No. 10-60934

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT GENERATION CO. LLC, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

Respondent.

Petitions for Review of a Final Rule Promulgated by the United States Environmental Protection Agency

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BRIEF OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IGNACIA S. MORENO
Assistant Attorney General

MATTHEW R. OAKES
MATTHEW B. HENJUM
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-6187

Of Counsel:
JAN TIERNEY
Office of General Counsel
United States Environmental Protection Agency

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REQUEST FOR ORAL ARGUMENT

Respondent United States Environmental Protection Agency ("EPA") requests oral argument in this matter. EPA believes oral argument would be useful to the Court.

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JURISDICTION

In this case, two sets of petitioners ("Environmental Petitioners"[1] and "Industry Petitioners"[2]) seek review of a November 10, 2010 action by the United States Environmental Protection Agency ("EPA") approving in part and disapproving in part revisions to the Texas State Implementation Plan ("SIP") under the Clean Air Act ("CAA" or "Act"). *See* "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 Fed. Reg. 68,989 (Nov. 10, 2010) ("Final Rule").

This Court has jurisdiction over these consolidated petitions pursuant to 42 U.S.C. § 7607(b)(1). EPA does not contest Petitioners' standing.

STATEMENT OF ISSUES

This case involves EPA's partial approval and partial disapproval of a revision to the Texas SIP. The portions of the revision at issue in this case proposed to create an affirmative defense against civil penalties for excess emissions during both planned and unplanned startup, shutdown and malfunction ("SSM")[3] events. EPA approved

[1] Environmental Integrity Project, Sierra Club, Environment Texas Citizen Lobby, Inc., Citizens for Environmental Justice, Texas Environmental Justice Advocacy Services, Air Alliance Houston, and Community In-Power and Development Association.

[2] Luminant Generation Company LLC, SandowPower Company LLC, Big Brown Power Company LLC, and Oak Grove Management Company LLC.

[3] Rather than SSM events, petitioners refer to "maintenance, startup and shutdown" events or "MSS" events. We avoid using Petitioners' defined term "MSS" because

the affirmative defense with respect to unplanned SSM events, and disapproved the affirmative defense with respect to planned events. This case presents the following issues:

(1) Texas submitted a proposed SIP revision that authorized a narrow affirmative defense for unavoidable excess emissions during unplanned SSM events – where the elements of the defense are met a source is not subject to penalties. Did EPA abuse its discretion in approving portions of Texas' proposed SIP revision that contained an affirmative defense for unplanned and unavoidable SSM events?

(2) Texas' proposed SIP revision also included a poorly defined affirmative defense for planned maintenance events that could, potentially, be broadly applicable. Did EPA abuse its discretion in disapproving portions of Texas' proposed SIP amendment that contained an affirmative defense for planned maintenance events?

STATEMENT OF THE CASE

The CAA requires a State, in its SIP, to establish enforceable emissions limits for sources within its borders. Emissions limits must continuously apply under the CAA, and those contained in SIPs must meet all CAA applicable requirements, including attainment of National Ambient Air Quality Standards ("NAAQS").

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that term can easily be confused with SSM events that are historically recognized in both caselaw and EPA policy. For reasons explained below, an "unplanned maintenance" event may fall into the SSM category as a "malfunction." A "planned maintenance" event is avoidable, and thus cannot properly be covered by an affirmative defense.

Penalties assessed for violations of emissions limits are a tool commonly used to ensure attainment and maintenance of the NAAQS. EPA and the States have long recognized, however, that during certain SSM periods emission control equipment often cannot function effectively. During these periods, therefore, it can be impossible for sources to comply with emissions limits even when engaging in best operating practices. For this reason, EPA has, since the 1970's, interpreted the CAA to authorize a State to design narrowly tailored affirmative defenses that shield sources from penalties, but not injunctive relief, when unavoidable excess emissions (or "upsets") occur during SSM events. EPA's interpretation of the CAA embodies the recognition that while avoidable excess emissions must be deterred, it is inequitable, and ineffective from a deterrence perspective, to subject sources to penalties for events beyond their control.

On November 10, 2010, EPA approved in part and disapproved in part proposed SIP revisions submitted by the State of Texas. The approved portions, *inter alia*, create an affirmative defense for unplanned SSM events. A source seeking to apply this affirmative defense has the burden to prove that nine criteria exist before the defense applies. EPA determined that this affirmative defense is consistent with the CAA because it applies to only those events where unavoidable excess emissions may occur. The disapproved portions, *inter alia*, create an affirmative defense for planned maintenance, startup and shutdown events. EPA determined that this

affirmative defense impermissibly applies to planned maintenance because excess emissions are avoidable during these periods if a source engages in best operating practices. EPA also determined that the portions of the defense applicable to startup and shutdown could not be approved because they were drafted in a manner that renders them insufficiently stringent, and because those provisions are not severable.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

The Clean Air Act, 42 U.S.C. §§ 7401–7671q, establishes a comprehensive program for controlling and improving the nation's air quality through both State and federal regulation. Under Title I of the Act, EPA is charged with identifying air pollutants that endanger the public health and welfare, and with formulating the NAAQS that specify the maximum permissible concentrations of those pollutants. 42 U.S.C. §§ 7408-7409.

The Act gives States the primary responsibility for ensuring that NAAQS are achieved. 42 U.S.C. § 7410(a). Each State must prepare a State implementation plan, or "SIP," that provides for the implementation, maintenance and enforcement of the NAAQS in each air quality control region within the State. *Id.* § 7410(a)(1) & (2). EPA must approve the SIP if it meets the applicable requirements of the Act. *Id.* § 7410(k)(3). The general requirements for SIPs are set forth in 42 U.S.C. § 7410(a)(2), and include enforceable emissions limitations, which are defined in § 7602(k) as

requirements established to limit the quantity, rate or concentration of air pollutant emissions on a continuous basis, and other control mechanisms to meet the requirements of the CAA. The SIP process is not a static one, however. States routinely submit SIP revisions to EPA for approval. States also submit revisions when changes to federal or State law occur and the State seeks to incorporate those changes into the SIP.

A. The CAA, Cooperative Federalism, and the State's SIP Authority

As the Fifth Circuit explains, the CAA "established a federal-state partnership, recognizing that prevention and control of air pollution at its source is the primary responsibility of States and local governments, and delegated to the States primary responsibility for implementing the NAAQS standards." *Louisiana Envtl. Action Network v. EPA,* 382 F.3d 575, 578-79 (5th Cir. 2004). *See also Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976) (States have "the primary responsibility for formulating pollution control strategies."); 42 U.S.C. § 7407(a). This federal-State partnership is often described as "cooperative federalism," an approach "that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981). For this approach to be effective, "federal agencies cannot consign States to the ministerial tasks of information gathering and making initial recommendations, while reserving to

themselves the authority to make final judgments under the guise of surveillance and oversight." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 518 (2004) (Kennedy J., dissenting).

B. EPA Review of State Plans and Revisions

While States have "wide discretion" in formulating their plans, *Union Elec. Co.,* 427 U.S. at 250, SIPs must include certain measures Congress specified "to assure that national ambient air quality standards are achieved." 42 U.S.C. § 7410(a)(2)(C). To gain EPA approval, each plan must, among other things, include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives . . .), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements" of the Act. *Id.* § 7410(a)(2)(A). EPA may not approve a SIP that would interfere with any CAA applicable requirement, including NAAQS attainment. *Id.* § 7410(l).

Once a State submits a SIP or SIP revision, EPA conducts a completeness review. 42 U.S.C. § 7410(k)(1)(B). Once complete, "the Administrator shall approve" the SIP within 12 months "if it meets all of the applicable requirements" of the Act. *Id.* § 7410(k)(2) & (3).

EPA has several options if it determines that the submitted SIP does not meet all of the applicable requirements of the statute. It can issue a conditional approval, a partial approval and partial disapproval, or a full disapproval. *Id.* § 7410(k)(3) & (4).

A SIP revision does not modify the federally enforceable requirements of the existing SIP until it is approved by the EPA Administrator; until that time, the terms of the existing SIP remain the federally enforceable requirements even if a party proves that EPA has unreasonably delayed its review of proposed revisions. 40 C.F.R. §§ 51.104-.105; *See General Motors Corp. v. United States*, 496 U.S. 530, 540 (1990).

II. REGULATORY BACKGROUND AND RULEMAKING HISTORY

EPA's policy regarding SSM events in SIPs has been consistent, and EPA has been consistent with respect to Texas' most recent proposed SIP amendments. Historically, the State of Texas has submitted various revisions to its SIP. The most relevant here are the two most recent, a version of the Texas SIP that was granted limited approval in 2005, and the proposed revision that was partially approved by the Final Rule.

A. EPA's Policy Regarding Affirmative Defenses for Upsets

Since the early 1970s, States have incorporated SIP provisions to deal with excess emissions (emissions which exceed any applicable emission limitation) during SSM periods.[4] EPA's first policy on this issue, adopted in 1978, interpreted the Act to prohibit automatic exemptions for periods of excess emissions. 1982 Guidance at 1, 3. If a source could demonstrate that an upset was "due to an unavoidable

[4] *See* Memorandum from Kathleen M. Bennett to EPA Regional Administrators titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (Sept. 28, 1982), Index #9, App. C (the "1982 Guidance").

occurrence," however, that 1978 policy provided that States could consider that demonstration in determining whether an enforcement action is required. *Id.* Even before that 1978 policy was formally issued, EPA made clear that during periods of routine maintenance, sources were obligated to meet CAA emission requirements. For example, in 1977 EPA promulgated two Federal Implementation Plans[5] ("FIPs") concerning excess emissions from smelters in Utah and Idaho. EPA explained that the FIPs "did not address periods of…routine maintenance" because "the purpose" of the rules was to only "address excess emissions caused by 'sudden and unavoidable failure' of process or control equipment." 42 Fed. Reg. 21,473/2[6]; 42 Fed. Reg. 51,872/2[7]. Because routine maintenance is predictable, and can be scheduled to coincide with shutdown periods, EPA concluded that it would have been inconsistent with CAA requirements to allow sources to exceed emissions limits during those periods. *Id.*

EPA's SSM policy was formalized in two memoranda that clarified EPA's interpretation of the Act regarding "Excess Emissions During Startup, Shutdown,

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[5] A FIP is defined as a "plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP] . . . ." 42 U.S.C. § 7602(y).

[6] Final Rule, Utah Sulfer Oxides Control Strategy Concerning Excess Emissions and Kennecott Copper Corporation smelter, 42 Fed. Reg. 21,472 (April 27, 1977), Index #13, App. M.

[7] Final Rule, Idaho Sulfer Oxides Control Strategy Concerning Excess Emissions, 42 Fed. Reg. 58,171 (Nov. 8, 1977), Index #14, App. N .

Maintenance, and Malfunctions." *See* "1982 Guidance" and "1983 Guidance[8]." EPA concluded that:

> scheduled maintenance[9] is a predictable event which can be scheduled at the discretion of the operator, and which can therefore be made to coincide with maintenance on production equipment, or other source shutdowns. Consequently, excess emissions during periods of scheduled maintenance should be treated as a violation unless a source can demonstrate that such emissions could not have been avoided…

1982 Guidance at 3; 1983 Guidance at 3. EPA supplemented its policy in 1999, by clarifying the types of excess emissions provisions States may incorporate into SIPs. 1999 Guidance[10] at 1. Specifically, "States have the discretion to provide" an affirmative defense for upsets "that arise during certain malfunction, startup and shutdown episodes." *Id.* at 2. EPA subsequently explained that its omission of an affirmative defense for maintenance activities from the 1999 Guidance was intentional. 72 Fed. Reg. 5232, 5238 (Feb. 5, 2007). In particular, "EPA did not provide for an affirmative defense during maintenance activities in the 1999 policy," because "[t]he source or operator should be able to plan maintenance that might

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[8] Memorandum from Kathleen M. Bennett to EPA Regional Administrators titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (Feb. 15, 1983), Index #10, App. D (the "1983 Guidance").

[9] The term "planned" as used in Texas' SIP revision is equivalent to the term "scheduled" that EPA and Texas have used elsewhere to classify certain SSM events. *See, e.g.*, 70 Fed. Reg. 16,129-30 (Mar. 30, 2005).

[10] Memorandum from Steven A. Herman to EPA Regional Administrators titled "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Sept. 19, 1999), Index #11, App. E (the "1999 Guidance").

otherwise lead to excess emissions to coincide with maintenance of production equipment or other facility shutdowns." 75 Fed. Reg. 26,892, 26,896-97 (May 13, 2010). EPA's 2001 Guidance on its SSM policy[11] confirms EPA's policy that a State's SIP can include "appropriately tailored affirmative defenses, consistent with" the 1999 Guidance. 2001 Guidance at 2. Throughout each of these policy statements it is clear that upsets are always considered a violation, and subject to injunctive relief, even where a State recognizes some form of an affirmative defense for penalty claims. *See, e.g.,* 1999 Guidance at 5, n.2.

B. EPA's Limited Approval of Texas' Pre-existing SIP

EPA has repeatedly notified Texas that an affirmative defense for planned maintenance is not appropriate. For example, on March 30, 2005, EPA granted only a *limited*, rather than full, approval of Texas' prior excess emissions rule. "Limited Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown and Malfunction Activities," 70 Fed. Reg. 16,129 (Mar. 30, 2005) ("2005 Rule"). Limited approvals are rarely granted, and only where a SIP revision strengthens the pre-existing SIP even though "portions of a rule prevent EPA from finding that the rule meets a certain requirement of the Act." Calcagni

[11] Memorandum from Eric Schaeffer and John S. Seitz to EPA Regional Administrators titled "Re-Issuance of Clarification – State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Dec. 5, 2001) (the "2001 Guidance"), Index #12, App. F.

Memorandum[12] at 3. Under a limited approval the entire revision is incorporated into the SIP, though EPA puts the State on notice that "[w]ithin a reasonable time" it will disapprove the rule "for not meeting all the requirements of the Act." *Id.*

Texas' 2005 Rule was written to include, for a limited duration, affirmative defenses for upsets, including for planned maintenance. *See* 30 Tex. Reg. 3593-95 (June 17, 2005). The 2005 Rule generally strengthened the Texas SIP. 70 Fed. Reg. 16,130/2. Specifically, EPA found that the 2005 Rule's limited affirmative defenses for upsets were an improvement because they replaced prior general exemptions for upsets and for planned maintenance. *See* 25 Tex. Reg. 6727-51 (July 14, 2000). Though the planned maintenance affirmative defense was an improvement over the prior exemption, however, EPA determined that it was inconsistent with the requirements of CAA Section 110 and EPA policy. Moreover, EPA cautioned that if Texas "revises its rules to include an affirmative defense for excess emissions in the Texas SIP in the future, the State should ensure…that the affirmative defense does not apply to excess emissions from scheduled maintenance activities." 70 Fed. Reg. 16,131/1-2.

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[12] Memorandum from John Calcagni, Director, Air Quality Manegement Division, to EPA Regional Directors, titled "Processing of State Implementation Plan Submittals" (the "Calcagni Memorandum"), available at http://www.epa.gov/ttn/oarpg/t1/memoranda/siproc.pdf. Although this document is not in the Administrative Record, it is a publicly available document cited for the limited purpose of explaining the relevant regulatory history in response to issues Industry Petitioners raise. *See*, e.g., Pet. Br. at 16-17.

EPA's decision to issue a limited approval of the 2005 Rule despite its inconsistencies with the CAA was also based in part on EPA's recognition that Texas designed the affirmative defense provisions to expire on their own terms on June 30, 2005. *Id.* at 16,131/1.

C. EPA Comments Regarding Texas' Proposed SIP Revisions

On June 29, 2005, Texas proposed revisions to its excess emissions rule. 30 Tex. Reg. 4097. In response, EPA informed Texas of five "areas of concern regarding consistency with the [CAA] and approvability of the SIP revision." 2005 Comment Letter[13] at 1. The first concern was that the proposed rule "provid[ed] an affirmative defense for certain maintenance and planned activities." *Id.* EPA concluded that it could not "approve a blanket affirmative defense for scheduled maintenance activities" and "strongly recommend[ed] that the State establish an enforcement discretion approach for excess emissions from scheduled maintenance." *Id.*

On August 26, 2005, consistent with its prior comments to the State, EPA issued a new limited approval granting Texas' proposal to extend the expiration dates for the affirmative defenses in Texas' 2005 Rule from June 30, 2005 to no later than

[13] Letter from Thomas H. Diggs, Chief, Air Planning Section, EPA Region VI to Russell Kimble, TCEQ (Aug. 8, 2005) (the "2005 Comment Letter"), Index #40, App. J.

June 30, 2006. "Limited Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown and Malfunction Activities," 70 Fed. Reg. 50,205 (Aug. 26, 2005). EPA granted only a limited approval to this revision because EPA's "basis" for granting the 2005 Rule a limited approval "remain[ed] unchanged." *Id.* at 50,205. EPA stated that it "agree[d] with many of the points raised by the commenters regarding the underlying flaws with" the 2005 Rule. *Id.* at 50,206/2. EPA concluded, however that it "d[id] not think the brief extension of the expiration date at issue here w[ould] have a significant effect" and that it "w[ould] not grant any further extensions of the expiration date in the absence of a submitted SIP revision correcting the defects in the rule." *Id.* Texas ultimately submitted its revised excess emissions rule, the rule at issue in this case, on January 23, 2006. 75 Fed. Reg. 26,894/1.

D. The Final Rule

In its revision submitted on January 23, 2006, Texas addressed requirements with respect to SSM activities, distinguishing between unplanned and planned SSM activities, and providing for an affirmative defense in both instances. 75 Fed. Reg. 26,893/3–94/1 (summarizing revisions). EPA and Texas discussed potential issues with Texas' proposed revisions to the SIP over the next year-and-a-half, 75 Fed. Reg. 26,894/1, and on May 13, 2010, EPA proposed to approve portions of Texas' revision, but to disapprove Texas' proposed revisions providing an affirmative

defense for excess emissions during planned maintenance, startup, or shutdown activities. *See* 75 Fed. Reg. 26,892/2. After notice and comment, EPA finalized its proposal in the Final Rule. 75 Fed. Reg. 68,989/2–69,002/1. As provided in the proposed and final rules, EPA disapproved the revisions for planned startup, shutdown and maintenance because planned maintenance events can, and should, be scheduled during process shutdowns – and where that is not possible a source should ensure that control equipment is effective during maintenance.[14] 75 Fed. Reg. 68,992/3. Because excess emissions during planned maintenance can be avoided, an affirmative defense that protects a source from penalties would not be narrowly tailored, and not consistent with CAA requirements. *Id.*

STANDARD OF REVIEW

This Court's review is governed by the deferential standard set forth in the Administrative Procedure Act, 5 U.S.C. § 706, under which agency action is valid unless, *inter alia*, it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). This standard "is a narrow one," under which the Court is not "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). "If the agency's reasons and policy choices conform to minimal standards of rationality, then its

[14] As explained at 75 Fed. Reg. 26,896, EPA interprets "unplanned maintenance" (the term Texas uses in its SIP revision) to be a "malfunction" and thus to fall under the EPA policy regarding affirmative defenses for malfunctions.

actions are reasonable and must be upheld." *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).

Judicial deference also extends to EPA's interpretation of a statute it administers, particularly in a notice and comment rulemaking context such as this one. *United States v. Mead Corp.*, 533 U.S. 218, 226-28 (2001); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). In reviewing an agency's statutory interpretation, the Court must first decide "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Where "Congress has explicitly left a gap" to be filled, the agency's regulation is "given controlling weight unless . . . arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. EPA need not articulate "the best" interpretation, only a reasonable one. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744-45 (1996). Courts "accord 'great deference' to the EPA's construction" of the CAA. *BCCA Appeal Group v. EPA*, 355 F.3d 817, 825 (5th Cir. 2004) (quoting *Union Elec. Co.*, 427 U.S. at 256).

Finally, where the issue presented is a challenge to the agency's interpretation of its own regulation, that interpretation must be given "controlling" weight "unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks and citation omitted); *Talk American, Inc. v.*

Michigan Bell Telephone Co., 131 S.Ct. 2254, 2261 (2011) (agency is entitled to deference even where the interpretation is first provided in the agency's brief); *Belt v. EmCare, Inc.*, 444 F.3d 403, 415 (5th Cir. 2006) (same).

SUMMARY OF ARGUMENT

EPA properly exercised its discretion in approving Texas' affirmative defense for unplanned SSM events. EPA's approval is consistent with the structure of the CAA, which operates through a federal-State partnership that gives States flexibility to define implementation plans that meet local needs, so long as those plans meet the minimum standards established by Congress. Just as the CAA requires a State to establish enforceable, continuously applicable emissions limits to assure NAAQS attainment, it likewise authorizes a State to define what constitutes a violation of those limits. Texas' affirmative defense for SSM events is consistent with EPA's long-standing interpretation that a State can create affirmative defenses shielding sources from enforcement actions for penalties where excess emissions are unavoidable.

EPA also properly exercised its discretion in disapproving Texas' affirmative defense for planned maintenance, startup and shutdown. States do not have unfettered discretion in designing their SIPs, and where a State proposes a SIP that fails to meet minimum CAA standards, EPA is obligated to disapprove the plan. In accordance with EPA's long-standing interpretation of the CAA, EPA determined that Texas' proposed affirmative defense for planned maintenance events would

undermine the CAA's attainment and enforceability requirements because sources can prevent excess emissions from occurring during planned maintenance. Furthermore, Texas' affirmative defense for planned startup and shutdown is not severable and cannot be independently approved. Moreover, that defense is insufficiently stringent because it includes criteria that, on their face, apply only to unplanned events.

EPA's final action was a reasonable interpretation of the CAA's requirements, ensuring that sources are subject to appropriate enforceable emissions requirements while allowing Texas to ensure that a source is not unduly penalized where excess emissions are unavoidable. Accordingly, EPA's final action warrants *Chevron* deference and, particularly given the significant discretion that the Fifth Circuit accords EPA's decisions under the CAA, should be upheld.

ARGUMENT

I. EPA REASONABLY DETERMINED THAT TEXAS' PROPOSED AFFIRMATIVE DEFENSE FOR UNPLANNED SSM EVENTS DID NOT VIOLATE THE CLEAN AIR ACT

Environmental Petitioners base their arguments on the unfounded assumption that EPA seeks to adjudicate liability and penalties for CAA violations, thus usurping the judiciary's traditional role. This line of argument shows a fundamental misunderstanding of the approved provisions of Texas' SIP revision, and of EPA's role in reviewing those submissions. The approved affirmative defense establishes two tiers of violations for excess emissions during unplanned SSM events – some

violations subject a source only to injunctive relief (where the elements of an affirmative defense are satisfied), and some violations subject a source to both injunctive relief and penalties (where the elements of an affirmative defense are not satisfied). As discussed below, this approach is within the scope of a State's authority, and strikes a reasonable balance between the sometimes competing interests of the CAA and the realities and limits of technology. At an elemental level, the State's approach here is similar to the misdemeanor/felony dichotomy in criminal law, where the same action has different consequences depending on whether an independent element (*mens rea*, for example) can be proven.[15]

A. Recognition of an Affirmative Defense for Unplanned Upsets Is an Appropriate Way to Balance Competing CAA Goals

Both EPA and States implementing the CAA must balance a tension, inherent in many types of air regulation, to ensure adequate compliance while simultaneously recognizing that despite the most diligent of efforts, emission limits may be exceeded under circumstances beyond the control of the source. In some cases, 100% compliance may not be feasible. Texas' liability scheme for unplanned SSM excess emissions (or "upsets") is one way to balance this tension.

[15] Felonies and misdemeanors, like the separate classes of offenses recognized for violations of the Texas SIP, are often distinguished by an additional element or aggravating characteristic in the felony which warrants a more stringent response.

Texas, in its SIP, must include "enforceable emission limitations," that limit the "quantity, rate, or concentration of emissions of air pollutants on a continuous basis." *See* 42 U.S.C. § 7410(a)(2)(A) (setting out SIP requirements); 42 U.S.C. § 7602(k) (defining "emission limitation"). *See generally Sierra Club v. EPA*, 551 F.3d 1019, 1021 (D.C. Cir. 2008) (addressing standards to address hazardous air pollutants under section 112 of the Act, and holding that emissions limitations under that section must both continuously apply and meet section 112's minimum stringency requirements, even during periods of startup, shutdown and malfunction). The Ninth Circuit recognizes "Congress' primary purpose behind requiring regulation on a continuous basis" was "to exclude intermittent control technologies from the definition of emission limitations." *Kamp v. Hernandez*, 752 F.2d 1444, 1452 (9th Cir.1985). Thus, EPA is required to ensure that a SIP's emissions limitations are continuous, enforceable, and not intermittent, a requirement reflected in EPA's SSM policies. *See* 1982, 1983, 1999 and 2001 Policies. Texas' affirmative defense for unplanned SSM events meets this requirement by ensuring that even where there is an upset event during a malfunction, the emission limitation is still enforceable through injunctive relief.

While "continuous" limitations, on the one hand, are required, there is also caselaw indicating that in many situations it is appropriate for EPA and the State to account for the practical realities of technology. In *Bunker Hill Co. v. EPA*, 572 F.2d

1286, 1293 (9th Cir. 1977), for example, the petitioner, a smelter, argued that air emission controls required by EPA's FIP were not technologically feasible, and on that basis challenged the FIP.[16] The Ninth Circuit acknowledged that EPA need not show that standards can be met 100 percent of the time, given the possibility of mechanical failure, but also noted that EPA will typically be required to promulgate provisions that contemplate how to deal with violations beyond a source's control. *Id.* at 1302 n.35 ("To hold the source liable for 'violations' that even the EPA admits will occur one percent or less of the time would be to require more than available and feasible technology."). The Ninth Circuit found that the "record must establish that the required technology is feasible, not merely possibly feasible." *Id.* Similarly, in *Essex Chemical v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973), the D.C. Circuit acknowledged that "variant provisions" such as provisions allowing for upsets during startup, shutdown and equipment malfunction "appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force."

These cases, individually, may be distinguished in particular settings, and intervening caselaw such as *Sierra Club v. EPA* and the 1977 amendments may even

[16] This case was decided prior to enactment of the Clean Air Act Amendments of 1977, which added the "continuous" requirement of 42 U.S.C. § 7602(k). On petition for rehearing, however, the Ninth Circuit considered the impact of the 1977 Amendments, and determined that those Amendments did nothing to alter the Court's decision. *Bunker Hill*, 572 F.2d at 1306.

undermine the relevance of these cases today. Collectively, however, they indicate that there is another consideration for States when developing a SIP – not only must the emission requirements be "continuous," 42 U.S.C. § 7602(k), States should also consider developing a system that incorporates some level of flexibility. The affirmative defense provision approved here for unplanned upsets does nothing to interfere with the "continuous" emissions requirement, but simply provides for a defense to civil penalties for excess emissions that are proven to be beyond the control of the source. By incorporating an affirmative defense into its SIP, Texas has formalized its approach to upset events. In a Clean Water Act setting, the Ninth Circuit required this type of formalized approach when regulating "upsets beyond the control of the permit holder." *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1272-73 (9th Cir. 1977). *But see, Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1057-58 (D.C. Cir. 1978) (holding that an informal approach is adequate).

Appropriately crafted affirmative defense provisions give the State the necessary flexibility to both ensure that its emission limitations are "continuous" as required by 42 U.S.C. § 7602(k), and account for unplanned upsets as necessary to preserve the reasonableness of the Texas SIP as a whole.

B. The CAA Gives States Authority to Define Conduct that Leads to A Violation.

States are required to submit SIPs that "include enforceable emission limitations" sufficient to meet CAA requirements and to create a program to enforce the limitations the State sets. 42 U.S.C. § 7410(a)(2)(A)-(B). Allowing a State to design a limited affirmative defense is one way to allow a State to define what constitutes an enforceable emission limitation. EPA's role, with respect to a proposed SIP revision, is to review the submission to determine whether it meets the minimum criteria of the CAA, and where it does, to approve the submission. *See* 42 U.S.C. § 7410(k). The Supreme Court explained the review process as follows:

> Under § [7410(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 § [7410(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.

Train v. NRDC, 421 U.S. 60, 79 (1975). EPA exercises this authority in conjunction with the principles outlined in Executive Order 13,132, which outlines criteria agencies must account for when formulating policies that have federalism implications. 64 Fed. Reg. 43,255-59 (Aug. 4, 1999). When implementing their SIPs,

this Executive Order directs EPA to give States "the maximum administrative discretion possible." *Id.* at 43,256.

Here, EPA was considering a plan developed under State authority, and EPA's approval was based on its reasonable construction of the Act's requirements which, in the absence of any unambiguous limitations to the contrary, is entitled to deference. *See generally Louisiana Envtl. Action Network v. EPA*, 382 F.3d at 581-82 (recognizing that 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. at 843 n.9). Texas' recognition of an affirmative defense to civil penalties in limited circumstances is a proper exercise of its discretion under the CAA. *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."); *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 470 (States have broad discretion in designing their SIPS, so long as they comply with CAA requirements); *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).").

One purpose of the CAA's cooperative federalism design is to ensure States have sufficient flexibility to allow for reasonable economic growth while, at the same

time, improving the ambient air quality. *See* H.R.Rep. No. 95–294, at 211 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1290. A State's discretion is not without boundaries, however. As EPA recognizes in the Final Rule, "while the Act does give States a fair degree of latitude in choosing a mix of controls necessary to meet and maintain the NAAQS, it also places some limits on the choices States can make." 75 Fed. Reg. 68,995/3.

Texas was operating within the scope of its authority in creating an affirmative defense that would apply to penalty claims for a limited set of excess emissions, but not to claims for injunctive relief for those events. Environmental Petitioners may prefer for Texas to design its SIP differently, but that preference alone does not compel disapproval of Texas' SIP revision.

C. Texas' Affirmative Defense Merely Creates Different Categories of Violation.

Relevant to Environmental Petitioners' arguments, the Texas SIP effectively recognizes multiple types of violation for unplanned upsets: (1) "Excessive emission events;" (2) "Upset" events during an unplanned maintenance, startup and shutdown activity where the source cannot meet the elements of an affirmative defense; and, (3) "Upset" events during an unplanned maintenance, startup and shutdown activity where the source can meet the elements of an affirmative defense. For the first two types of violation, a source can always be subject to either injunctive relief or

penalties, or both. *See* 30 TAC § 101.222(c) (source emitting excessive emissions is not entitled to affirmative defense). In the third, a source can be subject to injunctive relief, but not penalties. *Id. See also* 30 TAC § 101.222(b) (for an upset event, a source has the opportunity to prove an affirmative defense).

The affirmative defense EPA approved is appropriately narrow. As described above, sources are generally subject to enforcement actions for any "upset" events – defined as "[a]n unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions." 30 TAC § 101.1(109). If those "upset" events are considered "excessive emission events" based on their frequency, duration, impact on human health, and other measures, they are not eligible for an affirmative defense under any circumstance. 30 TAC § 101.222(a)-(b). If the violation is not deemed "excessive" then the violation may be subject to an affirmative defense to penalties if the emitting source can establish not only that the upset occurred during "unplanned maintenance, startup, or shutdown activity,"[17] but also that nine additional 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 that the unauthorized emissions "could not have been prevented through planning and design." *See* 30 TAC § 101.222(c) (listing nine separate elements that a source must prove in order to

[17] Defined at 30 TAC § 101.1 (108)(A)-(B).

establish an affirmative defense). EPA determined this affirmative defense was appropriately narrow. *See* 75 Fed. Reg. 68,992/2–68,993/1.

Even if a source proves all nine required criteria and establishes the applicability of the approved affirmative defense, the violator is still subject to injunctive relief – thus where any citizen is concerned that emissions might contribute to a violation of the NAAQS, that party can seek an abatement order. *See* 75 Fed. Reg. 68,994/1. EPA believes that such injunctive relief is "the most effective means to ensure limited harm to ambient air quality." 75 Fed. Reg. 68,996/3. EPA's partial approval of the Texas SIP was reasonable, given the appropriately narrow nature of the affirmative defense created by Texas.

D. Where the Elements of the Texas Affirmative Defense Are Met, the Violation is Subject Only to Injunctive Relief, Thus the CAA § 113(e) Penalties Never Come Into Play.

Environmental Petitioners' argument rests on the incorrect assumption that the CAA penalty factors are relevant in a situation where Texas has defined the emission standard such that penalties are not available for some violations under the terms of the Texas SIP. The CAA sets out specific provisions that a Court must consider "[i]n determining the amount of any penalty to be assessed under this section." 42 U.S.C. § 7413(e). These factors only come into play, however, where the violation, if proven, allows for penalties to be assessed. Texas has defined what constitutes a violation in a way that makes it clear that, where an affirmative defense is proved, there is no

liability for penalties. Stated another way, in the case of an "upset" caused by an unplanned SSM event, where the elements of the affirmative defense are proved, a source's violation is the equivalent of a misdemeanor (which is not subject to penalties), and not a felony (which is). *See supra* n.13. Although a Court has authority to determine whether the elements of an affirmative defense have been satisfied, once it finds that those elements are satisfied and thus what type of violation has occurred, it may not change the State's definition of the violation.

The CAA does not require that all violations be treated equally – instead the State is granted authority to determine what constitutes a violation, and to distinguish both quantitatively and qualitatively between different types of violations. This is part of the essential flexibility recognized in a regulator's ability to define enforceable emissions limitations. Texas has exercised its regulatory authority here by distinguishing between unplanned upsets that are subject to both injunctive relief and penalties, and unplanned upsets that meet extensive additional criteria, and are subject to only injunctive relief.

EPA's partial approval of Texas' SIP is based on EPA's longstanding CAA interpretation that SIP provisions may provide a limited affirmative defense for upsets during SSM events. The application of EPA's guidance documents have withstood judicial challenges in a range of contexts, including a Sixth Circuit challenge where the Court upheld EPA's disapproval of a SIP revision that provided an automatic

exemption from limitations during SSM episodes, *Michigan DEQ v. Browner*, 230 F.3d 181, 185 (6th Cir. 2000), and a Tenth Circuit case in which the Court found that EPA's SSM policy embodied a reasonable interpretation of the CAA, *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1129 (10th Cir. 2009).

A citizen suit claim under 42 U.S.C. § 7604(a)(1) allows citizens to commence a civil action against any person alleged to be in violation of "an emission standard or limitation under this chapter." The CAA, however, allows States to establish such "enforceable emission limitations." 42 U.S.C. § 7410(a)(2)(A). Thus, the citizen suit provision clearly contemplates enforcement of the standards that are defined by the State under the SIP provisions in title I of the CAA. As a result, where a State defines its emissions limitations and enforcement measures to allow a source the opportunity to prove its entitlement to a lesser degree of violation (not subject to penalties) in narrow, specified circumstances, as the State did here, no CAA statutory provision entitles a Court to alter the fundamental design of the SIP and require penalties.

EPA agrees with Environmental Petitioners that, where section 113(e) comes into play in a judicial proceeding, it is the Court that determines the level of the appropriate penalty. In such a circumstance the Court *must* balance the statutory factors to determine what penalty is appropriate. *See generally* 42 U.S.C. § 7413(b) (recognizing that where EPA seeks to recover a civil penalty and brings an enforcement action in federal court, the Court shall have jurisdiction to assess a civil

penalty). The Court never reaches the section 113(e) criteria, however, in a case where the EPA-approved SIP does not provide for civil penalties associated with a particular violation.[18]

E. Recognition of an Affirmative Defense Does Not Undermine the Authority of the Courts

Under the CAA, it is the State in the context of its SIP, and not the Court in the context of an enforcement action, that determines the "enforceable emissions limitations," 42 U.S.C. § 7410(a)(2)(A), and creates "a program to provide for the enforcement" of those limitations, 42 U.S.C. § 7410(a)(2)(C). EPA must ensure that SIP revisions contain adequate provisions to meet CAA requirements, but in this statutory setting the State, not the Court, determines what conduct creates a violation subject to civil penalties. *See* 42 U.S.C. § 7410(a)(2)(D).

Environmental Petitioners cite to several cases for the proposition that the assessment of penalties in a civil enforcement action is left to the discretion of the district court. *See* Envtl. Br. 23, citing *United States v. B & W Investment Properties*, 38 F.3d 362, 368 (7th Cir. 1994); *U.S. EPA v. Envtl. Waste Control, Inc.*, 917 F.2d 327, 335 (7th Cir. 1990); *Tull v. United States*, 481 U.S. 412, 427 (1987). None of these cases,

[18] To the extent Environmental Petitioners' argument is based on the scope of EPA's Penalty Policy, that argument was not asserted below, and has been waived. *See* Envtl. Br. 13-16; *Infra* § II. A. 1. EPA acknowledges that penalties are an important deterrent, but in the case of Texas' affirmative defense for unplanned events the deterrence value is minimal, because the excess emissions, by definition, must be unexpected and unavoidable. *See* 30 TAC § 101.222(c).

however, speaks to the salient issue here – whether a district court must be allowed to assess penalties even where the standard set out in a SIP (or comparable implementation authority) is defined such that certain violations are not subject to civil penalties. Instead, in each of the cases cited by Environmental Petitioners, the violation at issue was not of a standard defined to provide for only injunctive relief.

The CAA clearly grants the Court jurisdiction to determine whether the elements of liability are met in a particular instance. *See* 42 U.S.C. §§ 7413(b), 7604(a). As Environmental Petitioners point out on page 23 of their opening brief, the CAA states that a district court has jurisdiction "to apply any appropriate civil penalties." *See* 42 U.S.C. § 7604(a). Civil penalties cannot be "appropriate," however, where the SIP has defined the standard(s) to preclude penalties under limited circumstances. Here, Texas has established, and EPA has approved as part of the Texas SIP, provisions addressing emissions caused by upset events. These provisions define the available relief where elements of an affirmative defense are satisfied. In general, 42 U.S.C. § 7413 authorizes EPA and courts to assess penalties where violations are shown. This section, however, is reasonably construed, as a whole, not to override a state's choice in its SIP to establish a lesser category of violations that simply are not subject to penalties.

Petitioners primarily rely on two cases, *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990), and *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), for the proposition that

the courts have rejected attempts to regulate where authority is granted by statute to the Judiciary. Envtl. Br. 24-25. Both cases arise under statutes that, like the CAA, contain citizen suit provisions, but the statutes at issue in each of those cases make clear that the Court ultimately has authority to apply a penalty (in the case of *Adams Fruit*) or determine the scope of liability (in the case of *Kelley*). The CAA grants courts ultimate authority to issue a penalty where liability for penalties has been established pursuant to a federally-approved SIP, but allows the States discretion to determine the scope of a violation.

There is a stark difference between the statute at issue in *Adams Fruit*, which stated expressly that "[i]f the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages," 494 U.S. at 641 (quoting 29 U.S.C. § 1854(c)(1) (1982 ed.), and the CAA statutory provision, which allows the court to "apply any *appropriate* civil penalties," 42 U.S.C. § 7604(a) (emphasis added). The key distinction is that the provision of the labor laws at issue in *Adams Fruit* not only expressly establishes a private right of action (something the CAA does), but also "provides for actual and statutory damages in cases of intentional violations," (which the CAA does not require for every violation). *Adams Fruit*, 494 U.S. at 642 The statute makes clear that for any intentional violation of "any regulation under this chapter" the Court may award penalties. 29 U.S.C. § 1854(c)(1) (1982 ed.). In short, the labor law provisions at issue

expressly recognize that the Court must always have the option to award damages where it finds that a respondent has intentionally violated the chapter's provision or implementing regulations. The CAA, however, only allows for "appropriate" penalties, and creates a system that allows States, through their SIP, to determine standards, define what behavior creates a violation, and to provide enforcement measures. *See* 42 U.S.C. § 7410(a)(2); 75 Fed. Reg. 68,999/1-/2. In the CAA context relevant here, it is the State, through its federally-approved SIP, that establishes what the underlying substantive requirements (and corresponding violations) actually are, whereas in *Adams Fruit* it was federal statutes that established the substantive requirements. The CAA does not contain the clear statutory authority that was central to the Supreme Court's analysis in *Adams Fruit*.

Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied,* 25 F.3d 1088 (D.C. Cir. 1994), is also inapposite. *Kelley* involves EPA's authority to interpret the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). EPA was faced with conflicting judicial interpretations as to the scope of a safe harbor provision from CERCLA liability for "secured creditors." *Id.* at 1103. Judicial interpretations on the scope of this safe harbor provision were expanding secured creditor liability, resulting in upheaval of the lending markets. *Id.* at 1104. In response, EPA instituted a rulemaking clarifying the scope of the provision. *Id.* The court found that, because CERCLA provides for a private right of action to recover

cleanup costs, questions of liability can be put at issue in federal court by disputing parties – without any government involvement. *Id.* Based on that logic, the court concluded that EPA, one of many potential plaintiffs, lacked authority to define liability by regulation. *Id.* at 1107. However, under CERCLA the statute defines who is liable. *See* 42 U.S.C. § 9607(a) (defining liable parties under CERCLA); 42 U.S.C. § 9601(20)(A) (creating safe harbor provision). Thus, in a CERCLA setting, the court found that Congress clearly intended for the judiciary, not EPA, to apply the statutory terms and determine liability. 15 F.3d at 1108. *See also Kelley v. E.P.A.*, 25 F.3d 1088, 1090 (D.C. Cir. 1994) ("Section 107(a) sets forth the general grounds whereby liability is imposed on persons . . . . Congress must have meant that the plaintiff bore the burden to prove those facts by a preponderance of the evidence.").

The CAA operates differently. Under the CAA, the States and EPA are more than just one of many potential plaintiffs. Rather, through the SIP process, the CAA grants States (and EPA), the authority to define substantive requirements that will address air pollution and provide for attainment and maintenance of the NAAQS. Until EPA approves a SIP promulgated by the State, or promulgates a federal implementation plan (FIP) in place of the State plan, the behavior that creates liability has not been defined, and there is no standard for a citizen to enforce through a citizen suit. Because the violation is defined by the State and/or EPA, the State and

EPA can determine the parameters of liability without impinging on the Court's jurisdiction.

F. EPA's Final Action Partially Approving the Texas SIP was Within the Agency's Discretion

EPA interprets the CAA as allowing a limited affirmative defense only where attainment will not be detrimentally affected, and this is exactly what the approved portions of the Texas SIP provide. *Chevron* only requires that EPA establish "an adequate rationale" for its approval of an affirmative defense. *See National Tank Truck Carriers, Inc. v. EPA*, 907 F.2d 177, 184 (D.C. Cir. 1990). The Agency has done more than that here. With respect to its partial approval, EPA explains:

> The affirmative defense provision only provides limited relief to sources in an action for penalties. Although sources may avoid a penalty for certain excess emissions where they can successfully prove all of the elements of the affirmative defense, the excess emissions are still considered violations and the administrative or judicial decision-maker in an enforcement action may weigh all of the factors to determine if other relief, such as injunctive relief, is appropriate.

75 Fed. Reg. 69,000/1. The Tenth Circuit has found that a similar rationale in the FIP context satisfies the *Chevron* requirements. *Arizona Public Service Co. v. EPA*, 562 F.3d at 1130.

Since 1977, the EPA has interpreted all excess emissions as "violations" of the applicable standards for which "notices of violations" could, but not necessarily would, issue. 42 Fed. Reg. 21,472. EPA recognizes that even if properly maintained,

however, equipment can sometimes fail. 1999 Policy at 2. Allowing an affirmative defense that applies only to actions for penalties, and not to injunctive relief, is an appropriate way to balance EPA's fundamental responsibility to ensure that SIPs "provide for attainment and maintenance" of the NAAQS, while still accounting for unavoidable and unplanned equipment failure. *Id.* EPA's startup, shutdown, and malfunction policy, as applied in prior cases and here, embodies a reasonable interpretation of the Clean Air Act. *See, e.g., Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d at 1129. *See generally Browner*, 230 F.3d at 183-85 (extending deference to EPA's application of its SSM policy).

Nothing in the CAA mandates that any violation of any standard promulgated by a State for inclusion in a SIP must carry a potential sanction of penalties, and nothing in the record indicates that the approved affirmative defense will lead to NAAQS exceedances that would not occur in the absence of such a defense. EPA's action here was both reasonable and within the Agency's authority.

II. EPA'S PARTIAL APPROVAL IS CONSISTENT WITH TITLE V, THE NAAQS, AND TEXAS' OWN INTERPRETATION OF ITS SIP

A. Environmental Petitioners' Title V Challenges Must Fail

1. Petitioners Have Waived These Arguments

Before addressing the substance of Environmental Petitioners' arguments related to Title V of the CAA, it should be noted that neither Environmental

Petitioners, nor anyone else, submitted adverse comments regarding this issue during this rulemaking. It is well-settled that issues must be raised during the comment process before raising them in litigation.[19] Environmental Petitioners here claim, for the first time, that EPA did not adequately consider a specific provision of Title V of the CAA when partially approving the Texas SIP. Envtl. Br. 37-38. This provision requires States administering Title V permitting programs to have authority to assess penalties of at least $10,000 per day for each violation, 42 U.S.C. § 7661a(b)(5)(E), and Environmental Petitioners claim that this demonstrates that the State, in its SIP, must allow penalties to be assessed in SSM situations. Envtl. Br. at 37-38. This argument has been waived, and may not be raised for the first time in this Court.

Environmental Petitioners were on notice of EPA's intent to approve Texas' proposed limited affirmative defense for unplanned maintenance events. *See* 75 Fed. Reg. 26,894–96. In the Final Rule, EPA's action essentially tracked the proposed course of action. Though they provided comments, Environmental Petitioners never raised the Title V permitting issue they now assert. Failure to raise issues during a

[19] *See, e.g., Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (characterizing a party's requirement to initially present its comments during the rulemaking in order for an appellate court to consider the issue as "black-letter administrative law"); *Military Toxics Project v. EPA*, 146 F.3d 948, 956-57 (D.C. Cir. 1998) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.") (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)).

notice and comment period waives subsequent challenges, and bars Enbironmental Petitioners' Title V claim here. *Texas Oil & Gas Ass'n v.* EPA, 161 F.3d 933 n.7 (5th Cir. 1998), citing *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 35-37 (1952).[20]

In any event, as we discuss in the following sections, even if the Court were to reach the merits of Petitioners' claims on these issues, those challenges should be denied.

2. Title V Provisions of the CAA Do Not Undermine EPA's Partial Approval Here

Title V of the CAA requires major stationary sources of air pollution to receive operating permits that incorporate CAA requirements. *See Public Citizen, Inc. v. EPA*, 343 F.3d 449, 453 (5th Cir. 2003). Operating permits issued under Title V of the Act consolidate CAA requirements into a comprehensive permit. *See* 42 U.S.C. §§ 7661-7661f. The purpose of the Title V operating permit is not to impose any substantive

[20] In a separate decision, this Court declined to require a petitioner to raise issues to EPA prior to seeking judicial review. *See American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 295 (5th Cir. 1998). In *American Forest* this Court did not consider the Federal Register Act, 44 U.S.C. § 1507, which provides that publication in the Federal Register gives the public constructive notice of agency action, and declined to follow *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952), which was cited by this Court in support of its decision requiring administrative exhaustion in *Texas Oil & Gas Ass'n.* Additionally, EPA's approval of the Final Rule, in contrast to the rule in *American Forest*, did not involve a significant modification of the proposed action and no other commenters raised the issue now sought to be reviewed by Environmental Petitioners.

new requirements on sources, but instead to combine the many CAA requirements into a single document to ensure "[i]ncreased source accountability and better enforcement." Operating Permit Program, 57 Fed.Reg. 32,250-51 (July 21, 1992). *See also Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (Title V permit "is a source-specific bible for [CAA] compliance").

In developing a Title V permit program under the CAA, the State must ensure that the permitting authority may "recover civil penalties in a maximum amount of not less than $10,000 per day" for each Title V permit violation. 42 U.S.C. § 7661a(b)(5)(E). This provision does not impact whatever authority a State, through a SIP, may have to define what behavior is subject to civil penalties under the CAA. The State has authority in the SIP to shape what the applicable requirements are, and what constitutes a violation is inherent in defining those state SIP requirements. A Title V permit, in turn, need only assure compliance with the applicable requirements (as specified by the SIP). Further, Texas' Title V program provides for the requisite civil penalties. *See* Tex. Water Code § 7.052(c); *see also, Public Citizen*, 343 F.3d at 462 (upholding EPA's approval of Texas' Title V program, including on the issue of adequate civil penalties). To the extent that the State must have authority under Title V to seek penalties for violations of the SIP, Texas has that authority under Texas Water Code § 7.052(c).

B. Texas' Affirmative Defense for Unplanned SSM Events Will Not Interfere with Applicable CAA Requirements

EPA's fundamental responsibility regarding the NAAQS program, which is primarily implemented through SIPs, is to ensure that the NAAQS are attained and maintained. 42 U.S.C. § 7410(a). Environmental Petitioners incorrectly claim that "EPA has failed to explain its determination that limiting the scope of remedies available for violations of the Act will not interfere with attainment." Envtl. Br. 40. As we have discussed throughout this brief, the Texas SIP defines what behavior constitutes a violation of Texas law, and does so in a way to ensure that the NAAQS are attained and maintained.

The CAA allows Texas to define what constitutes a violation of the SIP, so long as the SIP ensures attainment and maintenance of the NAAQS. The State did so in a way that provides for implementation and maintenance of NAAQS standards, as required by 42 U.S.C. § 7410(a), and thus EPA was required to approve that portion of the Texas SIP. *See* 42 U.S.C. § 7410(k)(3). Notably, a source is not eligible for the Texas affirmative defense where an unauthorized emission can "cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution," 30 TAC § 101.222(c)(9). Disapproval of the affirmative defense would provide no greater protection against a violation of the NAAQS because the type of unplanned events for which the source can successfully assert the defense are unavoidable.

The affirmative defense provisions are available only in response to malfunctions that "could not have been prevented through planning and design" and are not applicable where upset events recur in a pattern "indicative of inadequate design, operation, or maintenance." 30 TAC § 101.222(c)(2)-(3). The gist of these and the other affirmative defense elements is that a source must take all possible steps to prevent excess emissions, and take all possible steps to minimize the amount, duration, and impact of those events. Because the affirmative defense requires sources to take all possible preventative steps, the absence of the affirmative defense would not improve air quality. Furthermore, the most powerful tool available to stop the excess emissions – injunctive relief – is still available. This, combined with the fact that no affirmative defense is available where an unauthorized emissions event would cause a NAAQS exceedance, ensures that the NAAQS are adequately protected in Texas.

The burden on Environmental Petitioners in a citizens' suit to prove a violation remains unchanged. For particular types of violation (unplanned SSM events where the affirmative defense may apply) there is a possibility that the source may prove that an affirmative defense is appropriate, thus taking penalties off the table, but this approach does not violate any CAA provision.

C. The Final Rule Does Not Change the Meaning of the Texas SIP

EPA's partial approval of the Texas SIP does not, and cannot, expand the scope of Texas' proposed SIP revisions. Environmental Petitioners' argument to the contrary ignores the fact that Texas is defining, through its SIP, the behavior that forms the basis for a CAA violation. Certain unplanned events, where a source can meet additional affirmative defense elements required by the Texas SIP, are simply not subject to an action for penalties under the CAA citizens' suit provision. Thus, EPA's recognition that "the Texas SIP provides a source the option to assert an affirmative defense" even in response to a citizens' suit action, 75 Fed. Reg. 68,999, is entirely consistent with the State's Statement that "its rules are not intended to . . . impact citizens' legal rights under the [CAA]." 30 Tex. Reg. 8884, 8922 (Dec. 30, 2005). Citizens still have every right that existed prior to amendment of the Texas SIP to assert a citizens' suit claim. In short, because a citizens' suit claim is limited to SIP violations as defined by the State, SIP provisions as a practical matter define the violations that can form the basis of a citizens' suit claim.[21]

[21] The facts in *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 587-88 (5th Cir. 1981), cited by Environmental Petitioners, are inapposite. Envt'l Br. at 46, 48. In *Florida Power* EPA attempted to require Florida to include a particular limitation in its SIP revision. *Id.* Here, EPA has partially approved, and partially disapproved Texas' SIP without requiring any additional SIP provisions. Partial approval is expressly permitted by statute. *See* 42 U.S.C. § 7410(k)(3).

III. EPA REASONABLY DETERMINED THAT TEXAS' PROPOSED AFFIRMATIVE DEFENSE FOR PLANNED MAINTENANCE VIOLATED THE CLEAN AIR ACT

Industry Petitioners take the opposite position of Environmental Petitioners, and claim that EPA was required to approve a poorly drafted and potentially wide ranging affirmative defense for planned SSM events – a defense which would effectively excuse excess emissions during planned maintenance of a source's facilities. Though the CAA gives States a great deal of leeway in designing a SIP, there are limits to that authority. Texas went well beyond those limits in seeking to effectively excuse excess emissions for planned maintenance events, and by drafting its proposed affirmative defense in a way that might not require a source to establish all elements of the affirmative defense.

The fact that Texas once improperly shielded excess emissions arising during planned maintenance from penalties forms the primary basis for Industry Petitioners' arguments here. This thin reed cannot support the weight of Petitioners' arguments. Texas was aware EPA would disapprove an affirmative defense for planned maintenance for the precise reasons set forth in EPA's proposed and Final Rule. As early as 2005, EPA stated unequivocally that "if Texas revises its rule to include an affirmative defense for excess emissions in the future, the State should ensure that…the affirmative defense does not apply to excess emissions from scheduled maintenance activities," 70 Fed. Reg. 16,131/2 and, further, that "EPA cannot

approve a blanket affirmative defense for scheduled maintenance activities." 2005 Comment Letter, comment 16, at vi. Texas ignored EPA's warnings.

EPA's long-standing interpretation of the CAA is that affirmative defenses are only appropriate where excess emissions are unavoidable, and EPA has consistently concluded that sources can avoid excess emissions during planned maintenance by conducting such maintenance during shutdown periods or by ensuring that control equipment is operational. EPA's decision to disapprove Texas' affirmative defense for planned maintenance was reasonable.

A. EPA Reasonably Determined That Texas' Affirmative Defense for Planned Maintenance Would Undermine the CAA's Attainment and Enforceability Requirements

While the CAA grants States broad discretion to design their SIPs, it "nonetheless subjects the States to strict minimum compliance requirements." *Union Electric Co.*, 427 U.S. at 256-57. Congress requires EPA to interpret the CAA and to ensure that a State's SIP adheres to the Act's minimum requirements. *See BCCA Appeal Group,* 355 F.3d at 824-25. CAA section 110(l) provides that EPA "shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment" or other CAA requirements. 42 U.S.C. § 7410(l). The "key criterion" that EPA must consider is attainment and maintenance of the NAAQS. *Arizona Pub. Serv. Co.*, 562 F.3d at 1129. *See* 42 U.S.C. § 7410(a)(1). To that end, a SIP must include appropriate judicially enforceable emissions limitations that

sources must comply with on a continuous basis. *See* 42 U.S.C. §§ 7410(a)(2)(A),7602(k).

The CAA neither defines the term "interfere," nor "directly speak[s] to how a determination of 'interference' is to be made." *Kentucky Res. Council, Inc., v. EPA*, 467 F.3d 986, 995 (6th Cir. 2006). This compels the Court to analyze EPA's disapproval under *Chevron* step 2. *See GHASP v. EPA,* 289 Fed. Appx. 745, 753-54 (5th Cir. 2008); *Kentucky Res. Council,* 467 F.3d at 995 (applying deference under *Chevron* step 2 to EPA's determination that SIP revision would not interfere with CAA's anti-backsliding provisions). In *Browner*, the Sixth Circuit faced a similar situation and upheld EPA's disapproval of a SIP provision that permitted CAA exemptions for certain SSM events. 230 F.3d at 185. The Sixth Circuit relied in part on the analysis in EPA's 1982 and 1983 Guidance documents, highlighting EPA's conclusion that exemptions for SSM events "are inconsistent with the purpose of the CAA's . . . mandate that the NAAQS be attained and maintained." The Sixth Circuit also pointed out that petitioners in that case failed to offer evidence that Michigan's SIP would not interfere with NAAQS attainment. *Id.*

This Court should, likewise, defer to EPA's reasonable disapproval of Texas' affirmative defense for planned maintenance. EPA specifically determined that the affirmative defense "would undermine the enforceability, as well as the attainment, requirements of the" CAA. 75 Fed. Reg. 68,994/2. Under EPA's interpretation, a

State's SIP must be designed to deter all avoidable excess emissions in order to ensure attainment and maintenance of the NAAQS. Penalties cannot deter unavoidable excess emissions, but are necessary to deter avoidable violations. *See id.* at 68,992/3. Consequently, EPA reasonably interprets the CAA to authorize only those affirmative defenses that are "narrowly tailored" to address excess emissions that sources cannot avoid. *Id.*

Here, EPA determined that Texas' affirmative defense for planned maintenance is not narrowly tailored because planned maintenance activities are predictable, and excess emissions can be avoided by scheduling maintenance during shutdown periods. *See id.* at 68,992/3, 68,993 n.8. Where a source chooses not to schedule maintenance during shutdown periods, it "should ensure that control equipment can be consistently effective during such maintenance activities." *Id.* at 68,992/3. EPA has consistently maintained this position in guidance documents and other rulemakings. *See, e.g.*, 1982 Guidance 3; 1983 Guidance at 3; 42 Fed. Reg. 51,871/2; 42 Fed. Reg. 21,473/2; 65 Fed. Reg. 51,412, 51,426/1; 72 Fed. Reg. 5232, 5238/1-2. EPA's 1999 Guidance does not recognize an affirmative defense for planned maintenance activities. *See generally* 1999 Guidance. EPA's 1982 and 1983 Guidance similarly recognize that planned maintenance is, by its nature, planned, predictable, and, thus, any related excess emissions are avoidable. 1982 Guidance at 3;

1983 Guidance at 3.[22] A consistent and longstanding interpretation of an agency charged with administration of a particular act, while not controlling, is entitled to "considerable weight." *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975). By exposing sources to potential penalties, EPA's partial disapproval ensures a proper incentive to avoid excess emissions during planned maintenance. It is reasonable to conclude that such an incentive will deter and minimize excess emissions.

Industry Petitioners argue that EPA's determination that sources can avoid excess emissions during planned maintenance "runs counter to the evidence before the agency" because "pollution control equipment like electrostatic precipitators…are not effective during certain maintenance periods." Pet. Br. 38, n.30. As EPA expressly recognized, however, even if there is "a unique situation where maintenance cannot be performed at a time and in a manner that would ensure" excess emissions are avoided, then Texas has the option to establish an "alternative limit" to narrowly address that limited situation. 75 Fed. Reg. 68,993 n.8. The possible existence of

[22] Industry Petitioners' assertion that the 1999 Guidance simply "did not address" affirmative defenses for planned maintenance is misleading, given that the express purpose of that document was to "clarify the types of excess emissions provisions States may incorporate into SIPs . . . . " 1999 Guidance at 1. If EPA interpreted the CAA to allow for an affirmative defense for planned maintenance, EPA would have included it in the 1999 Guidance. EPA specifically explained that its "omission" of an affirmative defense for maintenance activities from the 1999 Guidance was "intentional." 72 Fed. Reg. 5238.

such a limited situation does not justify Texas' proposed affirmative defense which is broadly applicable to maintenance activities from which excess emissions can be avoided. *Id.*

Furthermore, as in *Browner*, there is no evidence in the record that Texas' affirmative defense would not interfere with Texas' attainment and maintenance of the NAAQS. In both its limited approval of Texas' 2005 excess emissions rule and its comments on Texas' rule during the State administrative process, EPA clearly informed the State that an affirmative defense for planned maintenance would be disapproved. *See* 70 Fed. Reg. 16,130-31; 2005 Comment Letter, comment 16, at vi. EPA's decision was reasonable based on the record before it. If Industry Petitioners or the State believed that additional analysis or modeling supported an alternate conclusion, they should have submitted that data. Industry Petitioners' legal argument here cannot create a factual basis for their claims. *See Browner,* 230 F.3d at 185.

One of the criteria of Texas' proposed affirmative defense for planned maintenance is that the exceedance does not "cause or contribute to the exceedance of the NAAQS." 30 TAC § 101.222(c)(9). Industry Petitioners argue that this criterion saves the affirmative defense. Ind. Pet's Br. 38-39. This completely ignores EPA's finding that excess emissions due to planned maintenance can be avoided. SIPs must be structured with the proper incentives to avoid such emissions in the first place. Because EPA's disapproval is consistent with EPA's longstanding

interpretation of the CAA as well as the evidence in the record, EPA reasonably concluded that Texas' affirmative defense for planned maintenance does not meet the CAA's requirements.

B. Although EPA Erred in Approving Texas' Excess Emissions Rule in 2000, EPA is Neither Permitted nor Required to Make the Same Error Here

In 2000, EPA approved a prior Texas excess emissions rule that included an exemption for excess emissions from planned maintenance. *See* 65 Fed. Reg. 70,792 (Nov. 28, 2000) ; 25 Tex. Reg. 6727-6751 (July 14, 2000). Texas' 2000 rule, although more stringent than the 1972 rule it replaced,[23] was inconsistent with EPA's longstanding interpretation of the CAA because it provided an exemption for periods of excess emissions, including during planned maintenance. EPA has publicly conceded that it "erred" in approving Texas' 2000 rule. 2004 TSD[24] at 4.

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[23] Texas' 2000 rule was more stringent than the 1972 rule because, for example, it narrowed the availability of the exemption for excess emissions from planned maintenance by including more criteria that a source had to prove to invoke the exemption, and because it strengthened record keeping requirements. Texas' 1972 rule regarding excess emissions, located in Section XIV of Texas' SIP, is available at http://www.tceq.texas.gov/assets/public/implementation/air/sip/sipdocs/1972-SIP/1972_sip_section_xiv.pdf.

[24] "Technical Support Document For 30 TAC Chapter 101, General Air Quality Rules, Rule Log Numbers 2001-075-101-AI & 2003-038-101-AI [Subchapter F]," March 2, 2004, ("2004 TSD"). Although this document is not in the Administrative Record for this case, it is a publicly available document cited for the limited purpose of providing the relevant regulatory history of a prior version of Texas' excess emissions rule that Industry Petitioners address in their brief. *See*, e.g., Pet. Br. at 8-10. This document has been publicly available in hard copy at EPA's Region 6 record

Industry Petitioners argue that EPA's prior, erroneous, SIP approval demonstrates that EPA arbitrarily and capriciously disapproved Texas' narrower affirmative defense for planned maintenance in 2010. *See*, e.g., Pet. Br. 41. An agency is not bound to follow a prior, incorrect, interpretation of its own policy. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (recognizing that an administrative interpretation is not controlling where it is plainly erroneous). Furthermore, even if EPA's actions were viewed as a policy change, the Supreme Court has recognized that an agency may change its policy interpretations. *See FCC v. Fox Tele. Stations, Inc.,* 129 S. Ct. 1800, 1810-11 (2009); *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005). EPA's approval of Texas' 2000 rule was plainly inconsistent with its interpretation of the CAA as set forth in the guidance documents discussed above. EPA's error in 2000, however, did not alter or override EPA's long-standing policy. In its 2000 Final Rule, EPA stated that it was approving Texas' excess emissions rule "in accordance with the requirements of the Federal Clean Air Act (the Act) and EPA's policy on excess emissions." 65 Fed. Reg. 70,792. EPA did not specifically discuss or analyze why that rule in general, or an exemption from compliance with emission limits during planned maintenance in particular, was consistent with the CAA and EPA guidance.

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center since March 2, 2004, and EPA recently posted it on-line for the convenience of the public and the parties to this case at http://www.regulations.gov/#!documentDetail;D=EPA-R06-OAR-2006-0132-0055.

EPA processes a large number of SIP actions annually, and, even with the checks and balances built into its public review process, the agency may make errors in evaluating certain SIP submittals. Indeed, the CAA anticipates that the Agency may make errors in approving SIPs. Section 110(k)(6) of the Act allows EPA upon the Administrator's determination that a SIP action was in error to revise such action. 42 U.S.C. § 7410(k)(6).[25] Furthermore, EPA's 1999 and 2001 Guidance documents concede that EPA has in the past erroneously approved excess emission provisions that were inconsistent with the Act. The 1999 Guidance states that "a recent review of SIPs suggests that several contain provisions that appear to be inconsistent with" EPA's policy, "either because they were inadvertently approved after EPA issued the 1982-1983 guidance or because they were part of the SIP at that time and have never been removed." 1999 Guidance at 1. Similarly, the 2001 Guidance clarifies that the 1999 Guidance was not intended to retroactively alter the status of any previously approved SIP provision, thereby implying that EPA had on some past occasion approved provisions inconsistent with the Guidance. 2001 Guidance at 1.

Neither Texas' 2000 Rule, nor EPA's error in approving that rule, are at issue here. The fact that EPA previously acted inconsistently with the CAA and its own policy "did not permit, much less require, the EPA to disregard the law in the instant

[25] EPA did not invoke this power here because EPA is not moving, *sua sponte*, to correct an existing SIP. Instead, EPA is considering approval of a new SIP.

case." *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 115 (3d Cir. 1997); *see also Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795, 802-03 (D.C. Cir. 1988) ("[p]ast administrative practice that is inconsistent with the purpose of an act of Congress cannot provide an exception").[26]

C. Approving Texas' Affirmative Defense for Planned Maintenance Would Make its SIP *Less* Stringent, Not More Stringent

Industry Petitioners argue that EPA was required to approve Texas' affirmative defense for planned maintenance because this provision would make Texas' SIP more stringent. Pet. Br. 44-50. This argument is both factually incorrect and legally irrelevant.

As a factual matter, the Texas SIP that was in place when EPA evaluated Texas' proposed excess emissions rule did not have an affirmative defense for planned maintenance, nor did it otherwise excuse compliance with the applicable emission limits during planned maintenance. Although Texas designed that prior SIP to include affirmative defenses for excess emissions, it also chose to include an expiration date of June 30, 2005 for those defenses. EPA later agreed to extend that expiration date to June 30, 2006, but the Texas SIP has not contained an affirmative defense for excess emissions since July 1, 2006. *See* 70 Fed. Reg. 50,205/2-3; 75 Fed.

[26] Similarly, even if EPA previously approved a SIP in another state containing an identical planned maintenance affirmative defense, "section 110(l) would still bar [EPA's] approval of the rule into the Texas SIP." 75 Fed. Reg. 68,994/2.

Reg. 68,993/3. Accordingly, EPA's determination that Texas' proposed affirmative defense for planned maintenance would make Texas' SIP less, not more, stringent, is based on a straightforward reading of Texas' SIP as the State designed it.

Industry petitioners allege that the affirmative defenses in Texas' prior SIP expired "because of EPA's failure to timely act on" Texas' submittal at issue here. Pet. Br. 49. This is factually incorrect. EPA was required to act on Texas' current SIP submittal, which was submitted on March 23, 2006, by March 23, 2007. *See* 42 U.S.C. § 7410(k)(2). EPA acknowledges that it acted on Texas' SIP submittal well after the March 23, 2007, deadline, but this delay did not materially affect EPA's analysis of Texas' submittal. Even if EPA had acted between the June 30, 2006 expiration date for the affirmative defenses and the March 23, 2007 statutory deadline for acting on Texas' submittal, at that time the SIP still would have no longer included any affirmative defenses for excess emissions.

More importantly, EPA cannot be required to approve a SIP revision that violates the CAA, regardless of whether the revision is more stringent than the prior version. Accordingly, even if EPA had acted on the current submittal prior to the expiration date of the affirmative defenses, nothing would have compelled a different result here. EPA had already warned the State through its limited approval of Texas' 2005 Rule that the affirmative defense for planned maintenance was inconsistent with the Act and would not be approved if re-submitted. 70 Fed. Reg. 16,131/2 ; *see*

Calcageni Memo at 3. EPA reiterated this position in the comments it submitted to Texas during the State administrative process. 2005 Comment Letter, comment 16, at vi.[27] Texas' affirmative defense for planned maintenance violates the CAA. It is irrelevant whether this affirmative defense is more stringent than prior SIP provisions addressing excess emissions from planned maintenance that also violated the CAA.[28]

IV. EPA Reasonably Disapproved Texas' Affirmative Defense for Planned Start-up and Shutdown

Although EPA interprets the CAA to allow affirmative defenses for certain startup and shutdown because it is not always feasible for sources to comply with emission limits during these periods, in this case EPA reasonably disapproved Texas' proposed defense for planned startup and shutdown because those provisions are not severable, and contain improper cross references that undermine the narrow scope of the affirmative defense. EPA's reasonable disapproval warrants deference. *See*

[27] Though EPA has, in other settings, demonstrated NAAQS compliance by showing that a SIP has become more stringent, that policy only applies where the prior SIP already meets the CAA's minimum requirements. *See* Pet. Br. 46. Texas' SIP does not.

[28] Industry Petitioners also claim Texas' affirmative defense for planned maintenance is justified by "administrative necessity" and the "one-step-at-a-time-doctrine" because Texas is transitioning toward a SIP under which it will permit all planned maintenance, startup and shutdown events. Pet. Br. 50-55. As an initial matter, Industry Petitioners are not the administrator, and lack standing to assert these justifications on behalf of the State. Texas is not a Petitioner here, and has not challenged the Final Rule. Fundamentally, EPA must review State SIP provisions, and must disapprove of SIP provisions that do not comply with the CAA. The agency did so here.

GHASP, 289 Fed. Appx. at 753-54; *Kentucky Resources Council,* 467 F.3d at 995; *Browner*, 230 F.3d at 184.

EPA has found that for planned activities, most sources should be able to comply with applicable emissions limitations, or develop alternative limits, and therefore should not qualify for an affirmative defense that would, at least in some respects, excuse compliance with such limitations. 75 Fed. Reg. 26,897 n.1. The agency found that the affirmative defenses for planned events were not severable. 75 Fed. Reg. 68,991, 68,997. Not only are these affirmative defenses for planned events tied together in the same sentence of the same provision of the Texas Administrative Code, *see* 30 TAC § 101.222(h), but they also improperly incorporate the provisions related to the affirmative defense for unplanned events in a way that completely undermines the stringency of the affirmative defense elements.

As set forth in EPA's 1999 Guidance, EPA recommends that States include specific elements that a source must meet in order to prove an affirmative defense for either startup and shutdown periods or unplanned events. 1999 Guidance, attach., at 6. Texas' proposed affirmative defense for startup and shutdown, set forth in 30 T.A.C. section 101.222(h), incorporates "the criteria listed in subsection (c)(1)-(9) of this section for emissions." Though the criteria listed in subsection (c)(1)-(9) are consistent with EPA's guidance for purposes of *unplanned* events, they are facially deficient (and, indeed, seeming inapplicable) with respect to *planned* events like startup

and shutdown. *See* 30 T.A.C. § 101.222(c). For example, 30 T.A.C. § 101.222(c)(2) requires a source to prove that its unauthorized emissions "from *any unplanned maintenance, startup, or shutdown activity* could not have been prevented through planning and design." (emphasis added). A source attempting to assert an affirmative defense for a *planned* activity, arguably, would not need to ensure that its unauthorized emissions could have been prevented – thus making this limitation on the affirmative defense inapplicable. Similar references to "unplanned maintenance" are found in the criteria set out in 30 TAC § 101.222(c)(3), (4), (6) and (8). Because criteria (2), (3), (4), (6) and (8) expressly apply only to *unplanned* activities a source claiming an affirmative defense for *planned* startup and shutdown could claim that these criteria do not apply. 75 Fed. Reg. 68,997/2. Accordingly, EPA determined that the defenses for planned startup and shutdown "fail[]to include all the necessary criteria for planned startup or shutdown" defenses. *Id.*

EPA's conclusion is reinforced by comparing section 101.222(c) as submitted to EPA and section 101.222(c) as originally adopted by Texas and published in the Texas Register on December 30, 2005. In that published version, criteria (2), (3), (4) and (8) did not specify that they applied to "unplanned" activities; rather the generic term "activity" was used. 30 Tex. Reg. 8,953, 8954/2 -8955/1. Texas changed the language in this section through a rulemaking on January 20, 2006 entitled "correction of error." 31 Tex. Reg. 422, 423/1. The rulemaking provided no explanation for the

changes, but the result is that criteria that applied generally to an "activity" were converted to criteria that apply specifically to "unplanned" activities. This prior language demonstrates that Texas could have drafted section 101.222(c) in a manner that clearly indicated that all nine criteria apply to both planned and unplanned activities, but chose not to do so. Furthermore, the existence of this "correction of error" would allow sources claiming an affirmative defense for planned startup and shutdown to argue in court that it was the *intent* of Texas that criteria (2), (3), (4) and (8) apply only to unplanned activities.[29]

Texas' cross-referencing is confusing. EPA reasonably concluded that it undermines the stringency of Texas' affirmative defense for planned startup and shutdown and, therefore, that the defense is non-severable from the affirmative defense for planned maintenance. Accordingly, EPA reasonably disapproved Texas' affirmative defenses for planned startup and shutdown, and concluded that "any future rule submitted by the State must be clear about the applicable criteria that apply." 75 Fed. Reg. 68,991 n.5.

[29] Because EPA disapproved Section 30 T.A.C. section 101.222(h) in its entirety, sections 101.222(i) and (j) were necessarily also disapproved. These sections are not severable from section 101.222(h) because, on their face, they operate by reference to section 101.222(h) and have no substantive content in its absence. *See* 75 Fed. Reg. 68,991/3; 30 T.A.C. § 101.222(i), (j). Industry Petitioners do not argue that sections 101.222(i) and (j) are severable from section 101.222(h).

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

BRUCE S. GELBER
Acting Deputy Assistant Attorney General

s/ Matthew R. Oakes
MATTHEW R. OAKES
MATTHEW B. HENJUM
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2686

Of Counsel:

JAN TIERNEY
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 12th day of July, 2011. Any other counsel of record will be served by first class U.S. mail on this same day.

s/ Matthew R. Oakes
MATTHEW R. OAKES
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2686

CERTIFICATION OF COMPLIANCE

Pursuant to 5th Cir. R. 32.3, I hereby certify the following with regard to the type-volume limitations, typeface requirements, and type style requirements of Fed. R. App. P. 32(a) and 5th Cir. R. 32:

1. This brief contains 13,886 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

July 12, 2011

s/ Matthew R. Oakes
MATTHEW R. OAKES
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2686

CERTIFICATION OF COMPLIANCE WITH 5TH CIR. R. 25.2

Pursuant to 5th Cir. R. 25.2.1, I hereby certify that the electronic submission of the brief is an exact copy of the paper document.

Pursuant to 5th Cir. R. 25.2.13, I hereby certify that all required privacy redactions (of which there were none) have been made.

July 12, 2011

s/ Matthew R. Oakes
MATTHEW R. OAKES
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2686

CERTIFICATION OF COMPLIANCE WITH ECF FILING STANDARDS

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Pursuant to this Circuit's ECF Filing Standards, I hereby certify that Microsoft Forefront Client Security has been run on the electronic version of this brief and that no virus was detected.

July 12, 2011

s/ Matthew R. Oakes
MATTHEW R. OAKES
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2686

ADDENDUM OF STATUTE, RULES, AND REGULATIONS TO RESPONSE BRIEF

Petitioners have reproduced the majority of the regulatory materials primarily relied upon in United States' brief, and those materials are not duplicated here. For the Court's ease of reference, this addendum reproduces the following additional statutory and regulatory materials:

Statutes

Federal Register Notices:

Texas Code Provisions

Effective: January 23, 2004

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title--

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as--

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in

accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless--

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to

the national ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)--

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent

that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

(ii) any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

(iii) each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

(5) Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase “2 years from the date of promulgation of the new or revised national ambient air quality standard” shall be replaced by the phrase “1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead”.

(6) Designations

(A) Submission

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 $PM_{2.5}$ national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

(B) Promulgation

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 $PM_{2.5}$ national ambient air quality standards.

(7) Implementation plan for regional haze

(A) In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as "regional haze requirements").

(B) No preclusion of other provisions

Nothing in this paragraph precludes the implementation of the agreements and recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States.

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 107, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1678, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, § 103, 91 Stat. 687; Nov. 15, 1990, Pub.L. 101-549, Title I, § 101(a), 104 Stat. 2399; Jan. 23, 2004, Pub.L. 108-199, Div. G, Title IV, § 425(a), 118 Stat. 417.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1970 Acts. House Report No. 91-1146 and Conference Report No. 91-1783, see 1970 U.S. Code Cong. and

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) 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 chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions--

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibil- ity,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for--

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover--

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated

with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or re-

voke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations--

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan;

transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator--

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409

(D) For purposes of this paragraph--

(i) The term “parking surcharge regulation” means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term “management of parking supply” shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term “preferential bus/carpool lane” shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such pro-

mulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub.L. 101-549, Title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that--

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that--

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or incre-

ment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines--

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum cri- teria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination

and the basis thereof shall be provided to the State and public.

(*l*) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of Novem-

ber 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 110, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1680, and amended June 22, 1974, Pub.L. 93-319, § 4, 88 Stat. 256; S.Res. 4, Feb. 4, 1977; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399; July 17, 1981, Pub.L. 97-23, § 3, 95 Stat. 142; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 101(b)-(d), 102(h), 107(c), 108(d), Title IV, § 412, 104 Stat. 2404-2408, 2422, 2464, 2466, 2634.)

HISTORICAL AND STATUTORY NOTES

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7413. Federal enforcement

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28)--

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as “period of federally assumed enforcement”), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by--

(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

(3) EPA enforcement of other requirements

Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or subchapters, or for the payment of any fee owed to the United States under this chapter (other than subchapter II of this chapter), the Administrator may--

(A) issue an administrative penalty order in accordance with subsection (d) of this section,

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders

An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers. An order issued under this subsection shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year after the date the order was issued, and shall be nonrenewable. No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or ap-

plicable implementation plan promulgated or approved under this chapter.

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may--

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies; [FN1]

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibi- tion.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

(c) Criminal penalties

(1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475(a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a(a) or 7661b(c) of this title (relating to permits), or any requirement or prohibition of subchapter IV-A of this chapter (relating to acid deposition control), or subchapter VI of this chapter (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, and including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter) shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(2) Any person who knowingly--

(A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

(B) fails to notify or report as required under this chapter; or

(C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter [FN2]

shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(3) Any person who knowingly fails to pay any fee owed the United States under this subchapter, subchapter III, IV-A, V, or VI of this chapter shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(5)(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

(B) In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury--

(i) the defendant is responsible only for actual awareness or actual belief possessed; and

(ii) knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant;

except that in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

(C) It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(i) an occupation, a business, or a profession; or

(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subparagraph by a preponderance of the evidence.

(D) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subparagraph (A) of this paragraph and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(E) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(F) The term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(6) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

(d) Administrative assessment of civil penalties

(1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person--

(A) has violated or is violating any requirement or prohibition of an applicable implementation plan (such order shall be issued (i) during any period of federally assumed enforcement, or (ii) more than thirty days following the date of the Administrator's notification under subsection (a)(1) of this section of a finding that such person has violated or is violating such requirement or prohibition); or

(B) has violated or is violating any other requirement or prohibition of this subchapter or subchapter III, IV-A, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver,

permit, or plan promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter); or

(C) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

(2)(A) An administrative penalty assessed under paragraph (1) shall be assessed by the Administrator by an order made after opportunity for a hearing on the record in accordance with sections 554 and 556 of Title 5. The Administrator shall issue reasonable rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person.

(B) The Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under this subsection.

(3) The Administrator may implement, after consultation with the Attorney General and the States, a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed $5,000 per day of violation may be issued by officers or employees designated by the Administrator. Any person to whom a field citation is assessed may, within a reasonable time as prescribed by the Administrator through regulation, elect to pay the penalty assessment or to request a hearing on the field citation. If a request for a hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence. Payment of a civil penalty required by a field citation shall not be a defense to further enforcement by the United States or a State to correct a violation, or to assess the statutory maximum penalty pursuant to other authorities in the chapter, if the violation contin- ues.

(4) Any person against whom a civil penalty is assessed under paragraph (3) of this subsection or to whom an administrative penalty order is issued under paragraph (1) of this subsection may seek review of such assessment in the United States District Court for the District of Columbia or for the district in which the violation is alleged to have occurred, in which such person resides, or where such person's principal place of business is located, by filing in such court within 30 days following the date the administrative penalty order becomes final under paragraph (2), the assessment becomes final under paragraph (3), or a final decision following a hearing under paragraph (3) is rendered, and by simultaneously sending a copy of the filing by certified mail to the Administrator

and the Attorney General. Within 30 days thereafter, the Administrator shall file in such court a certified copy, or certified index, as appropriate, of the record on which the administrative penalty order or assessment was issued. Such court shall not set aside or remand such order or assessment unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. Such order or penalty assessment shall not be subject to review by any court except as provided in this paragraph. In any such proceedings, the United States may seek to recover civil penalties ordered or assessed under this section.

(5) If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order--

(A) after the order or assessment has become final, or

(B) after a court in an action brought under paragraph (4) has entered a final judgment in favor of the Administrator,

the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed (plus interest at rates established pursuant to section 6621(a)(2) of Title 26 from the date of the final order or decision or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the United States enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be 10 percent of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of such quarter.

(e) Penalty assessment criteria

(1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 7607(a) of this title, or actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

(2) A penalty may be assessed for each day of violation. For purposes of determining the number of days of violation for which a penalty may be assessed under subsection (b) or (d)(1) of this section, or section 7604(a) of this title, or an assessment may be made under section 7420 of this title, where the Administrator or an air pollu-

tion control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

(f) Awards

The Administrator may pay an award, not to exceed $10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation of this subchapter or subchapter III, IV-A, V, or VI of this chapter enforced under this section. Such payment is subject to available appropriations for such purposes as provided in annual appropriation Acts. Any officer, or employee of the United States or any State or local government who furnishes information or renders service in the performance of an official duty is ineligible for payment under this subsection. The Administrator may, by regulation, prescribe additional criteria for eligibility for such an award.

(g) Settlements; public participation

At least 30 days before a consent order or settlement agreement of any kind under this chapter to which the United States is a party (other than enforcement actions under this section, section 7420 of this title, or subchapter II of this chapter, whether or not involving civil or criminal penalties, or judgments subject to Department of Justice policy on public participation) is final or filed with a court, the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing. The Administrator or the Attorney General, as appropriate, shall promptly consider any such written comments and may withdraw or withhold his consent to the proposed order or agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of this chapter. Nothing in this subsection shall apply to civil or criminal penalties under this chapter.

(h) Operator

For purposes of the provisions of this section and section 7420 of this title, the term “operator”, as used in such provisions, shall include any person who is senior management personnel or a corporate officer. Except in the case of knowing and willful violations, such term shall not include any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of subsection (c)(4) of this section, the term “a person” shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of paragraphs (1), (2), (3), and (5) of subsection (c) of this section the term “a person” shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 113, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1686, and amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(b), (c), 85 Stat. 464; June 22, 1974, Pub.L. 93-319, § 6(a)(1) to (3), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 111, 112(a), 91 Stat. 704, 705; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(10) to (21), (b)(1), 91 Stat. 1400, 1404; July 17, 1981, Pub.L. 97-23, § 2, 95 Stat. 139; Nov. 15, 1990, Pub.L. 101-549, Title VII, § 701, 104 Stat. 2672.)

[FN1] So in original. The semicolon probably should be a comma.

[FN2] So in original. Probably should be followed by a comma.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1970 Acts. House Report No. 91-1146 and Conference Report No. 91-1783, see 1970 U.S. Code Cong. and Adm. News, p. 5356.

1971 Acts. House Report No. 92-258 andHouse Conference Report No. 92-578, see 1971 U.S. Code Cong. and Adm. News, p. 1610.

1974 Acts. House Report No. 93-1013 and Conference Report No. 93-1085, see 1974 U.S. Code Cong. and Adm. News, p. 3281.

1977 Acts. House Report No. 95-294 andHouse Conference Report No. 95-564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

House Report No. 95-338, see 1977 U.S. Code Cong. and Adm. News, p. 3648.

1981 Acts. House Report No. 97-121 andHouse Conference Report No. 97-161, see 1981 U.S. Code Cong. and Adm. News, p. 56.

1990 Acts. Senate Report No. 101-228, House Conference Report No. 101-952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Codifications

Section was formerly classified to section 1857c-8 of this title.

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions
§ 7602. Definitions

When used in this chapter--

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(b) The term "air pollution control agency" means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term "interstate air pollution control agency" means--

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term "Federal land manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms "emission limitation" and "emission standard" mean 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.. [FN1]

(*l*) The term "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term "primary standard attainment date" means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(*o*) The term "delayed compliance order" means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term "schedule and timetable of compliance" means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this chapter, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) Indian tribe.--The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(s) VOC.--The term "VOC" means volatile organic compound, as defined by the Administrator.

(t) PM-10.--The term "PM-10" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

(u) NAAQS and CTG.--The term "NAAQS" means national ambient air quality standard. The term "CTG" means a Control Technique Guideline published by the Administrator under section 7408 of this title.

(v) NO_x.--The term "NO_x" means oxides of nitrogen.

(w) CO.--The term "CO" means carbon monoxide.

(x) Small source.--The term "small source" means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

(y) Federal implementation plan.--The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an

inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

(z) Stationary source.--The term "stationary source" means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 302, formerly § 9, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 400, renumbered Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(4), 79 Stat. 992, and amended Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 504; Dec. 31, 1970, Pub.L. 91-604, § 15(a)(1), (c)(1), 84 Stat. 1710, 1713; Aug. 7, 1977, Pub.L. 95-95, Title II, § 218(c), Title III, § 301, 91 Stat. 761, 769; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(76), 91 Stat. 1404; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 101(d)(4), 107(a), (b), 108(j), 109(b), Title III, § 302(e), Title VII, § 709, 104 Stat. 2409, 2464, 2468, 2470, 2574, 2684.)

[FN1] So in original.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1963 Acts. House Report No. 508 and Conference Report No. 1003, see 1963 U.S. Code Cong. and Adm. News, p. 1260.

1965 Acts. House Report No. 899, see 1965 U.S. Code Cong. and Adm. News, p. 3608.

1967 Acts. House Report No. 728 and Conference Report No. 916, see 1967 U.S. Code Cong. and Adm. News, p. 1938.

1970 Acts. House Report No. 91-1146 and Conference Report No. 91-1783, see 1970 U.S. Code Cong. and Adm. News, p. 5356.

1977 Acts. House Report No. 95-294 andHouse Conference Report No. 95-564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

House Report No. 95-338, see 1977 U.S. Code Cong. and Adm. News, p. 3648.

1990 Acts. Senate Report No. 101-228, House Conference Report No. 101-952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

may, on 7-days notice to the grantee, withhold further payment, suspend the supportive services grant, or prohibit the grantee from incurring additional obligations of supportive services grant funds, pending corrective action by the grantee or a decision to terminate in accordance with paragraph (c) of this section. VA will allow all necessary and proper costs that the grantee could not reasonably avoid during a period of suspension if such costs meet the provisions of the applicable Federal Cost Principles.

(c) *Termination.* Supportive services grants may be terminated in whole or in part only if paragraphs (c)(1), (2), or (3) of this section apply.

(1) By VA, if a grantee materially fails to comply with the terms and conditions of a supportive services grant award and this part.

(2) By VA with the consent of the grantee, in which case VA and the grantee will agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the grantee upon sending to VA written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if VA determines in the case of partial termination that the reduced or modified portion of the supportive services grant will not accomplish the purposes for which the supportive services grant was made, VA may terminate the supportive services grant in its entirety under either paragraphs (c)(1) or (2) of this section.

(d) *Deobligation of funds.* (1) VA may deobligate all or a portion of the amounts approved for use by a grantee if:

(i) The activity for which funding was approved is not provided in accordance with the approved application and the requirements of this part;

(ii) Such amounts have not been expended within a 1-year period from the date of the signing of the supportive services grant agreement;

(iii) Other circumstances set forth in the supportive services grant agreement authorize or require deobligation.

(2) At its discretion, VA may re-advertise in a Notice of Fund Availability the availability of funds that have been deobligated under this section or award deobligated funds to applicants who previously submitted applications in response to the most recently published Notice of Fund Availability.

(Authority: 38 U.S.C. 501, 2044)

§ 62.81 Supportive services grant closeout procedures.

Supportive services grants will be closed out in accordance with the following procedures upon the date of completion:

(a) No later than 90 days after the date of completion, the grantee must refund to VA any unobligated (unencumbered) balance of supportive services grant funds that are not authorized by VA to be retained by the grantee.

(b) No later than 90 days after the date of completion, the grantee must submit all financial, performance and other reports required by VA to closeout the supportive services grant. VA may authorize extensions when requested by the grantee.

(c) If a final audit has not been completed prior to the date of completion, VA retains the right to recover an appropriate amount after considering the recommendations on disallowed costs once the final audit has been completed.

(Authority: 38 U.S.C. 501, 2044)

[FR Doc. 2010–28407 Filed 11–9–10; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2006–0132; FRL–9223–2]

Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is finalizing its proposal to partially approve and partially disapprove a revision to the Texas State Implementation Plan (SIP) submitted by the Texas Commission on Environmental Quality (TCEQ) in a letter dated January 23, 2006 (the January 23, 2006 SIP submittal). Today's action finalizes our May 13, 2010 proposal that concerned revisions to 30 Texas Administrative Code (TAC) Chapter 101, General Air Quality Rules, Subchapter A General Rules; and Subchapter F Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities. We are finalizing our proposed approval of those portions of the rule that are consistent with the federal Clean Air Act (the Act or CAA), and finalizing our proposed disapproval of those portions of the rule that are inconsistent with the Act. More specifically, we are finalizing our proposed disapproval of provisions that provide for an affirmative defense against civil penalties for excess emissions during planned maintenance, startup, or shutdown activities and related provisions that contain nonseverable cross-references to the affirmative defense provision. A disapproval of these provisions means that an affirmative defense is not available in an enforcement action in Federal court to enforce the SIP for violations due to excess emissions during planned maintenance, startup, or shutdown activities. We are taking this action under section 110 of the Act.

DATES: This rule will be effective on January 10, 2011.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2006–0132. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information 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 either electronically through *http://www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6691, fax (214) 665–7263, e-mail address *shar.alan@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," and "our" refer to EPA.

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I. What actions did we propose?

In EPA's May 13, 2010 proposal (75 FR 26892), we proposed to partially approve and partially disapprove a revision to the Texas SIP, as submitted to EPA on January 23, 2006. More specifically, the May 13, 2010 proposal reflected EPA's intent to partially approve and partially disapprove submitted revisions to 30 TAC General Air Quality Rule 101 into the Texas SIP, as outlined in the Table below.

30 TAC General Air Quality Rule 101	Type of action	Type of change
Subchapter A, Section 101.1 (Definitions)	Proposed Approval	Revised Section.
Subchapter F, Section 101.201 (Emissions Event Reporting and Recordkeeping Requirements) [1].	Proposed Approval	Revised Section.
Subchapter F, Section 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements) [2].	Proposed Approval	Revised Section.
Subchapter F, Section 101.221 (Operational Requirements)	Proposed Approval	New Section.
Subchapter F, Section 101.222 (a)–(g) (Demonstrations)	Proposed Approval	New Section.
Subchapter F, Section 101.222 (h)–(j) (Demonstrations)	Proposed Disapproval	New Section.
Subchapter F, Section 101.223 (Actions to Reduce Excessive Emissions)	Proposed Approval	New Section.

[1] Subsequent to the proposal, TCEQ withdrew section 101.201(h) from EPA's review. Letter from Bryan W. Shaw, TCEQ Chairman to Alfredo Armendariz, EPA Region 6 Administrator, dated August 5, 2010.
[2] Subsequent to the proposal, TCEQ withdrew section 101.211(f) from EPA's review. Letter from Bryan W. Shaw, TCEQ Chairman to Alfredo Armendariz, EPA Region 6 Administrator, dated August 5, 2010.

Section E of the May 13, 2010 proposal (75 FR at pp. 26896–26897) stated EPA's reasoning for the proposal to disapprove sections 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity), 101.222(i) (concerning effective date of permit applications), and 101.222(j) (concerning processing of permit applications) into the Texas SIP. In short, we proposed to disapprove section 101.222(h) because it provides an affirmative defense for excess emissions during planned maintenance. Section 101.222(h) also provides for an affirmative defense for excess emissions during planned startup and shutdown. However, because the provisions regarding excess emissions during planned startup and shutdown are not severable from that for planned maintenance, we proposed to disapprove section 101.222(h) in its entirety. We further noted that a preferable means of dealing with excess emissions from planned startup and shutdown, in cases where sources are unable to comply with an applicable emission limit during those periods, would be to establish an alternative limit that would apply during startup and shutdown.

We proposed to disapprove sections 101.222(i) and (j), which concern the timing and processing procedures for permits that would address excess emissions during periods of maintenance, startup or shutdown, because those provisions were not severable from section 101.222(h). For more detail, see 75 FR 26896–26897 of the May 13, 2010 proposal.

We proposed to approve section 101.1 (Definitions) because it provides for consistency among Subchapters A and F, thereby facilitating implementation of the rule and other legislative changes. We proposed to approve section 101.201 (Emissions Event Reporting and Recordkeeping Requirements), because it establishes new requirements that local air pollution authorities be informed of excess emissions. We proposed to approve section 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), because it provides for reporting and recordkeeping of the initial notification and final report of the scheduled maintenance, startup, and shutdown activities. We proposed to approve section 101.221 (Operational Requirements) because it provides the requirement that air pollution abatement equipment must be maintained and be in good working order. We proposed to approve section 101.222(a)–(g) (Demonstrations) because it provides an affirmative defense for certain emission events that is consistent with the interpretation of the Act as set forth in our guidance documents. We also proposed to approve section 101.223 (Actions to Reduce Excessive Emissions) because it provides for a corrective action plan and written notification for facilities determined to have excessive emission events to take necessary actions to reduce the future occurrence of such events.

II. When did the public comment period end?

EPA's proposed action of May 13, 2010 (75 FR 26892) provided a 30-day public comment period. During this 30-day period we received 7 letters requesting EPA extend the public comment period. In response, we extended the public comment period by two weeks, such that it closed on June 28, 2010, rather than June 14, 2010. *See* 75 FR 33220 (June 11, 2010).

III. Who submitted comments to us?

During the public comment period, we received written comments on our May 13, 2010 proposal (75 FR 26892) from the Lower Colorado River Authority; Texas Municipal Power Agency; National Environmental Development Association's Clean Air Project; Texas Industry Project; American Electric Power; Luminant; Utility Air Regulatory Group; Texas Oil and Gas Association; Texas Association of Business; Texas Commission on Environmental Quality; Texas Mining and Reclamation Association; Gulf Coast Lignite Coalition; San Miguel

Electric Cooperative; Association of Electric Companies of Texas; and Environmental Clinic—University of Texas School of Law on behalf of Citizens for Environmental Justice, Lone Star Chapter Sierra Club, Public Citizen's Texas Office, Air Alliance Houston, Environmental Integrity Project, and Environmental Defense Fund.

IV. What is our final action?

Except for two provisions that were withdrawn by the State by letter dated August 5, 2010, as described below, we are finalizing our proposal to approve revisions to 30 TAC Chapter 101, Subchapter A General Rules; and Subchapter F Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities of the January 23, 2006 SIP submittal as revisions to the federally-approved Texas SIP.

Subsequent to the publication of the proposed rule, in a letter dated August 5, 2010, TCEQ notified EPA of its withdrawal from EPA review of sections 101.201(h) (concerning annual emissions event reporting) and 101.211(f) (concerning annual scheduled maintenance, startup, and shutdown activity reporting), as adopted by the TCEQ on December 14, 2005. The withdrawal of these two pieces of the submission does not affect our ability to take final action approving the remaining pieces we proposed to approve. As an initial matter, the withdrawn portions are independent provisions that are severable from the remaining regulations pending before EPA. In addition, the withdrawal of these provisions does not create a defect in the remaining portions of the rule for which we proposed approval. Paragraphs (a) through (g) of section 101.201 and paragraphs (a) through (e) of section 101.211 acted upon today contain all of the necessary requirements for how and when to report excess emissions events. TCEQ only withdrew the annual reporting requirement in the two paragraphs, and an annual reporting requirement is not a criterion for an approvable excess emissions SIP revision. Furthermore, TCEQ already has the ability to collect emissions information under the Texas SIP at the Emission Inventory Requirements in 30 TAC sections 101.10 (b) and (f), which require an owner or operator to submit emission inventories and/or related data, including excess emissions occurring during maintenance activities, startup and shutdowns, and upset conditions, to the state.[3] Section 101.10 was approved into Texas SIP on January 26, 1999 at 64 FR 3847.

Because the submitted rule and the Texas SIP already contain adequate reporting requirements for excess emissions during planned and unplanned startup, shutdown, maintenance and malfunction events, TCEQ's withdrawal of the sections referenced above does not affect our partial approval of the remaining portions of the rule which were proposed for approval. Thus, as described below, we are taking final action to approve all of the provisions for which we proposed approval, with the exception of withdrawn sections 101.201(h) and 101.211(f) of the January 23, 2006 SIP submittal. We have made TCEQ's August 5, 2010 withdrawal letter available for public inspection in the docket associated with this action, identified as EPA–R06–OAR–2006–0132.

In summary, we are finalizing our May 13, 2010 proposal to approve Subchapter A, section 101.1 (Definitions); and Subchapter F, sections 101.201 (Emissions Event Reporting and Recordkeeping Requirements) (except for 101.201(h)), 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements) (except for 101.211(f)), 101.221 (Operational Requirements), 101.222(a) through (g) (Demonstrations), and 101.223 (Actions to Reduce Excessive Emissions) into the Texas SIP. We are approving these provisions for the reasons provided in our proposed approval: They clarify existing reporting requirements; they clarify that the rule does not allow exemptions from compliance with federal requirements, including any requirements in the federally-approved SIP; they provide for an affirmative defense[4] from unplanned startup, shutdown, or maintenance (*i.e.,* malfunctions), consistent with the CAA as interpreted by EPA; and they provide for a corrective action plan and written notification concerning excessive emission events. *See* section D of our May 13, 2010 proposal (75 FR at 26894).

We are also finalizing our May 13, 2010 proposal to disapprove sections 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity), 101.222(i) (concerning effective date of permit applications), and 101.222(j) (concerning processing of permit applications) of the January 23, 2006 submittal. As we explain more fully below, we are disapproving section 101.222(h) because it provides an affirmative defense against penalties for excess emissions during planned maintenance activities. Because the portions of section 101.222(h) that provide an affirmative defense for excess emissions during planned startup and shutdown are not severable from the provision for maintenance, those provisions are also disapproved.[5] Section 101.222(i) concerns the scheduling and applicable effective dates for permit applications submitted to TCEQ for sources that request unauthorized emissions associated with the planned maintenance, startup, or shutdown activities be permitted. Since section 101.222(i) is not severable from section 101.222(h), which we are disapproving, we are disapproving section 101.222(i). Section 101.222(j) concerns the processing of permit applications referenced in 101.222(h), and provides the Executive Director with the authority to process, review, and permit unauthorized emissions from planned maintenance, startup, or shutdown activities. We explained our reasons for proposing to disapprove section 101.222(h) above. Since section 101.222(j) is not severable from section 101.222(h), which we are disapproving, we are disapproving section 101.222(j).

In light of the comments received on this action, we provide in more detail here our rationale for our final action

[3] Furthermore, although not included as part of the approved SIP, the title V deviation reporting requirements provide significant information to the State (which is also available to EPA and the public) regarding emission event violations.

[4] An affirmative defense is defined, in the context of an enforcement proceeding, as 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. By demonstrating that the elements of an affirmative defense have been met, a source may avoid a civil penalty, but not injunctive relief.

[5] Although we interpret the Act to allow for an affirmative defense for excess emissions during startup and shutdown, we note that the current Texas rule includes a defect which could prevent our approval of this provision in the future if submitted in the same form. Specifically, instead of identifying the criteria a source must meet to assert an affirmative defense for planned activities, the Texas rule cross-references the criteria that apply for unplanned events. Thus, sources might argue that many of the criteria would not apply and would not need to be proved when asserting an affirmative defense. The criteria that a source must prove in asserting a defense are critical for ensuring that the defense will not be abused. Thus, any future rule submitted by the State must be clear about the applicable criteria that apply and those criteria must ensure that, among other things, excess emissions were not due to inadequate design, that the facility was operated consistent with good practices for minimizing emissions and the frequency and duration of operation in startup or shutdown mode was minimized. *See* the 1999 Policy at 6.

disapproving that provision. EPA's interpretation of the CAA is that it is not appropriate for SIPs to exempt periods of startup, shutdown, maintenance or malfunction from compliance with applicable emission limits. This is supported by the definition of "emission limitation" in section 302(k) of the Act, which requires emissions be limited on a "continuous" basis. In addition, we have noted that because SIPs are used to demonstrate how an area will attain and maintain health-based standards, it is not appropriate to exempt any periods of operation from compliance with the limits relied on to demonstrate that public health will be protected. We recognize that courts have disagreed whether it may be appropriate to provide for certain exceptions from compliance with emission limits when setting technology based standards. *Mossville Environmental Action Now* v. *EPA,* 370 F.3d 1232, 1242 (DC Cir. 2004) (upholding, as reasonable, standards that had factored in variability of emissions under all operating conditions). *See, Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) ("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation."). Although one might argue that it is appropriate to account for such variability in technology-based standards, EPA's longstanding position has been that it is not appropriate to provide exemptions from compliance with emission limits in SIPs that are developed for the purpose of demonstrating how to attain and maintain the public health-based NAAQS. For purposes of demonstrating attainment and maintenance, States assume source compliance with emission limitations at all times. Thus, broad provisions that would exempt compliance during periods of startup, shutdown, malfunction and/or maintenance would undermine the integrity of the SIP. Recently, in the context of the CAA section 112 program regulating emissions of hazardous air pollutants, the court in *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), *cert. denied, 130 S. Ct. 1735 (U.S. 2010),* held that the CAA section 302(k) definition of emission standard or emission limitation in conjunction with the provisions of section 112 require continuous compliance with section 112-compliant standards. We believe that this case supports EPA's long-standing interpretation in the SIP context that it is inappropriate to exempt periods of startup, shutdown and malfunction and/or maintenance from compliance with emission limitations.

Although EPA has long interpreted the CAA to bar States from including exemptions from compliance with applicable emission limitations during periods of startup, shutdown, maintenance and malfunction, we have also recognized that sources may, despite good practices, be unable to meet emission limitations during periods of startup and shutdown and, that despite good operating practices, sources may suffer a malfunction due to events beyond the control of the owner or operator. EPA's early policies provided that these events should be addressed through enforcement discretion. *See* the memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation entitled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (1982 Policy); and EPA's clarification to the above policy memorandum dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation (1983 Policy). Later, in practice, and then as reflected in a 1999 Policy memorandum, EPA adopted an interpretation of the Act that would allow sources to assert an affirmative defense to periods of excess emissions during startup, shutdown and malfunction in an enforcement action for penalties, though not in an action for injunctive relief. As explained in the 1999 Policy, in the course of an enforcement action for penalties, a source could assert the affirmative defense and the burden would be on the source to prove enumerated factors, including that the period of excess emissions was minimized to the extent practicable and that the emissions were not due to faulty operations or disrepair of equipment.[6]

The criteria a source must prove when asserting an affirmative defense, as provided in the 1999 Policy, are consistent with the criteria identified in section 113(e) of the CAA that the courts and EPA may consider in determining whether to assess a penalty (and, if so, what amount) in the context of an enforcement action. Our goal in developing the criteria recommended in the 1999 Policy was to provide an avenue for relief from penalties for actions that are outside the control of an owner or operator who is making best efforts to operate consistent with applicable requirements. In other words, we believe it is important to tailor the factors so that they encourage sources to make best efforts to comply with emission limits that are intended to bring an area into attainment with and to maintain health-based air quality standards. We believe, however, that maintenance activities can and should be scheduled during process shutdowns. To the extent they are not, the source should ensure that control equipment can be consistently effective during maintenance activities. Thus, we do not believe that an affirmative defense for excess emissions during planned maintenance is appropriate since there should not be circumstances during which a source should exceed emission limits during maintenance.[7] Although we do not believe it is appropriate to approve an affirmative defense for excess emissions during maintenance into the SIP, section 113(e) of the Act still provides that a source may raise factors in an enforcement action that the Administrator or a court may consider in determining an appropriate penalty.

We note that States are not required to provide an affirmative defense approach, but, if they choose to do so, EPA will evaluate the State's submitted rules to ensure they meet the requirements of the Act as interpreted by EPA through the policy and guidance documents listed in Section B of the May 13, 2010 proposal, including EPA's 1999 Policy. In order to be consistent with the Act, an affirmative defense must be narrowly-tailored in order not to undermine the enforceability of the SIP. An effective enforcement program must be able to collect penalties to deter avoidable violations. Thus, the SIP

[6] More recently, and consistent with an additional approach discussed in the 1999 Policy (at 4–5), with respect to planned startup and shutdown events, EPA has encouraged States to address planned startup and shutdown in their SIPs. For those sources and source categories where compliance with the applicable limit is not possible during startup and/or shutdown, the State should develop alternative, applicable emission limits for such events, which they can consider in SIPs demonstrating attainment and maintenance of the NAAQS. As part of its justification of the SIP revision and in order to address potential impacts on attainment and maintenance of the NAAQS, the State should analyze the impact of the potential worst-case emissions that could be anticipated to occur during startup and shutdown.

[7] We note that if excess emissions occur during maintenance and because of a malfunction, the affirmative defense for malfunctions might be available to the source for such maintenance activity as part of the broader malfunction event.

should only provide the defense for circumstances where it is infeasible to meet the applicable limit and the criteria that the source must prove should ensure that the source has made all reasonable efforts to comply. Otherwise, such an approach could undermine the enforceability and attainment demonstration requirements of the Act. Because, as discussed above, we do not believe that it is infeasible for sources to meet applicable limits during planned maintenance, we are disapproving section 101.222(h).[8]

We further note, as provided in more detail in our proposed rule, that severing the unapprovable provisions (Sections 101.222(h), (i), and (j)) of the rule does not affect the effectiveness or the enforceability of the remaining portions of the rule that we are approving in this final action. Section D of our May 13, 2010 (75 FR 26894) proposal stated the reasons for approving portions of the submittal, and Section E (75 FR 26896) explained why we proposed disapproval of sections 101.222(h), (i), and (j). As explained in the proposed rule at 75 FR 26893, we believe sections 101.222(h), 101.222(i), and 101.222(j) are severable from, and independent of, the remainder of the January 26, 2006 SIP submittal. Disapproving these provisions does not make the portions of the submission that we are proposing to approve more stringent than the State intended. The provisions being disapproved address completely separate activities when excess emissions occur (planned activities) from those addressed by the provisions being approved (unplanned activities). The approved provisions will provide the exact limited relief intended by the State for sources covered by those provisions: A source may assert an affirmative defense in an action seeking penalties for a violation of an applicable emission limit during unplanned startup, shutdown, malfunction or maintenance activity. In asserting the affirmative defense, the source has the burden to prove certain criteria have been met. EPA's action disapproving similar relief for excess emissions during planned activities does not affect the stringency of the defense being approved for periods of excess emissions during unplanned activities.

[8] To the extent there may be a unique situation where maintenance cannot be performed at a time and in a manner that would ensure compliance with an applicable emission limitation, the State can consider establishing alternative limits that would apply during such events. However, such a situation does not support the creation of an affirmative defense that would apply more broadly to a variety of maintenance activities.

V. What are the public comments and EPA's responses to them?

We have evaluated the comments received on the proposed rule and, as provided above, have determined to take final action consistent with our proposal, with the exception that we are not taking final action on two provisions withdrawn by the State. A summary of the comments and our responses are provided below.

A. General Comments of Support

Comments: Two commenters expressed support for EPA's proposed approval of those sections of the January 23, 2006 SIP submittal, identified with "proposed approval" in the above Table. Many other commenters requested that EPA approve not only those sections identified with "proposed approval" in the above Table but also the entire January 23, 2006 SIP submittal. Another commenter expressed support for EPA's proposal to disapprove certain sections of the January 23, 2006 SIP submittal, and requested EPA disapprove the entire January 23, 2010 SIP submittal as it relates to affirmative defenses.

Response: EPA appreciates the support of the commenters who agree with EPA's proposed action. We have also considered the concerns expressed by the commenters who disagreed with all or a portion of EPA's proposed action, as discussed below in response to the commenters' more detailed comments.

B. Comments Related to the SIP Stringency and CAA Section 110(l) Requirements

Comments: Several commenters characterized the January 23, 2006 SIP submittal as substituting a more stringent affirmative defense for a pre-existing SIP-approved automatic exemption for excess emissions, or that the submittal eliminates an exemption or affirmative defense. Other commenters expressed concern that EPA's partial approval would unlawfully increase the stringency of the Texas SIP. One commenter asserted that partial disapproval would expose sources to civil penalties. Another set of commenters stated that EPA's proposed disapproval is contrary to section 110(l) of the Act and an unmerited expansion of a solution to the problem of historically unauthorized emissions. Two commenters stated that section 101.222(h) incorporates by reference section 101.222(c)(9) which means that excess emissions would not be eligible for an affirmative defense if such events interfere with attainment and maintenance of the NAAQS. They argue that EPA has failed to show how the affirmative defense would interfere with the attainment and maintenance of the NAAQS. One commenter noted improvements to the air quality in Texas over the last 10 years despite increases in population, and claims that the affirmative defense provisions in the January 23, 2006 SIP submittal require a demonstration that the covered emissions did not cause NAAQS exceedances.

Response: We disagree that our action increases the stringency of the approved SIP. The federally-approved Texas SIP does not provide either an exemption for or an affirmative defense to excess emissions occurring during periods of planned or unplanned startup, shutdown, maintenance, or malfunction activities. Previously approved provisions that addressed excess emissions expired from the SIP on their own terms as of July 1, 2006. Thus, under the federally-approved Texas SIP, excess emissions are violations of the applicable emission limits, and the SIP does not include any provision for asserting an affirmative defense in response to an enforcement proceeding for excess emissions during planned or unplanned maintenance, startup, shutdown or malfunction. Thus, the action we are finalizing in this rulemaking—approving an affirmative defense available in an enforcement action for penalties for periods of excess emissions during unplanned maintenance, startup, shutdown activities (including opacity events)—does not make the approved SIP more stringent. Rather, it provides an avenue of limited relief in an action for penalties for a source that violates an applicable emission limit and can prove certain criteria have been met. Thus, the comments asserting that the partial disapproval would expose sources to penalties are incorrect, since excess emissions are violations of the existing SIP and the existing SIP does not contain affirmative defense provisions that provide relief in an action for penalties for any period of excess emissions.

In response to the commenter's concern that our disapproval would increase the stringency of the Texas SIP, we note further that section 110(k)(3) of the CAA provides that the administrator can approve a plan in part and disapprove a plan in part. A partial approval/partial disapproval action is permissible when portions of the plan are separable. "Separable" means the approved portions of the SIP revision should not result in the approved portions of the SIP submission being more stringent than the State would

have anticipated. The State's submitted provisions for an affirmative defense for excess emissions from unplanned maintenance, startup, or shutdown activities are separable from the provisions of the rule that we are disapproving. Our action has no effect on the stringency of the approved portions of the rule. The portions of the rule we are approving today that provide for an affirmative defense for excess emissions during unplanned maintenance, startup, or shutdown, and malfunction activities (as identified with "proposed approval" in the above Table) will operate exactly the same way under the federally approved SIP as they do under state law.

With respect to EPA's application of section 110(l) of the CAA in this rulemaking action, we agree that section 110(l) provides that EPA cannot approve a proposed SIP revision that would interfere with attainment or maintenance of the NAAQS. In addition, it provides that EPA cannot approve a SIP revision that would interfere with any other applicable requirement of the Act. Section 110(l) applies to this action, since the action is one that revises the existing SIP. We note that the portions of the January 23, 2006 SIP submittal we are approving do not modify any applicable emission limitation, nor do they authorize violations of applicable emission limitations. All emissions in excess of the applicable emission limits are considered violations. The affirmative defense neither authorizes nor condones such events and it is narrowly tailored consistent with our interpretation that such a defense not undermine the enforcement or attainment provisions of the Act. Thus, we have concluded that the affirmative defense provisions we are approving into the SIP will not interfere with attainment or maintenance of the NAAQS and, as explained in more detail above, such provisions are consistent with other applicable requirements of the Act. We further note that the affirmative defense is limited to actions for penalties and may not apply to actions for injunctive relief. Thus, to the extent the State, EPA or a private citizen is concerned that excess emissions might be causing or contributing to a violation of the NAAQS, they can seek a court order to abate the activity. We disagree with those commenters who suggest that in order for EPA to disapprove a SIP revision, section 110(l) requires EPA to demonstrate that there will be a violation of the NAAQS if EPA approves the SIP revision. As an initial matter, we note that the language in section 110(l) provides that EPA must disapprove a SIP revision if it "would interfere with any applicable requirement concerning attainment." This is quite distinct from an obligation to prove that a violation will occur. We believe that provisions that provide relief from penalties should be limited to circumstances where sources are unable to comply despite best efforts and, as explained above, we believe that maintenance activities can be scheduled at times that would avoid the occurrence of excess emissions. We further note that section 110(l) also provides that EPA may not approve a SIP revision that interferes with any applicable requirement of the Act. As explained more fully above, because maintenance activities can be planned to occur during planned outages, we do not believe that an affirmative defense for penalties is appropriate for excess emissions occurring during such planned maintenance activities. Allowing such a provision would undermine the enforceability, as well as the attainment, requirements of the Act.

Comment: One commenter stated that the New Mexico SIP provides for an affirmative defense to maintenance-related activities.

Response: Our review of a SIP revision submittal is governed by section 110(l) of the Act. Assuming for the moment that the New Mexico SIP contained a provision identical to that we are disapproving today for Texas, section 110(l) would still bar our approval of the rule into the Texas SIP for the reasons provided previously. The fact that we may have erred in approving a SIP for one State does not support an argument that we should make the same error with respect to a different State. In any event, we note that the commenter does not point to a specific provision in the New Mexico SIP to support its argument, and we are unaware of any provision in the New Mexico SIP that provides an affirmative defense for excess emissions during planned maintenance.

Comment: Other commenters claim that EPA's disapproval would create inequities between Texas sources and sources in other states whose programs contain affirmative defenses for startup or shutdown activities.

Response: We disagree. The commenters are referring to perceived inequities which are attributable to TCEQ's action combining a "planned maintenance" activity in section 101.222(h) with a "startup" or "shutdown" activity, leaving EPA no recourse but to partially disapprove the January 23, 2006 SIP submittal.

C. Comments Related to Texas' Phase Out Approach and Disapproval Effects

Comments: Some commenters characterized the January 23, 2006 SIP submittal as TCEQ's phase-out of a regulatory scheme in which excess emissions during planned maintenance, startup, or shutdown (MSS) activities were exempt from compliance to one where such emissions would become authorized under a permit. Other commenters claimed that EPA's disagreement with the Texas approach was not adequately explained. These commenters stated that the point of difference between EPA and TCEQ must have originated from the procedures and timing TCEQ is providing to affect its phase-out. As a result, EPA's partial disapproval would disrupt an orderly transition resulting in negative impacts (including interstate inequities) at the expense of Texas facilities and causing companies to forgo preventative maintenance. TCEQ commented on the reasons supporting its phase-out approach (which includes the categories of sources likely to report the majority of excess emissions, the degree of complexity of processing of permit applications for planned MSS activities for these categories, and facilitating the orderly/temporary transition to appropriate permit limits and requirements) and its plan to exercise enforcement discretion when reviewing excess emissions from planned MSS activities that fail to meet the schedule set forth in 30 TAC § 101.222(h). One commenter asserted that TCEQ's provision for an affirmative defense to emissions from planned maintenance activities is a direct response to EPA's comments to TCEQ.

Response: As an initial matter, it is important to understand what the commenters are referring to. The January 23, 2006 SIP submittal submitted by the State relates to a broader process envisioned by the State where it would have provisions in the Texas SIP that would address excess emissions during unplanned and planned MSS and malfunctions activities and also establish a process and schedule for addressing emissions from planned MSS for sources through a New Source Review (NSR) SIP permitting process. Pursuant to the January 23, 2006 SIP submittal, as sources apply for and receive NSR SIP permits that authorize emission limitations for the emissions occurring during planned MSS activities, then under the State's submitted transition process, the affirmative defense provisions addressing excess emissions during periods of planned MSS would

no longer apply upon the issuance of the NSR SIP permit. Instead, the terms and conditions, including the newly imposed emission limitations for the planned MSS emissions, of the NSR SIP permit would apply.

EPA's role in evaluating a proposed SIP revision is to make sure that the revision would not potentially interfere with attainment and maintenance of the NAAQS or any other applicable requirement of the Act. Thus, we must determine whether the State's regulatory choices are consistent with the federal Clean Air Act, including the obligation to attain and maintain the NAAQS and the ability to adequately enforce the obligations in the approved SIP. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). We explain our reasons for proposing disapproval of sections 101.222(h), (i), and (j) in section E of the May 13, 2009 proposal (75 FR 26892) and provide more detail above.

The commenters are incorrect that our disapproval of the three provisions is based on a "difference" with Texas over their approach to address periods of excess emissions as part of a broader permitting effort. The basis for our disapproval is explained above and is separate from any concern that we may have with Texas' overall approach to addressing excess emissions through permitting. The State's choice to create a permitting process to address excess emissions during planned maintenance, startup, or shutdown activities does not justify an approval into the SIP—even for a temporary period of time—a provision that we believe is inconsistent with the Act. We agree with the State that it is appropriate to consider appropriate emission limits that would apply during periods of planned startup and shutdown and to incorporate them into NSR SIP permits. As provided in the 1999 Policy, where it is not possible for sources to comply with applicable emission limits during periods of startup and shutdown, it is appropriate for the State to develop alternative emission limits that would apply during such periods. This can include the State using its EPA-approved NSR SIP requirements. However, we note that the State cannot issue any NSR SIP permit that has a less stringent emission limit than already is contained in the approved SIP. For example, the State cannot issue a NSR SIP permit that has less stringent Volatile Organic Compounds limits than those in Chapter 115 as approved into the Texas SIP, or less stringent Oxides of Nitrogen (NO_X) limits in Chapter 117 as approved into the Texas SIP. The State must issue a NSR SIP permit that meets all applicable requirements of the Texas SIP. If the State wishes to issue a NSR SIP permit that does not meet the applicable requirements of the Texas SIP, then any such alternative limits would need to be submitted to EPA for approval as a source-specific revision to the SIP, before they would modify the federally applicable emission limits in the approved SIP.

We disagree with the commenters who suggest that the partial disapproval will disrupt the orderly transition contemplated by Texas in which sources will address excess emissions in permits. As we have noted before, the current SIP does not provide an affirmative defense for any period of excess emissions. Thus, our disapproval of the provisions providing an affirmative defense for excess emissions during periods of planned maintenance, startup, or shutdown activities does not affect the status quo.

The commenters also appear to be asserting that EPA's disapproval of the submitted affirmative defense provision for excess emissions during planned maintenance, startup, and shutdown activities (which would apply in the period before a specific source applies for and receives a NSR SIP permit) would unfairly disadvantage sources. To the extent that the commenters are concerned that an inequity is created by Texas' phased-out approach for addressing periods of excess emissions through the permitting process, that inequity is created by the system developed by the State, not by EPA's partial disapproval of the SIP. These commenters appear to assume that EPA's approval of the submitted affirmative defense provision for excess emissions during planned MSS activities is needed only as a "temporary" measure until the State finishes issuing all affected sources their NSR SIP permits containing emissions limitations for these types of emissions. However, the State-issued NSR SIP permits must meet all applicable requirements under the EPA-approved Texas SIP. Should the State wish to issue a NSR SIP permit addressing periods of excess emissions during planned MSS activities that will not meet all of the requirements in the Texas SIP, then that particular NSR SIP permit must be submitted by the State to EPA for approval as a source-specific SIP revision.

The comment claiming that TCEQ added an affirmative defense for planned maintenance based on a comment from EPA provides no detail. We are unaware of any statement that we made that would have encouraged the State to add such a provision and the commenter does not reference any specific comment from EPA. Regardless of whether any statements were made, an affirmative defense for planned maintenance is not appropriate under the Act. Because the affirmative defense for planned maintenance is not severable from that for planned startup or shutdown, we are disapproving in whole the provision (section 101.222(h)) that establishes the affirmative defense for planned maintenance, startup, or shutdown activities.

D. Comments Related to NAAQS, Air Quality, and State Control Options

Comments: Some commenters contend that EPA's proposed disapproval is contrary to the cooperative federalism principles in the Act, referencing *CleanCOALition* v. *TXU Power,* 536 F.3d 469, 471 (5th Cir. 2008) and *Fla. Power & Light Co.* v. *Costle,* 650 F.2d 579, 581 (5th Cir. 1981), and amounts to second guessing Texas' reasonable choices for how to achieve the NAAQS, including opacity limits in 30 TAC Chapter 111. These commenters continue by stating that EPA's disapproval would lead to interstate inequities and remove permitting incentives.

Response: Under the NAAQS provisions of the CAA, air pollution control at its source is the primary responsibility of States and local governments. EPA is respectful of the Act and cognizant of the cooperative federalism principle contained therein. However, while the Act does give States a fair degree of latitude in choosing the mix of controls necessary to meet and maintain the NAAQS, it also places some limits on the choices States can make. EPA's role is to ensure that the SIP submittal is consistent with the CAA. Any SIP submittal, including revisions to 30 TAC Chapter 101, must adhere to applicable requirements of the federal CAA, including the obligation to provide for attainment and maintenance of the NAAQS and to ensure that the SIP may be adequately enforced. EPA's statutory responsibilities in reviewing a SIP is to ensure it meets the requirements of the Act, including those in section 110(a)(2) and section 172(c). As explained in the May 13, 2010 proposal and above, as part of EPA's review, we determined that the provision providing for an affirmative defense for excess emissions during planned maintenance is inconsistent with the CAA.

With respect to the comments that suggest that our proposed disapproval will lead to removal of permitting incentives, we disagree. The submitted transition permitting process is the State's choice for how to handle excess

emissions during planned maintenance, startup, or shutdown activities. Under the State's chosen transition process, after a source receives a NSR SIP permit that establishes emission limitations upon the planned maintenance, startup, or shutdown emissions, then the source no longer can assert an affirmative defense for excess emissions during planned MSS activities. The source can choose between a potential enforcement action (and whether it will prevail in its assertion of affirmative defense) or obtaining a NSR SIP permit that sets limits on the excess emissions during planned maintenance, startup, or shutdown activities. Thus, we do not see how the presence or absence of an affirmative defense for excess emissions during planned maintenance, startup, or shutdown activities in the SIP will affect the choice a source might make regarding permitting. Furthermore, we disagree with the comment that our disapproval will create interstate inequities because other SIPs contain affirmative defenses for excess emissions during planned maintenance activities. The commenter references no specific SIPs that contain provisions similar to what we are disapproving in this action. As stated above, our review of a SIP revision submittal is governed by section 110(l) of the Act; to the extent we may have erred in approving an affirmative defense for excess emissions during planned maintenance into a SIP for one State does not support an argument that we should make the same error with respect to a different State. Within Texas, however, we note that based upon our disapproval, an affirmative defense for excess emissions during periods of planned MSS would be equally unavailable to any source. For discussion concerning opacity limits in 30 TAC Chapter 111, see section H of this document.

Comment: One commenter notes the similarities between the proposed SIP revisions and the New Source Performance Standards (NSPS) requirements for SSM events.

Response: As an initial matter, we note that there are several differences between the proposed SIP revision and the NSPS requirements. First, the NSPS provisions in 40 CFR 60.11 do not establish an affirmative defense, but rather exempt periods of excess emissions during startup, shutdown and malfunction from compliance with underlying emissions limits, unless otherwise specified. The provision does not establish an affirmative defense nor does it address periods of maintenance. Even assuming the NSPS provisions were similar, however, we note that the Agency has historically allowed more flexibility in addressing emissions during startup, shutdown and malfunction for technology-driven regulations, such as the NSPS. SIPs, however, are designed for the purpose of attaining and maintaining the health-protective NAAQS, and the Agency has consistently taken the position that broad exemptions from compliance with applicable emission limits during SSM are not appropriate because they cannot be adequately accounted for in plans to demonstrate attainment and maintenance of the NAAQS. In addition to the difficulties States would encounter in predicting how many sources may be exceeding underlying limits at any one time, for how long, and by how much, such provisions undermine incentives for sources to operate using sound practices. In order to address the limits of technology for standards included in plans to attain the health-based NAAQS, we have urged States to set alternative emission limits that apply during periods of startup and shutdown where compliance with the otherwise applicable emission limits is impossible; to use enforcement discretion; or to establish an affirmative defense that is limited to actions for penalties. As explained above, however, we do not believe that it is appropriate to establish an affirmative defense for excess emissions during planned maintenance activities because we believe that these activities can be anticipated and scheduled during planned outages.

Comment: One comment suggests that providing affirmative defenses for startup, shutdown, and malfunction (SSM) could result in emissions contributing to ozone NAAQS exceedances. The same commenter also states that flaring and upsets could contribute to ozone nonattainment.

Response: We agree with the comments that flaring and upset events could contribute to ozone NAAQS nonattainment. Excess emissions related to flaring events are unauthorized emissions and thus are considered a violation of the applicable emission limit. TCEQ's ozone NAAQS control strategies including controls of flares are addressed in the substantive control requirement provisions of the SIPs as part of ozone attainment demonstration plans and were not specifically addressed as part of the emission event provisions in the 30 TAC Chapter 101 rules of the Texas SIP, including the January 23, 2006 SIP submittal. The rule on which we are taking action here does not excuse or authorize flaring events due to startup, shutdown, malfunction or maintenance. To the extent a flaring event causes excess emissions during a period of unplanned startup, shutdown or maintenance, the rule would provide limited relief to the source in an action for penalties, assuming the source could prove certain factors had been met; however, it does not authorize or excuse those excess emissions. Thus, our approval of the affirmative defense in an action for penalties for excess emissions during unplanned startup, shutdown or maintenance will not interfere with attainment or maintenance of the ozone NAAQS. We note that to the extent a violation of the NAAQS is caused by a violation of an emission limit in a SIP, the most effective means to ensure limited harm to ambient air quality from the exceedance would be an action for injunctive relief. That remedy is unaffected by our approval of the affirmative defense, which is limited to actions for penalties.

E. Comments Related to Technical Infeasibility and Disapproval Effects

Comment: Several commenters expressed concern that it is not technically feasible to meet certain emission limitations (including opacity limits) at all times during planned maintenance, startup, or shutdown activities, and that the proposed partial disapproval could lead to less effective and less safe operation of environmental control equipment, including sources that use Electrostatic Precipitators (ESPs) and Selective Catalytic Reduction as emissions control devices. For example, several commenters noted that during maintenance of a boiler at a coal-fired power plant, fans must remain on and the ESPs will not be energized, leading to excess emissions. These commenters claim that EPA's partial disapproval will force facilities to forgo preventative and proactive maintenance until permits can be issued for these activities. Other commenters note that EPA's NSPS regulations at 40 CFR 60.11(c) for coal-fired power plants provide exceptions for excess opacity emissions during planned startup, shutdown, and malfunction activities and that opacity limits in the Texas SIP were based on normal operations.

Response: As noted earlier, since July 1, 2006, no affirmative defense for excess emissions has been available in the federally-approved Texas SIP. Thus, our disapproval of the affirmative defense provision for periods of planned maintenance, startup, or shutdown activities will not change the status quo that has applied for over four years under the Texas SIP. We can understand that there may be excess opacity emissions in certain situations from operation of power generators equipped with ESPs. Under the current SIP these

excess opacity events would be violations, and yet power plants have been able to maintain and generate reliable power to their customers during this period. The commenters did not refute this. Thus, we do not believe our action to disapprove the affirmative defense for planned maintenance, startup, or shutdown activities where such defense has not been available since 2006, should jeopardize the safe and effective operation of the generators as several commenters claim. For this same reason, we also believe that our actions will not lead to facilities being forced to forego proactive maintenance when operated by trained and knowledgeable personnel.

The NSPS regulation at 40 CFR 60.11(c) does provide exceptions from compliance with underlying opacity limits during startup, shutdown and malfunction, but does not provide similar relief for periods of maintenance, as suggested by the commenter. As provided above, we have historically provided more leeway for compliance with technology-based standards than for health-based programs such as the NAAQS. Thus, the provisions adopted for purposes of the NSPS are not relevant to our action disapproving an affirmative defense for excess emissions during planned maintenance as part of a SIP.

F. Comments Related to EPA Guidance and Policies and Disapproval Effects

Comments: Some commenters state that the affirmative defense provisions in the January 23, 2006 SIP submittal are consistent with the EPA guidance documents referenced in the May 13, 2010 proposal, and that EPA's distinction between unplanned and planned startup or shutdown activity has no factual basis and is arbitrary and capricious.

Response: We disagree. The January 23, 2006 SIP submittal contains affirmative defense provisions for planned maintenance activities. As discussed previously, EPA's interpretation of the Act is that it would be inappropriate to provide an affirmative defense to an action for penalties related to excess emissions occurring during planned maintenance and that EPA's approval of such a defense into a SIP would be inconsistent with the CAA and EPA guidance. With respect to the comment concerning EPA's distinction between planned and unplanned startup or shutdown activities, we note that *unplanned* startup or shutdown activity is specifically defined in the Texas rules as nonroutine, and unpredictable. As such it is functionally equivalent to a malfunction. Therefore the distinction between planned and unplanned startup and shutdown is not arbitrary. EPA would allow a State to create a limited affirmative defense for excess emissions occurring during planned and unplanned startup and shutdown activities. However, with respect to the *planned* startup or shutdown provisions of section 101.222(h), the cross-reference of several criteria in section 101.222(c) apply only to *unplanned* activities which results in the failure to include all the necessary criteria for *planned* startup or shutdown activities, as discussed more fully below.

Comment: One commenter asserts that the affirmative defense provided in section 101.222(h) for excess emissions during planned maintenance, startup or shutdown activities should be approved because it incorporates by reference all the criteria set forth in section 101.222(c).

Response: As provided above, EPA cannot approve the submitted section 101.222(h) because it provides for an affirmative defense for excess emissions during planned maintenance activities into the Texas SIP since we believe such approval would be inconsistent with the CAA and EPA guidance. Because the portions of section 101.222(h) that provide an affirmative defense for excess emissions during planned startup and shutdown are not severable from the provision for maintenance, those provisions must also be disapproved.

While the commenter is correct that the submitted section 101.222(h) incorporates by reference the affirmative defense criteria set forth in the submitted section 101.222(c), such cross-referencing is problematic. Many of the criteria listed in submitted section 101.222(c)—namely, (c)(2), (c)(3), (c)(4), (c)(6), and (c)(8)—specifically state that they apply to "emissions from an *unplanned* maintenance, startup, or shutdown activity (emphasis added)." As stated in footnote 5 above, a source claiming an affirmative defense in an action for excess emissions during a planned startup or shutdown activity could claim that the criteria listed in section 101.222(c)(2), (c)(3), (c)(4), (c)(6), and (c)(8) do not apply. In the absence of the appropriate criteria for planned startup or shutdown activities, EPA cannot approve the submitted section 101.222(h) as part of the Texas SIP.

Comment: As noted by another commenter the proposed disapproval of section 101.222(h) could be interpreted as EPA's belief that it cannot approve any affirmative defense for excess emissions from planned startup or shutdown activities.

Response: As noted above and in footnote 5, we interpret the CAA to allow EPA to approve a SIP revision submittal from a State that provides an affirmative defense for excess emissions during planned startup or shutdown activities, but the inclusion of planned maintenance activities and the failure to include appropriate criteria (due to improper cross-referencing) for planned startup and shutdown activities renders the submitted section 101.222(h) unapprovable.

Comments: One commenter states that EPA's May 13, 2010 notice provides no basis for the proposed disapproval of an affirmative defense for excess emissions during planned maintenance, where a source can demonstrate that such emissions could not be avoided.

Response: We disagree. The May 13, 2010 proposal to disapprove section 101.222(h) specifically states that the source or operator should be able to plan maintenance that might otherwise lead to excess emissions to coincide with maintenance or production equipment or other facility shutdowns. EPA has determined that it is inappropriate to provide an affirmative defense for excess emissions resulting from planned maintenance activities. With respect to other planned activities, we noted that for those sources and source categories where compliance is not possible, the State should develop alternative, applicable emission limits for such events, which they can consider in SIPs demonstrating attainment and maintenance of the NAAQS, rather than establishing an affirmative defense for such emission events. *See* 75 FR 26896–7.

Comment: Other commenters claim that disapproving an affirmative defense during the period of transition to permitting planned maintenance, startup, or shutdown activities would create new liabilities and encourage arbitrary enforcement.

Response: We disagree. For the reasons provided above, EPA is disapproving sections 101.222(h), (i) and (j) because they are not consistent with the CAA, as interpreted by EPA through policy and guidance. For the reasons provided in the other responses, we do not believe that our action disapproving these three sections creates new liabilities. The existing SIP has not included an affirmative defense for excess emissions since June 30, 2006. Under the approved SIP, all periods of excess emissions are violations and the submitted SIP revisions that we are approving do not delineate when and how the state, EPA or a citizen chooses which sources and events to enforce against. We disagree

that our disapproval of section 101.222(h) will encourage arbitrary enforcement. Enforcement actions for excess emissions violations from planned maintenance, startup or shutdown activities will be subject to enforcement discretion. Enforcement discretion does not mean arbitrary enforcement.

Comment: Another commenter claims that a conditional approval would be more appropriate to address EPA's concerns with the January 23, 2006 SIP submittal.

Response: To propose conditional approval of a provision of a SIP revision submittal, EPA would need a State's written commitment to submit a SIP revision that corrects the deficiency no later than one year after a conditional approval and that justifies the timeframe needed to address the identified deficiencies in the SIP submittal; Texas did not provide a commitment that would have supported a proposed conditional approval.

Comment: One commenter suggests that the requirements associated with scheduled maintenance under section 101.211 are more stringent than EPA's guidance on excess emissions because the Texas rule imposes additional requirements, such as the reporting of maintenance, startup, or shutdown activities that are expected to exceed a reportable quantity (RQ) in advance of the activities.

Response: Since EPA's position is that excess emissions during planned maintenance activities cannot be afforded an affirmative defense, it is not relevant whether the submitted 101.211 may or may not be more stringent in terms of reporting requirements.

G. Comments Related to Procedural Aspects of the Rulemaking

Comments: One commenter questions EPA's failure to justify its delay in responding to the January 23, 2006 SIP submittal and the limited amount of time to review the proposed disapproval in the May 13, 2010 notice. Another commenter asserts that EPA failed to comply with its policy for Regional Consistency Review for SIP revisions and also asserts that EPA's disapproval is procedurally flawed because the May 13, 2010 proposal was signed by the Deputy Regional Administrator and not the Regional Administrator.

Response: Questions related to EPA's delay in acting on the January 23, 2006 SIP submittal were resolved by settlement agreement filed with the court in *BCCA Appeal Group et al.* v. *EPA* (Case No. 3–08CV1491–G, N.D. Tex.). Under the settlement agreement EPA agreed to take final action on the January 23, 2006 SIP submission by October 31, 2010.

We disagree with the comments suggesting that the comment period was not sufficient. In the initial proposed rule, EPA provided a 30-day comment period on the proposed action. This is consistent with the time period that EPA typically provides for actions on SIPs. Furthermore, EPA extended the comment period for an additional 14 days.

We also disagree with the commenters that suggest that EPA did not comply with internal procedures with respect to review of the SIP. The proposed disapproval is consistent with EPA's longstanding interpretation of the Act and does not deviate from EPA's existing practices and policies. Therefore, there was no need to initiate a SIP consistency process for this action, and the commenter's assertion for a need to initiate a SIP consistency process is misplaced.

Finally, the May 13, 2010 (75 FR 26892) proposal was signed by the Acting Regional Administrator, as provided by the Region 6 Order R6–1110.11, dated April 30, 2002. We have made this particular Order available for public inspection in the docket identified as EPA–R06–OAR–2006–0132.

H. Comments Related to Interpretation of 30 TAC 101.221(d)

Comments: One commenter asserts that the exemption provision of section 101.221(d) of the January 23, 2006 SIP submittal should be interpreted to apply to the opacity requirements of 30 TAC section 111.111, while another commenter requests clarification that the exemption provision in section 101.221(d) of the January 23, 2006 SIP submittal be interpreted to exclude federally approved SIP requirements. The commenter claims that TCEQ's and EPA's interpretation of that section is incorrect.

Response: 30 TAC section 111.111 entitled "Requirements for Specified Sources" was adopted by TACB on June 18, 1993, and approved by EPA as a revision to the Texas SIP on May 8, 1996 (61 FR 20734). At that time, it became federally enforceable. Therefore, the requirements in the SIP rule found at 30 TAC section 111.111 are "federal requirements." Section 101.221(d) plainly states that TCEQ will not exempt sources from complying with any "federal requirements." This position is also consistent with the April 17, 2007 letter from John Steib, Deputy Director, TCEQ Office of Compliance and Enforcement to EPA Region 6, in which the State confirmed that the term "federal requirements" in 30 TAC 101.221(d) includes any requirement in the federally-approved SIP. In section D of our May 13, 2010 proposal, we stated that new section 101.221 (Operational Requirements) requires that no exemptions can be authorized by the TCEQ for any federal requirements to maintain air pollution control equipment, including requirements such as NSPS or National Emissions Standards for Hazardous Air Pollutants (NESHAP) or requirements approved into the SIP. Texas confirmed this interpretation and, therefore, the State may not exempt a source from complying with any requirement of the federally-approved SIP. Any action to modify a state-adopted requirement of the SIP would not modify the federally-enforceable obligation under the SIP unless and until it is approved by EPA as a SIP revision. Moreover, to the extent a State includes federally-promulgated requirements, such as NSPS or NESHAP into the SIP, the State does not have authority to modify such requirements. EPA's long-standing position has been that States may not include in their SIPs provisions that allow a State Director or Board to modify the federally-applicable terms of the SIP without review and approval by EPA. This is because the emission reduction requirements in the SIP are relied on to attain and maintain the NAAQS, and exemptions or modifications to those requirements could undermine this fundamental purpose of the SIP.

I. Comments Related to Potential Enforcement Actions

Comments: Several commenters express a belief that EPA's proposed disapproval of sections 101.222(h), (i), and (j) would expose sources to enforcement uncertainty and the risk of citizen suits, and also cause them to forego preventative maintenance.

Response: EPA does not agree that disapproval of section 101.222(h), (i), and (j) would lead to the consequences asserted by the commenters. As previously noted, since July 1, 2006, the federally-approved Texas SIP has not included an affirmative defense for excess emissions occurring during unplanned and planned maintenance, startup, shutdown, or malfunction activities. Today's action approves into the Texas SIP affirmative defense provisions for excess emissions related to unplanned maintenance, startup, and shutdown activities (which are considered malfunctions). A source asserting the affirmative defense in an action for penalties could be relieved from paying such penalties if it can

prove that certain enumerated criteria are met. Therefore, contrary to the commenters' assertions, we do not believe that our action will increase the level of regulatory uncertainty for sources; rather, our action may create more regulatory certainty. We further note that because the affirmative defense would be raised in the context of an enforcement action, its existence is unlikely to affect whether an enforcement case is brought. As provided in more detail in a previous response, we also do not believe that this action will result in sources choosing to forego maintenance of an emissions unit.

Comment: Several commenters assert that EPA's approval of sections 101.222(b), (c), (d), and (e) into the Texas SIP (providing an affirmative defense to upset events and opacity events) would impermissibly limit the penalty assessment criteria and citizen suit provisions in the Act. This approval could alter the meaning of the rule and make the "defense" applicable to citizens and EPA enforcement actions in district court. Citing *Weyerhaeuser* v. *Costle,* 590 F.2d 1011 (DC Cir 1978), the commenter asserts that EPA's approval would limit injunctive relief available under the Act and delay "swift and direct" enforcement of excess emission violations.

Response: We disagree. We believe that the affirmative defense criteria set forth in those sections are consistent with the Clean Air Act's penalty assessment provision, 42 U.S.C. 7413(e), which allows some discretion in determining a penalty. Section 7413(e) of the Act provides that, "in determining the amount of any penalty to be assessed under this section, or section 7604(a) of this title, the Administrator or the court, *as appropriate,* shall *take into consideration (in addition to such other factors as justice may require)* the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation." (Emphasis added.) The use of the phrases emphasized above makes clear that the Administrator or the Court has broad discretion in the factors to consider in determining whether to assess a penalty, and if so, how much that penalty should be. The existence of an affirmative defense does not automatically preclude the assessment of civil penalties. The party raising the defense must prove that it is entitled to it, and if the affirmative defense is rejected by the court, a judge is still required to determine the appropriate penalties in a given case. Furthermore, approval of the provisions in sections 101.222(b), (c), (d), and (e) into the Texas SIP does not preclude citizen suits under the Act. Rather, the affirmative defense may be raised in defense of a claim brought by EPA, the State or a private citizen. As described above, the CAA contemplates that a source may raise a variety of factors in an attempt to mitigate or completely alleviate the assessment of a penalty. While approval of sections 101.222(b), (c), (d), and (e) into the Texas SIP would allow a source to assert affirmative defense for certain excess emissions, we do not believe that approval of those sections impermissibly limit the penalty assessment criteria set forth in CAA section 113(e).

We agree with the commenter that the State rulemaking cannot affect the authorities provided by the CAA to EPA and citizens. However, on December 15, 2005 TCEQ adopted revisions to 30 TAC Chapter 101, and submitted them to EPA as a revision to the Texas SIP. EPA has evaluated the January 23, 2006 SIP submittal and has determined that sections 101.222(b), (c), (d), and (e) of the submittal are consistent with the Act as interpreted by our policy and guidance documents. Our approval of sections 101.222(b), (c), (d), and (e) into the Texas SIP provides a source the option to assert an affirmative defense for certain periods of excess emissions in an enforcement action brought against it by EPA or a citizen in federal court.

Moreover, even where an affirmative defense is successfully raised in defense to an action for penalties, it does not preclude other judicial relief that may be available, such as injunctive relief or a requirement to mitigate past harm or to correct the non-compliance at issue. The commenters are incorrect that the affirmative defense limits injunctive relief. The affirmative defense is only available in an action for penalties and would not be available to a claim requesting injunctive relief. Finally, EPA is cognizant of the *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1057–58 (DC Cir. 1978) decision, but EPA disagrees that approval of sections 101.222(b)–(e) into the Texas SIP would interfere with the legislative goal of "swift and direct" enforcement. We agree that the availability of civil penalties serves as an incentive for companies to be more cautious, to take more preventative actions, and to seek to develop technologies and management practices to avoid excess emissions. However, we also believe that the criteria a source would need to prove in order to successfully assert an affirmative defense will encourage companies to take such caution. For example, among the required criteria that the source must prove are that the periods of unauthorized emissions could not have been prevented through planning and design; were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and all emission monitoring system were kept in operation if possible. *See* 101.222(c).

J. Comments Related to "Administrative Necessity" and "One-Step-at-a–Time" Doctrines

Comments: Several commenters assert that EPA's disapproval of sections 101.222(h), (i), and (j) will result in a rushed transition of TCEQ's scheduled phase-in approach for authorizing MSS activities and that EPA's actions are inconsistent with the "administrative necessity" and "one-step-at-a-time" doctrines used by EPA in defending its recent greenhouse gas tailoring rule.

Responses: We disagree. As an initial matter, and as we explain further above, the State's submitted phased-in permitting process will not serve to modify any applicable requirement under the Texas SIP. Furthermore, our action disapproving the three provisions at issue, as discussed previously, merely maintains the status quo and should have no effect on that permitting process. Furthermore, we think this situation is distinct from that addressed in the greenhouse gas tailoring rule of June 30, 2010 (75 FR 31514) (Tailoring Rule). The Tailoring Rule concerns the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Act. EPA's issuance of the Tailoring Rule, which regulates GHGs under the CAA as air pollutants, triggered a permitting obligation for GHG emissions as of January 2, 2011. In the absence of the Tailoring Rule, the permitting obligations would apply at the 100 or 250 tons per year levels provided under the Act, greatly increasing the number of required permits, imposing undue costs on small sources, overwhelming the resources of permitting authorities, and severely impairing the functioning of the programs. In that action, EPA was taking action to relieve an imminent new burden that would have been imposed on sources and permitting authorities.

In contrast, our disapproval of certain provisions of the submitted plan does not change the status quo that has applied under the Texas SIP since July 1, 2006. Our disapproval action does not establish any new, burdensome obligation for which relief is needed. Rather, sources have been obligated to comply at all times with the applicable emission limits with no enforcement discretion or affirmative defense provisions since the previous Texas rules expired from the Texas SIP on June 30, 2006 by their own terms. Thus there is no administrative necessity or "one step at a time" argument applicable in this situation.

K. Comments Related to Weakening of the SIP

Comments: One commenter asserts that EPA's approval of sections 101.222(b)–(e) would weaken the Texas SIP by: Failing to require a "program to provide for the enforcement" of emission limitations and other control measures, citing CAA section 110(a)(2); changing the Reportable Quantity (RQ) for NOx that could interfere with attainment of the NAAQS; and allowing opacity as the only applicable RQ for certain boilers and combustion turbines in section 101.201(d), by adding the definitions for "boiler" and "combustion turbine."

Response: As explained earlier in this notice, EPA's role in evaluating a proposed revision to a SIP is to make sure that it provides for attainment and maintenance of the NAAQS and that it otherwise complies with applicable requirements of the Act. Texas has chosen to establish an affirmative defense for certain type of excess emissions, provided certain criteria are met, as set forth in sections 101.222(b), (c), (d), and (e). For the reasons provided above, we believe that such an affirmative defense is consistent with the requirements of the Act, including the requirement under section 110 that States must have adequate enforcement programs. The affirmative defense provision only provides limited relief to sources in an action for penalties. Although sources may avoid a penalty for certain excess emissions where they can successfully prove all of the elements of the affirmative defense, the excess emissions are still considered violations and the administrative or judicial decision-maker in an enforcement action may weigh all of the factors to determine if other relief, such as injunctive relief, is appropriate.

With respect to changes in the reporting requirements, the commenter expresses concern that the RQ for NO_X would be increased from 100 pounds in the current SIP to 200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County and to 5,000 pounds in all other areas. An examination of section 101.1(89) (Reportable Quantity) reveals that there are many other substances, other than NOx, with an RQ of 5,000 pounds. Furthermore, it is important to remember that approving the raising of the reportable quantity for NOx into the Texas SIP does not change the fact that excess emissions below the reportable quantity are violations. All excess emissions must be recorded by the sources. Title V sources must report both reportable and recordable excess emissions as part of their annual deviation reports. Therefore, EPA does not believe that the change weakens the SIP; by adjusting the RQ, TCEQ is able to better manage its program by focusing on significant releases, and, as noted, the information for non-reportable quantities will otherwise be available.

The commenter notes that for certain boilers and combustion turbines opacity is the only applicable RQ and asserts that this change constitutes a weakening of the SIP. However, the language in the submitted 30 TAC subsection 101.201(d) [which provides a limited reporting exemption for certain boilers or combustion turbines equipped with Continuous Emission Monitoring Systems (CEMS) capable of sampling, analyzing, and recording data for each successive 15-minute interval] was previously approved by EPA as a revision to the Texas SIP on March 30, 2005. *See* 70 FR 16129. *See* section 101.201(d). The SIP-approved rule contained the same RQ reporting provision for opacity. Section 101.201 did not have an expiration date and it has been federally enforceable since April 29, 2005. In summary, the SIP only has required a RQ reporting provision for opacity; there is no change to this reporting provision. The only change that EPA is approving into the SIP affecting the existing SIP rule 101.201(d) is two new definitions in section 101.1 for "boiler" and "combustion turbine." These definitions, however, were taken verbatim from the 30 TAC Chapter 117 rules. *See* 73 FR 73562 (December 3, 2008). Therefore, the addition of these two definitions is non-substantive for the SIP's purposes. The commenter's assertion that the Texas SIP has been weakened is incorrect. As such, there is no substantive change to the existing SIP and there is no weakening of the SIP.

L. Comments Related to Clarification Requests

Comments: One commenter requests that EPA clarify that excess emission reports must be submitted with the source's title V monitoring and deviation reports.

Response: The January 23, 2006 SIP submittal concerns the SIP not the title V (operating permit) program, which is not a component of the SIP. The title V program is a separate program from the SIP. However, title V permits issued by Texas are required to contain all applicable SIP requirements. Under the approved Texas SIP, all excess emissions are violations, whether or not they meet the criteria for an affirmative defense. Therefore, a source subject to the title V program requirements is required as part of the title V permit program to report all excess emissions, both reportable and nonreportable, as deviations.

Comment: One commenter noted that section 101.222 does not require permitting of emissions from MSS activities.

Response: The submitted Section 101.222(h) provides the opportunity for a source to file an application with the State for a NSR SIP permit to impose emission limitations on excess emissions (including opacity) during periods of planned maintenance, startup, or shutdown. As noted previously, the State cannot issue a NSR SIP permit that does not meet all the requirements of the Texas SIP. If the State wishes to issue a NSR permit that varies from the Texas SIP requirements, then it must submit the permit to EPA for approval as a source-specific SIP revision. The submitted provision establishes an overall 7-year time period for sources to file such applications, allotting a specified, shorter timeframe within that period for different categories of sources to submit such applications. Submitted section 101.222(i) concerns the processing of such applications. The provision in submitted section 101.222(h), which provides for an affirmative defense to excess emissions during planned maintenance, startup, or shutdown activities, no longer applies for a specific source under the State rules once the period for filing and processing such an application expires for the source category. We agree with the State's interpretation of its rule that sources are not required to submit such applications. If sources choose not to seek a permit based on the prescribed timeline, then those sources' excess emissions occurring during these planned MSS activities would be

considered violations, for which an affirmative defense would not be available under the State rules.

Comment: One commenter wishes to point out that the provision of the Michigan SIP that EPA disapproved contained an automatic malfunction exemption and is not pertinent to this proceeding.

Response: The provision of the Michigan SIP that EPA disapproved and that was at issue in *Michigan Department of Environmental Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000) mainly concerned an automatic exemption. Our listing of that case in section B of May 13, 2010 proposal was for informational purposes.

VI. Final Action

Today, we are finalizing our May 13, 2010 (75 FR 26892) proposal to approve into the Texas SIP the following provisions of 30 TAC General Air Quality Rule 101 as submitted on January 23, 2006:

Subchapter A

Revised section 101.1 (Definitions); and

Subchapter F

Revised Section 101.201 (Emissions Event Reporting and Recordkeeping Requirements), but for 30 TAC 101.201(h) which is no longer before EPA for action,

Revised Section 101.211 (Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but for 30 TAC 101.211(f) which is no longer before EPA for action,

New Section 101.221 (Operational Requirements),

New Section 101.222 (Demonstrations), except 101.222(h), 101.222(i), and 101.222(j)),

New Section 101.223 (Actions to Reduce Excessive Emissions).

We are finalizing our May 13, 2010 (75 FR 26892) proposal to disapprove sections 101.222(h) (Planned Maintenance, Startup, or Shutdown Activity), 101.222(i) (concerning effective date of permit applications), and 101.222(j) (concerning processing of permit applications) into the Texas SIP.

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. If a portion of the plan revision meets all the applicable requirements of this chapter and Federal regulations, the Administrator may approve the plan revision in part. 42 U.S.C. 7410(k); 40 CFR 52.02(a). If a portion of the plan revision does not meet all the applicable requirements of this chapter and Federal regulations, the Administrator may then disapprove portions of the plan revision in part that does not meet 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 that meet the criteria of the Act, and to disapprove state choices that do not meet the criteria of the Act. Accordingly, this final action, in part, approves state law as meeting Federal requirements and, in part, disapproves state law as not meeting Federal requirements; and does not impose additional requirements beyond those imposed by state law. For that reason, this final 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);
- 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 (Pub. L. 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 Clean Air Act;
- 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);
- Does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law; and
- Is not a "major rule" as defined by 5 U.S.C. 804(2) under the Congressional Review Act, 5 U.S.C. 801 *et seq.,* added by the Small Business Regulatory Enforcement Fairness Act of 1996. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule."

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 10, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2) of the Act.)

List of Subjects in 40 CFR Part 52

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

Dated: October 29, 2010.

Al Armendariz,

Regional Administrator, Region 6.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart SS—Texas

■ 2. In § 52.2270 the entry for Chapter 101 in the table in paragraph (c) is amended by:
■ a. Revising the entry for Section 101.1 under Subchapter A.
■ b. Revising the entry for Section 101.201 under Subchapter F Division 1.
■ c. Revising the entry for Section 101.211 under Subchapter F Division 2.
■ d. Revising the entries for Section 101.221, 101.222, and 101.223 under Subchapter F Division 3.

The revisions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/ submittal date	EPA approval date	Explanation
	* * * * * * *			
	Chapter 101—General Air Quality Rules			
	Subchapter A—General Rules			
Section 101.1	Definitions	01/23/06	11/10/10 [Insert *FR* page number where document begins].	
	* * * * * * *			
	Subchapter F—Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities			
	Division 1—Emissions Events			
Section 101.201	Emissions Event Reporting and Recordkeeping Requirements.	01/23/06	11/10/10 [Insert *FR* page number where document begins].	101.201(h) is not in the SIP.
	Division 2—Maintenance, Startup, and Shutdown Activities			
Section 101.211	Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements.	01/23/06	11/10/10 [Insert *FR* page number where document begins].	101.211(f) is not in the SIP.
	Division 3—Operational Requirements, Demonstrations, and Actions To Reduce Excessive Emissions			
Section 101.221	Operational Requirements	01/23/06	11/10/10 [Insert *FR* page number where document begins].	
Section 101.222	Demonstrations	01/23/06	11/10/10 [Insert *FR* page number where document begins].	The SIP does not include 101.222(h), 101.222 (i), and 101.222 (j). See section 52.2273(e).
Section 101.223	Actions to Reduce Excessive Emissions.	01/23/06	11/10/10 [Insert *FR* page number where document begins].	
	* * * * * * *			

* * * * *

■ 3. Section 52.2273 is amended by adding a new paragraph (e) to read as follows:

§ 52.2273 Approval status.

* * * * *

(e) EPA is disapproving the Texas SIP revision submittals under 30 TAC Chapter 101—General Air Quality Rules as follows:

(1) Subchapter F—Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities, Division 1—Section 101.222 (Demonstrations): Sections 101.222(h), 101.222(i), and 101.222(j), adopted December 14, 2005, and submitted January 23, 2006.

[FR Doc. 2010–28135 Filed 11–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0740; FRL–9221–6]

Revisions to the California State Implementation Plan, Imperial County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the Imperial County Air Pollution Control District (ICAPCD) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on May 19, 2010 and concern particulate matter (PM) emissions from beef feedlots. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on December 10, 2010.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2008–0740 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. 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 in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Andrew Steckel, EPA Region IX, (415) 947–4115, *steckel.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 31, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: March 21, 2005

James B. Gulliford,

Regional Administrator, Region 7.

■ Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart Q—Iowa

■ 2. In § 52.820 the table in paragraph (c) is amended by revising the entry for ''Chapter V'' under the heading ''Polk County'' to read as follows:

§ 52.820 Identification of plan.

* * * * *

(c) * * *

EPA–APPROVED IOWA REGULATIONS

Iowa citation	Title	State effective date	EPA approval date	Explanation
Iowa Department of Natural Resources, Environmental Protection Commission [567]				
*	*	*	*	*
Polk County				
CHAPTER V.	Polk County Board of Health Rules and Regulations Air Pollution Chapter V.	1/6/2004	March 30, 2005 [insert FR page number where the document begins].	Article I, Section 5–2, definition of ''variance''; Article VI, Sections 5–16(n), (o) and (p); Article VIII, Article IX, Sections 5–27(3) and (4); Article XIII, and Article XVI, Section 5–75 (b) are not a part of the SIP.

* * * * *

[FR Doc. 05–6291 Filed 3–29–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–162–1–7598; FRL–7892–7]

Limited Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown and Malfunction Activities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action finalizes limited approval of revisions to the Texas State Implementation Plan (SIP) concerning excess emissions for which we proposed approval on March 2, 2004. The revisions address reporting, recordkeeping, and enforcement actions for excess emissions during startup, shutdown, and malfunction (SSM) activities. This limited approval action is being taken under section 110 of the Federal Clean Air Act (the Act) to further air quality improvement by strengthening the SIP. See sections 1 and 3 of this document for more information.

DATES: This rule is effective on April 29, 2005.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. Anyone wanting to examine these documents should make an appointment with the appropriate office at least two working days in advance.

Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Dallas, Texas 75202–2733.

Texas Commission on Environmental Quality (TCEQ), Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar of the Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733 at (214) 665–6691, *shar.alan@epa.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

Statutory and Executive Order Reviews

In this document ''we,'' ''us,'' and ''our'' refer to EPA.

1. What Actions Are We Taking in This Document?

On March 2, 2004 (69 FR 9776), we proposed approval of revisions and deletions to the Texas SIP pertaining to Texas' excess emissions rule, 30 TAC, General Air Quality Rule 101, Subchapter A, and Subchapter F (September 12, 2002, and January 5, 2004, submittals). Specifically, the revisions address the reporting and recordkeeping, and enforcement actions for excess emissions during SSM activities. The September 12, 2002, and January 5, 2004, submittals primarily address violations of SIP requirements caused by periods of excess emissions due to SSM activities. See section 1 of our March 2, 2004 (69 FR 9776), proposal for additional information.

Generally, since SIPs must provide for attainment and maintenance of the National Ambient Air Quality Standards (NAAQS), all periods of emissions in excess of applicable SIP limitations must be considered violations. The EPA cannot approve a SIP revision that provides an automatic exemption for periods of excess emissions violating a SIP requirement. In addition, excess emissions above applicable emission limitations in title V operating permits are deviations subject to title V reporting requirements.

Today, we are finalizing limited approval of the September 12, 2002, and January 5, 2004, revisions and deletions to the Texas SIP. The submitted revisions strengthen the SIP because they clarify that sources are not exempt from underlying SIP emissions limits where there is an emissions activity. Rather, the source may assert an affirmative defense in an action for penalties concerning the emission activity. The revisions also provide: (a) The commission may issue an order finding that a site has chronic ''excessive'' malfunctions, (b) if the executive director determines that a facility is having ''excessive'' malfunctions, the owner or operator must take action to reduce the excess emissions activities and obtain either a corrective action plan or a permit reflecting the control device, other measures, or operational changes required for the said reduction, and (c) the affirmative defense approach for malfunctions does not apply if there is a malfunction at a source under a corrective action plan. This limited approval will strengthen the latest federally approved Texas SIP dated November 28, 2000 (65 FR 70792).

As authorized by section 110(k)(3) of the Act, we are taking final action to grant a limited, rather than full, approval of this rule. We are finalizing this limited approval because we have determined that the rule improves the SIP and is largely consistent with the relevant requirements of the Act. The submittal, as a whole, strengthens the existing Texas SIP. For example, the revised affirmative defense provisions are an improvement over the related provisions in the current SIP, which are removed from the SIP by this action. This limited approval incorporates all of the submitted revisions into the Texas SIP. The entire rule becomes part of the State's approved, federally enforceable SIP and may be enforced by EPA and citizens, as well as by the State. We are finalizing a limited approval of this rule after review of adverse comments in response to our proposed approval of the rule, and in order to ensure national SIP consistency with EPA's interpretation of the Act and policy on excess emissions during SSM activities. Sections 101.221, 101.222, and 101.223 will sunset from State law, and therefore from the SIP, by their own terms, on June 30, 2005 without further action by EPA. Upon expiration of the provisions, all emissions in excess of applicable emission limitations during SSM activities remain violations of the Texas SIP, subject to enforcement actions by the State, EPA or citizens.

2. What Documents Did We Use in the Evaluation of This Rule?

The EPA's interpretation of the Act on excess emissions occurring during startup, shutdown or malfunction is set forth in the following documents: A memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, entitled ''Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions;'' EPA's clarification to the above policy memorandum dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation; EPA's policy memorandum reaffirming and supplementing the above policy, dated September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation, entitled ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown'' (September 1999 Policy); EPA's final rule for Utah's sulfur dioxide control strategy (Kennecott Copper), 42 FR 21472 (April 27, 1977), and EPA's final rule for Idaho's sulfur dioxide control strategy 42 FR 58171 (November 8, 1977); and the latest clarification of EPA's policy issued on December 5, 2001. See the policy or clarification of policy at: *http://www.epa.gov/ttn/oarpg/t1pgm.html*.

To find the latest federally approved Texas SIP concerning excess emissions see 65 FR 70792 (November 28, 2000).

3. What Is the Basis for a Limited Rather Than a Full Approval?

Section 101.222(c) addresses excess emissions from scheduled maintenance, startup, or shutdown activities, and section 101.222(e) addresses excess emissions from scheduled maintenance, startup, or shutdown activity from opacity activities. After reviewing the public comments, we believe that these provisions are ambiguous, at best, and inconsistent with the Act, at worst, and could create problems with enforcing the underlying applicable emission limits.

Texas has taken the position that these provisions provide for enforcement discretion by the State. In other words, if the enumerated criteria are met, then the State may exercise its enforcement discretion by choosing not to enforce against periods of excess emissions during scheduled maintenance, startup or shutdown. However, these provisions facially appear to go much further and excuse sources from permitting requirements (101.222(c)) or from the applicable opacity emission limits (101.222(e)) if the criteria are met. Thus, these rules appear to exempt sources from certain applicable SIP requirements. This is inconsistent with the statutory definition of emission limitation. And, if unaccounted for in the SIP, these emissions could interfere, among other things, with the ability of areas within the State to attain and maintain the NAAQS. In addition, to the extent these

provisions create an exemption from compliance, rather than simply explain when the State will exercise enforcement discretion, they would prevent EPA or citizen enforcement.

Moreover, it is unclear whether sections 101.222(c) and (e) may provide for an affirmative defense for certain scheduled maintenance activities. In guidance documents issued by EPA and other final rulemakings, we have indicated that scheduled maintenance activities are predictable events that are subject to planning to minimize releases, unlike malfunctions (emission activities), which are sudden, unavoidable or beyond the control of the owner or operator. The EPA's interpretation of Section 110 of the Act and related policies allows an affirmative defense to be asserted against civil penalties in an enforcement action for excess emissions activities which are sudden, unavoidable or caused by circumstances beyond the control of the owner or operator and where emissions control systems may not be consistently effective during startup or shutdown periods. However, EPA has determined that it is inappropriate to provide an affirmative defense for excess emissions resulting from scheduled maintenance, and to excuse these excess emissions from a penalty action. The State may, however, choose to exercise its enforcement discretion for excess emissions due to predictable events such as scheduled maintenance activities. See 42 FR 21472 (April 27, 1977), 42 FR 58171 (November 8, 1977), and 65 FR 51412 (August 23, 2000).

We are today granting a limited approval of the submitted revisions and deletions to the Texas SIP. We cannot fully approve the rule because sections 101.222(c) and (e): (1) Are ambiguous and unclear as to whether they address only State enforcement discretion, (2) might be interpreted to provide exemptions to SIP permitting requirements, and (3) might be interpreted to provide an affirmative defense for excess emissions from scheduled maintenance activities. Because the provisions found in sections 101.222(c) and (e) are not mandatory requirements of the Act and because section 101.222 will expire from the SIP by its own terms on June 30, 2005, no further action by Texas to correct the rule is necessary. Upon expiration of the provisions, all emissions in excess of applicable emission limitations during SSM activities remain violations of the Texas SIP, subject to enforcement action by the State, EPA or citizens. However, if Texas revises its rules to include an affirmative defense for excess emissions in the Texas SIP in the future, the State should ensure that the revisions do not contain exemptions from permitting or other SIP requirements, that the affirmative defense does not apply to excess emissions from scheduled maintenance activities, and, if the State wishes to codify its enforcement discretion, that terms are clear and do not bar or limit enforcement actions taken by EPA or citizens for excess emissions which exceed applicable SIP emission limitations. Any revisions should continue to recognize that emissions in excess of applicable emission limitations and SIP requirements are violations of the Texas SIP, subject to enforcement actions by the State, EPA or citizens. If the State submits a revised rule addressing excess emissions during SSM activities, EPA will review the rule for consistency with the requirements of the Act and EPA policy. Below, we summarize and respond to comments received during the public comment period on the proposed March 2, 2004 (69 FR 9776), Texas SIP revision.

4. Who Submitted Comments to Us?

We received one set of written comment on the March 2, 2004 (69 FR 9776), proposed Texas SIP revision. The comment was submitted jointly by the Environmental Integrity Project, Environmental Defense, Galveston-Houston Association for Smog Prevention, Refinery Reform, Community InPower and Development Association, Citizens for Environmental Justice, and Public Citizen's Texas Office (the Commenters).

5. What Is Our Response to the Submitted Written Comments?

Our responses to the written comments concerning the proposed March 2, 2004 (69 FR 9776), Texas SIP revision are as follows:

Comment #1: The Commenters state that Texas' rule is an improvement over its previous illegal exemption provisions; however, the rule still creates an affirmative defense which is too broad.

Response to Comment #1: We appreciate the Commenters' statement that the Texas excess emissions rule approved today into the Texas SIP is an improvement over its previous version, which is removed from the SIP by this action. The criteria and conditions constituting the affirmative defense approach, as incorporated in the rule, are those identified in EPA's 1999 policy on excess emissions. This improvement, in part, constitutes our rationale for a limited approval of this Texas SIP revision. However, we agree with Commenters that the affirmative defense may be too broad because, as discussed above, it appears to be available for certain maintenance activities. The EPA's interpretation of Section 110 of the Act and related policies allow an affirmative defense to be asserted against civil penalties in an enforcement action for excess emissions activities which are sudden, unavoidable or beyond the control of the owner or operator and where emissions controls may not be consistently effective during startup or shutdown periods. The State may choose to exercise its enforcement discretion for excess emissions from predictable events such as scheduled maintenance activities.

Comment #2: The Commenters state that EPA should disapprove sections 101.222(c) and (e) of Texas' submittal because these provisions maintain an exemption for excess emissions resulting from scheduled startup, shutdown and maintenance. The Commenters believe that the language in section 101.222(c) exempts certain excess emissions from compliance with permitted limits and thus means that no enforcement action can be taken for those periods of excess emissions. The Commenters cite to previous pronouncements by EPA that excess emissions during periods of startup and shutdown must be treated as violations. In addition, the Commenters reject as unfounded the statement by Texas that these exempted emissions are below the level required for inclusion in permits under the Texas Health and Safety Code. The Commenters note that there is no limit on how large these emissions might be.

Response to Comment #2: Section 101.222(c) generally addresses excess emissions from scheduled maintenance, startup, or shutdown activities and section 101.222(e) addresses excess opacity emissions resulting from scheduled maintenance, startup, or shutdown activities. On its face, both sections 101.222(c) and (e) establish criteria similar to those that EPA established for purposes of an affirmative defense. The Texas rule provides that emissions from scheduled startup, shutdown or maintenance must be included in a permit unless the owner or operator of a source proves that all of the criteria are met. The State has explained to EPA that it construes this provision as establishing enforcement discretion on the part of the State. They have explained that where the criteria are not met, then the State may enforce against a source for a violation of the applicable emissions

limitation for the period of excess emissions.

Upon further reading of the Texas rule, we are not convinced that the State's interpretation of the rule is likely to prevail if challenged. We think it is plausible that if EPA or a citizen group sought to enforce against a source which contends to have met the criteria specified in section 101.222(c), the source would offer a defense that such emissions were not subject to permitting requirements and were therefore not violations. Additionally, we are concerned about the interpretation of section 101.222(e), which also seems to provide an exemption from the applicable emission limits if a source can prove that the specified criteria are met. Again, the State has indicated that it interprets this provision not as excusing the source from compliance, but rather as a tool for the exercise of enforcement discretion on the part of the State. However, upon further review, we think the language is ambiguous at best and could well be construed by a court as excusing a source from compliance for these periods of excess emissions. Thus, even if the State chose not to enforce against a source where it believes the source has met the specified criteria, we believe it is possible that a court would dismiss any suit by EPA or citizens to enforce on the basis that the source was not subject to the underlying emission limit.

We believe that at best these provisions are ambiguous and, at worst, do in fact exempt sources from compliance with underlying emission limits if the specified criteria are met. Based on this conclusion, we have concerns about the effect of these provisions on the enforceability of applicable emission limits, and thus have concluded that we cannot fully approve the SIP. As stated above, however, we believe that the new rule, as a whole, strengthens the SIP and we are granting a limited approval of the SIP revisions.

Comment #3: The Commenters state that EPA should only approve sections 101.222(b) and 101.222(d) with the clarification that affirmative defense does not apply to federally performance-based standards. The Commenters state the Texas' rule will allow the affirmative defense to apply to violations of performance based Federal standards such as NSPS and NESHAP.

Response to Comment #3: Chapter 101 addresses violations of SIP requirements caused by periods of excess emissions due to SSM activities. For clarification and public record purposes, all of the federally promulgated performance or technology-based standards, and other Federal requirements, such as those found in 40 CFR parts 60, 61, and 63; and titles IV, and VI of the Act remain in full effect, and are independent of today's approval of revisions to the Texas SIP. We also want to make clear that today's limited approval of the Texas excess emissions rule into the Texas SIP may not, under any circumstances, be construed as rescinding, replacing, or limiting applicable Federal requirements regardless of the source's category or locality.

Comment #4: The Commenters state the affirmative defense in Texas' rule should not apply where a single source or small group has the potential to cause an exceedance of the NAAQS.

Response to Comment #4: We believe the Texas rule, which places the burden on the source asserting an affirmative defense to demonstrate that the specific activity at issue did not contribute to an exceedance of the NAAQS or PSD increments or to a condition of air pollution, is appropriate. Subsection 101.222(b)(11) requires the source or operator to prove that ''unauthorized emissions did not cause or contribute to an exceedance of the NAAQS, prevention of significant deterioration (PSD) increments, or to a condition of air pollution.'' This provision ensures that an affirmative defense could not be sustained for an emissions activity for which the owner or operator has failed to prove that the event did not cause or contribute to an exceedance of the NAAQS, PSD increments or to a condition of air pollution.

Comment #5: The Commenters state the Texas' rule allows boilers and combustion turbines to escape reporting requirements.

Response to Comment #5: Subsection 101.201(a)(3) concerns notification for reportable emissions activities involving boilers or combustion turbines. Subsection 101.211(a)(2) concerns the notification for a scheduled maintenance, startup, or shutdown activity involving a boiler or combustion turbine. Also see subsection 101.201(d) of the rule. We do not believe that Texas' reporting requirements for excess emissions exclude boilers or combustion turbines. For these reasons we disagree with the Commission.

Comment #6: The Commenters state that EPA should announce its intent to automatically re-issue a Notice of Deficiency (NOD) to the State should Texas adopt revised rules prior to June 30, 2005, that do not comply with the Act and EPA's guidance. The Commenters are concerned that Texas may rescind the existing rules and adopt new rules before June 30, 2005 and once again be in the position of being unable to enforce the excess emissions provision in the SIP.

Response to Comment #6: The present record does not provide sufficient information to enable the Agency to make a determination of whether a notice of deficiency under title V of the Act would be warranted for the circumstances forecast by petitioners.[1] The Agency would need to review the rule allegedly causing the title V program deficiency to determine whether a violation of title V has occurred. However, at this stage, Commenters are only speculating as to future revisions to the rules that the State might or might not adopt. The Agency also balances a number of other factors in determining whether to issue a notice of deficiency, including allocation of agency resources, likelihood of success in pursuing enforcement through an NOD, likelihood of resolving a program flaw through other mechanisms, and how enforcement in a particular situation fits within the Agency's overall policies. It is not practicable to review these factors prior to the time a revision to the Texas rules would warrant such review.

This concludes our responses to the written comments we received during public comment period concerning March 2, 2004 (69 FR 9776), Texas proposed SIP revision.

6. What Areas in Texas Will These Rule Revisions Affect?

These rule revisions affect all sources of air emissions operating within the State of Texas.

Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Accordingly, the Administrator certifies that this rule will not have a significant economic

[1] The Agency previously issued an NOD to Texas on January 7, 2002, based on different issues. See 67 FR 732. The State also revised and renumbered its rules relating to reporting, recordkeeping, and enforcement actions for SSM excess emissions, which are the rules at issue in the present action.

impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have federalism implications because it does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 31, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Excess Emissions, Intergovernmental relations, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 18, 2005.

Richard E. Greene,

Regional Administrator, Region 6.

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart SS—Texas

■ 2. The table in § 52.2270(c) entitled ''EPA Approved Regulations in the Texas SIP'' is amended as follows:

(a) Under Chapter 101, Subchapter A, by revising the entry for Section 101.1;

(b) Under Chapter 101, Subchapter A, by removing the entry for Section 101.1 Table II, ''Definitions—List of Synthetic Organic Chemicals;''

(c) Under Chapter 101, Subchapter A, by removing the entries for the following Sections: 101.6, 101.7, 101.11, 101.12, 101.15, 101.16, and 101.17;

(d) Under Chapter 101, Subchapter A, immediately following the entry for Section 101. Rule 19, ''Initiation of Review,'' by adding a new centered heading ''Subchapter F—Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities'' followed by new entries for Sections 102.201, 101.211, 101.221, 101.222, 101.223, 101.224, 101.231, 101.232, and 101.233.

The revision and additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 101—General Air Quality Rules				
Subchapter A—General Rules				
Section 101.1	Definitions	08/21/02	03/30/05 [Insert FR citation from published date].	

EPA APPROVED REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Subchapter F—Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities				
Division 1—Emissions Events				
Section 101.201	Emissions Event Reporting and Recordkeeping Requirements.	08/21/02	03/30/05 [Insert FR citation from published date].	
Division 2—Maintenance, Startup, and Shutdown Activities				
Section 101.211	Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements.	08/21/02	03/30/05 [Insert FR citation published date].	
Division 3—Operational Requirements, Demonstrations, and Actions to Reduce Excessive Emissions				
Section 101.221	Operational Requirements	12/17/03	03/30/05 [Insert FR citation from published date].	
Section 101.222	Demonstrations	12/17/03	03/30/05 [Insert FR citation from published date].	
Section 101.223	Actions to Reduce Excessive Emissions	12/17/03	03/30/05 [Insert FR citation from published date].	
Section 101.224	Temporary Exemptions During Drought Conditions.	08/21/02	03/30/05 [Insert FR citation from published date].	
Division 4—Variances				
Section 101.231	Petition for Variance	08/21/02	03/30/05 [Insert FR citation from published date].	
Section 101.232	Effect of Acceptance of Variance or Permit	08/21/02	03/30/05 [Insert FR citation from published date].	
Section 101.233	Variance Transfers	08/21/02	03/30/05 [Insert FR citation from published date].	
*	*	*	*	*

[FR Doc. 05–6313 Filed 3–29–05; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[TX–154–2–7609; FRL–7892–6]

Approval of Revisions and Notice of Resolution of Deficiency for Clean Air Act Operating Permit Program in Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving revisions to the Texas Title V operating permits program submitted by the Texas Commission on Environmental Quality (TCEQ) on December 9, 2002. In a Notice of Deficiency (NOD) published on January 7, 2002, EPA notified Texas of EPA's finding that the State's periodic monitoring regulations, compliance assurance monitoring (CAM) regulations, periodic monitoring and CAM general operating permits (GOP), statement of basis requirement, applicable requirement definition, and potential to emit (PTE) registration regulations did not meet the minimum Federal requirements of the Clean Air Act and the regulations for State operating permits pfrograms. This action approves the revisions that TCEQ submitted to correct the identified deficiencies. Today's action also approves other revisions to the Texas Title V Operating Permit Program submitted on December 9, 2002, which relate to concurrent review and credible evidence. The December 9, 2002, submittal also included revisions to the Texas State Implementation Plan (SIP). We published our final SIP approval in the **Federal Register** on November 14, 2003 (68 FR 64543). These revisions to Texas' operating permits program resolve all deficiencies identified in the January 7, 2002, NOD and removes the potential for any resulting consequences under the Act, including sanctions, with respect to the January 7, 2002, NOD.

DATES: This final rule is effective on April 29, 2005.

ADDRESSES: Copies of the documents relevant to this action, including EPA's Technical Support Document, are in the official file which is available at the Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in

Effective: September 1, 2007

Vernon's Texas Statutes and Codes Annotated Currentness
Water Code (Refs & Annos)
Title 2. Water Administration (Refs & Annos)
Subtitle A. Executive Agencies
Chapter 7. Enforcement
Subchapter C. Administrative Penalties
§ 7.052. Maximum Penalty

(a) The amount of the penalty for a violation of Chapter 37 of this code, Chapter 366, 371, or 372, Health and Safety Code, or Chapter 1903, Occupations Code, may not exceed $2,500 a day for each violation.

(b) The amount of the penalty for operating a rock crusher or a concrete plant that performs wet batching, dry batching, or central mixing, that is required to obtain a permit under Section 382.0518, Health and Safety Code, and that is operating without the required permit is $10,000. Each day that a continuing violation occurs is a separate violation.

(b-1) The amount of the penalty assessed against a manufacturer that does not label its computer equipment or adopt and implement a recovery plan as required by Section 361.955, Health and Safety Code, may not exceed $10,000 for the second violation or $25,000 for each subsequent violation. A penalty under this subsection is in addition to any other penalty that may be assessed for a violation of Subchapter Y, Chapter 361, Health and Safety Code.

(b-2) Except as provided by Subsection (b-1), the amount of the penalty for a violation of Subchapter Y, Chapter 361, Health and Safety Code, may not exceed $1,000 for the second violation or $2,000 for each subsequent violation. A penalty under this subsection is in addition to any other penalty that may be assessed for a violation of Subchapter Y, Chapter 361, Health and Safety Code.

(c) The amount of the penalty for all other violations within the jurisdiction of the commission to enforce may not exceed $10,000 a day for each violation.

(d) Except as provided by Subsection (b), each day that a continuing violation occurs may be considered a separate violation. The commission may authorize an installment payment schedule for an administrative penalty assessed under this subchapter, except for an administrative penalty assessed under Section 7.057.

CREDIT(S)

Added by Acts 1997, 75th Leg., ch. 1072, § 2, eff. Sept. 1, 1997. Amended by Acts 2001, 77th Leg., ch. 376, § 3.02, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 880, § 2, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 965, § 5.08(b), eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1271, § 2, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 1276, § 14A.843, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 333, § 1, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 902, § 2, eff. Sept. 1, 2007.

HISTORICAL AND STATUTORY NOTES

2008 Main Volume

Section 62 of Acts 1997, 75th Leg., ch. 1072, provides:

"(a) A change in law made by this Act that relates to an offense or penalty applies only to an offense committed on or after September 1, 1997. For purposes of this section, an offense is committed before September 1, 1997, if any element of the offense occurs before that date. An offense committed before September 1, 1997, is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

"(b) A change in law made by this Act that relates to an administrative or civil penalty or the revocation of a permit, license, certificate, registration, or other form of authorization issued by the Texas Natural Resource Conservation Commission applies only to a violation that occurred on or after September 1, 1997. A violation that occurs before September 1, 1997, is covered by the law in effect when the violation occurred, and the former law is continued in effect for that purpose."

Acts 2001, 77th Leg., ch. 376, in subsec. (a), deleted reference to Chapter 18.

Acts 2001, 77th Leg., ch. 880, in subsec. (a), deleted chapters 32 and 33 and added chapter 37.

Acts 2001, 77th Leg., ch. 965 and Acts 2001, 77th Leg., ch. 1271, added new subsec. (b); relettered former subsec. (b) as subsec. (c); relettered former subsec. (c) as subsec. (d) and inserted "Except as provided by Subsection (b)".

Acts 2001, 77th Leg., ch. 1271 made the same changes as did Acts 2001, 77th Leg., ch. 965.

Section 5.08(c) of Acts 2001, 77th Leg., ch. 965 provides:

> "The changes in law made by Section 5.5145, Water Code, as added by this Act, and Section 7.052, Water Code, as amended by this Act, apply only to a violation that occurs on or after the effective date of this Act. A violation that occurs before that date is governed by the law in effect at the time the violation occurred,

and the former law is continued in effect for that purpose."

Acts 2003, 78th Leg., ch. 1276, in subsec. (a), deleted "34, or" preceding "37", substituted "," for "or", and inserted "or Chapter 1903, Occupations Code,".

Acts 2005, 79th Leg., ch. 333, in subsec. (d), deleted "or assessed after a hearing under Section 7.058" from the end.

Acts 2007, 80th Leg., ch. 902 added subsecs. (b-1) and (b-2).

Section 4(b) of Acts 2007, 80th Leg., ch. 902 provides:

"(b) This Act may not be enforced before September 1, 2008."

CROSS REFERENCES

Civil and administrative penalties, see V.T.C.A., Health & Safety Code § 371.110.
Maintenance contract and performance bond, see V.T.C.A., Health & Safety Code § 366.0515.
Maximum penalty, civil penalties, see V.T.C.A., Water Code § 7.102.

RESEARCH REFERENCES

2011 Electronic Update

Encyclopedias

TX Jur. 3d Conservation & Pollution Laws § 4, Enforcement Powers.

TX Jur. 3d Conservation & Pollution Laws § 198, Civil and Administrative Penalties.

TX Jur. 3d Conservation & Pollution Laws § 253, Civil and Administrative Penalties.

Treatises and Practice Aids

Civins, Hall & Sahs, 45 Tex. Prac. Series § 4.4, Authority.

Civins, Hall & Sahs, 45 Tex. Prac. Series § 8.3, Texas Spill Reporting Requirements.

Civins, Hall & Sahs, 45 Tex. Prac. Series § 10.4, General Provisions.

Civins, Hall & Sahs, 46 Tex. Prac. Series § 24.2, Water Quality Issues.

Civins, Hall & Sahs, 46 Tex. Prac. Series § 20.13, Administrative and Civil Enforcement.

V. T. C. A., Water Code § 7.052, TX WATER § 7.052

Current through Chapters effective immediately through Ch. 41 of the 2011 Regular Session of the 82nd Legislature

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