

PRE-PUBLICATION NOTICE. The EPA Region 6 Regional Administrator, Ken McQueen, signed the following final rule on January 7, 2020, and EPA Region 6 is submitting it for publication in the *Federal Register* (FR). We are providing this document solely for the convenience of interested parties. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the final rule for purposes of compliance or effectiveness. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<https://www.regulations.gov>) in Docket No. EPA-R06-OAR-2018-0770. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2018-0770; FRL-10004-01-Region 6]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) Region 6 Regional Administrator finds that the affirmative defense provisions in the State Implementation Plan (SIP) for the State of Texas applicable to excess emissions that occur during certain upset events and unplanned maintenance, startup, and shutdown activities are consistent with CAA requirements. Accordingly, EPA Region 6 is withdrawing the SIP call issued to Texas that was published on June 12, 2015. This action is limited to the SIP call issued to Texas and does not otherwise change or alter the EPA's June 12, 2015 action.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2018-0770. All documents in the docket are listed on the <https://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 <https://www.regulations.gov> or in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, EPA Region 6 Office, SO₂ and Regional Haze Section (6ARSH), 1201 Elm Street, Suite 500, Dallas, TX 75270, 214-665-6691, Shar.Alan@epa.gov. To inspect the hard copy materials, please schedule an appointment with Alan Shar.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

Definitions

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

- i. The word Act or initials CAA mean or refer to the Clean Air Act.
- ii. The initials EPA mean or refer to the United States Environmental Protection Agency.
- iii. The initials MSS mean unplanned Maintenance, Startup or Shutdown activities, specific to Texas regulations.

- iv. The term Malfunction means a sudden and unavoidable breakdown of process or control equipment.
- v. The initials NAAQS mean National Ambient Air Quality Standards.
- vi. The initials NESHAP mean National Emission Standards for Hazardous Air Pollutants.
- vii. The initials OAQPS mean the Office of Air Quality Planning and Standards.
- viii. The initials OMB mean the Office of Management and Budget.
- ix. The initials PSD mean Prevention of Significant Deterioration.
- x. The terms EPA Region 6 and Region 6 refer to the United States Environmental Protection Agency, Region 6, located in Dallas, Texas.
- xi. The initials RTC mean Response To Comment.
- xii. The initials SIP mean State Implementation Plan.
- xiii. The word State means the state of Texas, unless the context indicates otherwise.
- xiv. The initials STEERS mean the State of Texas Environmental Electronic Reporting System.
- xv. The term Shutdown means, generally, the cessation of operation of a source.
- xvi. The initials SSM mean Startup, Shutdown, or Malfunction.
- xvii. The term Startup means, generally, the setting in operation of a source.
- xviii. The initials TAC mean the Texas Administrative Code.
- xix. The initials TCEQ mean the Texas Commission on Environmental Quality.

Table of Contents

- I. Summary of the Final Action
- II. Background
 - A. Clean Air Act and the Texas SIP

This document is a pre-publication version, signed by EPA Region 6 Regional Administrator, Ken McQueen, on 1/7/2020. EPA Region 6 is submitting it for publication in the *Federal Register*. We have taken steps to ensure the accuracy of this version, but it is not the official version. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*.

- B. Affirmative Defense Provisions in the Texas SIP
- III. Evaluation of the Affirmative Defense Provisions in the Texas SIP
 - A. Summary of Proposal Notice
 - B. Final Notice
 - C. Comments and Responses
- IV. Final Action
- V. Statutory and Executive Order Reviews

I. Summary of the Final Action

Today, Region 6 is making a finding that the affirmative defense provisions in Texas's SIP applicable to excess emissions that occur during upsets (30 TAC 101.222(b)), unplanned events (30 TAC 101.222(c)), upsets with respect to opacity limits (30 TAC 101.222(d)), and unplanned events with respect to opacity limits (30 TAC 101.222(e)) do not make Texas's SIP substantially inadequate to meet the requirements of the Act. Accordingly, Region 6 is withdrawing the SIP call issued to Texas that was published on June 12, 2015 (80 FR 33968-9).

II. Background

The background for this action is discussed in detail in our April 29, 2019 (84 FR 17986) proposed action. In that document, Region 6 invited comment on its belief that the best policy may be to permit certain affirmative defense provisions in SIPs, consistent with the court's decision in *Luminant Generation v. EPA*, 714 F.3d 841 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 387 (2013). See 84 FR 17990. Region 6 recognized that such a policy, if adopted, would depart from the policy set forth in the EPA's 2015 Startup, Shutdown and Malfunction (SSM) SIP

Action.¹ EPA Region 6 also proposed to make a finding that the affirmative defense provisions in the Texas SIP applicable to excess emissions that occur during certain upset events² and unplanned maintenance, startup, or shutdown activities³ would be consistent with CAA requirements if the alternative interpretation were adopted. Accordingly, Region 6 proposed to withdraw the SIP call⁴ issued to Texas that was published on June 12, 2015.

The 60-day public comment period closed on June 28, 2019, and Region 6 received numerous comments on the proposed action. The public comments are included in the publicly posted docket associated with this action at www.regulations.gov. Region 6 reviewed all public comments received on the proposed action and considered them before finalizing this action. In this preamble, Region 6 provides a summary of certain significant comments received on the 2019 Proposal and the Region's response to those comments. The Response To Comment (RTC) document for this action summarizes and responds to all other relevant comments received. The RTC document may be found in the docket for this action.

A. Clean Air Act and the Texas SIP

¹ See section XI.F of the Statement of the EPA's SSM SIP Policy as of 2015 as set forth in "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Final Rule" (80 FR 33840, 33981-2).

² See 30 TAC 101.1(110).

³ See 301 TAC 101.1(109).

⁴ "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Final Rule." (80 FR 33840), June 12, 2015. (2015 SSM SIP Action).

The CAA creates a framework for cooperative state and federal programs to prevent and control air pollution providing states with the "primary responsibility" for prevention and control of air pollution and flexibility for specific state needs and priorities.⁵ The Act requires the EPA to identify pollutants that could endanger the public health and welfare and to establish national ambient air quality standards (NAAQS), which the EPA has done for six criteria pollutants. Each state prepares a State Implementation Plan (SIP) that identifies the controls and programs the state will use to attain and maintain the NAAQS.⁶ In Texas, the Texas Commission on Environmental Quality (TCEQ) is the state agency responsible for implementing the requirements of the CAA related to SIPs. Since the EPA's approval of the initial Texas SIP in 1972, there has been a separate regulatory control strategy for unauthorized emissions⁷ due to malfunction events based on the acknowledgement that imposition of civil penalties may not be appropriate every time unauthorized emissions result from such events. The regulatory regime has evolved since 1972, with each iteration tightening requirements. In 2005, TCEQ adopted the affirmative defenses found at 30 TAC 101.222(b) - (e).⁸ The EPA approved these affirmative defense provisions related to upsets and unplanned maintenance, startup, or shutdown (MSS) activities as a revision to the Texas SIP in November 2010.⁹ The EPA subsequently issued a SIP call for these provisions as part of its 2015 SSM SIP Action based on the position that the affirmative defense provisions made the SIP substantially inadequate to meet the requirements of the Act. The 2015 SSM SIP Action included SIP calls for 45 jurisdictions in 36 states. For more

⁵ 42 U.S.C. § 7401(a)(3); 42 U.S.C. § 7407(a); *Train v. NRDC*, 421 U.S. 60, 79 (1975).

⁶ 42 U.S.C. §§ 7407(a) & 7410(a).

⁷ See 30 TAC 101.1(108).

⁸ See 30 Texas Register 8884 (Dec. 30, 2005), codified at 30 TAC 101.222.

⁹ 75 FR 68989 (Nov. 10, 2010).

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information concerning the SIP call issued to Texas, see section II.(C) of the proposed action (84 FR at 17988). On March 15, 2017, TCEQ petitioned the EPA to reconsider the SIP call issued to Texas in the 2015 SSM SIP Action.

B. Affirmative Defense Provisions in the Texas SIP

As stated above, the EPA approved the affirmative defense provisions found at 30 TAC 101.222(b) - (e) as a revision to the Texas SIP in November 2010.¹⁰ These provisions provide a narrowly tailored affirmative defense for emissions that exceed applicable emissions limitations that occur during upsets and unplanned MSS activities and are considered functionally equivalent to malfunctions. That is, the affirmative defense provisions in the EPA-approved Texas SIP apply to unplanned and unavoidable upset events and unplanned MSS activities that are not part of normal or routine operations and arise from sudden and unforeseeable events beyond the control of the operator. In addition, the affirmative defense provisions are inapplicable to emission events determined to be excessive¹¹ based on a number of criteria including frequency, duration, and impact on human health, and are unavailable in criminal actions or civil enforcement actions seeking administrative technical orders and actions for injunctive relief. In the context of an enforcement proceeding,¹² an affirmative defense is a

¹⁰ Id.

¹¹ To determine whether an emissions event or emissions events are excessive, the following factors are evaluated: (1) The frequency of the facility's emissions events; (2) the cause of the emissions event; (3) the quantity and impact on human health or the environment of the emissions event; (4) the duration of the emissions event; (5) the percentage of a facility's total annual operating hours during which emissions events occur; and (6) the need for startup, shutdown, and maintenance activities. See 30 TAC 101.222(a). The current EPA-approved Texas SIP does not provide any affirmative defense for an emissions event or emissions events that are determined to be excessive emission events. Such events trigger a requirement to develop a corrective action plan and are subject to a penalty action. See 30 TAC 101.223.

¹² See Appendix 2 of the RTC document, found in the docket for this action, for more information on how TCEQ implements Texas affirmative defense provisions. This document is a pre-publication version, signed by EPA Region 6 Regional Administrator, Ken McQueen, on 1/7/2020. EPA Region 6 is submitting it for publication in the *Federal Register*. We have taken steps to ensure the accuracy of this version, but it is not the official version. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*.

response or defense put forward by a defendant, who bears the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. See section IV.A of the proposed action for more information (84 FR 17991-92). The EPA's 2010 approval of the Texas SIP revision adding these affirmative defense provisions was subsequently challenged in court and upheld as reasonable under the Act by the U.S. Court of Appeals for the Fifth Circuit in *Luminant*. 714 F.3d 841.

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

A. Summary of Proposal Notice

Pursuant to 40 CFR 56.5(b), on October 16, 2018, Region 6 received EPA headquarters concurrence to convene a proceeding for reconsideration of the SIP call issued to Texas and to undertake a rulemaking pursuant to this reconsideration that may deviate from the EPA's national policy that provisions providing an affirmative defense to civil penalties for excess emissions during periods of startup, shutdown, malfunction, or maintenance are not consistent with CAA requirements. In the proposal, Region 6 explained that in light of the *Luminant* decision, a more appropriate policy approach may be to permit certain affirmative defense provisions in the SIPs of states in Region 6, and invited comment on this issue. Region 6 explained that it may be inappropriate to impose a civil penalty on sources for sudden and unavoidable emissions caused by circumstances beyond the control of the owner or operator. Region 6 recognized that even equipment that is properly designed and maintained can sometimes fail. Further, because the specific affirmative defense provisions in the Texas SIP

apply only to excess emissions that cannot be avoided by a source operator¹³, removing these affirmative defense provisions from SIPs will not reduce emissions and therefore would not result in an environmental or public health or welfare benefit.

In the proposal notice, Region 6 analyzed 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d) and 30 TAC 101.222(e) to see if such provisions were consistent with CAA requirements according to the policy under consideration. Based on this analysis, Region 6 proposed to determine that these provisions were consistent with CAA requirements and therefore are permissible components of a SIP if Region 6 were to adopt the new policy under consideration.

B. Final Notice

As explained in the proposal notice, Region 6 invited comment on whether to adopt a policy that certain affirmative defense provisions are generally permissible in SIPs in states in Region 6. However, after reviewing the comments received on Region 6's proposal notice, including on the regionwide policy under consideration, Region 6 has decided to limit this final action to the specific Texas affirmative defense provisions that were the subject of the 2015 SSM SIP Action and for which Texas filed a petition for reconsideration. Region 6 is not herein announcing any alternative CAA interpretation that would be applicable outside of Texas; Region 6 will determine whether to adopt a similar or other alternative interpretation for other Region 6 states if and when the need for such a determination arises in the future.

¹³ See 30 TAC 101.222(b)(2), 30 TAC 101.222(c)(2), 30 TAC 101.222(d)(2), and 30 TAC 101.222(e)(2). This document is a pre-publication version, signed by EPA Region 6 Regional Administrator, Ken McQueen, on 1/7/2020. EPA Region 6 is submitting it for publication in the *Federal Register*. We have taken steps to ensure the accuracy of this version, but it is not the official version. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*.

After considering the public comments received, Region 6 is finalizing its proposed determination that 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d), and 30 TAC 101.222(e) are permissible affirmative defense provisions. As outlined in the 2015 SSM SIP Action, the EPA views all emissions that are in excess of applicable limitations as violations. Nevertheless, Region 6 recognizes that imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances beyond the control of the owner or operator may not be appropriate. In the context of unplanned events or malfunctions, Region 6 is cognizant of the reality that even process equipment or a control device that is properly designed, maintained, and operated can sometimes fail. At the same time, as outlined in the 2015 SSM SIP Action, the EPA has a fundamental responsibility under the CAA to ensure that SIPs provide for attainment and maintenance of the NAAQS and protection of air quality increments in the Prevention of Significant Deterioration (PSD) program. After balancing these considerations, Region 6 has concluded that the Texas SIP provisions containing affirmative defenses are appropriately narrowly tailored and will not undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the CAA.

In its 2010 approval, Region 6 determined that the Texas affirmative defense provisions met the criteria outlined in the 1999 Guidance,¹⁴ which was the relevant guidance at the time outlining how the EPA would assess the approvability of affirmative defense provisions in SIPs. That guidance set forth the EPA's thinking at the time that if affirmative defense provisions met

¹⁴ "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, to EPA Regional Administrators, September 20, 1999 (1999 Guidance).

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specific enumerated criteria, they generally would be consistent with the fundamental requirements of the CAA. Region 6 finds that the Texas affirmative defense provisions still meet the criteria from that memo, namely that the “defendant” has the burden of proof of demonstrating that:

1. The excess emissions were caused by a sudden, unavoidable breakdown of technology, beyond the control of the owner or operator;
2. The excess emissions (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for, and (b) could not have been avoided by better operation and maintenance practices;
3. To the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;
4. Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;
5. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
6. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
7. All emission monitoring systems were kept in operation if at all possible;
8. The owner or operator's actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence;

9. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and
10. The owner or operator properly and promptly notified the appropriate regulatory authority.

The affirmative defense provisions in the Texas SIP related to non-excessive upset events that were approved in 2010, and that were subsequently made the subject of the SIP call issued in 2015 include a series of specific criteria enumerated in 30 TAC 101.222(b)(1) - (b)(11):

- “(1) the owner or operator complies with the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements). In the event the owner or operator fails to report as required by §101.201(a)(2) or (3), (b), or (e) of this title, the commission will initiate enforcement for such failure to report and for the underlying emissions event itself. This subsection does not apply when there are minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report;*
- (2) the unauthorized emissions were caused by a sudden, unavoidable breakdown of equipment or process, beyond the control of the owner or operator;*
- (3) the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or technically feasible design consistent with good engineering practice;*
- (4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events;*
- (5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded, and any necessary repairs were made as expeditiously as practicable;*
- (6) the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;*
- (7) all emission monitoring systems were kept in operation if possible;*
- (8) the owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;*
- (9) the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;*
- (10) the percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high; and*
- (11) the unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.”*

In Section 16, Table VII of the TSD¹⁵ prepared in conjunction with the final rule approving 30 TAC 101.222(a) - (g) of the Texas SIP (November 10, 2010, 75 FR 68989), Region 6 compared the criteria in 30 TAC 101.222(b)(1) - (b)(11) with the affirmative defense criteria outlined above and included in the EPA's 1999 Guidance. In the 2010 final action, Region 6 concluded that the criteria in 30 TAC 101.222(b) are very similar to those of the 1999 Guidance. Because EPA's thinking at the time was that, if affirmative defense provisions met the specific enumerated criteria from the 1999 Guidance, they generally would be consistent with the fundamental requirements of the CAA, and so Region 6 approved the affirmative defense provisions into the Texas SIP.¹⁶ As discussed previously, that approval action was upheld by the Fifth Circuit. See *Luminant*, 714 F.3d 841.

In addition, 30 TAC 101.222(f) states that meeting the affirmative defense criteria does not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to an emissions event or a maintenance, startup, or shutdown activity. It also states that an affirmative defense cannot apply to violations of federally promulgated performance or technology-based standards, such as those found in 40 CFR parts 60, 61, and 63. Additionally, the affirmative defense is available only for emissions that have been reported or recorded.

Furthermore, 30 TAC 101.222(g) states that evidence of any past event with respect to which an owner or operator invoked the affirmative defense provision shall nonetheless be admissible

¹⁵ See Document ID No. EPA-R06-OAR-2006-0132-0018 at www.regulations.gov.

¹⁶ Affirmative defense criteria similar to those found in 30 TAC 101.222(b)(1) - (b)(10) (for non-excessive upset events) may be found at 30 TAC 101.222(c), 30 TAC 101.222(d), and 30 TAC 101.222(e) (for unplanned MSS activity, excess opacity events, and opacity events resulting from unplanned MSS activity, respectively). This document is a pre-publication version, signed by EPA Region 6 Regional Administrator, Ken McQueen, on 1/7/2020. EPA Region 6 is submitting it for publication in the *Federal Register*. We have taken steps to ensure the accuracy of this version, but it is not the official version. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*.

in litigation proceedings and can be considered as relevant to demonstrate a frequent or recurring pattern of events, even if all of the criteria to receive an affirmative defense are proven.

As outlined above, Region 6 is herein reaffirming the determination that these affirmative defense provisions in the Texas SIP are very similar to, and compatible with, the criteria outlined in the 1999 Guidance. Because the affirmative defense provisions in the Texas SIP pertaining to upsets and unplanned events (malfunctions) are narrowly tailored, properly drafted, limited in scope or application, and effective in practice, EPA Region 6 finds that 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d) and 30 TAC 101.222(e) are consistent with CAA requirements for SIPs and permissible affirmative defense provisions.

C. Comments and Responses

In this subsection, Region 6 provides a summary of certain significant comments received on the 2019 Proposal and the Region's response to those comments. The RTC document, found in the docket for this action, summarizes and responds to all other relevant comments received.

1. Comments alleging that EPA Region 6's proposed action is inconsistent with the CAA and D.C. Circuit precedent

Comment: Commenters alleged that the proposal is inconsistent with CAA sections 304(a) and 113(e). The commenters asserted that the EPA cannot allow the affirmative defense provisions in the Texas SIP because those provisions directly conflict with Congress's exclusive grant of jurisdiction to the federal district courts to provide remedies in civil suits brought under the CAA for violations of emissions standards. The commenters noted that under CAA section 304, Congress gave "any person" the right to sue over violations of emission standards established in SIPs. Citing to language in the *NRDC* opinion, the commenters noted that CAA section 304 creates a private right of action, and it is the judiciary, not any executive agency, that

determines the scope – including the available remedies – of judicial power vested by the CAA. *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). The commenters also pointed to CAA section 113(e), noting that Congress expressly requires courts to consider enumerated penalty assessment criteria when they decide the amount of civil penalties to apply when they find a violation of an emission limitation; weighing these criteria, courts decide on a case-by-case basis what penalty, if any, is appropriate. The commenters also cited to congressional intent by noting that CAA section 304(a) was amended in 1990 to provide district courts with the new authority to apply civil penalties, because Congress felt it was necessary for deterrence, restitution, and retribution. The commenters concluded that affirmative defenses which, if proven, prohibit federal district courts from imposing penalties are irreconcilable with this congressional intent.

The commenters also took issue with the EPA’s statement in the proposal that “states have latitude to define in their SIPs what constitutes an enforceable emission limitation, so long as the SIP meets all applicable CAA requirements.”¹⁷ The commenters assert that the EPA’s claim is wrong for two reasons: (1) the CAA requires civil penalties be available as relief in a citizen enforcement case, so a SIP that limits that ability does not meet all the applicable CAA requirements; and (2) affirmative defense provisions are neither emission limitations nor control measures, but rather ancillary provisions that purport to limit the liability of a violating source, which is inconsistent with congressionally created remedies for violations of emission standards.

Response: Region 6 disagrees with the commenters. This action is not illegal, arbitrary, or inconsistent with any requirement of the CAA. The Act provides that, in the case of EPA

¹⁷ 84 FR 17990 (April 29, 2019).

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enforcement and citizen suits, a federal district court “shall have jurisdiction” to assess civil penalties; in assessing the amount of a civil penalty, the court must consider the penalty assessment criteria outlined in CAA section 113(e). In 2013, in reviewing Region 6’s approval of the same Texas SIP provisions in question here, the *Luminant* court held that approval was based upon a permissible interpretation of CAA section 113 and deserved deference. Region 6 acknowledges that an effective enforcement program must be able to collect penalties to deter avoidable violations. However, Region 6 also acknowledges – as did the *Luminant* court – that, despite good practices, sources may be unable to meet emission limitations during periods of unplanned malfunctions due to events beyond the control of the owner or operator. The EPA finds it reasonable to determine that a SIP can provide for an affirmative defense against civil penalties for circumstances where it is not feasible to meet the applicable emission limits, and the narrowly tailored criteria that the source must prove can ensure that the source has made every effort to comply with those emission limitations. This is consistent with the CAA because the criteria set forth in the Texas SIP that a source must meet to assert the affirmative defenses are consistent with the penalty assessment criteria identified in CAA section 113, which are considered by the courts and the EPA in determining whether or not to assess a civil penalty for violations, and, if so, the amount. The *Luminant* court upheld the EPA’s approval of the Texas affirmative defense provisions on that basis. *See Luminant* 714 F.3d 853 (acknowledging that the Texas affirmative defense criteria are consistent with the penalty assessment criteria in CAA section 113).

In addition, the EPA’s role, with respect to a SIP revision, is focused on reviewing the submission to determine whether it meets the applicable criteria of the CAA, and, where it does, section 110(k)(3) of the Act requires the EPA to approve the submission. In the context of a SIP,

the EPA is not, as a matter of law or policy, exercising discretion to establish its own requirements for the state to implement beyond the requirements contained in the CAA. CAA section 110(a)(2)(A) - (B) requires states to submit SIPs with emission limits and other control measures necessary or appropriate to meet CAA requirements, and CAA section 110(a)(2)(C) requires SIPs to include “a program to provide for the enforcement” of those emission control measures. In light of the latitude provided to states by Congress in CAA section 110 for NAAQS implementation, Region 6 has determined that inclusion of Texas’s affirmative defense provision in the SIP is appropriate due to the latitude that states have to define in their SIPs what constitutes an enforceable emission limitation, so long as the SIP meets all applicable CAA requirements.

As explained in the proposal notice for this action, the differences in scope and relative balance of state and federal authority between CAA sections 110 and 112 suggest that the D.C. Circuit’s reasoning in *NRDC* with respect to limits on federal agency authority under CAA section 110 does not address the distinct question of whether a state may include affirmative defense provisions as part of its overall strategy for inclusion in their SIP submissions to the EPA under CAA section 110. In the *Luminant* case, the environmental petitioners raised the same basic argument that was key to the D.C. Circuit’s *NRDC* holding: environmental petitioners argued that the EPA’s approval of the Texas affirmative defense SIP provision conflicts with the CAA’s provision that, in the case of EPA enforcement and citizen suits, a federal district court “shall have jurisdiction” to assess a “civil penalty.” 42 U.S.C. §§ 7413(b); 7604(a). The Fifth Circuit, however, upheld as “neither contrary to law nor in excess of [the EPA’s] statutory authority” the EPA’s position that the Texas provision at issue here is narrowly tailored and consistent with the penalty assessment criteria in CAA section 113(e). In addition, the Fifth

Circuit stated that the availability of the affirmative defense in the Texas SIP “does not negate the district court’s jurisdiction to assess civil penalties using the criteria outlined in [CAA section 113(e)], ... it simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed.” *Luminant*, 714 F.3d at 853 fn.9.

The commenters noted that Congress amended CAA section 304(a) in 1990 to provide courts the additional authority to assess civil penalties in citizen suit actions because civil penalties were thought necessary for deterrence. Even accepting this characterization of Congress’s intent, it has no bearing on the permissibility of the Texas affirmative defense provisions because the use of those provisions is limited to malfunctions, which are sudden, unavoidable, and beyond the control of the owner or operator. Among other factors, in order to use the Texas affirmative defense, a source owner or operator must show that all possible steps were taken to minimize the impact of the unauthorized emissions on air quality. Malfunctions, as defined in the Texas affirmative defense provision, cannot be deterred. Therefore, Region 6 maintains that in light of the *Luminant* decision, the appropriate policy is to consider the Texas affirmative defense provisions to be consistent with CAA requirements.

Comment: The commenters asserted that the EPA fails to rationally explain why following the *NRDC* decision’s statutory interpretation is inappropriate in light of *Luminant*. The commenters also noted EPA’s claim that the application of the *NRDC* decision may be “particularly inappropriate” in light of *Luminant* is unexplained and conflicts with the 2015 SSM SIP Action. Furthermore, the commenters alleged that the proposal’s change in position on affirmative defenses from the position expressed in the 2015 SSM SIP Action is irrational and cannot be reconciled with *NRDC*. Commenters particularly noted that the proposal fails to

explain why the *NRDC* court's acknowledgment of *Luminant* matters or why it matters that *Luminant* upheld the EPA's prior interpretation at Chevron step two.

The commenters also stated that the enforcement provisions of CAA sections 304 and 113 were the sole basis for the *NRDC* court striking down affirmative defenses, rather than the applicability of these provisions to CAA sections 112 or 110. The commenters pointed out that the *NRDC* court did not specifically evaluate the question of whether affirmative defenses are appropriate in section 110 SIPs, and the commenters disagreed with the EPA's statement that "the *NRDC* decision did not foreclose the EPA's ability to allow affirmative defense provisions in section 110 SIPs."¹⁸ The commenters alleged that, as the *NRDC* court shows, the text, structure, context, purpose, and history of the CAA plainly demonstrate Congress's intent to give federal courts the authority and obligation to determine what penalties (if any) are appropriate in enforcement cases. The commenters asserted that the *NRDC* court's reasoning applies with equal force to citizen suits alleging violations of SIP emission limits and equally to any remedy Congress gave courts jurisdiction to order.

The commenters stated that to provide a rational basis for its policy reversal, the EPA must evaluate whether the reasoning of the *NRDC* decision applies to CAA section 110 and explain the reasons for choosing to disregard the *NRDC* court's logic. The commenters alleged that the EPA premises its policy reversal on a belief that CAA section 110 somehow overrides the CAA's enforcement provisions, relying on what they characterize as an outdated notion of "cooperative federalism" that relies heavily on the *Train* and *Union Electric* decisions from the

¹⁸ 84 FR 17989 (April 29, 2019).

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1970s, which hold in keeping with what the commenters characterize as the antiquated notion that Congress deferred all specific decisions to the states as long as the result is compliance with national standards. The commenters asserted that the D.C. Circuit has since made clear that it has not suggested that states may develop SIPs free of extrinsic legal constraints, including those in the CAA, and that the EPA ignores subsequent amendments to the CAA that resulted in specific minimum requirements for SIPs in the Act, including specific control measures and permitting requirements. The commenters noted that demonstrating compliance with the national standards is not the sole measure for approval of a SIP revision.

Response: At the outset, Region 6 notes that it maintains discretion and authority to change its CAA interpretation from a prior position. In *FCC v. Fox*, the U.S. Supreme Court stated an agency’s obligation with respect to changing a prior policy quite plainly:

We find no basis . . . for a requirement that all agency change be subjected to more searching review. The [Administrative Procedure] Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.

FCC v. Fox Television Stations, 556 U.S. 502, 514 (2009).

In cases where an agency is changing its position, the Court stated that a reasoned explanation for the new policy would ordinarily “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *Id.* at 515. However, the Court held that the agency “need not demonstrate . . . that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.” *Id.* In cases where a new policy “rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account,” the

Court found that a more detailed justification might be warranted than what would suffice for a new policy. At the outset, it is important to note that the *Luminant* court upheld the EPA's approval of the very same affirmative defense provisions in the Texas SIP that are at issue in this action.¹⁹ Furthermore, the *Luminant* decision is the *only* existing court precedent that addresses the approvability of affirmative defense provisions in SIPs. The *Luminant* court held that the EPA acted consistent with statutory authority and upheld the EPA's interpretation that affirmative defenses against civil penalties are not inconsistent with CAA section 113 if the defense is narrowly tailored to address unplanned, unavoidable excess emissions in a manner that is consistent with the penalty assessment criteria set forth in CAA section 113(e). By contrast, the D.C. Circuit's *NRDC* decision only evaluated the validity of an affirmative defense provision in an emission standard created by the EPA itself under CAA section 112, and that decision *expressly reserved judgment* regarding the validity of an affirmative defense in the context of a SIP approved under CAA section 110. The *NRDC* ruling explicitly states, "[w]e do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan." 749 F.3d at 1064 n.2 (citing *Luminant*, 714 F.3d 841). Therefore, the *NRDC* decision did not speak to the EPA's ability to allow for affirmative defense provisions in SIPs. Texas's narrowly tailored and limited affirmative defense SIP provisions for malfunctions, as upheld by the Fifth Circuit's *Luminant* decision, are consistent with CAA requirements and it

¹⁹ Some commenters have noted that the claims asserted in the *Luminant* decision may not be relitigated in any future challenge to this action. The EPA reserves the right to assert this argument (or similar arguments) as a defense to this final action.

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is not necessary or appropriate to extend the D.C. Circuit's reasoning in *NRDC* to the specific affirmative defense provisions currently in the Texas SIP for the reasons discussed herein.

The commenters assert that Region 6 is reading the provisions of CAA section 110 to override the CAA's enforcement provisions, including CAA sections 113(b) and 304(a), but this is not true. Rather, Region 6 is reading all of these provisions together to authorize its approval of certain affirmative defense provisions in SIPs. SIPs are developed by the states under CAA section 110 and reflect the Act's core principle of cooperative federalism.²⁰ CAA section 110 affords broad discretion to states in how to develop and implement air emission controls after the federal government establishes NAAQS to be achieved. Region 6 agrees with the commenters' position that the flexibility afforded states in the development of SIPs is not without limitations and that demonstrating compliance with NAAQS is not the sole measure for SIP approvals. However, Region 6 finds the commenters' claims that subsequent amendments to the CAA (concerning control measures and permitting requirements) were ignored are misplaced and not relevant to this action. Also, as noted in an earlier response, the congressionally stated reasons for the amendment to CAA section 304(a) in 1990 (to provide deterrence) are not relevant to determining the permissibility of affirmative defense provisions that are limited to unavoidable, unpreventable malfunctions (which are beyond the control of the owner or operator and therefore cannot be deterred). This flexibility, and state discretion, under CAA section 110 has been

²⁰ 42 U.S.C. § 7401(a)(3); 42 U.S.C. § 7407(a); *Train v. NRDC*, 421 U.S. 60, 79 (1975).

acknowledged repeatedly by the EPA in its actions and in court decisions on those Agency actions.²¹

EPA Region 6 recognizes that the interpretation of the CAA to allow the Texas affirmative defenses in SIPs conflicts with the position taken in the 2015 SSM SIP Action; however, it is important to understand and acknowledge that the affirmative defense provisions for malfunctions in the Texas SIP are a key component of the state’s overall clean air control strategy which has evolved since the initial Texas SIP in 1972. See page 3 of the TCEQ comment letter recognizing that affirmative defense provisions are “part of a long-standing and integral part of the Texas SIP”²². Recognizing that states have latitude to define in their SIPs what constitutes an enforceable emission limitation, Region 6 has determined that the Texas SIP provisions are an example of how a limited affirmative defense can be properly crafted to be a part of an approved SIP.

One commenter quoted the D.C. Circuit as saying that it has avoided suggesting “that under [§ 7410] states may develop their plans free of extrinsic legal constraints,” including those contained in the Act. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1047 (D.C. Cir. 2001). In this action, Region 6 is in no way suggesting that no limitations exist on states’ SIP development. As noted previously in this response, Region 6 agrees with the commenters’ position that the

²¹ See *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 289 (1981) (noting that states are permitted “within limits established by [the NAAQS], to enact and administer their own regulatory programs, structured to meet their own particular needs”). See also *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976) (acknowledging that states have “wide discretion” in formulating their SIPs and that “[s]o long as national standards are met, the state may select whatever mix of control devices it desires”); *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003) (recognizing states have “broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements”) (citing *Union Elec. Co.*, 427 U.S. at 266).

²² Document ID No. EPA-R06-OAR-2018-0770-0018 at www.regulations.gov.

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flexibility afforded states in the development of SIPs is not without limitations. However, as explained elsewhere in this notice, Region 6 has determined that the affirmative defense provisions in Texas's SIP are consistent with CAA requirements.

Comment: The commenter stated that the EPA has not explained why it would be appropriate to prevent a federal court from imposing civil penalties for violation of a SIP emission limit while preserving the right of the court to impose civil penalties for violation of a NESHAP. The commenter claimed that, without a stated, logical reason for this distinction, it is arbitrary and capricious of the EPA to create a distinction.

Response: Region 6 disagrees with the commenter. As explained in the proposal notice, the mechanisms established under section 112 of the CAA to control air pollution are different than those under section 110 in significant ways. CAA section 110 functions within a cooperative federalism system in which states are required to develop plans to attain and maintain the NAAQS and the EPA determines whether the specific state plans comply with the Act's requirements. See 42 U.S.C. §§ 7410(a) & (k)(4). On the other hand, CAA section 112 requires the EPA (not states) to establish federal emission limitations for a specific class of sources and pollutants and strictly prescribes how the EPA must establish those standards, which states have little flexibility in how to implement. See 42 U.S.C. § 7412(d). More specifically, CAA section 110 requires states to adopt "emission limitations and other control measures, means, or techniques *...as may be necessary or appropriate* to meet the applicable requirements of this chapter" while CAA section 112 directs the EPA to adopt standards that "*require the maximum degree of reduction* in emissions" that the Administrator determines is achievable "through application of measures, processes, methods, systems or techniques *including, but not limited to*"

measures meeting a list of five requirements. *Cf.* 42 U.S.C. §§ 7410(a)(2)(a) with 7412(d)(2) (emphases added).

Region 6 now believes that the Agency gave insufficient weight to the fact that Region 6's prior approval of the Texas affirmative defense provisions that were subject to the 2015 SSM SIP Action had been upheld by the Fifth Circuit, the circuit to which review of Texas-specific actions is specifically assigned by Congress under CAA § 307(b), when applying the reasoning of *NRDC* to the SIP context in the EPA's 2014 supplemental proposal and the 2015 SSM SIP Action. As explained in the prior response, the petitioners in the *Luminant* case argued that the EPA's approval of the Texas affirmative defense SIP provision conflicts with CAA sections 113(b) and 304(a). As discussed above, the *Luminant* court was squarely presented with the argument that affirmative defense for malfunctions in the Texas SIP inappropriately altered or infringed upon federal district court jurisdiction to assess appropriate penalties and the court concluded that it did not, instead holding that it is permissible to include narrowly-tailored provisions that are consistent with the penalty assessment criteria in CAA section 113(e). The *Luminant* court acknowledged that "states have wide discretion in formulating their SIPs, including the broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements." 714 F.3d at 845 (internal quotations deleted), *citing* *Union Elec.*, 427 U.S. at 250; *BCCA Appeal Grp.*, 355 F.3d at 822.

While the *NRDC* court clearly states that affirmative defenses under CAA section 112 are inappropriate, that court's opinion explicitly deferred judgment on whether they were permissible for inclusion in an approved SIP. The *only* court decision to reach the question of the appropriateness of affirmative defenses in SIPs is the *Luminant* court. Region 6 is applying this directly on-point court decision, from the court which Congress has assigned the role of hearing

challenges to actions applicable to Texas, 42 U.S.C. § 7606(b), to the review of the affirmative defense provisions in the Texas SIP, which is the *Luminant* decision. Region 6 thinks the distinction between CAA sections 110 and 112 set forth here is reasonable under the Act. Where the Act requires under CAA section 112 the EPA to directly establish federal limits that meet detailed and strict criteria and that are established to further a different purpose than that of CAA section 110, it is reasonable to take the position that the EPA's and a state's discretion is more limited than in the section 110 context, and that only a court should determine what penalties should apply when those limits are violated, as the *NRDC* court found. However, when addressing limits that have been established by the state as part of an overall plan to address the NAAQS under the CAA section 110 regime, and where states have primary responsibility for and flexibility in establishing those limits, Region 6 thinks it is reasonable for states to include – and the EPA to approve – certain defenses to penalties for violations of those limits, as the *Luminant* court found.

Comment: Commenters stated that the EPA lacks the authority to disapprove affirmative defense SIP provisions if it finds that the SIP will ensure compliance with the NAAQS. Commenters referenced several court cases where the courts stated that it is the states and not the EPA that retain primacy for NAAQS implementation. Commenters stated that development of affirmative defense provisions for SSM periods is plainly within the states' authority under this statutory structure, and the EPA's role is limited to determining whether such SIP provisions are approvable. Commenters referenced CAA section 110(k)(2) and the EPA's previous statements in a memorandum and stated that, in the absence of any demonstrated link to air quality issues rendering a SIP substantially inadequate, any effort by the EPA to impose its policy preference on the states is beyond the EPA's authority. Furthermore, commenters stated that there is no

indication that the Texas affirmative defense for SSM provisions renders the Texas SIP substantially inadequate. The commenters alleged that the 2015 SSM SIP Action did not reflect the EPA's limited role, did not defer to the state on how to achieve CAA objectives, and wholly fails to demonstrate that the Texas SIP is in fact "substantially inadequate to attain or maintain" the NAAQS and meet other CAA requirements. The commenters stated that the EPA has failed to demonstrate that substantial reductions in emissions would result from eliminating affirmative defense provisions for SSM activities despite the reasonable design, operation, and maintenance of equipment to meet those requirements.

Response: This action is limited to Region 6's review of the SIP call issued to Texas in 2015. To the extent the commenters are arguing about other aspects of the EPA's 2015 SSM SIP Action, that is outside the scope of this action. Within the confines of this action, which is limited to the Texas affirmative defense provisions, Region 6 agrees with the commenters that the CAA grants states considerable latitude in fashioning a plan to ensure the attainment and maintenance of the NAAQS, as provided by CAA section 110. Section 110(k)(5) of the CAA defines the basis upon which the EPA can issue a call to a state to revise its SIP. Section 110(k)(5) of the CAA provides that the EPA can issue a SIP call whenever the Agency "finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant [NAAQS], ... *or to otherwise comply with any requirement of this chapter*" (emphasis added). Region 6 does not consider this role and responsibility to be limited or ministerial in nature. However, as discussed throughout this final action, based on an alternative interpretation of CAA requirements, Region 6 is now adopting the view that the Texas affirmative defense provisions are not substantially inadequate under the rubric of CAA section 110(k)(5) and, therefore, is withdrawing the SIP call for the Texas affirmative defense provisions issued in the 2015 SSM SIP Action.

2. Comments on the need for affirmative defense provisions

Comment: The commenter stated that the EPA should not defund the regulation and penalization of emissions related to SSM events. The commenter argued that mechanisms for accountability and financial and criminal liability should remain in place. The commenter believes that polluters should not escape penalties for significant emissions that result from scheduled maintenance, accidents, and/or a catchall class of “furtive” emissions.

Response: Region 6 disagrees with the commenter’s assertion that this action in any way “defunds the regulation and penalization” of SSM events. Rather, our action finds that specific and narrowly tailored affirmative defense provisions in the Texas SIP are not substantially inadequate under the rubric of CAA section 110(k)(5). As discussed in the NPRM and in this final notice, Region 6 has concluded that the Texas affirmative defense provisions are permissible under the alternative interpretation of the CAA presented here, including that CAA section 110(a)(2) authorizes Texas to establish emission limitations in its SIP that include a narrowly tailored affirmative defense to civil penalties for unavoidable excess emissions in a manner consistent with the penalty assessment criteria set forth in CAA section 113(e), as upheld in the *Luminant* decision. Under the requirements of these provisions, Texas will hold sources accountable for periods of excess emissions, including triggering penalties and corrective action plan requirements, where excessive emission events do not meet the requirements of the state’s narrowly tailored affirmative defense. With regards to the comment that sources should be held accountable for significant excess emissions that result during periods of scheduled maintenance, Region 6 notes that planned, scheduled maintenance events do not meet the criteria in the Texas affirmative defense provisions. In addition, there are no “furtive” or hidden emissions associated with the affirmative defense provisions that are the subject of this action because all excess

emissions are required to be reported to Texas online through the State of Texas Electronic Emissions Reporting System (STEERS) and the affirmative defense may not be asserted for emissions that have not been reported (see 30 TAC Chapter 101, Subchapter F). The commenter also argued that mechanisms for criminal liability should remain in place. The affirmative defense provisions in the Texas SIP do not apply to criminal penalties.

Comment: The commenter stated that most excess emissions can be attributed to accidents that could have been avoided through better maintenance or safety inspections. The commenter cited research that demonstrates that just over 10% of all excess emissions events from 2002-2017 were related to unavoidable natural disasters, and that this finding suggests that many excess emissions events in Texas cannot be considered unavoidable. The commenter stated that the proposal completely misses the distinction between “unavoidable” and truly unavoidable excess emissions (from unavoidable natural disasters) and thus fails to account for the deterrent effect that a stricter regulatory environment can have on the incidence of excess emissions.

Response: The commenter appears to be asserting that the only excess emissions that can be considered unavoidable are those that result following natural disasters. The EPA has never taken the position that all emission events are avoidable except from those that result from natural disasters, such as tornadoes or hurricanes. To the extent that the commenter is alleging that the Texas provisions do not adequately incentivize source owners or operators toward responsible behavior and better plant maintenance, Region 6 disagrees that the proposal does not address the distinction between unavoidable excess emissions and excess emissions that could have been avoided by better maintenance in regard to affirmative defenses. First, Region 6 observes that all emissions occurring above any air emission limitation in a permit, rule, or order of the commission are deemed a violation of the emission limitation. 30 TAC 101.1(108). An

enforcement action can be brought by the EPA, Texas, or citizens for any such violation. The affirmative defense provision only provides the defendant an opportunity, with regard to which the defendant bears the burden of proof, to demonstrate that the violation in question meets the strict criteria outlined in the Texas SIP. An affirmative defense is only available for non-excessive upset and unplanned events, so source owners and operators are incentivized to keep any emissions that occur over applicable limitations to a minimum to avoid being considered excessive. In addition, in order to successfully assert an affirmative defense in an enforcement action, the responsible party bears the burden to demonstrate that the unauthorized emissions could not have been avoided through better operation and maintenance practices, among a number of other identified criteria. A citizen or government agency has an opportunity to rebut this demonstration in the course of an enforcement action.

Each report of emissions that exceed applicable limitations is evaluated by the corresponding TCEQ field office. In fact, as stated earlier, Texas's regulatory regime has evolved since 1972, with each iteration bringing a tightening of requirements.²³

3. Comments concerning appropriateness of the regional scope of this action

Comment: Commenters argued that Region 6's proposed action is based on an interpretation of the CAA that varies from national policy, and the Region is required by law (specifically 40 CFR 56.5(b)) to obtain concurrence for such actions from the relevant EPA headquarters (HQ) office before taking final action. The commenters alleged that there is no record that the EPA has complied with its consistency regulations in proposing to exempt Texas from the national SSM

²³ See pages 2-3 of TCEQ's petition for reconsideration, Document ID No. EPA-R06-OAR-2018-0770-0010 at www.regulations.gov.

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policy, although the commenter acknowledged that the docket includes a letter of concurrence signed by the Director of OAQPS. The commenter asserted that governing EPA guidance documents state that where a proposed action would have significant national policy implications, a more complete review, including a steering committee or interagency review, coordination through the appropriate HQ office, and full concurrence by each affected EPA section is necessary. The commenter argued that nothing is in the record to indicate that Region 6 has conducted the required consultations and obtained all requisite concurrences in order for this action to move forward.

Commenters also argued that for an EPA regional office to depart from a national EPA policy on a particular issue, it must articulate a compelling reason that rationally explains why that issue deserves different treatment from other regions, but the EPA has failed to meet this requirement. The commenter contended that the EPA is obligated to correct inconsistencies by standardizing processes and policies rather than using CAA section 301(a)(2) as a license to institutionalize the kind of inconsistencies that have been proposed in EPA Regions 4 and 6, which depart from the nationally applicable policies in the 2015 SSM SIP Action and instead create a patchwork of regionally applicable CAA policies. The commenters alleged that there is no adequate explanation for authorizing an alternative interpretation, including no discussion of why an alternative interpretation is approvable under the regional consistency regulations.

Response: To the extent the commenters are raising concerns with the recent action proposed by EPA Region 4 concerning SSM SIP provisions in North Carolina, that is outside the scope of this action and Region 6 provides no response. With respect to the concerns raised concerning this Region 6 action, which is limited in scope to Texas, Region 6 did follow the procedures outlined in the regional consistency regulations at 40 CFR 56.5(b), as explained in

the proposal notice and acknowledged by commenters. Specifically, before granting Texas’s petition for reconsideration and before our proposed action, the Region 6 Regional Administrator sought and received EPA headquarters concurrence to deviate from the national policy announced in the 2015 SSM SIP Action.²⁴ Before finalization of this action, the Region 6 Regional Administrator again sought and received EPA headquarters concurrence to deviate from national policy in this final action.²⁵ The substance of the commenters’ allegation appears to be directed at Region 6’s alleged failure to follow the document titled “Revisions to State Implementation Plans—Procedures for Approval/Disapproval Actions,” OAQPS No. 1.2-005A, referenced in 40 CFR 56.5(c). However, the regional consistency regulations only require following this guideline “in reviewing State Implementation Plans.” In this action, the Region is not reviewing a SIP submission from a state under § 110(k)(3), but rather is withdrawing a SIP call issued pursuant to § 110(k)(5). Therefore, the provisions of 40 CFR 56.5(c) are not applicable. Even if this action fell under the auspices of 40 CFR 56.5(c), that regulation requires the region to follow “OAQPS No. 1.2-005A, or revision thereof.” OAQPS No. 1.2-005A is a guideline from 1975 that has been updated multiple times. EPA Region 6 did follow the most recent iteration of the EPA’s internal SIP review process for ensuring national consistency, which is the EPA’s 2018 SIP Consistency Issues Guide.

The commenters also argue that Region 6 failed to follow the regional consistency regulations by not providing a “compelling reason” for the region to deviate from the national policy outlined in the 2015 SSM SIP Action. Nothing in the EPA’s regional consistency

²⁴ See Document ID No. EPA-R06-OAR-2018-0770-0009.pdf, pages 3-4 at www.regulations.gov.

²⁵ See EPA Docket ID No. EPA-R06-OAR-2018-0770 at www.regulations.gov.

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regulations or CAA section 301(a)(2) require a “compelling reason” to underpin regional deviation from national policy. All that is required is that the region seek EPA headquarters concurrence for the action it intends to take, when such action deviates from national policy, and that has been done here. Moreover, the EPA’s Office of Air and Radiation reviewed a draft of this final action and determined that the circumstances and rationale set forth in this action provided a reasonable basis to concur on Region 6’s deviation from the national policy outlined in the 2015 SSM SIP Action.

Comment: The commenter stated that, although Region 6 relies heavily on the Fifth Circuit *Luminant* decision in order to apply a new CAA interpretation for all Region 6 states, New Mexico, Oklahoma, and Arkansas are not in the Fifth Circuit. The commenter states that this is arbitrary and capricious since there is no basis for treating the SIPs from these three states differently than the SIPs from states in other EPA regions.

Response: In the April 2019 proposal notice, Region 6 noted that it was considering adopting a regionwide policy that certain affirmative defense SIP provisions are consistent with CAA requirements, but noted that it would consider whether it would apply any regionwide policy to others states in Region 6 in separate actions. However, after reviewing the public comments received, EPA Region 6 has decided to limit its deviation from national policy regarding affirmative defenses only as to the SSM SIP call for Texas since the Texas provisions were previously upheld by the Fifth Circuit in the *Luminant* decision, and Region 6 is not herein announcing any policy with respect to the remaining Region 6 states. Therefore, at this time in all Region 6 states except Texas, the policy remains unchanged from what was announced in the 2015 SSM SIP Action.

Comment: The commenters noted that, as the EPA recognized in the 2015 SSM SIP Action, the agency’s legal interpretation of CAA requirements concerning permissible SIP provisions to address emissions during SSM events was a “nationally applicable rule.” The commenters noted that petitions challenging aspects of the SIP call or its SSM policy were required to be filed in the D.C. Circuit. The commenters suggested that Region 6 must acknowledge that the proposal at issue is part of the same nationally applicable regulation under CAA section 307(b)(1) for the following reasons:

1) The Region 6 proposal adopts a policy that varies from the national policy and announces a substantive change to determining whether affirmative defense provisions in SIPs are approvable. This reversal effectively amends the EPA’s national SSM policy and is therefore nationally applicable;

2) Although the proposal ostensibly only applies to states in Region 6, the EPA is using it to announce a substantial change to the CAA’s SIP requirements. Furthermore, the proposal necessarily applies to the 17 states covered by the affirmative defense aspect of the 2015 SSM SIP Action. That the EPA chose to promulgate a new national policy in a Federal Register notice that only applies to Region 6 does not preclude the courts from examining the underlying substance and applicability of the rule.

Response: Region 6 is not establishing a new national policy; rather, Region 6 is taking action associated with specific SIP provisions within the Texas SIP that are applicable only within a single state, Texas. Region 6 is simply reexamining the effect of the *Luminant* decision and the findings and statements made by that Court as it applies to the exact Texas SIP provisions that were the subject of the EPA’s finding of substantial inadequacy in the 2015 SSM SIP Action, as well as the nature and statements made by the *NRDC* court, and concluding that it

is not necessary to extend the reach of the *NRDC* decision to the particular affirmative defense provisions at issue in the Texas SIP. As the D.C. Circuit has recently explained, “[t]he court need look only to the face of the agency action, not its practical effects, to determine whether an action is nationally applicable.” *Sierra Club v. EPA*, 926 F.3d 844, 849 (D.C. Cir. 2019) (citing *Dalton Trucking*, 808 F.3d 875, 881 (D.C. Cir. 2015) and *Am. Road & Transp. Builders Ass’n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013)). On its face, this action is locally applicable because it is determining that specific provisions in the Texas SIP that are applicable only in Texas are consistent with CAA requirements and therefore withdrawing a SIP call issued to Texas in 2015. This action has immediate or legal effect only for and within Texas. If the EPA were to rely on the statutory interpretation set forth in this action in another potential future final agency action, the statutory interpretation would be subject to judicial review upon challenge of that later action.

Comment: The commenters claimed that even if the EPA’s proposal was not nationally applicable, the EPA must still make and publish a finding that the proposed amendment to the national SSM SIP call and policy established in that rule is based on a determination of nationwide scope and effect, as the proposal is in fact based on several determinations of nationwide scope and effect, the authority for which is given to the Administrator under the CAA. The commenters contended that the proposal is indisputably based on the EPA’s determinations about the nationwide validity of the nationally applicable 2015 SSM SIP Action. The commenters remarked that in the proposal, Region 6, by seeking HQ concurrence to propose an action inconsistent with national policy, admits that the proposal is, in fact, based on a determination of nationwide scope and effect. The commenters asserted that a determination of nationwide scope and effect is furthermore appropriate where a regionally applicable action

encompasses two or more judicial circuit courts. The commenters noted that since the revised affirmative defense policy would apply throughout Region 6, which spans three judicial circuits, and that the three courts could reach conflicting conclusions regarding the appropriateness of affirmative defenses, the proposal must be reviewed only in the D.C. Circuit. The commenters claimed that a refusal to find the rule is based on determinations of nationwide scope and effect would be inconsistent with the 2015 SSM SIP Action; there the EPA found that venue was appropriate in the D.C. Circuit because the agency was revising its interpretations with respect to certain issues and establishing a national policy applicable to all states. The commenters argued that the EPA's refusal to make and publish a finding of nationwide scope and effect constitutes an arbitrary, capricious, and unexplained departure from the EPA's past practice of directing review of SIP calls to the D.C. Circuit. The commenters concluded that while the EPA is not precluded from adopting a different approach to venue under the CAA, it must display an awareness of its changing position and show there are good reasons for the new policy.

Response: Under the venue provision of the CAA, an EPA action “which is locally or regionally applicable” may be filed “*only* in the United States Court of Appeals” covering that area, 42 U.S.C. § 7607(b)(1) (emphasis added). The only exception to that mandate is where the Administrator expressly finds and publishes that the locally or regionally applicable action is based on a determination of nationwide scope and effect. The requirement that the Administrator find and publish that an otherwise locally or regionally applicable action is based on a determination of nationwide scope and effect is an express statutory requirement for application of this venue exception, and there is no such finding to publish here. Absent an express statement – and publication – that such a finding has been made, thus invoking the venue exception, there can be no application of that exception. See, *e.g.*, *Lion Oil v. EPA*, 792 F.3d 978, 984 n.1 (8th

Cir. 2015) (even where the EPA, unlike here, made the necessary finding, the court found no need to decide application of the venue exception absent publication of that finding); *Texas v. EPA*, 829 F.3d 405, 419 (5th Cir. 2016) (“This finding is an independent, post hoc, conclusion by the agency about the nature of the determinations; the finding is not, itself, the determination.”); *Dalton Trucking*, 808 F.3d 875.

CAA section 307 expressly hands the Agency full discretion to make its own determination whether to exercise an exception to a Congressionally-dictated rule. See *Texas v. EPA*, 829 F.3d at 419-20 (the venue exception “gives the Administrator the *discretion* to move venue to the D.C. Circuit by publishing a finding declaring the *Administrator’s belief* that the action is based on a determination of nationwide scope and effect.”) (emphases added).

Even assuming that a court would review Region 6’s declination to make a nationwide scope or effect determination under the Administrative Procedure Act arbitrary and capricious standard, the declination is not unreasonable in this case. Commenters assert that Region 6’s decision to seek concurrence to propose an action inconsistent with national policy somehow constitutes an admission that such action is based on a determination of nationwide scope and effect. It is not clear how or why this should be so. In any case, as is stated throughout this notice, this action and the CAA interpretation it is based upon applies in Texas only and does not alter EPA’s national policy, and thus is not based on a determination of nationwide scope or effect. See *American Road & Transportation Builders Ass’n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (holding that venue for review of the EPA’s approval of revisions to California’s SIP lay in the Ninth Circuit because the approval only applied to projects within California, even if the SIP could set a precedent for future proceedings).

The commenters argue that it is appropriate for EPA to find and publish that an action is based on a determination of nationwide scope and effect where a regionally applicable action encompasses multiple judicial circuits. The EPA does not take a position on this question here, nor does it need to do so, because as explained earlier in this notice, this final action is limited to Texas, and thus only a single judicial circuit. Although Region 6 was initially contemplating a regionwide policy on affirmative defense provisions in SIPs, after reviewing comments received during the public process the region has decided to limit the deviation from national policy to Texas and the only final action being taken herein is to withdraw the SIP call issued to Texas.

The commenters also allege that the EPA has a past practice of directing review of SIP calls to the D.C. Circuit, but this is incorrect. In the 2015 SSM SIP Action, the Agency did opt to consolidate its action into a single national announcement of policy and issue 36 individual SIP calls through one notice. But at other times SIP calls have been issued by individual regions and reviewed in regional circuits. For example, in 2011, EPA Region 8 found that the Utah SIP was substantially inadequate to comply with the requirements of the CAA and therefore issued a SIP call for Utah to revise its SIP to change an unavoidable breakdown rule, which exempted emissions during unavoidable breakdowns from compliance with emission limitations. 76 FR 21639 (April 18, 2011). This SIP call was subsequently reviewed in the U.S. Court of Appeals for the Tenth Circuit. *US Magnesium v. EPA*, 690 F.3d 1157 (10th Cir. 2012).

Comment: Commenters stated that the proposed Texas withdrawal from the 2015 SSM SIP Action applies only to the Texas SIP and only has legal effect in the State of Texas; therefore, the action is “locally or regionally applicable” under the CAA judicial review provision and EPA Region 6 was correct in not making a finding that this action “is based on a determination of nationwide scope or effect.” The commenters noted that while *Luminant* is directly applicable to

Texas, the rationale for the action may be applicable elsewhere and it may be more appropriate to address Region 6 states outside the Fifth Circuit in a separate action. Commenters requested that Region 6 should clarify that its policy position on the treatment of SSM affirmative defenses is non-binding guidance that reflects the Region's interpretation of the CAA's requirements. The commenters stated that guidance should make clear that any Region 6 state that seeks approval of SIP provisions containing SSM affirmative defenses would be subject to a separate notice-and-comment rulemaking in which Region 6 would assess the provision and determine whether it complies with the requirements of the CAA. The commenters also stated that the policy guidance here would not constitute the consummation of any decision-making process with regard to those SIPs, nor would it determine any legal rights, obligations, or consequences. The commenters recommended that the policy guidance should make clear that the Region would examine individual SIP affirmative defense provisions for consistency with the CAA on a case-by-case rather than rejecting all such provisions out of hand.

Response: This action only concerns the Texas SIP and only has legal effect in Texas, so it is a locally or regionally (as opposed to nationally) applicable action. As stated in the TCEQ's petition for reconsideration and our proposal, the Texas affirmative defense SIP provisions are narrow and limited in scope. After careful consideration of the facts and circumstances surrounding our approval of the affirmative defense provisions in the Texas SIP, including the fact that the Fifth Circuit previously upheld the EPA's approval of the same provisions that were the subject of the Texas portion of the 2015 SSM SIP Action, Region 6 has concluded that it would be appropriate to withdraw the finding of inadequacy as it applies to the Texas SIP.

This action does not have any immediate or legal effect outside of Texas, and Region 6 is not announcing any policy that would apply outside of Texas. As noted by the commenter, Region 6

will examine any state submittal for a SIP revision, or any potential future petition for reconsideration of a SIP call issued to another Region 6 state, consistent with the EPA's obligations under the CAA. In this notice, Region 6 is taking a final action to withdraw the Texas SIP call based on the reasons set forth in the proposal and this notice. Apart from the action on the Texas SIP, Region 6 is not altering or changing the Agency's position with respect to affirmative defenses.

4. Other comments

Comment: The commenter alleged that the EPA's argument that "removing these affirmative defense provisions from SIPs will not reduce emissions and therefore would not result in an environmental or public health or welfare benefit" is flawed and inadequate. The commenter stated that, through this action, Region 6 is creating a less stringent regulatory environment, while providing no evidence to support its claim that eliminating affirmative defense provisions will not reduce excess emissions. The commenter contended that the EPA's argument is not based on any analysis and lacks substantive supportive evidence from the peer reviewed literature.

The commenter also cited research documenting the specific and general deterrence effects of enforcement on environmental rules and regulations. The commenter contended this research, which studies the Clean Water Act compliance behavior of paper and pulp facilities, concludes that compliance and enforcement actions reduce incidences and durations of noncompliance.

Response: The commenter, and the cited research, speak of emissions that exceed applicable limitations during routine events. This action concerns the Texas affirmative defense provisions that are only available for upsets and unplanned MSS events. Unplanned MSS events by definition are not routine. The specific affirmative defense provisions at issue herein apply to

unavoidable excess emissions by a source that cannot be prevented by an owner or operator through planning and design. Because the covered events, and resulting emissions that exceed applicable emission limitations, are unavoidable, by the very nature of source operations, they would occur regardless of whether the affirmative defense provisions were in the Texas SIP. Therefore, Region 6 disagrees that the affirmative defense provision provide a less stringent regulatory environment as the potential relief is only available for events proved to be unavoidable.

Furthermore, the following provides evidence that the Texas regulatory scheme provides deterrence to emissions events. In response to a similar comment, TCEQ in 2016 wrote²⁶:

“In fiscal year 2015, the agency [TCEQ] conducted over 109,000 investigations, which included 4,212 compliance investigations. More than 18,000 Notice of Violations were issued regarding investigations conducted. Enforcement efforts resulted in 1,681 administrative orders issued with over \$12.6 million to be paid as penalties and over 3.2 million to be expended for Supplemental Environmental Projects (SEPs). There were an additional 46 civil judicial orders issued by the Texas Office of Attorney General (OAG) that resulted in over \$16.1 million to be paid as penalties. The agency also participated in five search warrants and finalized ten criminal cases with convictions against 11 individuals and two corporations during FY 2015. The finalized cases included 19 felony counts and six misdemeanor counts. These cases resulted in total of \$16,000 in criminal fines, 30 years of community supervision, 156 months of

²⁶ October 31, 2016, TCEQ’s Interoffice Memorandum, from Richard Hyde, Executive Director to Tucker Royall, General Counsel, titled “Analysis of Environmental Integrity Project’s (EIP) Breakdowns in Air Quality Report, April 27, 2016”.

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incarceration, 1,050 hours of community service, and over \$23,370,000 in restitution.” TCEQ also stated, “It is important to note that the overall number of emission events reported decreased 10% from 4,987 in FY 2014 to 4,512 in FY 2015.”

Moreover, while Region 6 does not dispute the research cited by the commenter concerning the deterrence effect of enforcement, the Texas affirmative defense provisions do not prohibit enforcement. The Texas affirmative defense is only available for monetary penalties; an enforcement action can still be brought for injunctive relief. Region 6 also notes that the research on the regulation and enforcement of the Clean Water Act finds that enforcement reduces the incidence and duration of violations. The affirmative defense provisions in the Texas SIP only apply to excess emissions violations due to unavoidable malfunctions, where the source has proven that it meets specific criteria (including that the frequency and duration of the event was minimized and that all possible steps were taken to minimize the impact of the unauthorized emissions on air quality). This also does not speak in any way to Region 6’s alternative CAA interpretation outlined in the proposal and this notice and whether the Texas affirmative defense provisions are approvable in CAA SIPs.

Comment: One commenter noted that the EPA failed to conduct a detailed cost benefit analysis on the impacts of excess emissions on human health and the environment.

Response: There is nothing in the statute that requires the Agency to conduct a cost benefit analysis in order to withdraw a SIP call, and the commenter has not provided a compelling reason for why Region 6 should do so. In addition to statutory requirements, regulatory agencies also take direction from the President and the Office of Management and Budget (OMB) within the Executive Office of the President regarding what type of formal regulatory evaluation should be performed during rulemaking. Executive Order 12866, *Regulatory Planning and Review*,

requires an assessment of benefits and costs for all significant regulatory actions. As stated in the proposal, this action is not a “significant regulatory action” subject to review by OMB under Executive Order 12866. In reviewing SIP submissions, the EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely reaffirms that the Texas state law meets Federal requirements and does not impose additional requirements beyond those imposed by state law. Therefore, this action is not subject to review by the OMB.

Even if Region 6 were to conduct a cost benefit analysis, there are unlikely to be any impacts of this action. This final notice does not involve a revision to the Texas SIP, nor does it result in an amendment to the current federally codified Texas SIP concerning affirmative defense provisions. This final action withdraws a SIP call issued to Texas in 2015 thereby leaving in place a state rule that the EPA incorporated into the Texas SIP in November 2010. Furthermore, the Texas affirmative defense provisions only apply to unauthorized emissions that a defendant proves were unavoidable. Because these emissions were unavoidable, the existence or lack of the affirmative defense provisions should not impact the scope of emissions.

Comment: The commenter noted that, according to STEERS for calendar year 2017, 275 companies reported 4,067 periods of excess emissions that resulted in the release of more than 63 million pounds of air pollution. The commenter stated that according to data provided by TCEQ, affirmative defenses were claimed for 97 percent of those excess emissions events. The commenter concluded that this data indicates that these events are common enough to be considered routine and, therefore, should be regulated.

Response: Region 6 does not disagree with the commenter’s citation or their use of the data from STEERS. The fact that affirmative defense provisions were claimed for 97% of periods of

excess emissions reported, however, does not suggest that these events are considered routine. Instead, it suggests an operator of an emission unit that violates an applicable limit is doing so because of a malfunction that was, due to the specific circumstances, considered unavoidable, based on the facts available at the time the excess emissions report and claim was required to be filed with Texas. The Texas affirmative defense provisions for an upset is only available for an event where the source owner or operator proves by a preponderance of evidence in an enforcement proceeding that the event in question was indeed due to an unplanned and unavoidable breakdown or excursion of a process or operation. Moreover, the State of Texas has additional provisions for excessive emission events, if, in fact, a facility is routinely and frequently violating applicable standards.²⁷

Outside of the criteria outlined in the affirmative defense provisions, which are quite stringent, equipment and process downtime cost business money and serve as incentive to repair and remedy the situation in an expeditious manner. As previously stated, Region 6 takes the position that in the case of the affirmative defense provisions in the Texas SIP, it would be inequitable to penalize a source for occurrences beyond the company's control. Furthermore, evidence of any past upset, unplanned MSS, or excess opacity event to which an owner or operator invoked the affirmative defense provision is admissible in litigation proceedings and can be considered as relevant to demonstrate a frequent or recurring pattern of events, even if all subjects of the criteria are proven.²⁸

²⁷ See 30 TAC 101.222(a).

²⁸ See 30 TAC 101.222(g).

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Comment: The commenters alleged that the EPA fails to rationally confront how the affirmative defense provisions in the Texas SIP harm community enforcement efforts and the efficacy of pollution-control efforts. The commenters stated that the proposal fails to consider the polluters’ abuse of the affirmative defense provisions and how that use thwarts enforcement and therefore diminishes sources’ incentives for avoiding violations, resulting in higher levels of pollution. Additionally, the commenters alleged that the EPA has failed to rationally explain its departure from its treatment of such issues in the 2015 SSM SIP Action, where the EPA found that affirmative defense provisions do in fact interfere with actions taken to enforce emission limitations brought under the authority provided by CAA section 304. The commenters noted that where it is already difficult to bring citizen suits under the CAA, as demonstrated by the Hecker article²⁹ as well as *Sierra Club v. Energy Future Holding Corp.*, No. 12-cv-108-WSS, 2014 WL 2153913 (W.D. Tex. (Mar. 28, 2014)), affirmative defenses make enforcement even more difficult and expensive. The commenters referenced a case in the Hecker article, which described how the factual complexity inherent in a dispute over whether violations are infrequent and unavoidable, and could have been prevented through acceptable operating and maintenance practices, made it difficult to rebut the defendant’s assertion of affirmative defense and bring the suit in a cost-effective manner. The commenters alleged that in *Energy Future Holding*, without denying thousands of exceedances of the permit limits for opacity, Luminant argued, and the district court found, that TCEQ’s determinations did alter the court’s authority to find liability

²⁹ Jim Hecker, *The Difficulty of Citizen Enforcement of the Clean Air Act*, 10 Widener L. Rev. 303 (2004). (Referred to as “Hecker article”. This article describes the author’s experience litigating five citizen suits between 1995 and 2004, including one citizen suit case where a Texas refinery claimed SSM defenses.) This document is a pre-publication version, signed by EPA Region 6 Regional Administrator, Ken McQueen, on 1/7/2020. EPA Region 6 is submitting it for publication in the *Federal Register*. We have taken steps to ensure the accuracy of this version, but it is not the official version. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*.

for self-reported exceedances of emission limits. The commenters claimed that real world experience shows that defendants have relied upon, and will assuredly continue to rely upon, the Texas affirmative defense provisions to argue that a federal court's authority to find liability or impose penalties under the Act is limited.

Response: In this action, Region 6 is reviewing the regulatory affirmative defense provisions adopted by Texas and previously approved by the EPA into the Texas SIP. Region 6 is not investigating how these provisions have been applied in individual cases by either the State or individual courts. See *Montana Environmental Information Center v. Thomas*, 902 F.3d 971 (9th Cir. 2018) (holding that a petitioner's concern raising questions of implementation does not need to be addressed when EPA is approving a SIP, but rather is "better addressed at a different time"). To the extent the commenters disagree that the affirmative defense provisions were applied correctly in an individual case, they could have made such claims as a plaintiff or intervenor in the State's administrative or judicial enforcement action where the defendant asserted the affirmative defense. In this action, Region 6 is considering whether the affirmative defense provisions as crafted in state regulations, and approved into Texas's SIP, are consistent with CAA requirements.

However, Region 6 notes that the commenters provide insufficient evidence that sources "abuse" the Texas affirmative defense provisions. The commenters appear to be claiming that sources are using the affirmative defense provisions in the Texas SIP to bad effect or for bad purpose. This supposition is unsubstantiated, and the commenters have failed to provide actual evidence that the affirmative defense provisions in the Texas SIP are being misused. The EPA does not believe it appropriate to speculate as to the motives or incentives of a source owner or operator generally or with respect to any particular emissions incident.

Comment: The commenter claimed that the proposal fails to explain how the affirmative defense provisions in the Texas SIP will protect public health from air quality that violates the NAAQS. The commenter stated that neither the proposal nor *Luminant* considers how these provisions meet the legal requirements of SIPs to protect the NAAQS and PSD increments. The commenter noted that SSM events are well documented to have adverse human health impacts, especially on neighboring communities; furthermore, excess emissions represent a sizeable share of emissions in Texas. The commenter stated that Region 6 should have performed an analysis specific to sources in Texas, evaluating the potential impacts affirmative defenses would have on air quality throughout Texas, and demonstrating that the NAAQS would continue to be maintained in all areas of Texas notwithstanding the availability of such affirmative defenses. The commenter noted that Region 6 has made no attempt to do so in the proposal, therefore the proposal fails to provide a reasonable basis for approval.

Response: Region 6 disagrees that some type of additional analysis specific to sources in Texas is required that the Texas affirmative defense provisions in the Texas SIP will protect the public health and the environment. At issue is whether the affirmative defense provisions are consistent with CAA requirements. With respect to commenter's concern about NAAQS violations, the provisions in the Texas SIP clearly place the burden of proof on the source owner or operator to demonstrate that the NAAQS and PSD increments were not exceeded in order to make use of the affirmative defense. See 30 TAC 101.222(b)(11) (the owner or operator must demonstrate that "the unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution"). Therefore, the existence of these provisions, by

their own requirements, will not lead to any further interfere with the attainment of the NAAQS or PSD increments.

Additionally, in an effort to ensure air quality is protected in Texas, TCEQ investigates each reported emission event, and makes a determination of whether the emission event was excessive (30 TAC 101.222(a)). In addition, 30 TAC 101.222(f), titled Obligation, states that meeting the criteria in 30 TAC 101.222(b) - (e) and (h) do not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to an emissions event or a maintenance, startup, or shutdown activity. It also states that an affirmative defense cannot apply to violations of federally promulgated performance or technology-based standards, such as those found in 40 CFR parts 60, 61, and 63. The affirmative defense is available only for emissions that have been reported or recorded. Furthermore, the affirmative defense provisions in the Texas SIP are available only for emission events that are proven to be due to malfunctions.

Comment: The commenters asserted that the burden of proof for an affirmative defense requires operators to prove that unauthorized emissions did not cause or contribute to a NAAQS violation or PSD increment exceedance, although in practice TCEQ grants affirmative defense to operators' unsupported representations that they lack sufficient information to indicate that an exceedance has occurred. The commenters claimed that the implementation of this affirmative defense provision is inconsistent with the Fifth Circuit decision and the EPA's reading of the rule. The commenters alleged that this provision has public health damages resulting from periods of excess emissions exceeding \$250 million annually and noted that low-income communities and communities of color that are in close-proximity to sources claiming affirmative defenses bear the burden of periods of excess emissions, breathing deadly pollution,

being told to stay indoors, being told to shelter in place, experiencing more frequent hospital visits, and facing a higher risk of serious and chronic health harms.

Response: As discussed earlier, the affirmative defense provisions in the Texas SIP are defenses to a civil penalty asserted by a defendant in an enforcement action. Whatever conclusions made by TCEQ in its evaluation of excess emission reports for malfunctions is not binding upon the courts or other parties in a state or federal enforcement action brought under CAA sections 113(b) or 304(a). See *Environment Texas Citizen Lobby v. ExxonMobil*, 84 ERC 1578 (S.D. Tex. 2017) (stating that “TCEQ’s determination of the applicability of an affirmative defense at best rises to the level of prima facie proof” and “[r]eliance on the TCEQ’s determination is not sufficient to meet Exxon’s evidentiary burden at trial to demonstrate all eleven criteria are met”). In addition, the affirmative defense provisions in the Texas SIP are only applicable to upsets and unplanned periods of excess emissions. By definition, these events are unavoidable even when good practices are implemented at facilities. Upsets and unplanned periods of excess emissions are not beneficial operationally or financially to sources. The commenters appear to be asserting that affirmative defenses disincentivize mitigation of emissions due to malfunctions. However, among the criteria in the Texas affirmative defense provisions is that all possible steps were taken to minimize the impacts of the unauthorized emissions on air quality. As such, sources have incentives to mitigate the adverse air quality impacts from such events as much as possible. While Region 6 acknowledges commenters’ concern that emissions from malfunctions may contribute to adverse health impacts on communities around industrial facilities, malfunctions resulting in excess emissions are, subject to scrutiny both by TCEQ and in potential enforcement actions, as to whether the event itself was unavoidable using the narrowly tailored criteria provided in the affirmative defense provisions in

the Texas SIP. In this action, Region 6 is reviewing the regulatory affirmative defense provisions adopted by Texas and previously approved by the EPA into the Texas SIP. Region 6 is not reviewing how those provisions are being implemented by TCEQ. In addition, the Texas affirmative defense provisions do not apply to actions seeking injunctive relief.

IV. Final Action

Region 6 is finding that the affirmative defense provisions previously approved into the SIP do not make the Texas SIP substantially inadequate to meet the requirements of the Act. In doing so, EPA Region 6 is withdrawing the SIP call issued to Texas in 2015 SSM SIP Action. As is detailed in the proposal notice for this final action, in the absence of a SIP call, Texas no longer has an obligation to submit a SIP revision addressing its existing affirmative defense provisions. Texas may withdraw the SIP revision submitted in November 2016 in response to the 2015 SSM SIP Action, on which the EPA has not proposed or taken final action to approve or disapprove.

V. Statutory and Executive Order Reviews

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), since it alleviates an obligation on the State of Texas to revise its SIP by withdrawing the SIP call issued to Texas in 2015.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. Any agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to this rule. This action will not impose any requirements on small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. In this action, the EPA is not addressing any tribal implementation plans. This action is limited to the State of Texas. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in the response to comments section of the preamble.

L. Congressional Review Act (CRA)

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

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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. The EPA will submit a report containing this action 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). 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. The EPA will submit a report containing this action 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).

M. Judicial Review

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 **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. 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).)

List of Subjects in 40 CFR Part 52

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

Dated: January 7, 2020.

Kenley McQueen,
Regional Administrator, Region 6.