—may be permissible in SIPs under certain circumstances. The EPA stated that the general requirements in CAA section 110 to attain and maintain the NAAQS and the latitude provided to states through the SIP development process create a framework in which a state may be able to ensure attainment and maintenance of the NAAQS notwithstanding the presence of SSM exemptions in the SIP. Additionally, the EPA stated that it is permissible for a SIP to contain SSM exemptions only if the SIP is composed of numerous planning requirements that are collectively NAAQS-protective by design. Such redundancies, the EPA stated, help to ensure that the NAAQS are both attained and maintained, which was Congress's goal in creating the SIP development and adoption process. In evaluating whether the requirements of a SIP are collectively NAAQS protective despite the inclusion of an SSM exemption provision, the guidance memorandum stated that the EPA would conduct an in-depth analysis of the SIP, including a multifactor, weight-of-evidence exercise that balances many considerations. For director's discretion provisions, the EPA stated that any such provisions would necessarily be more protective of the NAAQS than a similarly-applicable automatic exemption provision, and may be appropriate in similar circumstances.

With respect to affirmative defenses, the Wheeler memo stated that affirmative defenses may be permissible in SIPs if they are narrowly tailored so as not to undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the CAA. The Wheeler memo reflected a policy interpretation previously held by the EPA in its 1999 SSM Guidance stating that an affirmative defense provision could generally be considered narrowly tailored if it provides that a defendant has the burden of demonstrating that 10 certain factors were met.

Following the issuance of the Wheeler memo, the EPA initiated a review of the policy and rationale described therein. This review resulted in the EPA issuing a new memorandum on September 30, 2021, signed by Deputy Administrator Janet McCabe, withdrawing the Wheeler memo.[33] This new memorandum is referred to in this document as the ''McCabe memo.'' The McCabe memo withdrew the Wheeler memo in its entirety and reinstated EPA's SSM Policy, as described in the 2015 SSM SIP Action, with respect to provisions that had been superseded by the Wheeler memo. It also reaffirmed EPA's SSM Policy, as described in the 2015 SSM SIP Action, with respect to all other provisions *not* superseded. The McCabe memo explained the reasons for the withdrawal of the Wheeler memo and reinstatement of EPA's SSM Policy by noting that ''the statutory interpretations extensively discussed in the 2015 policy are more consistent with the CAA and relevant case law for the reasons explained in the 2015 SSM SIP Action.'' [34] It noted, for example, that the Wheeler memo did not adequately address CAA requirements other than NAAQS attainment and maintenance. It also noted that the Wheeler memo did not address the 2008 D.C. Circuit holding that affirmative defense provisions are beyond the scope of EPA's authority to create. The McCabe memo pointed to EPA's SSM Policy's analysis of CAA provisions and found that analysis to be more consistent with the CAA and relevant case law, for the reasons explained in detail in the 2015 SSM SIP Action.

In addition to withdrawing the Wheeler memo and reinstating EPA's SSM Policy, the McCabe memo provided information about additional related actions that EPA intended to take with respect to the SSM SIP issues, specifically: (1) expeditiously revisiting the three state-specific SSM SIP call withdrawals for NC, TX, and IA and, also through notice-and-comment rulemaking, to consider whether any of the findings underlying these actions should be retained in light of the Agency's reaffirmation of EPA's SSM Policy, and (2) implementing EPA's SSM Policy on an ongoing basis through future notice-and-comment actions on SIP submissions, including implementing the 2015 SIP call and taking additional SIP actions consistent with EPA's SSM Policy. This document addresses those intended actions by initiating the notice-and-comment action for the NC, TX, and IA withdrawals and also by initiating additional SIP calls consistent with EPA's SSM Policy for additional deficient SSM provisions of which EPA is aware. Moreover, although not related to the current action, EPA notes that it is continuing to implement the 2015 SIP calls for the remaining states through separate SIP actions.

VI. Proposed Action To Reinstate Findings of Substantial Inadequacy and Issue SIP Calls for North Carolina, Texas, and Iowa

A. North Carolina

As explained in section V.B. of this document, on April 28, 2020, EPA Region 4 published a final action adopting an alternative policy allowing automatic exemption provisions and director's discretion provisions in SIPs for the state of North Carolina.[35] Consistent with EPA's SSM Policy as outlined in the 2015 SSM SIP Action and 2021 McCabe memo, the EPA is proposing in this document to reinstate the SIP call that was issued to North Carolina for provisions in 15A NCAC 02D .0535(c) and (g) in 2015 on the basis

[31] Memorandum from Administrator Wheeler to Regional Administrators, dated October 9, 2020, titled, ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans.'' *https://www.epa.gov/air-quality-implementation-plans/guidance-inclusion-provisions-governing-periods-startup-shutdown.*

[32] Memorandum from Administrator Wheeler to Regional Administrators, dated October 9, 2020, titled, ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans.'' *https://www.epa.gov/air-quality-implementation-plans/guidance-inclusion-provisions-governing-periods-startup-shutdown.*

[33] See Memorandum from Janet McCabe to Regional Administrators, dated September 30, 2021, titled ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy.'' *https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf.*

[34] *See* McCabe memo, p. 3.

[35] *See* 85 FR 23700.

that they contain impermissible director's discretion provisions.

In EPA's 2020 SIP call withdrawal for the state of North Carolina, Region 4 determined that it was reasonable to allow automatic exemption provisions and director's discretion provisions in the North Carolina SIP. The rationale for that determination was based on an evaluation of the SIP as a whole and finding the SIP, collectively, to be protective of the NAAQS, notwithstanding the existence of SSM provisions in the SIP. In that action, Region 4 stated that, although the North Carolina SIP contains SSM exemptions for limited periods applicable to discrete standards, the SIP is composed of numerous planning requirements that are collectively NAAQS-protective. Region 4 determined that the North Carolina SIP's overlapping requirements provide additional protection of the standards such that the SIP adequately provides for attainment and maintenance of the NAAQS, even if the SIP allows exemptions to specific emission limits for discrete periods, such as SSM events. Region 4 stated that such redundancy helps to ensure attainment and maintenance of the NAAQS, one of the goals of Congress when it created the SIP adoption and approval process in the CAA. Region 4 also noted that North Carolina currently does not have any nonattainment areas for any NAAQS and that air quality in the state has steadily improved over the years even though the exemption provisions have been included in the SIP, concluding that the SSM exemptions have not interfered with attainment or maintenance of the NAAQS.

Furthermore, in that action, Region 4 found that the alternative policy for North Carolina was reasonable because the D.C. Circuit's decision in *Sierra Club* v. *Johnson,* 551 F.3d 1019 (D.C. Cir. 2008) did not, on its face, apply to SIPs and actions taken under CAA section 110.[36] In that action, the EPA stated that, while the *Sierra Club* decision did not allow sources to be exempt from complying with CAA section 112 emission limitations during periods of SSM, that finding is not necessarily binding on CAA section 110 and EPA's consideration of SIPs under that section. In contrast to CAA section 112, that action stated, the CAA sets out a fundamentally different regime with respect to CAA section 110 SIPs, reflecting the principle that SIP development and implementation is customizable for each state's circumstances and relies on the federal-state partnership.[37] Region 4 stated that the D.C. Circuit's concern that CAA section 112 standards must apply ''continuously'' to regulate emissions from a particular source does not translate directly to the context of CAA section 110, where a state's plan may contain a broad range of measures, including limits on multiple sources' and source categories' emissions of multiple pollutants—all working together to ensure attainment and maintenance of an ambient standard that is not itself an applicable requirement for individual sources. In the SIP call withdrawal, Region 4 stated that, regardless of the measures a state seeks to include in its SIP, those measures must collectively work toward compliance with the nationally uniform NAAQS.[38]

In its April 28, 2020, action, Region 4 found that its interpretation is consistent with the concept that the CAA requires that some CAA section 110 standards apply continuously. Specifically, CAA 110(a)(2)(A) requires the SIP to include ''enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act.'' Region 4 argued that the phrase ''as may be necessary or appropriate to meet the applicable requirements of [the] Act'' allows the state some flexibility to develop SIP provisions that are best suited for their purposes.[39] In that context, Region 4 found that a reasonable interpretation of the CAA section 302(k) definition of the terms ''emission limitation'' and ''emission standard'' did not preclude North Carolina from adopting provisions that apply continuously while also allowing that unavoidable excess emissions that occur during certain discrete, time-limited periods of operation may not be considered a violation of the rule. Region 4 interpreted CAA section 110(a)(2)(A) to mean that a state may provide exemptions from numerical emission limits so long as the SIP contains a set of emission limitations, control means, or other means or techniques, which, taken as a whole, meet the requirements of attaining and maintaining the NAAQS under subpart A.

Accordingly, Region 4 evaluated specific overlapping planning requirements in the North Carolina SIP that it found to be protective of each individual criteria pollutant NAAQS.[40] After evaluating the SIP as a whole and determining that the SIP, collectively, was protective of the NAAQS, Region 4 concluded that automatic SSM exemptions were allowable in that SIP. Further, relying on the alternative policy's interpretation of the relevant CAA provisions, together with the specific automatic SSM provisions in the North Carolina SIP, Region 4 determined it was reasonable to find that the SIP met the applicable requirements of the CAA and, therefore, did not mandate a finding that the SIP is substantially inadequate.

After reconsidering its prior action, the EPA is now proposing that the withdrawal of the SIP call for North Carolina was inappropriate. In this action, EPA is proposing to return to its interpretation of the Act in the 2015 SSM SIP action, which is consistent with *Sierra Club*[41] and is thus proposing to reinstate the SIP call for North Carolina that was issued in 2015. The statutory interpretations extensively discussed in the 2015 SSM SIP Action are the appropriate reading of the CAA and relevant case law for the reasons explained in the 2015 SSM SIP Action. Specifically, with respect to automatic exemptions from emission limitations in SIPs, EPA's longstanding interpretation of the CAA is that such exemptions are impermissible because they are inconsistent with the fundamental requirements of the CAA. The EPA reiterated this interpretation in the 2015 SSM SIP Action, the 2021 McCabe memo, and is applying that interpretation in this document. By exempting emissions that would otherwise constitute violations of the applicable emission limitations, such exemptions interfere with the primary air quality objectives of the CAA (*e.g.,* attainment and maintenance of the NAAQS and the protection of public health and the environment),

[36] The reasoning of the court was that exemptions for SSM events in the CAA section 112 context are impermissible because they contradict the requirement that emission limitations be ''continuous'' in accordance with the definition of that term in section 302(k). Although the court evaluated this issue in the context of EPA regulations under section 112, in the 2015 SSM SIP Action, the EPA found that this same logic extends to SIP provisions under section 110, which similarly must contain emission limitations as defined in the CAA. Section 110(a)(2)(A) of the CAA requires states to have emission limitations in their SIPs to meet other CAA requirements, and any such emission limitations would similarly be subject to the definition of that term in CAA section 302(k).

[37] *See Virginia* v. *EPA,* 108 F.3d at 1408.

[38] *See* 85 FR 23700 at 23704.

[39] *See* Id. at 23705.

[40] *See* Id. at 23705–23707.

[41] 551 F.3d 1019 (D.C. Cir. 2008).

undermine the enforcement structure of the CAA (*e.g.,* the requirement that all SIP provisions be legally and practically enforceable by states, the EPA and parties with standing under the citizen suit provision), and eliminate the incentive for emission sources to comply at all times, not solely during normal operation (*e.g.,* incentives to be properly designed, maintained and operated so as to minimize emissions of air pollutants during startup and shutdown or to take prompt steps to rectify malfunctions). Even if Region 4's previous conclusion—that all of the provisions of the North Carolina SIP work together collectively to protect the NAAQS in that state—was correct, the EPA is now proposing to find that the exemption provisions in the North Carolina SIP are inconsistent with fundamental CAA requirements and are thus impermissible. Protection of the NAAQS and public health is an important goal of CAA section 110, and SSM exemptions both endanger that goal and are impermissible for additional reasons.

Crucially, exemption provisions are impermissible under the CAA section 302(k) requirement that emissions limitations must apply ''on a continuous basis.'' In *Sierra Club,* the D.C. Circuit held that, in the CAA section 112 context, emission limitations containing SSM exemptions were discontinuous and thus impermissible under CAA section 302(k). The EPA believes that the best reading of section 110 aligns with the logic laid out in *Sierra Club,* and similarly forecloses states' ability to create exemption provisions in SIPs. EPA's 2020 alternative interpretation was not consistent with the CAA section 110 requirement that standards apply continuously. Section 110(a)(2)(A) of the CAA does not provide flexibility in that regard. The phrase ''as may be necessary or appropriate to meet the applicable requirements of [the] Act'' in no way provides for exemptions from emission limitations and in no way precludes the CAA section 302(k) definition of the terms ''emission limitation'' and ''emission standard.'' Moreover, from a policy perspective, the EPA notes that the existence of impermissible exemptions in SIP provisions has the potential to lessen the incentive for development of control strategies that are effective at reducing emissions during certain modes of source operation such as startup and shutdown, even though such strategies could become increasingly helpful for various purposes, including attaining and maintaining the NAAQS and protecting public health.

With respect to discretionary exemptions from emission limitations in SIPs, the EPA also has a longstanding interpretation of the CAA that prohibits director's discretion provisions in SIPs if they provide discretion to allow what would amount to a case-specific revision of the SIP without meeting the statutory requirements of the CAA for SIP revisions.[42] In particular, the EPA interprets the CAA to preclude SIP provisions that provide director's discretion authority to create discretionary exemptions for violations when the CAA would not allow such exemptions in the first instance. As with automatic exemptions for excess emissions during SSM events, discretionary exemptions for such emissions interfere with the primary air quality objectives of the CAA, undermine the enforcement structure of the CAA and eliminate the incentive for emission sources to minimize emissions of air pollutants at all times, including startup and shutdown events. Through this action, the EPA is reiterating its position that the best reading of the CAA is that it precludes unbounded director's discretion provisions in SIPs.[43]

While this argument was not made explicitly in the EPA's action withdrawing the North Carolina SIP call, one could claim that the overlapping planning requirements cited to in that action themselves constitute an alternative emission limitation that applies during the SSM exemptions in North Carolina's otherwise applicable emission limitations, creating a single, continuous emission limitation. The EPA is proposing that such a claim is not consistent with the Agency's interpretation of the requirements of the CAA and the 2015 SSM SIP Policy, which lays out a clear set of criteria that the EPA considers when assessing whether an alternative emission limitation is acceptable.[44] The overlapping requirements operate more as ''general duty'' provisions than specific, enforceable limitations that would be appropriate under the best reading of the CAA. EPA explained at length in the 2015 SSM SIP Action why such ''general duty'' provisions are inappropriate and inconsistent with CAA requirements.[45]

For these reasons, the EPA correctly determined in its 2015 SSM SIP Action that automatic exemption and director's discretion provisions in SIPs are impermissible because they violate fundamental requirements of the CAA. The EPA reaffirmed that policy position in the McCabe memo and, as such, is proposing to reinstate the SIP call for 15A NCAC 02D .0535(c) and 15A NCAC 02D .0535(g) as they are substantially inadequate to meet the requirements of the Act. The EPA is also proposing to make additional findings of substantial inadequacy to be included in the SIP call for North Carolina. These provisions and findings of substantial inadequacy will be discussed in further detail in section VII.C. of this document.[46]

B. Texas

As explained in section V.B. of this document, on January 7, 2020, EPA Region 6 adopted an alternative policy regarding the permissibility of affirmative defense provisions for Texas and subsequently withdrew the SIP call that was issued to Texas as part of the 2015 SSM SIP Action. In light of EPA's SSM policy as outlined in the 2015 SSM SIP Action and McCabe memo, EPA is proposing in this document to reinstate the SIP call that was issued to Texas in 2015 on the basis that affirmative defense provisions are impermissible in SIPs.

In EPA's 2020 SIP call withdrawal for Texas, EPA stated that that imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances beyond the control of the owner or operator may not be appropriate. Region 6 concluded that the Texas SIP provisions containing affirmative defenses were appropriately narrowly tailored and would not undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the CAA. Region 6 explained in that action that the

[42] See, *e.g.,* CAA section 110(l).

[43] *See* 80 FR 33840 at 33918.

[44] *See* 80 FR 33840 at 33912–33914.

[45] See 80 Fed Reg. 33840 at 33889–33890, 33893, 33903, 33943, 33979–33980.

[46] The EPA notes that it maintains the discretion and authority to change its CAA interpretation from a prior position. *FCC* v. *Fox Television,* 556 U.S. 502 (2009). The EPA is aware that its proposed action would represent a change in position from the interpretations applied in the North Carolina, Texas, and Iowa SIP call withdrawal actions, and a return to the Agency's previous interpretations as outlined in the 2015 SSM SIP Action, in which the Agency issued the original SIP calls to those states. As is discussed elsewhere in this document, the interpretations applied in the North Carolina, Texas, and Iowa SIP Call withdrawal actions were not the best readings of the CAA. As is outlined in detail in this document, EPA's return to the original interpretation of the CAA and proposed application of that interpretation to the states discussed in this document does not represent a change in the factual findings underlying that application. Given the fact that the EPA is proposing that states will have 18 months to comply with any final SIP calls, the EPA also does not believe that this action, if finalized, would engender any serious reliance interests. *See id.* at 515–16.

differences in scope and relative balance of state and federal authority between CAA sections 110 and 112 suggest that the D.C. Circuit's reasoning in *NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014), with respect to limits on EPA's authority under section 110 does not address the distinct question of whether a state may include affirmative defense provisions as part of an overall strategy for inclusion in their SIP submissions under section 110. Given the distinction between sections 112 and 110, and in light of the *Luminant* decision, which upheld EPA's previous approval of the Texas affirmative defense provisions, EPA determined that the appropriate policy was to consider the Texas affirmative defense provisions to be consistent with CAA requirements.[47]

The EPA is now proposing that the withdrawal of the SIP call for Texas was inappropriate. In this action, EPA is proposing to return to its interpretation of the CAA in the 2015 SSM SIP action, which is more consistent with the reasoning of the D.C. Circuit in *NRDC* and is thus proposing to reinstate the SIP call for Texas that was issued in 2015. The statutory interpretations extensively discussed in the 2015 SSM SIP Action are more consistent with the CAA and relevant case law for the reasons explained in the 2015 SSM SIP Action. The CAA clearly states that private citizens have the right to sue over violations of SIP-approved emission limits.[48] Federal district courts are granted exclusive jurisdiction to hear such cases, enforce against violations of emission limits, and apply civil penalties as appropriate. These courts also have jurisdiction to enforce against emission limitation violations and assess civil penalties in civil actions brought by the EPA.[49] As explained in EPA's 2015 SSM SIP Action, the enforcement structure of the CAA, embodied in CAA section 113 and CAA section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. Affirmative defense provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain or what forms of remedy they purport to limit or eliminate. For these reasons, the EPA is now proposing to reinstate the SIP call that was issued to Texas in 2015 and find that Texas's affirmative defense provisions are impermissible under the CAA.

Further support for EPA's proposal is as follows. Section 113(b) of the CAA provides courts with explicit jurisdiction to determine liability and to impose remedies of various kinds, including injunctive relief, compliance orders and monetary penalties, in judicial enforcement proceedings. This grant of jurisdiction comes directly from Congress, and the EPA is not authorized to alter or eliminate this jurisdiction under the CAA or any other law. With respect to monetary penalties, CAA section 113(e) explicitly includes the factors that courts and the EPA are required to consider in the event of judicial or administrative enforcement for violations of CAA requirements, including SIP provisions. Because Congress has already given federal courts the jurisdiction to determine what monetary penalties are appropriate in the event of judicial enforcement for a violation of a SIP provision, neither the EPA nor states can alter or eliminate that jurisdiction by superimposing restrictions on that jurisdiction and discretion granted by Congress to federal courts. Affirmative defense provisions by their nature purport to limit or eliminate the authority of federal courts to determine liability or to impose remedies through factual considerations that differ from, or are contrary to, the explicit grants of authority in CAA section 113(b) and section 113(e). Accordingly, pursuant to CAA section 110(k) and section 110(l), the approval of affirmative defense provisions in SIPs would be inconsistent with the above-articulated interpretations of CAA sections 113(b) and (e).

In the 2020 SIP call withdrawal for Texas, Region 6 incorrectly relied on a rationale that the 2015 SSM SIP Action inappropriately applied the *NRDC* ruling to section 110 SIPs and that the *Luminant,* 714 F.3d 841, decision appropriately upheld EPA's approval of the Texas affirmative defense provisions into the SIP.[50] This was an incorrect reading of *NRDC.* The *NRDC* court ruled that CAA sections 113 and 304 preclude the EPA's 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.

As is discussed at length in the 2015 SSM SIP Action, and in light of the reasoning of the D.C. Circuit in the *NRDC* decision, the Agency believes that the position the EPA advanced before the court in the *Luminant* decision was not the best interpretation of the CAA, and that the correct reading of the CAA is that affirmative defense provisions are not appropriate in SIPs. In the *Luminant* decision, the Fifth Circuit analyzed EPA's former interpretation of the CAA under step 2 of *Chevron* and found that the Agency's position was reasonable.[51] The Fifth Circuit held that the CAA did not dictate the outcome put forth by environmental petitioners in the *Luminant* case; the court did not hold that the Agency could not reasonably interpret the CAA provisions at issue to come to the new position articulated in the 2015 SSM SIP Action. In fact, the Fifth Circuit upheld EPA's reading of the statute to preclude affirmative defense provisions for planned events in the same decision as a reasonable interpretation of the CAA. Crucially, the Region 6 2020 SIP call withdrawal did not state that the only reading of relevant sections of the CAA is that affirmative defense provisions, when narrowly tailored, may be appropriate; instead, following the *Luminant* court's example, Region 6's rationale rested on the reasonableness of that interpretation.

While the D.C. Circuit in the *NRDC* decision applied its ruling narrowly to section 112 of the CAA, the EPA believes the reasoning laid out by the court is similarly applicable to section 110. The distinctions identified in the 2020 SIP call withdrawal between sections 110 and 112 are not relevant; as is discussed at length in the 2015 SSM SIP Action, the EPA reasonably believes that 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. While it is true that states are accorded discretion under section 110 to determine how to meet CAA requirements, they are obligated to develop SIP provisions that meet fundamental CAA requirements. The EPA has the responsibility to review SIP provisions developed by states to ensure that they in fact meet fundamental CAA requirements. Sections 113 and 304 of the CAA apply with just as much force to CAA section 110 as CAA section 112.

In the 2020 SIP call withdrawal for Texas, Region 6 focused on whether the affirmative defense provisions at issue were narrowly tailored enough to threaten the fundamental requirement of

[47] *Luminant Generation* v. *EPA,* 714 F.3d 841 (5th Cir. 2013).

[48] *Id.* § 7604(a)(1), (f).

[49] *Id.* § 7413(b).

[50] Luminant, 714 F.3d 841.

[51] *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council,* 467 U.S. 837 (1984).

attainment and maintenance of the NAAQS. However, the EPA's proposed finding of substantial inadequacy is based not on those provisions' direct impact on attainment and maintenance of the NAAQS, but instead on a different portion of section 110(k)(5): whether the Texas provisions are ''substantially inadequate . . . to otherwise comply with any requirement of this chapter.'' In addition, the 2020 SIP call withdrawal for Texas relied on the rationale that the cooperative federalism framework of the CAA allowed the Agency flexibility in determining whether affirmative defense provisions are appropriate under the CAA. However, such flexibility is not appropriate here in light of the clear statutory language at issue. As discussed earlier and at length in the 2015 SSM Action, affirmative defense provisions in SIPs alter or eliminate federal court jurisdiction by superimposing restrictions on that jurisdiction and discretion granted by Congress to the courts. The 2020 Texas SIP call withdrawal action applied an impermissible interpretation of the CAA. Even if such an interpretation were permissible, the EPA's view is that this formulation of an affirmative defense in effect means that there is no emission limitation that applies when the criteria are met, *i.e.,* the affirmative defense operates to create a conditional exemption for emissions from the source during SSM events. As explained in the 2015 SSM SIP Action, the CAA requires that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise. Exemptions for emissions during SSM events, whether automatic or conditional based upon the criteria of an affirmative defense, are inconsistent with the requirement for continuous controls on sources.[52] Moreover, as described in section III of this document, such provisions allow opportunities for sources to emit pollutants during SSM periods repeatedly and in quantities that could cause unacceptable air pollution in nearby communities with no legal pathway within the existing EPA-approved SIP for air agencies, the EPA, the public or the courts to require the sources to make reasonable efforts to reduce these emissions.

For the reasons noted in the 2015 SSM SIP Action and those discussed in this document, the EPA reasonably determined that affirmative defense provisions in SIPs are inappropriate. The EPA reaffirmed that policy position in the McCabe memo and is proposing to apply that policy to Texas's affirmative defense provisions and reinstate the SIP call for 30 TAC 101.222(b)–(e) on the basis that those provisions are substantially inadequate to meet the requirements of the Act.

C. Iowa

As explained in section V.B. of this action, on December 17, 2020, EPA Region 7 issued a final action that withdrew the SIP call issued to Iowa as part of EPA's 2015 SSM SIP Action. In light of EPA's SSM policy as outlined in the 2015 SSM SIP Action and McCabe memo, the EPA is proposing in this document to reinstate the SIP call that was issued to Iowa in 2015 on the basis that automatic exemption provisions are impermissible in SIPs. The statutory interpretations extensively discussed in the 2015 SSM SIP Action are more consistent with the CAA and relevant case law for the reasons explained in the 2015 SSM SIP Action.

In the 2020 SIP call withdrawal for Iowa, EPA Region 7 applied a policy regarding SSM provisions that was consistent with EPA's national policy at that time, as outlined in the Wheeler memo. As noted in section V.C. of this action, on October 9, 2020, the EPA issued the Wheeler Memo which outlined a new national policy related to specific SIP provisions governing excess emissions during SSM events. In light of that policy and EPA's evaluation of Iowa's SIP, Region 7 withdrew the SIP call issued to Iowa as part of the 2015 SSM SIP Action.

In the Wheeler memo, consistent with the rationale presented by Region 4 in the North Carolina action, the EPA expressed that exemption provisions may be permissible in SIPs under certain circumstances. Specifically, the Wheeler memo stated that the general requirements in CAA section 110 to attain and maintain the NAAQS and the latitude provided to states through the SIP development process create a framework in which a state may be able to ensure attainment and maintenance of the NAAQS notwithstanding the presence of SSM exemptions in the SIP. The Wheeler memo stated that it is permissible for a SIP to contain SSM exemptions only if the SIP is composed of numerous planning requirements that are collectively NAAQS-protective by design. Such redundancy helps to ensure that the NAAQS are both attained and maintained, which was Congress's goal in creating the SIP development and adoption process. In evaluating whether the requirements of a SIP are collectively NAAQS protective despite the inclusion of an SSM exemption provision, the Wheeler memo stated that the EPA would conduct an in-depth analysis of the SIP, including a multifactor, weight-of-evidence exercise that balances many considerations. If the SIP contains limitations on whether SSM events are considered emission standard violations or requires that source owners or operators limit the duration and severity of SSM events, it may be reasonable to conclude that such a provision, when considered alongside other factors, would not jeopardize a state's ability to attain and maintain the NAAQS.

Accordingly, Region 7 evaluated the Iowa SIP and identified numerous provisions in the SIP that, when taken as a whole, led Region 7 to conclude that the SIP in its entirety is protective of the NAAQS. Specifically, Region 7 found that the Iowa SIP includes a series of overlapping requirements that provide for testing, reporting, and accountability for sources, including during periods of excess emissions. Region 7 argued that such overlapping requirements enable Iowa Department of Natural Resources (IDNR) to implement the NAAQS, allowing IDNR to maintain oversight, work with sources to maintain compliant operation, and, if necessary, enforce against sources. The specific Iowa provision that was SIP called in 2015 does allow for an exemption during excess emissions, but Region 7 stated that it also provides for two backstops that protect air quality and help to ensure attainment and maintenance of the NAAQS: (1) startup, shutdown and cleaning is to be accomplished expeditiously; and, (2) startup, shutdown, and cleaning is to be accomplished in a way that is consistent with good practice for minimizing emissions. In light of EPA's 2020 national policy, as outlined in the Wheeler Memo, and informed by a weight-of-evidence analysis of the Iowa SIP, Region 7 withdrew the SIP call that was issued to Iowa.

The EPA is now proposing that the withdrawal of the SIP call for Iowa was inappropriate. In this action, EPA is proposing to return to its interpretation of the Act in the 2015 SSM SIP action, which is consistent with *Sierra Club*[53] and is thus proposing to reinstate the SIP call for Iowa that was issued in 2015. Specifically, the McCabe memo noted that, ''the statutory interpretations extensively discussed in the 2015 policy are more consistent with the CAA and relevant case law for the reasons explained in the 2015 SSM SIP Action.'' The Wheeler memo, for example, did not adequately address CAA requirements other than NAAQS

[52] *See* 80 FR 33840 at 33854–33855, 33981.

[53] *See* 551 F.3d 1019 (D.C. Cir. 2008).

attainment and maintenance. These include, but are not limited to, CAA section 110(l)'s procedural requirements governing SIP revisions. Additionally, the Wheeler memo did not address CAA section 302(k)'s requirement that all emission limitations apply on a ''continuous'' basis. As a legal matter, the SIP called provision specifically allows for an exemption from the applicable emission limitations. This is impermissible under EPA's reading of CAA section 110(a)(2)(A) alongside CAA section 302(k). Emission limitations must apply at all times and exemptions from those limitations are contrary to the statute and inappropriate.[54]

The backstops identified by Region 7 in its weight-of-evidence analysis of the Iowa SIP in its SIP call withdrawal points to a number of provisions that lack meaningful measures and means for ensuring the attainment and maintenance of the NAAQS. The two specific backstops in the originally SIP called provision, IAC 567–24.1(1,) are vague and unenforceable, and certainly would not constitute alternative emissions limitations that would appropriately fill the gap left by Iowa's automatic exemption. The provision lays out the two cited backstops by stating that excess emissions during SSM periods are not violations if the startup and shutdown events are accomplished ''expeditiously and in a manner consistent with good practice for minimizing emissions.'' This terminology is not defined in the Iowa SIP and is not practically enforceable. Practically speaking, a source could be excused from an applicable emission limit for a long period during which the EPA would have absolutely no assurance that the NAAQS is being attained or maintained (not to mention assurance of compliance with all of the other requirements of the Act).

For those reasons, the reasons laid out in section VI.A of this action, and the reasons laid out in the 2015 SSM SIP Action, the EPA correctly determined in its 2015 SSM SIP Action that automatic exemption provisions in SIPs are impermissible because they are inconsistent with fundamental requirements of the CAA. The EPA reaffirmed that policy position in the McCabe memo and, as such, is proposing to find that IAC 567–24.1(1) is substantially inadequate to comply with CAA requirements, and thus is reinstating the SIP call for IAC 567–24.1(1).

VII. Proposed Action To Issue Additional Findings of Substantial Inadequacy and SIP Calls for Connecticut, Maine, North Carolina, Including Buncombe and Mecklenburg Counties, Shelby County, Tennessee, Wisconsin, and Louisiana

A. Connecticut

CT Sec. 22a–174–38(c)(11)

The EPA is proposing in this document to make a finding of substantial inadequacy and issue a SIP call to Connecticut for CT Sec. 22a–174–38(c)(11) on the basis that it constitutes an impermissible automatic exemption. As explained earlier in this document, EPA's position is that the best reading of the CAA is that it does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), emission limitations that appear in SIPs must be continuous, in accordance with the definition of ''emission limitations'' in CAA section 302(k). Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

CT Sec. 22a–174–38(c)(11), which applies to municipal waste combustors (MWCs), states, ''The emission limits and operating requirements of this section shall apply at all times except during periods of startup, shutdown or malfunction provided in this subdivision: (A) For determining compliance with an applicable carbon monoxide emissions limit, if a loss of boiler water level control or a loss of combustion air control is determined to be a malfunction, the duration of the malfunction period shall be limited to fifteen (15) hours per occurrence. Otherwise, the duration of each startup, shutdown or malfunction period shall be limited to three hours per occurrence for all MWC units; (B) For the purpose of compliance with the opacity emission limits, during each period of startup, shutdown or malfunction, the opacity limits shall not be exceeded during more than five (5) 6-minute arithmetic average measurements; and (C) During periods of startup, shutdown, or malfunction, monitoring data shall be excluded from calculations of compliance with the emission limits and operating requirements of this subdivision but shall be recorded and reported in accordance with subsections (k) and (*l*) of this section.''

The EPA proposes to find that this provision is impermissible even though the state has imposed some time limitations on its potential scope. For example, CT Sec. 22a–174–38(c)(11)(A) limits malfunction periods to ''fifteen (15) hours per occurrence'' and the duration of SSM periods to: three hours per occurrence for all MWC units.'' CT Sec. 22a–174–38(c)(11)(B) limits opacity limit exceedances during SSM events to ''five (5) 6-minute arithmetic measurements.'' Although the CAA does allow for alternative emission limitations or other enforceable control measures or techniques that apply during startup or shutdown, the CT SIP provision does not comply with the CAA's requirements as interpreted in EPA's SSM policy [55] because the provision still contains periods of time when no limit (numerical or otherwise) applies. There are no other provisions in the CT SIP that could act as alternative emission limits to fill those periods of time. In addition, the provision does not adequately explain how the time limitations will be legally and practically enforceable. This provision thus appears to provide for an automatic exemption from the emission limitations that would otherwise apply to municipal waste combustors in the Connecticut SIP and is substantially inadequate to comply with CAA requirements under sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

B. Maine

ME 06–096 Chapter 138–3–O

The EPA is proposing in this document to make a finding of substantial inadequacy and issue a SIP call to Maine for provision ME 06–096 Chapter 138–3–O on the basis that it constitutes an impermissible automatic exemption. As explained earlier in this document, EPA's position is that the best reading of the CAA is that it does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), emission limitations that appear in SIPs must be continuous, in accordance with the definition of

[54] The rationale laid out in section VI.A. of this document as to the inappropriate nature of the North Carolina provisions is also relevant to the Iowa provisions.

[55] See EPA's 2015 SSM SIP Action, 80 FR 33913–33917, for a discussion of EPA's policy regarding alternative emission limitations.

''emission limitations'' in CAA section 302(k). Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

This provision, which applies to Reasonably Available Control Technology (RACT) standards for stationary sources of Nitrogen Oxides (NO_X), states, ''For any source that employs the use of a continuous emissions monitoring system, periods of startup, shutdown, equipment malfunction and fuel switching shall not be included in determining 24-hour daily block arithmetic average emission rates provided that operating records are available to demonstrate that the facility was being operated to minimize emissions.'' EPA proposes to find that the inclusion of this exemption from otherwise applicable SIP emission limitations is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA proposes to find that this exemption is impermissible even though the state has imposed some factual limitations on its potential scope: the requirement to provide operating records ''to demonstrate that the facility was being operated to minimize emissions.'' While the CAA does allow for alternative emission limitations or other enforceable control measures or techniques that apply during startup or shutdown, this SIP provision does not comply with the Act's requirements for an alternative emission limit as interpreted in EPA's SSM policy. The provision does not adequately address emissions limitations during SSM events. Instead, it only explains how facilities will ensure that emissions are ''minimized.'' In addition, similar to the Iowa provision discussed above, such a vague requirement is not legally and practically enforceable, as it does not provide a meaningful and objective standard for a court to assess. This provision thus appears to provide for an automatic exemption from the emission limitations that would otherwise apply to RACT standards for stationary sources of NO_X in the Maine SIP without meaningful restrictions and is substantially inadequate to comply with CAA requirements under sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

ME 06–096 Chapter 150–4–C

The EPA is proposing in this document to make a finding of substantial inadequacy and issue a SIP call to Maine for provision ME 06–0096 Chapter 150–4–C on the basis that it constitutes an impermissible automatic exemption. As explained earlier in this document, EPA's position is that the best reading of the CAA is that it does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), emission limitations that appear in SIPs must be continuous, in accordance with the definition of ''emission limitations'' in CAA section 302(k). Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

This provision, which applies to visible emission standards for outdoor wood boilers and outdoor pellet boilers, states, ''No person shall cause or allow the emission of a smoke plume from any outdoor wood boiler or outdoor pellet boiler to exceed an average of 30 percent opacity on a six-minute block average basis, except for no more than two six minute block averages in a 3-hour period.'' While this provision does not explicitly mention periods of startup, shutdown, or malfunction, the EPA is proposing to find that the provision is impermissible under the CAA requirement that some emission limit must apply at all times. There are no other provisions in the ME SIP that could act as an appropriate alternative emission limit to fill the periods of time the emission limit does not apply. This provision appears to provide for an automatic exemption from the emission limitations that would otherwise apply to visible emission standards for outdoor wood boilers and outdoor pellet boilers in the Maine SIP and is substantially inadequate to comply with CAA requirements under sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

C. North Carolina

15A NCAC 02D .1423(g)

Separately from the reinstatement of the 2015 SIP Call discussed in the previous section, the EPA is also proposing in this document to make a finding of substantial inadequacy and issue a SIP Call to North Carolina for provision 15A NCAC 02D .1423(g) on the basis that it contains an impermissible automatic exemption.

As explained earlier in this document, EPA's position is that the best reading of the CAA is that it does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), emission limitations that appear in SIPs must be continuous, in accordance with the definition of ''emission limitations'' in CAA section 302(k). Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The provision 15A NCAC 02D .1423(g), which applies to large internal combustion engines, states, ''The emission standards of this Rule shall not apply to the following periods of operation: (1) start-up and shut-down periods and periods of malfunction, not to exceed 36 consecutive hours; (2) regularly scheduled maintenance activities.'' [56] The EPA is proposing to find the inclusion of these exemptions renders the provision impermissible under the CAA requirement that some emission limit must apply at all times. There are no other provisions in the NC SIP that could act as an appropriate alternative emission limit to fill the periods of time the emission limit does not apply, as is discussed in more detail above. The provision 15A NCAC 02D .1423(g) appears to provide for an impermissible automatic exemption and is substantially inadequate to comply with CAA requirements under sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

Mecklenburg County, NC: Mecklenburg County Air Pollution Control Ordinance (MCAPCO) Rule 2.0535(c)

The EPA is proposing in this document to make a finding of substantial inadequacy and issue a SIP call to North Carolina for local provision MACAPCO Rule 2.0535(c) on the basis

[56] The EPA notes that ''emission standard'' and ''emission limitation'' have the same definition under section 302(k) of the CAA, and EPA considers the terms interchangeable.

that it contains an impermissible director's discretion provision. As explained earlier in this document, EPA's position is that the best reading of the CAA is that it does not allow for exemptions through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), emission limitations that appear in SIPs must be continuous, in accordance with the definition of ''emission limitations'' in CAA section 302(k). Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, director's discretion provisions functionally could allow *de facto* revisions of the approved emission limitations required by the SIP, without complying with the process for SIP revisions required by the CAA.

The local provision, which applies to excess emissions reporting and malfunctions, states ''Any excess emissions that do not occur during start-up or shut-down are considered a violation of the appropriate Regulation unless the owner or operator of the source of excess emissions demonstrates to the Director, that the excess emissions are the result of a malfunction.'' The provision relies on the same unbounded director's discretion language found in 15A NCAC 02D .0535(c), including the list of factors to be considered by the director, and is inadequate for the same reasons. As explained in EPA's February 22, 2013, SIP call proposal on the state's rule, and reiterated in part earlier in this document, this director's discretion provision authorizes exemptions from otherwise applicable emission limitations, in violation of EPA's SSM Policy that emission limits apply at all times. In addition, this provision makes the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. There are no other provisions in the NC SIP that could act as an appropriate alternative emission limit to fill the periods of time the emission limit does not apply, as is discussed in more detail above. The EPA is proposing to find that the provision MCAPCO Rule 2.0434(c) appears to provide for of an unbounded director's discretion exemption and is thus substantially inadequate to meet CAA requirements in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

Buncombe County, NC: Western North Carolina Regional Air Quality Agency Air Quality Code (WNCRAQ Air Quality Code) Section 1–137(c)

The EPA is also proposing in this document to make a finding of substantial inadequacy and issue a SIP Call to North Carolina for local provision WNCRAQ Air Quality Code section 1–137(c) on the basis that it contains an impermissible director's discretion exemption. As explained earlier in this document, EPA's position is that the best reading of the CAA is that it does not allow for exemptions through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), emission limitations that appear in SIPs must be continuous, in accordance with the definition of ''emission limitations'' in CAA section 302(k). Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, director's discretion provisions functionally could allow *de facto* revisions of the approved emission limitations required by the SIP, without complying with the process for SIP revisions required by the CAA.

The local provision, which applies to excess emissions reporting and malfunctions, states ''Any excess emissions that do not occur during start-up or shut-down are considered a violation of the appropriate Regulation unless the owner or operator of the source of excess emissions demonstrates to the Director, that the excess emissions are the result of a malfunction.'' The provision relies on the same unbounded director's discretion language found in MCAPCO Rule 2.0535(c) and 15A NCAC 02D .0535(c), including the list of factors to be considered by the director, and is inadequate for the same reasons. This director's discretion provision authorizes exemptions from otherwise applicable emission limitations, in violation of EPA's SSM Policy that emission limits apply at all times. There are no other provisions in the NC SIP that could act as an appropriate alternative emission limit to fill the periods of time the emission limit does not apply, as is discussed in more detail above. In addition, this provision makes the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. The EPA is proposing to find provision WNCRAQ Air Quality Code section 1–137(c) appears to provide for an unbounded director's discretion exemption and is thus substantially inadequate to meet CAA requirements 110(a)(2)(A), 110(a)(2)(C), and 302(k).

D. Tennessee

Shelby County, Tennessee: Shelby County Air Code 3–17 (City of Memphis Code 16–83)

The EPA is proposing in this document to make a finding of substantial inadequacy and issue a SIP Call to Tennessee for local provisions Shelby County Air Code 3–17 (City of Memphis Code 16–83) [57] on the basis that they contain impermissible unbounded director's discretion exemptions.

As explained earlier in this document, EPA's position is that the best reading of the CAA is that it does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), emission limitations that appear in SIPs must be continuous, in accordance with the definition of ''emission limitations'' in CAA section 302(k). Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

[57] This Shelby County portion of the Tennessee SIP consists of the Shelby County Air Code developed by the Shelby County Health Department's Pollution Control Section and the mirrored regulations for included municipalities and the City of Memphis. EPA selected the City of Memphis Air Code to represent the SIP compilation in the past. Shelby County Air Code section 3–17 corresponds to City of Memphis Code section 16–83. The Shelby County LIP also includes the Town of Arlington, City of Millington, Town of Collierville, City of Bartlett, City of Germantown, and the City of Lakeland.

Shelby County Air Code 3–17 (City of Memphis Code 16–83), which incorporates by reference Chapter 1200–3–5 of the Tennessee Air Pollution Control Regulations, applies to visible emissions from stationary sources. Tennessee Compilation of Rules and Regulations (Tenn. Comp. R. & Regs) 1200–3–5–.02(1), which was SIP-called in 2015, states, ''Consistent with the requirements of Chapter 1200–3–20, due allowance may be made for visible emissions in excess of that permitted in this chapter which are necessary or unavoidable due to routine startup and shutdown conditions.'' As explained in EPA's February 22, 2013, SIP call proposal, this provision creates an unbounded director's discretion provision because it allows a state official to excuse excess visible emissions after giving ''due allowance'' to the fact that they were emitted during startup or shutdown events.[58] More importantly, the provision purports to authorize the local official to create exemptions from applicable SIP emission limitations when such exemptions are impermissible in the first instance. There are no other provisions in the TN SIP that could act as an appropriate alternative emission limit to fill the periods of time the emission limit does not apply.

As such, the EPA is proposing to find Shelby County Air Code 3–17 (City of Memphis Code 16–83), which appears to provide for director's discretion exemptions from the emission limitations that would otherwise apply to visible emission standards from stationary sources in the TN SIP, is substantially inadequate to meet CAA requirements sections 110(a)(2)(A), 110(a)(2)(C), and 302(k) as interpreted in EPA's SSM Policy.

E. Wisconsin

Wis. Admin. Code NR 431.05(1)–(2) and NR 436.03(2)

The EPA is proposing in this document to make a finding of substantial inadequacy and issue a SIP call to the state of Wisconsin for Wis. Admin. Code provisions NR 431.05(1)–(2) and NR 436.03(2) on the basis that these provisions contain impermissible automatic and director's discretion exemptions.

As explained earlier in this document, EPA's position is that the best reading of the CAA is that it does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), emission limitations that appear in SIPs must be continuous, in accordance with the definition of ''emission limitations'' in CAA section 302(k). Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, director's discretion provisions functionally could allow *de facto* revisions of approved emission limitations required by the SIP, without complying with the process for SIP revisions required by the CAA.

The provision NR 431.05(1), which applies to emissions limitations and visible emissions control for all air contaminant sources, states, ''No owner or operator of a direct or portable source on which construction or modification is commenced after April 1, 1972 may cause or allow emissions of shade or density greater than number 1 of the Ringlemann chart or 20% opacity with the following exceptions: (1) When combustion equipment is being cleaned or a new fire started, emissions may exceed number 1 of the Ringlemann chart or 20% opacity but may not exceed number 4 of the Ringlemann chart or 80% opacity for 6 minutes in any one hour. Combustion equipment may not be cleaned nor a fire started more than 3 times per day.'' While the CAA does allow for alternative emission limitations or other enforceable control measures or techniques that apply during startup or shutdown, 431.05(1) does not comply with the Act's requirements for an alternative emission limit as interpreted in EPA's SSM policy. While the provision appears on its face to provide for a numerical limitation on visible emissions exceedances at all times, an 80% opacity limit provides for functionally uncontrolled emissions. In EPA's experience, for most source categories, a source displaying 80% opacity would likely be operating without any emissions controls at all. Opacity limits in EPA rules and permits that represent controlled sources are typically much lower than 80% (most often 20% or lower). While framed as an alternative emissions limitation, EPA views this provision as operating in practice as an automatic exemption, which does not comply with the CAA or EPA's SSM policy. Further, the limit applies to emissions limitations and visible emissions control for all air contaminant sources—it is not ''limited to specific, narrowly defined source categories'' as EPA's SSM Policy for alternative emission limits recommends. As articulated in 1999 SSM SIP Guidance and 2015 SSM SIP Action, for some source categories, given the types of control technologies available, there may exist short periods of emissions during startup and shutdown when, despite best efforts regarding planning, design, and operating procedures, otherwise applicable emission limitation cannot be met. In these instances, it may be appropriate to create SIP revisions providing for alternative emission limitations, so long as they meet the criteria for developing and evaluating alternative emission limitations laid out by EPA, including that the revision be ''limited to specific, narrowly defined source categories.'' [59] Even if an 80 percent opacity limit were to be appropriate for certain sources in very specific scenarios, it operates too broadly to be appropriate in all situations.

Both NR 431.05(2) and NR 436.03(2) provide for unbounded director's discretion exemptions, authorizing exemptions from otherwise applicable emission limitations, in violation of EPA's SSM Policy that emission limits apply at all times. NR 431.05(2), which applies to emission limitations and visible emissions control for all air contaminant sources, states, ''No owner or operation of a direct or portable source on which construction or modification is commenced after April 1, 1972 may cause or allow emissions of shade or density greater than number 1 of the Ringlemann chart or 2 percent opacity with the following exceptions: (2) Emissions may exceed number 1 of the Ringlemann chart or 20 percent opacity for stated periods of time, as permitted by the department, for such

[58] Tenn. Comp. R. & Regs 1200–3–5–.02(1) refers to Chapter 1200–3–20 as prescribing the requirements for considering whether violations can receive ''due allowance.'' As SIP-called, 1200–3–20–.07(1) requires data to be reported ''to assist the Technical Secretary in deciding whether to excuse or proceed upon'' violations of applicable SIP emission limitations. Therefore, the due allowance at 1200–3–5–.02(1) can be interpreted to mean the discretion of the Technical Secretary to excuse violations during periods of SSM. The EPA SIP called the Shelby County incorporation by reference of Chapter 1200–3–20 in the 2015 SSM SIP Action, and Shelby County submitted a SIP revision addressing that SIP call through the State on March 1, 2022.

[59] *See* 80 FR 33840 at 33914 and EPA's 1999 SSM Guidance (Memorandum to EPA Regional Administrators, Regions I–X from Steven A. Herman and Robert Perciasepe, USEPA, Subject: State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown, dated September 20, 1999).

purpose as an operating test, use of emergency equipment, or other good cause, provided no hazard or unsafe condition arises.'' This provision constitutes a director's discretion exemption because it allows exceptions ''as permitted by the department'' for various purposes including ''other good cause.'' Although it limits the department head's discretion so that ''no hazard or unsafe condition arises,'' this vague language provides the department head with extremely broad discretion to approve emissions exceedances in accordance with ''good cause'' which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted due to emissions exceedances.

NR 436.03(2), which applies to emission limitations exceptions for all air contaminant sources, states, ''Emissions in excess of the emission limitations set in NR 400 to 499 may be allowed in the following circumstances: (a) When an approved program or plan with a time schedule for correction has been undertaken and correction is being pursued with diligence; (b) When emissions in excess of the limits are temporary and due to scheduled maintenance, startup or shutdown of operations carried out in accord with a plan and schedule approved by the department; (c) The use of emergency or reserve equipment needed for meeting of high peak loads, testing of the equipment or other uses approved by the department. Such equipment must be specified in writing as emergency or reserve equipment by the department. Upon startup of this equipment notification must be given to the department which may or may not give approval for continued equipment use.''

This provision constitutes a director's discretion exemption because, for example, NR 436.03(2) references exceptions to emissions limitations during periods of SSM as being acceptable so long as the emissions are ''carried out in accord with a plan and schedule approved by the department.'' Like NR 431.05(2), this vague language provides the department head or director with extremely broad discretion to approve emissions exceedances in accordance with an unspecified department plan, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from applicable emission limitations, and such an exemption is impermissible in the first instance. There are no other provisions in the WI SIP that could act as an appropriate alternative emission limit to fill the periods of time the emission limits do not apply.

As such, the EPA proposes to find that Wis. Admin. Code NC 431.05(1)–(2) and NR 436.03(2), which appears to provide for automatic and director's discretion exemptions from the emission limitations that would otherwise apply to air contaminant sources in the WI SIP, are substantially inadequate to comply with the CAA requirements in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k) and, thus, are impermissible for the aforementioned reasons.

F. Louisiana

Louisiana Administrative Code (LAC) Title 33 Chapter 9 Section 917

The EPA is proposing in this document to make a finding of substantial inadequacy and issue a SIP call to Louisiana for the LA. Admin Code Tit. 33 section 917 provision on the basis that it contains an impermissible director's discretion exemption.

As explained earlier in this document, EPA's position is that the best reading of the CAA is that it does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), emission limitations that appear in SIPs must be continuous, in accordance with the definition of ''emission limitations'' in CAA section 302(k). Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that seek to provide or create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The EPA proposes to find that a provision in Louisiana's SIP that allows emissions in excess of otherwise applicable SIP emission limitations due to ''exceptional circumstances'' (LA. Admin Code Tit. 33 section 917) is impermissible under the CAA as interpreted in EPA's SSM Policy because it includes an unbounded director's discretion provision. The provision authorizes a state official to grant a ''variance'' from any generally applicable SIP emission limitation if the state official ''finds that by reason of exceptional circumstances strict conformity with any provisions of [Louisiana's air quality] regulations would cause undue hardship, would be unreasonable, impractical or not feasible under the circumstances.'' This provision could be read to mean that once the state official has granted a variance for excess emissions due to conditions that make it difficult for sources to comply with otherwise applicable SIP limitations, those excess emissions are not violations. In fact, the state of Louisiana has granted several variances in recent years to allow for excess emissions during periods of SSM.[60] This is contrary to the fundamental enforcement structure of the CAA, as provided in CAA section 113 and CAA section 304, through which the EPA and other parties are authorized to bring enforcement actions for violations of SIP emission limitations.

As discussed in section V.A. of this document, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from applicable emission limitations, and such an exemption is impermissible in the first instance. Inclusion of an unbounded director's discretion provision in LA. Admin Code Tit. 33 section 917 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

The EPA notes that the Louisiana provision also states that ''No variance may permit or authorize the maintenance of a nuisance, or a danger to public health or safety.'' While this seems to be meant to limit the scope of Louisiana's authority to grant such a variance, the EPA does not believe that it provides any objective criteria that might allow for meaningful EPA or citizen enforcement. Such a vague limitation does not remedy the CAA inadequacies discussed above and does not comply with EPA's interpretation of the CAA as applied through EPA's SSM Policy regarding alternative emission limitations. There are no other provisions in the LA SIP that could act as an appropriate alternative emission limit to fill the periods of time the emission limits do not apply.

[60] *See* Louisiana variance memorandum in Docket ID EPA–HQ–OAR–2022–0814.

The EPA proposes to find that LA. Admin Code Tit. 33 section 917 provision appears to provide for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is unbounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

VIII. Legal Authority, Process, and Timing for SIP Calls

A. SIP Call Process Under CAA Section 110(k)(5)

Section 110(k)(5) of the CAA provides the EPA with authority to determine whether a SIP is substantially inadequate to attain or maintain the NAAQS or otherwise comply with any requirement of the CAA. Where the EPA makes such a determination, the EPA then has a duty to issue a SIP call. In addition to providing general authority for a SIP call, CAA section 110(k)(5) sets forth the process and timing for such an action.

First, the statute requires the EPA to notify the state of the final finding of substantial inadequacy. The EPA intends to provide notice to states via letter to the appropriate state officials in addition to publication of the final action in the **Federal Register**. Second, the statute requires the EPA to establish ''reasonable deadlines (not to exceed 18 months after the date of such notice)'' for the state to submit a corrective SIP submission to eliminate the inadequacy in response to the SIP call. The EPA implements this by proposing and taking comment on the schedule for the submission of corrective SIP revisions in order to ascertain the appropriate timeframe, depending on the nature of the SIP inadequacy. Third, the statute requires that any finding of substantial inadequacy and notice to the state be made public. By undertaking a notice-and-comment rulemaking, the EPA ensures that the air agency, affected sources, and members of the public all are adequately informed and afforded the opportunity to participate in the process. Through this proposal document and the subsequent final document, the EPA intends to provide a full evaluation of the issues and to use this process as a means of giving clear guidance concerning SIP provisions relevant to SSM events that are consistent with CAA requirements.

If the state fails to submit the corrective SIP revision concerning the deficiency by the deadline that the EPA finalizes as part of the SIP call, CAA section 110(c) authorizes the EPA to ''find that [the] State has failed to make a required submission.'' [61] Once EPA makes such a finding of failure to submit, CAA section 110(c)(1) requires the EPA to ''promulgate a Federal implementation plan at any time within 2 years after the [finding] * * * unless the State corrects the deficiency, and [the EPA] approves the plan or plan revision, before [the EPA] promulgates such [FIP].'' Thus, if EPA finalizes a SIP call and then finds that the air agency failed to submit a complete SIP revision that responds to the SIP call, or if the EPA disapproves such SIP revision, then the EPA will have an obligation under CAA section 110(c)(1) to promulgate a FIP no later than 2 years from the date of the finding or the disapproval, if the deficiency has not been corrected before that time.[62]

The finding of failure to submit a revision in response to a SIP call, or EPA's disapproval of that corrective SIP revision, can also trigger sanctions under CAA section 179. If a state fails to submit a complete SIP revision that responds to a final SIP call, CAA section 179(a) provides for the EPA to issue a finding of state failure. Such a finding starts mandatory 18-month and 24-month sanctions clocks. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program and restrictions on highway funding. However, CAA section 179 leaves it to the EPA to decide the order in which these sanctions apply. The EPA issued an order of sanctions rule in 1994 but did not specify the order of sanctions where a state fails to submit or submits a deficient SIP revision in response to a SIP call.[63] In this document, we are now proposing and taking comment on the following timeline: the EPA proposes that the 2-to-1 emission offset requirement will apply for all new sources subject to the nonattainment new source review program 18 months following such finding or disapproval unless the state corrects the deficiency before that date. The EPA proposes that the highway funding restrictions sanction will also apply 24 months following such finding or disapproval unless the state corrects the deficiency before that date. The EPA is proposing that the provisions in 40 CFR 52.31 regarding staying the sanctions clock and deferring the imposition of sanctions would also apply.

Mandatory sanctions under CAA section 179 generally apply only in nonattainment areas. By its definition, the emission offset sanction applies only in areas required to have a part D NSR program, typically areas designated nonattainment. CAA section 179(b)(1) expressly limits the highway funding restriction to nonattainment areas. Additionally, EPA interprets the section 179 sanctions to apply only in the area or areas of the state that are subject to or required to have in place the deficient SIP and for the pollutant or pollutants the specific SIP element addresses. For example, if the deficient provision applies statewide and applies for all NAAQS pollutants, then the mandatory sanctions would apply in all areas designated nonattainment for all NAAQS within the state. Following through on this interpretation, it is reasonable to expect that any newly designated nonattainment areas subsequent to the EPA taking final action on this proposal would also be subject to sanctions for failure to comply with SIP submittal obligations stemming from this SIP call, if finalized (or failure to comply with similar obligations for previously identified deficient statewide SSM provisions). In such cases, the EPA will evaluate the geographic scope of potential sanctions at the time it makes a final determination whether the state's SIP is substantially inadequate and issues a SIP call, as this may vary depending upon the provisions at issue.

B. SIP Call Timing Under CAA Section 110(k)(5)

If the EPA finalizes a proposed finding of substantial inadequacy and a proposed SIP call for any state, CAA section 110(k)(5) requires EPA to establish a SIP submission deadline by which the state must make a SIP submission to rectify the identified deficiency. Pursuant to CAA section 110(k)(5), the EPA has authority to set a SIP submission deadline up to 18 months from the signature date of the final finding of inadequacy. The EPA is proposing here that if it promulgates a final finding of inadequacy and a SIP call for a state, it will establish a date 18 months from the date of

[61] *See* CAA section 110(c)(1)(A).

[62] The 2-year deadline does not necessarily apply to FIPs following disapproval of a tribal implementation plan.

[63] *See,* ''Selection of Sequence of Mandatory Sanctions for Findings Made Pursuant to Section 179 of the Clean Air Act,'' 59 FR 39832 (August. 4, 1994), codified at 40 CFR 52.31.

promulgation of the final finding for the state to respond to the SIP call. Thereafter, the EPA will review the adequacy of that new SIP submission and take appropriate action on the submission in accordance with the CAA requirements of sections 110(a), 110(k), 110(l), 113(b), 113(e), 193, and 304, including EPA's interpretation of the CAA reflected in the SSM Policy as clarified and updated through this action.

Considering the affected air agencies' need to develop appropriate regulatory provisions to address the SIP call and conduct any required processes for developing a SIP, we are proposing the 18-month due date because we believe that states should be provided the maximum time allowable under CAA section 110(k)(5) in order to ensure they have sufficient time. EPA expects that 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. In light of the potential for public health impacts during this time period, we solicit comment on whether establishing a shorter time period than 18 months could instead be sufficient for the affected air agencies to develop and submit their SIP revisions.

The EPA acknowledges that the longstanding existence of many of the provisions at issue, such as automatic exemptions for SSM events, may have resulted in undue reliance on them as a compliance mechanism by some sources. As a result, development of appropriate SIP revisions may entail reexamination of the applicable emission limitations themselves, and this process may require the maximum time allowed by the CAA. Nevertheless, the EPA encourages the affected states to make the necessary revisions in as timely a fashion as possible and encourages the states to work with the respective EPA Regional office as they develop the corrective SIP revisions.

The EPA notes that the SIP calls that it is proposing for affected states in this document would be narrow and apply only to the specific SIP provisions determined to be inconsistent with the requirements of the CAA. To the extent that a state is concerned that elimination of a particular aspect of an existing emission limitation, such as an impermissible exemption, will render that emission limitation more stringent than the state originally intended and more stringent than needed to meet the CAA requirements it was intended to address, EPA anticipates that the state will revise the emission limitation accordingly, but without the impermissible exemption or other feature that necessitated the SIP call. The EPA will evaluate any such SIP revision in accordance with applicable CAA requirements, including CAA section 110(l).

Finally, the EPA notes that its authority under CAA section 110(k)(5) does not extend to requiring a state to adopt a particular control measure in its SIP in response to the SIP call. Under principles of cooperative federalism, the CAA vests air agencies with substantial discretion to develop SIP provisions, so long as the provisions meet the legal requirements and objectives of the CAA.[64] Thus, the issuance of a SIP call should not be misconstrued as a directive to the state in question to adopt a particular control measure. The EPA is merely proposing to require that affected states make a SIP revision to remove or revise existing SIP provisions that fail to comply with fundamental requirements of the CAA. The states retain discretion to remove or revise those provisions as they determine best, so long as they bring their SIPs into compliance with the requirements of the CAA.[65]

C. Severability

The findings of substantial inadequacy discussed in this action are based on an individual analysis of whether each SIP at issue contains provisions that are inconsistent with the CAA and EPA's SSM SIP policy. As such, it is reasonable to consider each SIP call as severable from the others because the SIP calls do not depend on one another. If any particular SIP call is stayed or determined to be invalid by a court, it is the EPA's intention that the remaining SIP calls shall continue in effect.

IX. Environmental Justice Considerations

This proposal applies, but does not change, EPA's interpretation of the statutory requirements of the CAA outlined in its 2015 SSM SIP Action. Through the SIP calls issued to certain states as part of this SIP call action under CAA section 110(k)(5), EPA is requiring each affected state to revise its SIP to comply with existing requirements of the CAA. EPA's action, therefore, leaves to each affected state the flexibility bound by the CAA as to how to revise the SIP provision in question to make it consistent with CAA requirements and to determine, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources. In the 2015 SSM SIP Action, the EPA did not perform an environmental justice analysis for purposes of this action, because it determined that it cannot geographically identify or quantify the resulting source-specific emission reductions.[66]

The EPA believes it is not practicable to assess whether the conditions that exist prior to this proposed action result in disproportionate and adverse effects on people of color, low-income populations, and/or indigenous peoples. While it is difficult to assess the environmental justice implications of this proposed action because the EPA cannot geographically identify or quantify the resulting source-specific emission reductions, the EPA believes that this proposed action is likely to either reduce or have no adverse impact on existing disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples.

As articulated in the 2021 McCabe memo, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. While there are many different kinds of SSM provisions with varying scope and effect, the EPA notes that the overarching effect of these provisions is to allow or excuse excess emissions that exceed SIP limitations. Eliminating impermissible SSM provisions is intended to ensure that all communities and populations, including overburdened communities, receive the full health and environmental protections provided by the CAA. The correction of SIP deficiencies by the states affected by this document is, therefore, expected to contribute to reduced excess emissions during SSM periods and improve human and environmental health for U.S. citizens, including people of color, low-income populations, and/or indigenous peoples.

Although not a basis for this proposed action, EPA would be interested in hearing from communities that have

[64] *See, Virginia, et al.* v. *EPA,* 108 F.3d 1397 (D.C. Cir. 1997) (SIP call remanded and vacated because, inter alia, the EPA had issued a SIP call that required states to adopt a particular control measure for mobile sources).

[65] Notwithstanding the latitude states have in developing SIP provisions, the EPA is required to assure that states meet the basic legal criteria for SIPs. See, *Michigan, et al.* v. *EPA,* 213 F.3d 663, 686 (D.C. Cir. 2000) (upholding NO_X SIP call because, inter alia, the EPA was requiring states to meet basic legal requirement that SIPs comply with CAA section 110(a)(2)(D), not dictating the adoption of a particular control measure).

[66] *See* 80 FR 33840 at 33982.

seen impacts from emissions events during SSM periods. This information, while not necessary to justify this action, may be useful to EPA in continuing to implement the Agency's SSM Policy. If the EPA finalizes this action, as described elsewhere in this document, affected states will be required to revise their SIPs. In complying with minimum public notice and comment requirements associated with SIP development processes, the EPA encourages affected state and local air agencies to provide for meaningful public engagement during that SIP review process and, where appropriate and applicable, evaluate environmental justice considerations.

X. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

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. This proposed action is merely reiterates EPA's 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

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities.[67] Instead, the action merely reiterates EPA's interpretation of the statutory requirements of the CAA. Through the SIP calls issued to certain states as part of this SIP call action under CAA section 110(k)(5), EPA is only requiring each affected state to revise its SIP to comply with existing requirements of the CAA. EPA's action, therefore, leaves to each affected state the choice as to how to revise the SIP provision in question to make it consistent with CAA requirements and to determine, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources.

[67] Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this document 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.

D. Unfunded Mandates Reform Act (URMA)

This action does not contain an unfunded of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. 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 1 year. Thus, this action is not subject to the requirements of sections 202 or 205 of the Unfunded Mandates Reform Act (UMRA).

This proposed action is also not subject to the requirements of section 203 of UMRA 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.

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 document, 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 action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it because it merely prescribes 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 subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) 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 (people of color and/or indigenous peoples) and low-income populations.

The EPA believes it is not practicable to assess whether the conditions that exist prior to this proposed action result in disproportionate and adverse effects

on people of color, low-income populations, and/or indigenous peoples. While it is difficult to assess the environmental justice implications of this proposed action because the EPA cannot geographically identify or quantify the resulting source-specific emission reductions, the EPA believes that this proposed action is likely to either reduce or have no adverse impact on existing disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples. The basis for this decision is contained in section IX of this preamble.

K. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the 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.'' For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii).[68]

The EPA is proposing to issue SIP calls to eight states (applicable in 10 statewide and local jurisdictions) located in four of the ten EPA regions pursuant to a uniform process and analytical approach. The EPA is proposing to apply a nationally consistent policy regarding SSM provisions in SIPs in each of these eight states as a follow-up to EPA's larger 2015 SSM SIP Action, in which the Agency issued SIP calls pursuant to the same nationally consistent policy to 36 states (applicable in 45 statewide and local jurisdictions), for which petitions for review were all filed in the D.C. Circuit in 2015. The jurisdictions that would be affected by this action, if finalized, represent a wide geographic area and fall within six different judicial circuits.

If the Administrator takes final action on this proposal, then, in consideration of the effects of the action across the country, the EPA views this action to be ''nationally applicable'' within the meaning of CAA section 307(b)(1). In the alternative, to the extent a court finds this proposal, if finalized, to be locally or regionally applicable, the Administrator intends to exercise the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of ''nationwide scope or effect'' within the meaning of CAA section 307(b)(1).[69]

XI. Statutory Authority

The statutory authority for this proposed action is provided in 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, Shutdown and malfunction, Startup, State implementation plan, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Michael S. Regan,

Administrator.

[FR Doc. 2023–03575 Filed 2–23–23; 8:45 am]

BILLING CODE 6560–50–P

[68] In deciding whether to invoke the exception by making and publishing a finding that this action, if finalized, is based on a determination of nationwide scope or effect, the Administrator intends to take into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit's authoritative centralized review versus allowing development of the issue in other contexts and the best use of agency resources.

[69] In the report on the 1977 Amendments that revised CAA section 307(b)(1), Congress noted that the Administrator's determination that the ''nationwide scope or effect'' exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95–294 at 323–24, reprinted in 1977 U.S.C.C.A.N. 1402–03.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 433, 447, 455, and 457

[CMS–2445–P]

RIN 0938–AV00

Medicaid Program; Disproportionate Share Hospital Third-Party Payer Rule

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Proposed rule.

SUMMARY: This proposed rule would address recent legislative changes to the Social Security Act, which governs the hospital-specific limit on Medicaid disproportionate share hospital (DSH) payments, as a result of the Consolidated Appropriations Act, 2021. This proposed rule would afford States and hospitals more clarity on how the limit, the changes to which took effect on October 1, 2021, will be calculated. Additionally, this proposed rule would enhance administrative efficiency by making technical changes and clarifications to the DSH program.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on April 25, 2023.

ADDRESSES: In commenting, please refer to file code CMS–2445–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *https://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2445–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2445–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Lia Adams, (410) 786–8258, Charlie Arnold, (404) 562–7425, Richard Cuno, (410) 786–1111, Stuart Goldstein, (410) 786–0694, Charles Hines, (410) 786–0252, and Mark Wong, (415) 744–3561, for Medicaid Disproportionate Share Hospital Payments and Overpayments. Jennifer Clark, (410) 786–2013, for Children's Health Insurance Program (CHIP).