



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2018-0770; FRL-9992-59-Region 6]

Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and of Call for Texas State Implementation Plan Revision - Affirmative Defense Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed action.

SUMMARY: The Environmental Protection Agency (EPA) Region 6 Regional Administrator is considering an alternative interpretation regarding affirmative defense provisions in State Implementation Plans (SIPs) of states in EPA Region 6 that departs from the EPA's 2015 policy on this subject. In accordance with the Federal Clean Air Act (Act or CAA), the EPA Region 6 is proposing to make a finding that the affirmative defense provisions in the SIP for the state of Texas applicable to excess emissions that occur during certain upset events and unplanned maintenance, startup, or shutdown activities are narrowly tailored and limited to ensure protection of the National Ambient Air Quality Standards (NAAQS) and other CAA requirements, and would be consistent with the newly announced alternative interpretation if adopted. Accordingly, the EPA Region 6 also is proposing to withdraw the SIP call issued to Texas that was published on June 12, 2015.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2018-0770 at <https://www.regulations.gov> or via email to Shar.alan@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from

Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Mr. Alan Shar, (214) 665-6691, Shar.alan@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, (214) 665-6691,

Shar.alan@epa.gov. To inspect the hard copy materials, please schedule an appointment with Mr. Shar.

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, the following definitions apply:

- i. The word *Act* or initials *CAA* mean or refer to the Clean Air Act.

- ii. 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.
- iii. The initials *EPA* mean or refer to the United States Environmental Protection Agency.
- iv. The initials *HAP* mean Hazardous Air Pollutant.
- v. The initials *MACT* mean Maximum Achievable Control Technology.
- vi. The term *Malfunction* means a sudden and unavoidable breakdown of process or control equipment.
- vii. The initials *NAAQS* mean National Ambient Air Quality Standards.
- viii. The initials *PSD* mean Prevention of Significant Deterioration.
- ix. The term *EPA Region 6* refers to the United States Environmental Protection Agency, Region 6, located in Dallas, Texas.
- x. The initials *SIP* mean State Implementation Plan.
- xi. The initials *SNPR* mean Supplemental Notice of Proposed Rulemaking.
- xii. The word *State* means the state of Texas, unless the context indicates otherwise.

- xiii. The term *Shutdown* means, generally, the cessation of operation of a source.
- xiv. The initials *SSM* mean Startup, Shutdown, or Malfunction.
- xv. The term *Startup* means, generally, the setting in operation of a source.
- xvi. The term *TCEQ* means the Texas Commission on Environmental Quality.

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I. Summary of the Proposed Action

Today, the EPA Region 6 is proposing to find that the affirmative defense provisions in Texas's SIP applicable to excess emissions that occur during upsets (30 TAC 101.222(b)),

unplanned events (30 TAC 101.222(c)), upsets with respect to opacity limits (30 TAC 101.222(d)), and unplanned events with respect to opacity limits (30 TAC 101.222(e)) do not make Texas's SIP substantially inadequate to meet the requirements of the Act. Accordingly, the EPA Region 6 is proposing to withdraw its finding of substantial inadequacy with regard to Texas's SIP and to withdraw the SIP call issued to Texas that was published on June 12, 2015 (80 FR 33968-9).

II. Background

A. CAA Provisions Regarding State Implementation Plans

In compliance with CAA section 110, every state has adopted and from time to time revises a SIP to attain and maintain the national ambient air quality standards (NAAQS).¹ These plans must include enforceable "emission limitations and other control measures, means, or techniques," as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the CAA. If a SIP or SIP revision meets the applicable requirements of the CAA, the EPA must approve it, at which point the state provisions become federally enforceable.

A state is required to revise its SIP in certain ways after certain events specified in the CAA, including an "infrastructure" revision after EPA promulgates a new or revised NAAQS and an "attainment plan" revision after EPA designates or redesignates an area under the state's jurisdiction as nonattainment for a NAAQS. States also often initiate revisions to their SIPs for other reasons (e.g., after the state has issued revisions of state rules and regulations previously approved by EPA for inclusion as part of the state's federally enforceable SIP). The EPA evaluates each such state-initiated revision for compliance with applicable CAA requirements.

¹ The NAAQS are codified at 40 CFR part 50.

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

EPA Region 6 proposes to withdraw the 2015 determination that the Texas SIP is substantially inadequate because of the presence of certain provisions that establish an affirmative defense as to civil penalties for sources with emissions during upsets and unplanned maintenance, startup and shutdown (MSS) activities that exceed otherwise applicable emission limitations in the SIP (See 80 FR 33840, June 12, 2015).

B. The EPA's Past Policy Supporting Affirmative Defense Provisions in State Implementation Plans

The EPA uses the term “affirmative defense” to mean a response or defense put forward by a defendant in the context of an enforcement proceeding, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. The term “affirmative defense provision” in the context of a SIP means, more specifically, a state law provision in a SIP that specifies particular criteria or preconditions that, if met, would 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.

In 1999, the EPA provided states with non-binding guidance on the subject of SIP provisions that established boundaries for affirmative defenses for excess emissions relative to a

SIP emission limitation.² According to the 1999 Guidance, SIPs could contain affirmative defense provisions as to civil penalties for excess emissions during startup, shutdown, and malfunction events, but approvable affirmative defense provisions in SIPs should be narrowly tailored and limited to ensure protection of the NAAQS and meet other CAA requirements applicable to SIPs. The EPA explained that “the imposition of a [monetary] penalty for excess emissions ... caused by circumstances entirely beyond the control of the owner or operator may not be appropriate.”³ The EPA explained that an approvable affirmative defense provision should require that a defendant have the burden of proof to demonstrate several enumerated criteria. One list of criteria was included for startup and shutdown events, and a very similar list of criteria was included for malfunction events. The 1999 Guidance also reiterated and clarified other aspects of the EPA’s guidance regarding how SIPs may address startup, shutdown, and malfunction (SSM) events.

As discussed further below, in 2013, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) upheld the EPA’s 2010 approval of an affirmative defense as to civil penalties for excess emissions during upsets and unplanned MSS activities (malfunctions) in the Texas SIP. See *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013, cert denied). Also in 2013, the EPA initiated an action partly in response to an administrative petition filed by Sierra Club in 2011 requesting: (1) that the EPA reexamine its CAA interpretation and guidance related to SIP provisions for SSM events; and (2) that the EPA determine that specific existing provisions in

² “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,” Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, to EPA Regional Administrators, September 20, 1999 (1999 Guidance).

³ Page 1 of the attachment to the 1999 Guidance.

specific SIPs were inconsistent with the CAA (SSM SIP Action).⁴ In the initial proposal for the SSM SIP Action, the EPA proposed to continue to interpret the CAA to allow affirmative defense provisions for malfunction events as in the 1999 Guidance,⁵ but to depart from that Guidance by interpreting the CAA to preclude affirmative defense provisions for planned startup and shutdown events. Applying this approach, the EPA proposed to find that affirmative defense SIP provisions for startup and shutdown events in a number of SIPs (but notably not including Texas, whose SIP did not include an affirmative defense for planned startup and shutdown events) caused those SIPs to be substantially inadequate to meet CAA requirements, and the EPA proposed to call on the affected states to revise those provisions.

After the EPA's initial proposal for the SSM SIP Action, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision regarding the legality of affirmative defense provisions included in a certain national emission standard for hazardous air pollutants (NESHAP) established under CAA section 112. In *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), the D.C. Circuit reviewed an affirmative defense provision in that NESHAP which made monetary penalties unavailable where, in an enforcement proceeding, sources could demonstrate that an emissions violation was due to an unavoidable malfunction and met additional criteria.⁶ The D.C. Circuit vacated the EPA's affirmative defense provision in that section 112 NESHAP, holding that the CAA gives district courts sole authority in federal enforcement proceedings to determine whether a penalty for a violation of a section 112 NESHAP is appropriate.⁷

⁴ 78 FR 12460 (Feb. 22, 2013).

⁵ The EPA stated in our initial proposal that we believed that a "narrow affirmative defense for malfunction events" was permissible in SIP provisions. 78 FR 12470.

⁶ *Id.*

⁷ *Id.* at 1063-64.

In the *NRDC* decision, the court stated that it was not confronted with the decision of whether an affirmative defense may be appropriate in a SIP and noted that the Fifth Circuit in *Luminant* had upheld the EPA's approval of affirmative defenses as to civil penalties in the Texas SIP.⁸

Following the *NRDC* decision, the EPA issued a supplemental notice of proposed rulemaking (SNPR) for the SSM SIP Action reconsidering the legal basis for affirmative defense provisions in CAA section 110 SIPs.⁹ In that notice, the EPA stated its view that the reasoning of the D.C. Circuit in *NRDC* should extend to affirmative defense provisions created by states in section 110 SIPs, that the EPA cannot approve any such affirmative defense provision in a SIP, and that if such an affirmative defense provision is included in an existing SIP, the EPA has authority under section 110(k)(5) to require a state to remove that provision. The EPA therefore reevaluated the affirmative defense SIP provisions addressed in the original proposal (i.e., those that had been identified in the Sierra Club petition) and the EPA reviewed additional affirmative defense provisions in other states' SIPs, including a provision in the Texas SIP that EPA had previously approved, and that *Luminant* upheld, as described in more detail later in this notice, that provided an affirmative defense as to civil penalties for upsets and unplanned maintenance, startup, and shutdown activities (functionally equivalent to malfunctions).¹⁰ In the supplemental proposal, the Agency proposed to find that the affirmative defense provisions in 17 states, including Texas, made those states' SIPs substantially inadequate. The EPA proposed to issue SIP calls pursuant to section 110(k)(5) for the SIPs with these provisions.¹¹

⁸ 749 F.3d at 1064 n.2 (citing *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013, cert. denied)).

⁹ 79 FR 55920, 55931-35 (Sept. 17, 2014).

¹⁰ *Id.* at 55936.

¹¹ *Id.* at 55925. The count of 17 affected states includes some ambiguous SSM SIP provisions that were not clearly affirmative defense provisions but contained features of an affirmative defense.

The EPA issued an SSM SIP policy, including a position on affirmative defenses, and finalized the SIP call for Texas and other states on May 22, 2015.¹² The EPA determined that affirmative defense SIP provisions that operate to alter or eliminate federal courts' jurisdiction to determine penalties for violations of SIP requirements would undermine Congress's grant of jurisdiction and are inconsistent with CAA requirements.¹³

C. The EPA's 2015 Reversal - Finding of Inadequacy and SIP Call for Texas Regarding Affirmative Defense Provisions

As noted previously, on September 17, 2014, the EPA published a SNPR concerning affirmative defense provisions in SIPs.¹⁴ In that notice, the EPA identified 30 TAC 101.222(b) - (e) as problematic affirmative defense provisions in the EPA-approved SIP for the state of Texas. 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)).

In the same SNPR, the EPA acknowledged that it had approved these affirmative defense provisions in 2010, after determining that they were consistent with the Agency's interpretation of the CAA and its recommendations for such provisions as expressed in the 1999 Guidance, applicable at that point in time. Moreover, the SNPR noted that the EPA successfully defended

¹² 80 FR 33957-74 (June 12, 2015).

¹³ 80 FR 33851-53.

¹⁴ See "State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional State; Proposed Rule." 79 FR 55920 (Sept. 17, 2014).

its approval of these specific provisions¹⁵ (as well as its disapproval of related provisions relevant to affirmative defenses for planned events) in the Fifth Circuit in the *Luminant* decision.

On May 22, 2015 (See 80 FR 33840, published June 12, 2015), the EPA finalized its SIP calls concerning treatment of excess emissions that occur during periods of SSM.¹⁶ The final SIP calls required each affected state, including Texas, to submit a corrective SIP revision addressing the identified inadequacies no later than November 22, 2016.¹⁷

On November 18, 2016, TCEQ submitted a SIP revision that included rules stating that the SIP-called provisions in 30 TAC 101.222(b) - (e) are applicable only to enforcement actions initiated by the state in state courts and are not intended to limit a federal court's ability to determine appropriate remedies. TCEQ conditioned this rule, however, as taking effect only upon a final and nonappealable court decision that upholds the 2015 SSM SIP Action.¹⁸ The EPA has not acted on the state's November 18, 2016, submittal.

D. Texas's 2017 Petition for Reconsideration and Stay of EPA's 2015 Reversal Action

On March 15, 2017, former TCEQ Chairman Bryan W. Shaw submitted a letter to the EPA petitioning the Agency to reconsider the 2015 Texas SIP call and reinstate its prior interpretation (regarding affirmative defenses for malfunctions) for proper enforcement of the CAA. TCEQ requested that the EPA reconsider issues raised in the petition and that the EPA stay implementation of the final rule's identification of the affirmative defenses as to civil penalties in the Texas SIP as inconsistent with the CAA pending reconsideration. On October 16,

¹⁵ See 79 FR 55945, September 17, 2014.

¹⁶ "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; Final Rule."

¹⁷ June 12, 2015 (80 FR 33840).

¹⁸ The 2015 SSM SIP Action has been challenged and is currently being held in abeyance. See *Env'tl. Comm. of the Florida Power Coordinating Group, et al. v. EPA* (D.C. Cir., filed July 27, 2015, Case No. 15-239 and consolidated cases).

2018, after review of the issues raised, the Regional Administrator for EPA Region 6 partially granted the petition, noting that the Region would provide notice and an opportunity for public comment if the Agency proposes changing the Texas SSM SIP call, but the Regional Administrator did not respond to TCEQ's request for a stay. See letter from the EPA Region 6 to TCEQ, dated October 16, 2018, included in the docket for this action. In the process of partially granting TCEQ's petition to reconsider the Texas SIP call, the Regional Administrator sought and obtained concurrence from the relevant office in the EPA's Office of Air and Radiation to potentially propose an action inconsistent with the EPA's interpretation of affirmative defense provisions contained in the 2015 SSM SIP Action when acting pursuant to the reconsideration of the Texas SIP call. The EPA CAA regulations allow an EPA Region to vary from a national policy such as the 2015 SSM SIP policy when the Region has obtained a requisite EPA Headquarters concurrence. See 40 CFR 56.5(b). TCEQ's petition and the concurrence from the relevant office in the EPA's Office of Air and Radiation are contained in the docket for this action.

III. The EPA Region 6 Policy Under Consideration on Affirmative Defense Provisions in SIPs

Upon further analysis, EPA Region 6 believes the policy position on affirmative defense SIP provisions for malfunctions as upheld by the Fifth Circuit's *Luminant* decision should be maintained and that it is not appropriate to extend the D.C. Circuit's reasoning in *NRDC* to the affirmative defense provisions in the Texas SIP. As the EPA acknowledged in the 2015 SSM SIP Action, the CAA does not speak directly to the question of whether affirmative defense provisions are permissible in section 110 SIPs. See 80 FR 33856; see also, *Luminant*, 714 F.3d at 852-53 (determining that under *Chevron* step 1 the CAA section 113 does not discuss whether a

state may include an affirmative defense in its SIP and “turn[ing] to step two of *Chevron*” in holding that the Agency’s interpretation of the CAA to allow certain affirmative defenses as to civil penalties in SIPs was a “permissible interpretation of section [113], warranting deference”). Therefore, Region 6 is considering finding that it has discretion to determine how to reasonably interpret the statute to develop a policy on this issue in a manner consistent with the precedent in the Fifth Circuit.¹⁹ The D.C. Circuit’s *NRDC* decision evaluated the validity of an affirmative defense provision in an emission standard created by the EPA under CAA section 112, and expressly reserved judgment regarding the same question in the section 110 context in light of the ruling of its sister circuit. “The Fifth Circuit recently upheld EPA’s partial approval of an affirmative defense provision in a State Implementation Plan. See *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013). We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan.”²⁰ Therefore, the *NRDC* decision did not foreclose EPA’s ability to allow for affirmative defense provisions in section 110 SIPs, particularly in light of the Fifth Circuit’s precedent upholding the EPA’s prior approval of the Texas provisions at issue here. Upon revisiting this issue and consistent with the authority for EPA Regions to adopt a policy that varies from national policy under the mechanism established by 40 CFR 56.5(b), EPA Region 6 is evaluating the particular relevance of the *Luminant* decision and whether the *NRDC* decision has any application to Region 6’s SIP approvals under CAA section 110 in this context. EPA Region 6 is considering finding that it may not be

¹⁹ *E.g.*, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); and *Louisiana Envtl. Action Network v. EPA*, 382 F.3d 575, 581-82 (5th Cir. 2004) (recognizing that a court’s reversal of EPA’s interpretation of the CAA is warranted only where an agency interpretation is contrary to “clear congressional intent.”) (quoting *Chevron*, 467 U.S. 837, 843 n.9 (1984)).

²⁰ *NRDC*, 749 F.3d at 1064 n.2.

appropriate to extend the reach of the *NRDC* decision to affirmative defense provisions in section 110 SIPs in a manner inconsistent with the *Luminant* decision.

The mechanisms established under section 112 of the CAA to control air pollution are different than those under section 110 in significant ways. NESHAP are developed by the EPA under CAA section 112. Under CAA section 112, once a source category is listed for regulation pursuant to CAA section 112(c), the statute directs EPA to use a specific and exacting process to establish nationally-applicable, category-wide, technology-based emissions standards under section 112(d). Under section 112(d), EPA must establish emission standards for major sources that “require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section” that EPA determines is achievable taking into account certain statutory factors. The EPA refers to these rules as “maximum achievable control technology” or “MACT” standards. The MACT standards for existing sources must be at least as stringent as the average emissions limitation achieved by the best performing 12 percent of existing sources in the category (for which the Administrator has emissions information) or the best performing five sources for source categories with less than 30 sources. See CAA section 112(d)(3)(A) and (B). This level of minimum stringency is referred to as the MACT floor. For new sources, MACT standards must be at least as stringent as the control level achieved in practice by the best controlled existing similar source. See CAA section 112(d)(3). The EPA also must analyze more stringent “beyond-the-floor” control options, which consider not only the maximum degree of reduction in emissions of a hazardous air pollutant (HAP), but must take into account costs, energy, and non-air quality health and environmental impacts when doing so.

In contrast, SIPs are developed by the states under CAA section 110 and reflect the Clean Air Act’s core principle of cooperative federalism. See *Michigan v. EPA*, 268 F.3d 1075, 1083

(D.C. Cir. 2001); 42 U.S.C. §§ 7401(a)(3) and (4). Section 110 affords broad discretion to states in how to develop and implement air emission controls after the federal government establishes NAAQS to be achieved. For example, in determining which emissions limits and other control measures to incorporate into SIPs, CAA section 110(a)(2)(A) provides states with flexibility to decide the specific controls that “may be necessary and appropriate” to meet the Act’s requirements. This flexibility, and state discretion, under section 110 has been acknowledged repeatedly by the EPA in its actions and in court decisions on those Agency actions.²¹ While CAA section 110 functions within a cooperative federalism system in which states propose plans to attain and maintain the NAAQS and the EPA determines whether their specific plans comply with the Act’s requirements, see 42 U.S.C. § 7410(k)(4), CAA section 112 on the other hand strictly prescribes how the EPA must establish federal emission limitations for a specific class of sources which states have little flexibility in how to implement.

In addition, the EPA’s role, with respect to a SIP revision, is focused on reviewing the submission to determine whether it meets the minimum criteria of the CAA, and, where it does, EPA must approve the submission. In the context of a SIP, the EPA is not establishing its own requirements for the state to implement. CAA section 110(a)(2)(A) - (B) requires states to submit SIPs with emission limits and other controls necessary to meet CAA requirements, and CAA section 110(a)(2)(C) requires SIPs to include “a program to provide for the enforcement” of those emission control measures. In light of the inherent flexibility established by Congress in

²¹ *E.g.*, *Train v. NRDC*, 421 U.S. 60, 79 (1975) (“Under § 110(a)(2), the Agency is required to approve a State plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section’s general requirements. The Act gives the Agency no authority to question the wisdom of a State’s choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2) Thus, so long as the ultimate effect of a State’s choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.”); *CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008) (“EPA has no authority to question the wisdom of a State’s choices of emission limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2).”).

CAA section 110 for NAAQS implementation, for Region 6 to approve a state's SIP submission that contains an affirmative defense provision that is adequately protective and does not interfere with any applicable requirement of the CAA may be an appropriate recognition that states have latitude to define in their SIPs what constitutes an enforceable emission limitation, so long as the SIP meets all applicable CAA requirements. See 42 U.S.C. § 7407(a) (States have the primary responsibility for assuring air quality within the state by submitting a SIP "which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained...").

These differences in scope and relative balance of state and federal authority between CAA sections 110 and 112 suggest that the D.C. Circuit's reasoning with respect to limits on federal agency authority under the latter does not address the distinct question of whether a state may deem affirmative defense provisions to be an appropriate part of their overall NAAQS maintenance strategy for inclusion in their SIP submissions to EPA. In further considering this issue and consistent with the above discussion, EPA Region 6 believes that the application of the D.C. Circuit's reasoning in the *NRDC* decision may be particularly inappropriate in this circumstance where, as noted in the *NRDC* decision, the EPA's approval of the Texas SIP provision at issue was upheld by the Fifth Circuit. In its 2014 supplemental proposal, when it applied the reasoning of *NRDC* in the SIP context, the EPA may have given insufficient weight to the fact that the Texas SIP provisions had been upheld by the Fifth Circuit. In the *Luminant* case, the environmental petitioners raised the same basic argument that was key to the D.C. Circuit's *NRDC* holding: environmental petitioners argued that the EPA's approval of the Texas affirmative defense SIP provision conflicts with the CAA's provision that, in the case of EPA enforcement and citizen suits, a federal district court "shall have jurisdiction" to assess a "civil

penalty.” 42 U.S.C. §§ 7413(b); 7604(a). The Fifth Circuit, however, upheld as “neither contrary to law nor in excess of [EPA’s] statutory authority” the EPA’s position that the Texas provision at issue here is narrowly tailored and consistent with the penalty assessment criteria in CAA section 113(e).²² See also 42 U.S.C. § 7410(a)(2)(C) (requiring states to include a program for the enforcement of control measures as necessary and appropriate to meet applicable CAA requirements).

EPA Region 6 believes that the best policy may be to permit certain affirmative defense provisions in the section 110 SIPs of states in Region 6, consistent with the *Luminant* decision, and invites comment on this issue. Consistent with the discussion above, EPA Region 6 believes that it may be inappropriate to impose a civil penalty on sources for sudden and unavoidable emissions caused by circumstances beyond the control of the owner or operator. EPA Region 6 recognizes that even equipment that is properly designed and maintained can sometimes fail. Further, because the specific affirmative defense provisions at issue herein apply to excess emissions that cannot be avoided by a source operator, removing these affirmative defense provisions from SIPs will not reduce emissions and therefore would not result in an environmental or public health or welfare benefit. Therefore, EPA Region 6 is considering adopting a policy that affirmative defense provisions are generally permissible in SIPs when they are adequately protective and do not interfere with any applicable requirement of the CAA and invites comment on this issue. 42 U.S.C. §§ 7410(k)(3) and (l).

IV. Evaluation of the Affirmative Defense Provisions in the Texas SIP

²² *Luminant*, 714 F.3d at 853. Other circuit courts have also upheld affirmative defense provisions promulgated by the Agency as part of federal implementation plans, which the EPA promulgates when a state has failed to provide a SIP that satisfies the minimum CAA requirements. *Montana Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012); *Arizona Public Service Co. v. EPA*, 562 F.3d 1116 (10th Cir. 2009).

As outlined in the previous section, and consistent with the *Luminant* decision, EPA Region 6 is considering reinstating EPA's policy that affirmative defense provisions in the SIPs are generally approvable in states in Region 6. EPA Region 6 believes that affirmative defense SIP provisions may be generally permissible when they are adequately protective and do not interfere with any applicable requirement of the CAA. As mentioned above, a state's authority to establish an enforceable emission limitation in its SIP under CAA section 110(a)(2) includes the authority to establish an emission limitation that includes an affirmative defense as to civil penalties. Upon analyzing 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d) and 30 TAC 101.222(e), EPA Region 6 is proposing to determine that these provisions are adequately protective and do not interfere with any applicable requirement of the CAA and therefore are permissible affirmative defense SIP provisions if EPA Region 6 adopts the new policy under consideration as outlined in section III.

A. Affirmative Defense Provisions in the Texas State Implementation Plan

Under the Texas SIP, the regulation and control of emissions occurring during startups, shutdowns and malfunctions has evolved over time.²³ Upsets and unplanned maintenance, startup, and shutdown (MSS) activities are equivalent to malfunctions, and the affirmative defense provisions governing emissions during those periods are the subject of this proposed rulemaking. In 2005, Texas revised its excess emissions regulations.²⁴ In particular, the revised regulations included narrowly tailored and limited affirmative defenses to civil penalties for excess emissions during "upsets" and "unplanned MSS activities" at Texas facilities. See 30 TAC 101.222(b) - (e). Texas submitted these provisions to the EPA on June 23, 2006, and the

²³ See *Luminant Generation Co. v. EPA*, 714 F.3d 841, 847-849; see also, Part II.A "TCEQ's Excess Emissions History," Comments by the Texas Commission on Environmental Quality Regarding State Implementation Plans, at 4-9 (November 5, 2014), EPA Docket ID No. EPA-HQ-OAR-2012-0322, Document No.0936.

²⁴ See 30 Tex. Reg. 8884 (December 30, 2005).

EPA approved them into the Texas SIP in 2010. See 75 FR 68989 (Nov. 10, 2010). The EPA's approval of these provisions as a revision to the Texas SIP was challenged but ultimately upheld. See *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013, cert. denied). In 2015, in the final SSM SIP Action as discussed above, the EPA determined, based on *NRDC*, that these previously approved and upheld affirmative defense provisions for malfunctions (upsets and unplanned MSS activities) were inconsistent with the CAA and thus the Texas SIP was substantially inadequate, and the EPA called on Texas to remove 30 TAC 101.222(b) - (e) from the Texas SIP. This action proposes to withdraw the 2015 Texas SIP call, and thereby leave in place the EPA's 2010 approval of the Texas SIP provisions related to affirmative defenses as to civil penalties for excess emissions during upsets and unplanned MSS activities.

According to 30 TAC 101.222(b), which is applicable to emission limits in the Texas SIP other than opacity limits, an affirmative defense as to civil penalties is available for all claims in enforcement actions concerning "upset events" that are determined not to be excessive emissions events²⁵ other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the following:

"(1) the owner or operator complies with the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements). In the event the owner or operator fails to report as required by §101.201(a)(2) or (3), (b), or (e) of this title, the commission will initiate enforcement for such failure to report and for the underlying emissions

²⁵ To determine whether an emissions event or emissions events are excessive, the following factors are evaluated: (1) the frequency of the facility's emissions events; (2) the cause of the emissions event; (3) the quantity and impact on human health or the environment of the emissions event; (4) the duration of the emissions event; (5) the percentage of a facility's total annual operating hours during which emissions events occur; and (6) the need for startup, shutdown, and maintenance activities. See 30 TAC 101.222(a). The current EPA-approved Texas SIP does not provide any affirmative defense for an emissions event or emissions events that are determined to be excessive emission events. Such events are required to have a corrective action plan developed and are subject to a penalty action.

event itself. This subsection does not apply when there are minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the unauthorized emissions were caused by a sudden, unavoidable breakdown of equipment or process, beyond the control of the owner or operator;

(3) the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded, and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;

(9) the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;

(10) the percentage of a facility's total annual operating hours during which unauthorized

emissions occurred was not unreasonably high; and

(11) the unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.”²⁶

The EPA approved 30 TAC 101.222(b) as a revision to the Texas SIP in 2010 because it determined that this provision provides a narrowly tailored affirmative defense as to civil penalties for excess emissions during an upset event, which the EPA considered equivalent to a malfunction event, that was consistent with the interpretation of the CAA as set forth in the 1999 Guidance. In particular, these affirmative defense provisions only concerned civil penalties for violations involving excess emissions during certain defined activities and did not preclude actions seeking injunctive relief. In addition, the criteria include a requirement that the unauthorized emissions did not cause or contribute to an exceedance of a NAAQS, PSD increment, or a condition of air pollution. As stated above, excess emissions were subject to reporting requirements and an analysis that such emissions were not excessive. See 30 TAC 101.201 (relating to emission event reporting and recordkeeping requirements) and 30 TAC 101.222(a) (relating to excessive emission event determinations). Excess emissions determined to be excessive triggered penalty and corrective action plan requirements.

In the Texas SIP, 30 TAC 101.222(d) provides the same affirmative defense terms for upset events related to SIP opacity limits. The EPA approved 30 TAC 101.222(d) for the same reasons as it approved 30 TAC 101.222(b). Also, the Texas SIP includes 30 TAC 101.222(c) and

²⁶ Texas Health and Safety Code, Title 5. Sanitation and Environmental Quality, Subtitle C. Air Quality, Chapter 382. Clean Air Act, Subchapter A. General Provisions, Section 382.003(1)(C)(3) defines Air Pollution to mean “the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that: (A) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or (B) interfere with the normal use or enjoyment of animal life, vegetation, or property.”

101.222(e) that provide similar affirmative defenses as to civil penalties for unplanned MSS activities that arise from sudden and unforeseeable events beyond the control of the operator that require immediate corrective action to minimize or avoid an upset or malfunction. These provisions allow an affirmative defense as to civil penalties where the source owner or operator has the burden to prove that such unplanned activities arose from sudden or unforeseeable events beyond the control of the operator, that immediate corrective action was required to minimize or avoid an upset or malfunction, and that the criteria in section 101.222(c) or (e) have been met. In approving the provisions into the SIP, the EPA agreed that Texas's treatment of unplanned MSS is functionally equivalent to EPA's 1999 Guidance definition of malfunction. The EPA approved these two provisions for the same reasons it approved 30 TAC 101.222(b) and 101.222(d), interpreting unplanned MSS to mean maintenance or shutdown related to a malfunction. A copy of 30 TAC 101.222 showing the specific terms for all four affirmative defense-related provisions is available in the docket for this action.²⁷

The EPA-approved Texas SIP also includes 30 TAC 101.222(f) and (g) which establish certain restrictions on the applicability of the affirmative defenses as to civil penalties in 30 TAC § 101.222(b) through (e). For example, 30 TAC 101.222(f) states that the affirmative defense provisions do not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to an emissions event or a maintenance, startup or shutdown activity, and that the affirmative defense provisions only apply to violations of SIP requirements, not to violations of federally promulgated performance or technology based standards, such as

²⁷ In the November 2010 action, the EPA also approved 30 TAC Chapter 101, Subchapter A, revised section 101.1 (Definitions); and Subchapter F, revised sections 101.201 (Emissions Event Reporting and Recordkeeping Requirements) and 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), and new sections 101.221 (Operational Requirements), 101.222 (a) through (g) (Demonstrations), and 101.223 (Actions to Reduce Excessive Emissions).

those found in 40 CFR parts 60, 61, and 63. Under 30 TAC 101.222(g), evidence of any past event subject to a possible affirmative defense is also admissible and relevant to demonstrate a frequent or recurring pattern of events which could preclude the successful assertion of the affirmative defense.

B. Application of Region 6 Policy, if Adopted, to Affirmative Defense Provisions in the Texas SIP

The identified provisions in 30 TAC 101.222(b) - (e) provide an affirmative defense for non-excessive upset and unplanned events, which are equivalent to the term malfunction used in EPA's 1999 Guidance. If a violation during an upset or unplanned MSS activity (malfunction) is found not to be "excessive," additional specified criteria are met (including a demonstration that the unauthorized emissions "did not cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution"), and the unauthorized emissions "could not have been prevented through planning and design," then the affirmative defense as to civil penalties is available. 30 TAC 101.222(b) - (e). Even if all required criteria are met and the owner or operator establishes the applicability of the approved affirmative defense, the excess emissions are still a violation of the underlying emission limit and injunctive relief is still available. See 75 FR 68991, footnote # 4.

As first outlined in the action initially approving these provisions into Texas's SIP in 2010, the EPA explained that section 101.222(b) is consistent with EPA's 1999 Guidance for the following reasons:

"(1) The rule does not provide an exemption from compliance with applicable emission limitations; (2) The affirmative defense provided is limited to upset or malfunctions; (3) The affirmative defense applies only to a judicial or administrative enforcement action for a violation of applicable emission limitations; (4) The defense applies only to civil penalties and cannot be asserted for an enforcement action for injunctive relief; (5) The rule specifies criteria, which must be met in order to assert the defense that are consistent

with those outlined in EPA's 1999 Policy; (6) The burden to prove that the criteria have been met is on the owner or operator; (7) A determination by TCEQ that the criteria have been met does not constitute a waiver of liability for the violation; (8) Nothing in the rule, including a determination by the TCEQ, would bar EPA or a citizen suit enforcement action for the emission violation; (9) The affirmative defense cannot be asserted where the unauthorized emissions cause or contribute to an exceedance of the NAAQS, PSD increments or to a condition of air pollution; (10) The affirmative defense may not be asserted against Federal performance or technology-based standards such as NSPS or NESHAP; (11) The affirmative defense may not be asserted where the Executive Director of TCEQ determines that the emissions event is excessive under the criteria in section 101.222(a); and (12) The emissions event must be reported to TCEQ under section 101.201 in order for the owner or operator to assert the affirmative defense.”

75 FR 26892, 26895 (May 13, 2010).

EPA further explained that sections 101.222(c) and 101.222(e) provide a similar affirmative defense for unplanned maintenance, startup or shutdown activities that arise from sudden and unforeseeable events beyond the control of the operator that require immediate corrective action to minimize or avoid an upset or malfunction. The EPA determined that “unplanned maintenance, startup, or shutdown” activity is functionally equivalent to EPA's 1999 Guidance definition of a malfunction. Similar to section 101.222(b), the provisions in sections 101.222(c) and 101.222(e) places the burden of proof on a source or operator to show that maintenance activities undertaken arose from sudden and unforeseeable events beyond the control of the operator, that immediate corrective action was required to minimize or avoid an upset or malfunction and that outlined criteria, which are consistent with EPA's 1999 Guidance, have been met. *Id.* at 26895-96.

Finally, the EPA explained that section 101.222(d), which concerns excess opacity events for non-excessive upset emission events, contains affirmative defense criteria that are specifically tailored for opacity-related activities, but follow the pattern of criteria in 101.222(b). *Id.* at 26896. Therefore, the EPA determined that the criteria in section 101.222(d) were also consistent with our interpretation of the Act as outlined in EPA's 1999 Guidance.

EPA Region 6 is reaffirming all of the above outlined findings from the 2010 action. EPA Region 6 has determined that these SIP provisions are narrowly tailored to address unavoidable, excess emissions and are consistent with the penalty assessment criteria set forth in CAA section 113(e). As outlined in section III, EPA Region 6 is considering an interpretation that narrowly tailored affirmative defense provisions are consistent with CAA requirements in provisions like Texas's where the affirmative defense as to civil penalties applies to upset or malfunction events. An effective enforcement program must be able to collect penalties to deter avoidable violations. 42 U.S.C. § 7413. However, sources may, despite good operating practices, suffer a malfunction due to events beyond the control of the owner or operator and be unable to meet emission limitations during periods of startup and shutdown. For this reason, EPA Region 6 proposes to determine that affirmative defense SIP provisions like those in the Texas SIP, which provide a narrowly tailored affirmative defense as to civil penalties for circumstances where it is infeasible to meet the applicable limit and the source must prove that the source has made all reasonable efforts to comply, are consistent with CAA requirements. See *Luminant*, 714 F.3d at 852 (upholding the EPA approval of these Texas provisions); 42 U.S.C. §§ 7410(k)(3) and (l), 7413(e) and 7604(a).

Based on the above analysis, EPA Region 6 is proposing to reinstate its determination that 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d) and 30 TAC 101.222(e) are adequately protective and do not interfere with any applicable requirement of the CAA such that they are permissible affirmative defense SIP provisions consistent with the new EPA Region 6 policy outlined in section III, if adopted. In today's proposed action, we are addressing only the affirmative defense provisions in the Texas SIP.

V. Proposed Action

EPA Region 6 is proposing to find that the affirmative defense provisions in the Texas SIP applicable to excess emissions that occur during upsets (30 TAC 101.222(b)), unplanned events (30 TAC 101.222(c)), upsets with respect to opacity limits (30 TAC 101.222(d)), and unplanned events with respect to opacity limits (30 TAC 101.222(e)) do not make the Texas SIP substantially inadequate to meet the requirements of the Act. Accordingly, EPA Region 6 is proposing to withdraw the SIP call issued to Texas as part of the 2015 SSM SIP Action. If EPA Region 6 finalizes this action as proposed, Texas will no longer have an obligation to submit a SIP revision addressing its existing affirmative defense SIP provisions in the absence of the SIP call. Texas may choose to withdraw the SIP revision it submitted in November 2016 in response to the SIP call, on which the EPA has not proposed nor taken action to approve or disapprove.

VI. Statutory and Executive Order Reviews

Under the Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
 - Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
 - Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
 - Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
 - Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
 - Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
 - Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Act; and
 - Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Particulate matter, Sulfur dioxide, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: April 23, 2019.

David Gray,

Acting Regional Administrator, Region 6.

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